Agendas and Attachments for:

• Meeting of the Committee on Special Projects (CSP);

• Meeting of the Council of the Probate and Estate Planning Section

Saturday, November 11, 2017
9:00 am
University Club
3435 Forest Road
Lansing, Michigan 48910
Probate and Estate Planning Section of the
State Bar of Michigan

Notice of Meetings

Meeting of the Section’s Committee on Special Projects (CSP) And
Meeting of the Council of the Probate and Estate Planning Section

Meetings date, time, and location:
November 11, 2017
9:00 a.m.
University Club
3435 Forest Road
Lansing, Michigan 48910

The meeting of the Section’s Committee on Special Projects will begin at 9:00 am and will end at approximately 10:15 am. The meeting of the Council of the Probate and Estate Planning Section will begin at approximately 10:30 am. If time allows and at the discretion of the Chair, we will work further on CSP materials after the Council of the Section meeting concludes.

David P. Lucas, Secretary
Vandervoort, Christ & Fisher, PC
70 Michigan Ave. West, Suite 450
Battle Creek, Michigan 49017
voice: (269) 965-7000
fax: (269) 965-0646
email: d lucas@vcflaw.com

Meeting Schedule for 2017-2018
October 14, 2017
November 11, 2017
December 16, 2017
January 20, 2018
February 17, 2018
March 24, 2018
April 21, 2018
June 16, 2018
September 8, 2018 (Annual Section Meeting)
CALL FOR MATERIALS

Council Meetings of the Probate and Estate Planning Section

Due dates for Materials for Committee on Special Projects

All materials are due on or before 5:00 p.m. of the Thursday falling 9 days before the next CSP meeting. CSP materials are to be sent to Geoffrey Vernon, Chair of CSP (gvernon@joslynvernon.com).

Schedule of due dates for CSP materials, by 5:00 p.m.:

December 7, 2017
January 11, 2018
February 8, 2018
March 15, 2018
April 12, 2018
June 7, 2018
August 30, 2018 (for September meeting)

Due dates for Materials for Council Meeting

All materials are due on or before 5:00 p.m. of the Friday falling 8 days before the next Council meeting. Council materials are to be sent to David Lucas, Secretary (dlucas@vcflaw.com).

Schedule of due dates for Council materials, by 5:00 p.m.:

December 8, 2017
January 12, 2018
February 9, 2018
March 16, 2018
April 13, 2018
June 8, 2018
August 31, 2018
STATE BAR OF MICHIGAN  
PROBATE AND ESTATE PLANNING SECTION COUNCIL

Officers of the Council for 2017-2018 Term

<table>
<thead>
<tr>
<th>Office</th>
<th>Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson</td>
<td>Marlaine C. Teahan</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>Marguerite Munson Lentz</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>Christopher A. Ballard</td>
</tr>
<tr>
<td>Secretary</td>
<td>David P. Lucas</td>
</tr>
<tr>
<td>Treasurer</td>
<td>David L.J.M. Skidmore</td>
</tr>
</tbody>
</table>

Council Members for 2017-2018 Term

<table>
<thead>
<tr>
<th>Council Member</th>
<th>Year Elected to Current Term (partial, first or second full term)</th>
<th>Current Term Expires</th>
<th>Eligible after Current Term?</th>
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<tbody>
<tr>
<td>Caldwell, Christopher J.</td>
<td>2015 (1st term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
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<tr>
<td>Clark-Kreuer, Rhonda M.</td>
<td>2015 (2nd term)</td>
<td>2018</td>
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</tr>
<tr>
<td>Goetsch, Kathleen M.</td>
<td>2015 (1st term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
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<tr>
<td>Lynwood, Katie</td>
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<td>2018</td>
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<tr>
<td>Mysliwiec, Melisa M.W.</td>
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<td>2018</td>
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<tr>
<td>Hentkowski, Angela M.</td>
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<td>2018</td>
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<td>Labe, Robert C.</td>
<td>2016 (1st term)</td>
<td>2019</td>
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</tr>
<tr>
<td>Mills, Richard C.</td>
<td>2016 (1st full term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
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<td>New, Lorraine F.</td>
<td>2016 (2nd term)</td>
<td>2019</td>
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<td>Piwowarski, Nathan R.</td>
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<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Syed, Nazneen H.</td>
<td>2016 (1st term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Vernon, Geoffrey R.</td>
<td>2016 (2nd term)</td>
<td>2019</td>
<td>No</td>
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<tr>
<td>Jaconette, Hon Michael L.</td>
<td>2017 (2nd term)</td>
<td>2020</td>
<td>No</td>
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<td>Kellogg, Mark E.</td>
<td>2017 (2nd term)</td>
<td>2020</td>
<td>No</td>
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<td>Lichterman, Michael G.</td>
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<td>2020</td>
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<td>Malviya, Raj A.</td>
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<td>2020</td>
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<tr>
<td>Olson, Kurt A.</td>
<td>2017 (1st term)</td>
<td>2020</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Savage, Christine M.</td>
<td>2017 (1st term)</td>
<td>2020</td>
<td>Yes (1 term)</td>
</tr>
</tbody>
</table>
Ex Officio Members of the Council

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; Hon. Philip E. Harter; Dirk C. Hoffius Brian V. Howe; Shaheen I. Imami; Stephen W. Jones; Robert B. Joslyn; James A. Kendall; Kenneth E. Konop; Nancy L. Little; James H. LoPrete; Richard C. Lowe; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack
CSP Materials
PROBATE & ESTATE PLANNING COUNCIL
AGENDA FOR
COMMITTEE ON SPECIAL PROJECTS

November 11, 2017

1. Divided and Directed Trusteeships ad Hoc Committee (9:00 - 9:20 am)
   Further discussion of divided and directed trusteeships legislative proposal. The following are included in the meeting materials:
   - Legislative Proposal.
   - Venn Diagram (revised) re MTC “Trust Protectors” and UDTA “Trust Directors.”

2. Legislation Development and Drafting Committee (9:20 - 10:15 am)
   Introduction of the "omnibus" EPIC update bill. The proposed (and annotated) legislation is included in the meeting materials along with Jim Spica’s October 24, 2017 memo re pet and other noncharitable purpose trusts.
A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by amending sections 7103, 7105, 7108, 7411, 7703, and 7704 as amended by 2009 PA 46, 2010 PA 325, and 2012 PA 483; by deleting (and reserving the numerical designation of) section 7809; and by adding sections 7703a and 7703b.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700.7103 Definitions

Sec. 7103. As used in this article:
(a) "Action", with respect to a trustee or a trust protector, includes an act or a failure to act.
(b) "Ascerturable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.
(c) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).
(d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:
(i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.
(ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.
(iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.
(iv) Whether the distribution of trust property is from income or principal or both of the trust.
(v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.
(e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.
(f) "Power of withdrawal" means a presently exercisable general power of appointment other than a power that is either of the following:
(i) Exercisable by a trustee and limited by an ascertainable standard.
(ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
(g) "Qualified trust beneficiary" means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:
(i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.
(ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.
(iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
(h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

(j) "Spendthrift provision" means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary's interest.

(k) "Support provision" means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

(l) "Trust beneficiary" means a person to whom 1 or both of the following apply:

(i) The person has a present or future beneficial interest in a trust, vested or contingent.

(ii) The person holds a power of appointment over trust property in a capacity other than that of trustee or trust director.

(m) "Trust instrument" means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) "Trust protectordirector" means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment that term as defined in section 7703a(1)(e).

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 sections 7401 and 7402(1)(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 power of the court to modify or terminate a trust under sections 7410, 7412(1) to (3), 7414(2), 7415, and 7416.

(e) 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.

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

(g) 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.

(h) Except as permitted under section 7809(2), the obligations imposed on a trust protectordirector in section 7703a(5) and (6) 7809(1).
(i) 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.

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

(k) The effect of an exculpatory term under section 7809(8)7703a(6)(b) or 7908.

(l) The effect of a release of a trustee or trust director from liability for breach of trust under section 7703a(9).

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

(n) Except as permitted by section 7703a(9), 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.

(r) The requirement under section 7703b(3)(d) regarding the eligibility of a trust’s sole beneficiary to be a “separate trustee” within the meaning of section 7703b.

700.7108 Principal place of administration

Sec. 7108. (1) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if either any of the following applies:

(a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction.

(b) A trust director’s principal place of business is located in, or a trust director is a resident of, the designated jurisdiction.

(c) All or part of the administration occurs in the designated jurisdiction.

(2) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the qualified trust beneficiaries.

(3) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (2), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(4) The trustee shall notify the qualified trust beneficiaries in writing of a proposed transfer of a trust's principal place of administration not less than 63 days before initiating the transfer. The notice of proposed transfer shall include all of the following:

(a) The name of the jurisdiction to which the principal place of administration is to be transferred.

(b) The address and telephone number at the new location at which the trustee can be contacted.

(c) An explanation of the reasons for the proposed transfer.

(d) The date on which the proposed transfer is anticipated to occur.

(e) In a conspicuous manner, the date, not less than 63 days after the giving of the notice, by which a qualified trust beneficiary must notify the trustee in writing of an objection to the proposed transfer.
(5) The authority of a trustee under this section to transfer a trust's principal place of administration without the approval of the court terminates if a qualified trust beneficiary notifies the trustee in writing of an objection to the proposed transfer on or before the date specified in the notice.

(6) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 7704.

(7) The view of an adult beneficiary shall be given weight in determining the suitability of the trustee and the place of administration.

700.7411 Modification or termination of noncharitable trust; consent; "settlor's representative" defined

Sec. 7411. (1) Subject to subsection (2), a noncharitable irrevocable trust may be modified or terminated in any of the following ways:

(a) By the court upon the consent of the trustee and the qualified trust beneficiaries, if the court concludes that the modification or termination of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust.

(b) Upon the consent of the qualified trust beneficiaries and a trust protector, person or committee who is given the power under the terms of the trust to grant, veto, or withhold approval of termination or modification of the trust.

(c) By a trustee or trust protector, other person or committee given to whom a power by the terms of the trust to direct the termination or modification of the trust has been given by the terms of a trust.

(2) Subsection (1) does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before April 1, 2010.

(3) Notice of any proceeding to terminate or modify a trust shall be given to the settlor, the settlor's representative if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, the trust protector, director, if any, a powerholder described in paragraph (b) or (c) of subsection (1), if any, the trustee, and any other person named in the terms of the trust to receive notice of such a proceeding.

(4) Upon termination of a trust under subsection (1), the trustee shall distribute the trust property as agreed by the qualified trust beneficiaries.

(5) If the trustee fails or refuses to consent, or fewer than all of the qualified trust beneficiaries consent, to a proposed modification or termination of the trust under subsection (1), the modification or termination may be approved by the court if the court is satisfied that both of the following apply:

(a) If the trustee and all of the qualified trust beneficiaries had consented, the trust could have been modified or terminated under this section.

(b) The interests of a qualified trust beneficiary who does not consent will be adequately protected.

(6) As used in this section, "settlor's representative" means the settlor's agent under a durable power of attorney, if the agent is known to the petitioner, or, if an agent has not been appointed, the settlor's conservator, plenary guardian, or partial guardian.

700.7703 Cotrustees; powers and duties

Sec. 7703. (1) Except as otherwise provided in this section, Cotrustees—cotrustees—shall act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustee or cotrustees may act for the trust.
(3) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(43) If prompt action is necessary to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust if either of the following applies:

(a) A cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity.

(b) A cotrustee who is available fails or refuses to participate in the administration of the trust following notice from the remaining cotrustee or cotrustees.

(54) By agreement of the trustees, a trustee may delegate to a cotrustee 1 or both of the following:

(a) Any power that is permitted to be delegated pursuant to section 7817(v) to an agent who is not a trustee.

(b) Any power that can only be performed by a trustee, if notice of the delegation is provided to the qualified trust beneficiaries within 28 days.

(65) Unless a delegation under subsection (5) was irrevocable, a trustee may revoke the delegation previously made. A revocation under this subsection shall be in writing and shall be given to all of the remaining cotrustees. If notice of the delegation was required to be provided to the qualified trust beneficiaries, notice of the revocation shall be given to the qualified trust beneficiaries within 28 days after the revocation.

(76) If 2 or more trustees own securities, their acts with respect to voting have 1 of the following effects:

(a) If only 1 trustee votes, in person or by proxy, that trustee's act binds all of the trustees.

(b) If more than 1 trustee votes, in person or by proxy, the act of the majority so voting binds all of the trustees.

(c) If more than 1 trustee votes, in person or by proxy, but the vote is evenly split on a particular matter, each faction is entitled to vote the securities proportionately.

(87) A trustee is not liable for the action or omission of a cotrustee if all of the following apply:

(a) The trustee is not unavailable to perform a trustee's function because of absence, illness, disqualification under other law, or other incapacity or has not properly delegated the performance of the function to a cotrustee.

(b) The trustee is aware of but does not join in the action or omission of the cotrustee.

(c) The trustee dissents in writing to each cotrustee at or before the time of the action or omission.

(98) A trustee who is not aware of an action by a cotrustee is not liable for that action unless the trustee should have known that the action would be taken and, if the trustee had known, would have had an affirmative duty to take action to prevent the action.

(109) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee in writing of the dissent at or before the time of the action is not liable for the action.

The other subsections of this section notwithstanding, the terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee’s exercise or nonexercise of a power of the other cotrustee to the same extent that a directed trustee described in section 7703a may be relieved from duty and liability with respect to a trust director’s power of direction under that section.

700.7703a Directed Trusteeship; construction of certain powers

7703a. (1) In this 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) "Power of appointment" means that term as defined in section 2(c) of the powers of
appointment act of 1967.
(d) "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. The term
includes a power over the investment, management, or distribution of trust property or other matters
of trust administration. The term excludes the powers described in subsection (2).
(e) "Trust director" means a person that is granted a power of direction. The person is a trust
director whether or not the terms of the trust refer to the person as a trust director and whether or not
the person is a beneficiary or settlor of the trust.

(2) Excepting the rules of construction in subsection (3), this section does not apply to:
(a) A power of appointment that is intended to be held by the donee in a nonfiduciary capacity.
(b) A power that is intended to be held in a nonfiduciary capacity that enables the holder to create
a power of appointment, regardless of whether the created power is intended to be held by the donee
of the created power in a fiduciary or a nonfiduciary capacity.
(c) A power to appoint or remove a trustee or trust director.
(d) A power of a settlor over a trust to the extent the settlor has a power to revoke the trust.
(e) A power of a beneficiary over a trust to the extent the exercise or nonexercise of the power
affects either of the following:
   (i) The beneficial interest of the beneficiary.
   (ii) The beneficial interest of another beneficiary represented by the beneficiary under part 3
       of this article with respect to the exercise or nonexercise of the power.
(f) A power over a trust if both of the following apply:
   (i) The terms of the trust provide that the power is held in a nonfiduciary capacity.
   (ii) The power must be held in a nonfiduciary capacity to achieve the settlor’s tax objectives
       under the internal revenue code.

(3) The following apply as rules of construction:
(a) Any power that is excluded from the general application of this section by subsection (2) and
    that is intended to be held in a nonfiduciary capacity shall not be subject to fiduciary constraint and
    may be exercised by the holder in any manner consistent with the scope of the power and any express
    requirements or limitations imposed by the terms of the trust. A trustee shall take action to comply
    with the exercise or nonexercise of such a power and is not liable for so acting provided, however,
    that a trustee must not comply with the exercise or nonexercise of any such power if the exercise or
    nonexercise was obtained with the trustee’s collusion or by the trustee’s fraud and compliance would
    be in pursuance of that collusion or fraud.
(b) Except as provided in paragraph (c) of this subsection, the following powers are intended to
    be held in a nonfiduciary capacity if granted to a person other than a trustee of the trust:
   (i) A power of appointment, including one in the form of a power to adjust between principal
       and income or convert to a unitrust or to modify, reform, terminate, or decant the trust.
   (ii) A power that enables the holder to create a power of appointment.
(c) The following powers are intended to be held in a fiduciary capacity even though the holder is
    not a trustee of the trust if the holder otherwise has no beneficial interest in the trust:
   (i) A power to adjust between principal and income or convert to a unitrust.
   (ii) A power to modify, reform, terminate, or decant the trust.

(4) Subject to subsection (5), the terms of a trust may grant a power of direction to a trust director.
(a) A power of direction includes only those powers granted by the terms of the trust.
(b) Both of the following apply as rules of construction:
(i) A trust director may exercise any further power appropriate to the exercise or nonexercise of the director’s power of direction.

(ii) Trust directors with joint powers must act by majority decision.

(5) A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or a further power under subsection (4)(b)(i) regarding both of the following:

(a) A payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of medicaid law in section 1917 of the social security act, 42 U.S.C. 1396p(d)(4)(A).

(b) A charitable interest in the trust, including required notices regarding the interest to the Attorney General.

(6) Subject to subsection (7), both of the following apply with respect to a power of direction or a further power under subsection (4)(b)(i):

(a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power as a sole trustee in a like position and under similar circumstances if the power is held individually or, if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.

(b) A term of a trust that relieves a trust director from liability for breach of fiduciary duty is unenforceable to the extent that either of the following applies:

(i) The term relieves the trust director of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

(ii) The term was inserted as the result of an abuse by the trust director of a fiduciary or confidential relationship to the settlor.

(7) 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.

(8) A directed trustee shall take action to comply with the exercise or nonexercise of a power of direction or further power of a trust director under subsection (4)(b)(i) and is not liable for so acting provided, however, that a directed trustee must not comply with the exercise or nonexercise of any such power if the exercise or nonexercise was obtained with the directed trustee’s collusion or by the directed trustee’s fraud and compliance would be in pursuance of that collusion or fraud.

(9) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if any of the following applies:

(a) The breach involved the trustee’s or other director’s bad faith or reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

(b) The release was induced by improper conduct of the trustee or other director in procuring the release.

(c) At the time of the release, the director did not know the material facts relating to the breach.

(10) Subject to subsection (11):

(a) A trustee shall provide information to a trust director to the extent the information is reasonably related both to the powers or duties of the trustee and the powers or duties of the director.

(b) A trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to the powers or duties of the director and the powers or duties of the trustee or other director.

(11) Subsection (10) notwithstanding:

(a) A trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director.
(b) By taking an action described in paragraph (a) of this subsection, a trustee does not assume the duty excluded by paragraph (a).

(c) A trust director does not have a duty to monitor a trustee or another trust director or inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director.

(d) By taking an action described in paragraph (c) of this subsection, a trust director does not assume the duty excluded by paragraph (c).

(12) Provided its reliance is not in bad faith:

(a) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.

(b) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.

(13) An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

(14) A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have in an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

(15) In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

(16) By accepting appointment as a trust director, the director submits personally to jurisdiction in this state regarding any matter related to a power or duty of the director. This section does not preclude use of another method to obtain jurisdiction over a trust director.

(17) The rules applicable to a trusteeship apply to a trust directorship regarding all of the following matters:

(a) Acceptance under section 7701(1).

(b) Giving of bond to secure performance under section 7702.

(c) Reasonable compensation under section 7708.

(d) Resignation under section 7705.

(e) Removal under section 7706.

(f) Vacancy and appointment of successors under section 7704, treating any instance in which two or more trust directors have the same power of direction as analogous to a cotrusteeship for purposes of section 7704(2).

(18) The application of this section with respect to a given trust is subject to both of the following:

(a) If the trust was created before the effective date of the amendatory act that added this section, the section applies only to decisions or actions taken on or after that date.

(b) If the trust’s principal place of administration is changed to this state on or after the effective date of the amendatory act that added this section, this section applies only to decisions or actions taken on or after the date of the change.

(19) In applying and construing the provisions of this section that are based on the Uniform Directed Trust Act, weight should be given to the goal of promoting uniformity in the law on directed trusteeships among the states that have enacted the uniform act.

700.7703b Divided Trusteeship

7703b. (1) In this section:
(a) “Affirmative action,” or action taken “affirmatively,” by a separate trustee does not include a failure to act.
(b) A “separate distributions trustee” means a person, or a cotrusteeship described in section 7703, that is designated by a separate trustees provision to exercise discretion under a discretionary trust provision.
(c) A “separate investment trustee” means a person, or a cotrusteeship described in section 7703, that is designated by a separate trustees provision to perform the trustee investment function.
(d) A “separate resultant trustee” means a person, or a cotrusteeship described in section 7703, that is designated to perform all trustee functions not allocated by the separate trustees provision to a separate investment trustee or to any separate distributions trustee.
(e) A “separate trustee” means any separate resultant trustee, separate investment trustee, or separate distributions trustee.
(f) A “separate trustees provision” means a trust provision that designates, or provides a method of designating both of the following:
   (i) A separate resultant trustee.
   (ii) A separate investment trustee or 1 or more separate distributions trustees.
   (g) A “separate trusteeship” means the office of any separate trustee.
   (h) “The trust” means the inclusive set of separate relations of trust to be separately accepted by the separate trustees under a given separate trustees provision.
   (i) The “trustee investment function” means the trustee function(s) expressly allocated by the separate trustees provision to a separate investment trustee. The trustee investment function may be broadly or narrowly defined by the separate trustees provision and may include determining for trust investment purposes the retention, purchase, sale, assignment, exchange, tender, or encumbrance of trust property and the investment and reinvestment of undistributed income and principal of the trust; management, control, and exercise of voting powers related directly or indirectly to any trust asset; and for nonpublicly traded investments or property for which there is no readily available market value, determining the methodology for valuing such property and the frequency of valuations.
(2) A trust instrument may include a separate trustees provisions.
(3) While a separate trustees provision applies, the whole trusteeship of the trust is divided, along the lines created by the designation of separate trustees, into discrete sets of separately accepted fiduciary responsibilities, each set separately allocated to 1 or another of the trust’s separate trustees.
   (a) Except as provided in paragraph (c) of this subsection, the trust’s separate trustees shall not be treated as cotrustees in their relations to 1 another. Thus:
      (i) A separate investment trustee accepts the common title to the trust property described in paragraph (c)(i) only for purposes of performing the trustee investment function described by the governing separate trustees provision for the benefit of the beneficiaries of the trust.
      (ii) A separate distributions trustee accepts the common title to the trust property described in paragraph (c)(i) only for purposes of administering the discretionary trust provision(s) indicated in the governing separate trustees provision for the benefit of those beneficiaries affected by the indicated discretionary trust provision(s).
      (iii) A separate resultant trustee accepts the common title to the trust property described in paragraph (c)(i) only for purposes of performing all trustee functions not allocated by the governing separate trustees provision either to the separate investment trustee (if any) or to any separate distributions trustee.
   (b) Each separate trustee shall act as to its separate trustee function(s) upon its own authority without need of approval from any other separate trustee of the trust. The trust’s separate trustees are not cotrustees for purposes of joinder of necessary parties in a proceeding for breach of trust, or for any other purpose not specifically described in paragraph (c) of this subsection.
(c) The trust’s separate trustees are treated as cotrustees in their relations to one another only for purposes of the following:

(i) Taking, holding, transferring, and defending title to trust property.
(ii) Determining venue and interested persons in proceedings concerning the trust.
(iii) Liability (if any) for income, property, or other taxes attributable to trust property.
(iv) The privileges and immunities of cotrustees to comment, to the trust’s beneficiaries or settlor(s) or others, on one another’s performance of fiduciary duties, which privileges and immunities separate trustees shall enjoy notwithstanding that each separate trustee is expressly relieved, by subsection (9) of this section, of any duty whatsoever to make any such comment to the settlor(s) or any beneficiary of the trust.

(d) The trust’s separate trustees are not cotrustees for purposes of the requirement in section 7402 that the same person is not the sole trustee and sole beneficiary of a trust: if a trust has only one beneficiary, that beneficiary may not be a separate trustee of the trust unless the separate trustee in question comprises a cotrusteeship of which the beneficiary is a cotrustee and the trust instrument prohibits the beneficiary from serving alone.

(e) A separate trustee shall not accept the particular trust associated with, nor, except as provided elsewhere in this subsection, participate in or provide advice regarding the performance of, the separate trustee function(s) of any other separate trustee of the trust. Ministerial acts performed by one separate trustee in connection with the separate trustee function(s) of another separate trustee of the trust (such as confirming that an investment or distribution directive of another separate trustee has been carried out, recording and reporting the actions of another separate trustee or conferring with another separate trustee for purposes of administrative coordination or efficiency) shall not be deemed to constitute an acceptance of the particular trust associated with the separate trustee function(s) of the other separate trustee. While a separate trustees provision applies, the prohibition of this subsection against the acceptance by one of the trust’s separate trustees of the particular trust associated with the separate trustee function(s) of any other of the trust’s separate trustees shall constitute a legal disability.

(f) A separate trustee has no duty to petition the court or to take other affirmative action to ensure that any vacancy in any separate trusteeship is filled. A separate trustee who elects, in spite of having no duty to do so, to petition the court or to take other affirmative action to ensure that a vacancy in a separate trusteeship is filled shall not be deemed to have accepted the particular trust associated with the vacant separate trusteeship, and a separate trustee who elects thus to petition the court or to take other affirmative action on a given occasion shall not thereby be obligated to do so on any other occasion.

(4) The separate trustees provision shall determine all of the following:

(a) That the trustee investment function shall be performed by the separate investment trustee (if there is one) or that 1 or more separate distributions trustees (if any) shall exercise discretion under 1 or more specified discretionary trust provisions.

(b) Which of the trust’s separate trustees shall perform, during any period in which the trust is not a unitrust, the function of allocating between principal and income, for fiduciary accounting purposes, receipts and disbursements or distributions affected by the separate trustees’ separate trustee functions.

(c) Which of the trust’s separate trustees shall be responsible for preparation and filing of tax and information returns for the trust and for responding on behalf of the trust to inquiries from governmental agencies.

(d) Which of the trust’s separate trustees shall be responsible for responding to attacks upon the trust’s validity or purpose(s).

(e) Which of the trust’s separate trustees shall be responsible for determining whether at any time cash or other property will be loaned by the trust to 1 or more beneficiaries of the trust, which shall be
responsible for determining whether at any time cash or other property will be loaned by the trust to 1 or more business enterprises in which any beneficiary of the trust has an ownership interest, and which shall be responsible for determining whether at any time cash or other trust property will be loaned by the trust to 1 or more business enterprises in which the trust itself has an ownership interest.

(f) In the case of a separate investment trustee, whether the separate investment trustee or the separate resultant trustee shall determine the trust’s asset allocation for investment purposes.

(5) The separate resultant trustee shall be responsible for possession, custody, or control of the trust property within the meaning of section 7810.

(6) Within its separate trustee function(s), a separate trustee:

(a) Has all of the rights, privileges, powers, immunities, and duties of a trustee described in this part 7 and in part 8 of this code,

(b) Is subject to control by the settlor(s) of a revocable trust or by a holder of a power to direct a trustee (if any) in the same circumstances an ordinary trustee or cotrusteeship would be,

(c) Is bound to seek or consider the advice of a designated trust advisor (if any) in the same circumstances an ordinary trustee or cotrusteeship would be.

(7) If a separate trustee comprises a cotrusteeship, then within that separate trustee’s separate trustee function(s), those cotrustees have all of the rights, privileges, powers, immunities, and duties of cotrustees described in this part 7.

(8) Each separate trustee has the duty to inform and report on its separate trustee function(s) to:

(a) Beneficiaries of the trust as described in section 7813, provided, however, that no separate trustee is required to provide any beneficiary any report that it knows will be duplicative of a report provided that beneficiary by another separate trustee of the trust,

(b) Each other separate trustee of the trust as is reasonably necessary for the other separate trustee to perform its separate trustee function(s).

(9) A separate trustee has no duty whatsoever either to monitor or review the actions of any other separate trustee of the trust or to notify or warn any settlor or beneficiary of the trust of any breach or possible breach of trust on the part of any other separate trustee of the trust. A separate trustee who elects, in spite of having no duty to do so, to notify or warn a settlor or beneficiary of the trust of a possible breach of trust on the part of another separate trustee shall not be deemed to have accepted the particular trust associated with the separate trustee function(s) of that other separate trustee, and a separate trustee who elects thus to notify or warn a settlor or beneficiary on a given occasion shall not thereby be obligated to do so on any other occasion.

(10) Absent clear and convincing evidence of collusion in a breach of trust, all of the following apply:

(a) A separate trustee is not liable for the act or omission of any other separate trustee of the trust.

(b) A separate trustee in breach of a trustee duty of its separate trustee function(s) shall be the only separate trustee of the trust obliged to defend or otherwise respond to any action brought by a beneficiary of the trust regarding that breach.

(c) Except as provided in paragraph (d) of this subsection, a separate trustee shall be liable to trust beneficiaries for breach of a trustee duty of its separate trustee function(s) as if the other separate trustee(s) of the trust were not in office and it were the sole trustee of the trust.

(d) A separate trustee may be liable concerning a trustee function of another separate trustee of the trust only for its own actions in the performance of ministerial offices pursuant to that other separate trustee’s instruction(s) and then only to the extent it acts in bad faith.

700.7704 Vacancy in trusteeship; manner of filling; priority; appointment by court of additional trustee or fiduciary

Sec. 7704. (1) A vacancy in a trusteeship occurs if 1 or more of the following occur:
(a) A person designated as trustee rejects the trusteeship.
(b) A person designated as trustee cannot be identified or does not exist.
(c) A trustee resigns.
(d) A trustee is disqualified or removed.
(e) A trustee dies.
(f) A guardian or conservator is appointed for an individual serving as trustee.

(2) If 1 or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. Though any separate trustee described in section 7703b may comprise a cotrusteeship, the relation between respective separate trustees serving under a given separate trustees provision described in section 7703b is not itself a cotrusteeship. Thus, a vacancy in a trusteeship shall be filled if the:
   (a) it leaves a trust that is not subject to a separate trustees provision as of the time of the vacancy without any remaining trustee; or
   (b) it leaves any of the several separate trusteeships governed by an operative separate trustees provision without any remaining trustee.

(3) If a vacancy in a trusteeship of a noncharitable trust is to be filled, the vacancy shall be filled in the following order of priority:
   (a) In the manner designated by the terms of the trust.
   (b) By a person appointed by the court.

(4) If a vacancy in a trusteeship of a charitable trust is to be filled, the vacancy shall be filled in the following order of priority:
   (a) In the manner designated by the terms of the trust.
   (b) By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection.
   (c) By a person appointed by the court.

(5) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary upon the showing of good cause.

700.7809  [Reserved] Trust protector; exercise of powers

Sec. 7809. [Reserved] (1) A trust protector, other than a trust protector who is a beneficiary of the trust, is subject to all of the following:
   (a) Except as provided in subsection (2), the trust protector is a fiduciary to the extent of the powers, duties, and discretions granted to him or her under the terms of the trust.
   (b) In exercising or refraining from exercising any power, duty, or discretion, the trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.
   (c) The trust protector is liable for any loss that results from the breach of his or her fiduciary duties.

(2) The terms of a trust may provide that a trust protector to whom powers of administration described in section 675(4) of the internal revenue code, 26 USC 675, have been granted may exercise those powers in a nonfiduciary capacity. However, the terms of the trust shall not relieve the trust protector from the requirement under subsection (1)(b) that he or she exercise or refrain from exercising any power, duty, or discretion in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(3) Except as otherwise provided in subsection (4), the trustee shall act in accordance with a trust protector's exercise of the trust protector's specified powers and is not liable for so acting.
(4) If either of the following applies to a trust protector's attempted exercise of a specified power, the trustee shall not act in accordance with the attempted exercise of the power unless the trustee receives prior direction from the court:
   (a) The exercise is contrary to the terms of the trust.
   (b) The exercise would constitute a breach of any fiduciary duty that the trust protector owes to the beneficiaries of the trust.

(5) A trustee is not liable for any loss that results from any of the following:
   (a) The trustee's compliance with a direction of a trust protector, unless the attempted exercise was described in subsection (4).
   (b) The trustee's failure to take any action that requires a prior authorization of the trust protector if the trustee timely sought but failed to receive the authorization.
   (c) Seeking a determination from the court regarding the trust protector's actions or directions.
   (d) The trustee's refraining from action pursuant to subsection (4).

(6) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(7) By accepting an appointment to serve as a trust protector of a trust registered in this state or having its principal place of administration in this state, the trust protector submits to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the trust protector may be made a party to any action or proceeding relating to a decision, action, or inaction of the trust protector.

(8) A term of a trust that relieves a trust protector from liability for breach of his or her fiduciary duties is unenforceable to the extent that either of the following applies:
   (a) The term relieves the trust protector of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
   (b) The term was inserted as the result of an abuse by the trust protector of a fiduciary or confidential relationship to the settlor.
I. INTRODUCTION AND SET DIAGRAM

The Council of the Probate and Estate Planning Section of the Michigan State Bar is considering a legislative proposal lately developed by the Council’s Divided and Directed Trusteeships ad Hoc Committee. Among other things, the Committee’s proposal (CP) imports the Uniform Directed Trust Act (UDTA) into the Michigan trust code (MTC). That importation is effected primarily by the addition of a new section to the MTC, CP section 7703a.2

Now, the MTC is a version of the Uniform Trust Code (UTC), and the UDTA displaces subsections (b) through (d) of UTC section 808,3 which have their local installation in Michigan in MTC section 7809.4 So, under the CP, the new section 7703a displaces MTC section 7809.5 The result is (among other things) a change in the scope of the statutory imposition of fiduciary constraint on persons having powers to direct the actions of trustees. That change can be described schematically as follows:

1 Appendix 1 hereto contains the portions of the CP pertaining to directed trusteeship and the importation of the UDTA into the MTC. In addition to those provisions, the CP contains provisions pertaining to a more innovative scheme of fiduciary coordination known as “divided trusteeship.” As to the difference between directed and divided trusteeships, see James P. Spica, Onus Fiduciae Est Omnis Divisa in Partes Tres: A Statutory Proposal for Partitioning Trusteeship, 49 REAL PROP. TR. & EST. L.J. 349, passim (2014).

2 Appendix 2 hereto contains parallel tables mapping the UDTA onto CP section 7703a and vice versa. The Uniform Law Commission promulgated the UDTA as a separate, stand-alone statute. See UNIF. DIRECTED TRUST ACT § 1 (UNIF. LAW COMM’N 2017) (short title). Because the CP enshrines the UDTA within the MTC, it locates some of the UDTA’s structural provisions outside of the new section 7703a. Thus, for example, the UDTA provision extending the Act’s application to the relations of cotrustees inter se is located, under the CP, in the MTC provision on cotrusteeships. See CP § 7703(10) (UNIF. DIRECTED TRUST ACT § 12).

3 See UNIF. DIRECTED TRUST ACT § 9 legislative note. Appendix 3 hereto contains an outline of the UDTA.

4 Compare MICH. COMP. LAWS § 700.7809 and UNIF. TRUST CODE § 808(b)-(d) (UNIF. LAW COMM’N 2010).

5 See CP § 7809 (deletion, numerical designation reserved).
All points in the interior of the rectangle enclosing this Venn diagram represent powers affecting possible trust relations. (The powers represented are fiduciary and nonfiduciary powers; some of them are held by trustees, some by beneficiaries, some by settlors, some by persons who fall into more than one of these functional categories, and some by persons who fall into none of them.) The region of the circle marked ‘TP,’ for “trust protector,” (comprising subregions (a) and (b)) represents the proper subset of discrete powers possession of which (in some circumstances at least) will bring the power holder under fiduciary obligations imposed by MTC section 7809. The region of the circle tagged ‘TD,’ for “trust director,” (comprising subregions (b) and (c)) represents the proper subset of discrete powers possession of which (in some circumstances at least) will bring the power holder under fiduciary obligations imposed by CP section 7703a.

Thus, subregions (a) and (c) map the changes recommended by the CP for the statutory imposition of fiduciary constraint on persons having powers to direct: subregion (a) represents powers currently triggering fiduciary obligations (in some circumstances) under MTC section 7809 that will not trigger such obligations (in those circumstances) under CP section 7703a; subregion (b) represents powers currently triggering fiduciary obligations (in some circumstances) under MTC section 7809 that will also trigger such obligations (in those circumstances) under CP section 7703a; subregion (c) represents powers that will trigger fiduciary obligations (in some circumstances) under CP section 7703a that do not trigger such obligations (in those circumstances) under MTC section 7809. So, If one likes the CP (as a proposed change from the status quo in Michigan re the statutory imposition of fiduciary constraint on powers to direct), it is because one prefers that powers lying in subregion (a) should not trigger statutory fiduciary obligations in the circumstances they currently do under the MTC and that powers lying in subregion (c) should trigger such obligations in the circumstances they will under CP section 7703a.

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6 Here we adopt the convenient, technical convention (common among logicians) of using single quotation marks “to construct a name for the [marked] expression.” ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 6 n.4 (1990). We shall use “[d]ouble quotes [sic] . . . in the many looser ways quotation marks can be used, often to mention a word and use it in the same breath.” Id.

7 As we shall see, the position of a given point in the set diagram depends, not only on the nature of the power the point represents, but also on the identity of the power holder. See infra note 11.

8 MTC section 7809 describes the duties and liabilities of what the MTC calls “trust protectors.” See MICH. COMP. LAWS §§ 700.7103(n), 700.7809. See also id. § 700.7105(2)(h) (minimum obligations imposed on trust protectors by section 7809 not liable to be subverted by terms of the trust).

9 The set diagram is not scaled—it does not represent the relative extent of the regions indicated.

10 CP section 7703a describes the duties and liabilities of what the CP (following the UDTA) calls “trust directors.” See CP §§ 7703a(1)(e) (UNIF. DIRECTED TRUST ACT § 2(9)), 7703a(6) (UNIF. DIRECTED TRUST ACT § 8(a)).
II. INTERPRETATION

Subregion (a) includes a power in a nonsettlor (of the trust in question):\(^{11}\)

1. To remove a trustee if exercise of the removal power will create either no vacancy or a vacancy that will have to be filled by the prospective action of someone other than the power holder.\(^{12}\)

2. To remove a nontrustee who has a power to direct the trustee in the exercise of one or more of the trustee’s powers \textit{qua} trustee (a character it will be convenient for us to refer to as a “nontrustee trust actor”)\(^{13}\) if either (a) the nontrustee trust actor’s power is nondispositive (because the trustee function subject to the power is nondispositive)\(^{14}\) or

\(^{11}\) Subregions (a) and (b) do not include any power held by a settlor of the trust in question because for purposes of MTC section 7809, the term ‘trust protector’ excludes “[t]he settlor of a trust” (meaning, presumably, the settlor of the trust in question). Mich. Comp. Laws § 700.7103(n)(i).

\(^{12}\) Subregions (a) and (b) do not include any power that constitutes a power of appointment because for purposes of MTC section 7809, the term “trust protector” excludes “[t]he holder of a power of appointment.” Id. § 700.7103(n)(ii). If someone wielding a power to remove a trustee can also replace a trustee whom she has removed, then the confluence of the removal and replacement powers constitutes a power of appointment—because it enables the power holder to transfer legal ownership of the res (from one trustee to another). See id. § 556.112(c) (“‘power of appointment’ means a power . . . to designate . . . the transferees of property”). See also id. § 556.115a(6) (power to transfer trust property from one trustee to another is a power of appointment). (The MTC does not define the term ‘power of appointment,’ but the provisions of the Michigan Powers of Appointment Act of 1967 (MPAA) just cited (viz., id. §§ 556.112(c), 556.115a(6)) are no doubt \textit{in pari materia} for purposes of interpreting the MTC. See, e.g., RUPERT CROSS, STATUTORY INTERPRETATION 150-51 (John Bell & George Engle eds., 3rd ed. 2005). See also Robert S. Summers, Statutory Interpretation in the United States, in INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 423 (D. Neil MacCormick & Robert S. Summers eds., 1991) (courts obliged to consider texts of closely related statutes.) Hence subregion (a) \textit{item 1} contemplates a power to remove a trustee \textit{without} a concomitant power to fill any resulting vacancy (or, indeed, to trigger the appointment of a known, predetermined successor). Otherwise, the MTC’s exclusion of holders of powers of appointment from the extension of the term ‘trust protector’ would take the case out of subregions (a) and (b) altogether.

\(^{13}\) A “nontrustee trust actor” may or may not be either a “trust protector” within the meaning of the current MTC or a “trust director” within the meaning of the CP (and the UDTA).

\(^{14}\) A power to direct the exercise of a power of appointment is a power of appointment. See, e.g., Mich. Comp. Laws § 556.112(c) (MPAA definition of ‘power of appointment’). And a power to create a power of appointment may also be a power of appointment. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 (2011) (unless instrument creating power manifests contrary intent, special power of appointment may be exercised to create powers of appointment in permissible appointees). See also UNIF. POWERS OF APPOINTMENT ACT § 102(13) (UNIF. LAW COMM’N 2013) (‘power of appointment’ circularly defined to include power to create “another power of appointment”). Thus, a power to remove and replace a nontrustee trust actor who can direct a trustee in the exercise of a fiduciary power of appointment is a power to create a power of appointment (in the removed nontrustee trust actor’s successor), which is itself a power of appointment; and that entails that the holder of the removal-and-replacement power is not a “trust protector” within the meaning of MTC section 7809. See \textit{supra} note 12.
(b) exercise of the removal power will create either no vacancy or a vacancy that will have to be filled by the prospective action of someone other than the power holder.  

3. To ascertain the happening of an event that affects the administration of the trust if the power does not constitute a power of appointment and the power holder is a health professional who acts in that capacity in ascertaining the happening of the event in question.  

4. To determine the capacity of a trustee, settlor, nontrustee trust actor, or beneficiary of the trust if the power does not constitute a power of appointment and the power holder is a health professional who acts in that capacity in making the determination.  

5. That is described in Internal Revenue Code (IRC) section 675(4), regardless of what the trust instrument says about the power’s being exercisable in a nonfiduciary capacity, if the power does not constitute a power of appointment.

Hence—in order to prevent the MTC’s exclusion of holders of powers of appointment from the extension of the term ‘trust protector’ from taking the case out of subregions (a) and (b) altogether—subregion (a) item 2(a) contemplates a power to remove and replace a nontrustee trust actor whose power (to direct the trustee) is a nondispositive power, i.e., a power that does not amount to a power to create a power of appointment because the trustee function that the nontrustee trust actor is empowered to direct is a nondispositive function. (“Dispositive powers are powers which authorize [a] person to create or dispose of beneficial interests or proprietary rights in property. . . . Powers of appointment are the most important and most common dispositive powers.” GERAINT THOMAS, THOMAS ON POWERS 7 (2d ed. 2012).)  

In that case (viz., subregion (a) item 2(a)), the power to remove and replace the nontrustee trust actor will not constitute a power of appointment within the meaning of the MTC because (1) by hypothesis, the power is not a power to create a power of appointment, (2) a power of appointment is otherwise defined as a power “to designate the transferees of property” (MICH. COMP. LAWS § 556.112(c); see supra note 12) and (3) the nontrustee trust actor, as such, will not hold legal or equitable title to the res—legal ownership thereof is in the trustee(s), equitable ownership in the beneficiaries. See, e.g., id. § 700.2901(2)(j) (defining ‘trust’ in terms of the relation between legal and equitable owners of trust property). Thus, if a given nontrustee trust actor’s power is a power to direct the trustee in the exercise of a nondispositive trustee function, the confluence of the powers to remove that nontrustee trust actor and replace her will not constitute a power of appointment, and the holder of the removal-and-replacement power (given that she is not a settlor of the trust in question (see supra note 11)) will be a “trust protector” within the meaning of MTC section 7809. See id. § 700.7103(n).

Subregion (a) item 2(b) contemplates a power to remove a nontrustee trust actor whose power is a power to direct the trustee in the exercise of a dispositive trustee function, i.e., the nontrustee trust actor’s power is a power that does amount to a power of appointment for the reason explained supra note 14. In that case, for the reason explained supra note 12, the contemplated power’s inclusion in subregion (a) or (b) depends on the power holder’s not being able to replace a nontrustee trust actor whom she has removed.

See supra note 12.

Cf. CP § 7703a(7) (UNIF. DIRECTED TRUST ACT § 8(b)).

Subregion (a) item 4 is just a special case of subregion (a) item 3.

See supra note 17.
Subregion (b) includes a power in a nonsettlor (of the trust in question): 21

1. To acquire, dispose of, exchange, or retain any trust investment if the power does not constitute a power of appointment.

2. To vote proxies for securities held in trust.

3. To make or take loans if the power does not constitute a power of appointment.

4. To adopt a particular valuation of trust property or determine the frequency or methodology of valuations.

5. To manage, or select managers for, a trust-owned business.

6. To select a custodian for trust assets.

7. To direct the delegation of a trustee’s or a nontrustee trust actor’s powers to the extent the powers to be delegated are nondispositive. 22

8. To change the trust’s principal place of administration or tax situs or the law governing the meaning and effect of the trust’s terms.

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20 This power is included in subregion (a) because under the current MTC, it must be exercised, regardless of what the trust instrument says, “in accordance with . . . the interests of the trust beneficiaries.” See Mich. Comp. Laws §§ 700.7809(1)(b) (trust protector must act “in accordance with . . . the interests of the trust beneficiaries”), 700.7809(2) (same even in exercise of IRC section 675(4) administrative power). See also id. § 700.7105(2)(h) (terms of MTC prevail over terms of the trust on this point). The Internal Revenue Service is unlikely to accept that such a power is “exercisable in a nonfiduciary capacity” within the meaning of IRC section 675(4), given that (1) the relevant inquiry for federal tax purposes is whether the power is in fact “exercisable primarily in the interests of the beneficiaries” (Treas. Reg. § 1.675-1(b)(4)(iii)) and (2) that the minimum standard of care thus applicable under the MTC to trust protectors is the same minimum standard applicable to trustees. See Mich. Comp. Laws §§ 700.7105(2)(b), (k); 700.7801; 700.7908.

A trust protector’s inability under the MTC, to exercise an IRC section 675(4) administrative power in a nonfiduciary capacity is without practical effect to the extent a power to substitute assets (by far the most prevalent of the powers described in section 675(4)) is given to or reserved by a settlor (of the trust in question) or constitutes a power of appointment. See supra notes 11-12. But anyone who doubts either that a power to substitute assets is a power of appointment within the meaning of the MTC or that a power to substitute assets is the only IRC section 675(4) power worth giving a nonsettlor, nontrustee trust actor for tax-engineering purposes will be glad of a proposal that excludes IRC section 675(4) powers from the scope of a nontrustee trust actor’s fiduciary obligations. The CP (following the UDTA) does that. See CP §§ 7703a(2)(f) (Unif. Directed Trust Act § 5(b)(5)), 7703a(3)(a) (no UDTA counterpart).

21 See supra note 11.

22 As to the transitivity of the dispositive character of powers of appointment, see supra note 14.
9. To ascertain the happening of an event that affects the administration of the trust if the power holder is not a health professional who acts in that capacity in ascertaining the happening of the event in question.  

10. To determine the capacity of a trustee, settlor, nontrustee trust actor, or beneficiary of the trust if the power holder is not a health professional who acts in that capacity in making the determination.

11. To determine the compensation to be paid to a trustee or a nontrustee trust actor if the power to do so does not constitute a power of appointment.

12. To prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust.

13. To veto a trustee’s or a nontrustee trust actor’s exercise of a given power if the given power is nondispositive.

14. To release a trustee or nontrustee trust actor from liability for an action proposed or previously taken by the trustee or nontrustee trust actor if the power of release does not constitute a power of appointment.

Subregion (c) includes:

1. Each of the fourteen powers described above as lying in subregion (b) if the holder is a settlor (of the trust in question) and the settlor does not have the power to revoke the trust.

2. Any power of appointment if the power is expressly a fiduciary power.

3. A power to adjust between principal and income or convert to a unitrust if the trust has disparate income and remainder beneficiaries and either (a) the donee of the power is

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23 See CP § 7703a(7) (UNIF. DIRECTED TRUST ACT § 8(b)).

24 Subregion (b) item 10 is just a special case of subregion (b) item 9.

25 As to the transitivity of the dispositive character of powers of appointment, see supra note 14.

26 Unlike the MTC’s ‘trust protector’ (see supra note 11), the CP’s (and UDTA’s) ‘trust director’ may include a settlor of the trust in question. See CP § 7703a(1)(e) (UNIF. DIRECTED TRUST ACT § 2(9)). But to be a “trust director” within the meaning of the CP (and UDTA), a person has to have a “power of direction,” which is defined to exclude any power of a settlor over a trust to the extent the settlor can revoke that trust. See id. §§ 7703a(1)(d) (UNIF. DIRECTED TRUST ACT § 2(5)), 7703a(2)(d) (UNIF. DIRECTED TRUST ACT § 5(b)(3)). So, in order for a settlor of a given trust to be a “trust director” with respect to that trust, she must not have a power of revocation.

27 See id. §§ 7703a(1)(d) (UNIF. DIRECTED TRUST ACT § 2(5)) (‘power of direction’ defined), 7703a(2)(a) (UNIF. DIRECTED TRUST ACT § 5(b)(1)) (exclusion from extension of term ‘power of direction’ for powers of appointment intended to be held by donee in nonfiduciary capacity), 7703a(3)(b) (UNIF. DIRECTED TRUST ACT § 5(c)) (certain powers of appointment granted to a donee other than a trustee constructively presumed to be nonfiduciary powers).
not a beneficiary (of the trust in question) and the power is not expressly a nonfiduciary power\textsuperscript{29} or (b) the donee is a beneficiary and the power is expressly a fiduciary power.\textsuperscript{30}

4. A power to modify, reform, terminate, or decant a trust if either (a) the power holder is not a beneficiary (of the trust in question) and the power is not expressly a nonfiduciary power\textsuperscript{31} or (b) the power holder is a beneficiary and the power is expressly a fiduciary power.\textsuperscript{32}

5. A power to veto a trustee’s or a nontrustee trust actor’s exercise of a given power if the given power is dispositive and the veto power is expressly fiduciary.

6. A power to release a trustee or nontrustee trust actor from liability for an action proposed or previously taken by the trustee or nontrustee trust actor if the power constitutes a power of appointment and is expressly fiduciary.

\textsuperscript{28} If a trust has disparate income and remainder beneficiaries, a power over the trust to adjust between principal and income or convert to a unitrust is a power of appointment. \textit{See, e.g.}, Mich. COMP. LAWS § 556.112(c) (MPAA definition of ‘power of appointment’).

\textsuperscript{29} \textit{See} CP § 7703a(3)(c)(i) (no UDTA counterpart) (power to adjust between principal and income or convert to unitrust granted to someone who otherwise has no beneficial interest in the trust constructively presumed to be a fiduciary power).

\textsuperscript{30} \textit{See supra} note 27.

\textsuperscript{31} \textit{See} CP § 7703a(3)(c)(ii) (no UDTA counterpart) (power to modify, reform, terminate, or decant a trust granted to someone who otherwise has no beneficial interest in the trust constructively presumed to be a fiduciary power).

\textsuperscript{32} \textit{See supra} note 27.
APPENDIX 1

UDTA Portion of the Legislative Proposal of the Divided and Directed Trusteeships ad Hoc Committee of the Council of the Probate and Estate Planning Section of the State Bar of Michigan

A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by amending sections 7103, 7105, 7108, 7411, 7703, and 7704 as amended by 2009 PA 46, 2010 PA 325, and 2012 PA 483; by deleting (and reserving the numerical designation of) section 7809; and by adding section[s] 7703a and 7703b.33

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700.7103 Definitions

Sec. 7103. As used in this article:
(a) "Action", with respect to a trustee or a trust protector, includes an act or a failure to act.
(b) "Ascertaintable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.
(c) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).
(d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:
(i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.
(ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.
(iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.
(iv) Whether the distribution of trust property is from income or principal or both of the trust.
(v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.
(e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.
(f) "Power of withdrawal" means a presently exercisable general power of appointment other than a power that is either of the following:
(i) Exercisable by a trustee and limited by an ascertainable standard.
(ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

33 The section references (to CP sections 7703b and 7704) bracketed in the long title of this presentation of the CP are references to portions of the CP pertaining to divided (as opposed to directed) trusteeships. See supra note 1.

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(g) "Qualified trust beneficiary" means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:
   (i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.
   (ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.
   (iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

(j) "Spendthrift provision" means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary's interest.

(k) "Support provision" means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

(l) "Trust beneficiary" means a person to whom 1 or both of the following apply:
   (i) The person has a present or future beneficial interest in a trust, vested or contingent.
   (ii) The person holds a power of appointment over trust property in a capacity other than that of trustee or trust director.

(m) "Trust instrument" means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) "Trust protectordirector" means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:
   (i) The settlor of a trust.
   (ii) The holder of a power of appointment so defined in section 7703a(1)(e).

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

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(e) 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.

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

(g) 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.

(h) Except as permitted under section 7809(2), the obligations imposed on a trust protector/director in section 7703a(5) and (6) 7809(4).

(i) The duty under section 7814(2) 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.

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

(k) The effect of an exculpatory term under section 7809(8)7703a(6)(b) or 7908.

(l) The effect of a release of a trustee or trust director from liability for breach of trust under section 7703a(9).

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

(n) Except as permitted by section 7703a(9), 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.

700.7108 Principal place of administration

Sec. 7108. (1) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if either any of the following applies:

(a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction.

(b) A trust director's principal place of business is located in, or a trust director is a resident of, the designated jurisdiction.

(c) All or part of the administration occurs in the designated jurisdiction.

(2) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the qualified trust beneficiaries.

(3) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (2), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(4) The trustee shall notify the qualified trust beneficiaries in writing of a proposed transfer of a trust's principal place of administration not less than 63 days before initiating the transfer. The notice of proposed transfer shall include all of the following:

(a) The name of the jurisdiction to which the principal place of administration is to be transferred.

(b) The address and telephone number at the new location at which the trustee can be contacted.

(c) An explanation of the reasons for the proposed transfer.
(d) The date on which the proposed transfer is anticipated to occur.

(e) In a conspicuous manner, the date, not less than 63 days after the giving of the notice, by which a qualified trust beneficiary must notify the trustee in writing of an objection to the proposed transfer.

(5) The authority of a trustee under this section to transfer a trust's principal place of administration without the approval of the court terminates if a qualified trust beneficiary notifies the trustee in writing of an objection to the proposed transfer on or before the date specified in the notice.

(6) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 7704.

(7) The view of an adult beneficiary shall be given weight in determining the suitability of the trustee and the place of administration.

700.7411 Modification or termination of noncharitable trust; consent; "settlor's representative" defined

Sec. 7411. (1) Subject to subsection (2), a noncharitable irrevocable trust may be modified or terminated in any of the following ways:

(a) By the court upon the consent of the trustee and the qualified trust beneficiaries, if the court concludes that the modification or termination of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust.

(b) Upon the consent of the qualified trust beneficiaries and a trust protector person or committee who is given the power under the terms of the trust to grant, veto, or withhold approval of termination or modification of the trust.

(c) By a trustee or trust protector other person or committee given to whom a power by the terms of the trust to direct the termination or modification of the trust has been given by the terms of a trust.

(2) Subsection (1) does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before April 1, 2010.

(3) Notice of any proceeding to terminate or modify a trust shall be given to the settlor, the settlor's representative if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, the trust protector director, if any, a powerholder described in paragraph (b) or (c) of subsection (1), if any, the trustee, and any other person named in the terms of the trust to receive notice of such a proceeding.

(4) Upon termination of a trust under subsection (1), the trustee shall distribute the trust property as agreed by the qualified trust beneficiaries.

(5) If the trustee fails or refuses to consent, or fewer than all of the qualified trust beneficiaries consent, to a proposed modification or termination of the trust under subsection (1), the modification or termination may be approved by the court if the court is satisfied that both of the following apply:

(a) If the trustee and all of the qualified trust beneficiaries had consented, the trust could have been modified or terminated under this section.

(b) The interests of a qualified trust beneficiary who does not consent will be adequately protected.

(6) As used in this section, "settlor's representative" means the settlor's agent under a durable power of attorney, if the agent is known to the petitioner, or, if an agent has not been appointed, the settlor's conservator, plenary guardian, or partial guardian.
700.7703 Cotrustees; powers and duties

Sec. 7703. (1) Except as otherwise provided in this section, Cotrustees shall act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustee or cotrustees may act for the trust.

(3) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(43) If prompt action is necessary to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust if either of the following applies:

(a) A cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity.

(b) A cotrustee who is available fails or refuses to participate in the administration of the trust following notice from the remaining cotrustee or cotrustees.

(54) By agreement of the trustees, a trustee may delegate to a cotrustee 1 or both of the following:

(a) Any power that is permitted to be delegated pursuant to section 7817(v) to an agent who is not a trustee.

(b) Any power that can only be performed by a trustee, if notice of the delegation is provided to the qualified trust beneficiaries within 28 days.

(65) Unless a delegation under subsection (5) was irrevocable, a trustee may revoke the delegation previously made. A revocation under this subsection shall be in writing and shall be given to all of the remaining cotrustees. If notice of the delegation was required to be provided to the qualified trust beneficiaries, notice of the revocation shall be given to the qualified trust beneficiaries within 28 days after the revocation.

(76) If 2 or more trustees own securities, their acts with respect to voting have 1 of the following effects:

(a) If only 1 trustee votes, in person or by proxy, that trustee's act binds all of the trustees.

(b) If more than 1 trustee votes, in person or by proxy, the act of the majority so voting binds all of the trustees.

(c) If more than 1 trustee votes, in person or by proxy, but the vote is evenly split on a particular matter, each faction is entitled to vote the securities proportionately.

(87) A trustee is not liable for the action or omission of a cotrustee if all of the following apply:

(a) The trustee is not unavailable to perform a trustee's function because of absence, illness, disqualification under other law, or other incapacity or has not properly delegated the performance of the function to a cotrustee.

(b) The trustee is aware of but does not join in the action or omission of the cotrustee.

(c) The trustee dissents in writing to each cotrustee at or before the time of the action or omission.

(98) A trustee who is not aware of an action by a cotrustee is not liable for that action unless the trustee should have known that the action would be taken and, if the trustee had known, would have had an affirmative duty to take action to prevent the action.

(10) The other subsections of this section notwithstanding, the terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee’s exercise or nonexercise of a power of the other cotrustee to the same extent that a directed trustee described in section 7703a may be relieved from duty and liability with respect to a trust director’s power of direction under that section.
700.7703a Directed Trusteeship; construction of certain powers

7703a. (1) In this 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) “Power of appointment” means that term as defined in section 2(c) of the powers of appointment act of 1967.
(d) “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. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in subsection (2).
(e) “Trust director” means a person that is granted a power of direction. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

(2) Excepting the rules of construction in subsection (3), this section does not apply to:
(a) A power of appointment that is intended to be held by the donee in a nonfiduciary capacity.
(b) A power that is intended to be held in a nonfiduciary capacity that enables the holder to create a power of appointment, regardless of whether the created power is intended to be held by the donee of the created power in a fiduciary or a nonfiduciary capacity.
(c) A power to appoint or remove a trustee or trust director.
(d) A power of a settlor over a trust to the extent the settlor has a power to revoke the trust.
(e) A power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects either of the following:
   (i) The beneficial interest of the beneficiary.
   (ii) The beneficial interest of another beneficiary represented by the beneficiary under part 3 of this article with respect to the exercise or nonexercise of the power.
(f) A power over a trust if both of the following apply:
   (i) The terms of the trust provide that the power is held in a nonfiduciary capacity.
   (ii) The power must be held in a nonfiduciary capacity to achieve the settlor’s tax objectives under the internal revenue code.

(3) The following apply as rules of construction:
(a) Any power that is excluded from the general application of this section by subsection (2) and that is intended to be held in a nonfiduciary capacity shall not be subject to fiduciary constraint and may be exercised by the holder in any manner consistent with the scope of the power and any express requirements or limitations imposed by the terms of the trust. A trustee shall take action to comply with the exercise or nonexercise of such a power and is not liable for so acting provided, however, that a trustee must not comply with the exercise or nonexercise of any such power if the exercise or nonexercise was obtained with the trustee’s collusion or by the trustee’s fraud and compliance would be in pursuance of that collusion or fraud.
(b) Except as provided in paragraph (c) of this subsection, the following powers are intended to be held in a nonfiduciary capacity if granted to a person other than a trustee of the trust:
   (i) A power of appointment, including one in the form of a power to adjust between principal and income or convert to a unitrust or to modify, reform, terminate, or decant the trust.
   (ii) A power that enables the holder to create a power of appointment.
(c) The following powers are intended to be held in a fiduciary capacity even though the holder is not a trustee of the trust if the holder otherwise has no beneficial interest in the trust:
   (i) A power to adjust between principal and income or convert to a unitrust.
(ii) A power to modify, reform, terminate, or decant the trust.

(4) Subject to subsection (5), the terms of a trust may grant a power of direction to a trust director.
   (a) A power of direction includes only those powers granted by the terms of the trust.
   (b) Both of the following apply as rules of construction:
      (i) A trust director may exercise any further power appropriate to the exercise or nonexercise of the director’s power of direction.
      (ii) Trust directors with joint powers must act by majority decision.

(5) A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or a further power under subsection (4)(b)(i) regarding both of the following:
   (a) A payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of medicaid law in section 1917 of the social security act, 42 U.S.C. 1396p(d)(4)(A).
   (b) A charitable interest in the trust, including required notices regarding the interest to the Attorney General.

(6) Subject to subsection (7), both of the following apply with respect to a power of direction or a further power under subsection (4)(b)(i):
   (a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power as a sole trustee in a like position and under similar circumstances if the power is held individually or, if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.
   (b) A term of a trust that relieves a trust director from liability for breach of fiduciary duty is unenforceable to the extent that either of the following applies:
      (i) The term relieves the trust director of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
      (ii) The term was inserted as the result of an abuse by the trust director of a fiduciary or confidential relationship to the settlor.

(7) 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.

(8) A directed trustee shall take action to comply with the exercise or nonexercise of a power of direction or further power of a trust director under subsection (4)(b)(i) and is not liable for so acting provided, however, that a directed trustee must not comply with the exercise or nonexercise of any such power if the exercise or nonexercise was obtained with the directed trustee’s collusion or by the directed trustee’s fraud and compliance would be in pursuance of that collusion or fraud.

(9) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if any of the following applies:
   (a) The breach involved the trustee’s or other director’s bad faith or reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
   (b) The release was induced by improper conduct of the trustee or other director in procuring the release.
   (c) at the time of the release, the director did not know the material facts relating to the breach.

(10) Subject to subsection (11):
   (a) A trustee shall provide information to a trust director to the extent the information is reasonably related both to the powers or duties of the trustee and the powers or duties of the director.
   (b) A trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to the powers or duties of the director and the powers or duties of the trustee or other director.

(11) Subsection (10) notwithstanding:

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(a) A trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director.

(b) By taking an action described in paragraph (a) of this subsection, a trustee does not assume the duty excluded by paragraph (a).

(c) A trust director does not have a duty to monitor a trustee or another trust director or inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director.

(d) By taking an action described in paragraph (c) of this subsection, a trust director does not assume the duty excluded by paragraph (c).

(12) Provided its reliance is not in bad faith:

(a) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.

(b) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.

(13) An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

(14) A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have in an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

(15) In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

(16) By accepting appointment as a trust director, the director submits personally to jurisdiction in this state regarding any matter related to a power or duty of the director. This section does not preclude use of another method to obtain jurisdiction over a trust director.

(17) The rules applicable to a trusteeship apply to a trust directorship regarding all of the following matters:

(a) Acceptance under section 7701(1).

(b) Giving of bond to secure performance under section 7702.

(c) Reasonable compensation under section 7708.

(d) Resignation under section 7705.

(e) Removal under section 7706.

(f) Vacancy and appointment of successors under section 7704, treating any instance in which two or more trust directors have the same power of direction as analogous to a cotrusteeship for purposes of section 7704(2).

(18) The application of this section with respect to a given trust is subject to both of the following:

(a) If the trust was created before the effective date of the amendatory act that added this section, the section applies only to decisions or actions taken on or after that date.

(b) If the trust’s principal place of administration is changed to this state on or after the effective date of the amendatory act that added this section, this section applies only to decisions or actions taken on or after the date of the change.

(19) In applying and construing the provisions of this section that are based on the Uniform Directed Trust Act, weight should be given to the goal of promoting uniformity in the law on directed trusteeships among the states that have enacted the uniform act.
## APPENDIX 2
UDTA / CP MTC § 7703a Parallel Tables

<table>
<thead>
<tr>
<th>UDTA §</th>
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\(^{34}\) Counterpart at MICH. COMP. LAWS § 700.7101.
\(^{35}\) Counterpart at id. § 700.1106(n).
\(^{36}\) Counterpart at id. § 700.7103(i).
\(^{37}\) Counterpart at id. § 700.1107(f).
\(^{38}\) Counterpart at id. § 700.1107(k).
\(^{39}\) Counterpart at id. § 700.1107(o).
\(^{40}\) CP sections 7703a(3)(a) and 7703a(3)(c) do not have counterparts in the UDTA.
\(^{41}\) Counterpart at MICH. COMP. LAWS § 700.1203(1).
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42 Counterpart at id. § 700.7105(1).
43 Counterpart at id.
APPENDIX 3

Outline of the UDTA

A. Legislative Apparatus
   1. Internal aids to construction
      a) Enacting parts
         (1) Interpretive sections (§§ 2 and 5(a))
            (a) Non exclusio: “‘Breach of trust’ includes . . .”
            (b) Exclusio: e.g., “‘Directed trust’ means . . .”
         (2) Meta-interpretive sections (§§ 4 and 17)
         (3) Saving section (§ 18) (and herein of ESGNCA section 102(a))
      b) Non-enacting parts: short title ((§ 1) (and herein of the uses of ULC Commentary)
   2. External aids to construction: the referents of the meta-interpretive sections, viz.,
      a) Common law and principles of equity (§ 4)
      b) Interpretations of the Act arrived at in other enacting jurisdictions (§ 17)
   3. Effective date and application (§ 3)
      a) Prospective application to decisions or acts (§ 3(a))
      b) Trust director’s location assimilated to that of trustee for purposes of determining
         the validity of provisions designating principal place of administration (à la UTC
         section 108(a)) (§ 3(b))

B. Exclusions from the Act’s Application (§ 5)
   1. Nonfiduciary powers of appointment (§ 5(b)(1))
      a) Definition (§ 5(a)) (and herein of lexical/stipulative circularity)44
      b) Construction (§ 5(c)) (and herein of decision-procedural circularity)45
   2. Fiduciary (and nonfiduciary) powers to appoint or remove a trustee or trust director
      (Covered Trust Actor)46 (§ 5(b)(2))

44 UDTA section 5(a) defines ‘power of appointment’ so as to include the definiendum in the
   definiens: “‘power of appointment’ means . . . or another power of appointment . . .” UNIF. DIRECTED
   TRUST ACT § 5(a) (UNIF. LAW COMM’N 2017) (emphasis added). “Circularity is a disease of analysis . . .
   that consists in representing a thing as being a synthesis of elements one of which is itself.” RICHARD
   ROBINSON, DEFINITION 145 (1972). (This particular circularity is imported to the UDTA from the
   Uniform Powers of Appointment Act. See UNIF. DIRECTED TRUST ACT § 5 cmt. 1; UNIF. POWERS OF
   APPOINTMENT ACT § 102(13) (UNIF. LAW COMM’N 2013).) Cf. CP §§ 7703a(1)(c), 7703a(2)(a)-(b).

45 UDTA section 5(c) constructively presumes that certain powers are powers to which the Act
does not apply. See UNIF. DIRECTED TRUST ACT §§ 5(a)-(b)(1), 5(c). But that means the presumption of
section 5(c) can never apply: if the presumption were to apply to a given power, it would follow that the
presumption does not apply to that power (for the presumption is part of the Act)—reductio ad absurdum.
Cf. CP § 7703a(2) (“Excepting the rules of construction in subsection (3), this section does not apply . . . .”).

46 It will be convenient for us to have a single term whose extension comprises trustees and those
who are “trust directors” within the meaning of the Act—hence the coinage here of the term ‘Covered
Trust Actor.’ We should note, however, that not all Covered Trust Actors are, as far as the Act is
concerned, fiduciaries. This is because, unlike the holders of powers excluded from the Act’s application
by UDTA section 5(b), a health-care professional described in UDTA section 8(b) (acting in the capacity
described in that section) may be a trust director. See UNIF. DIRECTED TRUST ACT §§ 2(5), 2(9), 5(b),
3. Settlor’s UTC section 603(a) (Restatement (Third) of Trusts section 74) powers
   (§ 5(b)(3))
4. Powers of a beneficiary qua beneficiary (§ 5(b)(4))
5. Powers created to achieve tax effects that depend on the powers’ being nonfiduciary
   (§ 5(b)(5))

C. Powers of Direction (§§ 6, 7)
   1. Definition (§ 2(5))
   2. Whatever is expressly granted (§ 6(b)) (and herein of the Comment’s list)
   3. Rules of construction (§ 6(c))
      a) Ancillary powers inferred (§ 6(c)(1))
      b) Co-directors act by majority decision (§ 6(c)(2))
   4. Saving limitations for special-needs and charitable planning (§ 7)

D. Duties and Liabilities of Trust Directors and Directed Trustees (§§ 8, 9, and 10 (part))
   1. Trust directors (§§ 2(8), 8)
      a) Fiduciary floor: directorship assimilated (by absorption) to trusteeship (§ 8(a)(1))
      b) Same as to permissible exculpation (§ 8(a)(2))
      c) Rule of construction for health-care-professional trust directors (§ 8(b))
      d) Floor, no ceiling (§ 8(c))
      e) Duty reasonably to inform Covered Trust Actors (§ 10(b))
   2. Directed trustees (§ 9)
      a) Duty reasonably to comply with direction (§ 9(a)) (and herein of the trustee’s
general duty of care)
      b) Unless (as a floor) “. . . the trustee would engage in willful misconduct” (§ 9(b))
         (herein of fugitive mental states)47
      c) Release by trust director assimilated to release by beneficiary (à la UTC
         section 1009) (§ 9(c))
      d) Proceeding on reasonable doubt (§ 9(d))
      e) Floor, no ceiling (§ 9(e))
      f) Duty reasonably to inform trust directors (§ 10(a))

E. Rights, Privileges, and Immunities (§§ 10 (part) and 11)
   1. Right to rely on information provided by other Covered Trust Actors (§ 10(c)-(d))
      a) “[U]nless . . . [the relying Covered Trust Actor] would engage in willful
         misconduct” (Id.)
      b) N.b., the virtue of accuracy (Id. Cf. § 9(b))

8(b). In that case, such a health-care professional will have a right under the Act, for example, to be kept
reasonably informed by other Covered Trust Actors about administrative matters implicating the health-
care professional’s “power of direction.” See id. § 10(a)-(b). But depending on the terms of the trust, the
health-care professional may have no duty under the Act to any of the trust’s beneficiaries. See id. § 8(b)-(c).

47 Cf. CP § 7703a(8) (“directed trustee must not comply . . . if the exercise or nonexercise was
obtained with the directed trustee’s collusion or by the directed trustee’s fraud and compliance would be
in pursuance of that collusion or fraud”).
2. Presumptive absence of duties to monitor; presumptive privileges to keep mum (§ 11)
   a) Presumptive irrelevance of willful misconduct (Id. Cf. §§ 9(b), 10(c)-(d))
   b) Presumption by construction (§ 11)

F. Directed-Trustee Treatment for Excluded Co-Trustees (§ 12)
   1. Motivation: e.g., UTC section 703(g)
   2. But see id. section 105(b)
   3. Cf. Restatement (Third) of Trusts section 81(2) cmt. b.

G. Personal Jurisdiction (à la UTC section 202(a)) (§ 15)

H. For the Rest, Directorships Are Assimilated (by Absorption) to Trusteeships (§§ 13, 14, and 16)
   1. Limitations on actions for breach (§§ 2(1), 13)
   2. Defenses (§ 14)
   3. Acceptance (§ 16(1))
   4. Bond and compensation (§ 16(2)-(3))
   5. Resignation and removal (§ 16(4)-(5))
   6. Vacancy (§ 16(6))
MCL 700.1106 Definitions; M to P

1 (1) As used in this act:

3 (a) "Mental health professional" means an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following:

6 (i) A physician who is licensed to practice medicine or osteopathic medicine and surgery in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

9 (ii) A psychologist licensed to practice in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

12 (iii) A registered professional nurse licensed to practice in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

15 (iv) A licensed master’s social worker licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

18 (v) A physician’s assistant licensed to practice in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

21 (vi) A licensed professional counselor licensed under part 181 of the public health code, 1978 PA 368, MCL 333.18101 to 333.18117.

(b) "Michigan prudent investor rule" means the fiduciary investment and management rule prescribed by part 5 of this article.

(c) "Minor" means an individual who is less than 18 years of age.

(d) "Minor ward" means a minor for whom a guardian is appointed solely because of minority.

(e) "Money" means legal tender or a note, draft, certificate of deposit, stock, bond, check, or credit card.
(f) “Mortgage” means a conveyance, agreement, or arrangement in which property is encumbered or used as security.

(g) “Nonresident decedent” means a decedent who was domiciled in another jurisdiction at the time of his or her death.

(h) “Organization” means a corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity.

(i) “Parent” includes, but is not limited to, an individual entitled to take, or who would be entitled to take, as a parent under this act by intestate succession from a child who dies without a will and whose relationship is in question. Parent does not include an individual who is only a stepparent, foster parent, or grandparent.

(j) “Partial guardian” means that term as defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.

(k) “Patient advocate” means an individual designated to exercise powers concerning another individual’s care, custody, and medical or mental health treatment or authorized to make an anatomical gift on behalf of another individual, or both, as provided in section 5506.

(l) “Patient advocate designation” means the written document executed and with the effect as described in sections 5506 to 5515.

(m) “Payor” means a trustee, insurer, business entity, employer, government, governmental subdivision or agency, or other person authorized or obligated by law or a governing instrument to make payments.

(n) “Person” means an individual or an organization.

(o) “Personal representative” includes, but is not limited to, an executor, administrator, successor personal representative, and special personal representative, and any other person, other than a trustee of a trust subject to article VII, who performs substantially the same function under the law governing that person’s status.
(p) “Petition” means a written request to the court for an order after notice.

(q) “Plenary guardian” means that term as defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.

(r) “Power of appointment” means that term as defined in section 2 of the powers of appointment act, 1967 PA 224, MCL 556.111 to 556.133.5.¹

(s) “Proceeding” includes an application and a petition, and may be an action at law or a suit in equity. A proceeding may be denominated a civil action under court rules.

(t) “Professional conservator” means a person that provides conservatorship services for a fee. Professional conservator does not include a person who is an individual who is related to all but 2 of the protected individuals for whom he or she is appointed as conservator.

(u) “Professional guardian” means a person that provides guardianship services for a fee. Professional guardian does not include a person who is an individual who is related to all but 2 of the wards for whom he or she is appointed as guardian.

(v) “Property” means anything that may be the subject of ownership, and includes both real and personal property or an interest in real or personal property.

(w) “Protected individual” means a minor or other individual for whom a conservator has been appointed or other protective order has been made as provided in part 4 of article V.

(x) “Protective proceeding” means a proceeding under the provisions of part 4 of article V.

¹This is a tie-in with Council’s earlier-adopted clarifications concerning powers of appointment in section 7302. This is a clarification, rather than new law.
MCL 700.1210  Cost-of-living adjustment

(1) The specific dollar amounts stated in sections 2102, 2402, 2404, 2405, and 3983 apply to decedents who die before January 1, 2001. For decedents who die after December 31, 2000, these specific dollar amounts shall be multiplied by the cost-of-living adjustment factor for the calendar year in which the decedent dies.

(2) The specific dollar amounts stated in sections 2519, 3605, 3916, 3917, 3918, 3981, 3982, and 5102 apply to those sections for the period ending December 31, 2017. For the period beginning on January 1, 2018, those specific dollar amounts shall be multiplied by the cost-of-living adjustment factor for each calendar year in which the decedent dies.

(3) Before February 1, 2001, and annually after 2001 thereafter, the department of treasury shall publish the cost-of-living adjustment factor to be applied to the specific dollar amounts referred to in subsection (1) for decedents who die during that calendar year and in section 7414 for trusts the value of the property of which is insufficient to justify the cost of administration. 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 amount.

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2 Threshold concerning payments to parents and guardians (without appointment of conservator) inside statutory will.
3 Threshold for the demand of a bond.
4 Threshold for the disposition of a decedent’s unclaimed assets.
5 Threshold; holding of funds by county treasurer.
6 Threshold for distributing to a disabled person without appointing a conservator.
7 Threshold for the disposition of decedent’s apparel and cash.
8 Threshold for distribution of a small estate.
9 Threshold; facility of payment.
MCL 700.2519  Statutory will

(1) A will executed in the form prescribed by subsection (2) and otherwise in compliance with the terms of the Michigan statutory will form is a valid will. A person printing and distributing the Michigan statutory will shall print and distribute the form verbatim as it appears in subsection (2). The notice provisions shall be printed in 10-point boldfaced type.

(2) The form of the Michigan statutory will is as follows:

MICHIGAN STATUTORY WILL NOTICE

1. An individual age 18 or older who has sufficient mental capacity may make a will.

2. There are several kinds of wills. If you choose to complete this form, you will have a Michigan statutory will. If this will does not meet your wishes in any way, you should talk with a lawyer before choosing a Michigan statutory will.

3. Warning! It is strongly recommended that you do not add or cross out any words on this form except for filling in the blanks because all or part of this will may not be valid if you do so.

4. This will has no effect on jointly held assets, on retirement plan benefits, or on life insurance on your life if you have named a beneficiary who survives you.

5. This will is not designed to reduce estate taxes.

6. This will treats adopted children and children born outside of wedlock who would inherit if their parent died without a will the same way as children born or conceived during marriage.

You should keep this will in your safe deposit box or other safe place. By paying a small fee, you may file this will in your county’s probate court for safekeeping. You should tell your family where the will is kept.
You may make and sign a new will at any time. If you marry or divorce after you sign this will, you should make and sign a new will.

INSTRUCTIONS:

1. To have a Michigan statutory will, you must complete the blanks on the will form. You may do this yourself, or direct someone to do it for you. You must either sign the will or direct someone else to sign it in your name and in your presence.

Read the entire Michigan statutory will carefully before you begin filling in the blanks. If there is anything you do not understand, you should ask a lawyer to explain it to you.

MICHIGAN STATUTORY WILL OF

(Print or type your full name)

ARTICLE 1. DECLARATIONS

This is my will and I revoke any prior wills and codicils.

I live in ___________________________ County, Michigan.

My spouse is ___________________________________________.

(Insert spouse’s name or write “none”)

My children now living are:

________________________________ ________
________________________________ ________
________________________________ ________

(Insert names or write “none”)

ARTICLE 2. DISPOSITION OF MY ASSETS

2.1 CASH GIFTS TO PERSONS OR CHARITIES.
(Optional)

I can leave no more than two (2) cash gifts. I make the following cash gifts to the persons or charities in the amount stated here. Any transfer tax due upon my death shall be paid from the balance of my estate and not from these gifts. Full name and address of person or charity to receive cash gift (name only 1 person or charity here):

____________________________________

(Insert name of person or charity)

____________________________________

(Insert address)

AMOUNT OF GIFT (In figures): $ ________________________________

AMOUNT OF GIFT (In words): ____________________________ Dollars

____________________________________

(Your signature)

Full name and address of person or charity to receive cash gift (Name only 1 person or charity):

____________________________________

(Insert name of person or charity)

____________________________________

(Insert address)

AMOUNT OF GIFT (In figures): $ ________________________________

AMOUNT OF GIFT (In words): ____________________________ Dollars

____________________________________

(Your signature)

2.2 PERSONAL AND HOUSEHOLD ITEMS.
I may leave a separate list or statement, either in my handwriting or signed by me at the end, regarding gifts of specific books, jewelry, clothing, automobiles, furniture, and other personal and household items.

I give my spouse all my books, jewelry, clothing, automobiles, furniture, and other personal and household items not included on such a separate list or statement. If I am not married at the time I sign this will or if my spouse dies before me, my personal representative shall distribute those items, as equally as possible, among my children who survive me. If no children survive me, these items shall be distributed as set forth in paragraph 2.3.

2.3 ALL OTHER ASSETS.

I give everything else I own to my spouse. If I am not married at the time I sign this will or if my spouse dies before me, I give these assets to my children and the descendants of any deceased child. If no spouse, children, or descendants of children survive me, I choose 1 of the following distribution clauses by signing my name on the line after that clause. If I sign on both lines, if I fail to sign on either line, or if I am not now married, these assets will go under distribution clause (b).

Distribution clause, if no spouse, children, or descendants of children survive me.

(Select only 1)

(a) One-half to be distributed to my heirs as if I did not have a will, and one-half to be distributed to my spouse’s heirs as if my spouse had died just after me without a will.

________________________________________
(Your signature)

(b) All to be distributed to my heirs as if I did not have a will.

________________________________________
(Your signature)

ARTICLE 3. NOMINATIONS OF PERSONAL REPRESENTATIVE, GUARDIAN, AND CONSERVATOR
Personal representatives, guardians, and conservators have a great deal of responsibility. The role of a personal representative is to collect your assets, pay debts and taxes from those assets, and distribute the remaining assets as directed in the will. A guardian is a person who will look after the physical well-being of a child. A conservator is a person who will manage a child’s assets and make payments from those assets for the child’s benefit. Select them carefully. Also, before you select them, ask them whether they are willing and able to serve.

3.1 PERSONAL REPRESENTATIVE.

(Name at least 1)

I nominate

_____________________________________________________

(Insert name of person or eligible financial institution)

of _________________________ to serve as personal representative.

(Insert address)

If my first choice does not serve, I nominate __________________

___________________________________________________________

(Insert name of person or eligible financial institution)

of _________________________ to serve as personal representative.

(Insert address)

3.2 GUARDIAN AND CONSERVATOR.

Your spouse may die before you. Therefore, if you have a child under age 18, name an individual as guardian of the child, and an individual or eligible financial institution as conservator of the child’s assets. The guardian and the conservator may, but need not be, the same person.

If a guardian or conservator is needed for a child of mine, I nominate

_____________________________________________________

(Insert name of individual)
of ____________________________________________ as guardian and
(Insert address)
______________________________________________________________
___
(Insert name of individual or eligible financial institution) of
____________________________________ to serve as conservator.
(Insert address)

If my first choice cannot serve, I nominate

______________________________________________________________
(Insert name of individual) of
______________________________________________________________
(Insert address)
______________________________________________________________
___
(Insert name of individual or eligible financial institution)

of ____________________________________________ to serve as conservator.
(Insert address)

3.3 BOND.

A bond is a form of insurance in case your personal representative or a
conservator performs improperly and jeopardizes your assets. A bond is not
required. You may choose whether you wish to require your personal
representative and any conservator to serve with or without bond. Bond
premiums would be paid out of your assets. (Select only 1)

(a) My personal representative and any conservator I have named shall serve
with bond.

______________________________________________________________
(Your signature)
(b) My personal representative and any conservator I have named shall serve without bond.

_________________________________
(Your signature)

3.4 DEFINITIONS AND ADDITIONAL CLAUSES.

Definitions and additional clauses found at the end of this form are part of this will.

I sign my name to this Michigan statutory will on ______________ , 20_____.

_________________________________
(Your signature)

NOTICE REGARDING WITNESSES

You must use 2 adults as witnesses. It is preferable to have 3 adult witnesses. All the witnesses must observe you sign the will, have you tell them you signed the will, or have you tell them the will was signed at your direction in your presence.

STATEMENT OF WITNESSES

We sign below as witnesses, declaring that the individual who is making this will appears to have sufficient mental capacity to make this will and appears to be making this will freely, without duress, fraud, or undue influence, and that the individual making this will acknowledges that he or she has read the will, or has had it read to him or her, and understands the contents of this will.

_________________________________
(Print Name)

_________________________________
(Signature of witness)
DEFINITIONS

The following definitions and rules of construction apply to this Michigan statutory will:

(a) “Assets” means all types of property you can own, such as real estate, stocks and bonds, bank accounts, business interests, furniture, and automobiles.
(b) “Descendants” means your children, grandchildren, and their descendants.

(c) “Descendants” or “children” includes individuals born or conceived during marriage, individuals legally adopted, and individuals born out of wedlock who would inherit if their parent died without a will.

(d) “Jointly held assets” means those assets to which ownership is transferred automatically upon the death of 1 of the owners to the remaining owner or owners.

(e) “Spouse” means your husband or wife at the time you sign this will.

(f) Whenever a distribution under a Michigan statutory will is to be made to an individual’s descendants, the assets are to be divided into as many equal shares as there are then living descendants of the nearest degree of living descendants and deceased descendants of that same degree who leave living descendants. Each living descendant of the nearest degree shall receive 1 share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the descendant. In this manner, all descendants who are in the same generation will take an equal share.

(g) “Heirs” means those persons who would have received your assets if you had died without a will, domiciled in Michigan, under the laws that are then in effect.

(h) “Person” includes individuals and institutions.

(i) Plural and singular words include each other, where appropriate.

(j) If a Michigan statutory will states that a person shall perform an act, the person is required to perform that act. If a Michigan statutory will states that a person may do an act, the person’s decision to do or not to do the act shall be made in good faith exercise of the person’s powers.

ADDITIONAL CLAUSES
Powers of personal representative

1. A personal representative has all powers of administration given by Michigan law to personal representatives and, to the extent funds are not needed to meet debts and expenses currently payable and are not immediately distributable, the power to invest and reinvest the estate from time to time in accordance with the Michigan prudent investor rule. In dividing and distributing the estate, the personal representative may distribute partially or totally in kind, may determine the value of distributions in kind without reference to income tax bases, and may make non-pro rata distributions.

2. The personal representative may distribute estate assets otherwise distributable to a minor beneficiary to the minor’s conservator or, in amounts not exceeding $5,000.00 per year, either to the minor, if married; to a parent or another adult with whom the minor resides and who has the care, custody, or control of the minor; or to the guardian. The personal representative is free of liability and is discharged from further accountability for distributing assets in compliance with the provisions of this paragraph.

POWERS OF GUARDIAN AND CONSERVATOR

A guardian named in this will has the same authority with respect to the child as a parent having legal custody would have. A conservator named in this will has all of the powers conferred by law.

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10 If this figure were subject to COLA under section 1210, it would be $7,475.00 today. The new base figure is intended to match our recommendation in section 3918.
MCL 700.3605 Demand for bond by interested person

1. A person apparently having an interest in the estate worth in excess of $2,500.00 or a creditor having a claim against the estate in excess of $2,500.00 may make a written demand that a personal representative give bond. The demand must be filed with the register, and if appointment and qualification have occurred, a copy must be mailed to the personal representative. Upon filing of the demand, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate or if bond is excused as provided in section 3603 or 3604. After receipt of notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of the fiduciary office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within 28 days after receipt of notice is cause for removal and appointment of a successor personal representative.

2. The dollar amounts described in this section shall be adjusted as provided in section 1210.

1 If this figure were subject to COLA under section 1210, it would be $3,737.50 today. This threshold is significantly higher than the current figure in EPIC, which reflects our conclusion that a beneficiary should have a significant gift at stake before they have the ability to easily impose an (expensive) bond requirement on the estate.
MCL 700.2722 Honorary trusts; trusts for pets

(1) Except as provided by another statute and subject to subsection (3), if a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee, and if there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for 21 years, but no longer, whether or not the terms of the trust contemplate a longer duration.

(2) Subject to this subsection and subsection (3), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor’s intent.

(3) In addition to the provisions of subsection (1) or (2), a trust covered by either of those subsections is subject to the following provisions:

(a) Except as expressly provided otherwise in the terms of the trust, no portion of the principal or income may be converted to the use of the trustee or to a use other than for the trust’s purposes or for the benefit of a covered animal.

(b) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) As directed in the terms of the trust.

(ii) To the settlor, if then living.

(iii) If the trust was created in a nonresiduary clause in the transferor’s will or in a codicil to the transferor’s will, under the residuary clause in the transferor’s will.

(iv) If no taker is produced by the application of subparagraph (i), (ii), or (iii), to the transferor’s heirs under section 2720.

(e) For the purposes of sections 2714 to 2716, the residuary clause is treated as creating a future interest under the terms of a trust.
(d) The intended use of the principal or income may be enforced by an individual designated for that purpose in the terms of the trust or, if none, by an individual appointed by a court upon petition to it by an individual. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or remove a person appointed.

(e) Except as ordered by the court or required by the terms of the trust, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) The court may reduce the amount of the property transferred if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subdivision (b).

(g) If a trustee is not designated or no designated trustee is willing or able to serve, the court shall name a trustee. The court may order the transfer of the property to another trustee if the transfer is necessary to ensure that the intended use is carried out, and if a successor trustee is not designated in the terms of the trust or if no designated successor trustee agrees to serve or is able to serve. The court may also make other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

(h) The trust is not subject to the uniform statutory rule against perpetuities, 1988 PA 418, MCL 554.71 to 554.78.
MCL 700.3916    Disposition of unclaimed assets

(1) In exchange for suitable receipts and following a court order if the administration is supervised, a fiduciary making final distribution shall deposit with the county treasurer the money or personal property the fiduciary has that belongs to any of the following:

(a) An heir, devisee, trust beneficiary, or claimant whose whereabouts the fiduciary cannot ascertain after diligent inquiry.

(b) An heir, devisee, trust beneficiary, or claimant who declines to accept the money awarded to the person.

(c) A person if the right of the person is the subject of appeal from an order of the court.

(2) As an alternative to deposit with the county treasurer under subsection (1), if the amount involved for a person described under subsection (1)(a) or (b) is $250.00 or less, the fiduciary may distribute the amount as part of the residue of the decedent’s estate or to those entitled to the trust fund balance. If the fiduciary has property other than money that belongs to a person described in subsection (1)(a) or (b), the fiduciary may sell the property for the purpose of reducing it to money to be deposited with the county treasurer.

(3) The fiduciary shall retain or file the county treasurer’s receipt for property deposited under this section in the same fashion as though the fiduciary paid or delivered the money or property to, and received a receipt from, the heir, devisee, trust beneficiary, or claimant.

(4) The dollar amounts described in this section shall be adjusted as provided in section 1210.

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12 If this figure were subject to COLA under section 1210, it would be $373.50 today.
MCL 700.3917 Duties of county treasurer

(1) The county treasurer shall receive and safely keep money deposited under authority of this act in a separate fund and keep a separate account for each distributee or claim. The county treasurer shall deposit the money in a county depository at the current rate of interest, shall pay out from the fund upon the order of the court, and shall turn over any surplus left in the treasurer’s hands at the termination of the treasurer’s term of office to the treasurer’s successor. The county treasurer shall, at the end of each year, render to the court, and to the county board of commissioners, a true account of that money.

(2) For the care of the money received under authority of this act, the county treasurer may take 1% from the different amounts paid out under court order unless the amount paid out to a single individual exceeds $1,000.00 $1,500.0013, in which case the county treasurer shall take $10.00 $15.00 plus 1/2 of 1% of the excess of the amount over $1,000.00 $1,500.00.

(3) A person entitled to the money may petition the court having jurisdiction for an order directing the county treasurer to pay over money that is deposited with the county treasurer. Upon receiving the petition, the court shall make an order as to notice of the hearing as the court considers proper. Upon satisfactory proof being made to the court of the claimant’s right to the money, the court shall order the county treasurer to pay the money and interest earned on the money, less the fee of the county treasurer, to the claimant.

(4) If a person whose whereabouts are unknown or who declined to accept the money does not make a claim to money deposited by a fiduciary before the expiration of 3 years after the deposit date, the money and interest earned on the money that would be distributed under this section to the person, if alive, less expenses, shall be distributed by court order to each person who would be entitled to the money if the person had died before the date that he or she became entitled to the money, and the person is forever barred from all claim or right to the money.

13 If this figure were subject to COLA under section 1210, it would be $1,495.00 today.
(5) The dollar amounts described in this section shall be adjusted as provided in section 1210.
MCL 700.3918  Distribution to person under disability

(1) A personal representative may discharge the personal representative’s obligation to distribute to an individual under legal disability by distributing in a manner expressly provided in the will.

(2) Unless contrary to an express provision in the will, the personal representative may discharge the personal representative’s obligation to distribute to an individual under legal disability as authorized by section 5102 or another statute. If the personal representative knows that a conservator has been appointed for an individual or that a proceeding for appointment of a conservator for the individual is pending, the personal representative is authorized to distribute only to the conservator. If the personal representative knows that a guardian of the estate of an individual with a developmental disability has been appointed under the mental health code, 1974 PA 258, MCL 330.1001 to 330.2106, or that a proceeding for appointment of a guardian of the estate for the individual with the developmental disability is pending, the personal representative is authorized to distribute only to the guardian of the estate.

(3) If the heir or devisee is under legal disability other than minority, the personal representative is authorized to distribute to any of the following:

(a) A trustee appointed by the court under section 3915(4).

(b) An attorney in fact who has authority under a power of attorney to receive property for that person.

(c) The spouse, parent, or other close relative with whom the individual under legal disability resides if both of the following are true:

(i) A conservator has not been appointed for the individual.

(ii) The distribution is in amounts not exceeding $25,000.00 a year or property not exceeding $25,000.00 in value, unless the court authorizes a higher amount or value.\textsuperscript{14}

\textsuperscript{14} If this figure were subject to COLA under section 1210, it would be $7,475.00 today.

\textsuperscript{15} We believe that it is appropriate to revise mandatory bond and restricted account requirements. Currently, Section 3982 is statutorily tied to section 5410, which requires a conservator to be bonded.
(4) A person receiving money or property for an individual under legal
disability shall use the money or property only for that individual’s support
and for reimbursement of out-of-pocket expenses for goods and services
necessary for that individual’s support. Excess money and property shall be
preserved for the individual’s future support. The personal representative is
not responsible for the proper use of money or property by the recipient if
distribution is made under the authority of this section.

(5) **The dollar amounts described in this section shall be adjusted as
provided in section 1210.**

Under the committee’s proposal, a probate court will not be required to impose a bond or restrict account
requirement on a conservator if the liquid assets are less than $100,000. To be clear, the Committee’s
proposal would maintain probate courts’ discretion to impose these requirements. The Committee is
suggesting these changes for three reasons:

(a) Bond can be uneconomical, particularly in smaller matters. In some regions, insurers are
routinely requiring that attorneys be the signatories on even smaller accounts. Between the cost of bond
and mandatory lawyer involvement, this statute can impose costs disproportionate to the risks mitigated.

(b) While restricted accounts are a good alternative, practitioners occasionally experience
significant difficulties in getting a financial institution to agree to hold a restricted account for the
fiduciary.

(c) Fundamentally, the Committee believes that probate judges are well able to evaluate the
risks and benefits of bond requirements without the current heavy-handed statutory mandate. In many if
not most cases, we expect that probate courts will still impose bond, but our suggested change will give
probate courts a bit more latitude.
MCL 700.3981  Delivery of modest amounts of cash not exceeding $500 and
decedent’s wearing apparel

(1) A hospital, convalescent or nursing home, morgue, or law enforcement
agency holding $500.00 or less and wearing apparel of a
decedent may deliver the money and wearing apparel to an individual
furnishing identification and a sworn statement that the individual is the
decedent’s spouse, child, or parent and that there is no application or petition
pending for administration of the decedent’s estate. The hospital, home,
morgue, or law enforcement agency making the delivery is released to the
same extent as if delivery were made to a legally qualified personal
representative of the decedent’s estate and is not required to see to the
property’s disposition. The individual to whom delivery is made is
answerable for the property to a person with a prior right and accountable to
a personal representative of the decedent’s estate appointed after the
delivery.

(2) The dollar amounts described in this section shall be adjusted as
provided in section 1210.

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10 If this figure were subject to COLA under section 1210, it would be $747.50 today.
MCL 700.3982 Court order distributing small estates

(1) Upon a showing of evidence, satisfactory to the court, of payment of the expenses for the decedent’s funeral and burial and if the balance of a decedent’s gross estate consists of property of the value of $15,000.00 or less, the court may order that the property be turned over to the surviving spouse or, if there is not a spouse, to the decedent’s heirs.

(2) Upon a showing of evidence, satisfactory to the court, that the decedent’s funeral or burial expenses are unpaid or were paid by a person other than the estate, and if the balance of the gross estate after payment of the expenses would consist of property of the value of $15,000.00 or less, the court shall order that the property be first used to pay the unpaid funeral and burial expenses, or to reimburse the person that paid those expenses, and may order that the balance be turned over to the surviving spouse or, if there is not a spouse, to the decedent’s heirs.

(3) Other than a surviving spouse who qualifies for allowances under this act or the decedent’s minor children, an heir who receives property through an order under this section is responsible, for 63 days after the date of the order, for any unsatisfied debt of the decedent up to the value of the property received through the order. The court shall state in the order the condition on the distribution of property provided by this subsection.

Upon the filing of a petition under this section, the court may enter an order allowing immediate distribution of a decedent’s assets to the persons entitled to them upon a satisfactory showing of the following:

(a) The decedent was domiciled in the county at the time of death, or if not a Michigan resident, owned property located in the county at the time of death.

(b) The following have been paid, or will be paid under the order, up to the value of the assets described in the petition: (i) the reasonable costs of administration, (ii) the decedent’s funeral and burial expenses, (iii) all applicable exemptions and allowances, and (iv) the decedent’s debts.
(c) The balance of the decedent’s entire estate after payment of the
debts and expenses would consist of property of the value of
$100,000 or less.

(2) The petitioner shall swear that the petition is accurate and complete to
the best of the petitioner’s knowledge and belief, and shall state all of
the following:

(a) The petitioner’s interest.

(b) The decedent’s name, place and date of death, and age.

(c) The decedent’s county and state of domicile at the time of death.

(d) The names and addresses of the spouse, children, devisees, and
heirs with the ages of those who are minors so far as known or
ascertainable with reasonable diligence by the petitioner.

(e) If the decedent was not domiciled in the state at the time of the
decedent’s death, a statement showing venue.

(f) If the decedent appears to have died with a valid will, all of the
following:

(i) That the original of the decedent’s last will is in the court’s
possession or accompanies the petition, or that an
authenticated copy of a will in the possession of the probate
court or county clerk of another jurisdiction accompanies
the petition.

(ii) That, to the best of the petitioner’s knowledge, the will was
validly executed.

(iii) That, after the exercise of reasonable diligence, the
petitioner is unaware of an instrument revoking the will and
that the petitioner believes the instrument is the decedent’s
last will.

(iv) The name of the person who would hold priority to
appointment as personal representative under section 3203.
(g) A description of the property right or interest that the petitioner seeks to have determined, including, the legal description of any real property and the decedent’s interest in it.

(h) The value of the property right or interest that the petitioner seeks to have determined, and a description of any security interest against an asset.

(i) The balance of the decedent’s entire estate after payment of debts and expenses would consist of property of the value of $100,000 or less.

(j) Twenty-eight days have elapsed since the decedent’s death.

(k) Either of the following, as applicable:

(i) The decedent appears to have died intestate, and an application or petition for the appointment of a personal representative is not pending or has not been granted in any jurisdiction.

(ii) The decedent appears to have died testate, an application or petition for the appointment of a personal representative is not pending or has not been granted in any jurisdiction, and the person who has priority to serve as personal representative under the decedent’s will has consented in writing to use of this procedure.

(l) All of the decedent’s funeral expenses, expenses of last illness, and all unsecured debts have been paid or will be paid pursuant to the order granting this petition, up to the value of the property right or interest determined.

(m) The proposed distributees are entitled to distribution of the property under sections 3101 of the Estates and Protected Individuals Code, subject to the limitations described in subsection Error! Reference source not found.

(3) The following shall accompany the petition:

(a) The decedent’s original will, if applicable.
(b) A certified copy of the decedent’s death certificate.

(c) If the decedent died testate, a signed consent by the person who would have priority to serve as the personal representative under section 3203.

(d) Proof that the petitioner has served the petition on the decedent’s heirs, devisees, and known creditors.

(4) Upon a satisfactory showing that this section’s requirements have been satisfied, the court shall order that the decedent’s property be first used to pay the reasonable costs of administration, the unpaid funeral and burial expenses or to reimburse the person that paid those expenses, and may order that the property right or interest in a decedent’s property is determined, as follows:

(a) If the decedent died testate, to the persons who would receive the subject property under the decedent’s will and Article II, Part 4 of this act.

(b) If the decedent died intestate, to the persons who would receive the property under intestate succession and Article II of this act.

(5) Up to the value of property received under this section, every distributee is responsible for (i) the reasonable costs of administration, (ii) the expenses for the decedent’s funeral and burial, (iii) all applicable exemptions and allowances, and (iv) the decedent’s unsatisfied debts that become known up to 63 days after the date of the order. The court shall state in the order the condition on the distribution of property provided by this subsection.

(6) By swearing to a petition under this section, the petitioner submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the petition or for perjury that may be instituted against the petitioner.

(7) If a decedent’s estate meets the criteria for using the procedure under either this section or section 3983 and if a person is authorized by this act to use either procedure, a person, other than the court, shall not require the authorized person to use 1 procedure rather than the other.
(8) A dollar amount prescribed by this section shall be adjusted as provided in section 1210.
MCL 700.3983 Collection of personal property by sworn statement

(1) After 28 days after a decedent’s death, a person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent shall pay the indebtedness or deliver the tangible personal property or the instrument to a person claiming to be the decedent’s successor upon being presented with the decedent’s death certificate and a sworn statement made by or on behalf of the successor stating all of the following:

(a) The estate does not include real property and the value of the entire estate, wherever located, net of liens and encumbrances, does not exceed $15,000.00 $25,000.00, adjusted as provided in section 1210.

(b) Twenty-eight days have elapsed since the decedent’s death.

(c) An application or petition for the appointment of a personal representative is not pending or has not been granted in any jurisdiction.

(d) The claiming successor is entitled to payment or delivery of the property.

(e) The name and address of each other person that is entitled to a share of the property and the portion to which each is entitled.

(2) A transfer agent of a security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of a sworn statement as provided in subsection (1).

(3) The state court administrative office shall develop and make available a standardized form for use as a sworn statement that can be used for the procedure authorized under subsection (1). The form shall include a notice that a false statement may subject the person swearing to the statement to prosecution for perjury.

(4) The dollar amounts described in this section shall be adjusted as provided in section 1210.
MCL 700.5102 Payment or delivery

(1) A person under a duty to pay or deliver money or personal property to a minor may perform this duty by paying or delivering the money or property, in an aggregate value that does not exceed $5,000.00 each year, to any of the following:

(a) The minor if he or she is married.
(b) An individual having the care and custody of the minor with whom the minor resides.
(c) A guardian of the minor.
(d) A financial institution incident to a deposit in a state or federally insured savings account in the sole name of the minor with notice of the deposit to the minor.

(2) This section does not apply if the person making payment or delivery knows that a conservator has been appointed or a proceeding for appointment of a conservator of the minor’s estate is pending.

(3) Other than the minor or a financial institution, an individual receiving money or property for a minor is obligated to apply the money to the minor’s support and education, but shall not pay himself or herself except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor’s support. An excess amount shall be preserved for the minor’s future support and education. A balance not used for those purposes and property received for the minor shall be turned over to the minor when majority is attained. A person who pays or delivers money or property in accordance with this section is not responsible for the proper application of the money or property.

(4) The dollar amounts described in this section shall be adjusted as provided in section 1210.

17 If this figure were subject to COLA under section 1210, it would be $7,475.00 today.
MCL 700.531new Standby Guardian; qualifications

(1) At a hearing convened under this part, the court may designate 1 or more standby guardians. The court may designate as standby guardian any competent person who is suitable and willing to serve.

(2) The standby guardian shall receive a copy of the court order establishing or modifying the guardianship, and the order designating the standby guardian.

(3) A standby guardian shall file an acceptance of her designation under subsection (2) within 28 days of receiving notice of the order designating the standby guardian.

(4) If, for any reason, the standby guardian is unable or unwilling to serve, the standby guardian shall promptly notify the court and interested persons.

(5) A standby guardian has no authority to act unless the guardian dies, becomes either permanently or temporarily unavailable.

(6) During an emergency affecting the protected person’s welfare when the guardian is unavailable, the standby guardian may temporarily assume the powers and duties of the guardian. A person may rely on the standby guardian’s representation that she has authority to act, if given the order issued under subsection (2) and acceptance filed under subsection (3). A person who acts in reliance upon the representations and documentation described in this subsection without knowledge that the representations are incorrect is not liable to any person for so acting and may assume without further inquiry the existence of the standby guardian’s authority.

(7) A standby guardian’s appointment as guardian shall become effective without further proceedings immediately upon the death, incompetency, or resignation of the current guardian. The powers and duties of the standby guardian shall be the same as those of the prior guardian.
Upon assuming office, the standby guardian shall promptly notify the court, any known agent appointed under a power of attorney executed pursuant to section 5103, and interested persons. Upon receiving notice, the court may enter an order appointing the standby guardian as guardian without the need for additional proceedings. The guardian shall serve this order on the interested persons.
MCL 700.5301  Appointment of guardian for incapacitated individual by will or other writing

(1) If serving as guardian, the parent of an unmarried legally incapacitated individual may appoint by will, or other writing signed by the parent and attested by at least 2 witnesses, a guardian for the legally incapacitated individual. If both parents are dead or the surviving parent is adjudged legally incapacitated, **and no standby guardian has been appointed pursuant to section 531new**, a parental appointment becomes effective when, after having given 7 days’ prior written notice of intention to do so to the legally incapacitated individual or to the person having the care of the legally incapacitated individual or to the nearest adult relative, the guardian files acceptance of appointment in the court in which the will containing the nomination is probated or, if the nomination is contained in a nontestamentary nominating instrument or the testator who made the nomination is not deceased, when the guardian’s acceptance is filed in the court at the place where the legally incapacitated individual resides or is present. The notice must state that the appointment may be terminated by filing a written objection in the court as provided by subsection (4). If both parents are dead, an effective appointment by the parent who died later has priority.

(2) If serving as guardian, the spouse of a married legally incapacitated individual may appoint by will, or other writing signed by the spouse and attested by at least 2 witnesses, a guardian of the legally incapacitated individual. **If no Standby Guardian has been appointed pursuant to Section 531new, the** appointment **by will or other writing** becomes effective when, after having given 7 days’ prior written notice of intention to do so to the legally incapacitated individual and to the person having care of the legally incapacitated individual or to the nearest adult relative, the guardian files acceptance of appointment in the court in which the will containing the nomination is probated or, if the nomination is contained in a nontestamentary nominating instrument or the testator who made the nomination is not deceased, when the guardian’s acceptance is filed in the court at the place where the legally incapacitated individual resides or is present. The notice must state that the appointment may be terminated by filing a written objection in the court as provided by subsection (4).

(3) An appointment effected by filing the guardian’s acceptance under a will probated in the state of the decedent’s domicile is effective in this state.
Upon the filing of the legally incapacitated individual’s written objection to a guardian’s appointment under this section in either the court in which the will was probated or, for a nontestamentary nominating instrument or a testamentary nominating instrument made by a testator who is not deceased, the court at the place where the legally incapacitated individual resides or is present, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the parental or spousal nominee or another suitable person upon an adjudication of incapacity in a proceeding under sections 5302 to 5317.
MCL 700.5310   Resignation or removal of guardian

(1) On petition of the guardian and subject to the filing and approval of a report prepared as required by section 5314, the court shall accept the guardian’s resignation and make any other order that is appropriate.

(2) The ward, a person appointed to be guardian in a will or other writing by a parent or spouse under section 5301, or any other a person interested in the ward’s welfare may petition for an order removing the guardian, appointing a successor guardian, modifying the guardianship’s terms, or terminating the guardianship. A request for this order may be made by informal letter to the court or judge. If the request is made by the person appointed by will or other writing under section 5301, the person shall also present proof of their appointment by will or other writing. A person who knowingly interferes with the transmission of this kind of request to the court or judge is subject to a finding of contempt of court.

(3) Except as otherwise provided in the order finding incapacity, upon receiving a petition or request under this section, the court shall set a date for a hearing to be held within 28 days after the receipt of the petition or request. An order finding incapacity may specify a minimum period, not exceeding 182 days, during which a petition or request for a finding that a ward is no longer an incapacitated individual, or for an order removing the guardian, modifying the guardianship’s terms, or terminating the guardianship, shall not be filed without special leave of the court.

(4) Before removing a guardian, appointing a successor guardian, modifying the guardianship’s terms, or terminating a guardianship, and following the same procedures to safeguard the ward’s rights as apply to a petition for a guardian’s appointment, the court may send a visitor to the present guardian’s residence and to the place where the ward resides or is detained to observe conditions and report in writing to the court.
MCL 700.5313 Guardian; qualifications

(1) The court may appoint a competent person as guardian of a legally incapacitated individual. The court shall not appoint as a guardian an agency, public or private, that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual. If the court determines that the ward’s property needs protection, the court shall order the guardian to furnish a bond or shall include restrictions in the letters of guardianship as necessary to protect the property.

(2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, in the following order of priority:

(a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in this or another state.

(b) A person the individual subject to the petition chooses to serve as guardian.

(c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.

(d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

(e) A person appointed by a parent or spouse of a legally incapacitated person by will or other writing pursuant to Section 5301.

(3) If there is no person chosen, nominated, or named under subsection (2), or if none of the persons listed in subsection (2) are suitable or willing to serve, the court may appoint as a guardian an individual who is related to the individual who is the subject of the petition in the following order of preference:

(a) The legally incapacitated individual’s spouse. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased spouse.
(b) An adult child of the legally incapacitated individual.

(c) A parent of the legally incapacitated individual. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased parent.

(d) A relative of the legally incapacitated individual with whom the individual has resided for more than 6 months before the filing of the petition.

(e) A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

(4) If none of the persons as designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106.
MCL 700.5314  Powers and duties of guardian

Whenever meaningful communication is possible, a legally incapacitated individual’s guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward’s care, custody, and control, but is not liable to third persons by reason of that responsibility for the ward’s acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward’s place of residence within or without this state. The guardian shall visit the ward within 3 months after the guardian’s appointment and not less than once within 3 months after each previous visit. The guardian shall notify the court within 14 days of a change in the ward’s place of residence or a change in the guardian’s place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward’s care, comfort, and maintenance and, when appropriate, arrange for the ward’s training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward’s person, the guardian shall take reasonable care of the ward’s clothing, furniture, vehicles, and other personal effects and commence a protective proceeding if the ward’s other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward’s best interest to sell or otherwise dispose of the ward’s real property or interest in real property, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward’s real property or interest in real property.
(c) The power to give the consent or approval that is necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service. The power of a guardian to execute a do-not-resuscitate order under subdivision (d) does not affect or limit the power of a guardian to consent to a physician’s order to withhold resuscitative measures in a hospital.

(d) The power of a guardian to execute, reaffirm, and revoke a do-not-resuscitate order on behalf of a ward is subject to this subdivision. A guardian shall not execute a do-not-resuscitate order unless the guardian does all of the following:

(i) Not more than 14 days before executing the do-not-resuscitate order, the guardian visits the ward and, if meaningful communication is possible, consults with the ward about executing the do-not-resuscitate order.

(ii) The guardian consults directly with the ward’s attending physician as to the specific medical indications that warrant the do-not-resuscitate order.

(e) If a guardian executes a do-not-resuscitate order under subdivision (d), not less than annually after the do-not-resuscitate order is first executed, the guardian shall do all of the following:

(i) Visit the ward and, if meaningful communication is possible, consult with the ward about reaffirming the do-not-resuscitate order.

(ii) Consult directly with the ward’s attending physician as to specific medical indications that may warrant reaffirming the do-not-resuscitate order.

(f) If a conservator for the ward’s estate is not appointed, the power to do any of the following:

(i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward’s welfare to perform that duty.

(ii) Receive money and tangible property deliverable to the ward and apply the money and property for the ward’s support, care,
and education. The guardian shall not use money from the ward’s estate for room and board that the guardian or the guardian’s spouse, parent, or child have furnished the ward unless a charge for the service is approved by court order made upon notice to at least 1 of the ward’s next of kin, if notice is possible. The guardian shall exercise care to conserve any excess for the ward’s needs.

(g) The guardian shall report the condition of the ward and the ward’s estate that is subject to the guardian’s possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision shall contain all of the following:

(i) The ward’s current mental, physical, and social condition.

(ii) Improvement or deterioration in the ward’s mental, physical, and social condition that occurred during the past year.

(iii) The ward’s present living arrangement and changes in his or her living arrangement that occurred during the past year.

(iv) Whether the guardian recommends a more suitable living arrangement for the ward.

(v) Medical treatment received by the ward.

(vi) Whether the guardian has executed, reaffirmed, or revoked a do-not-resuscitate order on behalf of the ward during the past year.

(vii) Services received by the ward.

(viii) A list of the guardian’s visits with, and activities on behalf of, the ward.

(ix) A recommendation as to the need for continued guardianship.

(x) **A statement signed by the standby guardian, if any have been appointed, that the standby guardian continues to be willing to serve in the event of the unavailability, death, incapacity, or resignation of the guardian.**
(h) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward’s estate received by the guardian in excess of the amount the guardian expends for the ward’s current support, care, and education. The guardian shall account to the conservator for the amount expended.
MCL 700.7103 Definitions

As used in this article:

(1) “Action”, with respect to a trustee or a trust protector, includes an act or a failure to act.

(2) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.

(3) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).

(4) “Discretionary trust provision” means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee’s discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:

   (a) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.

   (b) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.

   (c) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.

   (d) Whether the distribution of trust property is from income or principal or both of the trust.

   (e) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.

(5) “Interests of the trust beneficiaries” means the beneficial interests provided in the terms of the trust.
“Power of withdrawal” means a presently exercisable general power of appointment other than a power that is either of the following:

(a) Exercisable by a trustee and limited by an ascertainable standard.

(b) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

“Qualified trust beneficiary” means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary’s qualification is determined:

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

(b) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.

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

“Revocable”, as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

“Settlor” means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

“Spendthrift provision” means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary’s interest.
“Support provision” means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

“Trust beneficiary” means a person to whom 1 or both of the following apply:

(a) The person has a present or future beneficial interest in a trust, vested or contingent.

(b) The person holds a power of appointment over trust property in a capacity other than that of trustee.

“Trust instrument” means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

“Trust protector” means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(a) The settlor of a trust if, in creating the trust, the settlor was not acting in a fiduciary capacity.

(b) The holder of a power of appointment, if the holder does not hold the power in a fiduciary capacity.\(^{18}\)

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\(^{18}\) The changes in subsection 14 have already been approved by Council. In its current form, Michigan Trust Code (MTC) section 7103’s definition of ‘trust protector’ excludes the settlor of a trust and the holder of a power of appointment. Yet a decanting trustee (an attorney-in-fact who creates a trust pursuant to a durable power of attorney, a conservator, etc.) may find it in the beneficiaries’ (the principal’s, the protected individual’s, etc.) best interest (1) to transfer assets to an independent trustee, (2) to retain powers to direct that trustee, and (3) to expect to exercise the retained powers in a fiduciary capacity. Furthermore many of the powers settlors grant nontrustee “protectors” amount to powers of appointment within the meaning of the Powers of Appointment Act. It is hard to see why trust beneficiaries and settlors in these cases should be deprived of the facility and protections of MTC section 7809. The following proposed amendments to section 7103 are designed to allow settlors who create trusts while acting as fiduciaries and the holders of fiduciary powers of appointment to be treated as “trust protectors” within the meaning of the MTC.
MCL 700.7105  Duties and powers of trustee; provisions of law prevailing over terms of trust

(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 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) 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.
Others treated as qualified beneficiaries

(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 as provided in section 2722 trust under section 7409 has the rights of a qualified trust beneficiary under this article.

(3) 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.
MCL 700.7302 Representation; holder of power of revocation or amendment or power of appointment.19

(1) To the extent there is no conflict of interest between the holder of a power of appointment and the person represented with respect to a particular question or dispute, the holder of a power of revocation or amendment or a presently exercisable or testamentary general or special power of appointment, including one in the form of a power of amendment or revocation, may represent and bind a person whose extent the person’s interest, as a permissible appointee, taker in default, or otherwise, is subject to the power. For the purpose, however, of granting consent or approval to modification or termination of a trust or to deviation from its terms, including consent or approval to a settlement agreement described in section 7111, only the holder of a presently exercisable or testamentary general power of appointment may represent and bind such a person as provided in this section.

(2) For purposes of this section:

(a) There is no conflict of interest between the holder of a nonfiduciary power of appointment and a person whose interest is subject to the power to the extent the subject interest is liable to be extinguished by an exercise of the power. Thus, for example, if person A currently has a right to receive income from property P for life subject to a nonfiduciary testamentary power in person B to appoint the income of P away from A, then there is no conflict of interest that would prevent B from currently representing A with respect to A’s right to receive income from the property after B’s death (if A survives B); but there may be such a conflict with respect to A’s right to receive income from P during B’s life.

19 The changes to this section have already been approved by Council.
(b) If a power of appointment is subject to a condition precedent other than the death of the holder of a testamentary power, no interest is subject to the power until the condition precedent is satisfied. Thus, for example, if person A currently has a right to receive income from property P for life, and person B is granted a testamentary power to appoint the income of P away from A if, but only if, B graduates from college, then A’s right to receive income from P after B’s death (if A survives B) is not subject to B’s power until B graduates from college; but if B does graduate from college, then A’s right to receive income from P after B’s death (if A survives B) will become subject to B’s power on B’s graduation, even though B can only exercise the power by will.

(c) “Nonfiduciary” means, with respect to a power of appointment, that the power is not held in a fiduciary capacity.
MCL 700.7402 Creating trust; requirements

(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, as provided in section 2722.

(2) The trustee has duties to perform.

(3) The same person is not the sole trustee and sole beneficiary.
MCL 700.7408 new Trust for care of pet

(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.
MCL 700.7409 new Noncharitable purpose trust

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. 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) 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.

(c) 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.
MCL 257.236  [Motor Vehicle Code; Administration, Registration, Certificate of Title and Anti-Theft] Procuring title to vehicle acquired by operation of law; validity of registration upon death of owner; application for title by surviving spouse or heir; proof of death; certification; petition

(1) If ownership of a vehicle passes by operation of law, upon furnishing satisfactory proof of that ownership to the secretary of state, the person acquiring the vehicle may procure a title to the vehicle regardless of whether a certificate of title has ever been issued. Upon death of an owner of a registered vehicle, the license plate assigned to the vehicle, unless the vehicle is destroyed, is a valid registration until the end of the registration year or until the personal representative of the owner’s estate transfers ownership of the vehicle.

(2) If an owner of 1 or more vehicles, which vehicles do not have a total value of more than $60,000.00, dies and the owner does not leave other property that requires issuance of letters as provided in section 3103 of the estates and protected individuals code, 1998 PA 386, MCL 700.3103, the owner’s surviving spouse, or an heir of the owner in the order specified in section 2103 of the estates and protected individuals code, 1998 PA 386, MCL 700.2103, may apply for a title, after furnishing the secretary of state with proper proof of the death of the registered owner, attaching to the proof a certification setting forth the fact that the applicant is the surviving spouse or an heir. Upon proper petition, the secretary of state shall furnish the applicant with a certificate of title.

(3) The specific dollar amount specified in sub-section 257.236(2) shall be multiplied by the cost-of-living adjustment factor for each calendar year.

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20 If this figure were subject to COLA under section 1210, it would be $89,700.00 today.
“Cost-of-living adjustment factor” means a fraction, the numerator of which is the United States consumer price index for the prior calendar year and the denominator of which is the United States consumer price index for 2017. As used in this subdivision, “United States consumer price index” means the annual average of the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics, or its successor agency, and as certified by the state treasurer.

The department of treasury shall publish the cost-of-living adjustment factor to the specific dollar amount referred to in sub-section 257.236(2) for the calendar year in which the owner dies.
MCL 324.80312 [Natural Resources and Environmental Protection Act; Part 803 Watercraft Transfer and Certificate of Title] Certificate of title for watercraft; issuance; compliance; transfer of ownership; requirements; petition for watercraft not owned; proof of ownership and right of possession; statement of lien

(1) The secretary of state may issue a certificate of title for a watercraft to a person who complies with subsection (2) or (3) if the transfer of ownership of that watercraft is any of the following:

(a) By operation of law including, but not limited to, inheritance, devise, bequest, order in bankruptcy, insolvency, replevin, or execution of sale.

(b) By sale to satisfy a storage or repair charge.

(c) By repossession upon default in performance of the terms of a security agreement.

(d) As provided in subsection (3).

(2) A person applying for a certificate of title under this section shall do all of the following:

(a) Surrender to the secretary of state either a valid certificate of title or the manufacturer’s or importer’s certificate for the watercraft or, if surrender of a certificate for that watercraft is not possible, present proof satisfactory to the secretary of state of the applicant’s ownership of and right of possession to the watercraft.

(b) Pay the fee prescribed in section 80311.

(c) Present to the secretary of state an application for certificate of title.

(3) A person may petition the secretary of state for a certificate or certificates of title for 1 or more registered watercraft that the person does not own, if each of the following circumstances exists:

(a) The record owner of the registered watercraft dies without leaving other property that requires the procurement of letters under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102.
(b) The total value of the deceased owner’s interest in all watercraft subject to the petition for a certificate or certificates of title under this section is $100,000.00 or less, as adjusted for each calendar year beginning January 1, 2017.

(i) The specific dollar amount shall be multiplied by the cost-of-living adjustment factor for each calendar year.

(ii) “Cost-of-living adjustment factor” means a fraction, the numerator of which is the United States consumer price index for the prior calendar year and the denominator of which is the United States consumer price index for 2017. As used in this subdivision, “United States consumer price index” means the annual average of the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics, or its successor agency, and as certified by the state treasurer.

(iii) The department of treasury shall publish the cost-of-living adjustment factor to the specific dollar amount for the calendar year of the deceased owner’s death.

(iv) A product resulting from the cost-of-living adjustment factor to a specific dollar amount shall be rounded to the nearest $1,000.00 amount.

(c) The person petitioning for a certificate or certificates of title under this section is 1 of the following, in the following order of priority:

(i) The surviving spouse of the watercraft owner.

(ii) A person entitled to the certificate or certificates of title in the order specified in section 2103 of the estates and protected individuals code, 1998 PA 386, MCL 700.2103.

(d) The person who petitions for a certificate of title under this section furnishes the secretary of state with proof satisfactory to the secretary of state of each of the following:

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21 If this figure were subject to COLA under section 1210, it would be $149,500.00 today.
(i) The death of the owner of each watercraft for which a certificate of title is sought.

(ii) The petitioner’s priority to receive the decedent’s interest in each watercraft for which a certificate of title is sought.

(4) A certification by the person, or agent of the person, to whom possession of the watercraft passed, that sets forth the facts entitling that person to possession and ownership of the watercraft, together with a copy of the journal entry, court order, instrument, or other document upon which the claim of possession and ownership is founded, are satisfactory proof of ownership and right of possession. If the applicant cannot produce proof of ownership, the applicant may apply to the secretary of state for a certificate of title and submit evidence that establishes that person’s ownership interest in the watercraft. If the secretary of state finds the evidence sufficient, the secretary of state may issue to that person a certificate of title for that watercraft. The office of secretary of state shall examine the records in its possession and, if it determines from that examination that a lien is on the watercraft, and if the applicant fails to provide satisfactory evidence of extinction of the lien, the secretary of state shall furnish a certificate of title that contains a statement of the lien.
MCL 554.530 [Michigan Uniform Transfers to Minors Act] Absence of will or authorization to make irrevocable transfer; transfer by personal representative, trustee, or conservator; conditions

(1) Subject to subsection (3), a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor pursuant to section 13 in the absence of a will or under a will or trust that does not contain an authorization to make the irrevocable transfer.

(2) Subject to subsection (3), a conservator may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor pursuant to section 13.

(3) A transfer under subsection (1) or (2) may be made only if the personal representative, trustee, or conservator considers the transfer to be in the best interest of the minor; the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument; and, if the transfer exceeds $10,000.00 in value, the transfer is authorized by the court.
Council Materials
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

November 11, 2017
Lansing, Michigan

Agenda
10:30-12:00

1. Call to Order
2. Introduction of Guests
3. Excused Absences
4. Minutes of October 14, 2017 Meeting of the Council
   Attachment 1
5. Chairperson’s Report – Marlaine Teahan
   Attachment 2
6. Report of the Committee on Special Projects – Geoff Vernon
   Requesting a vote approving the Divided and Directed Trusteeships proposed
   legislation (Materials are attached to the CSP Agenda)
   Public Policy Position
   5 minutes
7. Committee Reports
   A. Community Property Trusts Ad Hoc Committee – Neal Nusholtz
      Requesting vote to approve drafted legislation for "Optional Community Property
      Trust", original version previously approved by Council. Attachment 3, Committee
      report and proposed SB __.
      Public Policy Position
      10 minutes
   B. Amicus Curiae Committee – David Skidmore
      Requesting a vote to file a motion for leave to file an amicus brief in both the
      Brody Trust and Brody Conservatorship cases. Attachment 4, For each --
      Opinions, Applications, Memoranda from Committee
      Public Policy Position
      15 minutes
C. Court Rules, Forms, & Proceedings Committee – Melisa Mysliwiec

Attachment 5, Committee's report

(1) Requesting votes on e-filing and proposed modifications to MCRs
   - Report on e-filing, ADM File No. 2002-37
     Public Policy Position
   - Report on SBM’s Civil Discovery Court Rule Review Special Committee
     Public Policy Position

(2) Update on HB 4821 and HB 4822, oral report
   15 minutes

D. Insurance Legislation Committee – Geoff Vernon

Oral Report on SB 644, discussion; requesting a vote opposing the bill
Public Policy Position Attachment 6 is SB 644
5 minutes

E. Tax Committee – Raj Malviya

Oral Report and Tax Nugget, Attachment 7
5 minutes

8. Liaison Reports
   A. Business Section Liaison – John Dresser
      5 minutes

9. Other Business

10. Adjournment
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION OF
THE STATE BAR OF MICHIGAN

October 14, 2017
Lansing, Michigan

Minutes

I. Call to Order: The Chair of the Section, Marlaine C. Teahan, called the meeting to order at 10:50 am

II. Attendance:
A. The following officers and members of the Council were present:
Marlaine C. Teahan, Chair
Marguerite Munson Lentz, Chair Elect
Christopher A. Ballard, Vice Chair
David P. Lucas, Secretary
David L.J.M. Skidmore, Treasurer
Kathleen M. Goetsch
Nazneen Hasan
Angela M. Hentkowski
Mark E. Kellogg
Robert B. Labe
Michael G. Lichterman
Katie Lynwood
Richard C. Mills
Melisa M.W. Mysliwiec
Kurt A. Olson
Nathan R. Piwowarski
Christine M. Savage
Geoffrey R. Vernon
A total of 18 Council officers and members were present, constituting a quorum

B. The following officers and members of the Council were absent with excuse:
Christopher J. Caldwell
Rhonda M. Clark-Kreuer
Hon. Michael L. Jacoette
Raj A. Malviya
Lorraine F. New

C. The following officers and members of the Council were absent without excuse:
none

D. The following ex-officio members of the Council were present:
John E. Bos
Nancy L. Little
Michael J. McClory
Harold Schuitmaker
The following liaisons to the Council were present:

Susan Chalgian
John R. Dresser
Joseph Patrick McGill
Jeanne Murphy
Rebecca A. Schnelz
James P. Spica

Others present:

Aaron Bartell
Becky Bechler
Ryan Bourjaily
Georgette David
Daniel Hilker
Rose Scheid
Mike Shelton
Tess Sullivan
Nancy Welber

Minutes of the September 9, 2017 Meeting of the Council: it was moved and seconded to approve the Minutes of the September 9, 2017 meeting of the Council, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

Chair’s Report – Marlaine C. Teahan: The Chair reviewed the Chair’s Report which was included with the meeting agenda materials. There was discussion regarding the Report, including the Chair’s request for the names of individuals who might be willing to act as the Council’s liaison to the Michigan Bankers Association, and that the caption “probate and trust administration” should be used (in place of “estate planning”) in the State Bar Economics of Practice survey.

Report of the Committee on Special Projects – Geoffrey R. Vernon: Mr. Vernon discussed the meeting of the Committee on Special Projects which had immediately preceded the meeting of the Council, and Mr. Vernon requested that comments and suggestions regarding the standby guardianship discussion be directed to Nathan R. Piwowarski and that comments and suggestions regarding the divided and directed trustee discussion be directed to James P. Spica.

Old Business - Standing and Ad Hoc Committee Reports

Court Rules, Forms, and Procedures Committee - Melisa M.W. Mysliwiec: Ms. Mysliwiec discussed the activity of the Court Rules, Forms, and Procedures Committee, including House Bills 4821 and 4822, which propose to amend EPIC. Ms. Mysliwiec reported that the Committee is concerned about (i) HB 4821, among other concerns, because of the potential damage to an
estate because of the proposed lengthening of reporting and posting periods before action can
be taken, and because of the proposed potential criminal penalties; and (ii) HB 4822, among
other concerns, authority is taken from the Probate Courts, and that procedures already exist to
address the matters addressed in this proposed legislation. The Committee’s motion is:
the Probate and Estate Planning Section opposes HB 4821 and
HB 4822 in current form, but that the Section is willing to work
with the Sponsors of the legislation to make changes to the
proposed legislation to address issues that are of concern to the
Section.
The Chair stated that, since this would be a public policy position of the Section, the vote of the
Council would have to be recorded. Following discussion, the Chair called the question and the
Secretary recorded the vote of 18 yes, 0 no, and 0 abstain. The Chair declared the motion
approved.

B. Citizens Outreach Committee - Kathleen M. Goetsch: Ms. Goetsch reported that the Committee
had discussed the posting by third parties on the Section’s portion of the State Bar website. The
Committee’s motion is:
persons who are not members of the Probate and Estate
Planning Section will not be permitted to post items on the
Section’s area within the State Bar of Michigan website.
Following discussion, the Chair called the question and on voice vote, the Chair declared the
motion approved.

VII. New Business - Standing and Ad Hoc Committee Reports

A. Amicus Curiae Committee - David L.J.M. Skidmore: Robert B. Labe excused himself from the
meeting, stating that he had a potential conflict. Mr. Skidmore reviewed the Committee’s
report, regarding the request for an amicus by a party in the Brody matter, which was included
with the meeting agenda materials. The Committee’s motion is:
the Probate and Estate Planning Section authorizes the
submission of an amicus as described in the Amicus Curiae
Committee’s report which as presented to the meeting
Following discussion, Mr. Skidmore stated that his sense was that the Council had concluded
that no action should be taken on the motion at this time, and the Mr. Skidmore, on behalf of
the Committee, withdrew the motion.

B. Legislative Analysis and Monitoring Committee – Ryan P. Bourjaily/Daniel S. Hilker: Mr.
Bourjaily reviewed the Committee’s report, which was included with the meeting agenda
materials. The report was discussed, including noting that the “Bill Hound” service, a legislation
status reporting service, was available to subscribers for a fee.
C. Legislation Development & Drafting Committee – Nathan Piwowarski/Katie Lynwood: Mr. Piwowarski reported that the Committee was working on legislation regarding the *Jajuga* case, and that Ms. Lynwood had testified at the House Judiciary Committee on this legislation.

D. Real Estate Committee - Mark E. Kellogg: Mr. Kellogg reported that the Committee has worked on SB 540, which is legislation to provide an exemption for uncapping for a variety of transfers of real estate. The Committee’s motion is:

the Probate and Estate Planning Section supports SB 540 in current form

The Chair stated that, since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question and the Secretary recorded the vote of 17 yes, 0 no, and 0 abstain (one voting member having left the meeting prior to this vote). The Chair declared the motion approved.

E. Tax Committee - Christine M. Savage: Ms. Savage reviewed the Committee’s report, which was a Tax Nugget included with the meeting agenda materials.

VIII. Liaison Reports

A. State Bar Commissioner Liaison – Joseph Patrick McGill: The Chair welcomed Mr. McGill to the position of State Bar Commissioner Liaison to the Section. Mr. McGill reported that he serves on the Board of Commissioners of the State Bar, and that he is the Chair of the State Bar Representative Assembly. Mr. McGill encouraged the Section to be active in support of, and opposition to, matters of interest and concern to members of the Section, and that the Board of Commissioners may provide assistance to the Section’s efforts if the Board’s activity in such assistance is not in conflict with the limitations imposed by the *Keller* case.

B. Uniform Law Commission Liaison -- James P. Spica: Mr. Spica’s report was included with the meeting agenda materials, and Mr. Spica stated that he had no oral report.

IX. Hot Topics: The Chair stated that there had been no request to include any other topics for the Council’s agenda

X. Other Business: The Chair called for any other matters or business to be brought before the Council at the meeting, and none was offered or requested.

XI. Adjournment: seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 12:07 pm.

Respectfully submitted,
David P. Lucas, Secretary
Action Item:

**Budget request.** ICLE has requested increased funding for the 2018 annual probate institute to $15,000 (up from $14,000). This is our contribution to the Institute which we have sponsored with ICLE for many years. In the last few years, this amount increased to include our Speaker's dinner and help with the planning of that event. At the November meeting, I will request that the Council vote to approve this request.

My Report:

1. **Busy Fall.** It's been an unbelievably busy start to our new Council year. Most all of our committees and committee chairs can attest to this fact. The Legislature is hard at work, cranking out bills that impact our mission like never before. Add to that -- the Courts are publishing more opinions that impact probate, trust, guardianship and conservatorship law. Add to that reactive work, we are working extremely hard on our own Legislative initiatives and services for our membership, including our online discussions, probate journal, and networking opportunities. Many thanks to all of you who are regularly going above and beyond in all you do for our Section!

I expect the Spring will be different. We may have breathing room to take on new projects. If you have any ideas for new ways to serve our members, please contact me. Also, let me know if you want to join a committee or if you see a need for a new committee.

2. **Agenda.** To get on an upcoming Agenda, please contact me directly. Let me know what you want to do (report on your committee's work, have general discussion to help guide your committee, get a vote to report a public policy position). Tell me how much time you need and who will be presenting for your committee. Most important, if your matter must be heard in a certain month, let me know so that you are near the top of the agenda, ensuring adequate time for discussion. If you do not let me know you need time on the agenda, there is a possibility you will not be able to present for your committee. If there a late-breaking development and you need time on the agenda but the latest news on the issue happened after the deadline for the agenda, please call me to see what we can do to address the issue.

3. **New Liaison.** We look forward to input and collaboration from our new liaison:

   Daniel W. Borst, Michigan Bankers Association

4. **New Committee Members.** We are excited to add new committee members every month. Join me in welcoming our newest committee members:

   Trevor J. Weston, Amicus Curiae Committee
   Rebecca Wrock, Premarital Agreement Legislation Ad Hoc Committee

5. **Correspondence.** I exchanged several e-mails in the last few months with Diana Raimi regarding HB 4759 and HB 4751 (Allard reaction bills). Attorney Raimi is the Chair of the Legislative Committee of the Michigan Chapter of the American Academy of Matrimonial Lawyers. Her committee has closely followed these bills. Chris Savage, Chair of our Premarital Agreements Legislation Ad Hoc Committee, has also been following this email thread.
6. **Public Policy Positions Taken in October.** HB 4821 and HB 4822, Council voted to oppose the bills in current form but to work with the sponsors to make suggested changes regarding issues that are of a concern to the Section. Reports are posted online at [http://connect.michbar.org/probate/reports/policy](http://connect.michbar.org/probate/reports/policy)

7. **Economic Practice of Law Survey, 2017** – Please be sure to take this survey. It has been suggested that we select estate and trust administration as the closest category to estate planning. I am working with the State Bar to add in estate planning to the survey in 2020. [http://www.michbar.org/News/NewsDetail/nid/5487](http://www.michbar.org/News/NewsDetail/nid/5487)

8. **Meetings with Becky Bechler of Public Affairs Associates.** Becky has had several meetings with me, committee chairs, and legislators and is very busy helping us accomplish our mission, getting our legislative initiatives moving forward, and react to bills that others have drafted/introduced.


   Some interesting highlights from Title V:
   (Sec. 504) DOJ must publish model power of attorney legislation for the purpose of preventing elder abuse.

   (Sec. 505) DOJ must publish best practices for improving guardianship proceedings and model legislation related to guardianship proceedings for the purpose of preventing elder abuse.

10. **Monthly materials.** The Secretary David Lucas and I have agreed to streamline our monthly agenda and delete various documents (award, committee, and liaison lists), given that our Section's SBM website contains all of these materials. Go to [http://connect.michbar.org/probate/home](http://connect.michbar.org/probate/home) to find these materials. In addition, we have placed many of these items in the Library of the SBM Connect Community page for the Probate and Estate Planning Section.

   Here are a few links that have been recently updated:

   Committee List:


   Liaison List:

   [https://higherlogicdownload.s3.amazonaws.com/MICHBAR/36b40f18-75e7-4b75-a650-4e26fe2c65ac/UploadedImages/pdfs/liaisons.pdf](https://higherlogicdownload.s3.amazonaws.com/MICHBAR/36b40f18-75e7-4b75-a650-4e26fe2c65ac/UploadedImages/pdfs/liaisons.pdf)

MEMORANDUM

To: Probate Council
From: The Community Property Trusts
       Ad Hoc Committee

By way of introduction for Probate and Estate Planning Section members who are unfamiliar with the proposed Optional Community Property Statute, the bill will allow married couples in Michigan to get the same income tax advantage as other married couples in Community Property Trust states.

There are two (2) kinds of state laws for marital property. Common law states like Michigan and Community Property states of which there are about a dozen. States that allow Community Property to take advantage of a Federal income tax savings provision which gives a higher tax deduction to the survivor of a trust upon the death of one of the spouses when the property is sold.

The tax benefits are obtained by titling marital property in a special Community Property Trust. If the surviving spouse sells that property their cost basis would be the amount equal to the fair market value of the property at the time of death and that saves income taxes for a surviving widow or widower..

In Michigan inherited assets after the death of a spouse are taxed at a higher level than Community Property Trust states.

This bill will allow married couples in Michigan to get the same I.R.S. tax advantage as other married couples in Community Property Trust states.

As of this writing, Senator Bieda is anticipating introducing the Probate Councils Optional Community Property Statute. Minor corrections were made to the original draft which did not change the substance of the proposed statute. Wherever the word divorce appeared in the draft, annulment and separate maintenance were added. The most significant change would be to Section 7506(1)(a), which provides the following:
“(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.”

The proposal for that section reads:

Sec. 7506. (1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply: (a) During EXCEPT AS OTHERWISE PROVIDED IN SECTION 7510 IN RELATION TO A MICHIGAN COMMUNITY PROPERTY TRUST, DURING the lifetime of the settlor…

The change to §7506 was needed because the assets of a Community Property Trust are only accessible by creditors directly for joint debt. Otherwise, if the debt is the debt of a single spouse, a creditor would be able to attach only that spouse’s rights as a beneficiary of the trust. Community property states have a concept called community debt, which is debt that benefits the community of the marriage. In community property states, creditors can attach community property for community debt. But “community debt” seems like a large expansion into an entirely new area of law, so, to avoid that, the Committee chose to use “joint debt” of both spouses instead of community debt. Since community property trusts are revocable, an amendment to section 7506 (which allows creditors to go after a revocable trust) was made to accommodate the issue of access to trust assets directly for joint debt only.

The Creditor’s Committee had asked for a provision that stated existing creditor rights would not be affected by a community property trust. Since that statement seems unnecessary and could create more litigation than it would avoid, the Community Property Committee decided to put some language in the reporter’s comments to the effect that the statute or the formation of a community property trust will not disturb existing creditor rights. The Senate version of the bill is attached.
COMMUNITY PROPERTY TRUSTS
AD HOC COMMITTEE

A version with marked changes from the last time Council voted on the statute is found at SBM Connect Library for Probate and Estate Planning Section.

Very truly yours,

The Community Property
Trust Ad Hoc Committee
A bill to amend 1998 PA 386, entitled "Estates and protected individuals code,"
by amending sections 7103, 7105, and 7506 (MCL 700.7103, 700.7105, and 700.7506), section 7103 as amended by 2012 PA 483, section 7105 as amended by 2010 PA 325, and section 7506 as amended by 2009 PA 46, and by adding sections 7212, 7510, and 7616.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 7103. As used in this article:

(a) "Action", with respect to a trustee or a trust protector, includes an act or a failure to act.

(b) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code OF 1986, 26 USC 2041 and 2514.
(c) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 7405(l).

(d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:

(i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.

(ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.

(iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.

(iv) Whether the distribution of trust property is from income or principal or both of the trust.

(v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.

(e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.

(F) "MICHIGAN COMMUNITY DEBT" MEANS DEBT INCURRED JOINTLY BY BOTH MARRIED SPOUSES DURING THE PERIOD OF THE MICHIGAN COMMUNITY ESTATE.

(i) PROPERTY TRANSFERRED TO THE MICHIGAN COMMUNITY PROPERTY TRUST.

(ii) PROPERTY TRANSFERRED TO THE MICHIGAN COMMUNITY PROPERTY TRUSTEE.

(iii) PROPERTY OR RIGHTS TO PROPERTY MADE PAYABLE TO A MICHIGAN COMMUNITY PROPERTY TRUST OR TITLED IN THE NAME OF THE MICHIGAN COMMUNITY PROPERTY TRUST OR IN THE NAME OF THE MICHIGAN COMMUNITY PROPERTY TRUSTEE AS TRUSTEE OF THE MICHIGAN COMMUNITY PROPERTY TRUST.

(iv) INCOME, EARNINGS, OR APPRECIATION ASSOCIATED WITH PROPERTY DESCRIBED IN SUBPARAGRAPHS (i) TO (iii).

(H) "MICHIGAN COMMUNITY PROPERTY TRUST" OR "CP TRUST" MEANS A MICHIGAN COMMUNITY PROPERTY TRUST THAT BEARS THE NAME "COMMUNITY PROPERTY TRUST" OR "CP TRUST" IN ITS TITLE AND THAT MEETS THE CONDITIONS OF SECTION 7616.

(I) "MICHIGAN COMMUNITY PROPERTY TRUSTEE" OR "CP TRUSTEE"
MEANS A TRUSTEE OF A MICHIGAN COMMUNITY PROPERTY TRUST.

(J) "PERIOD OF THE MICHIGAN COMMUNITY ESTATE" MEANS THE PERIOD
OF TIME THAT BOTH MARRIED SPOUSES ARE DOMICILED IN THIS STATE. THE
PERIOD OF MICHIGAN COMMUNITY ESTATE BEGINS THE MOMENT BEFORE
PROPERTY IS TRANSFERRED TO A MICHIGAN COMMUNITY PROPERTY TRUST FOR
THE FIRST TIME. THE PERIOD OF MICHIGAN COMMUNITY ESTATE ENDS ON THE
FIRST OF THE FOLLOWING EVENTS:

(i) AT LEAST 1 SPOUSE IS NO LONGER DOMICILED IN THIS STATE.
(ii) THE DEATH OF A SPOUSE.
(iii) THE ENTRY OF A JUDGMENT OF DIVORCE OR SEPARATE MAINTENANCE BETWEEN THE SPOUSES.

(iv) ANNULMENT OF THE MARRIAGE OF THE SPOUSES.

(K) (f)—"Power of withdrawal" means a presently exercisable
general power of appointment other than a power that is either of
the following:

(i) Exercisable by a trustee and limited by an ascertainable standard.
(ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(l) (g)—"Qualified trust beneficiary" means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:

(i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.
(ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in
subparagraph (i) terminated on that date without causing the trust
to terminate.

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

(M) (n)—"Revocable", as applied to a trust, means revocable by
the settlor without the consent of the trustee or a person holding
an adverse interest. A trust's characterization as revocable is not
affected by the settlor's lack of capacity to exercise the power of
revocation, regardless of whether an agent of the settlor under a
durable power of attorney, a conservator of the settlor, or a
plenary guardian of the settlor is serving.

(N) (i)—"Settlor" means a person, including a testator or a
trustee, who creates a trust. [IF] EXCEPT AS OTHERWISE PROVIDED IN
SECTION 7616(2), IF more than 1 person creates a trust, each person
is a settlor of the portion of the trust property attributable to
that person's contribution. The lapse, release, or waiver of a
power of appointment shall NOT cause the holder of a power of
appointment to be treated as a settlor of the trust.

(O) (i)—"Spendthrift provision" means a term of a trust that
restrains either the voluntary or involuntary transfer of a trust
beneficiary's interest.

(P) (i)—"Support provision" means a provision in a trust that
provides the trustee shall distribute income or principal or both
for the health, education, support, or maintenance of a trust
beneficiary, or language of similar import. A provision in a trust
that provides a trustee has discretion whether to distribute income
or principal or both for these purposes or to select from among a
class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a
discretionary trust provision.

(Q) (1) "Trust beneficiary" means a person to whom 1 or both
of the following apply:

(i) The person has a present or future beneficial interest in
a trust, vested or contingent.

(ii) The person holds a power of appointment over trust
property in a capacity other than that of trustee.

(R) (a) "Trust instrument" means a governing instrument that
contains the terms of the trust, including any amendment to a term
of the trust.

(S) (a) "Trust protector" means a person or committee of
persons appointed pursuant to the terms of the trust who has
the power to direct certain actions with respect to the trust.

Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment.

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

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

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

(g) 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.

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

(i) 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.

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

(k) The effect of an exculpatory term under section 7809(8) or 7908.
(l) The rights under sections 7910 to 7913 of a person other than a trustee or beneficiary.

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

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

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

(p) 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.

(Q) THE CONDITIONS UNDER SECTION 7616(1) FOR CREATING A MICHIGAN COMMUNITY PROPERTY TRUST.

(R) THE RIGHTS UNDER SECTION 7616(2) OF A SETTLOR OF A MICHIGAN COMMUNITY PROPERTY TRUST.

SEC. 7212. (1) A COURT WITH JURISDICTION OVER AN ACTION FOR SEPARATE MAINTENANCE, DIVORCE, OR ANNULMENT BETWEEN SPOUSES WHO ARE SETTLORS OF A MICHIGAN COMMUNITY PROPERTY TRUST HAS JURISDICTION OVER THE MICHIGAN COMMUNITY PROPERTY TRUST, MICHIGAN COMMUNITY PROPERTY, AND PROPERTY PAYABLE TO THE MICHIGAN COMMUNITY PROPERTY TRUST. IN A PROCEEDING INVOLVING A DETERMINATION OF ABANDONMENT OR DISAPPEARANCE OF A SPOUSE, THE COURT ALSO HAS JURISDICTION OVER THE MICHIGAN COMMUNITY PROPERTY TRUST, MICHIGAN COMMUNITY PROPERTY, AND PROPERTY PAYABLE TO THE MICHIGAN COMMUNITY PROPERTY TRUST.
(2) A court that has jurisdiction over an action for divorce, separate maintenance, or annulment described in subsection (1) shall treat each spouse's 1/2 share in a Michigan community property trust as marital property. The court may order distributions from the Michigan community property trust in accordance with the allocation of property of the spouses in the action for divorce, separate maintenance, or annulment.

(3) In an action for divorce, separate maintenance, or annulment described in subsection (1), a distribution from a Michigan community property trust may be subject to a property settlement agreement in conjunction with the action for divorce, separate maintenance, or annulment.

Sec. 7506. (1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) During—except as otherwise provided in section 7510 in relation to a Michigan community property trust, during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(b) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that at the settlor's death was revocable by the settlor, either alone or in conjunction with another person, is subject to expenses, claims, and allowances as provided in section 7605.

(c) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach no more than the lesser of the following:
(i) The claim of the creditor or assignee.

(ii) The maximum amount that can be distributed to or for the settlor's benefit exclusive of sums to pay the settlor's taxes during the settlor's lifetime.

(2) If a trust has more than 1 settlor, the amount a creditor or assignee of a particular settlor may reach under subsection (1)(c) shall MUST not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) A trust beneficiary is not considered a settlor merely because of a lapse, waiver, or release of a power of withdrawal over the trust property.

(4) An individual who creates a trust shall IS not be considered a settlor with regard to the individual's retained beneficial interest in the trust that follows the termination of the individual's spouse's prior beneficial interest in the trust if all of the following apply:

(a) The individual creates, or has created, the trust for the benefit of the individual's spouse.

(b) The trust is treated as qualified terminable interest property under section 2523(f) of the internal revenue code OF 1986, 26 USC 2523.

(c) The individual retains a beneficial interest in the trust income, trust principal, or both, which beneficial interest follows the termination of the individual's spouse's prior beneficial interest in the trust.

SEC. 7510. (1) A CREDITOR MAY FILE AN ACTION TO COLLECT MICHIGAN COMMUNITY DEBT DIRECTLY AGAINST THE MICHIGAN COMMUNITY
PROPERTY TRUST. IF A CREDITOR FILES AN ACTION TO COLLECT UNDER THIS
SUBSECTION, A SPOUSE WHO IS A SETTLOR OF THE MICHIGAN COMMUNITY
PROPERTY TRUST IS NOT ENTITLED TO CONTRIBUTION OR INDEMNIFICATION
FROM THE OTHER SPOUSE WHO IS A SETTLOR OF THE MICHIGAN COMMUNITY
PROPERTY TRUST.

(2) FOR A DEBT THAT IS THE DEBT OF A SINGLE SPOUSE WHO IS THE
SETTLOR OF A MICHIGAN COMMUNITY PROPERTY TRUST OR FOR A JOINT DEBT
THAT IS NOT MICHIGAN COMMUNITY DEBT, EITHER OF THE FOLLOWING
APPLIES:

(A) A MICHIGAN COMMUNITY PROPERTY TRUSTEE MAY BE JOINED IN AN
ACTION AGAINST THE SPOUSE OR SPOUSES, AS APPLICABLE.

(B) AN ACTION MAY BE BROUGHT AGAINST THE MICHIGAN COMMUNITY
PROPERTY TRUST AFTER A COURT HAS ENTERED A JUDGMENT AGAINST THE
SPOUSE INDIVIDUALLY OR BOTH SPOUSES JOINTLY.

SEC. 7616. (1) A TRUST IS A MICHIGAN COMMUNITY PROPERTY TRUST
ONLY IF ALL OF THE FOLLOWING CONDITIONS ARE MET:

(A) THE TRUST CONTAINS PROPERTY PLACED IN THE TRUST BY MARRIED
SPOUSES DURING THE PERIOD OF THE MICHIGAN COMMUNITY ESTATE.

(B) THE TERMS OF THE TRUST EXPRESSLY PROVIDE THAT IT IS A
MICHIGAN COMMUNITY PROPERTY TRUST.

(C) THE TRUST INSTRUMENT HAS THE PHRASE "COMMUNITY PROPERTY
TRUST" OR "CP TRUST" IN ITS TITLE.

(D) THE ORIGINAL TRUST INSTRUMENT HAS BEEN EXECUTED BY MARRIED
SPOUSES.

(E) THE TRUST INSTRUMENT INCLUDES THE FOLLOWING PROVISION:
"THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING,
BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER
THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE
COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY,
THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION.
IF YOU HAVE ANY QUESTIONS, YOU SHOULD SEEK COMPETENT ADVICE.".
(2) EACH SETTLOR OF A MICHIGAN COMMUNITY PROPERTY TRUST HAS
ALL OF THE FOLLOWING RIGHTS IN MICHIGAN COMMUNITY PROPERTY:
(A) EACH SETTLOR HAS A 1/2 INTEREST IN MICHIGAN COMMUNITY
PROPERTY DURING HIS OR HER LIFETIME AND ON DEATH.
(B) EACH SETTLOR MAY, WITHOUT THE CONSENT OF THE OTHER
SETTLOR, TRANSFER DURING HIS OR HER LIFETIME OR ON HIS OR HER DEATH
1/2 OF THE MICHIGAN COMMUNITY PROPERTY AS EXPRESSED IN THE TRUST
INSTRUMENT. IF A VALUATION OF MICHIGAN COMMUNITY PROPERTY IS
NECESSARY TO ACHIEVE A 1/2 DISTRIBUTION ON DEATH UNDER THIS
SUBDIVISION, THE MICHIGAN COMMUNITY PROPERTY TRUSTEE SHALL FAIRLY
VALUE THE MICHIGAN COMMUNITY PROPERTY.
(C) EXPENSES OF A MICHIGAN COMMUNITY PROPERTY TRUST ARE
TREATED AS 1/2 BELONGING TO EACH SPOUSE.
(D) EXCEPT FOR MICHIGAN COMMUNITY PROPERTY TRANSFERRED AS
DESCRIBED IN SUBDIVISION (B), MICHIGAN COMMUNITY PROPERTY MUST BE
DISTRIBUTED OUT OF THE MICHIGAN COMMUNITY PROPERTY TRUST EQUALLY TO
BOTH SPOUSES. UNLESS OTHERWISE AGREED BY BOTH SPOUSES, MICHIGAN
COMMUNITY PROPERTY THAT CANNOT BE DIVIDED MUST BE HELD AS TENANTS
IN COMMON. UNLESS THE MICHIGAN COMMUNITY PROPERTY TRUST INSTRUMENT
EXPRESSLY PROVIDES OTHERWISE, OR UNLESS OTHERWISE ORDERED BY A
COURT WITH JURISDICTION OVER THE MICHIGAN COMMUNITY PROPERTY TRUST,
A MICHIGAN COMMUNITY PROPERTY TRUSTEE SHALL NOT DISTRIBUTE MICHIGAN
COMMUNITY PROPERTY FROM THE MICHIGAN COMMUNITY PROPERTY TRUST
UNLESS BOTH SPOUSES CONSENT TO THE DISTRIBUTION IN THE MICHIGAN
COMMUNITY PROPERTY TRUST INSTRUMENT OR IN A SEPARATE DOCUMENT.
(E) ALL RIGHTS IN MICHIGAN COMMUNITY PROPERTY ARE EQUAL
REGARDLESS OF THE SOURCE OF THE MONEY USED TO PURCHASE THE MICHIGAN
COMMUNITY PROPERTY, REGARDLESS OF WHO TRANSFERRED THE PROPERTY INTO
THE MICHIGAN COMMUNITY PROPERTY TRUST, INCLUDING THIRD PARTIES, AND
REGARDLESS OF WHOSE LABOR RELATES TO THE ACQUISITION OR ITS
APPRECIATION IN VALUE. EXCEPT FOR A TRANSFER OF A SPOUSE'S 1/2
INTEREST IN MICHIGAN COMMUNITY PROPERTY UNDER SUBDIVISION (B), AN
AMENDMENT TO OR REVOCATION OF A MICHIGAN COMMUNITY PROPERTY TRUST
REQUIRES THE WRITTEN CONSENT OF BOTH SPOUSES. A THIRD-PARTY GIFT TO
A MICHIGAN COMMUNITY PROPERTY TRUST IS CONSIDERED A GIFT TO BOTH
SPOUSES EQUALLY.
(F) EXCEPT AS OTHERWISE PROVIDED IN THE TERMS OF THE TRUST, A
SPOUSE MAY DELEGATE IN WRITING ANY POWER TO THE OTHER SPOUSE TO ACT
ON BEHALF OF THE MICHIGAN COMMUNITY PROPERTY TRUST. BOTH SPOUSES
MAY APPOINT IN WRITING A THIRD PARTY TO ACT AS A MICHIGAN COMMUNITY
PROPERTY TRUSTEE. EXCEPT AS OTHERWISE PROVIDED IN THE TERMS OF THE
TRUST, WHILE BOTH SPOUSES ARE LIVING, THE APPOINTMENT OR REMOVAL OF
A MICHIGAN COMMUNITY PROPERTY TRUSTEE MUST BE MADE BY BOTH SPOUSES.
ON THE DEATH OF A SPOUSE, THE SURVIVING SPOUSE MAY APPOINT OR
REMOVE A MICHIGAN COMMUNITY PROPERTY TRUSTEE. EITHER SPOUSE MAY
REVOKE A GRANT OF AUTHORITY TO A MICHIGAN COMMUNITY PROPERTY
TRUSTEE AND MAY GRANT NEW AUTHORITY TO A MICHIGAN COMMUNITY
PROPERTY TRUSTEE. HOWEVER, THE SPOUSES MAY AGREE THAT A REVOCATION
OF AUTHORITY UNDER THIS SUBDIVISION MUST BE MADE BY BOTH SPOUSES.
UNLESS THE TERMS OF THE TRUST PROVIDE OTHERWISE, A SPOUSE SHALL NOT
SELL, CONVEY, OR ENCUMBER REAL PROPERTY IN THE MICHIGAN COMMUNITY
PROPERTY TRUST UNLESS THE OTHER SPOUSE DOES EITHER OF THE
FOLLOWING:

(i) JOINS AS A MICHIGAN COMMUNITY PROPERTY COTRUSTEE IN THE
EXECUTION OF THE DEED OR OTHER DOCUMENT BY WHICH THE REAL PROPERTY
IS SOLD, CONVEYED, OR ENCUMBERED.

(ii) EXECUTES A DOCUMENT THAT AUTHORIZES A MICHIGAN COMMUNITY
PROPERTY TRUSTEE TO EXECUTE DOCUMENTS TO SELL, CONVEY, OR ENCUMBER
THE REAL PROPERTY.

(G) IF BOTH SPOUSES PARTICIPATE IN MANAGING A BUSINESS THAT IS
MICHIGAN COMMUNITY PROPERTY, A MICHIGAN COMMUNITY PROPERTY TRUSTEE
SHALL NOT SELL, CONVEY, OR ENCUMBER ASSETS OF THE BUSINESS,
INCLUDING REAL PROPERTY OR THE GOODWILL OF THE BUSINESS, UNLESS
BOTH SPOUSES HAVE EXPRESSLY OR IMPLIEDLY CONSENTED TO THE SALE,
CONVEYANCE, OR ENCUMBRANCE OF THE PROPERTY. UNLESS THE MICHIGAN
COMMUNITY PROPERTY TRUST INSTRUMENT PROVIDES OTHERWISE, IF ONLY 1
SPOUSE PARTICIPATES IN THE MANAGEMENT OF A BUSINESS DESCRIBED IN
THIS SUBDIVISION, A MICHIGAN COMMUNITY PROPERTY TRUSTEE MAY, IN THE
ORDINARY COURSE OF THE BUSINESS, ACQUIRE, PURCHASE, SELL, CONVEY,
OR ENCUMBER THE ASSETS OF THE BUSINESS, INCLUDING REAL PROPERTY AND
GOODWILL, WITHOUT THE CONSENT OF THE NONPARTICIPATING SPOUSE.

(H) UNLESS THE MICHIGAN COMMUNITY PROPERTY TRUST INSTRUMENT OR
OTHER SEPARATE DOCUMENT PROVIDES OTHERWISE, A SPOUSE SHALL NOT MAKE
A GIFT OF MICHIGAN COMMUNITY PROPERTY WITHOUT THE EXPRESS CONSENT
OF THE OTHER SPOUSE.

(I) PROPERTY TRANSFERRED TO A MICHIGAN COMMUNITY PROPERTY
TRUST DURING THE PERIOD OF THE MICHIGAN COMMUNITY PROPERTY ESTATE
IS TREATED FOR ALL PURPOSES AS IF THE PROPERTY WERE ACQUIRED BY
EITHER OR BOTH SPOUSES DURING THEIR MARRIAGE ON THE DATE THE
PROPERTY IS TRANSFERRED TO THE MICHIGAN COMMUNITY PROPERTY TRUST.

(J) A SPOUSE SERVING AS A MICHIGAN COMMUNITY PROPERTY TRUSTEE
IS LIABLE TO THE OTHER SPOUSE FOR ANY LOSS OR DAMAGE CAUSED BY
FRAUD OR BAD FAITH IN THE MANAGEMENT OF THE MICHIGAN COMMUNITY
PROPERTY.
Amicus Committee materials for 11/11/17 Probate Council meeting
STATE OF MICHIGAN
COURT OF APPEALS

In re RHEA BRODY LIVING TRUST, dated
January 17, 1978, as amended.

ROBERT BRODY,

Intervenor-Appellant/Cross-
Appellee,

v

CATHY B. DEUTCHMAN,

Petitioner-Appellee/Cross-Appellee,

and

MICHAEL BARTON, Special Fiduciary,

Intervenor,

and

JAY BRODY,

Intervenor-Appellee/Cross-
Appellant.

Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

In this case involving the Rhea Brody Living Trust, Rhea’s husband, Robert Brody, appeals as of right the probate court’s order granting partial summary disposition to Rhea and Robert’s daughter, Cathy B. Deutchman. In relevant part, the order resolved claims relating to two family businesses, Brody Realty and Macomb Corporation, declared Rhea Brody disabled
pursuant to the terms of the trust, and removed Robert as successor trustee of the trust. Jay Brody, Rhea and Robert’s son and the brother of Cathy, cross-appeals.\(^1\) We affirm in part, reverse in part, and remand for further proceedings.

I. PROBATE COURT JURISDICTION

On appeal, Robert and Jay ask this Court to vacate the probate court’s orders for lack of subject matter jurisdiction. According to Robert and Jay, the trust action included a “business or commercial dispute” as defined in MCL 600.8031(1)(e) and was therefore within the mandatory jurisdiction of the business court under MCL 600.8035. We disagree.

Neither Robert nor Jay raised the jurisdictional issue in the lower court. However, “[s]ubject-matter jurisdiction cannot be waived and can be raised at any time by any party or the court.” \(\text{In re Contempt of Dorsey}, 306 \text{Mich App} \ 571, \ 581; \ 858 \text{NW2d} \ 84 (2014),\) vacated in part on unrelated grounds 500 \text{Mich} \ 920 (2016). “Whether the trial court had subject-matter jurisdiction is a question of law that this Court reviews de novo.’” \(\text{Bank v Michigan Education Ass’n-NEA}, 315 \text{Mich App} \ 496, \ 499; \ 892 \text{NW2d} \ 1 (2016),\) quoting \(\text{Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp}, 237 \text{Mich App} \ 721, \ 730; \ 605 \text{NW2d} \ 18 (1999).\) “We review de novo questions of statutory interpretation, with the fundamental goal of giving effect to the intent of the Legislature.” \(\text{Bank}, \ 315 \text{Mich App} \ 499.\)

“Subject-matter jurisdiction is conferred on the court by the authority that created the court.” \(\text{Reed v Yackell}, 473 \text{Mich} \ 520, \ 547; \ 703 \text{NW2d} \ 1 (2005).\) The probate court is a court of limited jurisdiction and derives its power from statutes. \(\text{Manning v Amerman}, 229 \text{Mich App} \ 608, \ 611; \ 582 \text{NW2d} \ 539 (1998).\) Specifically, MCL 700.1302 grants the probate court “exclusive legal and equitable jurisdiction,” over matters concerning “the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary.” Additionally, MCL 700.1303(h) provides for concurrent legal and equitable jurisdiction over claims by or against a fiduciary or trustee.

\(^1\) Cathy argues that because Jay had no pecuniary interest in Robert’s removal as trustee, he is not an aggrieved party pursuant to MCR 7.203(A), and therefore, he lacks standing to file a claim of cross-appeal. We disagree. The order removing Robert as trustee is a final order. “To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.” \(\text{Federated Ins Co v Oakland Co Rd Comm}, 475 \text{Mich} \ 286, \ 291; \ 715 \text{NW2d} \ 846 (2006)\) (quotation marks and citation omitted). The probate court’s prior orders included remedies for breaches by Robert, including reformation of the terms of a sale of the Brittany Park property to Jay and canceling an option agreement to which Jay was a party. “Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case.” \(\text{Bonner v Chicago Title Ins Co}, 194 \text{Mich App} \ 462, \ 472; \ 487 \text{NW2d} \ 807 (1992).\) Because the probate court’s remedies for Robert’s breaches affected Jay, Jay has standing to file a cross-appeal challenging the probate court’s rulings related to Robert’s conduct, which served as the basis for the court’s decision to remove Robert as trustee.
A business court’s jurisdiction is established by MCL 600.8035, which provides that “[a]n action shall be assigned to a business court if all or part of the action includes a business or commercial dispute.” MCL 600.8035(3). Under MCL 600.8031(1)(c), a “business or commercial dispute” means, among other things, “[a]n action involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise.” Notwithstanding the broad definition of “business or commercial dispute” found in MCL 600.8031(1)(c), the Legislature specifically excluded proceedings under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq., in MCL 600.8031(3)(c).

Robert and Jay first argue that this action fell within the mandatory jurisdiction of the business court because it involved “the rights or obligations of . . . members . . . or managers” of a company, MCL 600.8031(2)(b), an action “arising out of contractual agreements or other business dealings,” MCL 600.8031(2)(c), and an action “involving the sale, . . . purchase, . . . or finances of a business enterprise,” MCL 600.8031(1)(c)(iv). Accordingly, they contend, Cathy was required to bring the action in the circuit court for business court assignment. This argument lacks merit. Matters brought under the EPIC are specifically excluded from the definition of “business or commercial dispute” in MCL 600.8031(1)(c). Cathy sought Robert’s removal as trustee of Rhea’s estate, and reversal of damage she alleged that Robert had already caused to the interests of the trust. Cathy’s petition seeking Robert’s removal as trustee, delivery of all accountings of trust property to an appointed trustee, temporary court supervision of the trust, an order rescinding transactions Robert entered as trustee, and damages for the Rhea Trust, was brought under various provisions of the EPIC. To the extent the petition involved transactions of the Brody family businesses or existing contracts, these matters arose only tangentially to the central issue of Robert’s breach of fiduciary duty as trustee of the Rhea Trust. Cathy’s petition clearly fell within the range of matters specifically excluded from the definition of “business or commercial dispute” under the business court statute.

Next, Robert and Jay argue that, regardless of the nature of Cathy’s petition, her claims fell within the mandatory jurisdiction of the business court under MCL 600.8035(3), which states that “[a]n action that involves a business or commercial dispute that is filed in a court with a business docket shall be maintained in a business court although it also involves claims that are not business or commercial disputes, including claims under section 8031(3).” (Emphasis added.) Robert and Jay ask this Court to interpret the above language as requiring every case affecting or affected by a business matter, including a trust case, to be brought before the business court. We decline to do so.

When this Court interprets a statute, our goal is to give effect to the Legislature’s intent as determined by the statutory language. Bukowski v City of Detroit, 478 Mich 268, 273; 732 NW2d 75 (2007). “In order to accomplish this goal, this Court interprets every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage.” Id. at 273-274. Here, we find Robert’s and Jay’s proposed construction of the second sentence of MCL 600.8035(3) inconsistent with the plain language of the statute. Specifically, we note that the Legislature employed the phrases “an action . . . filed in a court with a business docket,” and “shall be maintained in a business court,” (emphasis added), in its jurisdictional mandate. These phrases indicate a Legislative intent to hold cases originally filed in the business court for the extent of proceedings, regardless of whether the business dispute also involves, or comes to
involve, excluded subject matter. This simple reading of the statutory language is consistent with the Legislature’s stated purpose in establishing the business court, which is to “[a]llow business or commercial disputes to be resolved with expertise, technology, and efficiency,” MCL 600.8033(3)(b), and “[e]nhance the accuracy, consistency, and predictability of decisions in business and commercial cases,” MCL 600.8033(3)(c). To read this section as requiring every action affecting a business to be originally filed in the business court or transferred to the business court upon the inclusion of matters affecting a business would be to read language into the statute that simply does not exist, and to brush aside the Legislative goal of accuracy and efficiency by imposing on the business courts mandatory jurisdiction over a seemingly endless variety of nonbusiness-related matters.²

Further, Robert’s and Jay’s proposed construction of the business court statute would create a direct conflict between the mandatory jurisdiction of the business court over all matters affecting or involving a business with the exclusive jurisdiction of the probate court to consider probate and trust matters. “If two statutes lend themselves to a construction that avoids conflict, that construction should control.” Parise v Detroit Entertainment, LLC, 295 Mich App 25, 27; 811 NW2d 98 (2011) (quotation marks and citation omitted). The construction of MCL 600.8035(3) proposed by Robert and Jay would render the probate court without jurisdiction to consider any trust matter that also involved or affected, however tangentially, a business transaction. We cannot reconcile this construction with the Legislature’s grant of exclusive jurisdiction to the probate court over trust matters. Nor can we reconcile the proposed construction of MCL 600.8035(3) with the Legislature’s stated purpose for its broad grant of exclusive jurisdiction on the probate court, which is “to simplify the disposition of an action or proceeding involving a decedent’s, a protected individual’s, a ward’s, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court.” MCL 700.1303(3).

Finally, to the extent the probate court’s grant of exclusive jurisdiction over trust matters in MCL 700.1302 and MCL 700.1303 conflicts with the broad inclusion of trust-related matters within the exclusive jurisdiction of the business court under MCL 600.8035(3), we conclude that the more specific grant of jurisdiction in MCL 700.1302 and MCL 700.1303 controls. Both statutes confer jurisdiction on a court, and “[w]hen two statutes are in pari materia but conflict with one another on a particular issue, the more specific statute must control over the more general statute.” Donkers v Kovach, 277 Mich App 366, 371; 745 NW2d 154 (2007).

² Notably, by amendment effective October 11, 2017, the Legislature has amended MCL 600.8031 to remove any “action involving the sale, ... purchase, ... or finances of a business enterprise” from its broad definition of “business or commercial dispute.” 2017 PA 101. Once the statute takes effect, a “business or commercial dispute” will include only actions in which at least one party is a business enterprise. MCL 600.8031(1)(c) (as amended). We find the Legislature’s recent amendment persuasive evidence of a Legislative intent to limit the business court’s jurisdiction to matters substantially involving the affairs of a business.
“While it is true that a judgment entered by a court that lacks subject-matter jurisdiction is void, subject-matter jurisdiction is established by the pleadings and exists when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous.” *Closet v No Name Corp.*, 302 Mich App 550, 561; 840 NW2d 375 (2013) (quotation marks and citations omitted). Cathy’s petition was brought under the EPIC, and the probate court had exclusive jurisdiction over Cathy’s claims under MCL 700.1302 and MCL 700.1303. Robert’s and Jay’s jurisdictional challenge therefore fails.

II. STANDING

Robert and Jay both argue that Cathy did not have standing (i.e., she was not a proper party) to request adjudication of the issues in her petition, including Robert’s removal as trustee of the Rhea Trust and reversal of actions taken by Robert as trustee. We disagree.

The parties dispute whether, at the time Cathy filed her petition, the trust was revocable or irrevocable. Robert and Jay argue that Cathy has no beneficial interest in the trust because she is a contingent beneficiary, and the trust is revocable. Robert’s and Jay’s argument is premised on three assumptions: (1) that Rhea has not been declared disabled pursuant to the trust, and her trust is revocable by its plain terms, or (2) that the trust’s terms render it revocable by Robert, the trustee and holder of a DPOA, indefinitely, and (3) that a contingent beneficiary does not have standing to bring an action regarding the administration of a revocable trust. We need not consider the validity of Robert’s and Jay’s first two assumptions, however, because we conclude that their argument fails on its third assumption.

Whether a party has standing is a question of law that this Court reviews de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass’n*, 264 Mich App 523, 527; 695 NW2d 508 (2004). “[S]tanding refers to the right of a party plaintiff initially to invoke the power of the court to adjudicate a claimed injury in fact.” *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). In *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 621-622; 873 NW2d 783 (2015), this Court explained the relationship between standing and a real party in interest:

MCR 2.201(B) provides that “[a]ll action must be prosecuted in the name of the real party in interest . . . .” The real party in interest is a party who is vested with a right of action in a given claim, although the beneficial interest may be with another. In general, standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and “in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.” Both the doctrine of standing and the included real-party-in-interest rule are prudential limitations on a litigant’s ability to raise the legal rights of another. Further, “a litigant has standing whenever there is a legal cause of action.” But plaintiffs must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties. The real party in interest is one who is vested with the right of action as to a particular claim, or, stated otherwise, is the party
who under the substantive law in question owns the claim asserted. [Citations omitted.]

The probate court found that Cathy had standing pursuant to MCL 700.7201, which provides, in pertinent part, that "[a] court of this state may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." MCL 700.7201(1) (emphasis added). Under MCL 700.7201(3):

A proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and a determination regarding the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do any of the following:

(a) Appoint or remove a trustee.

(b) Review the fees of a trustee.

(c) Require, hear, and settle interim or final accounts.

(d) Ascertain beneficiaries.

(e) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a trust.

(f) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.

(g) Release registration of a trust.

(h) Determine an action or proceeding that involves settlement of an irrevocable trust. [Emphasis added.]

The definition of "interested person" is provided in MCL 700.1105(c), which states:

"Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, and by the supreme court rules.

The probate court properly determined that Cathy is an interested person under MCL 700.1105(c). There is no dispute that Cathy is Rhea’s child. In addition, Cathy is a "beneficiary." Under MCL 700.1103(d), a beneficiary includes a "trust beneficiary," defined as
a person with “a present or future beneficial interest in a trust, vested or contingent.” Black’s Law Dictionary defines “beneficial interest” as “[a] right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property.” The plain language of the trust indicates that Cathy has a future (upon Rhea’s death), contingent (assuming no revocation or amendment) interest in the trust property. See Restatement Trusts, 1d, § 56 comment f (intervivos trust where death of settlor is a condition precedent results in a “contingent equitable interest in remainder”). Specifically, Cathy will receive Rhea’s clothing and jewelry. In addition, if Robert predeceases Rhea, then a subtrust comprising 50% of the Rhea Trust’s remaining assets is created for Cathy. If Rhea predeceases Robert, then a marital trust and a family trust are created, and under the marital trust, Rhea’s descendants are each entitled to net income distributions and any principal necessary for education, health, support, and maintenance.

Robert and Jay ask this Court to adopt the approach of other jurisdictions in holding that a contingent beneficiary lacks standing to challenge the administration of a revocable trust. Robert’s and Jay’s reliance on the Uniform Trust Code (UTC) and cases from other jurisdictions is misplaced. Cases from other jurisdictions are inapposite because they involve statutory language that does not control here. Although we may look to decisions from other jurisdictions for guidance, In re Lampart, 306 Mich App 226, 235 n 6; 865 NW2d 192 (2014), we need not look outside our jurisdiction when our own law is clear. Because Cathy is an interested person under MCL 700.1105 and could invoke the court’s jurisdiction to remove a trustee under MCL 700.7201(3)(a), she had standing to file her petition. Given our conclusion, we find it unnecessary to address the parties’ dispute over whether Rhea was “disabled” under the trust terms during the relevant time periods, or whether the trust is revocable or irrevocable.

III. BREACH OF FIDUCIARY DUTIES BY ROBERT

In his cross-appeal, Jay argues that the probate court erred when it found no genuine issue of material fact regarding Robert’s breach of fiduciary duty to the trust and granted partial summary disposition in favor of Cathy. Robert makes a similar claim in his reply brief on appeal. We disagree.

Because the probate court necessarily relied on facts outside the pleadings, we treat the court’s grant of summary disposition as though it was supported by MCR 2.116(C)(10). See Sharp v City of Lansing, 238 Mich App 515, 518; 606 NW2d 424 (1999). A motion is properly granted under this subrule if no genuine issue of material facts exists and the moving party is entitled to judgment as a matter of law. Royal Prop Group, LLC v Prime Ins Syndicate, Inc, 267 Mich App 708, 713; 706 NW2d 426 (2005). In reviewing a lower court’s decision, this Court must view all the submitted admissible evidence in a light most favorable to the nonmoving party. In re Smith Estate, 252 Mich App 120, 123; 651 NW2d 153 (2002). “A genuine issue of

3 Robert did not raise this argument in his statement of questions presented in his opening brief on appeal. Therefore, the claim would be waived, except that it is properly raised by Jay. See People v Fonville, 291 Mich App 363, 383; 804 NW2d 878 (2011).
material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003). “This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law.” Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999).

This Court generally reviews the probate court’s decision to remove a trustee for an abuse of discretion. In re Duane v Baldwin Trust, 274 Mich App 387, 396-397; 733 NW2d 419 (2007). An abuse of discretion occurs only when the probate court’s decision falls outside the range of principled outcomes considering the facts and circumstances of the case. Saffian v Simmons, 477 Mich 8, 12; 727 NW2d 132 (2007). This Court reviews the language in a will or trust de novo, and the objective of a court in construing a trust is to “give effect to the intent of the settlor.” In re Stillwell Trust, 299 Mich App 289, 294; 829 NW2d 353 (2012) (quotation marks and citation omitted).

According to the terms of the Rhea Trust, Robert, as trustee, was required to act in the best interests of the trust beneficiaries. Robert was also a trust beneficiary, and under the plain language of the trust, Robert was prohibited from possessing powers that would permit him to enlarge or shift the beneficial interests under the trust. According to the trust’s terms, if Robert came to possess such power, he was required to appoint an independent co-trustee. The Rhea Trust held a 98% interest in Brody Realty, one of the companies owned and operated by the Brody family. As manager of Brody Realty, Robert possessed the power to sell interests belonging to or affecting the trust, and he acted pursuant to that power. First, Robert sold Brody Realty’s membership interest in the Brittany Park property to Jay and Jay’s two children, Stuart Brody and Rachel Brody. Second, Robert sold Jay an option to purchase the Rhea Trust’s interest in both Brody Realty and the Macomb Corporation. In arguing that Robert did not breach his fiduciary duty by entering into these transactions, Robert and Jay point to provisions in the Rhea Trust and a durable power of attorney (DPOA) executed by Rhea appointing Robert as her attorney-in-fact, which grant Robert broad authority over the trust property. But Rhea limited those powers with the trust provision requiring appointment of a co-trustee. Robert failed to appoint a co-trustee to ensure that the beneficiaries’ best interests were served while he served in a potentially conflicting role, and there is no dispute that his failure constituted a breach of his duties under the trust.

Jay argues that the Brittany Park property was not an asset of the Rhea Trust, and any provisions limiting a shift in beneficial interests under the trust did not apply to the Brittany Park sale. Jay also claims that an option agreement between Robert and Jay, which gave Jay an option to purchase the Rhea Trust’s interests in Brody Realty and Macomb Corporation, did not enlarge or shift any interests because even if he exercised his option under the agreement, Jay and Cathy would still each receive 50 percent of the Rhea Trust’s assets. These arguments fail. Brittany Park was owned by Brody Realty. The Rhea Trust owned 98 percent of Brody Realty, and was therefore interested in the sale. Under the option agreement, Jay’s acceptance would shift Cathy’s interest from 50% of Brody Realty to 50% of any proceeds from its sale. There is no guarantee that these separate interests would be equivalent, especially given the potential of income from Brody Realty. Under the Rhea Trust, Jay and Cathy would have each shared 50 percent of the remaining trust property following the deaths of their parents, including Brody
Realty. The probate court did not clearly err in concluding that the option contract shifted interests under the trust to favor Jay.

Robert and Jay further argue that there was no breach of fiduciary duty with respect to the option agreement because Robert was not required to treat his children equally and the Rhea Trust allowed him to make unequal distributions or to delay distributions. They are correct that, under Articles 8 and 9 of the trust, if Rhea predeceases Robert, the trust provisions will benefit Robert and he will have the power to appoint and distribute assets in “equal or unequal proportions.” But Rhea has not predeceased Robert, and the probate court did not clearly err in determining that the Rhea Trust was created with the general intent to treat Cathy and Jay equally. Trust Article 10 provides that upon the death of the survivor of Rhea and Robert, the trust property not previously distributed will be divided in separate trusts, with 50 percent to Jay and 50 percent to Cathy. Both Robert and Cathy testified that Rhea intended an equal distribution between the two siblings. It is uncertain who will live longer—Rhea or Robert—or what article of the Rhea Trust will control. While any inequities in the option agreement may be permissible under Articles 8 and 9, any inequity created by the Brittany Park sale or the option agreement would be inconsistent with the 50/50 split under Article 10. The probate court did not err in concluding that there was no genuine issue of material fact regarding Robert’s breach of fiduciary duty.

IV. APPROPRIATE REMEDIES

Robert and Jay also take issue with the remedies imposed by the probate court with respect to both the Brittany Park sale and the option agreement, arguing that the probate court lacked the power to reform or rescind a contract. We agree, in part, as to the Brittany Park sale.

“This Court reviews equitable decisions of the probate court de novo, but overturns any underlying factual findings only upon a finding of clear error.” In re Filibeck Estate, 305 Mich App 550, 553; 853 NW2d 448 (2014). “A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made.” Loutts v Loutts, 298 Mich App 21, 26; 826 NW2d 152 (2012) (quotation marks and citations omitted). “The granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case.” Tkachik v Mandeville, 487 Mich 38, 45; 790 NW2d 260 (2010) (quotation marks and citation omitted).

A. REFORMATION OF THE BRITTANY PARK AGREEMENT

Pursuant to a 2013 purchase agreement, Brody Realty sold its 63.5-percent interest in Brittany Park to Jay Brody’s Trust, Jay’s daughter Rachel, and Jay’s son Stuart. One purchase agreement documented the sale of the interest in two separate transactions, occurring on December 17, 2013 (13.6 percent) and December 31, 2013 (49.9 percent). Due to a purported lack of marketability and control, as well as extensive capital improvements required, Robert reduced the first sale price with a 15-percent discount and the second sale price with a 40-percent discount. The total amount of the sale price was $3,348,857.18, which included a down payment of $1,050,000. Pursuant to the agreement, Jay’s trust was required to repay the entire amount of

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the outstanding debt at an interest rate of 1.65 percent over 9½ years. Robert personally loaned Jay $850,000 to help him make the repayments. Ultimately, Jay Brody’s Trust attained a 62-percent interest in the Brittany Park Apartments, while Rachel and Stuart each received a 10-percent interest.

The probate court determined that Jay was complicit in Robert’s breaches of fiduciary duty and identified a “whole pattern of favoring Jay Brody at the expense of Cathy . . . .” After the probate court removed Robert, it reformed the Brittany Park purchase agreement to increase the purchase price to $4,293,406.64, and to increase the interest rate on the balance to 3.99 percent.

Reformation was not appropriate in this case. Reformation is an equitable remedy available for contracts if the writing “fails to express the intentions of the parties . . . . as the result of accident, inadvertence, mistake, fraud, or inequitable conduct . . . .” Major v Wayne Int’l Life Ins Co, 23 Mich App 260, 272; 178 NW2d 504 (1970); see also Holda v Glick, 312 Mich 394, 403-404; 20 NW2d 248 (1945). Courts of equity have the power to reform contracts so that they may “conform to the agreement actually made.” Casey v Auto-Owners Ins Co, 273 Mich App 388, 398; 729 NW2d 277 (2006) (quotation marks and citation omitted). If the basis for a proposed reformation is mistake, the mistake must be mutual. Holda, 312 Mich at 403-404. A mistake in law, i.e., a mistake by one side or the other regarding the legal effect of an agreement, is not a basis for reformation. Casey, 273 Mich App at 398.

The probate court erred when it reformed the purchase agreement for the Brittany Park sale because the parties to the Brittany Park sale intended the purchase price and interest rate to be the amounts delineated in the plain language of the purchase agreement. There is no evidence that they intended anything different.

Cathy argues that, regardless of the rules of contract, the probate court was permitted to reform the purchase agreement for the Brittany Park sale pursuant to its broad power under MCL 700.7901 to remedy a breach of trust. Specifically, Cathy argues that the probate court could “trace trust property wrongfully disposed of and recover the property or its proceeds” under MCL 700.7901(2)(i). We disagree. MCL 700.7901 provides:

(1) A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust.

(2) To remedy a breach of trust that has occurred or may occur, the court may do any of the following:

(a) Compel the trustee to perform the trustee’s duties.

(b) Enjoin the trustee from committing a breach of trust.

(c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means.

(d) Order a trustee to account.
(e) Appoint a special fiduciary to take possession of the trust property and administer the trust.

(f) Suspend the trustee.

(g) Remove the trustee as provided in section 7706.

(h) Reduce or deny compensation to the trustee.

(i) Subject to section 7912, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.

(j) Order any other appropriate relief.

The language of MCL 700.7901 makes no express reference to reformation. Rather, through MCL 700.7901, the Legislature only empowered the probate court with authority to void a sale, impose a lien or constructive trust on property, or recover property and its proceeds.

Cathy also argues that reformation was permissible under the probate court's authority to "[o]der any other appropriate relief" under MCL 700.7901(2)(j). This Court has defined "appropriate" as "'particularly suitable; fitting; compatible,' " or "'[s]uitable for a particular person, condition, occasion, or place; proper; fitting,' " Morinelli v Provident Life & Accident Ins Co, 242 Mich App 255, 262; 617 NW2d 777 (2000), quoting Random House Webster's College Dictionary (2d ed, 1997), and The American Heritage Dictionary: Second College Edition (1985). In this case, the reformation was not fitting because, as discussed earlier, the Brittany Park sale did not fail to express the intent of the parties. An order to recover proceeds from a sale could have been tailored to remedy the specific breach of fiduciary duty—here, Robert's and Jay's complicity in managing the trust contrary to Rhea's intent and without appointing a co-trustee to protect the beneficiaries best interests—by ordering the responsible parties to pay for any inequity. Moreover, the probate court's chosen remedy was not particular to the circumstances because the reformation affected the interests of Jay's trust, Stuart, and Rachel. There is no evidence in the record that Stuart and Rachel played a role in any improper conduct. Reformation was not appropriate under the plain language of MCL 700.7901(2)(j).

Cathy argues that the probate court's contract reformation was appropriate as an incident to its broad equitable powers. Cathy cites Evans v Grossi, 324 Mich 297, 305; 37 NW2d 111 (1949), for the proposition that a court of equity "may do whatever is necessary, not only for the preservation of trust property but, also, whatever is necessary for the protection of the rights of beneficiaries and the promotion of their interests." But a court's equity powers are not unlimited. Our Supreme Court has explained that "[a]lthough courts undoubtedly possess equitable power... [a] court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking." Devillers v Auto Club Ins Ass'n, 473 Mich 562, 590-591; 702 NW2d 539 (2005). "Equity jurisprudence [mold[s] its decrees to do justice amid all the vicissitudes and intricacies of life." Tkachik, 487 Mich at 45-46 (second alteration in original;
quotation marks and citation omitted). The probate court’s order did not weigh the intricacies of the sale against the parties responsible for the misconduct, and it erred when it chose the remedy of reformation of the Brittany Park purchase agreement.⁴

In his brief on cross-appeal, Jay claims that he should now have the option to rescind the Brittany Park agreement because of mistake or material change to the subject of the contract. But a party who bears the risk of a mistake is not entitled to rescind the contract. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 30; 331 NW2d 203 (1982). In this case, the probate court found that Jay was complicit in Robert’s breaches of his fiduciary duties. Therefore, it would not be unreasonable to allocate the risk of mistake to Jay. However, the probate court did not consider this issue and we will not decide it on appeal. The probate court should consider whether rescinding the contract for mutual mistake is appropriate on remand.

Jay also argues that the probate court could have treated the Brittany Park sale as a gift or advance on future distributions. Indeed, under the terms of the Rhea Trust, the trustee was permitted to make gifts to Rhea’s descendants for the best interests of Rhea, her family, and the estate. Any gift was required to be “deemed a satisfaction of such legacy or distribution, pro tanto, and that the gift or transfer made by the Trustee is not considered to be in addition to such legacy or distribution.” Although MCL 700.7901(2)(j) authorizes the court to “[o]rder any other appropriate relief,” it is for the probate court on remand, not this Court on review, to determine whether treating the sale as a gift is particularly suited to the circumstances.

Finally, Jay argues that the probate court incorrectly eliminated the discounts for lack of marketability and control in the Brittany Park sale when it increased the purchase price. Because we have concluded that the probate court’s reformation of the Brittany Park purchase agreement was in error, we find it unnecessary to address the propriety of the marketability discounts at this time.⁵ Any remaining factual questions must be resolved on remand.

B. SETTING ASIDE THE OPTION AGREEMENT

⁴ In light of this outcome, we decline to address Jay’s argument that no claim regarding the Brittany Park sale was properly before the probate court because Robert was acting as a manager of Brody Realty when he executed the sale, not as a trustee of the Rhea Trust.

⁵ Robert and Jay also argue that the probate court violated Stuart’s and Rachel’s right to due process by reforming the purchase agreement for the Brittany Park sale without giving Stuart and Rachel notice and an opportunity to be heard regarding the matter. In light of our decision, it is unnecessary to address this constitutional issue. Moreover, Stuart and Rachel have not complained of any violation, and Robert and Jay do not have standing to assert Stuart’s and Rachel’s due process claims on their behalf. *Barrows v Jackson*, 346 US 249, 255; 73 S Ct 1031, 1034; 97 L Ed 1586 (1953).
Robert and Jay also argue that the probate court improperly set aside an option agreement entered between Robert and Jay granting Jay the option to purchase substantial amounts of the Rhea Trust interest upon Rhea’s death. We disagree.

In exchange for approximately $103,322 and $33,325.24, Robert sold Jay an option to purchase “everything,” including the Rhea Trust’s interest in Brody Realty and the Macomb Corporation, as well as the interest in Brody Realty and the Macomb Corporation held by Robert’s trust. The period to exercise the option would begin on the nine-month anniversary of Rhea’s death and end on the 15-year anniversary of her death. Due to the option’s existence, the Rhea Trust’s assets would remain frozen until the option was exercised or the 15-year option period had expired. The purchase price would be determined by the “fair market value of the membership interests or capital stock . . . considering all applicable valuation discounts.” If Jay exercised the option related to the Rhea Trust interest in Brody Realty, Jay would repay the purchase price to the Rhea Trust in monthly payments over nine years at the midterm applicable federal rate of interest. Pursuant to the option agreement, Jay also received an irrevocable present proxy to vote Robert’s interest in Brody Realty, which prevented Robert from exercising his rights to vote and directly conflicted with his responsibilities under the Rhea Trust:

From the date of Rhea’s death until all the options provided under this agreement have expired, Rhea’s trust shall use all means at its disposal to ensure that Jay (and not Cathy Deutchman or Jim Deutchman) manages Brody Realty . . . and Macomb Management includes [sic] voting control of Brody Realty and Macomb, amending articles, by-laws, operating agreements and entering into all contracts including agreements to sell and property management agreements. To ensure the foregoing, Rhea’s Trust will provide Jay with irrevocable proxies to represent Rhea’s Trust at any meeting of the members or managers of Brody Realty and any meeting of the Macomb Shareholders.

The option agreement further provided:

In the event Cathy Deutchman or James Deutchman, directly or indirectly, interfere with or attempt to interfere with Jay Brody’s rights under this agreement then the purchase price shall be reduced by $2 million, and Jay shall determine how this reduction in the purchase price shall be allocated.

The option agreement did not contain any provisions pertaining to Cathy’s interests in the Rhea Trust or the family’s businesses. Cathy was not given the option to purchase the assets of the trust.

“Rescission of a contract is an equitable remedy to be exercised in the sound discretion of the trial court.” Schmude Oil Co v Omar Operating Co, 184 Mich App 574, 586-587; 458 NW2d 659 (1990). Here, the probate court concluded that the option agreement was part of a pattern of favoring Jay over Cathy. The probate court reasoned that the option’s delay of
distribution to Cathy and the fact that the option was offered only to Jay, along with the present proxy and the $2,000,000 penalty, supported this conclusion.

On appeal, Robert and Jay argue that there is a question of fact regarding whether the option favored Jay over Cathy. Robert argues that any discounts to the purchase price would only be applied by an independent appraiser after determining the fair market value, and that Cathy would not necessarily be disadvantaged by the repayment period if Jay exercised the option. However, the probate court did not solely rely on either the discounts or the repayment period in setting aside the option agreement. Rather, the probate court appropriately considered the overall delay in distribution to Cathy, which ran contrary to the terms of the Rhea Trust. Pursuant to the option agreement, Jay would be able to purchase the entire interest in Brody Realty immediately upon exercising the option, while Cathy would not be paid for her interest for 15 years.

Jay suggests that the 15-year option period was not more beneficial to Jay than to Cathy, and that distribution delays are allowed under the terms of the Rhea Trust. Jay is correct that, under the trust, the trustee may “delay making the distributions and divisions . . . for a reasonable period of time if the Trustee, in its sole discretion, determines that such delay will accomplish one or more of the trust’s purposes.” Even if a 15-year delay is deemed a “reasonable period of time” under the language of the trust, the delay itself affected Cathy and Jay unequally. Neither Cathy’s nor Jay’s interests in Brody Realty would be distributed until the option was exercised or expired. But Jay would enjoy the full control over the entity through the proxy during that period. The inequity in that arrangement is clear. Additionally, the language of the option agreement evidences a clear intent to favor Jay’s interests over Cathy’s, Robert’s, and the Rhea Trust’s. Robert and Jay have failed to establish any error requiring reversal of the portion of the order setting aside the option agreement.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O’Brien
/s/ Kathleen Jansen
/s/ Christopher M. Murray

\^\^ Peripherally, the parties dispute whether the proxy and the $2,000,000 penalty in the option agreement were permissible under Michigan law. We need not decide these questions because we conclude that the probate court did not err when it set aside the option agreement containing those provisions.
Application for Consideration

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

Date: October 5, 2017

Name: William H. Horton ______________________ P Number 31567 ______________

Firm Name: Giarmore, Mullins & Horton, P.C. ________________________________

Address: 101 W. Big Beaver Rd, 10th Floor ________________________________

City: Troy __________________________ State: MI ______ Zip Code 48084 __________

Phone Number: 248-457-7060 __________ Fax Number: (248) 404-6360 __________

E-mail address: bhorton@gmhlaw.com ________________________________

Name of Case: In re Rhea Brody Trust, Oakland County Probate Court Case No. 15-361,379-TV. Court of Appeals Case No. 330871.

Parties Involved: Robert Brody (husband), Rhea Brody (wife), Jay Brody (son), Cathy Deutchman (daughter). Cathy was the Petitioner.

Current Status: Decision by Court of Appeals September 12, 2017. Robert and Jay intend to file an Application for Leave to Appeal to the Supreme Court.

Deadlines: Application for Leave to Appeal to be filed on or before October 24, 2017. By analogy to MCR 7.312(H)(3), a motion to file an amicus brief should be filed by the Section after the Application is filed.

Issue(s) Presented: Whether a contingent beneficiary has standing to challenge the administration of a revocable trust. The Court of Appeals held the beneficiary has standing even though the trust is revocable.

Michigan Statute(s) or Court Rule(s) at Issue: MCR 2.201(B) (real party in interest); MCL 700.7103(h) (definition of "revocable"); MCL 700.7603(1) (duty owed only to settlor); MCL 700.7201(1) (jurisdiction invoked by interested person).
Common Law Issues/Cases at Issue: Whether a person without a vested interest in a trust is a real party in interest or has standing. E.g., In re Pagonas, Court of Appeals Case No. 290864 (July 27, 2010) (unpublished) (no standing if no interest in trust); numerous published opinions in other Uniform Trust Code states holding no standing until the trust becomes irrevocable.

Why do you believe that this case requires the involvement of the Section? The Section is the voice of Michigan's established probate and estate planning attorneys and its opinion is given great weight by the Court. This decision upends the advice almost certainly provided by the Section's attorneys for years that the settlor of a revocable trust unilaterally controls his or her assets until death. In addition to undermining the utility of a revocable trust in the future, the decision also provides a basis for challenging the use of assets in the many revocable grantor trusts that are currently in existence. Moreover, Michigan's Trust Code is the adoption of the Uniform Trust Code. This decision is contrary to the decisions of 14 other states, most of which, like Michigan, are Uniform Trust Code states. We are aware of no decisions to the contrary anywhere. One of the primary purposes of the Uniform Trust Code is to provide certainty among the states. Since many Michigan clients have assets in other states or citizens of other states have assets in Michigan, this decision is likely to cause unwarranted complexity in estate planning — essentially the creation of a Michigan-specific strategy — in order to avoid the effect of this decision if the client desires to retain control over their assets until death.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? Yes. The decision of the Court of Appeals is stare decisis unless overruled or vacated. MCR 7.215(C)(2). According to the Court of Appeals decision, any "interested person" can challenge a trustee's" decisions while the trust is revocable - even though such "interested persons" can be removed as a beneficiary until the trust becomes irrevocable. The effect of this opinion is that the settlor no longer has complete control over his or her property until death.
MEMORANDUM

TO: Marlaine C. Teahan, Chair, Probate Council
FROM: David L.J.M. Skidmore, Chair, Amicus Committee
DATE: October 16, 2017
RE: Application for Amicus Brief - Brody Trust

Counsel for Robert Brody has requested that the Probate Council file an amicus brief in support of his appeal of Brody v Deutchman, ___ NW2d ___ (2017); No. 330871, 2017 WL 4015783.

PROCEDURAL BACKGROUND

Brody Trust involved the following litigants and interested persons: (1) Rhea Brody ("Rhea" or the "Settlor"), the settlor of the Rhea Brody Living Trust U/A/D January 17, 1978, as amended (the "Trust"); (2) Robert Brody ("Robert" or the "Trustee"), Rhea's husband and the acting Successor Trustee of the Trust at the time of the commencement of the proceeding; (3) Jay Brody ("Jay"), Rhea and Robert's son; and (4) Cathy Deutchman ("Cathy"), Rhea and Robert's daughter.

Cathy filed a petition with the Oakland County Probate Court seeking relief related to the Trust. The relief sought by Cathy included: removal of Robert as Trustee; appointment of a Successor Trustee; equitable relief to reverse or ameliorate the effects of transactions performed by Robert as Trustee; delivery of trust accountings by Robert as removed Trustee to an appointed Successor Trustee; temporary court supervision of the Trust; and an award of money damages. Id at *2.

Robert as Trustee and Jay opposed Cathy's petition. In part, Robert as Trustee and Jay argued that Cathy lacked standing to petition the Court for relief regarding the Trust, on the following grounds: (1) under the terms of the Trust, Rhea was the sole beneficiary during her lifetime; 1 (2) Cathy was a contingent remainder beneficiary (i.e., Cathy's beneficial interest in

1 Under the Trust Agreement, the Successor Trustee possessed the power, during the incapacity of the Settlor, to distribute income and/or principal to the Settlor and/or her spouse for their respective health, support, maintenance and general welfare. (Art Four, Sec 3.A & 3.B.) The Successor Trustee also possessed the power to make annual exclusion gifts to Grantor's spouse, Grantor's descendants, and/or the spouses of Grantor's descendants. (Art Four, Sec 3.E.) Hence, during Settlor's incapacity, Cathy was a potential recipient of annual exclusion gifting from Robert as Successor Trustee, and the existence of this factor supports the conclusion that Cathy had standing to petition the Probate Court for relief related to the Trust.
the Trust was contingent on surviving until the death of her second parent to die; (3) by its
terms, the Trust was revocable by Rhea (meaning that Rhea at any time had the right to modify
or revoke Cathy’s beneficial interest); (4) Rhea had not been found or declared to be mentally
incapacitated, so that she still possessed the power to amend or revoke her Trust; and (5) as a
matter of law, a contingent beneficiary does not have standing to bring an action regarding the
administration of a revocable trust.

Cathy argued that Rhea was mentally incapacitated by dementia and no longer had the
ability to amend or revoke her Trust, which conferred standing upon Cathy.

TRUST AGREEMENT

The Trust Agreement creating the Rhea Brody Living Trust is part of the record on
appeal. The Court of Appeals, in its decision, did not discuss the terms of the Trust Agreement.

Under the Trust Agreement, the Settlor named herself as the initial Trustee of the Trust.
(Art One, Sec 1.) She designed her husband Robert as the first Successor Trustee.² (Art Thirteen,
Sec 3.B.)

The Trust Agreement provides that the Settlor is to be deemed disabled when determined
to be such by either two licensed physicians or a court of competent jurisdiction. (Art Four, Sec
2.A & 2.B.) The Settlor will no longer be deemed disabled if and when she is determined to have
recovered, by either two licensed physicians or a court of competent jurisdiction. (Art Four, Sec.
2.D.)

While the Settlor is deemed disabled, the Successor Trustee is directed to account to the
Settlor’s “Designated Agent,” defined as either the Settlor’s attorney-in-fact under durable power
of attorney or duly appointed conservator. (Art Four, Sec 2.E; Art 16, Sec 1.B.) The Trust
Agreement provides that the Settlor’s Designated Agent represents the Settlor for purposes of
MCL 700.7303, which governs and permits virtual representation of a principal by her fiduciary.

The Trust is deemed to be irrevocable during any period in which the Settlor is deemed
disabled. (Art Four, Sec 3.F.) However, during the Settlor’s disability, the Settlor’s Agent
nonetheless possesses “the power to terminate, revoke, amend, reform and restate this Trust
Agreement,” provided that such powers are granted to the Settlor’s Agent by “the document
pursuant to which the Agent was appointed.”³ (Id; Art Four, Sec 3.E.) The Trust is also
irrevocable upon the Settlor’s death. (Art Four, Sec 1.D.)

PROBATE COURT’S RULING

“The probate court found that Cathy had standing pursuant to MCL 700.7201, which
provides, in pertinent part, that ‘[a] court of this state may intervene in the administration of a

² Prior to the Brody Trust litigation, Robert had commenced to serve as Successor Trustee.

³ Under Rhea’s durable power of attorney, Robert as attorney-in-fact possessed the power to
revoke or amend the Trust Agreement.
trust to the extent its jurisdiction is invoked by an interested person or as provided by law.” MCL 700.7201(1).” *Id* at 4.

The probate court determined that Cathy was an interested person under MCL 700.1105(c). “The definition of ‘interested person’ is provided in MCL 700.1105(c), which states: ‘Interested person’ or ‘person interested in an estate’ includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, and by the supreme court rules.” *Id* at 5.

The probate court rendered partial summary disposition for Cathy, granting much of the relief sought by her petition, including a determination that Rhea was “disabled pursuant to the terms of the trust.” *Id* at 1. Robert and Jay appealed as of right. *Id*

**COURT OF APPEALS’ RULING**

The Court of Appeals affirmed the probate court’s ruling. However, in apparent contrast to the probate court’s ruling, the Court of Appeals held that Rhea’s capacity or incapacity, and the Trust’s revocability or irrevocability, were irrelevant to its analysis. “Because Cathy is an interested person under MCL 700.1105 and could invoke the court’s jurisdiction to remove a trustee under MCL 700.7201(3)(a), she had standing to file her petition. Given our conclusion, we find it unnecessary to address the parties’ dispute over whether Rhea was ‘disabled’ under the trust terms during the relevant time periods, or whether the trust is revocable or irrevocable.” *Id* at 5.

“The parties dispute whether, at the time Cathy filed her petition, the trust was revocable or irrevocable. Robert and Jay argue that Cathy has no beneficial interest in the trust because she is a contingent beneficiary, and the trust is revocable. Robert’s and Jay’s argument is premised on three assumptions: (1) that Rhea has not been declared disabled pursuant to the trust, and her trust is revocable by its plain terms, or (2) that the trust’s terms render it revocable by Robert, the trustee and holder of a DPOA, indefinitely, and (3) that a contingent beneficiary does not have standing to bring an action regarding the administration of a revocable trust. We need not consider the validity of Robert’s and Jay’s first two assumptions, however, because we conclude that their argument fails on its third assumption.” *Id* at 4.

The argument that “failed” was the argument that, as a matter of law, “a contingent beneficiary does not have standing to bring an action regarding the administration of a revocable trust.” Hence, the Court of Appeals ruled, categorically, that a contingent trust beneficiary has standing to bring such an action.

The Court of Appeals based its ruling on the definition of “interested person” in MCL 700.1105(c), concluding that Cathy was an “interested person” as a “child” of Rhea. The Court of Appeals also concluded that Cathy was an “interested person” as a “beneficiary” of the Trust. “In addition, Cathy is a ‘beneficiary.’ Under MCL 700.1103(d), a beneficiary includes a
‘trust beneficiary,’ defined as a person with ‘a present or future beneficial interest in a trust, vested or contingent.’ Black’s Law Dictionary defines ‘beneficial interest’ as ‘[a] right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property.’ The plain language of the trust indicates that Cathy has a future (upon Rhea’s death), contingent (assuming no revocation or amendment) interest in the trust property. See Restatement Trusts, 1d, § 56 comment f (intervivos trust where death of settlor is a condition precedent results in a ‘contingent equitable interest in remainder’). Specifically, Cathy will receive Rhea’s clothing and jewelry. In addition, if Robert predeceases Rhea, then a subtrust comprising 50% of the Rhea Trust’s remaining assets is created for Cathy. If Rhea predeceases Robert, then a marital trust and a family trust are created, and under the marital trust, Rhea’s descendants are each entitled to net income distributions and any principal necessary for education, health, support, and maintenance.” *Id* at *5

The Court of Appeals ruled that it did not need to consider legal authority from other jurisdictions “holding that a contingent beneficiary lacks standing to challenge the administration of a revocable trust.” *Id.* “Robert’s and Jay’s reliance on the Uniform Trust Code (UTC) and cases from other jurisdictions is misplaced. Cases from other jurisdictions are inapposite because they involve statutory language that does not control here. Although we may look to decisions from other jurisdictions for guidance, . . . [w]e need not look outside our jurisdiction when our own law is clear.” *Id.*

**ANALYSIS**

MCL 700.7201(1) provides that “an interested person” may invoke the jurisdiction of a state court to “intervene in the administration of a trust.” “A court of this state may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.” MCL 700.7201(1). According to the Reporter’s Comment, this statute “is not jurisdictional” but is intended to “clarify[] the role of the courts with respect to the administration of trusts.” J. Martin and M. Harder, Estates and Protected Individuals Code with Reporters’ Commentary, Section 700.7201, Reporter’s Comment (ICLE 2017).

“Interested person” is defined by MCL 700.1105(c). However, the Court of Appeals failed to appreciate that identification of a proper “interested person” involves more than a literal application of the first sentence of that statute. Indeed, the second sentence of the statute provides that “[i]dentification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, and by the supreme court rules.” MCL 700.1105(c). The Reporter’s Comment to MCL 700.1105(c) provides: “Whether a party is an interested person turns on whether he or she has a claim against the estate or has an economic or other legal interest in the estate that will be affected, positively or negatively, by the proceeding.” J. Martin and M. Harder, Estates and Protected Individuals Code with Reporters’ Commentary, Section 700.1105, Reporter’s Comment (ICLE 2017).

MCL 700.1105(c) references the role of “the supreme court rules” in identifying “interested persons.” Michigan Court Rule 5.125 governs the identification of “interested persons” in various types of probate court proceedings. MCR 5.125(C)(33) identifies “the persons interested in a proceeding affecting a trust other than those already covered by subrules
(C)(6), (C)(28), and (C)(32)[.]” The list includes “the qualified trust beneficiaries affected by the relief requested” and, “if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2).” MCL 700.7603 will be further discussed below. The Court of Appeals did not mention MCR 5.125 in its decision.

MCR 5.125(C)(33) indicates that the “interested persons” include an affected “qualified trust beneficiary.” That term is defined by MCL 700.7103(g) to mean “a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary’s qualification is determined: (i) The trust beneficiary is a distributee or permissible distributee of trust income or principal; (ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate; (iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.” The Court of Appeals did not mention MCL 700.7103(g) in its decision.

While MCL 700.7201(1) refers to “an interested person” invoking the jurisdiction of a state court, MCL 700.7203(1) provides more narrowly that the probate court “has exclusive jurisdiction of proceedings in this state brought by a trustee or beneficiary that concern the administration of a trust as provided in section 1302(b) and (d).” The Court of Appeals did not mention MCL 700.7203(1) in its decision.

Hence, the determination of who is an “interested person” entitled to invoke the jurisdiction of the probate court depends on “the particular purposes of, and matter involved in, a proceeding,” MCL 700.1105(c), and whether the petitioner “has an economic or other legal interest in the estate [or trust] that will be affected, positively or negatively, by the proceeding.” J. Martin and M. Harder, Estates and Protected Individuals Code with Reporters’ Commentary, Section 700.1105, Reporter’s Comment (ICLE 2017).

In evaluating the petitioner’s potential “legal interest” in the trust, the probate court must consider whether the petitioner is owed any legal duty by the current trustee of the trust. Consider the following hypothetical: Beneficiary A is currently entitled to mandatory distribution of income from the Trustee of the Trust. Beneficiary B is entitled to distribution of the remaining Trust assets at the death of Beneficiary A. Suppose that Beneficiary A waives her right to receive income distributions in a particular year and directs the Trustee to add such income to the principal of the Trust. Beneficiary B has no right to object to this arrangement because the Trustee’s duty to distribute income is owed only to Beneficiary A. If Beneficiary B petitions the probate court to remove the Trustee based on its failure to distribute income to Beneficiary A, the probate court would have to determine whether Beneficiary B is the real party in interest to maintain such claim. That analysis involves more than asking whether Beneficiary B is merely a “beneficiary” of the Trust. Instead, the probate court must consider whether any legal duties to Beneficiary B have been allegedly breached. If Beneficiary B has no legal interest in the transaction that is the subject of the proceeding, then Beneficiary B would lack standing to pursue the petition.
In a proceeding involving a revocable trust during the settlor’s lifetime, the probate court may conclude that a petitioner other than the settlor lacks standing to petition for relief because the current trustee only owes legal duties to the living settlor. “[W]hile a trust is revocable, rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.” MCL 700.7603(1). The Court of Appeals did not mention MCL 700.7603 in its decision.

However, the trustee’s duties may be affected by the incapacity of the settlor. “If the trustee reasonably believes that the settlor of a revocable trust is an incapacitated individual, the trustee shall keep the settlor’s designated agent or, if there is no designated agent or if the sole agent is a trustee, each beneficiary who, if the settlor were then deceased, would be a qualified trust beneficiary informed of the existence of the trust and reasonably informed of its administration.” MCL 700.7603(2).

These statutes reflect the following realities. A living settlor with mental capacity possesses the ability to oversee the trustee’s performance and to take action in response to perceived mistakes or improprieties. A living settlor without mental capacity does not possess this ability. It then becomes necessary for somebody else with an interest in the trust to oversee the trustee’s performance. Hence, the incapacitated settlor’s agent is entitled to receive notice regarding trust administration in order to oversee the trustee’s performance. If the agent and the trustee are the same person, then the agent cannot perform the oversight function. In that case (or if there is no designated agent), “each beneficiary who, if the settlor were then deceased, would be a qualified trust beneficiary informed of the existence of the trust and reasonably informed of its administration.” MCL 700.7603(2). The probate court would use the definition in MCL 700.7103(g) to identify qualified trust beneficiaries. “Subsection (2) ... creates a mechanism for ensuring supervision of a trustee while the settlor is incapacitated.” J. Martin and M. Harder, Estates and Protected Individuals Code with Reporters’ Commentary, Section 700.7603, Reporter’s Comment (ICLE 2017).

MCL 700.7603 does not expressly state that a qualified trust beneficiary, receiving notice of trust administration under subsection (2), becomes entitled to enforce any perceived breach of duty by the trustee. However, such power is implicit in the statutory framework. It would be absurd to provide notice of trust administration to qualified trust beneficiaries during the settlor’s incapacity in order to ensure supervision of the trust – but withhold any power in such beneficiaries to respond to problems with the trustee’s administration.

Hence, in Brody Trust, Rhea’s mental capacity or incapacity was directly relevant to Cathy’s standing to petition the probate court for relief regarding the Trust. It is apparent from the companion Brody Conservatorship case, In re Conservatorship of Brody, ___ NW2d___ (2017), that Robert was not only Successor Trustee of the Trust but also Rhea’s attorney-in-fact under durable power of attorney. Therefore, given Rhea’s mental incapacity, the qualified trust beneficiaries – including Cathy – were entitled to notice regarding trust administration and
empowered to petition the probate court for relief regarding perceived problems with trust administration.  

The probate court properly relied on this incapacity factor in its analysis and ruling. The Court of Appeals improperly ruled that this incapacity factor was irrelevant to its analysis. Moreover, the Court of Appeals’ ruling that a “child” or a “beneficiary” always possesses standing to petition the probate court for relief related to a trust was erroneous, based on the foregoing analysis.

MCL 700.7603 is not mentioned in the list of Michigan Trust Code provisions which cannot be modified by the terms of the trust agreement. MCL 700.7105(2). A question has therefore been raised regarding whether the terms of the Brody Trust Agreement (directing the Successor Trustee to account only to the Settlor’s Designated Agent in the event of Settlor’s disability, without consideration of whether the Successor Trustee is the same person as the Settlor’s Designated Agent) prevail over MCL 700.7603(2) (directing the Successor Trustee, if the same person as the “settlor’s designated agent,” to account to “each beneficiary who, if the settlor were then deceased, would be a qualified trust beneficiary”).

It is debatable whether the Brody Trust Agreement’s direction that the Successor Trustee account only to the Settlor’s Designated Agent in the event of Settlor’s disability should be construed (1) to apply in all circumstances, regardless of whether the Successor Trustee is the same person as the Settlor’s Designated Agent, or (2) to not apply when the Successor Trustee is the same person as the Settlor’s Designated Agent. One might argue that the Brody Trust Agreement is silent on the “Successor Trustee same person as Settlor’s Designated Agent” because of oversight rather than intent. To the extent that a trust agreement does not address a particular matter, then the default provisions of the Michigan Trust Code, including MCL 700.7603(2), would apply.

Moreover, MCL 700.7105(2) provides that the terms of a trust agreement cannot modify MCL 700.7814(2)(c) (requiring the trustee to provide information about the trust to the qualified trust beneficiaries, within 63 days after the date on which the trustee knows that a formerly revocable trust has become irrevocable due to the settlor’s death “or otherwise”) or MCL 700.7814(4) (authorizing the probate court to order the trustee to serve accountings on qualified trust beneficiaries who are not entitled to receive accountings under the terms of the trust agreement).

Hence, in Brody Trust, contingent remainder beneficiary Cathy was entitled to receive notice that the Trust was irrevocable due to the Settlor’s disability. She was also entitled to petition the Probate Court to order Robert as Successor Trustee to serve her with accountings.

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4 Under MCL 700.7603(2), the triggering event for the qualified trust beneficiaries to receive notice is the trustee’s reasonable belief “that the settlor of a revocable trust is an incapacitated individual.” In cases where the parties are disputing the application of MCL 700.7603(2), a trustee who wants to avoid giving notice to qualified trust beneficiaries can be expected to deny having any such subjective belief regarding the settlor’s incapacity. In such a case, the question may become whether the trustee should have reasonably believed that the settlor was incapacitated.
based on the rationale underlying MCL 700.7603(2) – even if MCL 700.7603(2) was overridden by the terms of the Brody Trust Agreement.

The probate court and the Court of Appeals made reference to the settlor’s capacity or incapacity, and correspondingly, whether the Trust was revocable or irrevocable. Linking capacity and revocability is a matter which must be handled with some care. In one sense, the settlor’s capacity is directly relevant to whether a trust is revocable, but in another sense, the settlor’s capacity is irrelevant to whether a trust is a “revocable trust.”

Section 7103 of the Michigan Trust Code, MCL 700.7103, defines “revocable trust” in such a way that the incapacity of the settlor is irrelevant to the definition. “Revocable”, as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.” MCL 700.7103(h). IRS regulations provide a similar definition. These technical legal definitions are significant for tax treatment of the trust and other matters. Under these definitions, the settlor’s capacity is irrelevant to whether the trust is defined as a “revocable trust.”

However, in another sense, the settlor’s capacity is very much relevant to whether the trust is revocable or irrevocable. Initially, the trust agreement in question may expressly provide that the trust is irrevocable during any time period when the settlor is deemed disabled or incapacitated. The Trust Agreement in Brody Trust included such a provision. Consequently, once the Probate Court determined that the Settlor was incapacitated, the Trust Agreement by its terms became “irrevocable,” meaning that the Settlor lacked the ability to revoke or amend the Trust due to her incapacity. Even if a trust agreement does not expressly provide that the trust is irrevocable during any time period when the settlor is deemed disabled or incapacitated, it would still be accurate to say that a revocable trust is functionally irrevocable, or de facto irrevocable, once the settlor becomes mentally incapacitated, simply because an incapacitated settlor cannot exercise the power to amend or revoke the trust. In this sense, the settlor’s capacity is relevant to whether the trust is considered to be revocable or irrevocable.

The fact that an originally revocable trust is deemed irrevocable by the terms of the trust agreement during the settlor’s incapacity, or is de facto irrevocable due to the settlor’s incapacity, is relevant to the standing analysis at issue in Brody Trust. If a trust is revocable and the settlor retains mental capacity, then the settlor’s gift to a beneficiary remains subject to amendment or revocation. In other words, there is some degree of uncertainty. That uncertainty associated with a beneficiary’s interest in the trust is relevant to the beneficiary’s standing to petition the probate court for trust-related relief. Once a trust becomes “functionally irrevocable,” then the uncertainty is substantially, if not entirely, eliminated, and the contingent remainder beneficiary’s standing is solidified.

CONCLUSION

In conclusion, the Amicus Committee recommends that the Probate Council file an Amicus Brief in the Brody Trust matter requesting that the Michigan Supreme Court grant
certiorari in order to (1) reverse the Court of Appeals’ ruling that a contingent remainder beneficiary always has standing to petition the probate court for relief regarding trust administration, and (2) clarify that the contingent remainder beneficiary in this case did have standing because the settlor was incapacitated and the Settlor’s Designated Agent was also serving as Successor Trustee.

Several of the Michigan Trust Code provisions cited herein are based on the UTC. Case law from other jurisdictions applying identical UTC provisions may be helpful in the Amicus Brief. The drafter of the Amicus Brief should also include Michigan authority regarding statutory interpretation (particularly the idea that a statute must be construed in a way that is consistent with the entire statutory framework).

DLJMS

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STATE OF MICHIGAN
COURT OF APPEALS

In re CONSERVATORSHIP OF RHEA BRODY.

MARY LYNEIS, as Conservator for RHEA BRODY,

Appellee,

v

ROBERT D. BRODY,

Appellant,

and

JAY BRODY,

Interested Party,

and

GERALD BRODY and CATHY B. DEUTCHMAN,

Interested Parties-Appellees.

FOR PUBLICATION
September 19, 2017
9:00 a.m.

No. 332994
Oakland Probate Court
LC No. 2015-367333-CA

Before: O'BRIEN, P.J., and JANSSEN and MURRAY, JJ.

PER CURIAM.

In this estate case involving Rhea Brody's personal assets, Rhea's husband, appellant Robert Brody, appeals as of right the probate court's order appointing Mary Lyneis as Rhea's conservator. Rhea's daughter, Cathy B. Deutchman, filed the petition for conservatorship, which was opposed by Robert and Jay Brody, the son of Robert and Rhea. We affirm.
I. APPOINTMENT OF A CONSERVATOR

Robert argues on appeal that the probate court abused its discretion by appointing a conservator to manage Rhea’s estate and affairs under MCL 700.5401. We disagree.

This Court reviews a probate court’s appointment of a conservator for an abuse of discretion. In re Conservatorship of Shirley Bittner, 312 Mich App 227, 235; 879 NW2d 269 (2015). “An abuse of discretion occurs when the court’s decision falls outside the range of reasonable and principled outcomes.” Id. This Court reviews the probate court’s factual findings for clear error and its legal conclusions de novo. Id. at 235-236. “A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding.” In re Townsend Conservatorship, 293 Mich App 182, 186; 809 NW2d 424 (2011) (quotation marks and citation omitted). “The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court.” In re Erickson Estate, 202 Mich App 329, 331; 508 NW2d 181 (1993).

Article V of the Estates and Protected Individuals Code (EPIC), MCL 700.5101 et seq., provides protection for individuals under disability. The standards governing conservatorship appointments are described in MCL 700.5401, which, in relevant part, provides:

(3) The court may appoint a conservator or make another protective order in relation to an individual’s estate and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual’s support, care, and welfare or for those entitled to the individual’s support, and that protection is necessary to obtain or provide money.

These prerequisites must be established by clear and convincing evidence. MCL 700.5406(7). The clear-and-convincing-evidence standard is “the most demanding standard applied in civil cases . . . .” Bittner, 312 Mich App at 237, quoting In re Martin, 450 Mich 204, 227; 538 NW2d 399 (1995). Clear and convincing proof produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [Martin, 450 at 227 (quotation marks and citations omitted; alterations in original).]
Robert does not dispute that MCL 700.5401(3)(a) is satisfied, as Rhea’s frontal temporal dementia renders her unable to manage her property or business affairs effectively. On appeal, Robert argues only that the probate court clearly erred in its conclusion that Rhea “has property that will be wasted or dissipated unless proper management is provided.” We hold that the circuit court did not clearly err when it found that Rhea had property that would be wasted or dissipated without proper protection and oversight, or abuse its discretion when it appointed a conservator to oversee Rhea’s estate.

The probate court thoughtfully considered Rhea’s circumstances and the nature of each of the assets in Rhea’s personal estate—comprising a Fifth Third bank account for tax refunds, an individually-held IRA, a jointly-held Chase Bank account, and jointly-owned homes in Michigan and Florida—before concluding that the requirements of MCL 700.5401(3) had been met by clear and convincing evidence. The Fifth Third bank account, containing only $380.60 at the time of the hearing, existed for depositing tax refunds. Lyneis testified that, as special conservator, she was responsible for reviewing Rhea’s personal tax return and paying any tax liabilities, which included Rhea’s potentially-substantial income from the Rhea Trust. Rhea risked negative tax consequences for failure to file her signed return and pay any liabilities. While the probate proceedings were ongoing, Jay completed Rhea’s tax return but refused to provide it to Lyneis for review. Without the ability to review Rhea’s tax return, Lyneis was unable to verify whether any refund was properly deposited into the Fifth Third account. Assets involving tax liabilities and refunds, including the Fifth Third account dealing with refunds, risked waste or dissipation without proper management.

The probate court noted that Rhea’s IRA required an election of annual distributions. The probate court noted that with no one in place to authorize mandatory distributions, Rhea’s IRA would be subject to tax penalties, which created a risk of waste and dissipation of the IRA funds. Robert argues that the probate court could not have found the IRA subject to waste or dissipation as a result of tax penalties because automatic distributions from the IRA had been set up to occur automatically for years, and Rhea’s IRA requires “minimal involvement.” Respondent fails to explain how the fact that an asset requires only minimal oversight renders the asset less likely to fall victim to waste or dissipation. Further, Robert’s argument is not supported by the record. Although Lyneis testified that the annual distribution was deposited into the Rhea Trust for 2015, there was no evidence regarding annual distributions, automatic or otherwise, before 2015. Further, there is no evidence that appropriate distributions are guaranteed to occur absent intervention.

Rhea shares an interest in two homes, one in Michigan and one in Florida, with her husband Robert. The two also share a Chase Bank account, which is used to fund payments on the Florida home. The Brody family bookkeeper, Bonnie Delliger, testified that she actively requested funds from Rhea’s trust account to fund the Chase Bank account and satisfy mortgage payments on the Florida home. Because the Florida home is not regularly used, it is particularly susceptible to waste. Rhea herself is incapable of traveling to the Florida home. The probate court reasoned that, without management of mortgage payments or oversight of home maintenance, both the Michigan home and the Florida home risked waste or dissipation.

Robert suggests that it was improper for the probate court to consider joint assets when evaluating the risk of waste or dissipation because a conservator would be unable to change the
nature of jointly-owned property. Robert cites for authority our Supreme Court’s 1988 opinion in
In re Wright Estate, 430 Mich 463, 469-470; 424 NW2d 268 (1988), wherein the Court held
that while “a conservator has the power to collect, hold, and retain assets of the estate, he may
not change the nature of joint accounts created by the disabled adult before the adult was
declared incompetent.” (Quotation marks and citations omitted.) Robert misinterprets the
Court’s holding in that case. Although Wright precludes a conservator from changing the nature
of joint accounts after the conservator’s appointment, it does not limit a conservator’s power to
manage the accounts or preclude joint assets from being considered at the conservatorship
hearing. See id. Under MCL 700.5419, “[a]ppointment of a conservator vests in the conservator
title as trustee to all of the protected individual’s property... held at the time of or acquired after
the order.” (Emphasis added.) The probate court did not err when it considered whether the
jointly-held assets would be subject to waste or dissipation in satisfaction of MCL
700.5401(3)(b).1

Dellinger testified that she stopped managing payments for Rhea’s expenses in January
2016, when Lyneis was appointed special conservator. Dellinger was concerned that without a
conservator, Rhea’s expenditures would not receive continued oversight. The probate court
agreed, stating, “If no one is making decisions, it is a certainty, frankly, that property will be
wasted or dissipated.” Given these facts, the probate court did not clearly err in finding that, as a
result of Rhea’s inability to manage her property and business affairs, Rhea’s property would be
wasted without proper management.

Robert also argues that the probate court erred in appointing a conservator to act on
behalf of Rhea because Robert, who held a durable power of attorney (DPOA) was already in a
position to prevent waste and dissipation of Rhea’s estate. At the very least, according to Robert,
he should have been given priority over Lyneis as a potential conservator.

The existence of a DPOA does not prohibit the appointment of a conservator, and
selection of an individual to be appointed as an incapacitated person’s conservator is a matter
committed largely to the discretion of the probate court. In re Williams Estate, 133 Mich App 1,
11; 349 NW2d 247 (1984). The statute governing appointment of a conservator, MCL
700.5409(1), allows a court to determine if the individuals who fall within the statutory priority
guidelines are “suitable.” Additionally, MCL 700.5409(2), grants the probate court authority to
pass over “a person having priority and appoint a person having less priority or no priority” for
the role of conservator if good cause exists. The statute’s priority classifications are merely a
guide for the probate court’s exercise of discretion.

Under MCL 700.5409, a protected individual’s spouse is entitled to consideration for
appointment as conservator, and is granted priority over all other individuals except “[a]
conservator, guardian of property, or similar fiduciary appointed or recognized by the

1 The parties dispute whether the Fifth Third bank account was held by Rhea individually or held
jointly by Rhea and Robert. In light of our determination that the probate court properly
considered both Rhea’s individually-held assets and her jointly-held assets, we conclude that the
distinction is irrelevant.
appropriate court of another jurisdiction in which the protected individual resides,” MCL 700.5409(1)(a), and “[a]n individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney,” MCL 700.5409(1)(b). As Rhea’s husband, Robert was an individual entitled to priority consideration. However, Robert was not entitled to consideration unless the probate court considered an independent fiduciary and found him or her unsuitable. Lyneis, as trustee and independent fiduciary, had statutory priority over Robert, despite Robert’s marriage to Rhea. MCL 700.5409(1).

Additionally, considering the evidence before it, the probate court found Robert unsuitable for the conservatorship. The probate court found that Robert had abdicated his responsibilities under the DPOA and failed to act on Rhea’s behalf to protect her estate assets. The record supports the probate court’s finding. Robert is over 91 years old and requires a caregiver. Testimony established that Robert, who relied on others to help with his own financial decisions, did not handle matters using the DPOA. According to Delligener, Jay was acting on Robert’s behalf to make decisions for the Rhea Trust. Witnesses also testified that Jay exhibited controlling behavior over Robert. Given these facts regarding the relationship between Jay and Robert, it was not unreasonable to infer that Jay would attempt to influence Robert’s decision-making with respect to Rhea’s estate in the future. The probate court did not abuse its discretion when it selected Lyneis, an independent fiduciary, over Robert as conservator.

Robert also argues that the probate court’s appointment of a conservator was an abuse of discretion because there was no evidence that any asset of the estate had already been wasted or dissipated. However, the Legislature’s use of the word “will” to modify “be wasted or dissipated unless proper management is provided” in MCL 700.5401(3)(b) supports the probate court’s decision to focus on the likelihood that assets will be prospectively wasted or dissipated if a conservator is not appointed. See In re DeCoste Estate, 317 Mich App 339, 346; 894 NW2d 685 (2016) (explaining that the drafters of a statute are “assumed to have intended the effect of the language plain expressed,” and this Court must give every word of the statute its plain and ordinary meaning). The probate court properly concluded that it was unnecessary to find any waste or dissipation had already occurred. Rhea’s disability made her unable to manage her property and business affairs effectively. Although she had appointed Robert as her agent under the DPOA, he had abdicated these duties. Moreover, in addition to protecting against waste or dissipation of the assets currently in the estate, Lyneis testified that a conservator could protect the estate by interacting with the health insurance company, serving as the social security payee, and managing credit card bills and car lease payments. We are not left with a definite and firm conviction that the probate court erred in finding that a conservator was appropriate to fulfill these responsibilities.

We also reject Robert’s argument that the probate court improperly shifted the burden of proof from Cathy to Robert when it asked Robert’s attorney, “why do you care,” and “you’re the one objecting to it. I’m, I’m asking you for your reason for opposing [a] conservator. . . .” Robert takes the probate court’s remarks out of context. The probate court’s inquiry was in direct response to Robert’s argument before the probate court. Robert claimed to oppose the appointment of a conservator because, when compared to the Rhea Trust, Rhea’s personal estate was insignificant. The probate court merely asked Robert why he had bothered to oppose the petition if the assets were that insignificant. Later, the probate court judge stated, “These assets
regardless of how small people seem to view the estate, require, uh, decisions being made and there's a question, therefore, as to who has the legal authority to make decisions.” The probate court demonstrated that it understood the proper burden of proof when it stated on the record that Robert and Jay had no obligation to testify or present a defense.

In sum, the probate court did not clearly err in finding that Rhea’s property would be wasted or dissipated without proper management. Because there was clear and convincing evidence to support this conclusion, the probate court acted within its discretion in appointing a conservator under MCL 700.5401.

II. COURT-APPOINTED GUARDIAN AD LITEM

Next, Robert argues that the court-appointed guardian ad litem (GAL), William J. Petersmark, failed to fulfill his statutory duties under MCL 700.5406(4).

Robert failed to challenge the GAL’s performance in the probate court, and this issue is unpreserved. In re Smith Trust, 274 Mich App 283, 285; 731 NW2d 810 (2007). Although this Court may address an unpreserved issue if it involves a question of law and the necessary facts have been presented, Smith v Foerster-Bolser Constr, Inc, 269 Mich App 424, 427; 711 NW2d 421 (2006), we decline to fully address this issue because the record is simply undeveloped. Robert argues that the GAL failed to consider whether an alternative to conservatorship may be appropriate, but cites only the lack of explicit written consideration of the matter in Petersmark’s report. Petersmark’s failure to specifically note the full extent of consideration is not evidence that Petersmark failed to carry out his statutory obligation. Petersmark’s report indicated that he complied with the duties of a GAL as required by statute and court rule, which would have included consideration of whether there was an alternative to conservatorship under MCL 700.5406(4)(a), and whether limiting the scope or duration of the conservator’s authority under MCL 700.5406(4)(b) was appropriate before ultimately recommending a conservatorship without limitation. Petersmark was discharged before the conservatorship hearing, and did not testify regarding his thought processes or conclusions. On this record, we cannot conclude that Petersmark failed to perform his statutory duties.

III. COURT-APPOINTED ATTORNEY

Robert also raises two complaints regarding the probate court’s appointment of an attorney for Rhea, arguing that the probate court denied Rhea her right to retain an attorney of her choosing, and that appointed counsel failed to vigorously represent Rhea’s interests at the conservatorship hearing. Even assuming that Robert has standing to challenge an alleged deprivation of Rhea's constitutional rights, Robert’s claims fail because he has not demonstrated that Rhea possessed any such rights in the probate court. Robert asserts that there is a constitutional right to retained counsel under Const 1963, art 1, § 13, which states that “[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.” However, Robert fails to explain how this constitutional provision guarantees any individual, especially a nonsuitor, the right to an attorney, or how the probate court’s decision to appoint an attorney for Rhea violates this constitutional provision. Indeed, Robert concedes that the appointment was an exercise of the probate court’s discretion. Further, although the right to the effective assistance of counsel applies in criminal prosecutions, Const
Robert’s argument is also inconsistent with the record. The probate court appointed an attorney out of concern that Rhea, who was mentally incapacitated, was unable to hire an attorney on her own behalf. The probate court stated that if Rhea hired counsel after the appointment, he would revisit his decision to appoint an attorney on her behalf. Robert argues that he could have hired an attorney for Rhea as her attorney-in-fact under the DPOA, but he never attempted to do so. Robert did not object to the performance of appointed counsel during the conservatorship hearing, and we note that appointed counsel actively engaged in the proceedings. Robert has not indicated what appointed counsel should have done differently. Because Robert has failed to support his arguments, his claim is abandoned. See Houghton ex rel Johnson v Keller, 256 Mich App 336, 339; 662 NW2d 854 (2003) (explaining that “[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority,” and “[a]n appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.”) (Citations omitted.)

IV. TRUST EVIDENCE

Next, Robert argues that the probate court improperly admitted and relied on evidence from a concurrent proceeding in the probate court involving matters related to Rhea’s trust assets to conclude that estate assets were at risk of waste or dissipation. However, “‘[a] party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.’” Hoffenblum v Hoffenblum, 308 Mich App 102, 117; 863 NW2d 352 (2014) (citation omitted). Not only did Robert fail to object to the inclusion of information about the trust proceedings at the conservatorship hearing, Robert incorporated trust evidence into his own strategy, repeatedly referring to the trust proceedings during cross-examination of witnesses and in closing argument. Robert’s attorney specifically questioned Lynes about the trust and her role as trustee, telling her, “I want to segregate these . . . . I’ve got questions for you as the conservator, I’ve got questions for you as trustee.” Robert waived any error related to the admission of evidence regarding the Rhea Trust when he intentionally contributed to the error at the hearing below. See Gemma v Jackson, 286 Mich App 413, 422; 781 NW2d 124 (2009). However, we conclude that Robert’s argument also fails on its merits.

Generally, all relevant evidence is admissible. MRE 402; Morales v State Farm Mut Auto Ins Co, 279 Mich App 720, 729; 761 NW2d 454 (2008). “Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.” Lewis v LeGrow, 258 Mich App 175, 199; 670 NW2d 675 (2003), citing MRE 401. “[R]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Tobin v Providence Hosp, 244 Mich App 626, 637-638; 624 NW2d 548 (2001), citing MRE 403. When a trial court serves as the trier of fact in a case, it is presumed to consider evidence for its proper purpose. See People v Wofford, 196 Mich App 275, 282; 492 NW2d 747 (1992).
In the related trust case, the probate court found on the record that Jay was complicit in Robert’s breaches of fiduciary duty and identified a “whole pattern of favoring Jay Brody at the expense of Cathy . . .” However, at the conservatorship hearing, the probate court expressly refused to consider that complicity. The probate court stated that the evidence presented by the parties regarding Jay’s manipulation of Robert was consistent with “what’s been going on in the trust case. Jay Brody has a history of this behavior in the other case but that’s not evidence here. Uh, but this is, this is quintessential Jay Brody, frankly.” Moreover, as Robert acknowledges, when Cathy’s questioning focused on the trustee’s monthly expense payments for the trust, the probate court instructed her attorney, “Arguably, if you go far enough, it does have to do with the trust, but I would like to bring it back closer to, uh, you know, the handling of her personal estate.” The probate court limited the testimony just as Robert argues on appeal it should have done, and Robert’s arguments are unsupported by the record.

To the extent that the trust matter and the handling of Rhea’s estate were inextricably linked, the probate court properly allowed the introduction of evidence related to the trust matter. Robert complains about the introduction of a letter Dellinger sent to the guardian ad litem for the trust, which detailed Jay’s order for Dellinger to pay for Robert’s past expenses from the Rhea Trust. Robert claims that the letter was irrelevant on a number of grounds. First, Robert claims that the letter was not material because it only involved funds in the trust. But the record demonstrated that income from the trust flows directly to Rhea’s personal estate. The probate court could infer that, if Jay planned to invade the investment portfolio in the Rhea Trust to pay Robert’s expenses, the personal income from that portfolio could be reduced and proper management was necessary under MCL 700.5401(3)(b). Second, Robert claims the letter was irrelevant because it involved Jay’s statement, and Robert did not intend to act on the plans. But the record demonstrated throughout the proceedings that Jay attempted to exert control over Robert’s decisions. The court could infer that Jay may have exerted control with respect to repayment of Robert’s expenses as well.

Robert also complains that Cathy’s attorney improperly injected considerations of the trust in arguments to the probate court. But it is well-settled that an attorney’s statements and arguments are not evidence. See Guerrero v Smith, 280 Mich App 647, 658; 761 NW2d 723 (2008); Int’l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey (On Remand), 273 Mich App 26, 45; 730 NW2d 17 (2006). The probate court appointed Lynais to her separate roles as trustee and conservator, and was aware of the role she served in each capacity. Robert has not offered any argument to overcome the presumption that the court considered the evidence for its proper purpose.

V. JUDICIAL BIAS

Robert also suggests that the probate judge harbored bias against Robert and Jay as a result of his knowledge of the trust case. Robert challenges the probate court’s reliance on Dellinger’s letter regarding Jay’s plan to repay Robert for past expenses, as well as the court’s reference to Jay’s and Robert’s decisions not to attend parts of the proceedings, and Jay’s decision to withhold certain financial information from Lynais.

Robert failed to state a claim for judicial bias in his statement of questions presented, and this argument may be considered waived. River Investment Group, LLC v Casab, 289 Mich App
353, 360; 797 NW2d 1 (2010) (“[t]his issue is waived because plaintiff failed to state it in the statement of questions presented in its brief on appeal.”). Regardless, it is well established that “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” Cain v Mich Dep't of Corrections, 451 Mich 470, 496; 548 NW2d 210 (1996) (quotation marks and citation omitted). Here, the probate court was tasked with determining if Rhea's estate risked waste or dissipation. The probate court's reference to Dellinger's letter, which evidenced intent to invade trust property and might affect the income to Rhea's estate, did not demonstrate bias or antagonism. Further, the probate court did not demonstrate favoritism when it acknowledged the absence and lack of involvement by interested parties at various portions of the proceedings, especially when the probate court was required to consider those particular parties as candidates for the conservatorship appointment. The record simply does not support Robert's claim.

V. LIMITED CONSERVATORSHIP OR PROTECTIVE ORDER

Finally, Robert argues that the probate court should not have ordered a full conservatorship, but should have entered a less restrictive order, such as a limited conservatorship or a protective arrangement. Again, we disagree.

The need for “assistance” in managing financial affairs does not necessarily demonstrate an inability to manage finances or a mishandling of finances, and a need for some “assistance” will not support the imposition of a full conservatorship where an individual remains capable of making responsible decisions. Bittner, 312 Mich App at 240-241. Therefore, when determining whether there is cause for a conservatorship, the probate court must endeavor to maintain an individual's autonomy by ordering the least restrictive means of protecting assets. Id. at 241-242; see also MCL 700.5407(1) (“The court shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent necessitated by the protected individual’s mental and adaptive limitations and other conditions warranting the procedure.”).

Under MCL 700.5408(1), courts may impose limited protective arrangements in lieu of a full conservatorship. When considering whether a full conservatorship is appropriate,

a probate court should approach the task from a perspective of respect for the individual’s right to acquire, enjoy, and dispose of his or her property as the individual sees fit. Any restrictions on this fundamental right must be narrowly tailored to the individual’s specific capabilities and incapacities, bearing in mind the heightened evidentiary threshold for judicial interference. [Bittner, 312 Mich App at 242.]

In Bittner, this Court ruled that the probate court erred by appointing a conservator when Bittner understood her sources of income and economic responsibilities, and her financial affairs were well managed because she had arranged for assistance from her daughter. Id. at 240-243. This Court explained that Bittner’s “grant of a durable power of attorney to [her daughter]
confirms rather than negatives her ability to effectively manage her property and business affairs.” *Id.* at 243.

Although Robert equates Rhea’s situation to Bittner’s, we believe the two cases are distinguishable. Unlike Rhea, Bittner suffered only math and memory difficulties that “plague many elderly (and not so elderly) individuals,” and did not have a mental disability that made her unable to manage property or business affairs. *Id.* at 239. Moreover, because Bittner had never mismanaged or mishandled her affairs in the past, and she had appointed an agent under a DPOA, there was no clear and convincing evidence that the property would be wasted or dissipated without proper management. *Id.* at 240-241. In contrast, Rhea was not aware of the assets in her estate, let alone able to manage them. There is no evidence that Rhea continues to possess any ability to acquire, enjoy, and dispose of her property as she sees fit. Before she was struck with disability, Rhea appointed Robert as her agent via the DPOA. Although her act demonstrated some self-reliance and independence, her chosen method of oversight was rendered ineffective when Robert abdicated his duties.

The probate court specifically acknowledged that the least restrictive means of protecting Rhea’s assets, aside from a conservatorship, would be the DPOA. However, facts in the record called into question Robert’s ability to make decisions on Rhea’s behalf, including Robert’s abdication of such decisions in the past and the control Jay has exerted over Robert. Based on the testimony presented, the probate court opined that Jay was “overbearing, manipulative, abusive toward his father . . . and he was attempting to be the one in control.” We defer to the probate court on matters of credibility, and give broad deference to its factual findings. *Erickson*, 202 Mich App at 331. We are not definitely and firmly convinced that the probate court made a mistake when it concluded that the DPOA was insufficient to protect Rhea’s assets.

Robert does not adequately explain how Rhea would be able to maintain oversight of some, but not all, of her property under a limited conservatorship. Moreover, although Robert argues that a protective order may have been less invasive, Lynneis testified that she was not sure that some of the tasks needed by Rhea would be satisfactorily achieved with such an order. The probate court cited evidence that a DPOA or patient advocate form would be insufficient to manage responsibilities, such as dealing with Rhea’s insurance companies. Given these facts, the probate court did not clearly err in finding that a conservatorship, as opposed to a limited conservatorship or a protective arrangement, was most appropriate for Rhea.

Affirmed.

/s/ Colleen A. O’Brien
/s/ Kathleen Jansen
/s/ Christopher M. Murray
Application for Consideration

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

Date:

Name: William H. Horton P Number 31567

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Name of Case: In re Conservatorship of Rhea Brody, Oakland County Probate Court. Case No. 2015-367333-CA. Court of Appeals Case No. 332994. Designated for publication. This is a companion case to In re Rhea Brody Trust. Robert Brody has submitted an Application to the Section regarding that case.

Parties Involved: Robert Brody (husband), Rhea Brody (wife), Jay Brody (son), Cathy Deutchman (daughter). Cathy was the Petitioner.

Current Status: Decision by Court of Appeals September 19, 2017. Robert intends to file an Application for Leave to Appeal to the Supreme Court.

Deadlines: Application for Leave to Appeal to be filed on or before October 31, 2017. By analogy to MCR 7.312(H)(3), a motion to file an amicus brief should be filed by the Section after the Application is filed.

Issue(s) Presented: Whether a conservator is necessary when a person is unable to manage her property but the property is properly being managed by her spouse and financial professionals and, if a conservator is necessary, whether the spouse has statutory priority to be appointed the conservator.

Michigan Statute(s) or Court Rule(s) at Issue: MCL 700.5401(b) (property will be wasted or dissipated unless proper management is provided); MCL 700.5406(7) (clear and convincing
evidence); MCL 700.5408 (protective arrangements); MCL 700.5409 (priority of spouse if conservator is necessary); MCL 700.5419(1) (limited conservatorships).

**Common Law Issues/Cases at Issue:** In re Conservatorship of Shirley Bittner, 312 Mich App 227 (2015) (clear and convincing evidence; remedy to be narrowly tailored to respect independence).

**Why do you believe that this case requires the involvement of the Section?** The Section is the voice of Michigan’s established probate and estate planning attorneys and its opinion is given great weight by the Court. Michigan’s legislative policy is to have the least interference into a person’s affairs and, if intervention is necessary, to use the least intrusive means to protect the person, recognizing the importance of family relationships. In this case, Rhea’s few assets outside of her Trust were being properly managed. The trial court and the Court of Appeals held that since Rhea cannot manage her assets and her husband had relied on financial professionals to file her tax returns and make minimum required distributions from her IRA that there was a “risk of waste and dissipation” of those assets – even though there was no evidence of any waste or dissipation in the past. Such a ruling reverses the evidentiary standard from the petitioner to the party opposing the petition. In addition, the court ignored the statutory priority of a spouse over a third-party conservator, especially where the spouse also held a durable power of attorney and had proposed a protective order.

**Do you believe that a decision in this case will substantially impact this Section’s attorneys and their clients? If so, how?** Yes. The decision of the Court of Appeal is published and is **stare decisis** unless overruled or vacated. MCR 7.215(C)(2). According to the Court of Appeals, MCL 700.5401 gives the trial court discretion to determine the risk of mismanagement rather than apply the statutory language that the property “will be” wasted or dissipated. Also, the decision essentially negates the appointment of a person designated through a durable power of attorney and the Legislature’s stated policy of using the least intrusive means to protect the individual.
MEMORANDUM

To: Marlaine C. Teahan, Chair, Probate Council
From: Andrew W. Mayoras
Subject: Application for Amicus Brief - Conservatorship of Rhea Brody
Date: October 31, 2017

Overview

Counsel for Appellant Robert Brody, the husband of Rhea Brody, filed an application to the Michigan Supreme Court seeking reversal of the Probate Court’s and Court of Appeals’ rulings that appointed, and affirmed the appointment of, an independent fiduciary as Conservator for his wife. He requests that the Section file an amicus brief supporting his application as to two issues: (1) whether the Court of Appeals properly applied the “property will be wasted or dissipated unless proper management is provided” prong of MCL 700.5401(3), and (2) whether the court properly applied the priority statute for deciding who should serve as conservator, under MCL 700.5409.

The Amicus Committee recommends filing a brief as to the second issue only.

Issue Relating to Waste or Dissipation of Property

The Committee believes that 5401(3) was properly applied by the Court of Appeals. 700.5401(3) has a two-part test for determining when a conservator may be appointed. First, under (3)(a), the individual must be found to be unable to manage property and business affairs effectively. This prong was not at issue on the appeal, and all parties conceded that Rhea Brody did not have this ability because of frontal temporal dementia.

As to the second prong, the statute states as follows:

The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual’s support, care, and welfare or for those entitled to the individual’s support, and that protection is necessary to obtain or provide money.

MCL 700.5401(3)(b).
As to this issue, the appellant asserts that no conservator was needed because he was properly managing the property of his wife, along with the help of financial advisors. But the Probate Court found (as noted by the Court of Appeals) that the appellant had abdicated his financial decision-making duties for his wife to his son, who exhibited controlling behavior over the appellant. The Court of Appeals noted that this gave rise to a concern that the son would attempt to influence the appellant’s decision-making with respect to his wife. This was a sufficient basis to affirm the Probate Court’s decision as to the need for a conservator, even in the absence of a finding that assets had been wasted or dissipated in the past.

The appellant’s challenge to this holding appears to be fact-based, not legal-based. The appellant presents no authority for the proposition that a finding of past waste or dissipation is needed to demonstrate that it will happen in the future. Indeed, such a holding would artificially restrict a probate court’s discretion to appoint a conservator when there is a reasonable fear or belief that waste or dissipation will occur. Just because it has not happened yet should not be used to deny appointment of a conservator when a probate court finds that waste or dissipation will occur.

In addressing this issue, the appellant contends that without such evidence, it effectively shifts the burden of proof onto the party opposing the petition. The Committee does not share this concern, nor follow the logic behind this argument.

The burdens of production and persuasion still fall on the petitioner, under a clear and convincing evidence standard. Once proof is submitted that waste or dissipation will occur, it is within the probate court’s discretion to find if the burden was met or not. After the probate court exercises this discretion, the court of appeals will only reverse if left with a definite and firm conviction that the probate court erred. Given the finding that the person named under a DPOA “abdicated” his authority and was subject to controlling behavior by another that caused a concern of improper influence, nothing in the statute or case law (to the Committee’s knowledge) renders this insufficient evidence to support a probate court’s discretionary finding of a need for a conservator. It also does not shift the burden of proof to the respondent to prove that it will not occur.

The appellant’s position in large part rested on the fact that only a few of Rhea Brody’s assets were held in her individual name. The lower courts both considered her joint assets, expected IRA distributions, and her right to receive assets from her Trust (which is subject to a separate proceeding and appeal), which the Committee believes were properly included in the analysis under the second prong of §401(3). In his application to this Committee, the appellant does not address this particular holding, other than noting that Rhea Brody’s non-trust assets were “few.” The Court of Appeals detailed how non-Trust assets were at risk of dissipation or waste, and the Committee does not believe that an amicus brief on this point would be warranted.
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BARRON, ROSENBERG,  
MAYORAS & MAYORAS, P.C.

In summary, the Committee does not believe that the Section should take a position as to the first issue at this stage. If the Supreme Court grants the appellant’s application, then the Section can reconsider addressing this issue.

**Issue Relating to Statutory Priority of Conservator**

Unlike the first issue, the Committee recommends filing an amicus brief based on two clear legal errors in the published Court of Appeals Opinion. These errors do not appear to have adversely affected the outcome, because the Probate Court’s exercise of discretion may have been unaffected. However, the concern remains that this published opinion has effectively changed the application of MCL 700.5409, which could have a dramatic impact in selection of conservators in future contested protective proceedings, potentially including guardianship proceedings as well.

700.5409 states as follows, in pertinent part:

(1) The court may appoint an individual, a corporation authorized to exercise fiduciary powers, or a professional conservator described in section 5106 to serve as conservator of a protected individual’s estate. The following are entitled to consideration for appointment in the following order of priority:

(a) A conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides.

(b) An individual or corporation nominated by the protected individual ... including a nomination made in a durable power of attorney.

(c) The protected individual’s spouse.

* * *

(h) If none of the persons listed in subdivisions (a) to (g) are suitable and willing to serve, any person that the court determines is suitable and willing to serve.

(2) ... If persons have equal priority, the court shall select the person the court considers best qualified to serve. Acting in the protected
individual’s best interest, the court may pass over a person having priority and appoint a person having a lower priority or no priority.

MCL 700.5409.

In applying this statute, the appellant appears to be entitled to priority consideration both as the agent appointed under a DPOA and as the spouse. The Court of Appeals found exactly the opposite.

Specifically, it ruled that he, as the spouse, was “not entitled to consideration unless the probate court considered an independent fiduciary and found him or her to be unsuitable.” The Court then noted that the independent fiduciary instead had statutory priority under 5409(1).

This aspect of the holding is clearly erroneous. A fiduciary would only have priority if, under subsection (1)(a), he or she had been appointed in another jurisdiction in which the protected individual resides. Here, Appellee Mary Lynes was appointed in a special, or temporary, capacity in the same proceeding by the same court. She was not entitled to priority consideration.

Second, the Court of Appeals ruled that even if someone has priority, such as through a DPOA, this priority is largely irrelevant in light of the probate court’s discretion. It specifically stated, “The statute’s priority classifications are merely a guide for the probate court’s exercise of discretion.”

This statement is troubling and minimizes the role that 5409(1) plays. While the overarching guide is the best interest of the protected individual, as 5409(2) makes clear, the priority scheme helps not only define that interest, but permits the protected individual to maintain input into the decision. As 700.5407 makes clear, “The court shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual ....” His or her input should count for something.

This is especially true with a DPOA is in place, as with this case. Indeed, the Court of Appeals did not address the applicable DPOA statute on this point, which states, “The court shall make its appointment in accordance with the principal’s most recent nomination in a durable power of attorney except for good cause or disqualification.” 700.5503(2). The Court of Appeals did not expressly consider whether there was good cause or a basis to disqualify the appellant from serving. It should have done so, even though the outcome likely would have been the same.

Even in the absence of a DPOA, it is standard practice (as suggested by 5409(1)(h)), for courts to determine suitability of each person having priority, and to only move to the next level of
priority based on a finding of unsuitability. As the Reporter’s Comment notes:

The court applies the general and overriding requirement of suitability to the specific circumstances of each particular case. If there is potential for a conflict of interest between the interests of the person to be protected and a possible appointee, that potentiality may make the candidate unsuitable.

Martin & Harder, Estates & Protected Individuals Code with Reporter’s Commentary, The Institute of Continuing Legal Education (March 2017 Update), §700.5409 Reporter’s Comment, at p 421.

In short, the Court of Appeals could have reached the same conclusion as to selection of the conservator by analyzing suitability and conflict-of-interest factors. Yet it instead broadened the discretion of probate judges to, essentially, select whomever they favored without apparent limitation on judicial discretion. This error is magnified by the unexplained holding that grants priority to independent fiduciaries previously appointed in some capacity.

These two holdings collectively have the significant danger of favoring independent fiduciaries over those nominated by protected individuals, those appointed under DPOA documents, spouses, and other family members. The Committee recommends that the Section file an amicus brief to address and advocate for a correction of these points.
1. Civil Discovery Draft Rule Proposals

The State Bar's Civil Discovery Court Rule Review Special Committee, with the help of five subcommittees, has spent over a year engaged in a detailed review of the Michigan civil discovery court rules. The goal is to modernize the rules, adopt best practices, and make discovery less onerous, leading to improved efficiency in the judicial system and greater access to justice for all. With a broad cross-section of lawyers, judges, and court administrators from across the state, the committee has produced a draft report and set of proposed rules changes. They've asked for feedback on the draft proposal by December 1, 2017. The committee will take the feedback into consideration prior to submitting a finalized proposal to the Representative Assembly by March 10, 2018 for consideration at its April 21, 2018 meeting.

The Draft Proposal is available at www.michbar.org/generalinfo/civilprocedureanddiscovery and relevant provisions are attached, along with helpful introductory materials.

Our Committee concentrated our review on the provisions within Subchapter 5. The only rule with draft changes is 5.131, which begins on page 66 of the Proposal.

Rule 5.131 identifies that the general discovery rules within subchapter 2.300 apply in probate court; specifically, in all civil actions in probate court and in probate proceedings as well, except that the initial and mandatory disclosures required under MCR 2.302(A) are only required in probate proceedings that are contested. (MCR 5.131(A), (B).)

Rule 5.131 goes on to define a laundry list of certain actions that are considered "contested proceedings." (MCR 5.131(B)(1)(a).)

Comment: We struggle with the idea of listing what is considered a "contested proceeding" because it may not include everything that is contested, or, it may include something in the list that actually isn't being contested at all. Any list used is likely going to be over-inclusive or under-inclusive, or both. Would it be better to consider a proceeding "contested" only upon the occurrence of some triggering event, such as the filing of an objection or a response that opposes the relief sought? What if an action on the list is resolved at the first hearing without challenge, and the court doesn't specifically order that no mandatory disclosures are needed under Rule 2.302(A), does Rule 5.131(B)(1)(a) require them anyway?

As a proposed solution, we suggest adding the following language to the first line of Rule 5.131(B)(1)(a) if the laundry list of "contested" proceedings is left intact:
"Unless otherwise ordered by the court or unless the petition is unopposed under MCR 5.104(C), actions for the following are contested proceedings: ..."

Rule 5.131 goes on to include other proceedings as "contested" if an interested person has executed a "declaration of contest," serves it on other interested persons, and files it and proof of service with the court. (MCR 5.131(B)(1)(b).) However, it provides that the "declaration of contest" must be served and filed within 21 days after the filing of the petition initiating the proceedings, or prior to the first hearing on the petition, whichever is earlier.

Comment: The deadline to file a declaration of contest is tied to the date of filing, which could happen weeks before service leaving someone with inadequate notice. We would suggest tying the deadline for filing a declaration of contest to the date of service of the petition initiating the proceedings as opposed to the date of filing.

Comment: Considering the number of unrepresented parties in probate court, mandatory disclosures seem problematic. Perhaps a standard Notice should be created and served on all persons interested in a proceeding that is deemed "contested" under Rule 5.131(B)(1)(a) informing them of these disclosure obligations.

We request that the Council adopt the above comments as its public policy opinion and that the public policy opinion be forwarded to the State Bar of Michigan's Civil Discovery Court Rule Review Special Committee.

2. ADM File No. 2002-37 – E-Filing and Electronic Records Court Rule Amendments

(Thank you to Michael McClory and Rebecca Schnelz for their preparation of the content for this portion of the committee report)

The Court Rules, Forms and Proceedings Committee recognizes that the e-filing court rule amendments which take effect January 1, 2018 are the initial steps in the process of facilitating the implementation of mandatory state-wide e-filing in Michigan. The Supreme Court has solicited comments on these rules, due by January 1, 2018, which will be addressed at a public hearing. That State Bar may adopt a position on these items and has asked us to submit comments for consideration by the Board of Commissioners by November 6. We have requested permission to submit comments by November 13.

The rules are required to be in place to enable SCAO’s e-Filing vendor to begin programming the statewide solution. In addition, the proposal would move existing language into MCR 1.109 as a way to, for the first time, include most filing requirements in one single rule, instead of scattered in various rules. The proposal largely mirrors the administrative orders that most e-Filing pilot projects have operated under, but contains some significant new provisions. For example, courts would be required to maintain documents in an electronic document management system, and the electronic record would be the official court record.
Our review has identified a number of issues with the amendments. Some of the issues will have an immediate impact on probate cases if the proposed rules are not modified. Other issues are identified here in order to create awareness on the part of the Supreme Court and the State Court Administrative Office (SCAO) that the items must be addressed as these rules become refined. It is likely that drafts of specific proposed probate court rule amendments will be developed for submission by the committee.

Please note that the following is an initial list, which will be refined and likely be added to over time:

- The email address, if known, should be added to the required caption information. **MCR 1.109(D)(1)(b).**

- While not a court rule issue, a line\request for e-mail addresses must be added to court forms.

- The list of documents previously identified in 5.114(B)(1) as requiring authentication by verification under oath or penalties of perjury needs to be reinstated either in the modified 1.109 or within the probate rules. These documents are not all specifically identified other than in 5.114(B)(1), therefore the current language of 1.109(D)(3) effectively removes the signing requirement.

The new requirement contained in MCR 1.109(D)(2)(c) to include a family case inventory should be removed in relation to probate proceedings. This information has little relevance in relation to probate proceedings such as decedent estates, trusts and mental health cases. The additional filing requirement could also prove onerous to parties in many instances where they do not have access to such information. Currently, many filers simply leave this information blank on guardianship forms because they do not know the information.

- Proof of service\e-service for probate filings must be addressed in greater detail. A separate rule must be created or provisions made part of an existing court rule.

- Greater specificity is necessary on allowing documents to be sent electronically for other than filing (i.e., inventory info, etc.). A separate rule must be created or provisions made part of an existing court rule. **MCR 1.109(G)(3)(b).**

- A separate rule should be created for probate proceedings regarding the good cause exception\safe harbor for items that do not have to be filed electronically. It is imperative that the issue of filing original wills be addressed as part of this issue. **MCR 1.109(G)(3)(c).**
• Clarification regarding protocols for notification of the rejection of a filing must be developed, including the following issues:

  • Should an SCAO e-form notification be created? (this would address statewide technical rejections)

  • The interplay between a statewide system (technical) rejection (MCR 1.109(G)(5)(c)) and a subsequent notification by a court of rejection for substantive reasons (jurisdiction, venue, etc.). (MCR 1.109(G)(5)(a)(iii)) must be clarified.

  ▪ E-service process issues must also be addressed. Simultaneous e-service (which the filing system has the capability to perform) cannot be utilized if the hearing date is not available when the pleading is filed. MCR 1.109(G)(6). For example, when a party submits a motion for filing but the court sets a hearing date, simultaneous e-service will require the court to create and serve the notice of hearing separately from other documents once a date has been assigned. In addition, there are instances when a party may not want to immediately serve a document that has been filed with the court. Simultaneous service also removes a party’s option to serve a document only after they know the court has officially accepted it for filing.

  ▪ The same issue for e-service process relates to e-service transactions. A probate court rule amendment is desirable.

  ▪ Consideration needs to also be given on how to handle instances where there are multiple interested persons that require service of documents throughout the life of a case, but not all individuals become registered users of the e-filing system.

We request that the Council adopt the above comments as its public policy opinion and that the public policy opinion be forwarded to the State Bar of Michigan's Board of Commissioners.

Respectfully submitted,

Melisa M. W. Mysliwiec
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THE STATE BAR OF MICHIGAN
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I. INTRODUCTION

The Civil Discovery Court Rule Review Special Committee of the State Bar of Michigan (“Committee”) has a simple mission: in light of the issues surrounding discovery in civil litigation, should the Michigan Court Rules be revised and how?

First, what are the issues surrounding civil discovery? Is there anything broken that actually needs fixing? As discussed in more detail below, the strong consensus – for many years, from nearly all quarters of the judicial system, and the impetus of change throughout the federal court system and numerous state courts – is that the manner in which civil discovery is conducted is a problem. In short, discovery:

- is too expensive;
- is widely reviled by practitioners and judges;
- impedes access to justice; and
- distorts administration of judicial resources.

Second, should the court rules be revised in relation to civil discovery? The Michigan Rules of Court were adopted in 1985 and incrementally updated over the years. There has not been a holistic review of the rules in the intervening 32 years, or even a systematic review of a significant portion of the rules, such as those governing discovery. Changing the rules is not the only means by which to address issues in the judicial system, nor is it a panacea. But the Committee believes that Michigan citizens, lawyers, and judges can all benefit from appropriate rule changes.

Third, how can the rules be modified to improve civil discovery? Here, the Committee was guided by the existing structure and content of the rules, the changes during the past three decades in the federal courts, and various state court initiatives throughout the country. Our vision was to work towards a civil litigation system where:

- litigation is more cost effective;
- courts are more accessible and affordable;
- the rules aid case management and enable judicial officers to be informed and efficient; and
- the system accentuates to parties and lawyers that cooperation and reasonableness are key principles in the course of civil litigation.

In one sense, the proposed changes reflected in this Report are incremental in nature. The Committee did not tear down the rules and start with a blank sheet of paper, nor did we elect to simply adopt federal practice. Indeed, a guiding principle of our work was to do the least
amount of harm possible to both the structure and content of the existing rules. Yet, in another way, the proposed changes are extremely significant in both spirit and substance. When the federal rules were revised effective December 2015, Chief Justice Roberts opined that, “The amendments may not look like a big deal at first glance, but they are.” So too, we feel, these changes are, if adopted, a big deal and a positive step for justice in Michigan.

II. DISCOVERY REFORM IN OTHER JURISDICTIONS

The expense and burden of the civil litigation discovery process has been a topic of significant study within the federal courts and some state courts for many years. This has led to perennial calls for discovery reform, contributing to amendments to the Federal Rules of Civil Procedure in 1980, 1983, 1993, 2000, 2006, and 2010. In addition, several states have enacted meaningful amendments to their civil discovery rules.

The Federal Rules of Civil Procedure underwent significant revisions in 1993, including the adoption of initial disclosures under FR Civ P 26(a)(1) and the imposition of presumptive limits to the length of depositions. After enacting these amendments, however, the Advisory Committee on Civil Rules continued to receive complaints from the bar and the public about the high costs of discovery. A number of organizations – including the American College of Trial Lawyers, the American Bar Association Section of Litigation, and the Judicial Conference of the United States – examined solutions to contain litigation costs by, inter alia, limiting the scope and availability of discovery. Based on this activity, in 1996, the Advisory Committee on Civil Rules began focusing on the structure of the discovery rules and whether modest changes could effectuate reduced discovery costs, increased efficiency, uniformity of practice, and active judicial case management. In 1999, the Advisory Committee on Civil Rules reported that discovery accounts for as much as 90% of litigation costs when discovery is actively employed.

In 2008, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States asked the Civil Rules Advisory Committee to hold a conference on the issues of cost and delay in the federal civil litigation system. That conference was held in May 2010 at Duke University (the “Duke Conference”). The revision process was further supported by the Federal Judicial Center, which performed survey work and empirical analysis of the civil discovery process.

2. The American College of Trial Lawyers set forth a proposal, previously been advanced by the American Bar Association Section of Litigation and other bar groups, to limit the scope of discovery to address cost concerns. Further, pursuant to directives in the Civil Justice Reform Act, the Judicial Conference examined discovery and initial disclosure issues, including whether local variations of disclosures should continue, whether the scope of discovery should change, and whether specific time limits on discovery should be adopted.
4. Id. This statistic was later cited by the United States Supreme Court in Bell Atl Corp v Twombly, 550 US 544, 559 (2007).
In parallel with the work of the Duke Conference, the American College of Trial Lawyers together with the Institute for the Advancement of the American Legal System (“IAALS”) conducted their own survey, empirical analysis, and review of the civil litigation process. Their final report, issued on March 11, 2009, concluded that the scope and expense of discovery was significantly undermining the civil litigation system in this country.\(^5\) The major themes that emerged from the survey were:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today’s system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

2. The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: “The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else.” Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a “morass.” Another respondent stated: “The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare.”

3. Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, “Judges need to actively manage each case from the outset to contain costs; nothing else will work.”\(^6\)

In June of 2013, the Judicial Conference Standing Committee on Rules of Practice and Procedure approved a package of amendments to the Federal Rules of Civil Procedure for publication and public comment. These changes arose directly from the Duke Conference. They include numerous efforts to directly limit the scope and extent of discovery, both overtly (for example, by further limiting the presumptive number of depositions and written discovery requests) and indirectly, by adopting a “proportionality” standard to assist courts in fashioning an appropriate scope for discovery. After an extended public comment and revision process, the rules were adopted and became effective on December 1, 2015.

It has been said that, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and
economic experiments without risk to the rest of the country.”

States have risen to the challenge with regard to their rules governing civil litigation. Several states in particular – Iowa, Arizona, New Hampshire, Minnesota, Utah, and Washington – conducted a meaningful review of their civil discovery system (sometimes as part of a broader access-to-justice review) and proposed court rule changes. The IAALS, the Conference of Chief Justices, and the National Center for State Courts have similarly studied the issues and released reports. (See Section V for citations.)

With all of this activity, what about Michigan? The adoption of the rules in 1985 was the culmination of a process that began in 1973. After recommendations forwarded through the Representative Assembly and then the Bar, eventually a Committee to Revise and Consolidate the Court Rules was formed, resulting in a report in 1978 (402A Mich). After additional input, proposals and revision, the Supreme Court ordered a revised draft to be published in 1983 (417A Mich) which was then adopted two years later after additional comments and revisions. The rules have been revised many times since 1985. On occasion there have been revisions across numerous rules with a common topic, such as the changes in 2008 with regard to electronic discovery. More often there have been discrete changes to particular rules, emanating primarily from the Bar or the Court itself.

III. THE SCOPE, MAKEUP, AND WORKFLOW OF THE COMMITTEE

The work of the Committee was first recommended to the Board of Commissioners (the “Board”) of the State Bar of Michigan by the Bar’s Civil Procedure and Courts Committee in 2013. The Board adopted the Committee’s recommendation and suggested to the Supreme Court that it participate in a joint review project. In 2015, the Court recommended that the Bar proceed on its own with a review and set of proposed changes. In 2016, as part of the Bar’s 21st Century Task Force final report, the Board included the following amongst its goals:

- Modify court rules to reduce the expense and burden of civil discovery.
- Research whether pretrial discovery and practice should be tailored on a case-by-case basis, taking into consideration the parties’ financial resources and other relevant factors.
- Modify court rules and administrative procedures to better utilize mediation and alternative dispute resolution (ADR).
- Promote business process analysis, problem-solving court principles, and best practices to courts, law firms, legal aid programs, and other justice system entities.

8 Letter from Anne Boomer to Janet Welch, January 7, 2015.
Promote the use of properly trained mediators or special masters to expedite the discovery process.

Thereafter, then-President Lori Buiteweg formed the Committee.

The Committee consists of stakeholders with differing perspectives on and roles in the judicial system. Its members include lawyers, judges, and court administrators representing diversity in terms of: areas of practice, nature of practice (large firm, solo, public interest, judiciary, etc.), geography, gender, ethnicity, and years of practice.

The diversity and breadth of the Committee was then further complemented by wide solicitation of volunteers from various stakeholder groups, which volunteers then served on numerous subcommittees. This group of 30 additional volunteers further rounded out the breadth of viewpoints contributing to the Committee’s work.

The Committee’s work has been conducted in three stages: (1) review of the issues with regard to civil discovery and invite comment from stakeholders; (2) consideration and drafting of potential revisions; and (3) publication of the draft for comment and input from the public, Bar, and key stakeholder groups. After these steps, the Committee will review all feedback, revise the draft, and submit it to the Representative Assembly at its April 2018 meeting. If approved, the Report will be forwarded to the Michigan Supreme Court for consideration.

IV. GUIDING PRINCIPLES AND OVERVIEW OF PROPOSED CHANGES

A. As Much as Possible, Preserve Michigan’s Existing Court Rules, While Reinforcing Party Autonomy and Avoiding Unnecessary Case Management

Just as much as the need for reform was agreed upon by the Committee, there was also consensus on what not to do.

First, there was little desire to simply scrap Michigan procedure and largely adopt the federal rules. Significant differences between federal practice and Michigan practice made cutting-and-pasting inadvisable, including the types of cases litigated, the volume of cases, and disparate resources in terms of court and administrative staff. Which is not to say, of course, that the Committee did not benefit from the federal rule revisions and federal practice, and several elements of federal practice are recommended for adoption in Michigan. But these are surgical borrowings, not wholesale copying.

Second, there was keen awareness that a “one size fits all” set of rules often hurts more than it helps. The cases subject to discovery in Michigan vary tremendously in size, importance, complexity and consumption of resources. One set of rules with deviations only as approved by the court would simply create inefficiency, frustration, and a bottle-neck in the courtroom. Some jurisdictions have adopted formal differentiated case management practices – placing different
sorts of cases in tracks with different rules applicable to each. After consideration, the Committee instead elected for a general set of rules but with two key characteristics: (a) the parties’ ability to stipulate in to or out of various discovery practices or limitations (so long as not inconsistent with a court order and not affecting scheduling order dates) so they can right-size discovery to their case; and (b) enhanced opportunities for a judicial role in right-sizing the discovery and getting ahead of potentially complex matters (like e-discovery), including enhancements to early scheduling conferences, adoption of a discovery plan protocol, allowance for discovery mediators, and enhanced final pre-trial practice.

B. Modifying Civil Discovery to Avoid Excessive Discovery

1. Reinforcing Parties’ Obligations Under MCR 1.105

MCR 1.105 was originally copied from FR Civ P 1. Chief Justice Roberts noted the following when FR Civ P 1 was amended (along the lines of the Committee’s recommendation for MCR 1.105):

Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

Most of the proposed rule changes rely, ultimately, upon both parties (independently, and through counsel) and the court taking the dictates of MCR 1.105 seriously, and interpreting the discovery rules consistent with the letter and spirit of both that rule and the other changes proposed. These changes are not a sea change, but are a paradigm shift, one that has already been de facto underway for some time in our courts, and is particularly evident in the business courts. It will require time, education, and repeated reinforcement of these principles from the judicial branch, the bar, and other stakeholders to effectuate change.

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2. **Adopting Proportionality in MCR 2.302**

Another major change borrowed from the federal rules revisions is the concept of proportionality in the definition of the scope of discovery under MCR 2.302(B)(1). The Committee did not endorse a wholesale adoption of the language from FR Civ P 26, but adapted the federal rules proportionality provisions to its own proposal.

It is worth noting that an express adoption of proportionality is arguably an incremental and even stylistic change more than one of substance. Existing MCR 2.302(C) authorizes issuance of a protective order to protect a party or person from “undue burden or expense” and grants the court broad powers to define the scope and breadth of discovery. Changing the scope of discovery definition, however, is a powerful signal, and allows proportionality to modulate what is discoverable in the first instance, rather than allow proportionality to be only a defensive concept under MCR 2.302(C). The proposed changes will also drive parties to discuss, up front, the appropriate scope of discovery proportional to the matter, aided by a reinforcement of these discussions as part of early case management under MCR 2.401.

3. **Adopting Modest Initial Disclosures and Presumptive Limits on Interrogatories and Depositions**

The Committee proposes changes in the flow of discovery to get more information out sooner and to place some presumptive limits on those devices most often abused (interrogatories and depositions). The Committee proposes a 10 deposition limit with each deposition lasting no longer than 7 hours. These restrictions match those set forth in FR Civ P 30. The limits may be set aside through stipulation of the parties or court order. The Committee was more divided over a presumptive 20 interrogatories limit (less than under FR Civ P 33). While the majority of the Committee favored the limit, others favored the status quo, or favored a greater or lesser number of interrogatories. Like the presumptive limit on depositions, the interrogatory limit may be expanded via stipulation or court order.

Integral to the concept of presumptive limits is initial disclosures and the theory that, if basic information is provided up front and automatically, then the need for written discovery is lessened. The initial disclosures cover only the most basic sets of information, and the Committee was careful to exclude types of cases where initial disclosures would not be productive. In addition, the Committee crafted additional disclosures for no-fault cases, which represent a meaningful number of cases in our civil courts.

4. **Early and Regular Case Management with Additional Tools to Proactively Address Problem Areas**

Early case management is generally recognized as critical to keeping discovery appropriately scoped and moving forward expeditiously. It has been a key feature of the business courts. Case management must be balanced against the busy dockets and limited
resources of our trial courts and the fact that many cases simply do not require this sort of attention.

The Committee proposes:

- Modification of existing MCR 2.401(B)(2) and (C) to trigger early discussions of discovery scope and limitations.

- Adoption of formalized discovery planning (proposed new MCR 2.401(C)), initiated either by the parties or the court, to force early consultation and assist case management in those cases where it is needed.

- Adoption of an Electronically Stored Information (ESI) Conference protocol (proposed new MCR 2.401(K)) to allow either the parties or the court to focus upon ESI issues with appropriately educated representatives early in the case, which reduces ESI costs and motion practice later in the proceedings.

- Modification of MCR 2.301 to consolidate provisions regarding the timing of discovery and with a new subsection reinforcing the trial court’s control over the order and amount of discovery.

- Adoption of new MCR 2.411 to add a discovery mediator to the existing alternative dispute mechanisms in the court rules, a practice already widely utilized in some courts.

C. Updating Numerous Topics and Borrowing Best Practices, When Advisable, from Other Jurisdictions

The review and revision process provided an opportunity to modify or update several other portions of the rules. For example:

- While the committee considered and rejected the use of expert reports as under the federal rules (given the different mix of cases in state court), we recommend adoption of provisions of the federal rules which eliminate discovery disputes over certain communications between counsel and expert witnesses in new proposed MCR 2.302(B)(4)(e)-(f).

- Adoption of new proposed MCR 2.302(B)(5) and (6) and 2.313(E), among other provisions, to continue the evolution of the rules’ attention to ESI issues.

- Modification of MCR 2.305 to narrow its application to non-party subpoenas, whereas party discovery is governed by MCR 2.306, 2.307, and 2.308-310.
• Modification of existing MCR 2.306(B)(5) regarding so-called “representative”
  depositions and adding a mechanism for resolution of objections as to the scope of the
  notice.

• Modification of MCR 2.312 to require requests for admission to be clearly labelled,
given the potential sanction for failing to respond.

• Modification of multiple provisions addressing sanctions in an attempt to utilize
  common terminology and grant discretion to the trial court as to whether to award
  sanctions and the appropriate sanction.

• Adoption of a protocol for final pretrial orders and conferences in modified MCR
  2.401(I).

• Modification of MCR 8.119(I)(4) to allow for the filing of exhibits to motions and
  briefs under seal without cumbersome motion practice, while preserving both the
  appellate courts’ and the public’s appropriate access to judicial records.

D. Attention to Discovery in Various Specialty Areas

The discovery rules in subchapter 2.300 apply, in various instances, to proceedings in
domestic relations matters, proceedings involving juveniles and probate court. The Committee,
relying upon judges and practitioners in these more specialized areas, recommends targeted
changes which are crafted to the needs of those particular courts.

Domestic Relations Actions (subchapter 3.200):

• While Domestic Relations actions are exempt from initial mandatory
disclosures under MCR 2.302, requirement of an automatic financial
disclosure early in the case pursuant to new proposed MCR 3.206(B)(2).

• Adoption of confidentiality measures in new proposed MCR 3.222 to protect
  parties and minors from disclosure of private information.

Juveniles (subchapter 3.900):

• Mandatory disclosure of basic records and reports either via discovery or at
  least 21 days before a trial or hearing (modified MCR 3.922, 3.973 and 3.975-977).

Probate (subchapter 5.000):

• Adoption of significantly modified MCR 5.131 to address discovery in
  contested proceedings.
V. Reference Materials

Federal Judicial Center:  www.fjc.gov
- A good general clearinghouse on federal rule amendment related articles
- See also the annotated “Guidelines and Practices for Implementing The 2015 Discovery Amendments to Achieve Proportionality,” which is continuously updated (most recent version March 2017):
  https://law.duke.edu/sites/default/files/centers/.../civil_rules_project-mar.pdf

Institute for the Advancement of the American Legal System:  http://iaals.du.edu/
- Reports on various state court initiatives
- State by state map:  http://iaals.du.edu/rule-one/projects/action-ground?project_type=state

Conference of Chief Justices:

National Center for State Courts:
- The Landscape of Civil Litigation in State Courts
  http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/civil/id/133
  (includes, *inter alia*, 2013 comparison of state court civil litigation systems).

The New Hampshire Revisions:

The Minnesota Revisions:
https://www.leg.state.mn.us/docs/2012/other/120214.pdf

The Iowa Task Force Report:

The Arizona Civil Justice Reform Report:

The Utah Revisions:

The Washington State Task Force Report:
http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/ECCL%20Task%20Force/Reports/ECCL%20Final%20Report%2006152015.ashx
Civil Discovery Court Rule Review Special Committee Draft Rule Proposal

September 25, 2017
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particular thought a clear statement in the rules was beneficial if they were expected to increase active case management.

RULE 2.302 DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY

(A) Availability of Discovery.

(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.

(4) After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(A) Required Initial Disclosures.

(1) In General. Except as exempted by these rules, stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties:

(a) the factual basis of the party’s claims and defenses;

(b) the legal theories on which the party's claims and defenses are based, including, if necessary for a reasonable understanding of the claim or defense, citations to relevant legal authorities;

Subrules (a) and (b) are from Ariz R Civ P 26.1(a)(1) and (2).\(^1\)

(c) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(d) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(e) a description by category and location of all documents, electronically stored information, and tangible things that are not in the disclosing party’s possession, custody, or control that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. The description must include the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material;

(f) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under MCR 2.310 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

(g) a copy of any insurance, indemnity, or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

Subrules (c), (d), (f), and (g) are adapted from FR Civ P 26(a)(1)(A). The Oakland County business court case management protocol and Macomb County business court administrative order require the same disclosures. Subrule (e) adds a disclosure requirement for documents in the possession, custody, or control of a person other than the disclosing party. Subrule (f) is modified from the federal rule to clarify that a damage computation applies only to the disclosing party’s knowledge at the time of disclosure. Subrule (g) adds indemnity and suretyship agreements to the federal disclosure requirement, as provided in Ariz R Civ P 26.1(a)(10).

(h) the anticipated subject areas of expert testimony.

Subrule (h) is adapted from proposed Ariz R Civ P 26.1(a)(6).
(2) Additional Disclosures for No-Fault Cases. In addition to the disclosures under subrule (A)(1), in a case asserting a first-party claim for benefits under the Michigan no-fault act, MCL 500.3101, *et seq.*, the following disclosures must be made without awaiting a discovery request:

(a) The defendant insurance company must disclose:

(i) a copy of the first-party claim file and a privilege log for any redactions,

(ii) the payments the insurance company has made on the claim, and

(iii) related claims and litigation.

(b) The plaintiff must disclose:

(i) the identity of those who provided medical, household, and attendant care services to plaintiff,

(ii) all provider bills for which the plaintiff seeks reimbursement, and

(iii) the name, address, and phone number of plaintiff’s employers.

(3) Additional Disclosures by Claimants for Damages for Personal Injury. A party claiming damages for injury arising from a mental or physical condition must provide the other parties with executed medical record authorizations for all providers.

Subrules (2) and (3) are adapted in part from Wayne County Circuit Court’s Addendum to Scheduling Order in No-Fault Cases. In addition to those requirements, the proposal adds disclosure by the insurance company of payments and related claims and litigation. It also adds disclosure by plaintiff of provider bills for which plaintiff seeks reimbursement. No-fault cases are a significant part of trial court caseloads. These disclosures are intended to expedite resolution of those cases.

(4) Cases Exempt from Initial Disclosure. Unless otherwise stipulated or ordered, the following are exempt from initial disclosure under subrule (A)(1)-(3):

(a) an appeal to the circuit court under subchapter 7.100;
Adapted from FR Civ P 26(a)(1)(B)(i). The reference to subchapter 7.100 is to the rules governing circuit court appeals.

(b) an action in district court (see MCR 2.301(A)(2));

The committee recognizes that discovery is not permitted in district court except by leave of court or on stipulation, MCR 2.302(A)(2) (renumbered to MCR 2.301(A)(2) in this proposal), but for clarity this exception is included here. Some members of the committee believe that initial disclosures can be useful in certain categories of district court cases and that a blanket exemption may not be desirable. Rather than adopt a blanket rule, the committee is hopeful that the changes otherwise suggested herein, if implemented, may spur more and earlier discussions in district court about the proper scope of discovery where desirable and appropriate.

(c) an action under subchapter 3.200;

Domestic relations actions are exempt from these disclosure rules; instead, the committee recommends an automatic financial disclosure. See proposed MCR 3.206(B)(2).

(d) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;


(e) an action to enforce or quash an administrative summons or a subpoena;


(f) a proceeding ancillary to a proceeding in another court, including an action for a subpoena under MCR 2.305(E) or (F);

Adapted from FR Civ P 26(a)(1)(B)(viii).

(g) an action to compel or stay arbitration or to confirm, vacate, enforce, modify, or correct an arbitration award;

(h) an action for collection of penalties, fines, forfeitures, or forfeited recognizances under MCR 3.605;

(i) personal protection proceedings under subchapter 3.700; and

(j) an action for habeas corpus.

(5) Time for Initial Disclosures.
(a) **Application of Time Limits.** These deadlines apply unless a stipulation or order sets a different time.

(b) **In General.**

(i) A party that files a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within 14 days after any opposing party files an answer to that pleading.

When there are multiple defendants, the plaintiff’s disclosures are due within 14 days after any one of the defendants files an answer.

(ii) A party answering a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within the later of 14 days after the opposing party’s disclosures are due or 28 days after the party files its answer.

These deadlines are intended to allow a party against whom a claim is made to see the claimant’s disclosures before the answering party must file its disclosures. They are also intended to defer initial disclosures while a pre-answer motion is pending. MCR 2.108(C) extends the time for answering until after the court decides a pre-answer motion (such as a motion for summary disposition).

(iii) A party serving disclosures need only serve parties that have appeared. The party must serve later-appearing parties within 14 days of the appearance.

(c) **Parties Served or Joined Later.** A party first served or otherwise joined after the time for initial disclosures under subrule (A)(5)(a) or (b) must serve its initial disclosures within 14 days after filing the party’s first pleading, unless a stipulation or order sets a different time.

Adapted from FR Civ P 26(a)(1)(D). The federal rule requires later-joined parties to make disclosures “30 days after being served or joined.” This subrule starts the time running at the filing of the party’s first pleading. (See MCR 2.110(A) for the definition of pleadings.) The subrule applies to intervening plaintiffs and other parties that are added after the original parties make their disclosures.

(6) **Basis for Initial Disclosure; Unacceptable Excuses.** A party must serve initial disclosures based on the information then reasonably available to the party. A party is not excused from making disclosures because the party has not fully investigated the case or because the party challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.
(7) **Form of Disclosures.** Disclosures under subrule (A) are subject to MCR 2.302(G), must be in writing, signed, and served, and a proof of service must be promptly filed.

Adapted from FR Civ P 26(a)(4). The provision for the court to “order otherwise” is omitted.

(B) **Scope of Discovery.**

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. non-privileged matter that is relevant to any party’s claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the issues [or, the public or private importance of the issues\(^2\)], the amount in controversy, and the parties’ resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

\(^2\) Fed.R.Civ.P. 26 uses the phrase “importance of the issues at stake in the action.” The 1983 commentary explains: “The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” The committee believed that expressly stating “public or private” might add clarity.
SUBCHAPTER 5.000 GENERAL PROVISIONS

RULE 5.131 DISCOVERY GENERALLY

(A) The general discovery rules apply in probate proceedings.

(B) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court. Discovery for civil actions in probate court is governed by subchapter 2.300.

(A) Civil Actions. Discovery for civil actions in probate court is governed by subchapter 2.300.

(B) Proceedings.

(1) The general discovery rules in subchapter 2.300 apply in probate proceedings, except that the initial and other mandatory disclosures under MCR 2.302(A) are required only in a proceeding or matter that is contested. Notwithstanding the time for initial disclosures specified at 2.302(A)(1)(b), initial disclosures in probate proceedings are due within 21 days after a pre-trial conference under MCR 2.401, or within 21 days after the first hearing on the contested petition, whichever is earlier.

(a) Specific Contested Proceedings. Unless otherwise ordered by the court, actions for the following are contested proceedings: remove a fiduciary; surcharge a fiduciary; probate a lost or destroyed will or later-discovered will; determine heirs, devisees, or beneficiaries; construe, reform, or modify a governing instrument; cancel a devise or gift; partition property for the purposes of distribution; determine pretermitted status or pretermitted share; determine amount of elective share and contribution; and revocation of probate of a will.

(b) Declared Contested Proceedings. In addition to matters deemed contested under subrule (a), proceedings are contested if an interested person executes a declaration of contest, serves the declaration on other interested persons, and files the declaration and proof of service with the court. Any declaration of contest must be served and filed within 21 days after the filing of the petition initiating the proceedings, or prior to the first hearing on the petition, whichever is earlier.

(c) Contested Status by Order. The court may determine any proceeding to be a contested proceeding at any time.

(2) For purposes of discovery, an interested person is considered a party under the general discovery rules if that interested person is the petitioner or respondent, files a responsive pleading, or otherwise serves a declaration under MCR 5.120(B). The probate court, on its own motion or a motion filed by an interested
person, may designate an interested person a party for purposes of discovery upon good cause shown.

(3) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.

<table>
<thead>
<tr>
<th>Not all probate proceedings are candidates for discovery. This rule change specifies which cases and which parties have access to discovery and are bound by its mandatory disclosure requirements.</th>
</tr>
</thead>
<tbody>
<tr>
<td>As part of the discussion to the amendments to MCR 5.131, some supported limiting mandatory disclosures to contesting parties and thought that the rule should not identify the types of cases that required such a disclosures.</td>
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</tbody>
</table>
September 20, 2017

ADM File No. 2002-37

Amendments of Rules 1.109, 2.107, 2.113, 2.114, 3.206, 3.901, 3.931, 3.961, 4.302, 5.113, 5.114, 6.001, 6.101, 8.117, and 8.119 of the Michigan Court Rules

On order of the Court, this is to advise that the amendments of Rules 1.109, 2.107, 2.113, 2.114, 3.206, 3.901, 3.931, 3.961, 4.302, 5.113, 5.114, 6.001, 6.101, 8.117, and 8.119 of the Michigan Court Rules are adopted and will become effective January 1, 2018, pending comment and public hearing. Immediate adoption of these rules is necessary for the development of the statewide electronic-filing system. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amended rules. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.109 Court Records Defined; Document Defined; Filing Standards; Signatures; Electronic Filing and Service; and Access

(A) Court Records Defined.

(1) Court records are defined by MCR 8.119 and this subrule. Court records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.

(a) [Unchanged.]

(b) For purposes of this subrule:

(i) – (ii) [Unchanged.]
(iii) Data refers to any information entered in the case management system that is not ordinarily reduced to a document, but that is still recorded information, and any data entered into or created by the statewide electronic-filing system.

(iv) [Unchanged.]

(2) [Unchanged.]

(B) Document Defined. A document means a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8 ½ x 11 inch paper without manipulation.

(C) Filing With Court Defined. Pleadings and other documents and materials filed with the court as required by these court rules must be filed with the clerk of the court in accordance with MCR 1.109(D), except that the judge to whom the case is assigned may accept materials for filing when circumstances warrant. A judge who does so shall note the filing date on the materials and immediately transmit them to the clerk. It is the responsibility of the party who presented the materials to the judge to confirm that they have been filed with the clerk. If the clerk records the receipt of materials on a date other than the filing date, the clerk shall record the filing date in the case history.

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) All pleadings and other documents prepared for filing in the courts of this state and all documents prepared by the court for placement in a case file must be legibly printed in the English language, comply with standards established by the State Court Administrative Office MCR 8.119(C), and be filed on good quality 8½ by 11 inch paper or transmitted through an approved electronic means or created electronically by the court and maintained in a digital image. The print must be no smaller than 10 characters per inch (nonproportional) or 12-point (proportional), except with regard to forms approved by the State Court Administrative Office. An affidavit must be verified by oath or affirmation.

(b) The first part of every document must contain a caption stating:
(i) the name of the court;

(ii) the names of the parties or the title of the action, subject to (c);

(iii) the case number, including a prefix of the year filed and a two-letter suffix for the case-type code from a list provided by the State Court Administrator pursuant to MCR 8.117 according to the principal subject matter of the proceeding;

(iv) the identification of the document;

(v) the name, business address, telephone number, and state bar number of each attorney appearing in the case; and

(vi) the name, address, and telephone number of each party appearing without an attorney.

(c) In a civil case initiating document, the title of the action must include the names of all the parties, with the plaintiff’s name placed first. In subsequent documents, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as “et al.”

(d) In a domestic relations case initiating document, the title of the action must also include whether a party is a minor or an incompetent person as defined by MCR 2.201(E).

(e) In a case filed under the juvenile code, the caption must also contain a petition number, where appropriate.

(2) Case Initiation Information. A party filing a case initiating document and a party filing any response or answer to a case initiating document shall provide specified case information in the form and manner established by the State Court Administrative Office and as specified in other applicable rules. In addition, it must include:

(a) in a civil action, either of the following statements:

(i) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint, or
(ii) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/[_________ Court], where it was given docket number __________ and was assigned to Judge ___________. The action [remains]/[is no longer] pending.

(b) in a criminal action, either of the following statements:

(i) There are no pending or resolved cases in any jurisdiction that involve a minor child of the family or individual family member of the defendant, or

(ii) There are pending or resolved cases that involve a minor child of the family or individual family member of the defendant and that could affect jurisdiction, judicial assignment, venue, or consolidation under MCR 3.204, or notice under MCR 3.205. Attached is a completed family case inventory form identifying these individuals as required by MCR 6.101(A).

(c) in a family division or probate action, except for outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 et seq. and the Uniform Interstate Family Support Act, MCL 551.1101 et seq., either of the following statements:

(i) There are no pending or resolved cases in any jurisdiction that involve a minor child of the family or individual family member of the parties to the case, or

(ii) There are pending or resolved cases that involve a minor child of the family or individual family member of the parties to the case, and that could affect jurisdiction, judicial assignment, venue, or consolidation under MCR 3.204, or notice under MCR 3.205. Attached is a completed family case inventory form identifying these individuals as required by MCR 3.206(A)(3).
(3) Verification. Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit. If a document is required or permitted to be verified, it may be verified by

(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

(b) except as to an affidavit, including the following signed and dated declaration:

(i) in documents filed in the probate court or under the juvenile code, “I declare under the penalties of perjury that this _________ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.”

Any requirement of law that a document filed with the court must be sworn may be met by this declaration.

(ii) in all other documents, “I declare that the statements above are true to the best of my information, knowledge, and belief.”

In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under this subrule may be found in contempt of court.

(24) All other materials submitted for filing shall be prepared in accordance with this rule and standards established by the State Court Administrative Office. An attachment or discovery material that is submitted for filing shall be made part of the public case file unless otherwise confidential.

(35) Except where electronic filing is implemented, all original documents filed on paper may be reproduced and maintained by the court as a digital image in place of the paper original in accordance with standards and guidelines established by the State Court Administrative Office. Any document reproduced under this subrule replaces the paper as the official record.

(46) A clerk of the court may reject nonconforming documents as prescribed by MCR 8.119.
Electronic filing and electronic service of documents is governed by subrule (G) and the policies and standards of the State Court Administrative Office.

Filing Documents Under Seal. Public documents may not be filed under seal without a court order. A document may be sealed before the order is entered only as follows:

(a) A filer may request that a public document be filed under seal by filing a motion for leave to file under seal. As part of the filing, the filer shall provide a proposed order granting the motion and shall identify each document that is to be sealed under the order. The filer shall bear the burden of establishing good cause for sealing the document.

(b) Pending the court’s order, the filer shall serve copies of the motion, each document to be sealed, and the proposed order on all parties. The clerk of the court shall ensure that the sealed documents are accessible only to court staff and parties.

(c) Before entering an order sealing a document under this rule, the court shall comply with MCR 8.119(I). On entry of the order on the motion, the clerk shall maintain under seal only those documents stated in the court’s order and shall unseal any of the documents that were not stated in the order.

Signatures.

(1) [Unchanged.]

(2) Requirement. Every document filed shall be signed by the person filing it or by at least one attorney of record. A party who is not represented by an attorney must sign the document. In probate proceedings, the following also applies:

(a) When a person is represented by an attorney, the signature of the attorney is required on any paper filed in a form approved by the State Court Administrator only if the form includes a place for a signature.

(b) An application, petition, or other paper may be signed by the attorney for the petitioner, except that an inventory, account,
acceptance of appointment, and sworn closing statement must be signed by the fiduciary or trustee. A receipt for assets must be signed by the person entitled to the assets.

3) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

4) An electronic signature is acceptable in accordance with this subrule.

2a) An electronic signature means an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. The following form is acceptable: /s/ John L. Smith.

3b) If a law or court rule requires a signature to be notarized or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law or court rule, is attached to or logically associated with the signature.

4c) Retention of a signature electronically affixed to a document that will be retained by the court in electronic format must not be dependent upon the mechanism that was used to affix that signature.

5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that

a) he or she has read the document;

b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the
amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

(EF) Requests for access to public court records shall be granted in accordance with MCR 8.119(H).

(G) Electronic Filing and Service.

(1) Definitions. For purposes of this subrule:

(a) “Authorized user” means a user of the e-filing system who is registered to file, serve, and receive documents and related data through approved electronic means. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach.

(b) “Electronic filing” or “e-filing” means the electronic transmission of data and documents to the court through the electronic-filing system.

(c) “Electronic-filing system” means a system provided by the State Court Administrative Office that permits electronic transmission of data and documents.

(d) “Electronic notification” means the electronic transmission of information from the court to authorized users through the electronic-filing system. This does not apply to service of documents. See subrule (f).

(e) “Electronic service” or “e-service” means the electronic service of information by means of the electronic-filing system under this rule. It does not include service by e-mail under MCR 2.105(C)(4).

(f) “Notice of electronic filing or service” means a notice automatically generated by the e-filing system at the time a document is filed or served.
Electronic-Filing and Electronic-Service Standards. Courts shall implement electronic-filing and electronic-service capabilities in accordance with this rule and shall comply with the standards established by the State Court Administrative Office. Confidential and nonpublic information must be electronically filed or electronically served in compliance with these standards to ensure secure transmission of the information.

Scope and Applicability.

(a) A court shall:

(i) accept electronic filing and permit electronic service of documents;

(ii) comply with the electronic-filing guidelines and plans approved by the State Court Administrative Office; and

(iii) maintain electronic documents in accordance with the standards established by the State Court Administrative Office.

(b) A court may allow documents, including but not limited to exhibits for trial or inventory information for decedent estates, to be transmitted to the court for purposes other than filing in a case file.

(c) Exemption from Electronic Filing. Electronic filing is mandatory under Michigan Supreme Court Administrative Order 2017-XX. A party will be permitted to file documents in paper format with the clerk of the court if the party can demonstrate good cause for an exemption.

(d) Non-Electronic Materials. Courts must accommodate the filing and serving of materials that cannot be filed or served electronically.

(e) Converting Paper Documents. The clerk of the court shall convert to electronic format any document filed on paper.

(f) A court may electronically serve notices, orders, opinions, and other documents by means of the electronic-filing system.
(4) Official Court Record. The electronic version of any document filed with or generated by the court under this rule and any case initiation data transmitted in accordance with subrule (D)(2) is an official court record.


(a) General Provisions.

(i) Specified case information, including e-mail addresses for achieving electronic service, shall be provided electronically by the authorized user in the form and manner established by the State Court Administrative Office pursuant to subrule (D)(2).

(ii) The authorized user has the responsibility of ensuring that a filing has been received by the electronic-filing system. If the authorized user discovers that the version of the document available for viewing through the e-filing system does not depict the document as submitted, the authorized user shall notify the clerk of the court immediately and resubmit the filing if necessary. In the event of a controversy between the clerk of the court and the authorized user, the authorized user may file a motion with the court under subrule (G)(7).

(iii) If the clerk of the court rejects a submitted document pursuant to MCR 8.119(C), the clerk shall notify the authorized user of the rejection and the reason for the rejection. A rejected document shall not become part of the official court record and the rejection shall be recorded in an electronic-filing transaction from the court to the authorized user in accordance with subrule (c).

(b) Time and Effect of Electronic Filing. A document submitted electronically is considered filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or waived. A transmission is completed when the transaction is recorded as prescribed in subrule (c). Regardless of the date a filing is accepted by the clerk of the court, the date of filing is the date submitted. Electronic filing is not restricted by the operating hours of a court and any document submitted at or before 11:59 p.m. of a business day is considered filed on that business day.
(c) Electronic-Filing Transaction. On receipt of a submission or on rejection of a submission, the statewide electronic-filing system shall record the filing transaction and send a notice of electronic filing or rejection to the authorized user. The system shall maintain for every court a record of each filing transaction in accordance with the records retention and disposal schedules and standards established by the State Court Administrative Office. A notice of electronic filing shall include the date and time of filing or rejection, the name of the authorized user filing the document(s), the type of document, the text of the docket entry into the case management system, the name of the authorized user receiving the notice, and a hyperlink to the filed document(s).

(d) Documents Under Seal. A party seeking to file a document under seal must comply with subrule (D)(8).

(6) Electronic-Service Process.

(a) General Provisions.

(i) Service of process of case initiating documents shall be made in accordance with the rules and laws required for the particular case type.

(ii) Service of process of all other documents electronically filed shall be accomplished electronically among authorized users through the electronic-filing system.

(iii) Delivery of documents through the electronic-filing system in conformity with these rules is valid and effective personal service and is proof of service under MCR 2.107(D).

(iv) Except for service of process of initiating documents and as otherwise directed by the court or court rule, service shall be performed simultaneously with filing.

(b) Time and Effect. A document served electronically through the electronic-filing system in conformity with all applicable requirements of this rule is considered served when the transmission to the recipient’s e-mail address is completed. A transmission is
completed when the transaction is recorded as prescribed in subrule (c).

(c) Electronic-Service Transaction. On transmission of a document, the electronic-filing system shall record the service transaction. The system shall maintain for every court a record of each service transaction in accordance with the state-approved records retention and disposal schedules and standards established by the State Court Administrative Office.

(7) Transmission Failures. In the event the electronic-filing system fails to transmit a document submitted for filing, the authorized user may file a motion requesting that the court enter an order permitting the document to be deemed filed on the date it was first attempted to be sent electronically. The authorized user must prove to the court’s satisfaction that:

(a) the filing was attempted at the time asserted by the authorized user;

(b) the electronic-filing system failed to transmit the electronic document; and

(c) the transmission failure was not caused, in whole or in part, by any action or inaction of the authorized user. A transmission failure caused by a problem with a filer’s telephone line, ISP, hardware, or software shall be attributed to the filer.

Rule 2.107 Service and Filing of Pleadings and Other Papers

(A) – (C) [Unchanged.]

(D) Proof of Service. Except as otherwise provided by MCR 2.104, 2.105, or 2.106, proof of service of papers required or permitted to be served may be by written acknowledgment of service, or affidavit of the person making the service, a written statement by the individual who served the documents regarding the service verified under MCR 1.109(D)(3)2.114(B), or other proof satisfactory to the court. The proof of service may be included at the end of the paper document as filed. Proof of service must be filed promptly and at least at or before a hearing to which the paper relates.

(E) – (F) [Unchanged.]
Filing With Court Defined. Pleadings and other materials filed with the court as required by these rules must be filed with the clerk of the court in accordance with standards prescribed by MCR 1.109(C), except that the judge to whom the case is assigned may accept materials for filing when circumstances warrant. A judge who does so shall note the filing date on the materials and immediately transmit them to the clerk. It is the responsibility of the party who presented the materials to confirm that they have been filed with the clerk. If the clerk records the receipt of materials on a date other than the filing date, the clerk shall record the filing date on the register of actions.

Rule 2.113 Form, Captioning, Signing, and Verifying of Pleadings and Other Papers

(A) Applicability. The rules on the form, captioning, signing, and verifying of pleadings apply to all motions, affidavits, and other papers provided for by these rules prescribed in MCR 1.109(D). However, an affidavit must be verified by oath or affirmation.

(B) Preparation. Every pleading must be legibly printed in the English language and in compliance with MCR 1.109.

(C) Captions.

(1) The first part of every pleading must contain a caption stating

(a) the name of the court;

(b) the names of the parties or the title of the action, subject to subrule (D);

(c) the case number, including a prefix of the year filed and a two-letter suffix for the case type code form a list provided by the State Court Administrator pursuant to MCR 8.117 according to the principal subject matter of the proceeding;

(d) the identification of the pleading (see MCR 2.110[A]);

(e) the name, business address, telephone number, and state bar number of the pleading attorney;

(f) the name, address, and telephone number of a pleading party appearing without an attorney; and
(g) the name and state bar number of each other attorney who has appeared in the action.

(2) The caption of a complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff, or of a plaintiff appearing without an attorney.

(a) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

(b) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/[_________ Court], where it was given docket number _________ and was assigned to Judge ___________. The action [remains]/[is no longer] pending.

(3) If an action has been assigned to a particular judge in a multi-judge court, the name of that judge must be included in the caption of a pleading later filed with the court.

(D) Names of Parties.

(1) In a complaint, the title of the action must include the names of all the parties, with the plaintiff’s name placed first.

(2) In other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as “et al.”

(EB) – (GD) [renumbered but otherwise unchanged.]

Rule 2.114 Signatures of Attorneys and Parties; Verification; Effect; Sanctions

(A) Applicability. This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules. See MCR 2.113(A). In this rule, the term “document” refers to all such papers.

(B) Verification.

(1) Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit.
If a document is required or permitted to be verified, it may be verified by

(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

(b) except as to an affidavit, including the following signed and dated declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief."

In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under subrule (B)(2)(b) may be found in contempt of court.

(C) Signature.

(1) Requirement. Every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document.

(2) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

(3) An electronic signature is acceptable provided it complies with MCR 1.109(D).

(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses
incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

Rule 3.206 PleadingInitiating a Case

(A) Information in ComplaintCase Initiating Document.

(1) The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(2) Except for matters considered confidential by statute or court rule, in all domestic relations actions, the complaint or other case initiating document must state

(a) the allegations required by applicable statutes; and

(b) the residence information required by statute;

(c) the complete names of all parties; and

(d) the complete names and dates of birth of any minors involved in the action, including all minor children of the parties and all minor children born during the marriage.

(2) In a case that involves a minor, or if child support is requested, the complaint also must state whether any Michigan court has prior continuing jurisdiction of the minor. If so, the complaint must specify the court and the file number.

(3) In a case in which the custody of a minor is to be determined, the complaint or an affidavit attached to the complaint also must state the information required by MCL 722.1209.

(4) The caption of the complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff or petitioner, or of a plaintiff or petitioner appearing without an attorney;
(a) There is no other pending or resolved action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition.

(b) An action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition has been previously filed in [this court]/[______ Court], where it was given docket number ______ and was assigned to Judge ________. The action [remains]/[is no longer] pending.

(3) Except for outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 et seq. and the Uniform Interstate Family Support Act, MCL 551.1101 et seq., when any pending or resolved domestic relations or family division case exists in any jurisdiction that involves the family or individual family members named in the document filed under subrule (1), the filing party must attach to the case initiating document a completed family case inventory, on a form approved by the State Court Administrative Office. Each case listed on the inventory must specify:

(a) the court name and location,

(b) the case name,

(c) the court case number,

(d) the assigned judge,

(e) the status of the case,

(f) whether the court in the listed case has continuing jurisdiction over any minor named in the document, or over any of the minor’s siblings of the same parents, and if so, whether any support, custody, or parenting time orders remain in effect.

(54) [Renumbered, but otherwise unchanged.]

(65) [Renumbered, but otherwise unchanged.]

(76) [Renumbered, but otherwise unchanged.]
In a case in which the custody or parenting time of a minor is to be determined or modified, the filing party shall file a Uniform Child Custody Jurisdiction Enforcement Act Affidavit, on a form approved by the State Court Administrative Office, as required by MCL 722.1209(1).

[B] [Renumbered, but otherwise unchanged.]

[CD] [Renumbered, but otherwise unchanged.]

**Rule 3.901 Applicability of Rules**

(A) Scope.

(1) The rules in this subchapter, in subchapter 1.100, in MCR 5.113, and in subchapter 8.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

(2) – (3) [Unchanged.]

(B) [Unchanged.]

**Rule 3.931 Initiating Delinquency Proceedings**

(A) Commencement of Proceeding. Any request for court action against a juvenile must be by written petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(B) Content of Petition. A petition must contain the following information:

(1) [Unchanged.]

(2) the names and addresses, if known, of

(a) – (c) [Unchanged.]

(d) the juvenile’s membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe, and

(e) any court with prior continuing jurisdiction;

(3) – (5) [Unchanged.]
the court action requested; and

if applicable, the notice required by MCL 257.732(8), and the juvenile's Michigan driver's license number; and

information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending.

Rule 3.961 Initiating Child Protective Proceedings

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(B) Content of Petition. A petition must contain the following information, if known:

(1) [Unchanged.]

(2) The names and addresses of:

(a) the child's mother and father,

(b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father, and

(c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found, and

(d) any court with prior continuing jurisdiction.

(3) – (6) [Unchanged.]

(7) The information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending.

Rule 4.302 Statement of Claim

(A) Contents. The statement of the claim must be in an affidavit in substantially the form approved by the state court administrator. Affidavit forms shall be available at the clerk's office. The nature and amount of the claim must be stated in concise,
nontechnical language, and the affidavit must state the date or dates when the claim arose. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

Rule 5.113  **Papers; Form, Captioning, Signing, and Verifying of Documents; and Filing**

(A) Forms of **Papers; Documents Generally.** The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D). Documents must be substantially in the form approved by the State Court Administrator, if a form has been approved for the use.

(1) An application, petition, motion, inventory, report, account, or other paper in a proceeding must

(a) comply with MCR 1.109 and be legibly typewritten or printed in ink in the English language, and

(b) include the

(i) name of the court and title of the proceeding in which it is filed;

(ii) case number, if any, including a prefix of the year filed and a two-letter suffix for the case-type code (see MCR 8.117) according to the principal subject matter of the proceeding, and if the case is filed under the juvenile code, the petition number which also includes a prefix of the year filed and a two-letter suffix for the case-type code.

(iii) character of the paper; and

(iv) name, address, and telephone number of the attorney, if any, appearing for the person filing the paper, and

(e) be substantially in the form approved by the State Court Administrator, if a form has been approved for the use.

(2) A judge or register may reject nonconforming documents in accordance with MCR 8.119.
(B) [Unchanged.]

(C) Filing by Registered Mail. Where e-filing is implemented, any document required by law to be filed in or delivered to the court by registered mail, shall be filed through the electronic-filing system may be filed or delivered by certified mail, return receipt requested.

(D) [Unchanged.]

Rule 5.114 Signing and Authentication of Papers

(A) Signing of Papers.

(1) The provisions of MCR 2.1141.109(D) and (E) regarding the signing of papers apply in probate proceedings except as provided in this subrule.

(2) When a person is represented by an attorney, the signature of the attorney is required on any paper filed in a form approved by the State Court Administrator only if the form includes a place for a signature.

(3) An application, petition, or other paper may be signed by the attorney for the petitioner, except that an inventory, account, acceptance of appointment, and sworn closing statement must be signed by the fiduciary or trustee. A receipt for assets must be signed by the person entitled to the assets.

(B) Authentication by Verification or Declaration.

(1) An application, petition, inventory, accounting, proof of claim, or proof of service must be either authenticated by verification under oath by the person making it, or, in the alternative, contain a statement immediately above the date and signature of the maker: “I declare under the penalties of perjury that this _________ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.” Any requirement of law that a document filed with the court must be sworn may be met by this declaration.

(2) In addition to the sanctions provided by MCR 2.114(E), a person who knowingly makes a false declaration under subrule (B)(1) is in contempt of court.
Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C) – (E) [Unchanged.]

Rule 6.101 The Complaint

(A) Definition and Form. A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense. At the time of filing, specified case initiation information shall be provided in the form and manner approved by the State Court Administrative Office as required by MCR 1.109(D)(2). In addition, when any pending or resolved domestic relations or family division case exists in any jurisdiction in which the defendant is a party, a completed family case inventory shall be attached to the complaint, on a form approved by the State Court Administrative Office. Each case listed on the inventory must specify:

1. the court name and location,
2. the case name,
3. the court case number,
4. the assigned judge,
5. the status of the case,
6. whether the court in the listed case has continuing jurisdiction over any minor named in the document, or over any of the minor’s siblings of the same parents, and if so, whether any support, custody, or parenting time orders remain in effect.

(B) – (C) [Unchanged.]
Rule 8.117 Case Classification Codes

Use of Case-Type Code. As required by MCR 2.113(C)(1)(e)1.109(D)(1)(b)(iii), the plaintiff person filing a case initiating document must assign one case-type code from a list provided by the State Court Administrator according to the principal subject matter of the action (not the nature of the proceedings), and shall include this code in the caption of the complaint with other case initiation information required by MCR 1.109(D)(2). The case code must be included in the caption of all papers other documents thereafter filed in the case. The current case classification codes may be found at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/ef_casetypecodes.pdf

Rule 8.119 Court Records and Reports; Duties of Clerks

(A) [Unchanged.]

(B) Records Standards. The clerk of the court Trial courts shall comply with the records standards in this rule, MCR 1.109, and as prescribed by the Michigan Supreme Court.

(C) Filing of Documents and Other Materials. The clerk of the court shall endorse on the first page of every document the date on which it is filed process and maintain documents filed with the court as prescribed by. Documents and other materials filed with the court as defined in MCR 2.107(G) must comply with Michigan Court Rules and the Michigan Trial Court Case Records Management Standards and all filed documents must be file stamped in accordance with these standards. The clerk of the court may only reject documents that do not comply with MCR 1.109(D), are not signed in accordance with MCR 1.109(E), or are not accompanied by a filing fee meet the following minimum filing requirements:

1. standards prescribed by MCR 1.109,

2. legibility and language as prescribed by MCR 2.113(B) and MCR 5.113,

3. captioning prescribed by MCR 2.113(C)(1) and MCR 5.113,

4. signature prescribed by MCR 1.109(E)2.114(C) and MCR 5.114, and

5. the filing fee is not paid at the time of filing, unless waived or suspended by court order.
Records Kept by the Clerk of the Court. The clerk of the court shall maintain the following case records in accordance with the Michigan Trial Court Case File Records Management Standards, Michigan Trial Court Record Retention and Disposal Standards and Guidelines, and approved records retention and disposal schedules. Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated as confidential accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to subrule (I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

Case History and Case Files. The clerk shall maintain records of each case consisting of case history (known as a register of actions) and, except for civil infractions, a case file in such form and style as may be prescribed by the State Court Administrative Office. Each case shall be assigned a case number on receipt of a complaint, petition, or other case initiating document. The case number shall comply with MCR 1.109(D)(1)(b)(iii) or MCR 5.113(A)(1)(b)(ii) as applicable. In addition to the case number, a separate petition number shall be assigned to each petition filed under Chapter XIIA of the Probate Code, MCL 712A.1 et seq., as required under MCR 5.113(A)(1)(b)(ii) or MCR 1.109(D)(1)(e). The case number (and petition number if applicable) shall be recorded in the court’s automated case management system and on the case file. The records shall include the following characteristics:

(a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court’s automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Case File Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each
entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(b) Case File. The clerk of the court shall maintain a file of each action, bearing the case number assigned to it, for all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any other materials prescribed by court rule, statute, or court order to be filed with the clerk of the court. If case file records are maintained separately from the case files, the clerk shall maintain them as prescribed by the Michigan Trial Court Case File Records Management Standards.

(2) [Unchanged.]

(3) Abolished Records.

(a) [Unchanged.]

(b) Dockets. A register of actions Case history replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered in the court’s automated case management system.

(4) Official Court Record. There is only one official court record, regardless whether original or suitable-duplicate and regardless of the medium. Suitable-duplicate is defined in the Michigan Trial Court Records Management Standards. Documents electronically filed with the court or generated electronically by the court are original records and are the official court record. A paper printout of any electronically filed or generated document is a copy and is a nonrecord for purposes of records retention and disposal.

(E) – (G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; however, all other public information in its case files may be provided through electronic means only upon request. The court may provide access to any
case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(C)(2)(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1) Unless access to a case record or information contained in a record as defined in subrule (D) is restricted by statute, court rule, or an order entered pursuant to subrule (I), any person may inspect that record and may obtain copies as provided in subrule (J). In accordance with subrule (J), the court may collect a fee for the cost of this service, including the cost of providing the new record in a particular medium.

(2) [Unchanged.]

(I) [Unchanged.]

(J) Access and Reproduction Fees.

(1) A court may not charge a fee to access public case history information or to retrieve or inspect a case document irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided, and the technology used to create, store, retrieve, reproduce, and maintain the case record.

(2) A court may charge a reproduction fee for a document pursuant to MCL 600.1988, except when the reproduction fee for a case record that the court is required by law or court rule to provide a copy without charge to a person or other entity, irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided, and the technology used to create, store, retrieve, reproduce, and maintain the case record.

(23) The court may provide access to its public case records in any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403. If a court maintains its public records in electronic format only,

(a) the court may not charge a fee to access those case records when access is made on site through a public terminal or when a verbal request for public information is made on site to the clerk.
the court or a contracted entity may charge a fee, in accordance with Supreme Court order, to access those case records when the access is made off-site through a document management, imaging, or other electronic records management system.


(a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce a case record/document and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce a case record/document.

(b) – (c) [Unchanged.]

(45) [Renumbered but otherwise unchanged.]

(K) Retention Periods and Disposal of Court Records.

For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such in the Michigan trial courts approved records retention and disposal schedule. An order disposing of court records shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5399.811.

(L) [Unchanged.]
Staff comment: The amendments in this proposal are intended to begin moving trial courts toward a statewide uniform e-Filing process. The rules are required to be in place to enable SCAO’s e-Filing vendor to begin programming the statewide solution. In addition, the proposal would move existing language into MCR 1.109 as a way to, for the first time, include most filing requirements in one single rule, instead of scattered in various rules. The proposal largely mirrors the administrative orders that most e-Filing pilot projects have operated under, but contains some significant new provisions. For example, courts would be required to maintain documents in an electronic document management system, and the electronic record would be the official court record.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No.2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.
A bill to provide for and clarify the liability of and simplify claims and actions against insurance agents and agencies.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "insurance agents liability act".

Sec. 2. As used in this act:

(a) "Customer" means a person that has engaged a licensee or requested that the licensee place, procure, or service insurance coverage on the person's behalf and includes any other person that is requested to be included as or that is a named insured on the coverage. Customer does not include any of the following:

(i) Any other person that may be included in the coverage or in a policy issued as an additional insured, loss payee, mortgagee, land contract holder, or lien holder.
(ii) Any other person that may benefit from the coverage as a beneficiary or insured person.

(iii) Any other person that may have suffered or is alleged to have suffered loss, damage, or injury that may be recoverable under the coverage or a policy issued.

(b) "Insurance agent errors and omissions liability" means the cause of action described in section 4(1).

(c) "Insurance counselor" means an individual who is licensed as an insurance counselor under section 1234 of the insurance code of 1956, 1956 PA 218, MCL 500.1234.

(d) "Licensee" means an insurance producer, as that term is defined in section 1201 of the insurance code of 1956, 1956 PA 218, MCL 500.1201, including an insurance agency, that is licensed under the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302. Licensee includes an employee of an insurance producer. Licensee does not include an insurance counselor.

(e) "Person" means an individual, partnership, corporation, association, governmental entity, or other legal entity.

(f) "Special relationship" means a relationship between a licensee and a customer as to which 1 or more of the following occur:

(i) The licensee expressly undertakes additional duties or obligations beyond exercising the standard of care to place, attempt to place, or service the coverage requested by the customer that is the specific issue in dispute. A licensee does not expressly undertake an additional duty or obligation by doing either of the following:
(A) Using a common phrase of puffery or assurance, such as full coverage, good coverage, or you are covered.

(B) Offering options for optional or additional coverage or limits.

(ii) The customer makes an inquiry to the licensee or asks the licensee a question about the specific issue in dispute.

(iii) The licensee makes a representation or provides advice or an explanation about the specific issue in dispute to the customer. A licensee does not provide advice by offering options for optional or additional coverage or limits.

(iv) The customer makes an ambiguous request to the licensee that warrants clarification about the specific issue in dispute.

(g) "Special relationship" does not include a relationship between a licensee and a customer that is based only on 1 or more of the following:

(i) The length of a business or personal relationship between the licensee and the customer.

(ii) The number or percentage of policies or coverages procured or placed by the licensee for the customer.

(h) "Standard of care" means the minimum skill and care, knowledge, and expertise possessed and exercised by licensees placing or servicing the same or a comparable type and complexity of coverage with the same or a comparable premium level as the policy and coverage at issue or in dispute.

Sec. 3. (1) This act applies to a licensee with respect to services, conduct, or actions performed in the licensee's capacity as a licensee.
(2) This act does not apply to a licensee with respect to the licensee's duties in the receipt or handling of money under section 1207 of the insurance code of 1956, 1956 PA 218, MCL 500.1207.

Sec. 4. (1) There is a single cause of action against a licensee regarding services, conduct, or actions performed in the agent's capacity as a licensee, insurance agent errors and omissions liability.

(2) There is no cause of action against a licensee other than the cause of action described in subsection (1), including, but not limited to, any cause of action at common law or in equity for negligence, breach of contract, misrepresentation, fraud, breach of fiduciary duty, unjust enrichment, or quantum meruit, and any such cause of action is abolished.

Sec. 5. Except as provided in section 6, if a special relationship is established, a licensee's liability for insurance agent errors and omissions liability is limited to breach or violation of the standard of care for licensees to place and service insurance policies and coverage requested by the licensee's customers. A licensee has no duty or obligation to advise a customer or other person about the customer's insurance needs or requirements or to explain the coverage to a customer or other person. Except as provided in section 1207 of the insurance code of 1956, 1956 PA 218, MCL 500.1207, a licensee is not a fiduciary and does not have fiduciary obligations.

Sec. 6. If a special relationship is found to exist with the customer as to the specific matter or issue that is in dispute, the licensee shall comply with the standard of care in fulfilling the
additional duties or obligations agreed to, to clarify the
ambiguous request, to give accurate and responsive advice and
explanations, and to accurately respond to the inquiries or
questions.

Sec. 7. Unless the standard of care and breach or violation of
the standard of care is acknowledged or admitted by the licensee or
readily apparent under the facts without expert testimony, proof of
insurance agent errors and omissions liability requires expert
testimony or opinions to establish the standard of care, breach or
violating the standard of care, and whether damages proximately
resulted from the breach or violation of the standard of care.

Sec. 8. The liability and damages of a licensee for insurance
agent errors and omissions liability as a result of breaching or
violating the standard of care is limited to the loss, damages, or
benefits that would have been recovered or received by the customer
or another person had there been no error or omission by the
licensee, plus statutory interest, and does not include other
amounts or damages such as, by way of example only, mental distress
and upset damages; loss of profits that would not have been payable
under the policy or policies procured or to be procured in the
absence of the error or omission; punitive or exemplary damages; or
any other loss or damages that would not have been covered by the
policy or policies at issue in the absence of the error or omission
of the licensee.

Sec. 9. A person shall not commence an action or arbitration
or otherwise make a claim for insurance agent errors and omissions
liability against a licensee more than 2 years after the licensee
last provided services to the customer with respect to the specific policy or coverage at issue or more than 6 months after the date the customer knew, discovered, or should have discovered through the application of ordinary care that an error or omission may have been committed.

Sec. 10. This act applies to a cause of action that arises or an action, arbitration, or claim filed or made on or after the effective date of this act.
1. Rev. Proc. 2017-58 sets forth various annual inflation adjustments including the following:

The tax rate table for taxable years beginning in 2018 for estates and trusts is as follows:

**TABLE 5 – Section 1(e) - Estates and Trusts**

<table>
<thead>
<tr>
<th>If Taxable Income Is:</th>
<th>The Tax Is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not over $2,600</td>
<td>15% of the taxable income</td>
</tr>
<tr>
<td>Over $2,600 but not over $6,100</td>
<td>$390 plus 25% of the excess over $2,600</td>
</tr>
<tr>
<td>Over $6,100 but not over $9,300</td>
<td>$1,265 plus 28% of the excess over $6,100</td>
</tr>
<tr>
<td>Over $9,300 but not over $12,700</td>
<td>$2,161 plus 33% of the excess over $9,300</td>
</tr>
<tr>
<td>Over $12,700</td>
<td>$3,283 plus 39.6% of the excess over $12,700</td>
</tr>
</tbody>
</table>

b. Basic Exclusion Amount.

For an estate of a decedent dying in calendar year 2018, the basic exclusion amount is $5,600,000. The basic exclusion amount in 2017 was $5,490,000.

c. Annual Exclusion for Gifts.

(i) For calendar year 2018, the annual exclusion amount for gifts is $15,000. The annual exclusion amount was $14,000 in 2017. Section 2503(b) of the Internal Revenue Code excludes the first $15,000 of gifts per donee, per year, other than gifts of future interests, in calculating the donor’s taxable gifts. The donee must have a present interest in the gifted property to qualify for the annual exclusion.

(ii) In lieu of a gift tax marital deduction for a non-citizen spouse the amount of the annual exclusion is increased for transfers to a non-citizen spouse under Section 2523(i). Instead of a base amount of $10,000 adjusted for inflation under Section 2503(b), the base amount for the annual exclusion gift is $100,000 for gifts of present interests to non-citizen spouses. For calendar year 2018 the annual exclusion gift to a spouse who is not a citizen of the United States is $152,000. The annual exclusion to a non U.S. citizen spouse is $149,000 in 2017.


The highest individual income tax rate of 39.6% in 2018 impacts unmarried individuals (other than surviving spouses and heads of household) whose income exceed $426,700 and married taxpayers filing a joint return whose income exceeds $480,050.

The highest individual income tax rate of 39.6% in 2018 impacts unmarried individuals (other than surviving spouses and heads of household) whose income exceed $426,700 and married taxpayers filing a joint return whose income exceeds $480,050.
Instructions for Section Expense Reimbursement Form

The Expense Reimbursement Form can be prepared on your computer, digitally signed, digitally approved, and e-mailed for processing. All receipts and other required documentation can be scanned and e-mailed along with the form. You should keep a copy for your electronic file, and you will save paper and filing cabinet space as a result. You do not need to print the form and manually fill it out.

1. Type your name & address information. (You may tab after each field).
2. Select a section name from the drop down list.
3. Enter the appropriate expense account number.
4. Enter the amount(s).
5. In the date box, enter the date or pick from the calendar.
6. Type in the description and business purpose of the expense.
7. The form will automatically calculate the mileage, if applicable.
8. Type in the amount of the expense(s) for lodging, meals, miscellaneous.
9. The total expense will be displayed at the right hand side of the form for each line entered.
10. Please make sure the bottom right hand total amount and the upper right hand side total amounts are the same.
11. Date the form.
12. You may now digitally sign your form (placing your cursor over the signature line—it will prompt you through the process). Once you complete your first digital signature, it will be saved for future use.
13. You may save the form on your personal drive or shared drive for future reference.
14. You may enter a title if applicable.
15. Forward the form (by e-mail) along with scanned copies of receipts, list of names, and other required documentation to the treasurer of the section.
16. Once the form is approved, the treasurer will then forward the form/attachments to Alpa Patel in the Finance Department at SBM for processing.

Note: This form replaces any old or existing forms and should be used going forward.

If you have any questions about this form, please contact Alpa Patel at (517) 346-6362 or apatel@mail.michbar.org.
<table>
<thead>
<tr>
<th>Date</th>
<th>Description &amp; Purpose (Note start and end point for mileage)</th>
<th>Mileage</th>
<th>Lodging/Other Travel</th>
<th>Meals (Self + attach list of guests)</th>
<th>Miscellaneous (i.e. copying, phone, etc.)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>.535</td>
<td></td>
<td>0</td>
<td></td>
<td>$ 0.00</td>
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<td></td>
<td>$ 0.00</td>
</tr>
</tbody>
</table>

I certify that the reported expense was actually incurred while performing my duties for the State Bar of Michigan as

Date | Title | Signature
|------|-------|-------------
|      |       |             

Grand Total $ 0.00

I certify that the reported expense was actually incurred while performing my duties for the State Bar of Michigan as

Date | Title | Approved by (Signature)
|------|-------|-------------------------
|      |       |                         

306 Townsend St., Lansing MI 48933-2012, (800) 968-1442

Section Expense Reimbursement Form

Staple receipts to back of form as required. For electronic transmission, scan and PDF receipts and send with form by e-mail. Policies and procedures on reverse side.
STATE BAR OF MICHIGAN
Section Expense Reimbursement Policies and Procedures

General Policies
1. Requests for reimbursement of individual expenses should be submitted as soon as practical after being incurred, but not to exceed 45 days. However, at the end of the fiscal year, any remaining expense reimbursement requests for the fiscal year just ended must be submitted by the 30th working day in October. The State Bar reserves the right to deny a reimbursement request that is untimely or where the State Bar’s ability to verify an expense has been compromised due to any delay. Expense reimbursement forms, along with instructions for completing and transmitting expense reimbursement forms, are found on the State Bar of Michigan website at: http://michbar.org/forms/forms

2. All out of pocket expenses must be itemized. Each reimbursed expense must be clearly described and the business purpose indicated.

3. Reimbursement in all instances is limited to reasonable and necessary expenses.

4. Detailed receipts are recommended for all expenses but required for expenses over $25.

5. An itemized receipt is required before reimbursement will be made for any meal. The reimbursement request must identify whether the meal is a breakfast, lunch or dinner. If the receipt covers more than one person, the reimbursement request must identify the names of all those in attendance for whom reimbursement is claimed, and the business purpose of the meal. If the receipt includes charges for guests for whom reimbursement is not claimed, the guests need not be identified by name, but their presence and number should be noted. Reimbursed meals while traveling (except group meals) are taxable if no overnight stay is required.

For subsidized sections (Young Lawyers Section, Master Lawyers Section, and Judicial Section) the presumptive limits on meal reimbursement are the per diem amounts published on the State of Michigan Department of Technology, Management and Budget’s website at http://michigan.gov/dtmb/0,5552,7-150-9141_121322—00.html referencing Travel Rates and Select Cities for the current fiscal year. This policy applies to each individual meal - breakfast, lunch and/or dinner. Meal reimbursements exceeding the per diem amounts due to special circumstances must be approved by the section treasurer or section chair, whenever possible in advance of the expenditure. Reimbursement for meals exceeding the presumptive limits without an acceptable explanation of special circumstances will be limited to the published per diem amount. The presumptive limit on meal reimbursement applies to any meal expense (individual or group) reimbursed under this policy, but does not apply to meals for group meetings and seminars invoiced directly to the SBM. For all other sections, the amount of the meal reimbursement shall be deemed what is reasonable and necessary.

6. Spousal expenses are not reimbursable.

7. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursed mileage for traveling on State Bar business is limited to actual distance traveled for business purposes.

8. Receipts for lodging expenses must be supported by a copy of the itemized bill showing per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid. Barring special circumstances such as the need for handicap accessibility accommodations, for conference attendance, the reimbursement will be limited to the least expensive available standard room conference hotel rate.

9. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.

A. Tickets should be at the best rate available for as direct a path as possible. The use of travel websites such as Travelocity, Priceline and Hotwire are recommended to identify the most economical airfare alternatives.

B. Reimbursement of airfare will be limited to the cost of coach class tickets available for the total paid. Barring special circumstances such as the need for handicap accessibility accommodations, for conference attendance, the reimbursement will be limited to the least expensive available standard room conference hotel rate.

C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.

D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

10. Reimbursement for car, bus, or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

11. Outside speakers must be advised in advance of the need for receipts and the above requirements.

12. Bills for copying done by a firm should be approved in advance and include the numbers of copies made, the cost per page and general purpose (committee or section meeting notices, seminar materials, etc.).

13. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

14. The State Bar of Michigan is exempt from sales tax. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

15. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of the Finance Department. The State Bar of Michigan is paying your expenses or reimbursing you for a conference and you are aware you will receive a refund, please notify the finance department staff at the time you submit your request for payment.

16. Gift cards (Visa, AMEX) that are reimbursed are taxable for any amount, and tangible gifts (other than recognition items such as plaques, gavels, etc.) and gift certificates (for restaurants, department stores, etc.) purchased and reimbursed are considered taxable if greater than $100.

Specific Policies
1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.

4. Payments to vendors for $5,000 or greater are not reimbursable. Payments to vendors for $5,000 or greater should be paid directly by the State Bar.