Agendas & Attachments for

• Meeting of the Committee on Special Projects (CSP); and
• Meeting of the Council of the Probate and Estate Planning Section

Saturday, November 15, 2014
9:00 a.m.
University Club
Lansing, Michigan
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

November 15, 2014
9:00 a.m.
University Club
3435 Forest Road
Lansing, Michigan 48910

The above stated meetings of the Section will be held at the MSU University Club, 3435 Forest Road, Lansing, Michigan, Saturday, November 15, 2014. The Section's Committee on Special Projects (CSP) meeting will begin at 9:00 a.m., followed immediately by the meeting of the Council of the Section.

Marlaine C. Teahan
Secretary

Fraser Trebilcock
124 West Allegan Street, Suite 1000
Lansing MI 48933
Phone: (517) 377-0869
Fax: (517) 482-0887
e-Mail: mteahan@fraserlawfirm.com
CSP and Council Meetings of the
Probate and Estate Planning Section
of the
State Bar of Michigan

Schedule and Location of Future Meetings

All meetings will be held at the
University Club, 3435 Forest Road, Lansing, Michigan 48910

Meetings begin at 9:00 a.m.
unless otherwise noted on the Meeting Notice

The following is a list of the remaining meetings for 2014-15:

December 13, 2014
January 17, 2015
February 14, 2015
March 14, 2015
April 11, 2015
June 13, 2015
September 12, 2015 (Annual Section Meeting)
# Officers for 2014-2015 Term

<table>
<thead>
<tr>
<th>Officer</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson</td>
<td>Amy N. Morrissey</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>Shaheen I. Imami</td>
</tr>
<tr>
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</tr>
<tr>
<td>Treasurer</td>
<td>Lentz, Marguerite Munson</td>
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</tbody>
</table>

## Council Members for 2014-2015 Terms

<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>
</tr>
</thead>
<tbody>
<tr>
<td>Ard, W. Josh.</td>
<td>2012 (2nd term)</td>
<td>2015</td>
<td>No</td>
</tr>
<tr>
<td>Ouellette, Patricia M.</td>
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</tr>
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<td>Spica, James P.</td>
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<td>No</td>
</tr>
<tr>
<td>Clark-Kreuer, Rhonda M.</td>
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<td>2015</td>
<td>Yes (1 term)</td>
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<tr>
<td>Lucas, David P.</td>
<td>2012 (1st term)</td>
<td>2015</td>
<td>Yes (1 term)</td>
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<tr>
<td>Skidmore, David L.J.M.</td>
<td>2012 (1st term)</td>
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<tr>
<td>Brigman, Constance L.</td>
<td>2010 (2nd term)</td>
<td>2016</td>
<td>No</td>
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<tr>
<td>Allan, Susan M.</td>
<td>2010 (2nd term)</td>
<td>2016</td>
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</tr>
<tr>
<td>Mills, Richard C.</td>
<td>2014 (1st partial term)</td>
<td>2016</td>
<td>Yes (2 terms)</td>
</tr>
<tr>
<td>Marquart, Michele C.</td>
<td>2013 (1st term)</td>
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Budget Committee  
*Mission:* To develop the annual budget and to alert the Council to revenue and spending trends  
Marlaine C. Teahan, Chair  
Marguerite Munson Lentz  
James B. Steward

Annual Meeting  
*Mission:* To arrange the annual meeting at a time and place and with an agenda to accomplish all necessary and proper annual business of the Section  
Shaheen I. Imami

Bylaws Committee  
*Mission:* To review the Section Bylaws and recommend changes to ensure compliance with State Bar requirements, best practices for similar organizations and assure conformity of the Bylaws to current practices and procedures of the Section and the Council  
Nancy H. Welber, Chair  
Christopher A. Ballard  
David P. Lucas

Awards Committee  
*Mission:* To periodically award the Michael Irish Award to a deserving recipient and to consult with ICLE concerning periodic induction of members in the George A. Cooney Society  
Douglas A. Mielock, Chair  
Robert D. Brower, Jr.  
George W. Gregory  
Phillip E. Harter  
Nancy L. Little  
Amy N. Morrissey

Planning Committee  
*Mission:* To periodically review and update the Section’s Strategic Plan and to annually prepare and update the Council’s Biennial Plan of Work  
Shaheen I. Imami, Chair

Committee on Special Projects  
*Mission:* The Committee on Special Projects is a working committee of the whole of the Section that considers and studies in depth a limited number of topics and makes recommendations to the Council of the Section with respect to those matters considered by the Committee. The duties of the Chair include setting the agenda for each Committee Meeting, and in conjunction with the Chair of the Section, to coordinate with substantive Committee chairs the efficient use of time by the Committee  
Christopher A. Ballard, Chair

Nominating Committee  
*Mission:* To annually nominate candidates to stand for election as the officers of the Section and members of the Council  
George W. Gregory, Chair  
Mark K. Harder  
Thomas F. Sweeney
Probate & Estate Planning Section Committees 2014-2015

**Legislation Committee**  
*Mission: In cooperation with the Section’s lobbyist, to bring to the attention of the Council recent developments in the Michigan legislature and to further achievement of the Section’s legislative priorities, as well as to study legislation and recommend a course of action on legislation not otherwise assigned to a substantive committee of the Section*

William J. Ard, Chair  
Christopher A. Ballard  
Georgette E. David  
Mark E. Kellogg  
Sharri L. Rolland Phillips  
Harold G. Schuitmaker

**Amicus Curiae Committee**  
*Mission: To review requests made to the Section to file, and to identify cases in which the Section should file, amicus briefs in pending appeals and to engage and oversee the work of legal counsel retained by the Section to prepare and file its amicus briefs*

David L. Skidmore, Chair  
Kurt A. Olson  
Patricia M. Ouellette  
Nazneen H. Syed  
Nancy H. Welber

**State Bar and Section Journals Committee**  
*Mission: To oversee the publication of the Section’s Journal and periodic theme issues of the State Bar Journal that are dedicated to probate, estate planning, and trust administration*

Richard C. Mills, Chair  
Nancy L. Little, Managing Editor  
Melisa M. W. Mysliwiec, Assoc. Editor

**Citizens Outreach Committee**  
*Mission: To provide for education of the public on matters related to probate, estate planning, and trust administration, including the publication of pamphlets and online guidance to the public, and coordinating the Section’s efforts to educate the public with the efforts of other organizations affiliated with the State Bar of Michigan*

Constance L. Brigman, Chair  
Kathleen M. Goetsch  
Michael J. McClory  
Neal Nusholtz  
Michael L. Rutkowski  
Rebecca A. Schnelz, (Liaison to Solutions on Self-help Task Force)  
Nancy H. Welber  
Melisa M. W. Mysliwiec

**Probate Institute**  
*Mission: To consult with ICLE in the planning and execution of the Annual Probate and Estate Planning Institute*

James B. Steward
Probate & Estate Planning Section Committees 2014-2015

Electronic Communications Committee
Mission: To oversee all forms of electronic communication with and among members of the Section, including communication via the Section’s web site, the Section listserv, and the ICLE Online Community site, to identify emerging technological trends of importance to the Section and its members, and to recommend to the Council best practices to take advantage of technology in carrying out the section’s and Council’s mission and work

William J. Ard, Chair
Stephen J. Dunn
Phillip E. Harter
Nancy L. Little
Amy N. Morrissey
Jeanne Murphy (Liaison to ICLE)
Neal Nusholtz
Michael L. Rutkowski
Serene K. Zeni

Ethics Committee
Mission: To consider and recommend to the Council action with respect to the Michigan Rules of Professional Conduct and their interpretation, application, and amendment

David P. Lucas, Chair
William J. Ard
J. David Kerr
Robert M. Taylor

Unauthorized Practice of Law and Multidisciplinary Practice Committee
Mission: To help identify the unauthorized practices of law, to report such practices to the appropriate authorities and to educate the public regarding the inherent problems relying on non-lawyers

Patricia M. Ouellette, Chair
William J. Ard
J. David Kerr
Robert M. Taylor
Amy Rombyer Tripp

Court Rules, Procedures and Forms Committee
Mission: To consider and recommend to the Council action with respect to the Michigan Court Rules and published court forms, and the interpretation, use, and amendment of them

Michele C. Marquardt, Chair
(Liaison to SCAO for Estates & Trusts Workgroup)
James F. (“JV”) Anderton
Constance L. Brigman (Liaison to SCAO for Guardianship, Conservatorship, and Protective Proceedings Workgroup)
Rhonda M. Clark-Kreuer
Phillip E. Harter
Michael D. Holmes
Shaheen I. Imami
Hon. Michael L. Jaconette
Hon. David M. Murkowski
Rebecca A. Schnelz (Liaison to SCAO for Mental Health/Commitment Workgroup)
David L. Skidmore
Updating Michigan Law Committee
Mission: To review, revise, communicate and recommend Michigan’s trusts and estates law with the goal of achieving and maintaining leadership in promulgating probate laws in changing times

Geoffrey R. Vernon, Chair
Robert P. Tiplady, II, Vice Chair
Susan M. Allan
Howard H. Collens
Mark K. Harder
Shaheen I. Imami
Henry P. Lee
Marguerite Munson Lentz
Michael G. Lichterman
James P. Spica

Insurance Ad Hoc Committee
Mission: To recommend new legislation related to insurability and the administration of irrevocable life insurance trusts

Geoffrey R. Vernon, Chair
Stephen L. Elkins
Mark K. Harder
James P. Spica
Joseph D. Weiler, Jr.

Membership Committee
Mission: To strengthen relations with Section members, encourage new membership, and promote awareness of and participation in Section activities

Raj A. Malviya, Chair
Christopher J. Caldwell
Nicholas R. Dekker
Daniel A. Kosmowski
Katie Lynwood
Julie A. Paquette
Nicholas A. Reister
Marlaine C. Teahan
Joseph J. Viviano

Artificial Reproductive Technology Ad Hoc Committee
Mission: To review the 2008 Uniform Probate Code Amendments for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction

Nancy H. Welber, Chair
Christopher A. Ballard
Keven DuComb
Robert M. O'Reilly
Lawrence W. Waggoner

Real Estate Committee
Mission: To recommend new legislation related to real estate matters of interest and concern to the Section and its members

George F. Bearup, Chair
Jeffrey S. Ammon
William J. Ard
Stephen J. Dunn
David S. Fry
Mark E. Kellogg
J. David Kerr
Michael G. Lichterman
David P. Lucas
Katie Lynwood
Douglas A. Mielock
Melisa M. W. Mysliwiec
James T. Ramer
James B. Steward

Transfer Tax Committee
Mission: To monitor developments concerning Federal and State transfer taxes and to recommend appropriate actions by the Section in response to developments or needs

Lorraine F. New, Chair
Robert B. Labe
Marguerite Munson Lentz
Geoffrey R. Vernon
Nancy H. Welber
Guardianship, Conservatorship, and End of Life Committee

Mission: To monitor the need for and make recommendations with respect to statutory and court rule changes in Michigan related to the areas of legally incapacitated individuals, guardianships, and conservatorships

Rhonda M. Clark-Kreuer, Chair
Katie Lynwood, Vice Chair
William J. Ard
Michael W. Bartnik
Raymond A. Harris
Phillip E. Harter
Michael J. McClory
Richard C. Mills
Kurt A. Olson
James B. Steward

Specialization and Certification Ad Hoc Committee

Mission: To make recommendations to the Section with respect to the creation and implementation of a program that recognizes specialization and certification of specialization in the fields of probate, estate planning, and trust administration

James B. Steward, Chair
William J. Ard
Wendy Parr Holtvluwer
Patricia M. Ouellette
Sharri L. Rolland Phillips
Daniel D. Simjanovski
Richard J. Siriani
Serene K. Zeni

Charitable and Exempt Organization Committee

Mission: To educate the Section about charitable giving and exempt organizations and to make recommendations to the Section concerning Federal and State legislative developments and initiatives in the fields of charitable giving and exempt organizations

Lorraine F. New, Chair
Christopher A. Ballard
Michael W. Bartnik
William R. Bloomfield
Robin D. Ferriby
Richard C. Mills

Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee

Mission: To review the statutes, case law, and court rules of Michigan and other jurisdictions concerning the scope of the Attorney Client Privilege for communications between trustees and their counsel and if necessary or appropriate, to recommend changes to Michigan law in this area

George F. Bearup, Chair
Kalman G. Goren
Shaheen I. Imami
David G. Kovac
Michael J. McClory
David L. Skidmore
Serene K. Zeni

Alternative Dispute Resolution Section Liaison

vacant
<table>
<thead>
<tr>
<th><strong>Business Law Section Liaison</strong></th>
<th><strong>Law Schools Liaison</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mission:</strong> The liaison to the Business Law Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Business Law Section on matters of mutual interest and concern</td>
<td><strong>Mission:</strong> The Law Schools Liaison is responsible for developing and maintaining bilateral communication between the Section and the law schools located in the State of Michigan in matters of mutual interest and concern</td>
</tr>
<tr>
<td>John R. Dresser</td>
<td>William J. Ard</td>
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<thead>
<tr>
<th><strong>Elder Law and Disability Rights Section Liaison</strong></th>
<th><strong>Michigan Bankers Association Liaison</strong></th>
</tr>
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<tr>
<td><strong>Mission:</strong> The liaison to the Elder Law and Disability Rights Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Elder Law Section on matters of mutual interest and concern</td>
<td><strong>Mission:</strong> The liaison to the Michigan Bankers Association is responsible for developing and maintaining bilateral communication between the Section and the Michigan Bankers Association in matters of mutual interest and concern</td>
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<td>Susan M. Allan</td>
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<th><strong>Family Law Section Liaison</strong></th>
<th><strong>Probate Judges Association Liaisons</strong></th>
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<tr>
<td><strong>Mission:</strong> The liaison to the Family Law Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Family law Section on matters of mutual interest and concern</td>
<td><strong>Mission:</strong> The liaisons to the MPJA are responsible for developing and maintaining bilateral communication between the Section and the MPJA on matters of mutual interest and concern</td>
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| Patricia M. Ouellette | Hon. David M. Murkowski  
Hon. Michael L. Jaconette |

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<td><strong>Mission:</strong> The liaison to ICLE is responsible for developing and maintaining bilateral communication between the Section and the Institute for Continuing Legal Education</td>
<td><strong>Mission:</strong> The liaison to the Michigan Probate and Juvenile Registers Association is responsible for developing and maintaining bilateral communication between the Section and the Probate and Juvenile Registers Association on matters of mutual interest and concern</td>
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<td>Jeanne Murphy</td>
<td>Rebecca A. Schnelz</td>
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SCAO Liaisons  
*Mission: The liaisons to SCAO are responsible for developing and maintaining communications between the Section and SCAO on matters of mutual interest and concern*  
Constance L. Brigman  
Michele C. Marquardt  
Rebecca A. Schnelz  

Solutions on Self-help Task Force Liaison  
*Mission: The liaison to the Solutions on Self-help (SOS) Task force is responsible for maintaining bilateral communications between the Section and the Task Force*  
Rebecca A. Schnelz  

State Bar Liaison  
*Mission: The liaison to the State Bar is responsible for maintaining bilateral communication between the Section and the larger State Bar of Michigan, including the Board of Commissioners and staff of the State Bar*  
Richard J. Siriani  

Taxation Section Liaison  
*Mission: The liaison to the Taxation Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Taxation Section on matters of mutual interest and concern*  
George W. Gregory
Michael W. Irish Award

Mission: To honor a practitioner (supported by recommendations from his or her peers) whose contributions to the Probate and Estate Planning Section of the State Bar of Michigan and whose service to his or her community reflect the high standards of professionalism and selflessness exemplified by Michael W. Irish.

Recipients
1995 Joe C. Foster, Jr.
1996 John H. Martin
1997 Harold A. Draper
1998 Douglas J. Rasmussen
1999 James A. Kendall
2000 NO AWARD PRESENTED
2001 John E. Bos
2002 Everett R. Zack
2003 NO AWARD PRESENTED
2004 Brian V. Howe
2005 NO AWARD PRESENTED
2006 Hon. Phillip E. Harter
2007 George Cooney (April 3, 2007)
2008 Susan A. Westerman
2009 Russell M. Paquette (posthumously)
2010 Fredric A. Sytsma
2011 John A. Scott
2012 NO AWARD PRESENTED
2013 Michael J. McClory
2014 Sebastian V. Grassi, Jr.

The Michael W. Irish Award was first presented in 1995 in honor of the late Michael W. Irish. The award reflects the professionalism and community leadership of its namesake.
The George A. Cooney Society

**What:** This award is presented by the Institute of Continuing Legal Education and the Probate & Estate Planning Section of the State Bar of Michigan to a Michigan estate planning attorney for outstanding contributions to continuing legal education in Michigan.

**Who:** As of November 2014, there have been four recipients:

- John E. Bos (2007)
- Everett R. Zack (2009)
- John H. Martin (2011)
- John A. Scott (2013)

**When:** This award is not necessarily given every year. So far we’ve given awards in 2007, 2009, 2011, and 2013.

**Where:** The award is presented at the Annual Probate & Estate Planning Institute. ICLE will invite the recipient to attend the Institute, and one of the Section officers will present the individual award at the start of the Institute.

**Why:** With George Cooney’s passing, the State Bar of Michigan lost one of its premier estate planning and elder law attorneys. The Section and ICLE have chosen to jointly create the George A. Cooney Society to recognize a select group of lawyers who epitomize George’s dedication to his fellow attorneys and in recognition of his long-term, significant contributions to continuing legal education in Michigan.

**How:** ICLE will nominate candidates based upon the specific criteria contained in the Guidelines for Selection and will send a nominating letter to the Section for approval by the Executive Board. The Section’s leadership and at-large members may also recommend candidates to ICLE for consideration.

**Guidelines for Selection:**

- Significant CLE contributions to probate and estate planning over a substantial period of time.
- Outstanding quality of contributions.
- A wide range of contributions, e.g. multiple contributions for the following: speaker, author, editor, advisory board member, curriculum advisor, creating case study scenarios, preparing Top Tips, How-To Kits or other online resources, etc.
- Generous mentorship and assistance to colleagues with their probate and estate planning career development as well as activities and active involvement with the Probate & Estate Planning Section of the State Bar of Michigan.
Probate and Estate Planning Council
Committee on Special Projects Agenda

November 15, 2014
9:00 a.m.

1. Insurance Committee – Geoffrey Vernon
   Proposed MCL 700.1513
   Exculpation of trustees of life insurance trusts from liabilities related to
   the administration of policies held in the trust
   Memo summarizing the issue (Exhibit A-1)
   Proposed statute (Exhibit A-2)

2. Updating Michigan Law Committee – Geoffrey Vernon
   Proposed tenancy by the entireties statutes
   MCL 700.2801, 700.2806, 700.2114, 700.2519 (Exhibit B-1)
   MCL 554.44, 554.45 (Exhibit B-2)
   MCL 557.151 (Exhibit B-3)
   MCL 577.101, 577.102, 565.48, 565.49 (Exhibit B-4)
   MCL 700.7509 (Exhibit B-5)
   ACTEC Chart (Exhibit B-6)
   Sample Statutes from other States (Exhibit B-7)

3. Citizens Outreach Committee – Connie Brigman
   Coordination with Elder Law section
   Updating brochures on the section website move the brochures
   currently on our website.
   Current Brochures (Exhibit C)
MEMORANDUM

TO: Insurance Committee
Probate and Estate Planning Council

FROM: Geoffrey R. Vernon

RE: Consideration of a Statute Relieving ILIT Trustees From Compliance With the Prudent Investor Rules

DATE: 3/12/14

INTRODUCTION

Fifteen states have enacted statutes providing various forms of protection to trustees of trusts that acquire and/or retain life insurance policies. There are two public policy reasons cited in support of such laws. First, many grantors of irrevocable life insurance trusts ("ILITs") do not expect or intend to burden the trustee of the ILIT they created (who are frequently family members or friends rather than professional trustees) with the fiduciary duties of administering a trust that is intended to simply own a life insurance policy.¹ Second, trustee protection laws may make a state a more attractive situs for businesses that provide trustee services.

The initial question that this committee and our council needs to address is whether an ILIT trustee protection statute is sound public policy that we should support. We obviously need to weigh the advantages of relieving ILIT trustees from certain fiduciary duties (or simply exculpating them from damages caused by breaching them) against the possible harm to trust beneficiaries. Additionally, however, we should determine the likelihood that an ILIT trustee exculpation statute will be drafted by groups other than our council, the probability of it becoming law, and the potential ramifications of a poorly drafted or ill considered statute.

If it is decided that we should proceed to draft the law, the next question is how to best tailor the statute in order to create sound public policy that protects beneficiaries from improper trustee action or inaction. The several considerations that must be scrutinized when deciding the extent of the protection to be provided to ILIT trustees are discussed below.

¹ There appears to be some question as to whether an irrevocable life insurance trust that holds assets other than life insurance should be considered an "ILIT" and whether the trustees of trusts owning additional assets should be held to a higher standard than those holding only life insurance. Neither the ILIT trustee exculpation statutes passed by other states nor this memo makes any such distinction.
PUBLIC POLICY CONCERNS AND CURRENT MICHIGAN LAW

As indicated above, a purported problem to be alleviated through the enactment of a trustee protection statute is that many grantors who establish ILITs do not want the trustees to be subject to onerous duties when the intent of the trust is simply to hold life insurance on the grantor's life. Grantors of ILITs often wish to name a trusted family member or friend to simply pay the premiums when they come due (often with money that must be given to the trust by the grantor on an annual basis) or do nothing except serve as the owner of the policy.

Further, trustees of ILITs are often constrained by the fact that the grantor selects the policy and pays the premiums through gifts to the trust (or even makes the premium payment directly). It is frequently the case that an ILIT grantor and trustee do not know whether the life insurance policy owned by the trust is a sound investment. Additionally, the grantor rarely expects the trustee to have such knowledge or take any action with respect to the policy. Unfortunately, the terms of many insurance trust instruments are not consistent with the parties' intentions that the trustee's fiduciary duties be limited.

It is important to note that, except for specific circumstances, the trustees' duties and liabilities are determined by the terms of the trust instruments. The Michigan Trust Code ("MTC") provides that Michigan trustees are bound by the terms of the trust instrument and, in the absence of trust provisions to the contrary, the prudent investor rules of Estates and Protected Individuals Code ("EPIC").

Michigan's prudent investor rules do not contain provisions that are specific to acquiring and retaining life insurance. Inasmuch, a trustee's duties with respect to insurance policies are determined by analyzing the same factors as are considered with respect to any other type of investment. The Michigan prudent investor rule provides that a trustee's investment and management decisions must "be evaluated as a part of an overall investment strategy having risk and return objectives reasonably suited to the fiduciary estate." Circumstances that must be considered by a trustee include:

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2 See MCL 700.7105. See also MCL 700.7803.
3 MCL 700.1502, the Michigan prudent investor rule, provides: "(1) A fiduciary shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill, and caution. (2) The Michigan prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of the governing instrument. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the governing instrument."
4 MCL 700.1501 defines "portfolio" as "all property of every kind and character held by a fiduciary on behalf of a fiduciary estate."
5 MCL 700.1503(1).
(1) General economic conditions.\(^6\)
(2) The possible effect of inflation or deflation.\(^7\)
(3) The expected tax consequences of an investment decision or strategy.\(^8\)
(4) The expected total return from income and the appreciation of capital.\(^9\)
(5) The need for liquidity, regularity of income, and preservation or appreciation of capital.\(^10\)

Following are several commonly referenced obligations imposed upon a trustee dealing with life insurance policies:

(A) Determining the suitability of the insurance policy at trust inception.
(B) Monitoring policy performance and the financial condition of the underwriting carrier.
(C) Evaluating the merits and liabilities of trustee actions concerning exercise of various policy options including the suspension or discontinuance of premium payments, policy surrender or replacement, entering loan transactions, etc.
(D) Inquiring as to the health and financial condition of the insured.\(^11\)

While these standards are not statutory duties, they will likely be considered when determining a trustee’s standard of care in dealing with life insurance policies. It seems evident that many trustees of insurance trusts are not aware of or following the above obligations on a regular basis, if at all. The frequency at which a trustee must make these determinations is uncertain but may be as often as annually.\(^12\)

With regard to the public policy issue, we generally must decide whether we want the default rule to stay as is (which potentially provides greater duties and liabilities than

\(^{6}\) MCL 700.1503(2)(a).
\(^{7}\) MCL 700.1503(2)(b).
\(^{8}\) MCL 700.1503(2)(c).
\(^{9}\) MCL 700.1503(2)(e).
\(^{10}\) MCL 700.1503(2)(g).
\(^{12}\) See Office of the Comptroller of the Currency regulations requiring annual review of fiduciary accounts at 12 CFR 9.6(c).
what many grantors and trustees desire and anticipate) or whether the default rule should be changed to specifically limit trustee liability (which might limit the claims available to trust beneficiaries for shoddy trust administration). Knowing, in either case, that the trust instrument can be drafted to place on the trustee nearly any duties and liabilities the grantor chooses.

**DRAFTING DECISIONS**

Assuming we are satisfied that public policy considerations can be adequately addressed, there are many drafting issues that must be considered. These issues are best analyzed through a review of legislation passed by other states. In this regard, attached as Exhibit A is a summary of the laws of the states that have passed laws exonerating trustees of ILITs (which is followed by printed copies of the state statutes). Also attached, as Exhibit B, is a chart prepared by Trent S. Kiziah which provides a breakdown of the components of such states’ laws.\(^\text{13}\)

Following is a short summary of the various considerations that should be addressed during the drafting process:\(^\text{14}\)

1. **Acquisition and Retention of Life Insurance**
   
   A primary consideration is whether a trustee should be exculpated for actions taken (or not taken) with regard to a life insurance policy that the trustee had an active role in acquiring as opposed to only those policies which are transferred to the trust by the grantor and retained by the trustee.

2. **Default Law or Election by Notice to Beneficiaries**
   
   It must be decided whether the exonerating statute applies to all trustees as a default rule or whether a trustee must "opt-in" by providing notice to the beneficiaries.\(^\text{15}\) The details of the notice requirement should also be addressed if it is determined that the opt-in method is preferable.

3. **Relieving Trustee from Fiduciary Duties and/or Damages**
   
   Another issue is whether to relieve the ILIT trustee of the fiduciary duties related to the insurance policy or simply provide that the trustee is not liable for damages caused by a breach of the enumerated duties. All the states that have passed ILIT trustee protection statutes have exculpated the trustees but a few have not relieved them of their fiduciary duties (perhaps unintentionally). A possible reason for not

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\(^{13}\) The chart omits two states that have passed similar legislation, Maryland and West Virginia.


\(^{15}\) Note that while South Dakota requires notice to the settlor, such notice seems illogical since the trustee owes duties to the beneficiaries.
eliminating the duty is that a breach may still be grounds for trustee removal despite the trustee being relieved from liability for the loss.

4. Limitations as to Identity of the Insured

An additional concern is whether the trust owned policy must insure only the life of the grantor as opposed to also permitting exculpation with respect to policies insuring the grantor’s spouse, other relatives, and/or any other person.

5. Identity of Duties Waived

The following duties have been waived in the other states’ exculpation statutes:

A. Determine whether the contract is a proper investment.
B. Investigate the financial strength of the insurance company.
C. Exercise nonforfeiture provisions under the policy.
D. Diversify the contract.
E. Determine whether to exercise any policy option (Maryland makes specific reference to borrowing the cash value or reserve, acquiring a paid-up policy, or converting to a different policy).
F. Pay premiums (unless there is sufficient cash or other marketable assets available to pay the premium).
G. Inquire about changes in the health or financial condition of the insured.

6. Other Issues

A. Exculpating attorneys

Ohio has a specific provision exonerating the "attorney who drafted a trust, or any person who was consulted with regard to the creation of a trust" with respect to any loss "arising from the absence of" the stated duties.

B. Omitting certain trustees from protection

Florida does not provide protection to trustees who are affiliated with the life insurance company or who are paid a commission for the sale of the policy.

C. Prohibiting payment to a trustee for services related to insurance

Florida’s statute prohibits compensation of a "trustee who performs fiduciary or advisory services related" to the policy for performing services for which they would not be held liable under the statute.
CONCLUSION

I would like to present this issue to the Committee on Special Projects for consideration and discussion. Please let me know your thoughts on the above as soon as convenient.
EXHIBIT A

SUMMARY OF EXCULPATION STATUTES

Alabama - Exculpation for failure to diversify.

Arizona - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) investigate financial strength of insurance company, (iii) exercise nonforfeiture provisions, and (iv) diversify the contract.

Delaware - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) investigate financial strength of insurance company, (iii) exercise nonforfeiture provisions, (iv) diversify the contract, and (v) inquire about health or financial condition of insured.

Florida - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) investigate financial strength of insurance company, (iii) exercise nonforfeiture provisions, (iv) diversify the contract, and (v) inquire about health or financial condition of insured. Specific reference to exculpation statute must be in trust agreement and notice must be provided to beneficiaries (and no objections received from beneficiaries). Restrictions on trustees affiliated with life insurance companies and payment for services that are related to dealing with life insurance policies.

Maryland - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) diversify the investment, and (iii) exercise any policy options.

North Carolina - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) exercise any policy options, and (iii) diversify the investment.

North Dakota - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) exercise any policy options, and (iii) diversify the investment. Exculpation only applies to policies transferred to the trust or "acquired by the trustee of a trust which before the acquisition of the policy had never owned any such life insurance policy."

Ohio - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) diversify the investment, (iii) exercise any policy options, (iv) investigate financial strength of insurance company, and (v) inquire about health or financial condition of insured. Attorney who drafted trust is not liable for the absence of the duties (absent fraud).

Pennsylvania - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) investigate financial strength of insurance company, (iii) exercise nonforfeiture provisions, and (iv) diversify the contract.
South Carolina - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) exercise any policy options, and (iii) diversify the contract.

South Dakota - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) investigate financial strength of insurance company, (iii) determine whether to exercise any policy options, (iv) diversify the contract, and (v) inquire about health or financial condition of insured. Notice must be provided to settlor and settlor must not object.

Tennessee - Exculpation for failure to (i) determine whether policy is or remains a proper investment (as to type, quality, or otherwise), (ii) diversify the investment, and (iii) exercise any policy options.

Virginia - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) diversify the contract, and (ii) exercise any policy options, and (iii) diversify the contract. Exculpation applies to "policy of life insurance acquired by gift or pursuant to express permission or direction in the governing instrument."

West Virginia - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) exercise any policy options, and (iii) diversify the contract.

Wyoming - Exculpation for failure to (i) determine whether policy is a proper investment, (ii) investigate financial strength of insurance company, (iii) determine whether to exercise any policy options, (iv) diversify the contract, and (v) inquire about health or financial condition of insured.
EXHIBIT A-2
700.1513  Duties of a trustee with respect to the acquisition, retention, or ownership of a life insurance policy

Sec. 1513  (1)  Notwithstanding any other provision of the Michigan prudent investor rule and, except as otherwise provided in the terms of the trust, the duties of a trustee with respect to the acquisition, retention, or ownership of a life insurance policy as a trust asset do not include any of the following duties:

(a) Determine whether the trustee or trust beneficiaries have an insurable interest in the insured in accordance with the provisions of MCL 700.7114.
(b) Determine whether any life insurance policy is or remains a proper trust investment.
(c) Investigate the financial strength or changes in the financial strength of the life insurance company issuing or maintaining the policy.
(d) Inquire about changes in the health or financial condition of the insured under the policy.
(e) Diversify the investment in the policy relative to any other life insurance policies or any other trust assets.
(f) Pay or not pay policy premiums unless there is sufficient cash or other readily marketable assets held by the trust that were designated for this purpose by the settlor or a third party.
(g) Exercise or not exercise any option available under the policy regardless of whether the exercise or nonexercise results in the lapse or termination of the policy.

(2)  A trustee is not liable to the beneficiaries of the trust or any other person for any loss sustained with respect to a life insurance policy to which this section applies.

(3)  Unless otherwise provided in the terms of the trust, this section does not apply to a trustee (or an affiliate of a trustee) who received any commission or other payment from the issuer of a life insurance policy issued to the trust.

(4)  A trustee of the trust, the attorney or attorneys who drafted the terms of the trust, and any person who was consulted with regard to the creation of the trust, in the absence of fraud, is not liable to the beneficiaries of the trust or to any other person for any loss arising from or attributable to the absence of the duties specified in this section.

(5)  Except as otherwise provided in the terms of the trust, this section applies to a trust established before, on, or after [the effective date of this section] and to a life insurance policy acquired, retained, or owned by a trustee before, on, or after such date.
EXHIBIT B-1
700.2114 Parent and child relationship.

Sec. 2114.

(1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:

(a) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession.

(b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:

(i) The man joins with the child's mother and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.

(ii) The man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child's birth.

(iii) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.

(iv) The man is determined to be the child's father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(v) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(vi) The man is determined to be the father in an action under the revocation of paternity act.

(c) A child who is not conceived or born during a marriage is an individual born in wedlock if the child's parents marry after the conception or birth of the child.
(2) An adopted individual is the child of his or her adoptive parent or parents and not of his or her natural parents, but adoption of a child by the spouse of either natural parent has no effect on either the relationship between the child and that natural parent or the right of the child or a descendant of the child to inherit from or through the other natural parent. An individual is considered to be adopted for purposes of this subsection when a court of competent jurisdiction enters an interlocutory decree of adoption that is not vacated or reversed.

(3) The permanent termination of parental rights of a minor child by an order of a court of competent jurisdiction; by a release for purposes of adoption given by the parent, but not a guardian, to the family independence agency or a licensed child placement agency, or before a probate or juvenile court; or by any other process recognized by the law governing the parent-child status at the time of termination, excepting termination by emancipation or death, ends kinship between the parent whose rights are so terminated and the child for purposes of intestate succession by that parent from or through that child.

(4) Inheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers, and has not refused to support the child.

(5) Only the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent.

700.2519 Statutory will.

Sec. 2519.

(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.

7. 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.

8. 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.

2. 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 _________________________ as guardian and
(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.

700.2801 Effect of divorce, annulment, decree of separation, bigamy, and absence.

Sec. 2801.

(1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of marriage of husband and wife is not a divorce for purposes of this section.
For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or live together as husband and wife spouses.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual.

(c) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

(d) An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.

(e) An individual who did any of the following for 1 year or more before the death of the deceased person:

(i) Was willfully absent from the decedent spouse.

(ii) Deserted the decedent spouse.

(iii) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

700.2806 Definitions relating to revocation of probate and nonprobate transfers by divorce; revocation by other changes of circumstances.

Sec. 2806.

As used in this section and sections 2807 to 2809:

(a) "Disposition or appointment of property" includes, but is not limited to, a transfer of an item of property or another benefit to a beneficiary designated in a governing instrument.

(b) "Divorce or annulment" means a divorce or annulment, or a dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of section 2801. A decree of separation that does not terminate the status of husband and wife of the decedent's marriage is not a divorce for purposes of this section and sections 2807 to 2809.

(c) "Divorced individual" includes, but is not limited to, an individual whose marriage has been annulled.
(d) “Governing instrument” means a governing instrument executed by a divorced individual before the divorce from, or annulment of his or her marriage to, his or her former spouse.

(e) “Relative of the divorced individual's former spouse” means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(f) “Revocable” means, with respect to a disposition, appointment, provision, or nomination, one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his or her former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself or herself in place of his or her former spouse or in place of his or her former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.
EXHIBIT B-2
554.44 Land Real property conveyance to two or more persons; estate created.

Sec. 44.

All grants and devises of lands real property, made to 2 or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

554.45 Land Real property conveyance; exceptions to preceding section.

Sec. 45.

The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors personal representative, or to husband an individual and wife his or her spouse.
JOINT OWNERSHIP OF PERSONAL PROPERTY IN JOINT TENANCY BY THE ENTIRETIES

Act 212 of 1927

AN ACT to provide for the joint ownership by husband and wife in joint tenancy of certain classes of personal property with right of survivorship of a person and his or her spouse as tenants by the entireties.

557.151 Evidence of indebtedness payable to husband and wife; ownership in joint tenancy.

Tenancy by the entireties in real and personal property.

Sec. 1.

All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsee or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state.

An individual and his or her spouse may own real property or personal property (or any interest in real property or personal property) as tenants by the entireties (also known as “tenants by the entirety”). All real or personal property held by an individual and his or her spouse shall be presumed to be held by the individual and his or her spouse as tenants by the entireties, with full right of ownership by survivorship in case of the death of either unless the deed or other instrument of conveyance expressly provides for some other form of joint ownership.
557.101 Tenancy by entirety; termination.

Sec. 1.

In all cases where a person and his or her spouse own any interest in land as tenants by the entirety, such tenancy by the entirety may be terminated by a conveyance from either one to the other of his or her interest in the land so held.

557.102 Act declaratory of common law.

Sec. 2.

This act shall be deemed to be declaratory of the common law as heretofore existing in this state.

565.49 Conveyances; same person or persons among grantors and grantees; joint tenancy, tenancy by entireties.

Sec. 49.

Conveyances in which the grantor or 1 or more of the grantors are named among the grantees therein shall have the same force and effect as they would have if the conveyance were made by a grantor or grantors who are not named among the grantees. Conveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effective to create the type of ownership indicated by the terms of the conveyance.

565.48 Deed by surviving joint tenant of land; recording; certified copy of death.

Sec. 48.

No deed or other instrument in writing, purporting to convey an interest in land by the survivor or survivors under a deed to joint tenants or tenants by the entirety shall be recorded by the register of deeds of any county, unless, for each joint tenant or tenant by the entirety who is therein indicated to be deceased, a certified copy of the death certificate or other proof of death which is permitted by the laws of this state to be received for record by said register, is shown to have been recorded in said register's office by liber and page reference or shall accompany such deed for record.
EXHIBIT B-5
ARTICLE VII: MICHIGAN TRUST CODE
PART 5: CREDITOR'S CLAIMS: SPENDTHRIFT, SUPPORT, AND DISCRETIONARY TRUSTS
700.7509 TENANCY BY THE ENTIRETY PROPERTY

(1) As used in this section, "proceeds" means:

(a) Property acquired by a trustee upon the sale, lease, license, exchange, or other disposition of property originally conveyed by spouses as tenants by the entirety to a trustee or trustees.

(b) Interest, dividends, rents, and other property collected by a trustee on, or distributed on account of, property originally conveyed by spouses as tenants by the entirety to a trustee.

(c) Rights arising out of property originally conveyed by spouses as tenants by the entirety to a trustee.

(d) Claims and resulting damage awards and settlement proceeds arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, property originally conveyed by spouses as tenants by the entirety to a trustee.

(e) Insurance proceeds or benefits payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, property originally conveyed by spouses as tenants by the entirety to a trustee.

(f) Property held by a trustee that is otherwise traceable to property originally conveyed by spouses as tenants by the entirety to a trustee or the property proceeds described in subsections (a) to (e).

(2) Any property of spouses that was held by them as tenants by the entirety and subsequently conveyed as tenants by the entirety to a trustee of one or more trusts, and the proceeds of that property, shall have the same immunity from the claims of their separate creditors as would exist if the spouses had continued to hold the property or its proceeds as tenants by the entirety, so long as all of the following apply:

(a) The spouses remain married.

(b) The property or its proceeds continue to be held in trust by a trustee.

(c) The trust or trusts are, while both spouses are living, revocable by either spouse or both spouses, acting together.
(d) Each spouse is a qualified trust beneficiary of the trust or trusts while living.

(e) The trust instrument, deed, or other instrument of conveyance provides that this section shall apply to the property or its proceeds.

(3) After the death of the first spouse, all property held in trust that was immune from the claims of the deceased spouse's creditors under subsection (b) immediately prior to the deceased spouse's death shall continue to have the same immunity from the claims of the decedent's separate creditors as would have existed if the spouses had continued while both were alive to hold the property conveyed in trust, or its proceeds, as tenants by the entirety. To the extent that the surviving spouse remains a qualified trust beneficiary and has the power, exercisable in his or her individual capacity, to vest in the surviving spouse individually title to the property that was immune from the claims of the separate creditors of the decedent under subsection (2), the property shall be subject to the claims of the separate creditors of the surviving spouse.

(4) The immunity from the claims of separate creditors under subsections (2) and (3) may be waived as to any specific creditor or any specifically described trust property, including all separate creditors of a spouse or all former tenancy by the entirety property conveyed to a trustee, by the express provisions of a trust instrument, deed, or other instrument of conveyance, or by the written consent of both spouses.

(5) Except as provided in subsection (6), immunity from the claims of separate creditors under subsections (2) and (3) shall be waived if a trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property held in trust that is immune from the claims of separate creditors.

(6) Immunity is not waived under subsection (5) if the identity of the property that is immune from the claims of separate creditors and the fact of such immunity is otherwise reasonably disclosed by any of the following:

(a) A publicly recorded deed or other instrument of conveyance by the spouses to the trustee.

(b) A written memorandum by the spouses, or by a trustee, that is recorded among the land records or other public records in the county or other jurisdiction where the records of the trust are regularly maintained.

(c) The terms of the trust instrument, including any schedule or exhibit attached to the trust instrument, if a copy of the trust instrument is provided with the financial statement.

(7) A waiver under subsection (5) shall be effective only as to:

(a) The person to whom the financial statement is delivered by a trustee.

(b) The particular trust property held in trust for which the immunity from the claims of separate creditors is insufficiently disclosed on the financial statement.
(c) The transaction for which the disclosure was sought.

(8) In any dispute relating to the immunity of trust property from the claims of a separate creditor of a spouse, the trustee has the burden of proving the immunity of the trust property from the creditor's claims.

(9) In the event that any transfer of real property held in tenancy by the entirety to a trustee of a trust as provided under subsection (2) is held invalid by any court of proper jurisdiction, or if the trust is revoked or dissolved by a court decree or operation of law, while both spouses are living, then immediately upon the occurrence of either event, absent a contrary provision in a court decree, all real property held in the trust automatically shall be deemed for all purposes to be held by both spouses as tenants by the entirety.

(10) No transfer by spouses described in subsection (2) shall affect or change either settlor's marital property rights to the transferred property or interest therein immediately prior to such transfer in the event of dissolution of marriage of the spouses, unless both spouses expressly agree otherwise in writing. Upon entry of a judgment of divorce or annulment between the spouses, the immunity from the claims of separate creditors under subsection (2) shall terminate immediately.

(11) After a conveyance to a trustee described in subsection (2), the property transferred shall no longer be held by the husband and wife as tenants by the entirety.

(12) This section may not be construed to affect existing state law with respect to tenancies by the entirety. This section applies only to tenancy by the entirety property conveyed to a trustee on or after __________ ____, 2014.
EXHIBIT B-6
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<th>Must the Property Be Held as T by E Property Immediately Prior to Transfer to Joint Trust?</th>
<th>Does State Statute Permit the Joint Trust to be Split Into 2 Separate Shares While Both Spouses Are Living?</th>
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* Florida practitioners disagree as to whether a joint trust may qualify for tenancy by the entirety creditor protection, but there is no specific enabling statute.

** Illinois allows tenancy by the entirety status for the “homestead” only.

*** The Probate and Trust Committee of the Missouri Bar has proposed a revision to the existing Missouri statute which would eliminate this requirement, which on September 18, 2013, was endorsed by the Missouri Bar Board of Governors as a Bar-sponsored legislative proposal.

**** Tennessee is working on such a statute.
EXHIBIT B-7
§ 3334. Contributions to revocable trusts.

Delaware Statutes

Title 12. Decedents' Estates and Fiduciary Relations

Chapter 33. ADMINISTRATIVE PROVISIONS

Current through 2014 Legislative Session, Act Chapter 437

§ 3334. Contributions to revocable trusts

Where spouses make a contribution of property to 1 or more trusts, each of which is revocable by either or both of them, and, immediately before such contribution, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entireties, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, the sole remedy available to the creditor with respect to such trust property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.

Cite as 12 Del. C. § 3334

History. Amended by Laws 2013, ch. 172, s 2, eff. 8/6/2013.

§ 509-2. Creation of joint tenancy, tenancy by the entirety, and tenancy in common.

Hawaii Statutes

Division 3. PROPERTY; FAMILY

Title 28. PROPERTY

Chapter 509. CONVEYANCES TO TWO OR MORE

Current through Chapter 235 of the 2014 Legislative Session

§ 509-2. Creation of joint tenancy, tenancy by the entirety, and tenancy in common

(a) Land, or any interest therein, or any other type of property or property rights or interests or interest therein, may be conveyed by a person to oneself and another or others as joint tenants, or by a person to oneself and one's spouse or reciprocal beneficiary, or by spouses to themselves, or by reciprocal beneficiaries to themselves, as tenants by the entirety, or by joint tenants to themselves and another or others as joint tenants, or tenants in common to themselves or to themselves and another or others as joint tenants, or by tenants by the entirety to themselves or themselves and another or others as joint tenants or as tenants in common, or by one tenant by the entirety to the tenant's spouse or reciprocal beneficiary of all of the tenant's interest or interests, without the necessity of conveying through a third party, and each such instrument shall be construed as validly creating a joint tenancy, tenancy by the entirety, tenancy in common, or single ownership, as the case may be, if the tenor of the instrument manifestly indicates such intention.

(b) Conveyance of any real property located in the State and held by spouses or reciprocal beneficiaries as tenants by the entirety:

1. To a joint trust as tenant in severalty for their benefit and which is revocable and amendable by either or both during their joint lifetime; or

2. In equal shares as tenants in common to their respective separate trusts, each of which is revocable and amendable by the respective grantor, or any accumulation of such conveyed property,

shall have the same immunity from the claims of their separate creditors as would exist if the spouses or reciprocal beneficiaries had continued to hold the real property or its proceeds as tenants by the entirety.

(c) Subsection (b) shall apply as long as:

1. The spouses remain married or reciprocal beneficiaries remain in a registered reciprocal beneficiary relationship;
(2) The real property continues to be held in the trust as provided under subsection (b);

(3) Both spouses or reciprocal beneficiaries remain beneficiaries of the trust and no waiver as provided under subsection (g) has occurred;

(4) The first and last name of the spouse or reciprocal beneficiary for their respective trusts, or the first and last names of both spouses or reciprocal beneficiaries for a joint trust, are included in the name of the trust; and

(5) Notice of the intention to continue to hold the real property or its proceeds as tenants by the entirety is provided by a deed of conveyance by the spouses or reciprocal beneficiaries and filed or recorded in land court or the bureau of conveyances, or both, as appropriate; provided that the notice shall specifically refer to this section and state that the real property to be held by the trust shall be immune from the claims of their separate creditors.

(d) After the death of the first of the spouses or reciprocal beneficiaries, all real property held in the trust that was immune from the claims of their separate creditors under subsection (b) immediately prior to the individual's death shall continue to have the same immunity from the claims of the decedent's separate creditors as would have existed if the spouses or reciprocal beneficiaries continued to hold the real property conveyed in trust or its proceeds as tenants by the entirety.

(e) In the event that any transfer of real property held in tenancy by the entirety to a trustee of a trust as provided under subsection (b) is held invalid by any court of proper jurisdiction, or if the trust is revoked or dissolved by a court decree or operation of law, while both spouses or reciprocal beneficiaries are living, then immediately upon the occurrence of either event, all real property held in the trust shall automatically be deemed to be held by both spouses or reciprocal beneficiaries as tenants by the entirety.

(f) Upon entry of a decree granting divorce or annulment between the spouses or the termination of the reciprocal beneficiary relationship, the immunity from the claims of separate creditors under subsection (b) shall immediately terminate and the real property shall be treated as held in tenancy in common.

(g) The immunity from the claims of separate creditors under subsections (b) and (d) may be waived as to any creditor or any specifically described trust property by:

(1) The express provisions of a trust instrument; and

(2) The written consent of both spouses or reciprocal beneficiaries.

(h) Except as provided otherwise herein, in any dispute relating to the immunity of trust property from the claims of a separate creditor of a spouse or reciprocal beneficiary, the spouses or reciprocal beneficiaries shall have the burden of proving the immunity of the
trust property from the creditor's claims.

(i) After a conveyance of real property to a trust as provided under subsection (b), the real property transferred shall no longer be held by the spouses or reciprocal beneficiaries as tenants by the entirety and the disposition of the real property shall be controlled by the terms of the trust.

(j) For the purposes of this chapter "reciprocal beneficiary" means an adult who is a party to a registered reciprocal beneficiary relationship in accordance with chapter 572C, and has a valid certificate of reciprocal beneficiary relationship that has not been terminated.

Cite as HRS § 509-2

History. Amended by L 2012, c 209, §1, eff. 7/1/2012.

L 1941, c 167, §1; RL 1945, §12781; RL 1955, § 345-2; am L 1957, c 237, §1; HRS § 509-2; gen ch 1993; am L 1997, c 383, §10

Case Notes:

An estate by the entirety is not subject to claims of creditors of one of the spouses. 57 Haw. 608, 561 P.2d 1291.

Right of survivorship of a joint tenant is subject to levy. 59 Haw. 277, 580 P.2d 843.

Section states no presumption in favor of tenancy in common. 59 Haw. 474, 583 P.2d 966.

Property management agreement neither conveyed property nor altered the tenancy by the entirety; purpose of section and relevant antecedent is to eliminate common law requisite of a "straw man" in creating a joint tenancy. 64 H. 236, 639 P.2d 400.
§ 735 ILCS 5/12-112. What liable to enforcement.

Illinois Compiled Statutes
Rights and Remedies
Chapter 735. Civil Procedure
Act 5. Code of Civil Procedure
Article XII. Judgments-Enforcement
Part 1. In General

Current through P.A. 98-1125 (2013-2014)

§ 735 ILCS 5/12-112. What liable to enforcement

All the lands, tenements, real estate, goods and chattels (except such as is by law declared to be exempt) of every person against whom any judgment has been or shall be hereafter entered in any court, for any debt, damages, costs, or other sum of money, shall be liable to be sold upon such judgment. Any real property, any beneficial interest in a land trust, or any interest in real property held in a revocable inter vivos trust or revocable inter vivos trusts created for estate planning purposes, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants, except if the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due. However, any income from such property shall be subject to garnishment as provided in Part 7 of this Article XII, whether judgment has been entered against one or both of the tenants.

If the court authorizes the piercing of the ownership veil pursuant to Section 505 of the Illinois Marriage and Dissolution of Marriage Act or Section 15 of the Illinois Parentage Act of 1984, any assets determined to be those of the non-custodial parent, although not held in name of the non-custodial parent, shall be subject to attachment or other provisional remedy in accordance with the procedure prescribed by this Code. The court may not authorize attachment of property or any other provisional remedy under this paragraph unless it has obtained jurisdiction over the entity holding title to the property by proper service on that entity. With respect to assets which are real property, no order entered as described in this paragraph shall affect the rights of bona fide purchasers, mortgagees, judgment creditors, or other lien holders who acquire their interests in the property prior to the time a notice of lis pendens pursuant to this Code or a copy of the order is placed of record in the office of the recorder of deeds for the county in which the real property is located.
This amendatory Act of 1995 (P.A. 89-438) is declarative of existing law.

This amendatory Act of 1997 (P.A. 90-514) is intended as a clarification of existing law and not as a new enactment.

Cite as 735 ILCS 5/12-112

History. Amended by P.A. 096-1145, §5, eff. 1/1/2011.

P.A. 89-88, eff. 6-30-95; 89-438, eff. 12-15-95; 90-476, eff. 1-1-98; 90-514, eff. 8-22-97; 90-655, eff. 7-30-98.
§ 765 ILCS 1005/1c.

Illinois Compiled Statutes

Rights and Remedies

Chapter 765. Property

Miscellaneous Property

Act 1005. Joint Tenancy Act

Current through P.A. 98-1125 (2013-2014)

§ 765 ILCS 1005/1c.

Whenever a devise, conveyance, assignment, or other transfer of property, including a beneficial interest in a land trust, maintained or intended for maintenance as a homestead by both husband and wife together during coverture shall be made and the instrument of devise, conveyance, assignment, or transfer expressly declares that the devise or conveyance is made to tenants by the entirety, or if the beneficial interest in a land trust is to be held as tenants by the entirety, the estate created shall be deemed to be in tenancy by the entirety. Where the homestead is held in the name or names of a trustee or trustees of a revocable inter vivos trust or of revocable inter vivos trusts made by the settlors of such trust or trusts who are husband and wife, and the husband and wife are the primary beneficiaries of one or both of the trusts so created, and the deed or deeds conveying title to the homestead to the trustee or trustees of the trust or trusts specifically state that the interests of the husband and wife to the homestead property are to be held as tenants by the entirety, the estate created shall be deemed to be a tenancy by the entirety. Subject to the provisions of paragraph (d) of Section 2 and unless otherwise assented to in writing by both tenants by the entirety, the estate in tenancy by the entirety so created shall exist only if, and as long as, the tenants are and remain married to each other, and upon the death of either such tenant the survivor shall retain the entire estate; provided that, upon a judgment of dissolution of marriage or of declaration of invalidity of marriage, the estate shall, by operation of law, become a tenancy in common until and unless the court directs otherwise; provided further that the estate shall, by operation of law, become a joint tenancy upon the creation and maintenance by both spouses together of other property as a homestead. A devise, conveyance, assignment, or other transfer to 2 grantees who are not in fact husband and wife that purports to create an estate by the entirety shall be construed as having created an estate in joint tenancy. An estate in tenancy by the entirety may be created notwithstanding the fact that a grantor is or the grantors are also named as a grantee or the grantees in a deed. No deed, contract for deed, mortgage, or lease of homestead property held in tenancy by the entirety shall be effective unless
signed by both tenants. This Section shall not apply to nor operate to change the effect of any
devise or conveyance.

This amendatory Act of 1995 is declarative of existing law.

Cite as 765 ILCS 1005/1c

History. Amended by P.A. 096-1145, §10, eff. 1/1/2011.

P.A. 89-88, eff. 6-30-95; 89-438, eff. 12-15-95; 92-136, eff. 1-1-02.
§ 30-4-3-35. Matrimonial trusts; election; effect of the death of a spouse or the dissolution of the marriage; revocation.

Indiana Statutes

Title 30. TRUSTS AND FIDUCIARIES

Article 4. TRUST CODE

Chapter 3. RULES GOVERNING THE RIGHTS, POWERS, DUTIES, LIABILITIES, AND REMEDIES OF THE PARTIES TO A TRUST

Current through P.L. 226-2014

§ 30-4-3-35. Matrimonial trusts; election; effect of the death of a spouse or the dissolution of the marriage; revocation

(a) This section is intended to ensure that if real property is transferred to one (1) or more revocable trusts created by a husband and wife for estate planning purposes, the husband and wife will maintain real estate ownership protections equivalent to those they would have if they owned that real property in an estate by the entireties including an estate by the entireties created under IC 32-17-3-1.

(b) As used in this section, "joint matrimonial trust" means a single inter vivos trust established under this section by settlors who are husband and wife.

(c) As used in this section, "matrimonial property" means real property that:

(1) is subject to a written election to treat the property as matrimonial property under this section; and

(2) is owned by a matrimonial trust.

(d) As used in this section, "matrimonial trust" means a trust established under this section to own matrimonial property.

(e) As used in this section, "separate matrimonial trust" means a separate trust that is also a matrimonial trust.

(f) As used in this section, "separate trust" means a trust established by one (1) individual.

(g) A matrimonial trust may be established:

(1) jointly by a husband and wife; or

(2) in two (2) or more separate trusts.
(h) A husband and wife may elect to treat real property as matrimonial property with a written statement of the election:

(1) in an instrument or instruments conveying the real property to a matrimonial trust or trusts; or

(2) in a separate writing that must be recorded in the county where the real property is situated and indexed in the records of the county recorder’s office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(i) A guardian of a husband or wife may make an election under this section:

(1) without the approval of the court if the guardian has unlimited powers under IC 29-3-8-4; and

(2) with the approval of the court in all other cases.

(j) An attorney in fact of a husband and wife may join in the making of an election under this section under the powers conferred upon the attorney in fact by IC 30-5-5-2 if the power of attorney is recorded in the county where the real property is situated and indexed in the records of the county recorder’s office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

(k) The terms of a separate matrimonial trust or a joint matrimonial trust may (but are not required to) restrict the sale or transfer of the matrimonial property for:

(1) the lifetime of the settlor who dies first;

(2) the lifetime of the surviving settlor; or

(3) another defined time period.

(l) An interest in matrimonial property is not severable during the marriage of the husband and wife unless:

(1) both the husband and wife join in the severance in writing; or

(2) a third party owns and forecloses a mortgage or other lien against the interests of both the husband and wife in the matrimonial property.

(m) Notwithstanding any other provision of this section, the legal rights of a lienholder that exist at the time of an election to treat the real property subject to the lien as matrimonial property may not be subject to a severance described in subsection (l) without the lienholder's written consent.

(n) To the extent that a matrimonial trust continues to be a matrimonial trust after the death of a settlor (as provided by subsections (p) and (r));

(1) real property held or owned in a separate trust and for which an earlier election
was made under this section continues to be matrimonial property; and

(2) an unsecured creditor or judgment lien creditor who has a claim only against the deceased settlor but not against the surviving settlor cannot enforce that claim against the deceased settlor's interest or the surviving settlor's interest in the matrimonial property.

(o) After the death of a settlor of a matrimonial trust (whether separate or joint), the issue of whether the surviving settlor's interest in the matrimonial property will be exposed to the claims of the surviving settlor's existing creditors or new creditors must be determined according to:

(1) the nature and extent of the surviving settlor's interest in the matrimonial property under the terms of the deceased settlor's separate trust or the joint trust;

(2) all other relevant facts and circumstances; and

(3) pertinent principles of nontrust law outside this article.

(p) Matrimonial property held in a separate matrimonial trust or in a joint matrimonial trust continues to be matrimonial property after the death of one (1) settlor:

(1) if the settlors reserved a life estate in the matrimonial property for each settlor when they conveyed the matrimonial property to the matrimonial trust or trusts; or

(2) if the deceased settlor's separate trust provides to the surviving settlor:

   (A) a life estate;

   (B) an interest that qualifies for a deduction from the gross estate of the decedent under Section 2056 of the Internal Revenue Code regardless of whether an election is made to qualify the interest for the deduction; or

   (C) in some respect the current right to occupy or receive rent, royalties, or other kinds of income with respect to the matrimonial property.

(q) A separate matrimonial trust established by a deceased settlor ceases to be a matrimonial trust upon the termination of payments to the surviving settlor as a result of the surviving settlor's death or as a result of the surviving settlor's valid disclaimer of all interests in the matrimonial property held in the deceased settlor's trust.

(r) A separate matrimonial trust established by a settlor who remains alive continues to be a matrimonial trust during that settlor's remaining lifetime, so long as the settlor retains the right to use or occupy matrimonial property held in the settlor's separate trust.

(s) A matrimonial trust ceases to be a matrimonial trust upon the dissolution of the marriage of the settlors.
(t) A husband and wife may revoke a matrimonial trust by together executing a writing expressing the revocation.

Cite as IC 30-4-3-35

History. Amended by P.L. 99-2013, SEC. 10, eff. 7/1/2013.

Amended by P.L. 36-2011, SEC. 9, eff. 4/20/2011.

As added by P.L.6-2010, SEC.18.
§ 14.5-511. [Effective 1/1/2015].

Maryland Statutes

ESTATES AND TRUSTS

Title 14.5. MARYLAND TRUST ACT

Subtitle 5. Creditor’s Claims; Spendthrift and Discretionary Trusts

Current through 2014 Legislative Session

§ 14.5-511. [Effective 1/1/2015]

(a) In this section, "proceeds" means:

(1) Property acquired by the trustee on the sale, lease, license, exchange, or other disposition of property originally conveyed by a husband and wife to a trustee or trustees;

(2) Property collected by the trustee on, or distributed on account of, property originally conveyed by a husband and wife to a trustee or trustees;

(3) Rights arising out of property originally conveyed by a husband and wife to a trustee;

(4) Claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to property originally conveyed by a husband and wife to a trustee;

(5) Insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to property originally conveyed by a husband and wife to a trustee; or

(6) Property held by the trustee that is otherwise traceable to property originally conveyed by a husband and wife to a trustee or the property proceeds described in items (1) through (5) of this subsection.

(b) Property of a husband and wife that was held by them as tenants by the entirety and subsequently conveyed to the trustee or trustees of one or more trusts, and the proceeds of that property, shall have the same immunity from the claims of the separate creditors of the husband and wife as would exist if the husband and wife had continued to hold the property or the proceeds from the property as tenants by the entirety, as long as:

(1) The husband and wife remain married;

(2) The property or the proceeds from the property continue to be held in trust by the
trustee or trustees or the successors in trust of the trustee or trustees;

(3) Both the husband and wife are beneficiaries of the trust or trusts; and

(4) The trust instrument, deed, or other instrument of conveyance provides that this section shall apply to the property or the proceeds from the property.

(c) After the death of the first of the husband or wife to die, all property held in trust that was immune from the claims of their separate creditors under subsection (b) of this section immediately prior to the death of the individual shall continue to have the same immunity from the claims of the separate creditors of the decedent as would have existed if the husband and wife had continued to hold the property conveyed in trust, or the proceeds from the property, as tenants by the entirety.

(d) The immunity from the claims of separate creditors under subsections (b) and (c) of this section may be waived, as to each specific creditor or all separate creditors of a husband and wife or specifically described trust property, or all former tenancy by the entirety property conveyed to the trustee or trustees, by:

(1) The express provisions of a trust instrument; or

(2) The written consent of both the husband and the wife.

(e) (1) Except as provided in paragraph (2) of this subsection, immunity from the claims of separate creditors under subsections (b) and (c) of this section shall be waived if a trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property held in trust that is immune from the claims of separate creditors.

(2) Immunity is not waived under this subsection if the identity of the property that is immune from the claims of separate creditors is otherwise reasonably disclosed by:

(i) A publicly recorded deed or other instrument of conveyance by the husband and wife to the trustee;

(ii) A written memorandum by the husband and wife, or by a trustee, that is recorded among the land records or other public records in the county or other jurisdiction where the records of the trust are regularly maintained; or

(iii) The terms of the trust instrument, including a schedule or exhibit attached to the trust instrument, if a copy of the trust instrument is provided with the financial statement.

(3) A waiver under this subsection shall be effective only as to:

(i) The person to whom the financial statement is delivered by the trustee;
(ii) The particular trust property held in trust for which the immunity from the claims of separate creditors is insufficiently disclosed on the financial statement; and

(iii) The transaction for which the disclosure was sought.

(f) In a dispute relating to the immunity of trust property from the claims of a separate creditor of a husband or wife, the trustee has the burden of proving the immunity of the trust property from the claims of the creditor.

(g) After a conveyance to a trustee described in subsection (b) of this section, the property transferred shall no longer be held by the husband and wife as tenants by the entirety.

(h) This section may not be construed to affect existing State law with respect to a tenancy by the entirety.

(i) This section applies only to tenancy by the entirety property conveyed to a trustee or trustees on or after October 1, 2010.

Subtitle 6.

History. Added by 2014 Md. Laws, Ch. 585, Sec. 1, eff. 1/1/2015.
§ 456.950. Definition-property and interests in property, how held-death of settlor, effect of-marital property rights, effect on.

Missouri Revised Statutes

Title XXXI. TRUSTS AND ESTATES OF DECEDENTS AND PERSONS UNDER DISABILITY

Chapter 456. Trusts and Trustees-The Uniform Trust Code

Current through 2014 Special Session

§ 456.950. Definition-property and interests in property, how held-death of settlor, effect of-marital property rights, effect on

1. As used in this section, "qualified spousal trust" means a trust:
   (1) The settlors of which are husband and wife at the time of the creation of the trust; and
   (2) The terms of which provide that during the joint lives of the settlors all property or interests in property transferred to, or held by, the trustee are:
      (a) Held and administered in one trust for the benefit of both settlors, revocable by either or both settlors acting together while either or both are alive, and each settlor having the right to receive distributions of income or principal, whether mandatory or within the discretion of the trustee, from the entire trust for the joint lives of the settlors and for the survivor's life; or
      (b) Held and administered in two separate shares of one trust for the benefit of each of the settlors, with the trust revocable by each settlor with respect to that settlor's separate share of that trust without the participation or consent of the other settlor, and each settlor having the right to receive distributions of income or principal, whether mandatory or within the discretion of the trustee, from that settlor's separate share for that settlor's life; or
      (c) Held and administered under the terms and conditions contained in paragraphs (a) and (b) of this subdivision.

2. A qualified spousal trust may contain any other trust terms that are not inconsistent with the provisions of this section.

3. Any property or interests in property that are at any time transferred to the trustee of a qualified spousal trust of which the husband and wife are the settlors, shall thereafter be administered as provided by the trust terms in accordance with paragraph (a), (b), or (c) of subdivision (2) of subsection 1 of this section. All trust property and interests in property
deemed for purposes of this section to be held as tenants by the entirety, including the proceeds thereof, the income thereon, and any property into which such property, proceeds, or income may be converted, shall have the same immunity from the claims of the separate creditors of the settlors as would have existed if the settlors had continued to hold that property as husband and wife as tenants by the entirety. Property or interests in property held by a husband and wife as tenants by the entirety or as joint tenants or other form of joint ownership with right of survivorship shall be conclusively deemed for purposes of this section to be held as tenants by the entirety upon its transfer to the qualified spousal trust. All such transfers shall retain said immunity, so long as:

1. Both settlors are alive and remain married; and

2. The property, proceeds, or income continue to be held in trust by the trustee of the qualified spousal trust.

4. Property or interests in property held by a husband and wife or held in the sole name of a husband or wife that are not held as tenants by the entirety or deemed held as tenants by the entirety for purposes of this section and are transferred to a qualified spousal trust shall be held as directed in the qualified spousal trust's governing instrument or in the instrument of transfer and the rights of any claimant to any interest in that property shall not be affected by this section.

5. Upon the death of each settlor, all property and interests in property held by the trustee of the qualified spousal trust shall be distributed as directed by the then current terms of the governing instrument of such trust. Upon the death of the first settlor to die, if immediately prior to death the predeceased settlor's interest in the qualified spousal trust was then held in such settlor's separate share, the property or interests in property in such settlor's separate share may pass into an irrevocable trust for the benefit of the surviving settlor upon such terms as the governing instrument shall direct, including without limitation a spendthrift provision as provided in section 456.5-502.

6. No transfer by a husband and wife as settlors to a qualified spousal trust shall affect or change either settlor's marital property rights to the transferred property or interest therein immediately prior to such transfer in the event of dissolution of marriage of the spouses, unless both spouses otherwise expressly agree in writing.

7. This section shall apply to all trusts which fulfill the criteria set forth in this section for a qualified spousal trust regardless of whether such trust was created before or after August 28, 2011.

Cite as § 456.950, RSMo

History. Amended by 2014 Mo. Laws, HB 1231, s A, eff. 8/28/2014.
Amended by 2014 Mo. Laws, SB 500, s A, eff. 8/28/2014.

L. 2011 S.B. 59§ 1, A.L. 2012 S.B. 628 merged with S.B. 636

Note: This section is set out twice. See also RSMo s 456.9501, effective until 8/28/2014.
§ 35-15-NEW. Newly enacted section not yet numbered.

Tennessee Statutes

Title 35. Fiduciaries And Trust Estates

Chapter 15. Tennessee Uniform Trust Code

Part 5. Creditor's Claims - Mandatory, Support and Discretionary Interests - Effect of Spendthrift Provision

Current through Acts 2014, ch. 1015

§ 35-15-NEW. Newly enacted section not yet numbered

(a) As used in this section, "proceeds" means:

(1) Property acquired by the trustee upon the sale, lease, license, exchange, or other disposition of property originally conveyed by a husband and wife as tenants by the entirety to a trustee or trustees;

(2) Property collected by the trustee on, or distributed on account of, property originally conveyed by a husband and wife as tenants by the entirety to a trustee or trustees;

(3) Rights arising out of property originally conveyed by a husband and wife as tenants by the entirety to a trustee;

(4) Claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, property originally conveyed by a husband and wife as tenants by the entirety to a trustee;

(5) Insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, property originally conveyed by a husband and wife as tenants by the entirety to a trustee; or

(6) Property held by the trustee that is otherwise traceable to property originally conveyed by a husband and wife as tenants by the entirety to a trustee or the property proceeds described in subdivisions (a)(1)-(5).

(b) Any property of a husband and wife that was held by them as tenants by the entirety and subsequently conveyed as tenants by the entirety to the trustee or trustees of one (1) or more trusts, and the proceeds of that property, shall have the same immunity from the claims of their separate creditors as would exist if the husband and wife had continued to hold the property or its proceeds as tenants by the entirety, so long as;
(1) The husband and wife remain married;

(2) The property or its proceeds continues to be held in trust by the trustee or trustees or their successors in trust;

(3) The trust or trusts are, while both settlors are living, revocable by either settlor or both settlors, acting together;

(4) Both the husband and the wife are permissible current beneficiaries of the trust or trusts while living; and

(5) The trust instrument, deed, or other instrument of conveyance provides that this section shall apply to the property or its proceeds.

(c) After the death of the first of the husband and wife to die, all property held in trust that was immune from the claims of their separate creditors under subsection (b) immediately prior to the individual's death shall continue to have the same immunity from the claims of the decedent's separate creditors as would have existed if the husband and wife had continued while both were alive to hold the property conveyed in trust, or its proceeds, as tenants by the entirety. To the extent that the surviving spouse remains a beneficiary of the trust and has the power, exercisable in the individual capacity of the surviving spouse, to vest in the surviving spouse individually title to the property that was immune from the claims of the separate creditors of the decedent under subsection (b), the property shall be subject to the claims of the separate creditors of the surviving spouse.

(d) The immunity from the claims of separate creditors under subsections (b) and (c) may be waived as to any specific creditor or any specifically described trust property, including all separate creditors of a husband and wife or all former tenancy by the entirety property conveyed to the trustee or trustees, by the express provisions of a trust instrument, deed, or other instrument of conveyance, or by the written consent of both the husband and the wife.

(e) (1) Except as provided in subdivision (e)(2), immunity from the claims of separate creditors under subsections (b) and (c) shall be waived if a trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property held in trust that is immune from the claims of separate creditors.

(2) Immunity is not waived under this subsection (e) if the identity of the property that is immune from the claims of separate creditors and the fact of such immunity is otherwise reasonably disclosed by:

(A) A publicly recorded deed or other instrument of conveyance by the husband and wife to the trustee;
(B) A written memorandum by the husband and wife, or by a trustee, that is recorded among the land records or other public records in the county or other jurisdiction where the records of the trust are regularly maintained; or

(C) The terms of the trust instrument, including any schedule or exhibit attached to the trust instrument, if a copy of the trust instrument is provided with the financial statement.

(3) A waiver under this subsection (e) shall be effective only as to:

(A) The person to whom the financial statement is delivered by the trustee;

(B) The particular trust property held in trust for which the immunity from the claims of separate creditors is insufficiently disclosed on the financial statement; and

(C) The transaction for which the disclosure was sought.

(f) In any dispute relating to the immunity of trust property from the claims of a separate creditor of a husband or wife, the trustee has the burden of proving the immunity of the trust property from the creditor's claims.

(g) In the event that any transfer of real property held in tenancy by the entirety to a trustee of a trust as provided under subsection (b) is held invalid by any court of proper jurisdiction, or if the trust is revoked or dissolved by a court decree or operation of law, while both spouses are living, then immediately upon the occurrence of either event, absent a contrary provision in a court decree, all real property held in the trust automatically shall be deemed for all purposes to be held by both spouses as tenants by the entirety.

(h) No transfer by a husband and wife described in subsection (b) shall affect or change either settlor’s marital property rights to the transferred property or interest therein immediately prior to such transfer in the event of dissolution of marriage of the spouses, unless both spouses otherwise expressly agree otherwise in writing. Upon entry of a decree granting divorce or annulment between the spouses, the immunity from the claims of separate creditors under subsection (b) shall terminate immediately.

(i) After a conveyance to a trustee described in subsection (b), the property transferred shall no longer be held by the husband and wife as tenants by the entirety.

(j) This section may not be construed to affect existing state law with respect to tenancies by the entirety. This section applies only to tenancy by the entirety property conveyed to a trustee or trustees on or after July 1, 2014.

§ 55-20.2. Tenants by the entireties in real and personal property; certain trusts.

Virginia Statutes

Title 55. PROPERTY AND CONVEYANCES

Chapter 1. Creation and Limitation of Estates; Their Qualities

Current through 2014, Ch. 825

§ 55-20.2. Tenants by the entireties in real and personal property; certain trusts

A. Any husband and wife may own real or personal property as tenants by the entireties. Personal property may be owned as tenants by the entireties whether or not the personal property represents the proceeds of the sale of real property. An intent that the part of the one dying should belong to the other shall be manifest from a designation of a husband and wife as "tenants by the entireties" or "tenants by the entirety."

B. Any property of a husband and wife that is held by them as tenants by the entireties and conveyed to their joint revocable or irrevocable trusts, or to their separate revocable or irrevocable trusts, shall have the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety, so long as (i) they remain husband and wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their property.

Cite as Va. Code § 55-20.2

§ 4-10-402. Title of trust property.

Wyoming Statutes

Title 4. TRUSTS

Chapter 10. UNIFORM TRUST CODE

Article 4. CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST

Current through 2014 Legislative Session

§ 4-10-402. Title of trust property

(a) Property transferred to a trust shall be titled:
   (i) If it is real property, in accordance with W.S. 34-2-122; and
   (ii) If it is personal property, in:
         (A) The name of the current trustee as the trustee of such trust;
         (B) The name of "the trustee" as the trustee of such trust;
         (C) The name of the nominee of the trustee; or
         (D) The name of the trust.

(b) Any reference to the trustee shall be deemed to include any successor or substitute trustee serving from time to time.

(c) Any property of a husband and wife that is held by them as tenants by the entireties pursuant to W.S. 34-1-140 and conveyed to their joint revocable or irrevocable trusts, or to their separate revocable or irrevocable trusts, shall have the same immunity from the claims of their separate creditors as it would if it had remained held by the entireties, so long as:
   (i) They are both living and remain as husband and wife;
   (ii) The property continues to be held in the trust or trusts for their benefit; and
   (iii) The trust instrument, deed or other instrument of conveyance transferring the property to the trust or trusts provides that this subsection shall apply to the property and any proceeds resulting from the sale or disposition thereof.

(d) After the death of the first of the husband and wife to die, all property held in trust that was immune from the claims of the decedent's separate creditors under subsection (c) of this section immediately prior to the decedent's death shall continue to have the same
immunity from the claims of the decedent's separate creditors as would have existed if the husband and wife had continued to hold the property conveyed in trust, or its proceeds, as tenants by the entirety.

(e) Nothing in this section shall be construed to limit or otherwise alter the authority granted to the department of health to assert a claim against an estate under W.S. 42-4-206 or to file a lien under W.S. 42-4-207 as could be asserted against a tenancy by the entirety established in accordance with W.S. 34-1-140.

Cite as W.S. 4-10-402

History. Amended by Laws 2013, ch. 178, §2, eff. 7/1/2013.

Amended by Laws 2013, ch. 178, §2, eff. 7/1/2013.
EXHIBIT C
An Overview

Every year, some adults become unable to conduct their personal affairs or manage their finances due to incapacity. This incapacity may be due to a physical condition, cognitive deficit or incapacity, mental or physical illness, chronic drug or alcohol abuse, or a serious accident. This pamphlet will describe ways that adults can plan for incapacity so that there is someone to handle their finances and make medical decisions in the event they become incapacitated.

There are two basic ways one person can legally authorize another person to act for him or her. Before an individual becomes incapacitated, he or she can appoint another person to handle financial or medical matters by appointing an “agent” through a “durable power of attorney” (a durable power of attorney for financial matters and/or a patient advocate designation for medical and other care decisions) or create a trust for his or her assets and appoint a trustee to handle trust assets.

In the case of a durable power of attorney for financial matters, an individual authorizes one or more individuals or a bank to act as his or her agent (sometimes referred to as “attorney(s) in fact”). The durable power of attorney instrument will state the nature and extent of the powers given the agent. For decisions about medical treatment and other types of personal care decisions, an individual may execute a medical durable power of attorney (called a “patient advocate designation” in Michigan) and name a person (the “patient advocate”) to make medical treatment and other care decisions if he or she becomes unable to do so. Often, both a financial and medical care power of attorney are used because each instrument authorizes someone to help
in a specific way. More information on these important alternatives is contained in *The Durable Power of Attorney* and *Patient Advocate Designation* pamphlets, which are also published by the Probate and Estate Planning Section of the State Bar of Michigan.

What happens if an individual become incapacitated, but has not legally appointed another person to handle matters for him or her? If an individual becomes incapacitated, the Probate Court may appoint a guardian to take care of his or her personal care needs and/or a conservator to manage his or her finances and property. The same person may be appointed for both roles. The appointment of a guardian or conservator is a serious matter, which involves the time and expense of a court proceeding and the restriction of the individual’s legal ability to handle matters himself or herself. When a guardian is appointed, there is a public declaration that the person lacks capacity.

**Who are Incapacitated Individuals?**

In Michigan, adults who are “incapacitated” generally fall into two categories:

- individuals whose incapacity occurs during adulthood and
- individuals who have developmental disabilities, which in addition to other requirements must occur before the age of 22 (guardians for persons with developmental disabilities are appointed through a specialized procedure under the Mental Health Code).

This pamphlet focuses on those individuals whose incapacity occurs after age 22 and who meet the definition of incapacity:

“impaired by reason of mental illness, mental deficiency, physical illness or capacity, chronic use of drugs, chronic intoxication, or other cause, not including
minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.”

**Care and Custody Decisions for Incapacitated Persons Regarding Their Personal Activities**

**Alternatives to Guardianship**

If an individual becomes incapacitated, a spouse or other family member may informally make decisions concerning his or her care and custody without Probate Court proceedings for guardianship even though they do not have the legal authority to do so. However, a “patient advocate” designated in a medical durable power of attorney before incapacity has authority to act on the person’s behalf if the person has been determined to be incapable of making medical decisions.

**Appointment of a Guardian**

If there is no other way for decisions to be made on an individual’s behalf or to provide for his or her care and supervision. The incapacitated individual or another person interested in his or her welfare, may request guardianship by filing a petition with the probate court. The petition must be filed in the probate court in the county in which the individual resides or is present. The petition for appointment of the guardian must contain specific facts about the individual’s condition and recent conduct that demonstrate a need for assistance. Before a guardian may be appointed, the court must hold a hearing and find by clear and convincing evidence that:

1. The individual meets the definition of incapacitated individual (quoted above);” **and**
2. The appointment of a guardian is necessary to provide continuing care and supervision for the individual.

The law requires that the individual who is the subject of the petition be personally served with notice of the hearing (and he or she may object to the appointment of a guardian). There is a right to trial by jury and a hearing closed to the public. If the individual wishes to contest the petition, the court must appoint an attorney for him or her, unless he or she is already represented by his or her legal counsel. In addition, the individual’s spouse, as well as a person named as the individual’s attorney-in-fact in a durable power of attorney, and the children (or, if none, the parents) of the individual must be notified of the hearing and are likewise entitled to object to the appointment of a guardian. The probate court by law must appoint a “limited guardian,” rather than a full guardian, if the individual is legally incapacitated and lacks the ability to do some, but not all, required tasks.

The law also provides that unless an individual who is the subject of the petition is represented by his or her counsel, the court must appoint a guardian ad litem (GAL). Among other duties, the GAL must (1) personally visit the individual; (2) explain to the individual the nature, purpose, and legal effects of the appointment of a guardian as well as the individual’s rights at the hearing; (3) inform the individual of the name of the person(s) seeking appointment as guardian; and (4) submit a report to the court. The court may appoint a physician or mental health professional to examine him or her and submit a detailed report to the court. An individual has a right to an independent evaluation at public expense if he or she is indigent.

Any competent person or a professional guardian may be appointed as guardian – although the court will give preference to a person the individual has nominated, a person designated in the individual’s durable power of attorney or, if none, to the individual’s spouse,
adult child, parent, or relative with whom the individual resided for over six months. As a general rule, the closer the family relationship, the higher the priority for appointment as the individual’s guardian.

**Powers and Duties of a Guardian**

Michigan’s Estates and Protected Individuals Code determines the powers and duties of a guardian. Generally, a “full” or “plenary” guardian is responsible for the individual’s care, custody, and supervision. The guardian must also try to restore the individual to independence. Depending on the powers included in the letters of authority, the guardian may be responsible for making medical or other professional care and treatment decisions. However, if the person already appointed a patient advocate, that person still makes medical decisions, unless removed from those responsibilities by the court. The guardian is not liable to other people for the individual’s acts. Each year, the guardian must file a report with the probate court where the appointment took place and give a copy to the individual and all “interested persons” (as defined by Michigan Estates and Protected Individuals Code).

If there is no conservator appointed, the guardian may receive limited amounts of funds and hold certain personal possessions on behalf of the individual. Such sums or possessions can be used for the individual’s support, care, and education without the appointment of a conservator.

**Compensation of a Guardian**

A guardian may be compensated from the individual’s assets. The amount of compensation will depend upon the amount of time spent by the guardian, the nature of services provided, the amount of available funds, and the individuals specialized needs.
Acting for Incapacitated Adults Regarding Their Financial Interests

Alternatives to Conservatorship

If an individual becomes incapacitated to the extent that he or she cannot effectively manage his or her financial affairs, someone else will need to handle these issues for the individual. A durable power of attorney can be an excellent tool to provide for management of property and avoid the appointment of a conservator if an individual becomes incapacitated. Assets held in a trust for the individual’s benefit are not usually subject to probate court conservatorship proceedings if the individual becomes incapacitated, as long as there is a trustee other than the individual in question to administer the trust. These assets continue to be managed by the trustee without need for probate court or involvement of a conservator, even if one is appointed to handle assets outside the trust. An individual may set up a trust for his or her own benefit (usually in the form of a revocable trust). Likewise, someone else (a “third party”) may establish a trust for another person using the third party’s assets. For example, a parent might create a trust for a child. Regardless of who establishes the trust, assets are owned by the trust and managed by the trustee for the benefit of the person named in the Trust (the “beneficiary”). Trusts can be structured in many different ways. Consult with an attorney experienced in this area of law for more information.

Another alternative is the use of joint bank accounts. Both parties to a joint bank account (to which Social Security and other payments may be directly deposited) can use account funds, even if one person is incapacitated, without court action. However, joint bank accounts should be used very cautiously because when an individual names someone as a joint owner on his or her
bank account, the joint owner has the power to remove all of account funds and the account may be subject to claims by the joint owner’s creditors.

In addition, Social Security benefits (including retirement benefits, disability and supplemental security income (SSI)) may be paid to another person (called a “representative payee”) designated through the Social Security Administration. The representative payee must ensure that those monies are used for the individual’s benefit. If these benefits are the individual’s sole source of income, the designation of a “representative payee” provides a means for managing that income without court involvement.

If none of the above arrangements have been made, or the arrangements that are in place are not adequate to handle an individual’s financial and property issues, the Probate Court may appoint a “conservator” to handle his or her financial affairs. Whether a proceeding in the probate court for the appointment of a conservator is appropriate depends on the extent and nature of individual’s incapacity, as well as the extent and nature of the individual’s financial interests.

**Appointment of a Conservator**

The probate court may appoint a conservator for an individual after it holds a hearing and determines that:

1. The individual is unable to manage his or her property and business affairs because he or she has a mental illness, mental deficiency, physical illness or disability, is a chronic drug user or chronically intoxicated, confined, or detained by a foreign power or has disappeared and

2. 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 his or her support, and that protection is necessary to obtain or provide money.
Conservatorships often are for an indefinite duration and involve the management of the individual’s financial property and affairs.

When only a single transaction requires attention, the probate court may enter a protective order to accomplish this one-time matter, without appointing a continuing conservator. For example, in a long-term marriage, the court may decide that adequate protection is provided by transferring all marital assets to the spouse who can still manage financial affairs. Before such an order may be entered, the court will conduct the same hearing and make the same findings required for a conservatorship.

Under Michigan law, conservatorship proceedings may be initiated by:

- An individual for his or her own benefit;

- Anyone who is interested in an individual’s estate, affairs, or welfare (including a parent, adult child, guardian or custodian); or

- Anyone who would be adversely affected by a lack of effective management of an individual’s property or business affairs.

If an individual is mentally competent but, due to age or physical infirmity, desires a conservator to assist in the management of property and affairs, only that individual may petition the court for a conservator. An individual may obtain can obtain the same type of assistance, without court involvement, by executing a durable power of attorney or creating a living trust while he or she is competent.

Like a guardianship proceeding, the procedure for appointment of a conservator requires that notice of the hearing be given to the individual personally. Notice must also be given to:

- The individual’s children or, if none, to parents (or otherwise to his or her presumptive heirs);

- An individual’s agent (an “attorney in fact”) under a durable power of attorney;
• The nominated conservator;
• A government agency paying benefits to the individual or before which an application for benefits is pending; and
• The U.S. Administrator of Veterans’ Affairs (through their Michigan district counsel) if the individual is receiving or entitled to V.A. benefits.

The court hearing has many of the same safeguards and protections as a hearing on a guardianship as described above. There will also be a court-appointed GAL to review the accounts and petitions filed by the conservator during the conservatorship. The fees of the GAL are paid from the individual’s assets.

The conservator appointed by the court may be an individual or a professional conservator. Although Michigan law lists the priorities for appointment, the probate court, for good cause, may choose a person without priority or with lesser priority.

**Powers and Duties of a Conservator**

If a conservator is appointed, that conservator is responsible for the collection, preservation, and investment of the individual’s property and must use the property for the support, care, and benefit of the individual and his or her dependents. A conservator has a duty of loyalty and may not use any of the individual’s assets for the conservator’s personal benefit. The court may require the filing of a “fiduciary bond” to provide protection for the individual in case there is loss caused by the wrongful actions of the conservator.

The conservator must review all of the individual’s records and assemble a list of his or her properties, debts, charge accounts, and credit cards. Stores and companies of which the individual has been a customer, including credit card companies, should be notified of the conservator’s appointment. Within 56 days after being appointed, the conservator must file with
the probate court an “inventory” of all of the individual’s properties. A copy of the inventory must be sent to all “interested persons, the same people entitled to notice of a hearing for appointment of a conservator. The conservator must maintain careful records, and all payments from the individual’s funds or other property should be evidenced by proof of payment or a receipt (with a notation of the purpose of the disbursement).

The nature of investments made by the conservator on the individual’s behalf, as well as the amount of funds expended for the individual’s benefit, should be based on:

- The size of the estate;
- The probable duration of the conservatorship and the likelihood that, sometime in the future, the individual may be fully able to manage his or her own affairs;
- The accustomed standard of living for the individual and members of his or her household; and
- The availability of other funds for his or her support.

In addition, Michigan law instructs a conservator to consider the individual’s estate plan in making investments and distributions. Therefore, it is important for everyone to establish a written estate plan while he or she is able to do so. The conservator should examine the individual’s will, trust agreement, and even informal estate plan arrangements (such as joint bank accounts, life insurance policies and their beneficiary designations) and not take any inconsistent actions without prior court approval.

Each year, the conservator must file with the court for its review an itemized accounting that shows all receipts, disbursements, and distributions, as well as all remaining cash and property. Copies of the accounting must be sent to the “interested persons” before the court approval.
hearing. The conservator may also be required to file federal, state, and city income tax returns for the individual each year.

Compensation of the Conservator

Like a guardian, a conservator is entitled to just and reasonable compensation for services. In approving a conservator’s fee, the court will usually consider the following six major factors:

- The time expended by the conservator (it is important that the conservator who wishes to be compensated keep accurate time records and be able to demonstrate to the court that the services were both necessary and beneficial);
- The professional expertise and skill required;
- The nature, number, and complexity of assets;
- The makeup of parties who are interested in the conservatorship;
- The extent of the responsibilities and risks assumed; and
- The results obtained in administering the property.

Other Matters Affecting Guardianships and Conservatorships

Modification and Termination

An individual may request a modification or termination of his or her guardianship or conservatorship at any time. A request to modify or terminate the conservatorship may be filed by the conservator or any other person interested in the individual’s welfare. The request is made by filing a petition with the probate court, or, in the case of guardianship, may be made by an informal letter to the court or judge. Copies of the petition must also be served on all interested persons, including the individual (in other words, those who would be entitled to notification of a guardianship or conservatorship was filed at that time) as well as the guardian or conservator.
hearing is then held on the petition. The same procedural protections are available at a hearing for modification as are available at the initial hearing on the appointment. The court may find that the individual’s condition has improved or worsened, in which case the guardian’s or conservator’s responsibilities could be decreased or increased. If the court terminates the guardianship or conservatorship, the powers and authority of the guardian or conservator expire. The guardian or conservator will then be required to return all of the property to the individual. The conservator must also file and have approved by the court a final accounting through the time the last of the property is returned to the individual.

Using an Attorney and Other Professionals

Many people who take on a fiduciary role for an incapacitated person do not have the technical expertise to carry out all of the responsibilities and duties. In many instances, it will be necessary for such a person to retain the professional assistance of an attorney, accountant, bank trust department, investment counselor, psychiatrist, family counselor, or other professional. It is important that the professional’s proposed fee (whether it will be a fixed amount, an amount based on time and effort expended, a percentage, etc.) be discussed, understood, and agreed upon in advance – preferably in writing. In any event, these fees will be subject to the approval of the probate court. The role to be assumed by each professional should be expressly defined and monitored by the guardian or conservator throughout the period the services are being rendered. While the services of one or more professionals may have been retained, the guardian or conservator is still required by law to see that their responsibilities are properly performed. Reliance on the improper actions of a professional will not necessarily prevent personal liability on the part of the guardian or conservator for misdeeds or oversights.
This pamphlet may be purchased individually or in bulk from the State Bar of Michigan, Membership Services Department, 306 Townsend Street, Lansing, Michigan 48933-2083. You may call 1-800-948-1442 ext. 6322 to obtain price information.
Durable Power of Attorney

Most people are aware that they need a will and an estate plan so that when they die their assets can be administered and distributed to their beneficiaries promptly and efficiently. However, many people fail to plan adequately for lifetime incapacity. A person is incapacitated if he or she is unable to legally handle his or her affairs (business, financial and personal). Incapacity can be caused by illness, injury, an accident, or old age. If you are unable to handle your affairs, who can and will do so?

If you do not plan for who will handle your affairs, Michigan law provides for a probate court proceeding to have an individual or a bank appointed to act for you. Guardianship and conservatorship proceedings involve time, expense and result in a public declaration of incompetency. Furthermore, you have no assurance as to whom the court will appoint.

You can easily avoid a probate court proceeding by signing a document giving a relative, friend or a bank the power to act for you. This document is ordinary power of attorney. Unless a power of attorney is durable, it is automatically suspended or revoked (it is no longer valid) if you become incompetent—just when your family would need it most. The Michigan legislature responded to the problem by creating the “Durable Power of Attorney” which is a power of attorney that remains in effect even if you become incapacitated. You should consider having a Durable Power of Attorney. It can save you and your family the time, expense and the inconvenience of a probate court proceeding.

1. What is a power of attorney?
You, as “principal”, name another individual as your “agent” or “attorney-in-fact”, to act for you to handle your affairs.

Duties may include;

- signing checks,
- making deposits,
- paying bills,
- contracting for medical or other professional services,
- selling property,
- obtaining insurance, and
- doing all the things you do in managing your day to day affairs.
The authority that you give to your agent can be as broad (for example, to do anything you could do) or as narrow (for example, to sell a particular piece of real estate) as you choose to make it. A power of attorney should be in writing and signed by you so that your agent has something to show as to his or her authority to act for you. Usually, a power of attorney is signed with all of the formalities required when a deed is executed. This allows, for example, the power of attorney to be recorded with a local register of deeds office in the event your agent needs to use the power of attorney in connection with a real estate transaction.

2. What is a Durable Power of Attorney?
A Durable Power of Attorney is a written power of attorney that springs into effect or stays effective when the person becomes incapacitated. It contains the words “this power of attorney shall not be affected by my incapacity,” or “this power of attorney shall become effective upon my incapacity,” or similar words. In order to be valid, a durable power of attorney must be signed by you before you become incapacitated.

3. Do I Need A Durable Power Of Attorney Even If My Spouse And I Own Everything “Jointly?”
Yes. If you are incapacitated, your spouse can still sign checks and make withdrawals on joint bank accounts, but your spouse cannot sell jointly owned stocks or your jointly owned home or cottage without your signature. Your spouse cannot name or change a beneficiary on your life insurance or your retirement benefits.

4. Can I Make a Durable Power Of Attorney That Is Effective Even While I Am Still Able To Handle My Own Affairs? Isn’t That Dangerous?
Yes, you can make a Durable Power of Attorney that is presently effective. Your agent may be given a lot of authority, and that authority can be follow your instructions. It should be given to someone you trust.

5. Can I make a Durable Power of Attorney that becomes effective only if I become incapacitated?
Yes, you could write, “this power of attorney shall become effective upon my incapacity.” You need to indicate how you will be determined to be incapacitated so that when your agent goes to use the power of attorney (say at a bank), your agent will be able to convince the third party (for example, a bank teller) that you are incapacitated. It’s up to you to decide if you want a Durable Power of
Attorney that is presently effective or one that is effective only if you become incapacitated.

6. Can I revoke a Durable Power of Attorney? If so, how?
As long as you are competent you can revoke your Durable Power of Attorney. The revocation should be in writing, and it should be delivered to the agent and to third parties with whom the agent is dealing (for example, your bank). A conservator appointed by the probate court can revoke the Durable Power of Attorney. Finally, the Durable Power of Attorney terminates at the time of your death, unless there is uncertainty as to whether you are dead or alive. Please understand, however, that a third party is entitled to rely on a power of attorney that has been terminated or revoked until the third party has actual notice of the termination.

7. What are some specific authorities which might be given in a Durable Power of Attorney?
Ordinarily, you want your agent to be able to do anything you could do. Therefore, most Durable Powers of Attorney are very broad. Specifically, a power of attorney might authorize your agent to do any or all of the following on your behalf:

- Pay for support and care.
- Borrow money.
- Conduct banking transactions.
- Deal with property.
- Handle legal claims.
- Gain entry to safety deposit boxes.
- Deal with insurance and retirement benefits.
- Prepare and file tax returns.
- Exercise stockholder rights.
- Contract for services.
- Make gifts.
- Collect Social Security and other benefits.
- Exercise rights of the settlor or grantor of a trust.

A Durable Power of Attorney may be limited to authority over property and financial matters. If you want to authorize someone to make medical decisions for you or decisions to withdraw life-sustaining treatment when you are no longer able to do so, you should designate someone to act as your patient advocate.
8. Whom should I name as my agent?
You may name any adult (for example, a spouse, child, or other relative, or a friend) or you may name a bank; but you should select an agent who is willing to act and in whom you have confidence and trust. Remember, your agent may be making important financial and personal decisions for you.

9. Can I name more than one agent?
Yes, you can name two or more agents. If you do name more than one agent, you should specify whether your agents can act independently or whether they must act jointly. If you name two agents to act jointly, however, a deadlock may develop if they cannot agree. Rather than naming two persons to act jointly, you could name one agent with an alternate to act if the first agent cannot or will not act.

10. What are the agent’s obligations to me?
Your agent is obligated to follow your instructions and act in your best interests. The agent should keep accurate records and accounts and act prudently. If your agent improperly handles your affairs, he or she is legally responsible for damages to you.

11. What if my agent abuses the authority?
You can revoke the Durable Power of Attorney or, if because of your incapacity, you are unable to revoke it, anyone interested in your welfare can ask the probate court to intervene and appoint a conservator to handle your affairs. The conservator can require the agent to account and report, and can even suspend or revoke the Durable Power of Attorney. In addition, you (or your conservator) can sue your agent for damages caused by the agent’s abuse of authority.

12. What are some problems with a Durable Power of Attorney?
The biggest problem with any power of attorney is that there is no guarantee that it will be accepted or recognized by third parties. For example, if the purpose of the Durable Power of Attorney is to deal with governmental agencies, such as the Social Security Administration, the Veterans Administration, or the Internal Revenue Service, one must either use the agency’s special Power of Attorney form, or make sure that the Durable Power of Attorney presented to the agency contains the special wording required by each agency’s particular form.

Another problem occurs if you have an individual as your agent and he or she “quits” or dies or becomes incapacitated. In such event, if you haven’t named an alternate agent, there will be no one to act on your behalf. In order for a Durable
Power of Attorney to be workable, you have to give the agent a great deal of power and authority. Thus, you should be sure to choose someone you trust and have confidence in to handle your affairs.

13. What are some of the advantages of a Durable Power of Attorney?
   - You (not a court) select your agent.
   - It can give you and your family some peace of mind knowing some you have chosen will handle your affairs.
   - It can save time and the expense of a court proceeding.

14. How do I go about getting a Durable Power of Attorney?
It is recommended that you consult with a knowledgeable lawyer who can prepare a Durable Power of Attorney to suit your needs and to advise you on its use. Everyone should consider the advantages of having a Durable Power of Attorney. It’s an important part of estate planning.
What to Do When a Family Member Dies With Assets.

Ten Frequently Asked Questions about Probate Administration of a Decedent’s Estate

This pamphlet may be purchased individually or in bulk from:
State Bar of Michigan, Membership Services Department,
306 Townsend Street, Lansing, Michigan 48933-2083.
Call 1-800-968-1442 ext. 6326 to obtain price information.
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1. What is Probate for a Decedent? Probate is a court proceeding where a court appointed person (typically a family member) collects the assets titled in a decedent's name, pays the decedent's bills, and then turns what is left of the assets over to the decedent's heirs under his will, or, if he or she has no will, to immediate family members or other relatives as spelled out in a Michigan statute for someone who does not have a will (Michigan's Law of Intestate Succession). Distributions under Michigan’s Law of Intestate Succession are spelled out below.

<table>
<thead>
<tr>
<th>Surviving Family Member</th>
<th>Intestate Share.</th>
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| Spouse                  | 1. The entire estate if the decedent is only survived by his spouse and no parents or children are surviving.  
2. $204,000.00 (in 2011) plus ½ of the balance if the decedent is survived by children.  
3. $204,000.00 plus ¾ of the balance of the estate if there are no surviving children and parents of the decedent have also survived, who shall receive the other ¼. |
| Children and Grandchildren | If there is no surviving spouse the estate (or the balance of the estate if there is a surviving spouse) is distributed equally surviving children and the shares of deceased grandchildren are distributed equally among all grandchildren. |
| Parents                 | If there is no surviving spouse and no children, the estate (or the balance of the estate if there is a surviving spouse and no children) is distributed to surviving parents equally. |
| Siblings and Nieces or Nephews | If there is no surviving spouse, children or parents, the estate is divided up into equal shares for surviving siblings and surviving siblings leaving surviving children. The shares for surviving siblings are distributed to surviving siblings equally and the shares of all deceased siblings leaving surviving children are divided equally among nieces and nephews. |
| Grandparents            | If none of the above heirs have survived, but grandparents have survived, then to surviving paternal and maternal sides of grandparents receive equally. The share of a deceased grandparent shall be divided into equal shares for the next generation surviving and for deceased members of that generation leaving grandchildren surviving. The shares shall be distributed equally to the members of the closest surviving generation and the shares of deceased members of that generation shall be shared equally by the members of the surviving generation. If only one side of maternal or paternal grandparents leave descendants, that side shall receive the entire estate in the manner previously described. |
| No Surviving Family Members Listed Above | The State of Michigan |

2. When is Probate Required? Subject to a handful of exceptions listed below, probate is necessary when a person dies leaving property in his or her own name alone (such as a house titled only in the name of the decedent) or has rights to receive property perhaps at some time in the future (such as an inheritance from someone else or a lawsuit where the decedent is or was a party). Four kinds of property can pass to a decedent's heirs without going through probate.

   A. Property owned by the decedent and another person as joint tenants with right of survivorship will pass automatically to the surviving joint owner without going through probate (except in the case of certain joint bank accounts which are established with another person acting as agent for the decedent).
B. Beneficiary designated properties (such as life insurance, pension benefits, payable on death (POD) bank accounts, and IRAs) are payable on death, without probate, to the beneficiary designated by the decedent (or, if none, as designated in the contract or plan). Arrangements must be made with the company holding the property.

C. Properties owned by a revocable trust are not considered as being owned in a decedent’s name and do not go through probate. Instead, assets held in a trust are disposed of after death according to the instructions written in the trust document. This only applies to property actually titled in the name of the trust (e.g. John Doe, Trustee of the John Doe Trust dated xx/xx/xxxx). Those assets placed in the name of the trust, in a process sometimes called funding the trust, while the decedent was still alive will avoid probate. Property in a decedent’s name can be added later, through a "pour-over" will, but such assets require probate to make the transfer.

D. There are even some forms of property owned solely by the decedent that would otherwise require probate but by Michigan statute can be transferred to heirs without probate. Those notable exceptions include the following:

- **Unpaid wages.** An employer in Michigan may pay the wages due a deceased employee to the employee’s spouse, children, parents or siblings in that order unless the employee filed a request to the contrary with the employer.

- **Cash up to $500 and wearing apparel.** A hospital, convalescent or nursing home, morgue, or law enforcement agency in Michigan holding cash not exceeding $500 and wearing apparel of the decedent may deliver that property to the decedent’s spouse, child, or parent who provides (i) suitable identification and (ii) an affidavit that states the person’s relationship to the decedent and that there are no pending probate proceedings.

- **Traveler’s checks.** Most issuing companies (such as American Express) will redeem unused travelers checks following the death of the owner without requiring the appointment of a PR on submission of the checks, a death certificate, and an affidavit by the next of kin indicating to whom payment should be made.

- **Motor vehicle transfers.** If the combined value of one or more of the decedent’s motor vehicles does not exceed $60,000 (check figure) *and there are no probate proceedings, registration of title may be transferred by the Michigan Secretary of State to the surviving spouse or next of kin by following the instructions on the form TR-29 (including submitting a death certificate, the vehicle’s certificate of title if available, and certain other Michigan Secretary of State requirements).

- **Watercraft (over 20 foot – which requires title) transfers.** If the combined value of all of the decedent’s watercraft does not exceed $100,000, and there are no probate proceedings for the decedent’s estate, registration of title may be transferred by the Michigan Secretary of State to the surviving spouse or next of kin upon submitting a death certificate, an affidavit of kinship, and the watercraft’s certificate of title.
3. **What is a Personal Representative (PR) and Can I Be the PR?** A PR is a person appointed by the court to act on behalf of the estate and who is able to control or manage any of the assets in the Decedent's name. The PR is responsible for carrying out the duties and responsibilities described in this pamphlet. The person who can be appointed PR is the person highest on the following list:

   A. A person named in the Will to be PR  
   B. A surviving spouse if he or she is a devisee under the Will  
   C. Other devisees under the Will  
   D. The surviving spouse if he or she is not a devisee under the Will  
   E. Other heirs of the decedent  
   F. 42 days after the date of death, the nominee of a creditor approved by the probate judge

4. **What is the Quickest Time Period For Probate?** Other than small estates discussed below, a probate estate cannot be closed in less than 6 months from the date creditors are notified in the newspaper, (although probate courts generally follow a five month rule). The assets of an estate cannot be distributed to the heirs until creditors of the decedent have been allowed to file their claims. Creditors have to be notified either by: (1) a general "notice to creditors" that has been published in an appropriate newspaper indicating that creditors have 4 months to file their claims; or (2) by a notice sent to known creditors during the 4 month period, giving a known creditor the later of the 4 month period from publication or one month after they receive the notice. During the four month period after publication, the PR (See above "What is a Personal Representative and Can I be a Personal Representative") is obligated to send notices to known creditors and if creditors do not file their claims within the required time period, ordinarily, they cannot collect on their claims. If a creditor is discovered in the last 28 days of the four month period, the PR has 28 days after that discovery to notify a known creditor.

**Small Estate.** There are two types of small estate proceedings where the four month rule for Notice to Creditors (see above "What is the Quickest Time Period for Probate") does not apply. In both proceedings, estate assets left over after expenses are paid to individuals defined by statute (i) even though the decedent may have had a will giving the property to other persons or (ii) (if there is no will) regardless of Michigan’s law of intestate succession (See "What is Probate?") in certain instances.
A. **The $20,000.00 Small Estate.** The first type of small estate proceeding applies to those cases where all of the real and personal property owned by the decedent has a total value equal to or less than the sum of the following: (1) the funeral expenses plus (2) 20,000. **Note:** The $20,000 amount is for persons dying in 2010 or 2011. It is recalculated each year based on cost of living increases.

Upon presentation of a petition and payment of the filing fee, the probate court may order that the funeral expenses be paid, or, if they have not been paid, be assigned to the surviving spouse, or if none, to the decedent’s heirs under Michigan’s law of intestate succession. No court hearing is held. During the 63 day period following the court’s assignment of the property, if the heir or heirs are not the decedent’s surviving spouse or minor child, they will be responsible for any unsatisfied debt of the decedent up to the value of the property received. If children of a decedent receive assets and they are not minors, there is a $14,000.00 exemption (in 2011 that is subject to inflationary adjustment) that is spread between the spouse and the children based on their percentage of the assets) which is protected from the claims of creditors.

B. **Larger Small Estate Proceedings When Spouse or Minor Children are Heirs.** For somewhat larger estates, a second kind of small estate summary proceeding may be available in those cases when the decedent is survived by his or her spouse or minor/dependent children. If, upon preparation of the estate’s inventory, the value of the estate is less than the sum of the following:

(i) All mortgages and liens,
(ii) The homestead allowance (such an allowance of $20,000 (in 2011) can be paid to the surviving spouse or, if none, to the decedent’s minor and dependent children),
(iii) Exempt property (up to $14,000 (in 2011) of the decedent’s personal and household articles can be selected by the surviving spouse or, if none, by the decedent’s children),
(iv) The family allowance (of up to $24,000 (in 2011); if a higher amount is desired, it must be approved by the probate court),
(v) Funeral, last illness, and administrative expenses,

- then the PR (See above "What is a Personal Representative and Can I be a Personal Representative") may simply pay the amounts due the secured creditors and the balance to the surviving spouse (or, in some cases, to the conservator for the minor children) and then close the estate.

**Note:** The $20,000, $14,000, and $24,000 are recalculated each year based on cost of living increases.

**Estates Other than Small Estates and Court Supervision.** There are two forms of administration of a decedent’s estate (other than small estates described above) which differ based on the level of the judge’s involvement during the period of the proceedings. Unsupervised administration is begun by filing either an application or petition with the probate court. Supervised administration is begun by filing a petition that includes a request
for supervision. Without getting into a discussion of the many different circumstances where a judge's involvement might be an advantage or an unnecessary burden, sometimes it is acceptable to everyone to not have a judge overlooking matters and sometimes having the judge's involvement is preferred.

A. **Unsupervised Administration** permits the PR (See above "What is a Personal Representative and Can I be a Personal Representative") to act in a manner independent of the court unless intervention is requested by the PR (See above "What is a Personal Representative and Can I be a Personal Representative") or an interested person (such as an unpaid creditor or an estate beneficiary).

This form of administration is generally preferred unless there is a specific reason to request the court’s supervision of the estate. In addition, since there is less court involvement, fewer details concerning the estate’s administration will be in the court file and available for inspection by the public and the media, unsupervised administration offers some privacy for the decedent’s family.

B. **Supervised administration** requires the probate court’s review and approval of many estate activities. For example, in supervised administration the court would be required to

(i) approve the sale of the decedent’s real estate (unless the decedent’s will authorizes the PR (See above "What is a Personal Representative and Can I be a Personal Representative") to do so),

(ii) authorize the payment of PR and attorney fees, prior to payment

(iii) review the PR’s accounting of all receipts and disbursements, and

(iv) approve all distributions to heirs (people receiving property from the estate if there is no will) and devisees (people receiving property under a will). While the court’s involvement frequently adds to the time and expense of administering an estate, the court’s supervision will likely afford greater protection to the PR and the other interested persons against losses and claims. For example, a PR may ask for supervision if the best offer for the sale of real property is below the assessed value.

5. **What Sort of Things Should I do After a Death and Before Filing Probate?**

Immediately following death and before a PR is appointed, the following steps should be undertaken by members of the decedent’s family.

**Initial Responsibilities of the Family in All Cases.**

A. Make funeral arrangements and order sufficient copies of the death certificate (before appointment, the PR named in the will may carry out the written instructions of the decedent relating to the decedent’s body as well as funeral and burial arrangements).

B. Determine the existence and location of the decedent’s will and provide for safeguarding the decedent’s important documents. Anyone who has the original will has a duty to file it with the probate court.
C. Obtain the names and addresses of the decedent’s heirs and all persons named in the will.

D. Obtain a list of the decedent’s properties and the manner in which they are held [e.g., sole name, in trust, joint names, beneficiary designated (such as life insurance, IRAs, employee benefits [, and so on]), etc.].

E. Arrange for security of the decedent’s home and business (for example, insurance).

F. Keep careful records of all funeral and estate related expenses incurred.

G. Determine whether a probate proceeding is necessary for the decedent’s estate properties, determine who will be acting as PR, and, if necessary, take steps for filing a petition for appointment of a PR and determination of testacy or an application for appointment of a PR and, if there is a will, for probate in the probate court in the county of decedent’s residence.

In order to protect the estate, the PR should not let anyone use the decedent’s property before distribution. This is particularly important for cars.

A PR nominated in a decedent’s will has no authority to act on behalf of the estate until he or she is appointed by the court (as evidenced by its issuing letters of authority). However, if there is a problem or dispute prior to the court’s appointment of the nominated regular PR, the court can quickly appoint that person (or another) as a special PR to act on an interim basis for the purpose of preserving estate assets, obtaining the original will, or pursuing certain legal rights.

List of Possible Notifications, Which May Depend on Circumstances:

A. Social Security Administration. 800-772-1213 (Find out if survivor benefits are available).

B. Veteran’s Administration. (if decedent was formerly in the military).

C. Defense Finance and Accounting Service. 800-269-5170 (military service retiree receiving benefits).

D. Office of Personnel Management. 888-767-6738 (if decedent is a retired or former federal civil service employee).

E. U.S. Citizenship and Immigration Service. 800-375-5283 (if decedent was not a U.S. citizen).

F. Michigan State Department of Motor Vehicles. General Information Phone Number 888-767-6424 (if decedent had a driver’s license or state ID).

G. Financial Companies and Insurers. Credit card and merchant card companies, particularly if there are automatic payments. Banks, savings and loan associations, and credit unions, particularly if there are automatic withdrawals. Mortgage companies and lenders. Financial planners and stockbrokers. Pension providers. Life insurers and annuity companies. Health, medical and dental insurers. Disability insurer, Automotive insurer. Mutual benefit companies.
H. Credit Reporting Agencies. There are three national credit reporting agencies which you should notify of the death and instruct them to list all accounts as: “Closed. Account Holder is Deceased.” You may also request a credit report to obtain a list of all creditors and to review recent credit activities. Provide them a letter signed by you with your name, address, phone number, your relationship to the decedent, the decedent’s name, address, date of death, date of birth, location of birth, social security number, prior addresses for the last 5 years in chronological order, and that you want them to post in the decedent's credit report that they are deceased and that no credit should be issued. You may also want to request a credit report. The addresses and phone numbers are:

(i) Experian, 888-397-3742, P.O. Box 9701, Allen, Texas 75013.
(ii) Equifax, 800-525-6285, P.O. Box 105069, Atlanta, Georgia 30348.
(iii) TransUnion, 800-680-7289, P.O. Box 6790, Fullerton, California 92834.

I. Memberships. You should contact and cancel any memberships in the event there is a refund or in the event there are automatic renewals, including clubs, video rental organizations, alumni clubs, health and athletic clubs and professional organizations or unions.

6. What are my Responsibilities If a Probate is Started and I am Appointed Personal Representative (PR)? Generally, a PR has many duties to carry out while holding the decedent’s property for the estate’s interested persons (i.e., creditors, tax authorities, and beneficiaries).

A PR must not only be honest and impartially fair but must also be diligent, responsible, and prudent in completing their legally imposed obligations.

A PR has a duty of loyalty and cannot use estate assets for personal benefit. While a PR will likely employ an attorney or other professionals to assist with estate administration, the PR is still ultimately responsible for “getting the job done”—regardless of whether administration is supervised or unsupervised. It is very important that a PR timely communicate with and respond to any inquiries of beneficiaries and others who have an interest in the estate as it progresses.

A PR is required to carefully manage the estate’s assets. Basically, a PR must achieve a reasonable rate of return from interest, dividends, and rent on the estate’s assets, with a minimum of risk, while prudently preserving estate values.

For example, leaving substantial funds in a non-interest bearing checking account for an unreasonable length of time or investing estate assets in a highly speculative venture may be improper. The kinds of permissible investments are dictated by Michigan’s Prudent Investor Rule and past court decisions, the decedent’s will and by orders of the probate court. Typically, acceptable investments include insured bank accounts and certificates of deposit, money market accounts, and good quality publicly traded stocks and bonds.
Initial Responsibilities of the PR. After appointment by the court and receiving the letters of authority, the PR should:

A. Open and inventory the decedent’s safe deposit boxes in the manner provided by law.

B. Within 14 days of appointment or retention of an Attorney, whichever is later, the PR must send a “Notice of Attorney Fees” to the people affected by payment of attorney’s fees (heirs and creditors).

C. Within 28 days after appointment the PR should give notice to the surviving spouse that he or she can elect to take their intestate share (reduced by outside inheritance such as joint property or insurance) instead of under the Will. Or, if the spouse is a widow, she can elect to take her dower right.

D. Send copies of all court filed papers and a copy of the Will (if there is one) to the parties named in the Will and to the intestate heirs (See above "What is Probate for a Decedent")

E. Set up an accurate system to record all estate transactions.

F. Arrange for forwarding of decedent’s mail.

G. Collect dividends, interest, rents, and other income from businesses or other property owned by decedent.

H. Determine insurance, social security, pension, veteran, or other benefits payable to the estate or its beneficiaries.

I. Give required notice to creditors of the estate to file their claims.

J. Obtain possession of all known assets of decedent on behalf of the estate.

K. Confer with family, business associates, and others who may know of the decedent’s property.

L. Review the insurance on decedent’s property and obtain, increase, and renew casualty and liability coverage as needed.

M. Maintain any business or venture owned by decedent.

N. Examine the decedent’s records and tax returns for income patterns that may indicate assets.

O. Value those estate assets having readily ascertainable values.

P. Examine real estate leases and mortgages and determine their effect on asset valuations.

Q. Employ appraisers if necessary to determine the value of real estate, antiques, art collections, or other assets without easily ascertained value (an appraisal listing the contents of decedent’s home is normally needed for federal and Michigan death taxes).

R. If decedent owned property in other states, arrange for ancillary administration if necessary.
S. Carefully prepare the estate inventory reflecting the date of death holdings and values, and then send a copy to the estate’s beneficiaries.

**Other Responsibilities of a PR.** During and after assembly of the estate’s assets, the PR should also:

A. Starting as early as possible, plan to meet ultimate obligations of taxes, claims, administration expenses, allowances, and distributions.

B. Process payment of all valid claims of creditors and give notice to those whose claims are being disallowed (if the estate may be insolvent, extreme care must be taken to follow legal standards to prioritize claims before payment is made).

C. Provide for distribution of exempt property and allowances to the decedent’s spouse, minor children, and others who were in fact supported by decedent.

D. Operate decedent’s business(es) if it will benefit the estate and if authorized to do so by the court or decedent’s will.

E. Maintain prudent investment and business practices; carefully record all investment transactions.

F. Follow legal requirements when any sale of assets is necessary.

G. Obtain clearances from both federal and state taxing authorities.

H. Prepare annual accountings (which reflect all estate transactions) and send copies to the estate’s beneficiaries.

**Tax Returns.** From the very beginning, a PR must be mindful of the need to file tax returns, both for the decedent and the estate. Failure to timely file a return and pay any tax when due may subject the PR to personal liability for any interest, penalties, and possibly the tax itself. The following returns may be required:

A. Decedent’s federal, state, and city final income (or intangibles tax returns in other states) (typically due in April following the calendar year of death).

B. Gift tax returns if due for gifts in excess of $13,000.00 a single person (IRS Form 709 must be filed on April 15 of the year following the calendar year of death or the due date of the estate tax return, whichever is earlier).

C. Federal, state, and city business, sales, and/or payroll tax returns (FUTA, FICA/withholding, federal corporation or partnership returns, Michigan single business tax returns, etc.). Make sure that these are marked as "FINAL RETURN" or you will continue to receive notices expecting them to be filed.

D. Federal information returns (IRS Forms 1096 and 1099).

E. Federal estate tax return (IRS Form 706 is due nine months after death, unless extended ) if the decedent’s probate and other property interests (joint bank accounts, insurance and pension benefits, interests in revocable living trusts, etc.), before deducting debts and expenses, exceed the estate exemption amount (unlimited in 2010 and $5 million in 2011 and thereafter until changed). Although, for deaths in 2010, there is an alternate form (federal Form 8939) for
stepped up basis, which is too complicated to give a full discussion to in this pamphlet and the advice of a licensed professional is recommended.

7. When Can I Distribute Assets and Close The Estate? Before distributing estate assets to the heirs, the PR must be certain that all charges against the estate have been provided for or satisfied. To the extent there are insufficient assets, amounts distributable to certain beneficiaries may be reduced or eliminated. If there is a question of interpreting the decedent’s will or the laws of intestate succession (when there is no will - see above “What is Probate for a Decedent”), obtaining court approval of a proposed distribution may be necessary.

Prior court approval is required for estates in Supervised Administration (see above about Supervised Administration) before distributing any assets to estate beneficiaries. Also, a complete or final distribution should not occur until after all tax returns and necessary tax clearances have been secured. Receipts from the estate beneficiaries and a final accounting may be required to close the estate.

8. If the Personal Representative (PR) Hires a Professional, Who Pays Their Fee? Like all expense on behalf of the estate, fees for engaging an attorney and other professional services are paid by the Estate. Most persons appointed as a PR do not have the technical expertise to carry out all of the responsibilities in handling the estate. Often it will be advisable for a PR to retain the professional assistance of an accountant, attorney, bank trust department, or investment counselor. The fee to be charged by an attorney must be discussed, understood, and agreed to in writing. A copy of the writing must be provided to all interested persons (see above "Initial Responsibilities of the PR). Fees to be paid to other professionals should also be discussed and agreed to in the same manner; although a copy of these other fee agreements need not be provided to others. Also, the role to be assumed by each professional should be expressly defined and monitored throughout the estate’s administration.

9. Can I be Paid as the Personal Representative (PR)? In Michigan, there are no fee schedules or formulas for computing the amount of compensation for a PR’s services. Although the law requires that a PR’s fee must be just and reasonable, the following six major factors are usually considered:

A. The time expended to complete administration of the estate. More and more, the court (and the IRS) considers the quantity (and quality) of the time spent by the PR to be a significant factor. For this reason, each PR should log the amount of time spent each day on estate matters with a detailed description of the services performed.

B. The professional expertise required. Higher PR fees are justified if the PR’s work entails a greater level of expertise and skill (in securities, real estate, taxes, asset management, etc.) Correspondingly, lower PR fees are appropriate when little expertise or skill is necessary or when much of the expertise work is performed by professionals (lawyers, investment counselors, accountants, etc.) who charge the estate for their services.
C. **The nature, number, and complexity of the estate assets.** A PR is justified in receiving higher fees in those estates with diverse, numerous, and/or unique assets than in those with a simple composition.

D. **The makeup of parties who are interested in the estate.** A greater number of creditors and beneficiaries of an estate will generally cause more questions, communications, and coordination. Likewise, interested parties whose actions are adversarial or who are uncooperative may be a basis for higher PR fees.

E. **The extent of the responsibilities and risks assumed.** The total dollar value of the estate’s assets is some measure of the responsibilities and potential loss exposure undertaken by the PR and is thus an important factor in determining reasonableness (e.g., all else being equal, an estate valued at $200,000 warrants a higher fee than an estate valued at $50,000). In addition to assuming responsibility for a decedent’s assets, a PR may also be required to carry out or respond to transactions engaged in or events occurring before death, which is a basis for receiving a higher fee.

F. **The results obtained in administering the estate.** Favorable results in the investment and disposition of estate properties, minimizing estate expenses, and timely execution of responsibilities by the PR are also bases for the amount of a fee.

10.**Can I be Removed As a Personal Representative (PR)?** In the event of delinquency in performing duties, a PR may be removed by the probate court. Any interested person or the court itself may commence proceedings to remove a PR or compel compliance. A PR may be found personally liable for losses caused by errors or omissions or by the failure to act quickly, prudently, or fairly.
Patient Advocate Designations

Decisions about medical care can be among the most difficult and personal decisions that individuals face. Most people have strong opinions about the type of care they may want in certain situations. Sometimes, their mental or physical condition is such that they are no longer able to voice their opinions or designate another person to make these decisions due to their mental or physical condition.

A legal document called a Patient Advocate Designation allows individuals to designate another person in advance to make medical treatment decisions for them in the event that they become unable to make medical treatment decisions due to a mental or physical condition.

What Is a Patient Advocate Designations?

Patient Advocate Designations are legal documents that allow individuals (called “Patients”) to appoint another person or persons (a “Patient Advocate”) to exercise powers over their care, custody and medical treatment decisions during any period in which they are unable to participate in making those decisions. A Patient Advocate Designation is sometimes called a Medical Power of Attorney or a Health Care Proxy. Every individual has the legal right to make decisions regarding their own medical treatment. Patient Advocate Designations allow individuals to direct how medical treatment will be provided to them in the event that they are unable to participate in medical treatment decisions due to their mental or physical condition.

A Patient Advocate Designations is the Michigan legal document by which individual can designate another person to make medical treatment decisions for him or her. Neither trustees under revocable living trusts nor agents under financial Durable Powers of Attorney are authorized by law to make these decisions unless they also have been properly appointed Patient Advocate. If an individual with no patient advocate receives Medicaid or has a reduced life expectancy due to an advanced illness, the law allows the family to make medical treatment decisions when the individual is unable to do so. However, the law is unclear on who makes decisions if there is conflict among family members. In uncontested situations with no designated patient advocate, decisions generally may be made by a consensus of the next of kin but there is no legal basis for making decisions that way. Guardians are court-appointed
advocates who may have the authority to make care, custody and medical treatment decisions for the person for whom they have been appointed guardian depending on the powers in their letters of authority as determined by the court. However, if that person had properly executed a Patient Advocate Designation before the appointment of the guardian, the Patient Advocate usually retains the power to make decisions regarding that person’s medical care. Most importantly, the designation of a Patient Advocate often eliminates the need for a court-appointed guardian.

**What Type of Directives Can Be Included in a Patient Advocate Designation?**

In addition to appointing a Patient Advocate, individuals may include a statement of their desires relating to their care and medical treatment in the designation. They can also make “living will” declarations to describe the types of life-sustaining treatment that they would like to receive or not receive. However, living wills are not expressly authorized by Michigan law.

**What Are the Execution Requirements for a Patient Advocate Designation?**

Anyone 18 years old or older who is of sound mind and not under duress, fraud, or undue influence at the time of signing can execute a Patient Advocate Designation. This is a low standard and many people who may be considered to be incapacitated or developmentally disabled nevertheless may have the capacity to execute a Patient Advocate Designation.

In order to be valid, a Patient Advocate Designation must be properly signed and witnessed by two people. The witnesses must not be the appointed Patient Advocate, relatives, will beneficiaries, heirs, care workers, or employees of a facility where the Patient resides.

A Patient may revoke the designation at any time in any manner sufficient to communicate an intent to revoke even if at that time the Patient is unable to participate in medical treatment decisions. If the Patient’s physician or health facility has notice of the Patient’s revocation of the designation, the physician or health facility is required to note the revocation in the Patient’s medical records and bedside chart and must notify the Patient Advocate.
When Does the Designation Take Effect?

The designation comes into effect only when the person making the designation is no longer able to participate in medical treatment decisions. The Patient’s attending physician makes this determination in consultation with another physician or a licensed psychologist.

The determination must be put in writing, incorporated into the Patient’s medical record, and reviewed at least once a year. If a dispute arises whether the Patient is able to participate in medical treatment decisions, a petition can be filed in probate court requesting the court to determine whether the Patient is able to do so.

What Are the Responsibilities of Patient Advocates and the Limitations on their Powers?

The person appointed Patient Advocate must also sign an acceptance of the designation, agreeing to the terms of the appointment as set out in state law. These terms include certain legal limitations on the Patient Advocate’s authority.

A Patient Advocate cannot, under any circumstances, direct medical treatment that would lead to the death of the Patient. Michigan law prohibits euthanasia or “mercy killing”. A Patient Advocate is allowed, however, to make a decision to withhold or withdraw treatment that would allow a Patient to die. This can only be done if the Patient has authorized the Patient Advocate in a clear and convincing manner to make such a decision. The Patient must also acknowledged that such a decision to withhold or withdraw treatment would or could allow the Patient’s death. A Patient Advocate can never make a life-ending decision if the Patient is pregnant.

Even when a Patient has previously expressed a desire to have life-sustaining care or medical treatment withheld or withdrawn, the Patient Advocate cannot act on that earlier declaration if the Patient later expresses a desire to have life-sustaining care or treatment provided, regardless of whether the Patient is incapacitated or unable to participate in medical treatment decisions at that time.

The Patient Advocate has the duty to act in the Patient’s best interests. Preferences expressed or evidenced when the Patient is able to participate in
medical treatment decisions are presumed to be in the Patient’s best interests. The Patient Advocate has a duty to take reasonable steps to follow the Patient’s expressed desires, preferences and instructions. While these desires do not have to be set forth in writing, one of the best ways to ensure that the Patient Advocate has notice of them is to include them in the Patient Advocate Designation.

The Patient Advocate’s powers cannot be delegated to another person without prior authorization by the Patient. A designation appointing the spouse as Patient Advocate that was executed during the Patient’s marriage is suspended during an action for separation or dissolution of marriage and revoked when the marriage is dissolved.

What Are the Responsibilities of the Medical Professional Regarding Patient Advocate Designations?

Medical professionals are bound by sound medical practice and by the Patient Advocate’s instructions if they reasonably believe that the Patient Advocate Designation has been properly executed and the Patient Advocate is acting in compliance with the law. Under those circumstances, they are only liable in the same manner and to the same extent as if the Patient had made the decision. If a dispute arises as to whether the Patient Advocate is acting consistent with the terms of the Patient Advocate Designation, the Patient’s best interests or the law, a petition can be filed in the probate court requesting the court to determine whether the designation should be continued or the Patient Advocate should be removed.
Planning for Medicaid Qualification
Notes
Planning For Medicaid Qualification

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This pamphlet may be purchased individually or in bulk from the State Bar of Michigan, Membership Services Department, 306 Townsend Street, Lansing, Michigan 48933-2083. You may call 1-800-968-1442 ext. 6326 to obtain price information.
Background

In Michigan, the average annual cost of nursing home care was approximately $82,000 in 2011. Some people have sufficient income to cover nursing home expenses without depleting their assets. In addition, changes in the law have made long-term care insurance, which pays nursing home costs, more available. Many people, however, who require care in a nursing home cannot afford to pay for nursing home costs and therefore must do planning to qualify for Medicaid and avoid financial devastation.

While this pamphlet focuses on Medicaid qualification for nursing home care, the same financial eligibility rules apply for the MI Choice Waiver Program, which provides home and community-based services to enable people who need extensive care to remain in their own homes.

1. What is Medicaid?

Medicaid is a federal-state program that pays for medical treatment, including nursing home care, for low-income individuals who have minimal assets and who are age 65 or older, blind, or disabled. In Michigan, Medicaid is administered by the Michigan Department of Human Services (DHS). DHS publishes a pamphlet called, Nursing Home Eligibility (DCH-0726), which may be a helpful resource to you. You can apply for Medicaid through your local DHS office.

The rules on qualifying for Medicaid change often. This pamphlet is designed to answer some basic questions based on the law as of January 1, 2012. Before applying for or taking any action to qualify for Medicaid, you should contact an attorney who can advise you on the current rules, which may have changed since this pamphlet was published.

2. Do Medicare And Secondary Health Insurance Cover Nursing Home Care?

Nursing home care is generally divided into two types of care: skilled care and custodial care. Skilled care is rehabilitation or other treatment by a skilled professional. Custodial care is basic care including room and board. While Medicaid will pay for both custodial and skilled care, Medicare and most private medical insurance companies provide very limited coverage for nursing home care. Medicare, for example, fully covers only the first 20 days, and may partially cover the next 80 days, of skilled care in a nursing home.
3. What Are The Basic Requirements to Qualify For Medicaid?

- You are aged (65 or older), blind or disabled, and you medically qualify.
- Your monthly medical and nursing home expenses exceed your monthly income. However, to be eligible for MI Choice Waiver Program, your monthly income cannot exceed $2,094.
- Your countable assets do not exceed $2,000.

4. What Assets Can I Keep And Still Qualify For Medicaid?

You can keep up to $2,000 in countable assets. In addition, you can keep certain assets that are considered excluded and not counted in determining Medicaid eligibility. All assets that are not specifically excluded are considered countable. The following is a partial list of excluded assets:

- A home or a life estate in a home, so long as the equity value of the home is $506,000 or less, or a spouse, or child who is blind, disabled, or under the age of 21 resides in the home
- Personal belongings and household goods, including clothing and jewelry.
- One vehicle
- Up to $11,466 in a prepaid irrevocable funeral contract
- In limited circumstances, up to $1,500 designated as a burial fund to cover funeral costs
- Burial spaces costs and related items for you and your immediate family
- Life insurance that has a $0 cash surrender value (most term and group policies) or if the total face values of all policies a policy owner has for the same insured are $1,500 or less
- Certain annuities.
- Certain trusts.

In addition, with the exception of real estate, assets that you do not have the legal right to use or sell without the consent of all other owners are considered excluded. Similarly, assets that you have been unable to sell are considered excluded as long as you have followed, and continue to follow, the Medicaid rules on actively offering these items for sale.

Remember that countable assets can be used to purchase excluded assets, pay bills, or pay down debts on excluded assets.

5. How Are Assets of a Husband and Wife Counted?

The assets of both husband and wife are considered together. All of the countable assets owned by either spouse are totaled as of the first day one spouse enters a hospital or nursing home for long-term care. The spouse at home (“community spouse”) is permitted to retain the greater of $21,912 or one-half the value of the total countable assets, but not exceeding $109,560. These amounts change every year. It may be possible for the community spouse to obtain additional assets through a court order or an administrative hearing decision. In
addition, assets received by the community spouse after Medicaid qualification have no effect on the nursing home spouse’s continued eligibility for Medicaid.

6. Am I Required to Use All of My Income to Cover the Cost of My Nursing Home Care?

You bear primary responsibility for the cost of your nursing home care. Income received from Social Security, pensions, interest, dividends, and rents must be used to pay for care. You are entitled to keep a very modest personal needs allowance ($60 per month) and an amount equal to your premium for Medicare supplemental insurance. If you are married, your spouse is not required to use his or her separate income to pay for your nursing home care, and may even be able to keep a portion of your monthly income rather than paying it toward your nursing home care.

7. How Much Income is My Community Spouse Permitted to Keep?

If your community spouse does not have sufficient income of his or her own to pay for living expenses, he or she is entitled to a monthly income allowance ($1,838) plus an excess shelter allowance from your total combined income. The total of these allowances may increase if the community spouse’s monthly shelter expenses (mortgage or rent, homeowner’s insurance, property taxes, and utilities) exceed a standard amount set by DHS known as the excess shelter allowance. Both the monthly income allowance and excess shelter allowance amounts change every year. The community spouse’s own monthly income is deducted from the total of these allowances to determine the community spouse income allowance. The amount of income that the community spouse is allowed to retain (community spouse income allowance) may be increased by court order or an administrative hearing decision.

8. Can I Give Away Assets to Qualify for Medicaid?

Giving away assets to qualify for Medicaid is considered divestment and once eligible for Medicaid, results in a penalty period during which you will not receive Medicaid benefits. The rules provide for a 60 month look-back period. If you, or your spouse, transfer an asset for less than fair market value (which includes adding joint owners to certain assets) during the 60 month look-back period, you will be subject to a penalty period that does not begin until you become eligible for Medicaid. However, transfers between you and your spouse are allowed.

During a penalty period, Medicaid will not pay your cost for long term care services, Home and Community-Based Services, Home Help, and Home Health. The length of the penalty period is determined by dividing the uncompensated value of the property you transferred by the average monthly cost of skilled nursing home care published by DHS each year. The current average monthly cost of skilled nursing home care is $6,816.
The Medicaid rules regarding transfer of assets are complex. Before transferring any assets, you should consult an attorney familiar with Medicaid eligibility and asset transfer rules.

9. What Planning Can Be Done to Allow Medicaid Qualification?

Durable Power of Attorney

A Durable Power of Attorney is a document in which you give another individual (your agent) authority to handle your affairs in the event you become incapacitated. It can be an extremely effective Medicaid planning tool if it contains provisions allowing, among other things, the powers to gift, transfer and divest assets (including gifts to your agent); the powers to create, amend or revoke trusts; and the power to demand distributions from your revocable grantor trust. Without a well-drafted Durable Power of Attorney that enables Medicaid planning, often, the only remaining way to engage in Medicaid planning in the event you become incapacitated is by obtaining Court approval of divestments, transfers and related transactions necessary for Medicaid qualification.

Transfer of Assets

Transferring assets to qualify for Medicaid may be appropriate for some individuals as long as you make arrangements to provide for additional monthly income sufficient to pay your skilled nursing care costs until the penalty period caused by divestment ends.

In the case of a husband and wife, transferring assets to the community spouse is permitted under the Medicaid rules. Additionally, the community spouse is permitted to transfer assets to a certain type of trust created solely for the benefit of the community spouse, which shields all of the assets within the trust as excluded assets. In addition to assisting with Medicaid eligibility, such transfers may also protect the community spouse from the reach of the Michigan Medicaid Estate Recovery Program.

Purchase of Excluded Assets

Paying for home improvements or purchasing excluded assets such as a vehicle, personal items, household goods, a prepaid irrevocable funeral contract, or funeral insurance can be considered. Similarly, mortgages, land contracts, loans, and property taxes can be prepaid.

Updating Estate Planning

Reviewing or updating the community spouse’s estate planning documents including a new will and/or trust is highly advisable. The community spouse's estate planning documents likely give their assets to their spouse at death; however, this should be changed so that the community spouse does not return assets to the spouse receiving Medicaid at death, which would likely render them ineligible for Medicaid until the countable assets are spent down.
Conclusion

Saving enough money to pay for nursing home care is a practical impossibility for many older people and may make reliance on Medicaid necessary. Planning for Medicaid qualification involves difficult decisions that have complex property and tax law implications. In addition, the rules change often. However, planning opportunities exist for both single and married applicants and early planning is essential to maximize the options available to you.

Before applying for or taking any action to qualify for Medicaid, you should contact an attorney who can advise you on the current rules, which may have changed since this pamphlet was published.
End of CSP Materials
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

November 15, 2014
Lansing, Michigan

Agenda

I. Call to Order

II. Excused Absences

III. Introduction of Guests

IV. Minutes of October 25, 2014, Meeting of the Council
   See Attachment 1

V. Treasurer's Report – Marguerite Munson Lentz
   See Attachment 2

VI. Chairperson's Report – Amy N. Morrissey

VII. Report of the Committee on Special Projects – Christopher A. Ballard

VIII. Standing Committee Reports
   A. Internal Governance
      1. Budget – Marlaine C. Teahan
         See Attachment 3
      2. Bylaws – Nancy H. Welber
      3. Awards – Douglas A. Mielock
      4. Planning – Shaheen I. Imami
      5. Nominating – George W. Gregory
      6. Annual Meeting – Shaheen I. Imami
B. **Education and Advocacy Services for Section Members**

1. Amicus Curiae – David L. Skidmore
2. Probate Institute – James B. Steward
3. State Bar and Section Journals – Richard C. Mills
4. Citizens Outreach – Constance L. Brigman
5. Electronic Communications – William J. Ard
6. Membership – Raj A. Malviya

C. **Legislation and Lobbying**

1. Legislation – William J. Ard

   See Attachment 4 – 3 Public Policy Reports:
   - RAB 2014-xx to replace RAB 1988-19;
   - HB 5366-HB 5370 and SB 0293; and
   - SB 465 (S-1), SB 466 (S-1) Draft 1, and Proposed Amendment to the Security Freeze Act.

2. Updating Michigan Law – Geoffrey R. Vernon
3. Insurance Ad Hoc Committee – Geoffrey R. Vernon
4. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber

D. **Ethics and Professional Standards**

1. Ethics – David P. Lucas
2. Unauthorized Practice of Law & Multidisciplinary Practice – Patricia M. Ouellette
3. Specialization and Certification Ad Hoc Committee – James B. Steward

E. **Administration of Justice**

1. Court Rules, Procedures and Forms – Michele C. Marquardt
2. Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee – George F. Bearup

F. **Areas of Practice**

1. Real Estate – George F. Bearup
2. Transfer Tax Committee – Lorraine F. New

   See Attachment 5
3. Charitable and Exempt Organization – Lorraine F. New
4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

G. Liaisons
1. Alternative Dispute Resolution Section Liaison – vacant
2. Business Law Section Liaison – John R. Dresser
3. Elder Law and Disability Rights Section Liaison – Amy R. Tripp
4. Family Law Section Liaison – Patricia M. Ouellette
5. ICLE Liaison – Jeanne Murphy
6. Law Schools Liaison – William J. Ard
7. Michigan Bankers Association Liaison – Susan M. Allan
9. Probate Registers Liaison – Rebecca A. Schnelz
10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz
11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz
12. State Bar Liaison – Richard J. Siriani
13. Taxation Section Liaison – George W. Gregory

See Attachment 6

IX. Other Business

X. Hot Topics

XI. Adjournment
I. **Call to Order** – The meeting was called to order by the Chair at 10:20.

II. **Attendance.** Guests were introduced. A total of 5 officers and 15 members of the Council were present, representing a quorum.

A. **The following 5 officers of the Council were in attendance:**

Amy N. Morrissey, Chair  
Shaheen I. Imami, Chair Elect  
James B. Steward, Vice-Chair  
Marlaine C. Teahan, Secretary  
Marguerite Munson Lentz, Treasurer

B. **The following 15 members of the Council were in attendance:**

W. Josh Ard  
Christopher A. Ballard  
Constance L. Brigman  
Rhonda M. Clark-Kreuer  
Hon. Michael L. Jaconette  
Mark E. Kellogg  
David P. Lucas  
Raj A. Malviya  
Michele C. Marquardt  
Richard C. Mills  
Lorraine F. New  
David L.J.M. Skidmore  
James P. Spica  
Geoffrey R. Vernon  
Nancy H. Welber

C. **The following officers and members were absent with excuse:**

George F. Bearup  
Patricia M. Ouellette  
Susan M. Allan

D. **The following officers and members were absent without excuse:** None.

E. **The following ex-officio members of the Council were in attendance:**

George W. Gregory  
Henry M. Grix  
Mark K. Harder  
Dirk C. Hoffius  
Robert B. Joslyn  
Nancy L. Little  
John H. Martin  
Douglas A. Mielock  
Harold Schuitmaker  
John A. Scott  
Susan S. Westerman
F. Others in attendance:

John Dresser          Julie Paquette
Kathy Goetsch        Amy Peterman
Raymond A. Harris    Nathan Piwowarski
Jeff Kirkey          Nick Reister
Michael Lichterman   Carol Sewell
Katie Lynwood        Tess Sullivan
Jeanne Murphy        Nazneen H. Syed
Laurie Murphy        Robert M. Taylor
Neal Nusholtz        Amy Tripp
Robert M. O'Reilly   Geoffrey Weed

III. Minutes of September 6, 2014, Meeting of the Council. The September 6, 2014 minutes of the Council were approved, as amended. These minutes include an approved report of an electronic vote taken by email during the month of September.


V. Chairperson’s Report – Amy N. Morrissey. Ms. Morrissey reported on the following items:

- Sebastian Grassi will get the Michael Irish award. George Gregory and Nancy Little will present Mr. Grassi with this award at his home. To send congratulatory notes, or to call, Mr. Grassi's contact information is as follows:
  Sebastian v. Grassi, Jr.
  4372 Brightwood Drive
  Troy, MI 18084
  248-740-8963
  svgir@aol.com

- The Council held a very nice dinner last night to honor Tom Sweeney's year as Chairperson of the Section.

- An updated biennial plan of work is included in material as [Attachment B].

- Many thanks go to committee chairs for confirmed continued membership. Updated roster in materials. [Attachment C].

- This year, we have a new Membership Committee, chaired by Raj Malviya. Several new members have been added to other Committees.

- Our section now has a new website at The State Bar of Michigan website. In September, Ms. Morrissey attended section orientation and learned about the new section websites being launched (ours will launch soon). One of the features is a searchable community forum, like ICLE’s community. Ms. Morrissey encouraged those in attendance to explore the new website.

- On the legislative front – on September 6, 2014, we took an electronic vote in opposition to a UAGPPJA bill. The vote was to take a position against SB 465 and SB 466 because the bill's language did not tie in well with EPIC provisions on similar subject matter. A public policy position was reported on this vote. [Attachment D]. Also, mentioned that HB 5552 relative to uncapping has passed with immediate effect but note that several new exemptions are effective for transfers on or after 12-31-14. Public Act 310 of 2014. Even
though this bill has passed, our Real Estate Committee is still working on this legislation to possibly amend certain provisions.

- Congratulations to John H. Martin on his retirement as a law professor from Ohio Northern University, Pettit College of Law. With John's departure, the University is advertising two open faculty positions that may be of interest to Section members. See www.law.onu.edu.

VI. **Report of the Committee on Special Projects (CSP) – Christopher A. Ballard**

   A. At CSP, we reviewed the Fiduciary Access to Digital Assets Legislation, led by Meg Lentz. The bills under discussion relate to HB 5366, 5367, 5368, 5369, and 5370. The Committee drafted standalone proposed legislation that would be a substitute for these bills. Amendments to the proposed materials were approved at CSP and presented to Council. These amendments include:

   - Retain the language related to minors in Section 2 (5), and create a new sentence related to the definition of conservator to include a parent for the parent's minor child if no conservator, plenary guardian or partial guardian has been appointed for the minor child;
   - Modify Section 2(13) to take out "or is appointed in will" and "of a trust or is appointed in the terms" of a trust;
   - In Section 3a, delete phrase "Subject to Section 7(b) and" begin the sentence with "Unless…..";
   - In Section 6 delete phrase "Subject to Section 7(b) and" to begin sentence with "Unless…".

   A vote was taken by Council to support HB 5366, 5376, 5368, 5369 and 5370 in concept, provide the Committee's draft legislation for the standalone bill, and give the Committee Chair the ability to make non substantive changes. The standalone bill (with the above corrections made) is found at Attachment E. A red-line of only these changes is found at Attachment F.

   The vote taken was 20 for, 0 against, 0 abstentions, and 3 did not vote due to excused absences. The public policy position is found at Attachment G.

   B. Proposed new section MCL 700.1513 – Geoffrey Vernon led a discussion of memo explaining the proposal and draft legislation for new section MCL 700.1513. This new section of EPIC concerns exculpation of trustees of life insurance trusts from liabilities related to the administration of life insurance policies held in the trust. See Attachment H, a Memo summarizing the issue and Attachment I, the proposed language of MCL 700.1513.

VII. **Committee Reports**

A. **Internal Governance**

   1. **Budget** – Marlaine C. Teahan – A complete Budget report will be made next month.

   2. **Bylaws** – Nancy H. Welber reported that amended Bylaws were approved at the Section's Annual Meeting last month. We are waiting on the Board of Commissioners to approve our amended Bylaws at the November 21, 2014 meeting.

   3. **Awards** – Douglas A. Mielock No report other than Sebastian Grassi is to receive the Michael W. Irish Award.
4. **Planning** -- Shaheen I. Imami reported that he is exploring options for electronic meeting participation for our Section. Various considerations and concerns were shared by council members who have participated in meetings electronically.

5. **Nominating** – George W. Gregory – No Report

6. **Annual Meeting** – Shaheen Imami. No Report other than that the meeting will be held on 9-12-2015

**B. Education and Advocacy Services for Section Members**

1. **Amicus Curiae** – David L. Skidmore – No Report


3. **State Bar and Section Journals** – Richard C. Mills indicated that we are on track for upcoming issue of the Section Journal and that Nancy Little is working with ICLE on the revised contract for the electronic journal.

4. **Citizens Outreach** – Constance L. Brigman updated Council on the Patients' Guide. The guide is being copyrighted; last year, Chair Tom Sweeney put in an application for the copyright.

5. **Electronic Communications** – William J. Ard is reviewing our section webpage to see what needs updating. The work with the State Bar continues. Some changes include:
   - Each webpage will show the date of last review;
   - Monthly meeting minutes will continue to be posted separately from annual meeting minutes;
   - Remove outdated information, including the tab on Michigan Trust Code;
   - Revise email list guidelines relative to forwarding of messages and when posts related to commercial purposes are appropriate.

6. **Membership** – Raj A. Malviya. This is a new committee. Mr. Malviya introduced the new committee members. He reported that the committee has several goals, including determining how to best serve our members and to encourage participation in the Section, our committees, and attendance at CSP and Council meetings. The Committee members are enthusiastic and will be meeting early in November.
C. Legislation and Lobbying

1. Legislation – William J. Ard. Becky Bechler of Public Affairs Associates reported on the activities of the Legislature between now and the end of the year. She will meet with Representative Cotter on the digital assets legislation. A brief discussion was had on pending legislation related to determining who has priority to a dead body when no one claims it as well as how that bill relates to the slayer statute.

2. Updating Michigan Law – Geoffrey R. Vernon discussed the digital assets legislation that was discussed at CSP. We are looking for a sponsor for next session for the domestic asset protection statute. The committee is also looking at several new items that will be on CSP agenda next month including tenancy by the entireties issues. In addition, the Committee will be looking at what updates to EPIC will be required in the event Michigan law allows same gender marriages.

3. Insurance Ad Hoc Committee – Geoffrey R. Vernon - more on this next month at CSP.

4. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber reported that the Committee is about 2/3 of the way through their review and will be meeting in the coming week.

D. Ethics and Professional Standards

1. Ethics – David P. Lucas requested input on issues needing attention.

2. Unauthorized Practice of Law & Multidisciplinary Practice – Patricia M. Ouellette – no report.


E. Administration of Justice

1. Court Rules, Procedures and Forms – Michele C. Marquardt reported on her participation at a hearing before the Supreme Court on various Michigan Court Rule changes. The Committee's proposed changes were adopted and are found in Attachment J.

2. Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee – George F. Bearup – no report.

F. Areas of Practice


2. Transfer Tax Committee – Lorraine F. New – See report below as part of the Taxation Section Liaison report.

4. **Guardianship, Conservatorship, and End of Life Committee** – Rhonda M. Clark-Kreuer reported that the Committee will be taking a look at proposed legislation, SB 1102, especially as it relates to the evidentiary standard.

G. **Liaisons**

1. **Alternative Dispute Resolution Section Liaison** – vacant – no report.


3. **Elder Law and Disability Rights Section Liaison** – Amy R. Tripp reported on a recent change on how the "for the sole benefit" of a spouse trusts are treated by the Department of Human Services for Medicaid eligibility. While changes of this type are usually preceded by notice and comment, DCH did not follow this process with this change. Instead, on August 20, 2014 a memo regarding the change was sent to caseworkers to count all assets in the SBO trust when there is an application for long term care. The Elder Law section has prepared a complaint and is seeking injunctive relief in the Court of Claims that there was inadequate notice in this public policy change. There is no hearing date yet.

4. **Family Law Section Liaison** – Patricia M. Ouellette – no report.

5. **ICLE Liaison** – Jeanne Murphy reported on the Experts in Estate Planning series with Natalie Choate. So far, 200 people are registered. She expressed thanks from ICLE to the section for their generous support of this lecture series.


10. **SCAO Liaisons** – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz – no report.


13. **Taxation Section Liaison** – George W. Gregory reported on materials on a taxation section upcoming meeting. To attend, RSVPs are extended to Monday, October 27, 2014.

Mr. Gregory shared his concern with RAB draft 2014-XX, a replacement for RAB 198-19. Mr. Gregory thinks this revised Administrative Bulletin changes Michigan law and that Treasury should approach the Legislature with a law change instead of drafting a new Revenue Administrative Bulletin. Mr. Gregory and Mr. Bob Joslyn will draft a letter of comment to the Treasury Department for review and submission by the Chair. A motion was made by Mr. Gregory and seconded by Mr. Jim Spica to oppose this RAB draft. The vote was 20 to oppose, 0 against, 0 abstentions, and 3 did not vote due
to excused absences. Details regarding the position can be found in the formal public policy position report sent to the State Bar reporting on this vote. See Attachment K.

Mr. Gregory concluded his report by inviting those in attendance to the Oakland County Bar Association meeting on Monday, October 27, where he will discuss HB 5552 and the draft RAB, discussed above.

VII. **Other Business.** The Chair noted that materials for the next meeting will be due on November 6, 2014.

VIII. **Hot Topics –** None.

IX. **Adjournment** The Chair adjourned the meeting at 11:38 a.m.
ATTACHMENT 2
PROBATE AND ESTATE PLANNING COUNCIL
Treasurer’s Report
November 15, 2014

Income/Expense Reports

Last month, the outgoing Treasurer, Marlaine C. Teahan, presented the audited report through September 30, 2014. I do not yet have the trial balance from the State Bar to prepare the October 2014 income/expense report. (I was informed that the monthly trial balances for the previous month are usually sent around the 15th of each month.) I should receive the trial balance soon and will present the income/expense report for September at next month’s meeting.

Mileage Reimbursement Rate Effective 1/1/2014

The IRS business mileage reimbursement rate for 2014 is $0.56 per mile. If you are eligible for reimbursement of your mileage for Probate Council business, please use this rate on your SBM expense reimbursement forms. The SBM forms and instructions are attached.

Expense Reimbursement Requests

- Form: http://www.michbar.org/generalinfo/pdfs/sectexp.pdf
- Email forms to mlentz@bodmanlaw.com or provide paper copies in person or by mail.

Marguerite Munson Lentz, Treasurer
Probate and Estate Planning Section

Treasurer Contact Information:

Marguerite Munson Lentz
BODMAN PLC
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, Michigan 48226
office: 313-393-7589
fax: 313-393-7579
email: mlentz@bodmanlaw.com
### State Bar of Michigan
30th Townsend St., Lansing MI 48933-2012, 800-398-1442

#### Expense Reimbursement Form

<table>
<thead>
<tr>
<th>Date</th>
<th>Description &amp; Purpose (Note start &amp; end point for mileage)</th>
<th>Mileage Rate</th>
<th>Mileage</th>
<th>Reimbursement</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>
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<td>0.56</td>
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<td>$0.00</td>
</tr>
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</table>

I certify that the reported expense was actually incurred while performing my duties for the State Bar of Michigan as:

<table>
<thead>
<tr>
<th>Date</th>
<th>Title</th>
<th>Signature</th>
</tr>
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</table>

Grand Total $0.00

Please Provide Account Number

<table>
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<tr>
<th>Amount Total</th>
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</table>

Reset Form

Print Form
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 possible following the event and no later than two weeks following the close of the fiscal year in which the expense is incurred so that the books for that year can be closed and audited.

2. All out of pocket expenses must be itemized.

3. Detailed receipts are recommended for all expenses but required for expenses over $25.

4. Meal receipts for more than one person must indicate names of all those in attendance unless the function is a section council meeting where the minutes of that meeting indicate the names of those present. Seminar meal functions should indicate the number guaranteed and those in attendance, if different.

5. Spouse expenses are generally not reimbursable.

6. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursement of mileage or travel expenses is limited to actual distance traveled; not distance from domicile to the meeting site.

7. Receipts for lodging expenses must be supported by a copy of the itemized bill showing the per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid.

8. 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.

B. First class tickets will not be reimbursed in full but will only be reimbursed up to the amount of the best or average coach class ticket available for that trip.

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.

9. Reimbursement for car, bus or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

10. Outside speakers should be advised in advance of the need for receipts and the above requirements.

11. Bills for copying done by a firm should include the numbers of copies made, the cost per page and general purpose (committee or section meeting notice, seminar materials, etc.).

12. 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.

13. The State Bar of Michigan is Sales tax exempt. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

14. 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. If 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.

15. Reimbursement will in all instances be limited to reasonable and necessary expenses.

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.
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.
Probate and Estate Planning Section - Final Treasurer's Report through 9-30-14

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<th>Budget 2013-14</th>
<th>Variance</th>
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<td><strong>Net Increase (Decrease)</strong></td>
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<td>25,979.73</td>
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<td><strong>Ending Fund Balance (6)</strong></td>
<td><strong>222,164.83</strong></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

Footnotes
(1) Includes e-blast for the Journal
(2) Includes plaques for outgoing Chair and Council Members
(3) Includes SBM Leadership Conference expenses for incoming Chair and Chair Elect
(4) Includes ListServ, telephone, e-blast & other electronic communications
(5) Includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers’ Summit
(6) Includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount
## Probate Estate Planning Section Budget 2014-2015

<table>
<thead>
<tr>
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<td>$5,291</td>
<td>-$9,750</td>
<td>$15,868.23</td>
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</table>

(1) Includes e-blasts for Journal  
(2) Includes plaques for outgoing Chair and Council Members  
(3) Includes SBM Leadership Conference expenses for incoming Chair and Chair Elect  
(4) Includes teleconference charges, listserv, e-blast, & other electronic communications to members.  
(5) Includes copying costs and postage; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit

The fund balance of the "Amicus Fund" for 2014-15 is $35,423.50 with the total fund calculated as follows:

<table>
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<tr>
<th>Fund</th>
<th>Balance</th>
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<tr>
<td>Beginning General Fund</td>
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<tr>
<td>Beginning Amicus Fund</td>
<td>$25,423.50</td>
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<td>Unused 2013-14 Amicus to carryover</td>
<td>$10,000</td>
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<tr>
<td>Total Ending Fund Balance 2013-14</td>
<td>$222,164.83</td>
</tr>
</tbody>
</table>
PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

* Draft Revenue Administrative Bulletin 2014-XX, a Replacement of 1988-19

* 

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 3,533.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 20. The number who voted opposed to this position was 0.
Report on Public Policy Position

Name of Section:  
Probate & Estate Planning Section

Contact person:  
Marlaine C. Teahan

E-Mail:  
mteahan@fraserlawfirm.com

Regarding:  
Draft Revenue Administrative Bulletin 2014-XX, a replacement of 1988-19

Date position was adopted:  
October 25, 2014

Process used to take the ideological position:  
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:  
23

Number who voted in favor and opposed to the position:  
20 Voted for position  
3 Did not vote (absent)

Position:  
Oppose and Amend

Explanation of the position, including any recommended amendments:  
We oppose positions taken in a Draft Revenue Administrative Bulletin (“RAB”) that would replace RAB 1988-19 since the position is contrary to the law, inconsistent with positions taken by the Michigan Department of Treasury since the adoption of the Michigan Income Tax Act of 1967, of doubtful constitutional validity, and contrary to good public policy.

Under the subsection, "Taxability of a Nonresident Beneficiary of a Michigan Trust," RAB 1988-19 stated:  

"A nonresident beneficiary's taxable income is computed in the same manner as in the case of a resident individual except as provided in the State's Income Tax Act, MCL 206.51(6). The taxable income of a nonresident beneficiary will not include income from a resident estate or trust, regardless of the source or attribution of the income.

Example: A nonresident has income from real estate located in Michigan. He is also a beneficiary of a Michigan trust that has interest and dividends as its source of income. The taxpayer will only be taxed on the income from the
real property located in Michigan to the extent included in adjusted gross income. The trust income will be allocated to his or her state of domicile."

In contrast, the Proposed RAB provides:

"Taxable Income of Beneficiary of an Estate or Trust Distribution of estate or trust income to beneficiaries does not change the character of the sourcing of the income. The residency of beneficiaries does not determine whether the income is subject to Michigan income tax. If the income would have been subject to Michigan income tax if it had been retained by the estate or trust, then the distributed income received by a beneficiary is also subject to Michigan income tax."

We believe that RAB 1988-19 did in fact reflect MCL 206.51(6), which it cited as authority. MCL 206.51(6) has not been amended since the adoption of RAB 1988-19. In fact, MCL 206.51(6) has been the same since 1967. Further, Rule 206.12 does not take the position of the Draft RAB.

For these reasons, we urge the drafters of the replacement for RAB 1988-19 to maintain the position currently stated in RAB 1988-19 relative to the taxation of income of a beneficiary of an estate or trust.

Copy and paste the text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:
http://www.michigan.gov/treasury/0,4679,7-121-1557-276956--,00.html
Respectfully submits the following position on:

* 

HB 5366 – HB 5370, SB 0293

* 

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 3,533.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 20. The number who voted opposed to this position was 0.
Report on Public Policy Position

Name of Section: 
Probate & Estate Planning Section

Contact person: 
Marlaine C. Teahan

E-Mail: 
mteahan@fraserlawfirm.com

Bill Numbers:
HB 5366 (LaFontaine) Probate; guardians and conservators; fiduciary access to digital assets act; enact. Amends secs. 5407 & 5415 of 1998 PA 386 (MCL 700.5407 & 700.5415) & adds sec. 5423a.

HB 5367 (Lauwers) Probate; wills and estates; powers of personal representatives; enact fiduciary access to digital assets act. Amends secs. 3709 & 3715 of 1998 PA 386 (MCL 700.3709 & 700.3715) & adds secs. 3715a & 3723.

HB 5368 (Cotter) Probate; other; definitions relating to the fiduciary access to digital assets act; enact. Amends secs. 1103, 1104, 1106 & 1107 of 1998 PA 386 (MCL 700.1103 et seq.).

HB 5369 (Leonard) Probate; powers of attorney; authority or agent; enact fiduciary access to digital assets act. Amends sec. 5501 of 1998 PA 386 (MCL 700.5501) & adds sec. 5501a.

HB 5370 (Jenkins) Probate; trusts; fiduciary access to digital assets act; enact. Amends sec. 7817 of 1998 PA 386 (MCL 700.7817) & adds sec. 7912a.

SB 0293 (Bieda) Probate; wills and estates; power of personal representative of a decedent's estate; provide access to certain online accounts. Amends sec. 3715 of 1998 PA 386 (MCL 700.3715).

Date position was adopted: 
October 25, 2014

Process used to take the ideological position: 
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body: 
23

Number who voted in favor and opposed to the position: 
20 Voted for position
3 Did not vote (absent)
Position:
Support and Amend

Explanation of the position, including any recommended amendments:
While the Probate and Estate Planning Section supports these bills in concept, we believe that fiduciary access to digital assets is best accomplished in a standalone bill, rather than in various Michigan statutes. We have therefore drafted a proposed "Fiduciary Access to Digital Assets Act" which is based upon the Uniform Law Commission's act of the same name. The Council of the Section has approved the proposed standalone act, having revised the Uniform Act to conform to Michigan law, and has given the Chair of the drafting committee authority to make necessary non-substantive changes. We recommend the attached Fiduciary Access to Digital Assets Act to the Legislature as a substitute for the currently pending bills referenced below. The substitute standalone legislative proposal is attached.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This act may be cited as the Michigan Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this act:

(1) “Account holder” means:
   (a) a person that has entered into a terms-of-service agreement with a digital custodian; and
   (b) a fiduciary for a person described in subsection (1)(a).

(2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(3) “Carries” means engaging in the transmission of electronic communications.

(4) “Catalogue of electronic communications” means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) “Conservator” means a person that is appointed by a court to manage all or part of the estate of a protected person, including, without limitation, a conservator or limited conservator for a protected individual as defined in MCL 700.1106(v); a plenary guardian or partial guardian for an individual who has a developmental disability as defined in MCL 330.1100a(25); and a guardian for a minor if no conservator has been appointed. “Conservator” also includes a parent for the parent’s minor child if no conservator, plenary guardian, or partial guardian has been appointed for the minor child.

(6) “Content of an electronic communication” means information not readily accessible to the public concerning the substance or meaning of an electronic communication.

(7) “Court” means the probate court or, when applicable, the circuit court.

(8) “Digital asset” means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

(9) “Digital custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(10) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
(11) “Electronic communication” means a digital asset stored by an electronic communication service or carried or maintained by a remote-computing service. The term includes the catalogue of electronic communications and the content of an electronic communication.

(12) “Electronic communication service” means a digital custodian that provides to the public the ability to send or receive an electronic communication.

(13) “Fiduciary” means each person who is an original, additional, or successor personal representative, conservator, agent, or trustee. If a court or a governing instrument appoints a “special fiduciary”, for purposes of this act, the special fiduciary shall be treated as a personal representative if such fiduciary controls all or part of a decedent’s estate, as a trustee if such fiduciary controls all or part of a trust, as a conservator if such fiduciary controls all or part of the assets of a protected person, or as an agent if such fiduciary is appointed in a power of attorney.

(14) “Governing instrument” means a will, a trust, an instrument creating a power of attorney, or other dispositive or nominative instrument.

(15) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(16) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(17) “Personal representative” has the meaning as stated in MCL 700.1106(o).

(18) “Power of attorney” means a record that grants an agent authority to act in the place of a principal.

(19) “Principal” means an individual who grants authority to an agent in a power of attorney.

(20) “Protected person” includes a protected individual as defined in MCL 700.1106(v); a legally incapacitated individual as defined in MCL 700.1105(i); a minor for whom a guardian has been appointed but no conservator has been appointed; and an individual who has a developmental disability as defined in MCL 330.1100a(25).

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

(22) “Remote-computing service” means a digital custodian that provides to the public computer processing services or storage of digital assets by means of an electronic communication system, as defined in 18 U.S.C. Section 2510(14).

(23) “Terms-of-service agreement” means an agreement that controls the relationship between an account holder and a digital custodian.
“Trustee” has the meaning stated in MCL 700.1107(o).

“Will” has the meaning stated in MCL 700.1108(b).

SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL ASSETS OF A DECEDEENT.

(a) Unless otherwise provided by the court or the will of a decedent, a personal representative of the decedent has the right to access:

(1) the content of an electronic communication sent or received by the decedent if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the decedent; and

(3) any other digital asset in which the decedent had a right or interest.

(b) A person interested in an estate as defined in MCL 700.1105(c) may file a petition in the court for an order to limit, eliminate, or modify the personal representative’s power over the decedent’s digital assets. On receipt of a petition under this subsection, the court shall set a date for a hearing on the petition. The hearing date shall not be less than 14 days and not more than 56 days after the date the petition is filed.

SECTION 4. ACCESS BY CONSERVATOR TO DIGITAL ASSETS OF A PROTECTED PERSON.

(a) The court, after an opportunity for a hearing, may grant a conservator the right to access:

(1) the content of an electronic communication sent or received by the protected person if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the protected person; and

(3) any other digital asset in which the protected person has a right or interest.

(b) In granting to a conservator the right to access under subsection (a), the court shall consider:

(1) the intent of the protected person with respect to the access granted to the extent that intent can be ascertained; or

(2) whether granting access to a conservator is in the protected person’s best interest.
SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS.

(a) To the extent a power of attorney grants authority to an agent over the content of an electronic communication of the principal, the agent has the right to access the content of an electronic communication sent or received by the principal if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended.

(b) Except as provided in subsection (a) and unless otherwise provided by a power of attorney or the court, an agent has the right to access:

(1) the catalogue of electronic communications sent or received by the principal; and

(2) any other digital asset in which the principal has a right or interest.

SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS. Unless otherwise provided by the court or the settlor in the terms of a trust, a trustee:

(a) that is an original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received by the trustee and the content of an electronic communication; and

(b) that is not an original account holder has the right to access:

(1) the content of an electronic communication sent or received by the original or any successor account holder if the electronic communication service or the remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the original or any successor account holder; and

(3) any other digital asset in which the original or any successor account holder has a right or interest.

SECTION 7. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary that is an account holder or has the right under Sections 3, 4, 5, or 6 of this act to access a digital asset of an account holder:

(1) subject to the terms-of-service agreement and copyright or other applicable law, may take any action concerning the digital asset to the extent of the account holder’s authority and the fiduciary’s powers under law of this state;
(2) has, under applicable electronic privacy laws, the lawful consent of the account holder for the digital custodian to divulge the content of an electronic communication to the fiduciary; and

(3) is, under applicable computer fraud and unauthorized access laws, including MCL 752.795 and MCL 750.540, an authorized user.

(4) is deemed to have the consent of the device holder under MCL 750.157n to the extent that the digital asset is a financial transaction device within the meaning of MCL 750.157n; and

(5) is deemed to have the authority to access the digital assets under MCL 752.795 and MCL 750.540 to the extent that the digital asset is subject to MCL 752.795 or MCL 750.540.

(b) If a provision in a terms-of-service agreement limits a fiduciary’s access to the digital assets of the account holder, the provision is void as against the strong public policy of this state.

(c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this act to the extent the provision designates law that enforces a limitation on a fiduciary’s access to digital assets which limitation is void under subsection (b).

(d) A fiduciary’s access under this act to a digital asset does not violate a terms-of-service agreement, notwithstanding a provision of the terms-of-service agreement which limits third-party access or requires notice of change in the account holder’s status.

(e) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, protected person, principal, or settlor:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for purposes of any applicable computer fraud and unauthorized access laws, including MCL 752.795, MCL 750.540, and MCL 750.157n.

SECTION 8. COMPLIANCE.

(a) If a fiduciary with a right under this act to access a digital asset of an account holder complies with subsection (b), the digital custodian shall comply with the fiduciary’s request in a record for:

(1) access to the digital asset;

(2) control of the digital asset; or

(3) a copy of the digital asset to the extent permitted by copyright law.
If a request under subsection (a) is made by:

1. a personal representative with the right of access under Section 3, the request must be accompanied by a certified copy of the letters of the personal representative as defined in MCL 700.1105(j) or a small estate affidavit pursuant to MCL 700.3983;

2. a conservator with the right to access under Section 4, the request must be accompanied by a certified copy of the court order that gives the conservator authority over the digital asset or by a certified copy of the letters of the conservator as defined in MCL 700.1105(j) that gives the conservator authority over the digital asset;

3. an agent with the right of access under Section 5, the request must be accompanied by an original or a copy of a currently-effective power of attorney that authorizes the agent to exercise authority over the digital asset and a sworn statement executed by the agent pursuant to MCL 700.5505; and

4. a trustee with the right of access under Section 6, the request must be accompanied by a certificate of the trust under MCL 700.7913 that authorizes the trustee to exercise authority over the digital asset.

A digital custodian shall comply with a request made under subsection (a) not later than 56 days after receipt of the request. If the digital custodian fails to comply, the fiduciary may petition the court for an order directing compliance. A digital custodian is liable for damages, costs, expenses, and legal fees if the court determines that the digital custodian was not acting pursuant to a legal requirement in failing to comply with a request made under subsection (a).

So long as any payments under an applicable terms-of-service agreement are kept current or brought current within 56 days of any default, a digital custodian may not destroy, disable or dispose of any digital assets of the protected person for 2 years after the custodian receives a request or order under subsections (a) and (c). If the digital custodian has obligations under other state or federal laws to preserve records, this act does not override those other obligations.

A recipient of a certificate of trust under subsection (b)(4) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

A digital custodian that acts in reliance on a certificate under subsection (b)(4) without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certificate.
(g) A person that in good faith enters a transaction in reliance on a certificate of trust under subsection (b)(4) may enforce the transaction against the trust assets as if the representations contained in the certificate were correct.

(h) A person that demands the trust instrument in addition to a certificate of trust under subsection (b)(4) or excerpts under subsection (e) is liable for damages to the same extent the person would be liable under MCL 700.7913(8).

(i) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

SECTION 9. DIGITAL CUSTODIAN IMMUNITY. A digital custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this act.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 12. SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 13. APPLICABILITY.

(a) Subject to subsections (b) and (c), this act applies to:

(1) A fiduciary acting under a will, trust, or power of attorney executed before, on, or after the effective date of this act, except as otherwise provided in this act.

(2) Each proceeding pending in court or commenced after the effective date of this act, unless the court determines that it is not feasible to apply the act or, in the interests of justice, the act should not apply.

(b) This act does not impair an accrued right or an action taken in a proceeding before the effective date of this act in a proceeding.
(c) This act does not apply to a digital asset of an employer used by an employee in the ordinary course of business.

SECTION 14. EFFECTIVE DATE. This act takes effect immediately.
Respectfully submits the following position on:

* SB 465 (S-1) Draft 2; SB 466 (S-1) Draft 1, and Proposed Amendment to the Security Freeze Act *

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 23. The number who voted opposed to this position was 0.
Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
James B. Steward

E-Mail:
jamessteward@stewardsheridan.com

Regarding:
SB 465 (S-1) Draft 2; SB 466 (S-1) Draft 1, and proposed amendment to the Security Freeze Act

SB 465 (Schuitmaker) Probate; guardians and conservators; jurisdictional provisions in the estates and protected individuals code; revise to reflect adoption of the uniform adult guardianship and protective proceedings jurisdiction act. Amends secs. 1301, 5307 & 5402 of 1998 PA 386 (MCL 700.1301 et seq).

SB 466 (Schuitmaker) Probate; guardians and conservators; uniform adult guardianship and protective proceedings jurisdiction act; enact. Creates new act.

Date position was adopted:
September 17, 2014

Process used to take the ideological position:
Position adopted after an electronic discussion and vote

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
23 Voted for position
0 Voted against position
0 Abstained from vote
0 Did not vote

Position:
Oppose

Explanation of the position, including any recommended amendments:
The Probate & Estate Planning Section Council opposes SB 465 (S-1) Draft 2 and SB 466 (S-1) Draft 1, as well as the proposed companion amendment to the “Security Freeze Act,” in part because the proposed legislation has not been sufficiently reviewed and analyzed to ensure that the core concepts expressed by these Bills will actually result without causing unintended and undesirable changes to current Michigan guardian and conservator laws. For
example, one primary stated purpose of this proposed legislation is for the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) to apply only to those cases in which there is an inter-jurisdictional conflict. This intent is stated in Section 503 of the current proposal. However, the jurisdictional scope of the proposed Act is not actually limited in that manner. For example, Section 203 reads as follows:

"Sec. 203. This article provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult." [emphasis added]

This wording is identical to the corresponding provision (at Section 202) of the prior version. Therefore, this proposed legislation does not in fact provide that the jurisdictional hierarchy concepts of the Uniform Act will only apply if a jurisdictional issue is raised. If that intent is to be achieved, additional wording revisions are needed to provide exactly how that concept will be applied in practice, including some sort of time limitations on when the jurisdictional conflict issue must be raised.

In addition, we oppose adoption of Articles III and IV of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) which are contained in these Bills. The provisions of those Articles were previously reviewed and debated extensively. Ultimately, that review and debate resulted in the provisions adopted as Act 545 of 2012 (that Act basically makes it easier for an out-of-state guardian or conservator to be appointed as such for the ward in Michigan; see MCL 700.5202a, 700.5301a, 700.5313 and 700.5433). Articles III and IV do not need to be part of the jurisdictional Act and present separate issues.

When reviewing these proposals, we must continually keep in mind that the purpose of the Uniform Act is to change the jurisdictional basis for when Michigan courts are allowed to act regarding the appointment of guardian or conservator – if Michigan does not have jurisdiction, as stated in our laws, then the Michigan courts cannot act.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://www.legislature.mi.gov/(S(ojsbx2u34ekwqbf4uem1umh))/mileg.aspx?page=getObject&objectName=mcl-445-2512
Look to Revenue Procedure 2014-61 for updates on income tax tables and amounts that are adjusted for inflation for tax purposes.

For example, the estate exemption amount is growing to $5,430,000 in 2015, and the amount of gift that can be given to a non-citizen spouse rises to $147,000. The annual gift tax exclusion amount remains at $14,000. It will provide for you the limits on Code section 6166 amounts, the limit on the value of property for which Code section 2032A can be elected, and the value of qualified residential property limit under Code section 6031.

It is also useful for determining the contribution limits for IRAs, amounts for the Kiddie Tax calculation, and the amounts for the standard deduction, limit on itemized deductions and the personal exemption amount.

In addition, a final warning that for estates where portability was not elected in deaths after 12/31/10 and before 12/31/13, and no estate tax return was necessary or filed, the extension for the election of portability expires 12/31/14. If someone qualifies, they can still file a complete 706 with the language “Filed Pursuant to Rev. Proc. 2010…” at the top, and obtain the benefit of portability.

Lorraine New
George W. Gregory PLLC
Troy, MI
Attachment 6
From:  George Gregory, Liaison to the Taxation Section

The Taxation Section’s Trust & Estate Committee had a meeting at Warner Norcross in Southfield, Sean Cook presented a variety of personal goodwill tax cases and the primary presentation was by Jeff Risius of Stout Risius Ross about the Estate of Franklin Addel, TC Memo 2014-155. In that case the initial taxpayer position of about $4.5 million valuation was ultimately upheld against IRS valuation of $90 million and then $30 million at trial. Jeff Risius will (1) send you materials based on its ACTEC Fall Meeting hand out, and (2) if you want add you to its mailing list (Stout Risius Ross has a periodic publication which you can also subscribe to at http://www.srr.com/contact-us), if you e-mail him at jrisius@srr.com.

The Draft RAB on taxation of beneficiaries of estates and trusts was discussed, and generally deplored.

The recent changes in uncapping decisions were discussed.

The next Tax Section Council Meeting is on December 11, 2014 at the Honigman office in Bloomfield Hills.

Next year the State of Michigan will have an offer-in-compromise program. The word on the street is that it will resemble the Federal program.

The Annual Tax Conference will be held Thursday, May 21 and 22, 2015 at the Inn at St John’s in Plymouth.

George W. Gregory, Liaison