PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for:

Meeting of the Committee on Special Projects (CSP);

Meeting of the Council of the Probate and Estate Planning Section

NOTICE FOR REMOTE REGISTERING AND ATTENDANCE:

For those who are unable to attend in person, you may attend remotely by registering here: https://zoom.us/meeting/register/bb684641b51e8a8fcde7dc3c8da9331e

If you have any difficulty registering for remote attendance, please contact Mike Lichterman at mike@baarlegal.com. Remote attendees are required to register ahead of time. It is a new registration link each month and I will make sure to email it to you before you send out the Section-wide invitation to the meeting.
Probate and Estate Planning Section of the
State Bar of Michigan

Meeting of the Section’s Committee on Special Projects and
Meeting of the Council of the Probate and Estate Planning Section

Friday, November 15, 2019
9 a.m.

University Club of MSU
3435 Forest Road
Lansing, MI 48910

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

Mark E. Kellogg, Secretary
Fraser Trebilcock Davis & Dunlap, P.C.
124 West Allegan Street, Suite 1000
Lansing, Michigan 48933
517-377-0890
Email: mkellogg@fraserlawfirm.com
Each meeting starts with the Committee on Special Projects at 9 a.m., followed by the meeting of the Council of the Probate & Estate Planning Section.

**Call for materials**

_Due dates for Materials for Committee on Special Projects_
All materials are due on or before 5 p.m. of the date falling 9 days before the next CSP meeting. CSP materials are to be sent to Katie Lynwood, Chair of CSP (klynwood@bllhlaw.com)

_Schedule of due dates for CSP materials, by 5:00 p.m._:
Tuesday, November 12, 2019 (for Friday, November 15, 2019 meeting)

_Due dates for Materials for Council Meeting_
All materials are due on or before 5 p.m. of the date falling 8 days before the next Council meeting. Council materials are to be sent to Mark Kellogg (mkellogg@fraserlawfirm.com).

_Schedule of due dates for Council materials, by 5 p.m._:
Friday, November 8, 2019 (for Friday, November 15, 2019 meeting)
## Officers of the Council for 2019-2020 Term

<table>
<thead>
<tr>
<th>Office</th>
<th>Officer</th>
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<tbody>
<tr>
<td>Chairperson</td>
<td>Christopher A. Ballard</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>David P. Lucas</td>
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<tr>
<td>Vice Chairperson</td>
<td>David L.J.M. Skidmore</td>
</tr>
<tr>
<td>Secretary</td>
<td>Mark E. Kellogg</td>
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<tr>
<td>Treasurer</td>
<td>James P. Spica</td>
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## Council Members for 2019-2020 Term

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<tr>
<th>Council Member</th>
<th>Year Elected to Current Term (partial, first or second full term)</th>
<th>Current Term Expires</th>
<th>Eligible after Current Term?</th>
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<td>Jaconette, Hon. Michael L.</td>
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<td>Lichterman, Michael G.</td>
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<td>Malviya, Raj A.</td>
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<td>Nusholtz, Neal</td>
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<td>2021</td>
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<td>Labe, Robert C.</td>
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<td>2022</td>
<td>No</td>
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<td>Mayoras, Andrew W.</td>
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<td>Mills, Richard C.</td>
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<td>2022</td>
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<td>Syed, Nazneen Hasan</td>
<td>2019 (2nd term)</td>
<td>2022</td>
<td>No</td>
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<tr>
<td>Silver, Kenneth</td>
<td>2019 (1st term)</td>
<td>2022</td>
<td>Yes</td>
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Ex Officio Members of the Council

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

AGENDA
Friday, November 15, 2019
East Lansing, Michigan

1. Warren Krueger – Ad Hoc Committee – 30 minutes
   Re: Fiduciary exception to attorney client privilege
   See attached:
   - Memo from Warren Krueger (Exhibit A)
   - Memo from George Bearup (Exhibit B)
   - Spreadsheet of states and the fiduciary exception (Exhibit C)
MEMO

TO: State Bar of Michigan - Council of the Probate and Estate Planning Section
FROM: Warren H. Krueger, III, Chair of the Fiduciary Exception to the Attorney-Client Privilege Ad Hoc Committee
DATE: November 11, 2019
RE: Fiduciary Exception to the Attorney-Client Privilege

I. Background

The Council of the Probate and Estate Planning Section ("Council") is considering its position on whether Michigan should adopt a fiduciary exception to the attorney-client privilege ("Fiduciary Exception"). To that end, the Council previously established a subcommittee, chaired by George Bearup, to provide information about the Fiduciary Exception.1 George Bearup submitted a memorandum to the Council; however, the Council wishes to have a better understanding of the Fiduciary Exception and how other states are (or are not) applying that exception.

The Council formed the Fiduciary Exception to the Attorney-Client Privilege Ad Hoc Committee ("Committee"), and asked the Committee to provide supplemental research and report on the Fiduciary Exception. This memorandum builds on the memorandum submitted to the Council by George Bearup. This memo does revisit some of the grounds covered in George Bearup's memo; however, it does so for the purpose of consolidating information into one document. The attached table provides additional detail about how each state has addressed the Fiduciary Exception. If the Council is inclined to take a position supporting adopting of the Fiduciary Exception, George Bearup's memo address some of the discrete sub-issues that need further consideration.

II. Summary of Findings2

Number of states adopting some form of Fiduciary Exception: 8

Number of states rejecting the Fiduciary Exception: 16

Number of states taking no position or for which a position could not be determined: 26

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1 A copy of George Bearup's memo is attached to this memorandum.
2 See attached table for detailed information for each state.
III. The Fiduciary Exception

In United States v Jicarilla Apache Nation, 564 US 162; 131 SCt 2313 (2011), the U.S. Supreme Court provided an excellent definition of the Fiduciary Exception, and explained the historic rationale for the exception, stating:

The rule [is] that when a trustee obtain[s] legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries [are] entitled to the production of documents related to that advice. The courts reasoned that the normal attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorney's fees.

564 US 162, 170 (internal citations omitted).

The Fiduciary Exception is rooted in English common law. Under the English common law, the courts held that trust beneficiaries were entitled to the production of communications between the trustee and the attorney when these communications related to the trust administration and the legal services were paid for with trust funds. Talbot v Marshfield, 2 Drew & Sm. 549, 62 Eng Rep 728 (Ch. 1865); Wynne v Humberson, 27 Beav. 421, 54 Eng Rep 165 (1858).

Federal courts in the United States began to recognize the Fiduciary Exception in the 20th Century. See Garner v Wolfinbarger, 430 F2d 1093 (5th Cir 1970). Notably, the key American case that recognized the Fiduciary Exception is Riggs National Bank of Washington, D.C. v Zimmer, 355 A2d 709 (Del Ch 1976). In Riggs, the trustees filed a petition for instructions with the court and then asked their lawyer to prepare a legal opinion (the "Memorandum") on the pending petition as well as potential tax litigation that may arise between the Trust and the state. Id. at 710. The trustees paid for these legal services from the trust funds. Later, the beneficiaries brought a surcharge action against the trustees, seeking reimbursement for breach of trust committed by the trustees, related to the tax litigation. Id. During the discovery phase of the surcharge action, the beneficiaries requested production of the Memorandum, but the trustees refused to produce the Memorandum, asserting the attorney-client privilege.

The court in Riggs granted the beneficiaries' motion to compel production and recognized the Fiduciary Exception. In reaching this decision, the court noted that whether the beneficiaries could discover the Memorandum depended upon "the purpose for which it was prepared, and the party or parties for whose benefit it was procured, in relation to what litigation was then pending or threatened." Id. at 710. According to the court, the purpose of the Memorandum was to receive legal advice on potential tax litigation involving the trust, which was clearly for the purpose of the trust administration and for the benefit of the beneficiaries. Particularly, the court stated that "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust." Id. at 714.
Since the Delaware court decided Riggs, the Delaware state legislature has completely abrogated the judge-created rule that recognized the Fiduciary Exception by statute. The Delaware statute expressly provides that a fiduciary is entitled to retain counsel in connection with his duties as fiduciary, and regardless of whether the payment of legal fees is out of the fund related to the fiduciary’s duties, this will not constitute a waiver of the attorney-client privilege. See Del. Code Ann. Title 12 § 3333 (West 2007). Similarly, several other states have expressly declined to recognize the Fiduciary Exception by statute. States that have expressly rejected the Fiduciary Exception by statute include Florida, Hawaii, New Hampshire, Ohio, and South Carolina.

Additionally, other states have chosen to reject the Fiduciary Exception through case law, including California, Connecticut, Illinois, Kansas, Massachusetts, Nebraska, Oregon, Texas, and Virginia. Similarly, an Ethics Opinion issued in Kentucky expressly rejected the Fiduciary Exception.

In contrast, a minority of states have chosen to recognize the Fiduciary Exception. These states include Arizona, Arkansas, New York, and Pennsylvania. Moreover, a few states, including Maryland, have adopted a type of balancing test to determine whether the Fiduciary Exception applies to the factual situation at issue.

Although numerous states have not yet directly addressed the Fiduciary Exception, there has been an overall trend showing that a majority of states that have addressed the issue have chosen to reject the Fiduciary Exception. In contrast, only a minority of states have adopted the Fiduciary Exception and determined that both the fiduciary and the beneficiary are the real clients of the attorney.

IV. Michigan’s Treatment of the Fiduciary Exception

The treatment of the Fiduciary Exception under Michigan law has been contradictory and unclear in the past, but seems to be heading to a more definitive conclusion. In 1990, the Michigan Court of Appeals held that the real client of an attorney retained by the personal representative of an estate was the estate, not the personal representative, pursuant to the Revised Probate Code in effect at that time. *Steinway v Bolden*, 185 Mich App 234, 237-38 (1990). However, the Michigan Supreme Court subsequently promulgated a new provision in the Michigan Court Rules (“MCR”) which provides that “[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.” MCR 5.117(a).

Afterward, in 2009, the Michigan Court of Appeals issued an opinion holding that “when an attorney is retained by a fiduciary, the attorney represents both the fiduciary and the estate.” *Estate of Graves v Comerica Bank*, 2009 Mich App LEXIS 2523 (2009). To confuse matters, the Michigan Court of Appeals later issued an order rescinding the publication of the Graves opinion, leaving it unclear whether Michigan courts recognized the Fiduciary Exception.

Additionally, in 2010, an informal ethics opinion was issued by the State Bar of Michigan that stated “[t]he question of 'who is the client' when the lawyer is retained by a fiduciary has not been conclusively answered as a matter of law.” RI-350. This ethics opinion
confirmed to practitioners that Michigan law was still unclear as to whether the Fiduciary Exception is recognized in this state.

Finally, in 2017, the Michigan Court of Appeals held that pursuant to interpretation of statute and court rule, “an attorney hired to perform legal services for a conservator represents the conservator and does not have an attorney-client relationship with the estate.” Estate of Tyler Jacob Maki v Coen, 318 Mich App 532, 540 (2017) (emphasis added). The court reached this conclusion by interpreting the provisions governing the powers of conservators under the Estates and Protected Individuals Code (“EPIC”). See MCL 700.5423(2)(z). The court noted that the statute, which gives the conservator the power to hire an attorney “to advise or assist the conservator in the performance of the conservator’s administrative duties” focused “solely on the services and assistance provided to the conservator,” meaning that only the conservator should be treated as the client. Estate of Tyler Jacob Maki, 318 Mich App at 540-41 (quoting MCL 700.5423(2)(z)).

In reaching this decision, the Court of Appeals also relied on the “plain language” of MCR 5.117(a), determining that the rule makes it clear that “an attorney appearing in probate court on behalf of a conservator represents the conservator rather than the estate.” Estate of Tyler Jacob Maki, 318 Mich App at 541. Moreover, the court noted that Steinway was distinguishable from the case at hand because Steinway “relied primarily on the repealed provision” of the Revised Probate Code which used language stating that the personal representative could “employ counsel to perform necessary legal services in behalf of the estate.” Id. at 542 (quoting Steinway v Bolden, 185 Mich App 234, 237-38 (1990)). The decision by the Court of Appeals in Estate of Tyler Jacob Maki was later followed in an unpublished Michigan Court of Appeals decision that was decided in 2018. Warda v Linden, 2018 Mich App LEXIS 2332 (2018).

Based on those two recent Michigan Court of Appeals decisions addressing the Fiduciary Exception with regard to conservators, it seems that Michigan courts are likely inclined to reject the Fiduciary Exception as a whole. These court decisions heavily relied upon interpreting MCR 5.117(a) as well as the language in the provisions of EPIC to reach the decision that the plain language of the rules and statutes did not allow for the recognition of the Fiduciary Exception, at least in the context of the conservatorship.

Michigan courts have not yet addressed the Fiduciary Exception in the context of a trustee retaining an attorney for advice on trust administration. However, it appears from the statutory scheme of EPIC and previous interpretations of EPIC by the Michigan Court of Appeals that it is plausible that the courts may be inclined to reject the Fiduciary Exception in the context of trust administration. Importantly, the provisions in EPIC relating to the trustee’s powers are analogous to the provisions contained in EPIC regarding the conservator’s powers. EPIC provides that a trustee shall have the power to “employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee’s administrative duties.” MCL 700.7817(w) (emphasis added). This language is analogous to the language which the Court of Appeals relied upon in Estate of Tyler Jacob Maki that is contained in 700.5423(2)(z), related specifically to the conservator’s powers. Accordingly, if Michigan courts generally follow the trajectory established by the Michigan Court of Appeals in Estate of
Tyler Jacob Maki, in conjunction with the plain language of MCR 5.117(a), it is plausible that the courts would similarly reject the Fiduciary Exception in the context of trust administration.

V. Competing Positions

If no legislation is adopted regarding the Fiduciary Exception, and the application of the exception is left to courts, then the trajectory of Michigan law is toward rejecting the exception. However, below is a brief discussion of the competing reasons the Council may wish to consider in deciding whether to take a position on this issue.

Reasons for Recognizing the Fiduciary Exception

Those in favor of recognizing the Fiduciary Exception believe that the exception comports with the well-established duties of the trustee. See Riggs National Bank of Washington, DC v Zimmer, 355 A2d 709 (Del Ch 1976). A trustee owes the beneficiary certain fiduciary duties, including the duty of disclosure and the duty of loyalty.

By recognizing the Fiduciary Exception to the attorney-client privilege and allowing beneficiaries to discover legal documents relating to the trust administration, this ensures that the trustee’s duty of loyalty and duty of disclosure are being respected in all matters of the trust administration. See Follansbee v Gerlach, 56 PaD & C4th 483 (County Ct. 2002). Essentially, those in favor of the Fiduciary Exception argue that a trustee observing the proper legal duties owed to the beneficiary has “nothing to hide” and should be willing to disclose any legal information or advice obtained from an attorney regarding the trust administration.

Additionally, proponents for recognizing the Fiduciary Exception note that, frequently, the legal fees incurred by the trustee in seeking legal advice regarding the trust administration are paid for with trust assets. See Riggs National Bank of Washington, DC v Zimmer, 355 A2d 709 (Del Ch 1976). Therefore, because the legal advice is being paid for using trust assets and is ultimately for the benefit of the trust, the beneficiaries should be treated as the real clients of the attorney.

Reasons for Rejecting Recognition of the Fiduciary Exception

Those in favor of rejecting the Fiduciary Exception rely on the sanctity of the attorney-client privilege that has long been recognized in the American legal system. Moreover, those in favor of rejecting the Fiduciary Exception note that the trustee has the legal duty to effectuate the settlor’s intentions, which often may be in conflict with the interests of the beneficiary, which is why attorney-client confidentiality is so important for the trustee. See First Union National Bank v Turney, 824 So.2d 172 (Fla. Dist. Ct. App, 2001).

Further, those who oppose the Fiduciary Exception note that the overriding importance of full disclosure between the attorney and trustee is respected when there is a guarantee of attorney-client privilege. Additionally, those who reject the idea of the Fiduciary Exception note that the mere source of the payment of attorney’s fees should not be outcome determinative in deciding who is the real client of the attorney. Novella v Hartford Accident & Indemnity Co., 163 Conn. 552 (1972) (“An attorney’s allegiance is to his client, not to the person who happens to be paying him for his services.”). The Michigan Rules of Professional Conduct
also echo that the source of payment of fees is not determinative of who is the client. See MRPC 1.8.

VI. Conclusion

Although Michigan law has, in the past, been contradictory and unclear as to whether the Fiduciary Exception is recognized in this state, the Michigan Court of Appeals has recently made the issue slightly clearer. Importantly, in *Estate of Tyler Jacob Maki*, the Michigan Court of Appeals held that the conservator, not the estate, was the true client of the attorney, pursuant to Michigan statute and court rules. Therefore, it appears plausible that Michigan courts would follow a similar course and reject the Fiduciary Exception in trust administration. Although there are arguments supporting each perspective on the Fiduciary Exception, currently, a majority of states in the country that have taken a position on this issue have elected to reject the Fiduciary Exception.

If the Council does not take a position, Michigan courts are likely to follow the rationale of the *Estate of Tyler Jacob Maki* case and reject the Fiduciary Exception.

:WHK
MEMORANDUM

TO: Probate and Estate Planning Council
FROM: George F. Bearup
RE: Should the Fiduciary Exception to the Attorney-Client Privilege Extend to Trust and Estate Beneficiaries?

The subcommittee of the Probate and Estate Planning Council is unable to make a formal recommendation to the Council on this question. It seeks direction from the Council on whether to proceed with a formal proposal.

The subcommittee consists of David Skidmore, Ken Konop, Kai Goren, Shaheen Imani, and ad hoc member, David Kovac, who acts as liaison with The Michigan Bankers Association (MBA) – Trust Council.

The subcommittee is unable to reach a consensus on whether the fiduciary exception to the attorney-client privilege should be recognized in Michigan. Some attorneys who regularly handle probate litigation on behalf of beneficiaries believe that an exception to the attorney-client privilege is warranted in limited situations. Other attorneys who regularly represent fiduciaries believe that no exception should be recognized to the longstanding attorney-client privilege.

The MBA endorses the “no exception” position. It believes Michigan should consider adopting a rule of evidence (like Florida) or a statute by an amendment to the Michigan Trust Code (like Ohio) that expressly announces that there is no exception to the attorney-client privilege. If the Probate Council endorses the “no exception” position, the MBA is willing to prepare the draft legislation/or court rule for the Council’s consideration.

If the Probate Council concludes that there should be a recognized exception to the attorney-client privilege, then the subcommittee needs guidance with regard to: (i) statutory, court rule, or rule of evidence change? (ii) whether the source of payment of the attorney’s fees should make a difference to identify when the exception exists? (iii) whether the exception should extend to other fiduciaries, e.g., guardians, conservators, Personal Representatives, etc.

Previously a research memo was prepared with regard to this topic which is attached to provide some background to the common law rule, the recognized exception, the difficulty of identifying a “bright-line” test when the exception might apply, and how some states have addressed the issue.

George F. Bearup, Subcommittee Chair
MEMORANDUM

TO: Probate and Estate Planning Council
FROM: George F. Bearup
RE: The Fiduciary Exception to the Attorney-Client Privilege
     Extend to Trust and Estate Beneficiaries

The attorney-client privilege is one of the "oldest and most established" evidentiary privileges. United States v. Jicarilla Apache Nation, 131 S.Ct. 2313, 2318 (2011). Nevertheless, the application of the privilege is often opaque when a beneficiary of a trust seeks to uncover communication between a trustee and an attorney. Within this context, courts and legislatures are sharply divided. In some jurisdictions, a beneficiary is prohibited from discovering communication between a trustee and an attorney. In other jurisdictions, a beneficiary may discover such communication, provided the communication was administrative. Wynne v. Humberston, 27 Beav. 421, 243-424, 54 Eng. Rep. 165, 166 (1858); Tlobolt v. Marshfield 2 Dr. & Sm. 549, 550-551, 62 Eng. Rep. 728, 729 (1865). Ultimately, disagreements center on whether the beneficiary should be considered the attorney's client.

Michigan law does not address the exception. MCR 5.117(a) only provides: Representation of Fiduciary.

1. In Jicarilla Apache Nation, supra, the U.S. Supreme Court expressly addressed the fiduciary exception to the attorney-client privilege.

English courts first developed the fiduciary exception as a principal of trust law in the 19th century. The rule was that when the trustee obtained legal advice to guide the administration of the trust, and for the trustee's own defense and litigation, the beneficiaries were entitled to the production of documents related to that advice. . . the courts reasoned that normally attorney-client privilege did not apply in this situation because the legal advice was sought for the beneficiary's benefit and was obtained at the beneficiary's expense by using trust funds to pay the attorney's fees. . . the fiduciary exception quickly became an established feature of English common law. . . but did not appear in this country until the following century. American courts seemed first to have expressed skepticism. See In Re: Prudence Bonds Corp., 76 F.Supp 643, 647 (E.D.N.Y. 1948) declining to apply the fiduciary exception to the trustee of a bond holding corporation, because of the "important right of such a corporate trustee . . . to seek legal advice and nevertheless act in accordance with its own judgment." By the 1970's, however, American courts began to adopt the English common-law rule. See Garner v Wolfenbarger, 430 F.2d. 1093, 1103-1104 (C.A. 5, 1970) (allowing shareholders upon a showing of "good cause" to discover legal advice given to corporate management.

Nov 17, 2018
I. Majority Rule: Only the Fiduciary is the Client

The majority rule is that the trustee is the client. There are two (2) main reasons that courts and legislatures have supported this rule: (1) a general reluctance to recognize an exception to the attorney-client privilege; and (2) a fiduciary exception to the attorney-client privilege creates too much uncertainty, which discourages open and honest communication, which perhaps even discourages a trustee to seek legal advice. *Hule v. DaShazo*, 922 S.W.2d (Tex. 1996).

a. Texas. In *Hule, supra*, the court explained that without the exclusive right to the attorney-client privilege, the trustee — fearing “second guessing” by the beneficiary — might neglect or avoid legal advice, and thus, the trust would be adversely affected. The court held that “only the trustee, not a trust’s beneficiary, is the client and is entitled to assert the attorney-client privilege.”

b. California. In *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 594 (Cal. 2000), the court held that “there is no authority under California law for requiring a trustee to produce communications protected by the attorney-client privilege.” To reach its decision the court noted that “a trustee can keep beneficiaries ‘reasonably informed’ and provide ‘a report of information’ without necessarily having to disclose privileged communications.” *Id.*

c. Massachusetts. In *Spinner v. Nott*, 631 N.E.2d 542, 544 (Mass. 1994), the court held that an attorney “advising a trustee owe[s] no duty to beneficiaries, only to their clients — the trustees.” To reach its decision the court explained that “conflicting loyalties” between the beneficiaries and the trustee would interfere with the attorney-client relationship. *Id.* at 544-46.

d. Florida. In *First Union Nat’l Bank v. Turney*, 824 So.2d 172 (Fla. Dist. Ct. App. 2001), the court rejected the fiduciary exception. *Id.* at 186 (holding that “an attorney represents a single client, the trustee”). The court noted that without the guarantee of the attorney-client privilege, the trustee might be thrust into conflict with the settlor’s intentions, which are frequently different than the wishes of the beneficiaries. See Louis H. Hamel Jr., “Trustee’s Privileged Counsel: A Rebuttal,” 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, “The Fiduciary Exception to a Trustee’s Attorney/Client Privilege,” 21 ACTEC Notes 236 (1995).

II. Minority Rule: The Fiduciary and the Beneficiary are Both Clients if the Communication is Administrative.

The minority rule is that the fiduciary and the beneficiary are both clients if the communication is administrative. Courts and legislatures have reached this conclusion because: (1) administrative matters are ultimately for the benefit of the beneficiary; and (2) the attorney is generally paid out of *trust funds*. However, the latter (source of payment) rationale lost traction — even in Delaware — as courts and the legislature have recognized that who pays is not

a. Delaware. In Riggs Nat'l Bank of Wash. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976), the court noted that the beneficiary is the "real" client of the attorney. Accordingly, the court held that trust beneficiaries are privy to attorney-client communication between a trustee and an attorney when the communication pertains to an administrative matter.


c. Pennsylvania. In Follansbee v. Gerlach, 56 Pa.D. & C.4th 483 (County Ct. 2002), the court reasoned that a beneficiary has an essential right to complete information. Accordingly, the court held that a beneficiary may view attorney-client communications with regard to administrative matters.

III. Minority Rule: How do Courts Determine Whether a Matter is Administrative or Defensive?

Under the minority rule, the fiduciary and the beneficiary are both clients if the communication is administrative. However, it is difficult to determine whether the subject matter of the communication is administrative in nature. Accordingly, most courts tend to focus on two (2) factors to make this determination.

1. Payment of the Attorney. Though not dispositive, courts will consider who pays the attorney as a factor in the determination of who the client actually is. In Riggs, the court viewed it as a "significant factor." Id. at 711-12("the payment of the law firm out of the trust assets [was] a significant factor . . .").

In Fischel v. Equitable Life Assurance, 191 F.R.D. 606, 609 (N.D. Ca. 2000) the court explained that "while generally the fiduciary exception applies to matters of trust administration,

² "Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege. However, in the event that the fiduciary is found to have breached some fiduciary duty, the Court may, in its discretion, deny such fiduciary the right to have some part or all of such fees and expenses paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have previously been paid."

³ "Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary."
the attorney-client privilege reasserts itself as to any advice that a fiduciary obtains to protect itself from liability."

The Restatement (Second) of Trusts takes a similar approach when it suggests that a trustee must pay for legal advice out of his own pockets in order to retain the attorney-client privilege.

2. A Divergence of Interests. Another way to determine whether a matter is administrative or defensive is to consider whether there exists a divergence of interests. In Jacob v. Barton, 877 So. 2d 935, 937 (Fla. Dist. Ct. App. 2004), the court noted that "[t]o the extent that the lawyers' work concerns the dispute with [the beneficiary], their client is the trustee, not the beneficiary." See also Burnett Banks Trust Co. v. Compaq, 629 So. 2d 849, 851 (Fla. Dist. Ct. App. 1993). Clearly, attorney advice after a lawsuit begins will prove a divergence of interests because the communication is defensive.

Also, there is generally a divergence of interests when the issue pertains to trustee compensation. Wachtel v. Health Net, 482 F.3d 225, 234 (3d Cir. 2006).

But other bright lines are more elusive. See Black v. Pitney Bowes, No. 05 Civ. 108 (GEL), 2006 U.S. Dist. LEXIS 92263, at *3-7 (S.D.N.Y. Dec. 21, 2006). Courts might consider whether the fiduciary has a legitimate personal interest in the legal advice sought. But words like legitimate, personal, and interest all lend themselves to a court’s discretion. See, e.g., Wachtel v. Health Net, Inc., 482 F.3d 225, 232 (3d Cir. 2007).

IV. Uniform Rule: The Fiduciary is the Sole Client if the Communication is "Defensive"

Regardless of jurisdiction, courts and legislatures tend to agree that a fiduciary is the sole client if he or she has assumed a defensive posture against the beneficiary. Accordingly, if a fiduciary retains an attorney in a personal, defensive, non-administrative capacity, in anticipation of litigation or after its commencement, the fiduciary is solely entitled to the attorney-client privilege. Restatement (Second) of Trusts § 173 cmt. B (1959) (which explains that a trustee retains the attorney-client privilege if the trustee obtains counsel "at his own expense and for his own protection."). See also United-States v. Metz, 178 F.3d 1058, 1063-64 (9th Cir. 1999) (which noted that where a fiduciary seeks advice of counsel for his own personal defense in contemplation of adversarial proceedings against beneficiaries, the trustee has the attorney-client privilege).

V. A handful of other states had addressed the question of the fiduciary exception to the attorney-client privilege by statute.

Florida.

90.5021. Fiduciary-Client Privilege

(1) For purposes of this Section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in SS. 731.201 and 736.0103, an administrator ad litem as described in S. 733.308, a curator as described in S. 733.501, a guardian or a guardian ad litem as
defined in S. 744.102, a conservator as defined in S. 710.102, or an attorney-in-fact as described in Chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under S. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying S. 90.502 to a communication under this Section, only the person or entity acting as a fiduciary is considered a client of the lawyer. (emphasis added.)

(3) This section does not affect the crime or fraud exception to the attorney-client privilege as provided in S. 90.502(4)(a).

New York: New York Civil Practice Law and Rule Section 4503, Attorney:

Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of any attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

(1) Personal Representative.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the
Ohio. Ohio is currently looking at proposed legislation on the exception. Schwartz and Langsam, attorney-client privilege: Representing Trustees in Ohio, 19 Ohio Prob. L.J. 236 (July/August 2009) suggesting that Ohio appears to be aligned with majority view.

Ohio R.C. 5815.16: A lawyer to a fiduciary such as a trustee is not the lawyer, i.e., owes no duties or obligations to those the fiduciary serves:

A. Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort or otherwise to any third-party to whom the fiduciary owes fiduciary obligations.

H. As used in this Section fiduciary means a trustee under an express trust or an executor or administrator of a decedent's estate. (emphasis added.)

VI. Practical Realities

While many jurisdictions obviously reject the notion that a beneficiary is the client of the fiduciary's attorney, beneficiaries may see thing with an entirely different perspective, particularly where trust funds are used to pay for the fiduciary's legal advice. Beneficiaries may reach this expectation when they are informed of their fiduciary's continuing duty to inform and report. See MCL 700.7814(1):

(1) A trustee is directed to keep the qualified trust beneficiaries reasonably informed about the administration of the trust and material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a trust beneficiary's request for information related to the administration of the trust.

(2) A trustee shall do all of the following: (a) upon the reasonable request of a trust beneficiary to promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relative information about the trust property.
Probate and Privilege

Why Fiduciary-Attorney Communications May Be Vulnerable to Discovery
By Geoffrey S. Weed

At first blush, the issue seems simple. Of course, at first blush, many complex legal issues seem simple. The plain language of MCR 5.117(d) states that "[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary." From that language, one might logically conclude that the attorney-fiduciary relationship is the same as any other attorney-client relationship—that the rules governing attorney-client privilege remain the same whether one is representing a criminal defendant, a civil litigant, or a trustee.

The legal reality, however, is convoluted. From the common law, courts have recognized a fiduciary exception to attorney-client privilege. In the 1865 trust contest Talbot v. Marshfield,1 an English court held that a trustee could not assert attorney-client privilege against trust beneficiaries.2 The court made this decision while reviewing the modern-day equivalent of two requests for production of documents that ordinarily would have been privileged.3 The Talbot court reasoned that the trustee could not assert the privilege because, as a fiduciary, he was obligated to provide the beneficiaries with information regarding the trust.4 The court further reasoned that the source of the attorney's fees prevented assertion of the privilege; since the trustee had paid his attorney with trust assets—assets which rightfully belonged to the beneficiaries, not the trustee—how could he then hope to assert attorney-client privilege against those same beneficiaries?5

Today, while a split of authority exists, the fiduciary exception is alive and well in American jurisprudence.6 The seminal iteration of the modern exception is found in Riggs National Bank of Washington, D.C v. Zimmer.7 In Riggs, while acknowledging the importance of the attorney-client privilege, the court held that "[i]t is the policy of preserving the full disclosure necessary in the trustee-beneficiary relationship" outweighed the policy considerations that justify the attorney-client privilege.8 The court reasoned that, in any event, trust beneficiaries are a trust attorney's real clients, going so far as to imply that a trustee cannot, without necessarily breaching the trustee's duties as a fiduciary, obtain legal representation if the attorney-client privilege might later be asserted against beneficiaries.9

Since 1976, when the Riggs decision was announced, numerous jurisdictions have upheld the fiduciary exception following largely the same reasoning.
Communications to an attorney by a fiduciary are often deemed to be privileged if they are made in a defensive posture relative to litigation, but communications are not privileged if they are made in relation to normal administration of the trust or estate.

The exception is softened by allowing for a distinction based on the purpose of the communication. Communications to an attorney by a fiduciary are often deemed to be privileged if they are made in a defensive posture relative to litigation, but communications are not privileged if they are made in relation to normal administration of the trust or estate.

On the other hand, several jurisdictions have, either through legislation or judicial decision, done away with the fiduciary exception altogether. The Texas Supreme Court, for instance, has decided against the exception, reasoning that the attorney-client privilege is just as important to the trustee-attorney relationship as it is to any other attorney-client relationship and that the real client is the trustee—and after all, a beneficiary cannot sue his or her trustee’s attorney for malpractice because no attorney-client relationship exists. Likewise, since 2002, New York, Delaware, South Carolina, and Florida have all enacted statutory schemes that either limit or expressly eliminate the fiduciary exception.

Unfortunately, however, the exception remains unlegislated and largely unlitigated in the majority of jurisdictions. In Michigan, the legal authority is anything but authoritative. In a 1990 published opinion, Steinway v. Boladi, a panel of the Michigan Court of Appeals held unanimously that, under the Revised Probate Code, the real client of an attorney retained by the personal representative of an estate was the estate itself, not the personal representative. Although attorney-client privilege was not at issue in Steinway, the opinion appeared to imply that Michigan would follow the higher example and embrace the fiduciary exception.

In direct response to Steinway, the Michigan Supreme Court promulgated MCR 5.117(a), which stated that “an attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.” The new rule seemingly resolved the question of the fiduciary exception’s fate in Michigan. But in 2009, the Michigan Court of Appeals issued another unanimous published opinion, Estate of Graves v. Comerica Bank, which presumably ignored MCR 5.117(a). In Graves, the Court of Appeals held that “when an attorney is retained by a fiduciary, the attorney represents both the fiduciary and the estate.” Since Graves was announced, however, the Court of Appeals, on its own motion, issued an order rescinding publication of the opinion.

While it may seem that the Graves court simply ignored MCR 5.117(a), there is another distinct possibility. The authority of the Michigan Supreme Court to establish “rules of practice and procedure” is, of course, beyond question. But it is also axiomatic that “the Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law.” Thus, the Court in Graves, while cognizant of MCR 5.117(a), may have decided that the court rule could not control its decision regarding the substantive law of privilege.

Muddling things further still, the most relevant ethics opinion, informal opinion RI-350, has left attorneys to treat water alone in these treacherous ethical currents. The 2010 opinion stated that determining the identity of the client “requires an examination of applicable substantive law, which is beyond the scope of the Committee’s charge,” and goes on to explain that the question of who the real client is has not been conclusively decided as a matter of law in the fiduciary attorney context. Thus, probate practitioners are left to their own devices in deciding how to deal with the many ethical implications posed by owing duties to multiple masters, to both the trustee and the beneficiary, the personal representative, and the heir.

In the end, that is the position each attorney for a fiduciary faces under the current state of the law. Without sufficient guiding precedent or legislation, each attorney stands alone regarding
Probate and Privilege

A thorough analysis of the law here reveals almost nothing besides a general state of disarray. There is a split of authority in other jurisdictions, a conflict between caselaw, and complex questions of constitutional law and separation of powers. Everything is in flux, and every step the practitioner takes across this legal landscape appears precarious.

Accordingly, when representing fiduciaries, it is imperative to be proactive and clarify the exact nature of the attorney-client relationship from the outset. If you will be representing the fiduciary only, be sure to include language to that effect in your fee agreement or engagement letter. Also, notify the beneficiaries in writing that you do not represent them and that they may wish to consult independent counsel. Conversely, if you consider your true client to be the trust or estate, be sure to inform the fiduciary, include notice of that fact in your engagement letter, and consider having the fiduciary sign an acknowledgment that you represent the fiduciary only as an agent of the trust or estate. Finally, if you are representing a fiduciary in litigation against beneficiaries, explain that it might be in your client’s best interests—despite the general availability of the trust or estate assets—to pay the litigation costs from the client’s own funds or file a petition asking whether the trust or estate assets can be used without invoking the fiduciary exception. While it might, indeed, be painful for the fiduciary to pay your retainer from personal funds, emphasize that something else could be far worse: being ordered to produce privileged documents and attorney-client communications for opposing counsel’s review.

ENDNOTES

1. MCL 5.1179(7).
3. Id.
5. Id.
6. Id.
7. Id.
10. Id. at 11, quoting Riggs, 355 Ala. 209, 792 So. 2d 1 (2001).
11. Id.
12. See Below, n. 8 supra at 524-525.
13. Id.
14. Id.
15. See Bonfils, n. 4 supra at 17-24.
16. Id. at 17-18, citing Howe v. DeShano, 922 SW2d 926 (Tenn. 1996).
17. Id. at 19-20.
22. Id.
23. See id.
24. MCR 2.117(2), see also supra, n. 19 supra at § 1.8.
25. Id.
26. See, e.g., In re Estate of Gore, unpublished op. of the Court of Appeals, issued December 3, 2009 (Docket No. 286674).
27. Id. (publication reversed).
28. See supra, n. 19 supra at § 1.8.
29. See supra, n. 19 supra at § 1.8.
30. Id. (publication reversed).
31. See supra, n. 19 supra at § 1.8.
32. See supra, n. 19 supra at § 1.8.
33. See supra, n. 19 supra at § 1.8.
34. MCR 2.117(2), see also supra, n. 19 supra at § 1.8.

Geoffrey S. Ward focuses his practice on estate planning and probate matters. He graduated magna cum laude from Thomas M. Cooley Law School, where he won 10 "book awards" and served on the board of the Law Review. Geoffrey has published several scholarly articles in various legal publications and is an active contributor forICLE. He lives in Macomb County with his wife, Kristin, and two daughters, Erin and Olivia.

—Nov 17, 2018

ENDNOTES

1. MCR 2.117(2).
3. Id.
5. Id.
6. Id.
7. Id.
10. Id. at 11, quoting Riggs, 355 Ala. 209, 792 So. 2d 1 (2001).
11. Id.
12. See Below, n. 8 supra at 524-525.
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30. Id. (publication reversed).
32. MCR 2.117(2).
33. See supra, n. 19 supra at § 1.8.
34. MCR 2.117(2), see also supra, n. 19 supra at § 1.8.
The Attorney-Client Privilege Is Alive 
And Well, Hallelujah!

By Lian de la Riva, Esq., Markowitz, Ringel, Trusty and Hartog, Miami, Florida

The Attorney-Client Privilege is an indispensable tool of any attorney. Practitioners rely on their client's communications and the free flow of information to be effective advocates. The privilege can be loosely traced back to the Roman Republic. In the 16th century, under the rule of Elizabeth I, the privilege was firmly established in English law. During the Elizabethan Era, the privilege was based on a concept of honor and barred any barrister from testifying against their client. Over time, the privilege morphed into the tool we utilize today. The privilege creates a sacred space between the attorney and the client, and therefore allows the attorney to provide "sound legal advice and advocacy." The doctrine of the Attorney-Client Privilege has been defined by the distinguished Dean Wigmore as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived." 

Florida first codified the Attorney-Client Privilege in 1976. However, certain privileged communications are not absolutely protected. An exception to the Attorney-Client Privilege was carved out for communications between an attorney and a client who is acting in a fiduciary capacity. This exception can be traced as far back as Trust cases in the English Courts. The Fiduciary Exception was particularly troublesome in the world of Guardianship, Probate and Estate Planning because the exception permitted certain communications to become discoverable. Due to litigants' (typically a beneficiary) creative arguments, the Fiduciary Exception was used to pierce the veil of protected communications, resulting in a chilling effect on the free flow of information from the fiduciary clients, whether a Guardian, a Personal Representative or a Trustee. The District Court of Appeal for the Second District of Florida recognized that billing records and other confidential communications between the fiduciary and her attorney could become discoverable if it was found that the services rendered were for the benefit of a third-party beneficiary. See Jacob v. Barton and Tripp v. Salkovitz. The United States Supreme Court also turned its attention to the matter of the Attorney-Client Privilege in the context of a fiduciary client in United States v. Jicarilla Apache Nation, and held that the fiduciary exception to privileged communications does not apply to the general trust relationship between the United States and Indian tribes.

Given the ambiguity and attacks on the Attorney-Fiduciary Client Privilege, in 2011 the Florida Legislature enacted Fla. Stat. §90.5021, which provides that communications between a lawyer and client acting as a fiduciary are privileged and protected from disclosure to the same extent as if the client were not acting as a fiduciary. Fla. Stat. §90.5021 was intended to clarify Florida law and protect communications between the attorney and the fiduciary client. The Florida Trust Code and Probate Rules were also amended to ensure qualified beneficiaries and interested persons were made aware of the Attorney-Fiduciary Client privilege applicability to both Personal Representatives and Trustees. Most practitioners sighed in relief upon the passing of this statute, but the relief was short lived.

Our state's Supreme Court has been balancing the fiduciary client's privilege versus the need to pierce the privilege for the benefit of the victim (typically a third-party beneficiary) of that privilege. Although passed in 2011, Fla. Stat. §90.5021 was not adopted until January 25, 2018. In 2014, the Supreme Court questioned the need for and casted doubt on the privilege on what appeared to be procedural grounds. Then again in 2017, the High Court outright declined to adopt the Fla. Stat. §90.5021. Thankfully, in part due to work of the Probate Rules Committee and this Section, the Supreme Court formally adopted Section 90.5021 of the Evidence Code in an out-of-cycle report.

This is a moment to rejoice and then review what many consider basic principles of the Attorney-Client Privilege. For seven years, we have cautiously advised our Fiduciary Clients of the potential litigation and possibility of communications becoming discoverable. Now is the time to take a proactive Approach...
approach and educate our clients about the intricacies of the Privilege, how it works, how it can be lost or waived and how the communications can be used against them. First you should assess each Client’s understanding of the privilege and evaluate the dangers of losing it on a case-by-case basis. A key point to review with our clients is when the privilege can be asserted, these basic elements must be present: a communication between lawyer and client and the purpose of which is to seek legal advice.

It must be understood that the Fiduciary Protection, found under Fla. Stat. §90.5021, is not absolute and can be pierced leading certain communications to become discoverable. Most often the privilege is lost by the intentional or inadvertent production of the communication to a third party, such as a beneficiary in a Trust or Probate Administration. Many times, production of a privileged communication occurs when a Fiduciary Client forwards an email thread including communications between them and their attorney. Fiduciary Clients should be consulted during the engagement process and during the progression of the matter of the dangers of making any disclosures or deciding to include beneficiaries in what would have been a privileged communication. Although cumbersome, a one-time review of communications your client intends on sending to third-parties to assess whether any privileged information is being disclosed is reasonable and efficient way to protect the privilege. Avoid electronic mail threads where privileged and non-privileged communications may be discussed interchangeably. It’s better to send separate emails. Finally, writing Attorney-Client Privilege in a subject line of a communication will not provide the protection if the communication is sent to a third party.

Endnotes
6 877 So. 2d 935 (Fla. 2d DCA 2004).
7 919 So. 2d 716 (Fla. 2d DCA 2006).
8 131 S.Ct. 2313 (2011).
11 In re Amendments to the Florida Evidence Code, 144 So.3d 536 (Fla. 2014).
12 In re Amendments to the Florida Evidence Code, 210 So.3d 1231 (Fla. 2017).
14 Notably, in most will and trust contexts, exceptions to the Attorney-Client Privilege have been codified to authorize the disclosure of most communications between an estate planning attorney and their deceased client. See, e.g., Fla. Stat. §90.502(4)(b), (d) and 16.
EXHIBIT C
<table>
<thead>
<tr>
<th>State</th>
<th>Recognize Fiduciary Exception</th>
<th>Authority</th>
<th>Rationale</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>No</td>
<td><em>Caplan v Benator</em>, 262 So.3d 672, (Ct of Civ App 2018) (citing Rule 502(d) Ala. R. Evid.)</td>
<td>Alabama Rules of Evidence § 502(d) states, “[t]here is no privilege under this rule as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by <em>intervivos</em> transaction.”</td>
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<td>Alaska</td>
<td>Neither rejected nor adopted</td>
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<td>Arizona</td>
<td>Yes</td>
<td><em>In re Kipnis Section 3.4 Trust</em>, 235 Ariz 153; 329 P3d 1055 (2014)</td>
<td>See ARS § 12-2234</td>
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<td>Arkansas</td>
<td>Yes</td>
<td><em>In re Estate of Torian</em>, 564 SW2d 521 (Ark. 1978)</td>
<td>Arkansas common law recognizes a distinct variation of the fiduciary exception to the attorney-client privilege under which the fiduciary and the beneficiaries of the subject estate are viewed as joint clients of the fiduciary’s attorney for purposes of the attorney-client privilege.</td>
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<td>California</td>
<td>No</td>
<td><em>Wells Fargo Bank v Superior Court</em>, 990 P2d 591 (Cal. 2000)</td>
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<td>Colorado</td>
<td>Adopted in Colorado federal court</td>
<td><em>Galena Street Fund, L.P. v Wells Fargo Bank, N.A.</em>, 2014 WL 943115 (March 10, 2014)</td>
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<td>Connecticut</td>
<td>No</td>
<td><em>Hubbell v Ratcliffe</em>, 50 Conn L. Rptr 856, (Conn Super Ct 2010)</td>
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<tr>
<td>Delaware</td>
<td>Recognized and</td>
<td><em>Riggs National Bank</em></td>
<td>Del Code Ann. Title 12 § 3333 states, “[e]xcept as provided in the”</td>
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<td>State</td>
<td>Status</td>
<td>Statute or Case Reference</td>
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<tr>
<td>Florida</td>
<td>Statutorily Repealed</td>
<td>Fla Stat § 90.502(2)</td>
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<tr>
<td>Georgia</td>
<td>Recognized, but not applied or adopted in probate context</td>
<td>St. Simons Waterfront, LLC v Hunter, Maclean, Exley &amp; Dunn, PC, 293 Ga 419; 746 SE2d 98 (2013)</td>
<td></td>
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<tr>
<td>Hawaii</td>
<td>No</td>
<td>Hawaii R. Probate Rule 42(a), (b).</td>
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<td></td>
<td>Where an attorney represents a fiduciary, then the fiduciary, not the beneficiaries, is the client of the attorney. The beneficiaries are not considered clients of the attorney, then they cannot pierce the privilege between attorney and client.</td>
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<td>Idaho</td>
<td>Unknown</td>
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<td></td>
<td>The fiduciary exception would undermine the sanctity of the attorney-client privilege. The source of payment of fees of the fiduciary’s attorney is not dispositive on the question as to whether the fiduciary or the beneficiary is the attorney’s client.</td>
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</tr>
<tr>
<td>Indiana</td>
<td>Unknown</td>
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 governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege.”
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<td>Iowa</td>
<td>Unknown</td>
<td>Herrmann v Rain Link, Inc., 2012 U.S. Dist. LEXIS 50553 (D. Kan. 2012).</td>
<td>Pointed out that no Kansas appellate court has adopted, or even addressed, the fiduciary exception or the scope of its application.</td>
</tr>
<tr>
<td>Kansas</td>
<td>No</td>
<td>Ethics Opinion 401 (1997).</td>
<td>In representing a fiduciary, the lawyer's client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. The lawyer's obligation to preserve client's confidences under MRPC 1.6 is not altered by the circumstance that the client is a fiduciary.</td>
</tr>
<tr>
<td>Maryland</td>
<td>Balancing test</td>
<td>Greenberg v State, 421 Md. 396, 409 (2011)</td>
<td>(1) Where legal advice of [any] kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection [may] be waived.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>No</td>
<td>Steinway v Bolden, 185 Mich App 234 (1990); MCR 5.117(A); In re Estate of Graves, Dec. 3, 2009 (Docket No. Steinway</td>
<td>Even though the personal representative retains the attorney, the attorney's client is the estate, not the personal representative, a conclusion supported by the fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and the fees are paid from the estate.</td>
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<tr>
<td>State</td>
<td>Requirement</td>
<td>Opinion</td>
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<td>Montana</td>
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<tr>
<td>Nebraska</td>
<td>No</td>
<td>In re Estate of Wagner, 386 N.W.2d 448 (Neb. 1986)</td>
<td></td>
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<tr>
<td>Nevada</td>
<td>Unknown</td>
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<tr>
<td>New Jersey</td>
<td>No; Yes for successor fiduciary</td>
<td></td>
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<tr>
<td>New Mexico</td>
<td>Not yet addressed by New Mexico state court and it was not recognized by a New Mexico federal court</td>
<td>Murphy v. Gorman, 271 F.R.D. 296 (D.N.M. 2010)</td>
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MCR 5.117(A): "Representation of Fiduciary. An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary."

*Graves:* When attorney is retained by a fiduciary, the attorney represents both the fiduciary and the estate.
Furthermore the federal court cited another New Mexico Court of Appeals case in which the court stated, “an attorney has no duty to the nonclient beneficiary of a client fiduciary, even when the attorney represents the client in the client’s role as a fiduciary, if such a duty would significantly impair the performance of the attorney’s obligations to his or her client.” *Murphy*, 271 F.R.D. at 317, citing *Durham v Guest*, 142 N.M. 817, 823 (2007). Accordingly, the federal court predicted that if the New Mexico Supreme Court was faced with the issue, it would decline to recognize the fiduciary exception to the attorney-client privilege and the federal court refused to recognize the exception in this case.

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<tr>
<th>State</th>
<th>Inquire</th>
<th>Case</th>
<th>Summary</th>
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<tr>
<td>New York</td>
<td>Yes</td>
<td><em>Hoopes v Carota</em>, 142 AD2d 906 (Sup Ct NY 1988)</td>
<td>Requires a showing of good cause from those seeking disclosure from the fiduciary balancing the competing factors for and against the privilege present in the individual case. But note that commentators have recognized that under the fiduciary exception analysis of Hoopes and Beck, “when a fiduciary seeks legal advice concerning the fiduciary’s own potentially conflicting obligations, including with respect to potentially different interests of beneficiaries, the fiduciary may assert privileges against the beneficiaries.” See Consultation with a Law Firm’s In-House Counsel on Matters of Professional Ethics Involving One or More Clients of the Law Firm, NY St Bar Assn Comm on Prof Ethics Op 789 (NYSBA Opinion 789) (Oct. 26, 2005)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Unknown</td>
<td>The fiduciary exception has not yet been considered by North Carolina appellate courts. However, it is predicted that if a North Carolina appellate court were to consider the issue in the future, it would likely reject the fiduciary exception because the North Carolina trust code only requires that the trustee is obligated to “provide reasonably complete and accurate information as to the nature and amount of the trust property” which is more narrow than the requirements enumerated in the Uniform Trust Code. See Mike Anderson, <em>Punctilios Without Privilege?</em>, WORLD SERVICES GROUP (Oct. 2012).</td>
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<tr>
<td>State</td>
<td>Fiduciary Exception</td>
<td>Source(s)</td>
<td>Description</td>
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<tr>
<td>North Dakota</td>
<td>Unknown</td>
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<tr>
<td>Ohio</td>
<td>No</td>
<td>Ohio Rev. Code Ann. § 5815.16(A)</td>
<td>“Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.” Ohio Rev. Code Ann. § 5815.16(A).</td>
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<tr>
<td>Oklahoma</td>
<td>Unknown</td>
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<tr>
<td>Oregon</td>
<td>No</td>
<td>Crimson Trace Corp v Davis Wright Tremaine LLC, 326 P3d 1181 (Sup Ct Ore 2013).</td>
<td>The attorney-client privilege is established through the legislative enactment of Oregon Evidence Code Section 503, which also enumerates exceptions to the privilege. In analyzing the existence of the fiduciary exception in the context of attorney to attorney communications within a law firm, the court concluded “that OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. Insofar as that list does not include a ‘fiduciary exception,’ that exception does not exist in Oregon. And the trial court erred in relying on that exception to compel production of communications that otherwise fell within the general scope of the privilege.” Note: the court’s reasoning rested on the idea that a court cannot supersede legislative enactments – i.e., re-write statutes. Since the ACP and its exceptions were legislatively created, the court wouldn’t effectively re-write the statute by adding an unwritten exception. The court noted that in other states (including Michigan), the ACP is created by common law, in which case courts would be free to adopt exceptions as they saw fit.</td>
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<tr>
<td>Pennsylvania</td>
<td>Yes</td>
<td>Pittsburgh History and Landmarks Foundation v Ziegler, 200 A3d 58 (Pa 2019); In re Estate of McAleer, 194 A3d 587 (2018); Follansbee v</td>
<td>In 2018, the Superior Court of Pennsylvania affirmed a lower court’s decision on the issue of the fiduciary exception. In deciding to recognize the fiduciary exception to the attorney-client privilege the court also discussed Comment j to Section 82 of the Third Restatement of Trusts which provides that, “[a] trustee is privileged to refrain from disclosing to beneficiaries or co-trustees opinions obtained from, and other communications with, counsel retained for the trustee’s personal protection in the course, or in anticipation, of</td>
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<tr>
<td>State</td>
<td>Unknown</td>
<td>Law or Statute Reference</td>
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<tr>
<td>South Carolina</td>
<td>No</td>
<td>“Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.”</td>
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<tr>
<td>South Dakota</td>
<td>Unclear</td>
<td>SDCL § 19-19-502 provides that there is no attorney-client privilege for “[c]laimants through the same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.” SDCL § 19-19-502(d)(2). However, South Dakota courts have not yet addressed the issue of the fiduciary exception.</td>
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In the comments to Tenn. Code Ann. § 35-15-813, which addresses the duties and powers of the trustee under Tennessee law, it is stated that “it is believed that overall Tennessee law gravitates toward the view that the fiduciary and not the beneficiary is the client.” The comments note that this conclusion was supported by the fact that the fiduciary exception to the attorney-client privilege is generally recognized in Tennessee, but limited by refusing to recognize the exception where the trustee has retained counsel for the “trustee’s personal protection.”
Tennessee Uniform Trust Code is primarily focused on achieving the settlor’s intent, which would be furthered by rejecting the notion of a fiduciary exception to the attorney-client privilege. 2013 Restated Comments to Official Text of Tenn. Code Ann. § 35-15-813.

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<th>State</th>
<th>Status</th>
<th>Case</th>
<th>Description</th>
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<tr>
<td>Texas</td>
<td>No</td>
<td><em>Huie v DeShazo</em>, 922 SW2d 920 (Tex 1996).</td>
<td>Rejecting the beneficiaries’ argument that a trustee's duty of disclosure extends to any communications between a trustee and the trustee's attorney because the trustee's affairs are the beneficiaries' affairs, the court held that notwithstanding a trustee's duty to its beneficiary, only the trustee, and not the beneficiary, is the client of the attorney. The court observed that a trustee's duty of full disclosure extends to all material facts affecting the beneficiaries' rights and that the attorney-client privilege does not limit this duty. It pointed out that a trustee could not cloak a material fact with the privilege by communicating it to an attorney, but it must be able to consult freely with his or her attorney to obtain the best possible legal guidance, and trustees might forsake legal advice or blindly follow counsel's advice without the privilege.</td>
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<td>Utah</td>
<td>Unknown</td>
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<tr>
<td>Vermont</td>
<td>Unknown</td>
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<td>The official comment to 14A V.S.A. § 813 (outlining the duties and powers of the trustee) states that “[t]he drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee’s attorney.” 14A V.S.A. § 813, Official Comment.</td>
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<tr>
<td>Virginia</td>
<td>No</td>
<td><em>Batt v Manchester Oaks Homeowners Association, Inc.</em>, 80 Va. Cir. 502 (Va. Cir. Ct. 2010)</td>
<td>In declining to recognize a fiduciary exception to the attorney-client privilege in a dispute between homeowners and members of a homeowners’ association, the Circuit Court of the City of Fairfax, Virginia noted that a fiduciary exception to attorney-client privilege would run “afoul” to the express intent of the Supreme Court of Virginia. Batt v Manchester Oaks Homeowners Association, Inc., 80 Va Cir. 502, 506-07. (2010). Furthermore, the court stated that “[t]he Fiduciary-Beneficiary Exception is a creature of the federal courts.</td>
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and has not been applied by any court in the Commonwealth of Virginia.” *Id.* at 506.

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<tr>
<th>State</th>
<th>Status</th>
<th>Statute Reference</th>
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<tbody>
<tr>
<td>Washington</td>
<td>Unknown</td>
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<tr>
<td>West Virginia</td>
<td>Unknown</td>
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<tr>
<td>Wisconsin</td>
<td>Unclear</td>
<td>Wis. Stat. § 905.03</td>
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<td>Wis. Stat. § 905.03 provides that no attorney-client privilege applies “to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.” Wis. Stat. § 905.03(4). However, Wisconsin courts have not yet addressed the issue of the fiduciary exception.</td>
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<tr>
<td>Wyoming</td>
<td>Unknown</td>
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Council Materials
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN
Friday, November 15, 2019 @ 9 a.m.
University Club of MSU

Agenda

I. Call to Order

II. Introduction of Guests

III. Excused Absences

IV. Lobbyist Report—Public Affairs Associates

V. Monthly Reports:
   A. Minutes of Prior Council Meeting (Mark Kellogg)—ATTACHMENT 1
   B. Chair’s Report
      1. Probate Section Demographics
      2. Follow up on Meeting Days for 2020-2021: Friday/Saturday
   C. Committee on Special Projects (Katie Lynwood)
   D. Legislative Analysis & Monitoring Committee (Dan Hilker)—ATTACHMENT 2
   E. Legislative Development and Drafting Committee (Nathan Piwowarski)

VI. Other Committees Presenting Oral Reports
   A. Amicus Committee (Andy Mayoras)—ATTACHMENT 3
   B. Tax Committee (Michael Shelton)—ATTACHMENT 4

VII. Other Committees Presenting Written Reports Only
    A. Tax Section Liaison (Neal Nuscholtz)—ATTACHMENT 5

VIII. Other Business

IX. Adjournment

Next Probate Council Meeting: Saturday, December 14, 2019, at 9 a.m.
Meeting of the Council of the
Probate and Estate Planning Section of
the State Bar of Michigan

October 19, 2019
Ann Arbor, Michigan

Minutes

I. Call to Order

The Chair of the Council, Christopher A. Ballard, called the meeting to order at 11:30am.

II. Introduction of Guests

A. Meeting attendees introduced themselves.
B. The following officers and members of the Council were present: Christopher A. Ballard, Chair; David P. Lucas, Chairperson Elect; David L.J.M. Skidmore, Vice Chair; Hon. Michael L. Jaconette; Michael G. Lichterman; Christine M. Savage; Christopher J. Caldwell; Kathleen M. Goetsch; Katie Lynwood; Melisa M.W. Myśliwiec; Neal Nusholtz; Andrew W. Mayoras; Richard C. Mills; and Kenneth Silver. The Chair noted that a quorum was present, in person.
C. The following liaisons to the Council were present: Jon Hohman; and Jeanne Murphy.
D. Others present: Aaron Bartell; Ryan Bourjaily; Daniel Hilker; Chiara Mattieson; Michael D. Shelton; and Rebecca Wrock.

III. Absences

The following officers and members of the Council were absent with excuse: Mark E. Kellogg, Secretary; James P. Spica, Treasurer; James F. Anderton; Angela M. Hentkowski; Robert C. Labe; Nathan R. Piwowarski; and Nazneen Hasan Syed. The following member of the Council was absent without excuse: Raj A. Malviya.

IV. Lobbyist Report - Public Affairs Associates

The Chair stated that the Section’s Lobbyist was not present at the meeting.

V. Monthly Reports:

A. Minutes of Prior Council Meeting (submitted by Mark E. Kellogg): it was moved and seconded to approve the Minutes of the September 20, 2019 meeting of the Council,
B. Chair’s Report:

1. The Chair referred the attendees to the Chair’s Report, which is Attachment 2 as included in the meeting materials, and the Chair invited comments from Council members about any part of the Chair’s report.

2. The Chair stated that the Chair would defer discussion regarding the Council’s regularly-scheduled meeting days to the Council’s November meeting.

C. Committee on Special Projects (Katie Lynwood). Ms. Lynwood reported on three matters discussed by the Council’s Committee on Special Projects:

1. The Committee on Special Projects discussed a draft of legislation regarding a lawyer as drafter of an instrument benefitting the drafting lawyer, which draft is included in the meeting materials. The Committee’s motion is:

   The Probate and Estate Planning Section supports the enactment of legislation to add a new section 700.1215 to the Estates and Protected Individuals Code, captioned “Gifts to drafting lawyers and other disqualified persons,” in the form presented to the meeting; and

   The Chair of the Section’s Lawyer as Drafter Committee is authorized to modify the Section’s public policy position with nonsubstantive changes, as determined by such Chair.

   The Chair stated that since this would be a Public Policy Position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded the vote of 15 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 8 not voting. The Chair declared the motion approved.

2. Ms. Lynwood reported that the Committee on Special Projects had discussed the matter as to whether a trust may be a co-tenant with right of survivorship, but that no action was requested of the Council at this time.

3. Ms. Lynwood reported that the Committee on Special Projects had discussed a memorandum included in the meeting materials in the form of a memorandum to the Legislative Development and Drafting Committee, regarding vehicle transfer
on death legislation, but that no action was requested of the Council at this time. Ms. Lynwood invited comments from Council members about any part of the memorandum regarding vehicle transfer on death legislation.

D. Legislative Analysis and Monitoring Committee (Dan Hilker). Mr. Hilker reported to the Council on three items discussed by, and acted upon, by the Legislative Analysis and Monitoring Committee.

1. HB 4922 would repeal Michigan's estate tax. Certain persons reported to the Committee opposition to such repeal, since current law could help the State, without harm to the State. Following discussion, Mr. Hilker reported that the Committee did not recommend any action by the Council on this proposed legislation at this time. The Chair requested that, before the Council takes any action on this matter, Mr. Hilker further discuss this matter with such objecting persons, and with the Section's lobbyist.

2. HB 4264 and 4265, and SB 108, 109, 412, 413 constitute a package of proposed legislation to address issues relating to elder abuse.
   a. Such legislation had been reported favorably out of the House Family Juniors and Seniors Committee, and has been referred to the House Judiciary Committee. Mr. Hilker reported that the package of legislation included criminal penalties for elder abuse, and convictions implicated EPIC's slayer statute, and common-law presumptions of undue influence. Members of the Council suggested that the Council and the Section provide input on such legislation because, notwithstanding criminal sanctions for violation (with respect to legislation regarding criminal sanctions, the Council typically declines to take action). The Legislative Analysis and Monitoring Committee wants to make the Council aware of such legislation, for action by the Council with respect to such legislation. Mr. Hilker reported that the Elder Law Section of the State Bar has taken a position against such legislation. The Committee's motion is:

   The Probate and Estate Planning Section opposes HB 4260 as written, and Council of the Section, through the Chair of the Section's Legislative Analysis and Monitoring Committee (or such Chair's designee) desires to consult with the Sponsor of such legislation to modify such legislation such that it will be in form anticipated to be acceptable to the Section.

The Chair stated that since this would be a Public Policy Position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded the
vote of 15 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 8 not voting. The Chair declared the motion approved.

b. The Chair established an ad hoc Criminal Elder Abuse Committee, and the Chair appointed Kurt Olson and Mike Lichterman as co-chairs of such Committee. The Chair requested that others who are interested in this matter, and willing to work on this matter contact Messrs. Olson and Lichterman.

3. Durable Powers of Attorney are not being accepted or respected by financial institutions. Mr. Hilker reported that financial institutions have concerns about durable powers of attorney because, at initial intake, an individual either has to make a legal determination regarding the authority of the agent, or refer the instrument to the institution's legal department. Mr Hilker described an approach under which (i) a lawyer would prepare a durable power of attorney; (ii) the lawyer would prepare a statutory form with check-boxes, to indicate what powers the attorney-in-fact holds by reason of the document; and (iii) a cover letter is presented to the financial institution, with the durable power of attorney, and the statutory check-box document. Mr. Hilker suggested that such a protocol might satisfy banks. Following discussion by the Council, the Chair requested that Mr. Hilker begin the drafting of legislation to be proposed to the State legislature, and the Chair requested that other Council members who have comments or an interest in such matters contact Mr. Hilker.

E. Legislative Development and Drafting Committee (Nathan Piwowarski). The Chair stated that there was no report to this meeting from the Legislative Development and Drafting Committee.

VI. Other Committees Presenting Oral Reports

A. Court Rules, Forms, and Proceedings (Melisa Mysliwiec). Ms. Mysliwiec reported that proposed Administrative Order 2018 - 24, issued September 11, 2019, would modify Rule 8.301 of the Michigan Court Rules, to provide that only the Probate Registers and Deputy Probate Registers may perform certain administrative tasks that would otherwise be performed by the Probate Judge. The Hon. Michael Jaconette reported that the Michigan Probate Judges Association is taking no position ADM 2018 - 24 at this time. Ms. Mysliwiec reported that the Court Rules, Forms, and Proceedings Committee is making no request of the Council to take a position on this matter at this time.

B. Guardianship, Conservatorship, and End of Life (Kathy Goetsch). Ms. Goetsch referred to her report included in the meeting materials, which Ms. Goetsch stated was prepared by her, generally without input from other Committee members. Ms. Goetsch reported that, although the Guardianship, Conservatorship, and End of Life Committee is making no
request of the Council to take action on this matter at this time, the Council should be prepared to be proactive and take action since action by others, including the Legislature, could happen at any time.

VII. Other Committees Presenting Written Reports Only

A. Uniform Law Commission (James Spica). The Chair referred to Mr. Spica's report, which is included in the meeting materials.

B. Liaison to the Tax Section (Neal Nusholtz). The Chair referred to Mr. Nusholtz' report, which is included in the meeting materials. Mr. Nusholtz distributed a flyer about a Walk-In Clinic, sponsored by the Internal Revenue Service, scheduled for October 22, 2019, at which representatives of taxing authorities would be available to help people resolve tax problems.

VIII. Other Business

The Chair asked if there was any other business to be brought before the meeting. Mr. Skidmore requested that the Council approve an expenditure of $15,000.00 from the Section for the Section's regular sponsorship of the ICLE Annual Probate Institute.

IX. Adjournment

Seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 12:25 am.

Respectfully submitted,
David P. Lucas, acting Secretary
HB 4922 (2019)

Motion for Public Policy Position in Support

Daniel S. Hilker, Chair of the Legislation Monitoring and Analysis Committee, moves that the Council for the Probate and Estate Planning Section of the State Bar of Michigan take the following Public Policy Position in Support of HB 4922 (2019) with explanation:

Position: Support.

Explanation of the position: The Section supports the repeal of the Michigan Estate Tax Act. The current law has no practical effect. The Michigan Estate Tax Act depends upon the existence of a federal estate tax credit for state estate taxes. The credit was repealed in 2001 and is unlikely to be re-enacted by Congress.

Discussion: This recommendation is made after the review of comments from the following individuals knowledgeable on this subject: George Gregory, Robert Brower, Robin Ferriby, and Dennis Mitzel.

HB 4922 has passed out of the House Committee on Tax Policy and was referred to the House Committee on Ways and Means. If enacted, HB 4922 would repeal the Michigan Estate Tax Act, which is Act 188 of 1899, MCL 205.201 – 205.256.

In its current form, the Michigan Estate Tax is a "sponge tax." Sponge taxes were enacted by the majority of states when federal law granted a credit against federal estate taxes for certain estate taxes paid to the state. Michigan's Estate Tax is designed to take full advantage of the allowable credit, and therefore "sponge" federal estate tax revenue without increasing the tax burden on Michigan citizens.

The repeal of the federal credit in 2001 made sponge taxes completely ineffective by 2005. It has been 18 years since the repeal, and there has been no revival of the federal credit. Congress will not re-enact the credit and voluntarily give federal estate tax revenue back to the states.

The Michigan Estate Tax Act has no practical effect on Michigan citizens, and there is no expectation that it ever will.

A copy of the present language will be retained, along with the considerable time and energy that certain section members spent working on it. Such language will be available for re-submission as a new bill in the event that the federal credit is revived. Since a sponge tax brings in revenue without adversely affecting any Michigan residents, it would receive quick bi-partisan support. At that time, the Council could also invest the time in an overhaul of the legislation to make it easier for the Department of Treasury to apply and easier for taxpayers to understand. Until that improbable day, the Michigan Estate Tax Act should be repealed.

November 7, 2019

Daniel S. Hilker
MEMORANDUM

To: Probate Council
From: Andrew W. Mayoras
Subject: Application for Amicus Brief - Schaaf v. Forbes
Date: November 5, 2019

Overview

This appeal primarily involves a single, discreet issue: Can a trust own real property as a joint tenant with rights of survivorship?

The Court of Appeals, in a 2-1 split, unpublished decision (dated August 6, 2019), ruled that a trust can do so. The majority opinion reasoned that the common law prohibition on trusts and other entities that do not “die” owning property as a JTWROS was supplanted by MCL 554.44 and MCL 554.45.

554.44 states that “[a]ll grants and devises of lands, 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 provides an exception to that rule, stating, “[t]he preceding section shall not apply to mortgage nor to devises or grants made in trust, or made to executors, or to husband and wife.”

The COA reasoned that a “trust” is considered to be a “person” under MCL 8.3 (even though 8.3 does not include trusts) as well as in the EPIC definition section, MCL 700.1106(o) and (i). It further ruled that section 45’s language “grants made in trust” expressly recognized trusts to be capable of owning land as a JTWROS.

Finally, the COA noted that the rule against perpetuities means that trusts do end at some point, unlike corporations, so they can, in a sense, “die.”

The dissent ruled that these statutes did not replace common law, and because a trust cannot die during the life of the cotenant (noting that the rule against perpetuities extends far beyond the lifespan of a living cotenant), it cannot hold property as JTWROS. Further, MCL 8.3 does not list trusts, and in fact, must be read dependent on the context of the given statute. The dissent urges for application of common sense, and many years of settled common law, that since a trust cannot die, it cannot own property JTWROS.

There is also a secondary, subject-matter jurisdictional issue. The defendant in the underlying case raised probate court vs. circuit court jurisdiction for the first time on appeal (the case was started in circuit court). The majority remanded to allow the circuit court to address that issue before the COA.
ruled on it. The dissent argued that circuit court had jurisdiction over this dispute, even though a trust was involved, because interpretation, distribution or administration of a trust was not at issue.

The plaintiffs, who lost in the court of appeals, have now filed an application for leave to the Supreme Court and have submitted amicus requests to the Probate Section as well as to the Real Property Section, solely on the issue of the whether a trust can hold real estate as a JTWROS. They have not asked us to address the jurisdictional issue.

Recommendation

The Amicus Committee recommends that the Probate Section grant the application to file an amicus brief at this time. While we, at times, have recommended not filing amicus briefs at this stage of an appeal until after the Supreme Court decides to grant leave or not, we feel one is warranted in this instance. If the Supreme Court does not grant leave, this case would result in uncertainty for future estate planners, probate attorneys, and their clients in terms of whether and to what extent deeds would be interpreted in the future when a trust is a co-owner. As such, we recommend supporting the application for leave with an amicus brief, potentially considering a joint brief with the Real Property Section.

We agree with the applicant and the dissenting COA opinion that because a trust cannot die, consistent with common law, it should not be permitted to hold property JTWROS. Further, as the applicant argues, given the majority COA’s ruling, a natural extension would be that deeds which are silent would actually carry a presumption of JTWROS for trusts (based on the exception to the statutory tenants in common statute, under the COA’s reading of “grants made in trust” to be an exception to the general rule). We fear that this could have many unintended consequences for deeds that may be interpreted to be JTWROS under this new ruling.

Additionally, because this opinion is unpublished, it is not binding, so some courts may follow this ruling and others may not. Even if the Supreme Court were to affirm the Court of Appeals, at least there would consistency and certainty going forward.

Finally, the committee discussed whether to include the jurisdictional issue in an amicus brief and ultimately decided against it. While there is a compelling argument that this case does involve declaration of rights of a trust and therefore is within the exclusive jurisdiction of the probate court, the majority COA opinion did not address the issue.

We fear that if we raise this jurisdictional issue in an amicus brief, it could lead to a remand on that issue alone, without the Supreme Court addressing the substantive issue. Even if the Supreme Court were to vacate the COA opinion, if it does not resolve this issue with finality one way or the other, it would leave too much uncertainty on a legal principle that was previously accepted to be definitive, prior to this recent opinion. So we recommend addressing only the primary, substantive issue and not taking a position on jurisdiction.
Application for Consideration

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

Date 10/14/19

Name Nicholas Curcio

Firm Name Curcio Law Firm PLC

Address 622 E. Savidge Street, Suite 108

City Nunica State MI Zip Code 49456

Phone Number 616-430-2201 Fax Number

E-mail address ncurcio@curciofirm.com

Attach Additional Sheets as Required

Name of Case Schaaf v. Forbes, COA Case No. 343630

Parties Involved Plaintiffs seeking leave to appeal: Cindy Schaaf, Colleen Fryer, & Gwen Mason

Defendant: Angie Forbes

Current Status Preparing application for leave to appeal to Michigan Supreme Court

Deadlines Application due: November 7. No deadline for amicus support, but within 2 months ideal.

Issue(s) Presented Whether trusts can own property as joint tenants with rights of survivorship.
Michigan Statute(s) or Court Rule(s) at Issue: MCL 554.45

Common Law Issues/Cases at Issue: Whether trusts can own property as joint tenants with rights of survivorship.

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? The COA's decision displaces the longstanding common law rule that only natural persons can own property as joint tenants. The Court's interpretation of MCL 554.45 not only allows trusts to own property as joint tenants, but also establishes a presumption that any deed conveying land to a trust and another party creates a joint tenancy. This new presumption is an aberration in property law, that appears to be a departure from the law in every other state.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? By altering longstanding presumptions in the construction of deeds, the COA's interpretation of MCL 554.45 will frustrate expected inheritances throughout the state. Specifically, in circumstances where a deed conveys land to a trust and individuals as co-owners (without specifying the type of co-ownership) the individuals will be deprived of their expected future interests because they will rarely "outlive" the co-owner trust, which only "dies" when the rule of perpetuities requires its dissolution.

Note: We are also seeking amicus support from the Real Property Section. There may be an opportunity for a joint brief filed by the two sections.
STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-
Appellees,

v

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-
Appellant.

Before: TUKE L, P.J., and SERVITIO and RIORDAN, JJ.

PER CURIAM.

In this dispute among co-owners of real property, defendant appeals as of right the circuit court’s orders voiding certain purported conveyances, ordering that the property be sold intact in lieu of partitioning it, and awarding plaintiffs contribution relating to the costs associated with certain earlier litigation connected with the subject property. We reverse in part, affirm in part, vacate in part, and remand to the circuit court for further proceedings consistent with this opinion, including consideration of whether, in light of this holding, the circuit court has subject matter jurisdiction to hear this case.¹

¹ In her reply brief on appeal, defendant challenged the jurisdiction of the circuit court to hear and decide this case, on the basis of MCL 700.1302(b)(vi)’s grant of “exclusive legal and equitable jurisdiction” to the probate court over “[a] proceeding that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary,” including to “determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.” Although a party may not normally raise a new issue in a reply brief, MCR 7.212(G), “a challenge to subject-matter jurisdiction may be raised at any time.”
I. FACTS

Mae Fitzpatrick and Leo Bussa, mother and son, jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980s and 1990s, a portion of the waterfront property was divided into seven separate parcels for residential development. Access to the seven lots was through the subject parcel by an easement on a private road, Bussa Lane. After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel. Bussa Lane provided the only means of access to the latter parcel as well.

Fitzpatrick died in 2004, leaving Bussa as the trustee of the Fitzpatrick Trust. Bussa endeavored to restructure ownership of the subject 60-acre parcel by executing five conveyances. First, he, as trustee of the Bussa Trust, conveyed to himself, as an individual, the trust's half interest. He then conveyed that interest to himself, defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while retaining his own enhanced life estate. This left the Fitzpatrick Trust retaining its half interest in the subject parcel as a tenant in common, and the other half, formerly that of the Bussa Trust, shared by Bussa personally, along with defendant and plaintiffs Schaaf and Fryer, as joint tenants with rights of survivorship.

Bussa then, as trustee of the Fitzpatrick Trust, simultaneously conveyed half of the latter trust's interest to himself as trustee of the Fitzpatrick Trust, and to plaintiff Mason, "as Joint Tenants with Rights of Survivorship," while retaining his own personal enhanced life estate, and the other half of that interest to himself, again as trustee of the Fitzpatrick Trust, and to defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while again retaining his own enhanced life estate.

Shortly before he died, Bussa commenced litigation relating to a proposed subdivision of the parcel and use of the Bussa Lane easement. The owners of the seven adjacent parcels objected to any increased burden on that easement, and they contested the litigation. Upon Bussa’s death, the instant parties were substituted as plaintiffs in the case, who continued the litigation. That case ended in a ruling that acknowledged that the 60-acre parcel had the right to use the easement, but prohibited the further burdening of the easement by allowing additional owners or newly created parcels to use it.

Plaintiff Mason, as successor trustee of the Fitzpatrick Trust, drew up and filed deeds confirming the transfers from Bussa to the remaindermen. Plaintiffs contested the validity of the conveyances that purport to have the Fitzpatrick Trust as a joint tenant with rights of survivorship. The circuit court agreed that “a Trust cannot hold Property as a joint tenant with rights of survivorship,” and thus that the Fitzpatrick Trust “had no authority to convey the

Adams v Adams, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). However, we conclude that it is appropriate to permit the circuit court to decide this issue in the first instance.

2 An enhanced life estate is “a life estate reserved in the grantor and enhanced by the grantor’s reserved power to convey.” Frank, Ladybird Deeds, Mich BJ 30, 30 (June, 2016).
Property as joint tenants with rights of survivorship.” The court voided the attendant conveyances, which left the interests in the Fitzpatrick Trust’s half of the subject parcel to pass in accord with the terms of the trust itself. The circuit court recognized the resulting interests in the subject property as follows:

- **Gwen Mason (Plaintiff)**
  - An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;

- **Cindy Schaaf (Plaintiff)**
  - An undivided 16\(\frac{2}{3}\) percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and
  - An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;

- **Colleen Fryer (Plaintiff)**
  - An undivided 16\(\frac{2}{3}\) percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and
  - An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;

- **Charlene Forbes (Defendant)**
  - An undivided 16\(\frac{2}{3}\) percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and
  - An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The court summarized the ownership situation as “an undivided one-half of the Parcel . . . held by the Parties as tenants in common” and “[t]he other undivided half . . . owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship.” The parties do not dispute that the circuit court correctly identified the interests of the parties if indeed Bussa’s and Mason’s conveyances of the Fitzpatrick Trust’s real property are set aside.

The circuit court concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel’s reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, “partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved.” Accordingly, the court ordered
that the property be sold intact.

The circuit court further held that the parties, "[a]s cotenants and beneficiaries of Leo Bussa," were "jointly and equally responsible for the costs and attorney fees" associated with the earlier litigation concerning the easement, and also "for the real estate taxes and expenses associated with maintenance of the Property." The court set forth detailed findings and calculations, and concluded that plaintiffs were "entitled to $30,000.86 of Defendant's share from the sales proceeds of the Property." This appeal followed.

II. STANDARD OF REVIEW


III. JOINT TENANCY WITH RIGHTS OF SURVIVORSHIP HELD BY A TRUST

The circuit court held, without reference to any legal authority, that the conveyances from the Fitzpatrick Trust failed by operation of law. On appeal, plaintiffs argue, without citation to any legal authority, that the circuit court correctly decided this issue. We disagree.

Plaintiffs' position finds some support in the common law, where corporations and sovereigns could not hold title as a joint tenant because the "king and corporation can never die." 2 Blackstone, Commentaries on the Laws of England, p 184. Presumably, the lack of reciprocity in survivorship precluded these entities from holding and conveying land in this manner. See 6A Fletcher, Cyclopedia of the Law of Corporations § 2816; 2 Tiffany Real Prop §423 (3d ed); 10 McQuillin Mun Corp §28:19 (3d ed). Notably, the common law rule was limited to corporations and sovereigns, and was not explicitly extended to trusts, which do not enjoy a perpetual existence because of the rule against perpetuities. However, to the extent that the common law does support plaintiffs' position, it has been abrogated by statute.

MCL 554.44 states that, "[a]ll grants and devises of lands, 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." (Emphasis added.) Thus, § 554.44 creates a presumption in favor of tenancy in common. Matter of Estate of Kappier, 418 Mich 237, 239; 341 NW2d 113 (1983). MCL 554.45 provides an exception to this rule, stating that, "[t]he preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife." (Emphasis added.) These statutes abrogate the common law principles regarding joint tenancy, and because they are not limited to natural persons or otherwise exclude trusts, the conveyance at issue does not fail by operation of law.

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3 The common law rule against perpetuities has been adopted in Michigan by statute, but has been amended to allow for perpetual trusts of personal property. MCL 554.51, et seq.; MCL 554.71, et seq.; 554.91 et seq.; Moffit v Sederlund, 145 Mich App 1, 14; 378 NW2d 491 (1985).
MCL 8.3 states, “In the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature.” MCL 8.3/ states that “[t]he word ‘person’ may extend and be applied to bodies politic and corporate, as well as to individuals.” Although this definition does not expressly include trusts, it does show the intention that the term “person” include entities other than natural persons. Additionally, the legislature could have limited the term “person” in § 554.44 to mean only natural persons. We cannot read into a statute what the legislature did not include, Book-Gilbert v Greenleaf, 302 Mich App 538, 547; 840 NW2d 743 (2013), and limiting § 554.44 to apply only to natural persons would require this Court to rewrite the statute. Moreover, the presumption established in § 554.44 is limited by § 554.45, which expressly exempts “grants made in trust.” Words in a statute should not be construed in a vacuum, but should be read together to harmonize the meaning, giving effect to the act as a whole. GC Timmis & Co v Guardian Alarm Co, 468 Mich 416, 421; 662 NW2d 710 (2003). The express exemption in § 554.45 of “grants made in trust,” along with its cross-reference to § 554.44, further evidences the legislative intent to expand the meaning of “person” to include trusts.

Additional textual support is found in MCL 565.49, which states:

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.

4 Notably, MCL 8.3/ does not state that the term “person” can extend and “be applied only to bodies politic and corporate, as well as to individuals” as the dissent concludes. MCL 8.3/ does not limit “individuals” to mean only natural persons. Because so, we apply the ordinary meaning of the term, Grossman v Brown, 470 Mich 593, 598; 685 NW2d 198 (2004), and turn to Black’s Law Dictionary (11th ed), which defines “individual” as “1. Existing as an indivisible entity. 2. Of, relating to, or involving a single person or thing, as opposed to a group.” (Emphasis added.) Returning to the definition of “person” we note that Black’s Law Dictionary (11th ed) defines the term as follows:

1. A human being – Also termed natural person. 2. The living body of a human being <contraband found on the smuggler’s person>. 3. An entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being • In this sense, the term includes partnerships and other associations, whether incorporated or unincorporated. [Emphasis added.]

Thus, the plain and ordinary meaning of the terms “individual” and “person” aligns with the definition provided by MCL 8.3/.
Again, the legislature abrogated the common law by statute, and abolished strict adherence to the four unities doctrine. *Albro v Allen*, 434 Mich 271; 454 NW2d 85 (1990). However, the statute includes no language which hints at an intent to limit to natural persons the ability to hold a joint tenancy with rights of survivorship. Moreover, the statute requires that this Court to give full effect to the conveyance despite a grantor-trustee also being a grantee on an instrument attempting to convey a joint tenancy with a right of survivorship.

Finally, there are no provisions in EPIC\(^5\) that suggest any legislative intent to prohibit a trust from holding and conveying real property in this manner. Rather, in the definitions section of EPIC, MCL 700.1106(o), defines “person” as “an individual or an organization.” MCL 700.1106(i), further defines “organization” as, “a corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity.” (Emphasis added.) In Article II of EPIC, which concerns intestacy, wills, and donative transfers, the legislature has limited the term “persons” in the following manner:

1. This part shall be known and may be cited as the “disclaimer of property interests law”.
2. As used in this part:
   3. “Person” includes an entity and an individual, but does not include a fiduciary, an estate, or a trust. [MCL 700.2901 (emphasis added).]

“Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion.” *People v Pelto/a*, 489 Mich 174, 185; 803 NW2d 140 (2011). “Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.” *Id.* (cleaned up).

When reading the act as a whole, it is apparent the legislature knew how to limit the definition of person to exclude trusts from the definition of “person” as it did so in § 700.2901. However, this Court cannot read that same limiting language into the statutes regarding property conveyances, §§ 554.44-45 and § 565.49, or read as surplusage the provisions in § 700.1106 which recognize a trust as a person. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (“In interpreting a statute, we must avoid a construction that would render part of the

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\(^5\) The Estates and Protected Individuals Code, Act 386 of 1998 (EPIC). “In 1998, the Michigan Legislature enacted EPIC, 1998 PA 386, which became effective April 1, 2000. The new law, which repealed and replaced the Revised Probate Code, 1978 PA 642, MCL 700.1 et seq., was intended to modernize probate practice by simplifying and clarifying the law concerning decedents’ affairs and by creating a more efficient probate system. MCL 700.1201; MCL 700.1303(3).” *In re Leete Estate*, 290 Mich App 647, 661; 803 NW2d 889 (2010).
Accordingly, we hold that a trust may hold and convey real property as a joint tenant with rights of survivorship. The conveyances from the Fitzpatrick Trust to itself, plaintiffs, and defendant, as joint tenants with rights of survivorship, do not fail by operation of law, and we reverse the circuit court’s ruling on this issue.

IV. PARTITION AND CONTRIBUTION

Additionally, the circuit court’s ruling on Count II, requesting partition of the property, was based on the proportionate property interests of the parties, which in turn was based on an erroneous legal conclusion, and is therefore vacated.

With regard to Count III, plaintiffs’ request for contribution, we affirm. “Contribution is an equitable remedy based on principles of natural justice.” Tkachik v Mandeville, 487 Mich 38, 47; 790 NW2d 260 (2010). The circuit court’s ruling on this issue was not made with regard to the respective property interests of the parties. In fact, it was made in disregard of those interests, assessing the four parties equal shares of the costs, relying on the equitable maxim that “equality is equity.”

6 The dissent presumably concludes that the legislature has not abrogated the common law, and therefore, a trust cannot hold property as a joint tenant with the right of survivorship because trusts cannot die as a natural person does. As we stated supra, this is a questionable extension of the common law, which only prohibited the monarch and corporations from holding property in this manner. Blackstone and the seminal case, Law Guarantee and Trust Society v Governor & Co of the Bank of England, 24 QBD 406 (1890), teach that the fundamental principle underlying the right of survivorship is the reciprocity of survivorship, meaning that no party may exist perpetually. See 2 Blackstone, Commentaries on the Laws of England, pp **184-185, n 33 (stating that the right of survivorship, or jus accrescendi, “ought to be mutual” but that another reason for prohibiting corporations from holding such rights is that it might be “ruinous to the family of the deceased partner” to permit capital or stock to pass in this manner, and thus, “[t]he right of survivorship, for the benefit of commerce, holds no place among merchants”) (citation omitted). This reasoning does not apply to trusts that cannot exist in perpetuity. See MCL 554.51, et seq.; MCL 554.71, et seq.; 554.91 et seq. Accordingly, there is no reason why the right of survivorship should be made exclusive to beings that enjoy a natural life, as opposed to trusts that also are subject to the rule against perpetuities.

Further, the dissent recites the Black’s Law Dictionary (11th ed) definitions of “right of survivorship” and “death” for the proposition that the right of survivorship may only be held by a natural person susceptible to “cessation of all vital functions and signs.” However, the complete entry for “death” reads as follows: “The ending of life; the cessation of all vital functions and signs. — Also termed decease; demise.” “Demise” is defined as, “[t]he death of a person or (figuratively) of a thing; the end of something that used to exist <the corporation’s untimely demise>.” Black’s Law Dictionary (11th ed). Accordingly, the plain meaning of the terms associated with rights of survivorship do not limit enjoyment of this right to only natural persons.
V. LATE-OFFERED DOCUMENTATION

Defendant argues that the circuit court erred by receiving, and considering, more than 300 pages of documentation plaintiffs offered only as the case proceeded to the issue of contribution. We disagree. We review a circuit court’s evidentiary rulings for an abuse of discretion. Price v Long Realty, Inc, 199 Mich App 461, 466; 502 NW2d 337 (1993). This includes a court’s decisions concerning discovery. Baker v Oakwood Hosp Corp, 239 Mich App 461, 478; 608 NW2d 823 (2000). “A trial court does not abuse its discretion when its decision falls within the range of principled outcomes.” Rock v Crocker, 499 Mich 247, 260; 884 NW2d 227 (2016).

Defendant characterizes plaintiffs’ late submission of documents as occurring less than 24 hours before trial, but, in fact, it was on the eve of the day originally scheduled for trial on the issue of contribution, but which proceeding brought to light that plaintiff Fryer could not be present because of a medical issue, and also that the parties had agreed to have the court decide the question of contribution on the basis of briefing to be completed several weeks hence.

In responding to defendant’s motion to disallow the recent submissions, the circuit court took into account, among other things, that a decision on contribution was still several weeks away:

First, any documents that were identified either formally as trial exhibits or that were produced as part of discovery are available as trial documents in this case, which would include largely apparently, based on the representations of counsel, the documentation that has been offered or is intended to be offered by the plaintiff in this case; however, any documents that were not specifically identified or reasonably identified pursuant to the normal general identifications that attorneys use in their witness and exhibit lists would not be admissible. There will be an opportunity in reply briefs for argument with regard to admissibility of documentation. So, my expectation is that probably largely in the reply briefs there will be arguments regarding admissibility of individual documents, the parties are welcome to make those for any reason whatsoever and the Court will rule on those in a case by case basis. But, again, these documents were largely provided by the defense, they are known to the defense, while they were not specifically identified as trial exhibits and while defendant is correct the initial trial was to be heard I believe in the fall of 2016, which would mean the initial trial exhibits would have been due in the fall or late summer, August probably of 2016, we are now six months beyond that, we have had multiple hearings on this matter since that time, the element of surprise if you will particularly with regard to matters that have been produced pursuant to discovery requests simply doesn’t exist. The parties know what the files are, they know what the potential exhibits are, so, again, we’ll allow matters that are at least identified somehow in the witness and exhibit list and we’ll take argument regarding anything that isn’t or any objections to matters that are on the witness exhibit list in the reply briefs and the Court will decide those on a case by case basis.

On appeal, defendant continues to complain about the filing of "305 pages of proposed
trial exhibits,” without any of the differentiation that the circuit court called for. Further, defendant does not dispute the validity of the court’s distinguishing between documents that were and were not “specifically identified or reasonably identified pursuant to the normal general identification that attorneys use in the witness and exhibit lists,” does not take issue with the court’s statement concerning what would and would not be deemed admissible thereafter, and does not assert that she acted on the invitation to specify objectionable documents in the briefing to follow, let alone that the circuit court made any erroneous decisions in connection with such activity.

To summarize, defendant on appeal reiterates the general objection to plaintiffs’ offering of more than 300 pages of documents collectively, with no acknowledgement that the circuit court was prepared to distinguish the offerings in meaningful ways and issue decisions on admissibility accordingly. Defendant’s failure to offer cogent argument relating to the circuit court’s thoughtful ruling from the bench on her objection to plaintiffs’ recent offering of abundant production, or to assert that she accepted the court’s invitation to sort through the documents and offer more nuanced reasons for objecting to the admission of some, constitutes abandonment of the issue. See DeGeorge v Warheit, 276 Mich App 587, 594-595; 741 NW2d 384 (2007) (“It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant’s arguments, and then search for authority either to sustain or reject the appellant’s position.”).

VI. CONCLUSION

We reverse in part, vacate in part, affirm in part, and remand to the circuit court for further proceedings consistent with this opinion, including consideration of whether, in light of this holding, the circuit court has subject matter jurisdiction to hear this case.

/s/ Jonathan Tukel
/s/ Michael J. Riordan
I respectfully dissent. While I agree with the majority that the circuit court did not abuse its discretion in receiving and considering more than 300 pages of documentation that plaintiffs offered as the case proceeded to the issue of contribution, I disagree with the majority's conclusion that a trust can hold and convey property as a joint tenant with rights of survivorship.

At the outset, I would find that the trial court had jurisdiction to hear and decide this case. "Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." Altman v Nelson, 197 Mich App 467, 472; 495 NW2d 826 (1992). The circuit court is a court of general jurisdiction, extending to "all civil claims and remedies except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. See also Const 1963, art 6, § 1. The Legislature exercised its prerogative to limit the jurisdiction of the circuit court when it vested the probate court with "exclusive legal and equitable jurisdiction" over "[a] proceeding that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary," including to "determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right." MCL 700.1302(b)(vi).
The Legislature indicated that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts did not extend to plaintiffs' real property claims by having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property. See MCL 600.2932(1) (a person "who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff"); MCL 600.3301 ("Actions containing claims for the partition of lands may be brought in the circuit courts . . . . Such actions are equitable in nature.").

Further, the Legislature did not grant the probate court exclusive jurisdiction over necessarily any cause of action that might incidentally touch on such issues as a settler's intentions, but instead confined that grant to "[a] proceeding that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." MCL 700.1302(b)(vi) (emphasis added). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." Gross v Gen Motors Corp, 448 Mich 147, 160; 528 NW2d 707 (1995). The statutory reference to "a proceeding" that "concerns" trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b)(vi) covers not necessarily every issue that might arise from involvement of a trust, but rather to whole causes of action fundamentally arising from issues concerning the distribution of trusts, or the rights and duties of affected persons.

The issue in this case primarily concerned the legal question of whether a trust—any trust—may hold and convey property as a joint tenant with rights of survivorship. Plaintiffs set forth three specific causes of action in "Plaintiffs' Second Amended Complaint to Determine Interest in Property and For Partition": (1) an "Action to Determine Interests in Land", (2) "Partition", and (3) "Contribution." In count I, plaintiffs specifically asserted that any transfers from the Fitzpatrick Trust to plaintiffs and defendant, as joint tenants with rights of survivorship, were ineffective because the trust could not own the property with rights of survivorship. In count II, plaintiffs asserted that they and defendant are co-owners of the subject property with each owning an undivided interest in the whole property, and that because it has become impossible for all to jointly possess and enjoy the whole of the property, the property should be sold and the proceeds divided. In count III, plaintiffs asserted that defendant has not shared in the responsibilities of ownership of the property, and that they were entitled to contribution for paying more than their fair share of the expenses associated with the property. The parties brought to the circuit court disputes among living co-owners of real property over identification and realization of their respective but overlapping interests, not issues concerning the distribution of, or rights under, the trusts that largely engendered those interests. Plaintiffs did not ask the circuit court to construe, invalidate, or modify the Fitzpatrick Trust, or any other testamentary instrument involved in the chain of title in the subject property, and defendant does not suggest that plaintiffs' claims for determining interests in land, partition, and contribution were not actionable in the circuit court. Moreover, the circuit court did not rule on any issue concerning any trust settler's intent, the scope of any trust, or the administration of any trust, and need not have done so because, as it recognized, the issue for resolution was the legal issue of whether a trust can hold property as a joint tenant with rights of survivorship. I believe that jurisdiction over this matter properly lies with the circuit court.
Next, I agree with the trial court that a trust cannot own or convey property as a joint tenant with rights of survivorship. First, I am not convinced that the majority’s interpretation of MCL 554.44 is correct. MCL 554.44 states that all grants and devises of lands 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.

The majority relies upon the definition of “person” in MCL 8.31 to conclude that use of the word “persons” in MCL 554.44 includes a trust. However, MCL 8.31 explicitly states that the word “person” can extend to “bodies politic and corporate, as well as to individuals.” Thus, in clear and unambiguous terms, “person” is extended to political and corporate bodies under that provision. The majority concludes that MCL 8.31, because it does not contain the word “only”, can be extended to include trusts. I disagree.

First, MCL 8.31 does not state that “person” may include, but is not limited to, “bodies politic and corporate, as well as to individuals.” It simply states that it may include those three specifically named things. Absent any legislative expression indicating that it intended to include other entities, the statute must be read according to its plain language. It is axiomatic that “if the statute’s language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written.” People v Lewis, 503 Mich 162, 165; 926 NW2d 796 (2018). To apply MCL 8.31, this Court need not, and indeed must not, look any further than the unambiguous statutory language.¹

While the majority indicates that “bodies politic and corporate as well as to individuals” is not meant to be an exhaustive list included in the definition of “person” under MCL 8.31, the legislature is wholly capable of indicating when its use of listed items in a statute is not meant to be an exhaustive list. See, e.g., People v Feeley, 499 Mich 429, 438; 885 NW2d 223 (2016)(“the Legislature’s use of the phrase ‘including, but not limited to’ . . . indicates that it intended an expansive and inclusive reading . . . this particular phrase is not ‘one of limitation,’ but is instead meant to be illustrative and purposefully capable of enlargement.”). “This Court cannot assume that language chosen by the Legislature is inadvertent. Bush v Shabahang, 484 Mich 156, 169; 772 NW2d 272 (2009).

I find further guidance on this issue in McCormick v Carrier, 487 Mich 180, 188; 795 NW2d 517 (2010). Overruling precedent, the McCormick Court held that the Court in Kreiner v Fischer, 471 Mich 109; 683 NW2d 611 (2004), improperly expanded the language of MCL 500.3135. “[T]he Kreiner majority went astray and gave the statute a labored interpretation inconsistent with common meanings and common sense.” McCormick, 487 Mich at 205. The McCormick Court noted that the Kreiner Court applied “its chosen definition” to certain terms in

¹ The majority cites various legal treatises to support its position. Treatises, however, “are not binding authority; rather, they are considered only as potentially persuasive authority.” Fowler v Doan, 261 Mich App 595, 601; 683 NW2d 682 (2004). Where, as here, we are presented with an unambiguous statute, reference to nonbinding authority is unnecessary.
the statute, and interjected two terms that were not in MCL 500.3135, thereby shifting the meaning of one word "from the most natural contextual reading of the word." *Id.* at 206.

In the matter before this Court, I believe that the majority, too, has judicially expanded MCL 8.31, applying its chosen definition, and has given the statute an interpretation inconsistent with its plain meaning and common sense. Again, the statute states very clearly that the word person "may extend and be applied to bodies politic and corporate, as well as to individuals." The majority focuses on the term "individuals" and relies upon a definition of that term to include a single "thing" as a basis for determining that a trust (presumably as a thing) is included in the definition of "person" for purposes of MCL 8.31. I, however, look at the context, and do not isolate that word in determining its meaning. After all, when interpreting statutes, "we must not read a word or phrase of a statute in isolation; rather, each word or phrase and its placement must be read in the context of the whole act." *Alvan Motor Freight, Inc v Dept of Treasury*, 281 Mich App 35, 40; 761 NW2d 269 (2008). In context, it is clear that the Legislature intended in MCL 8.31 to clarify that when the word "person" is used (and not otherwise specifically defined) in a statute, that word does not only refer to "person" in its most commonly understood definition (an individual, i.e. single, human being), but that it additionally refers to political and corporate bodies. In other words, I would read MCL 8.31 to mean that "person" applies not just to individuals (understood as single human beings), but also to political and corporate bodies. This interpretation takes into consideration that the Legislature stated that the word "person" may "extend" ("to spread or stretch forth; to increase the scope, meaning, or application of." Merriam-Webster's Collegiate Dictionary (11th ed.)) to corporate and political bodies in addition to the previously understood ("as well as") individuals. And, trusts are distinctly dissimilar to political and corporate bodies such that their inclusion into the two specified bodies cannot be fairly inferred. I would therefore find that the word "person" as it appears in MCL 554.44 refers only to individuals, political bodies, and corporate bodies. Consequently, I would find that neither the presumption set forth in MCL 554.44, nor the exception to that presumption set forth in MCL 554.45, applies in this matter.

I believe that the primary issue before this Court, whether a trust may own and transfer real property as a joint tenant with rights of survivorship, can be very simply resolved by looking to the plain, unambiguous statutory language of MCL 8.31, and taking a common sense approach by additionally looking at the definition of and explanation concerning ownership as joint tenants with rights of survivorship. The earliest recognition of a joint tenancy with rights of survivorship in this state appears in *Schulz v Brohl*, 116 Mich 603; 74 NW 1012 (1898). In that case:

the interest created by a deed to Peter Brohl and Christine Schulz "and to the survivor of them" was described as "a moiety to each [party] for life, with remainder to the survivor in fee." 116 Mich at 605, 74 NW 1012. Peter conveyed his interest to a third party, Joseph Brohl, reserving a life estate. Subsequent to Peter's death, Christine Schulz brought an action to quiet title. The Court held in her favor, stating that "[n]either grantee could convey the estate so as to cut off the remainder." *Albro v Allen*, 434 Mich 271, 276; 454 NW2d 85 (1990). [Emphasis in original]

Since that time, both this Court and our Supreme Court have consistently defined and applied a joint tenancy with rights of survivorship as concerned with the *life and death* of one joint tenant.
See e.g., Jackson v Estate of Green, 484 Mich 209, 213; 771 NW2d 675 (2009) ("the principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate."); Walters v Leech, 279 Mich App 707, 711; 761 NW2d 143 (2008), citing 1 Cameron, Michigan Real Property Law (3d ed.), § 9.14, p. 328 ("... at the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property."). Indeed, "right of survivorship" is even defined in Black's Law Dictionary (11th ed.) as "[a] joint tenant’s right to succeed to the whole estate upon the death of the other joint tenant." “Death”, in turn, is defined as “the ending of life; the cessation of all vital functions and signs.” Black’s Law Dictionary (11th ed.).

Logically, survivorship rights obviously address the interests of natural persons, including the uncertainties normally attending to natural persons' life spans. A trust, not being a natural person, has no actual residential needs, cannot occupy real property in fact, and does not "die." Common sense indicates that it cannot end its life or that all of its vital functions and signs could cease. Instead, a trust comes to an end on its own terms or by other orderly processes. As plaintiffs point out, if a trust could maintain its own interest in real property as a joint tenant with the right of survivorship, the survivorship interests of any joint tenants who are natural persons would be substantially "illusory—because the trust would never ‘die’ and thus those other tenants would have nothing more than a life estate in the property.” I would thus affirm the circuit court’s orders voiding the purported conveyances concerning the Fitzpatrick Trust property as a joint tenant with rights of survivorship.

I would also affirm the circuit court’s holding that the parties’ interests were better served by sale of the subject parcel than by attempting partition in kind. Defendant asserts that, according to MCL 600.3304, “[a]ll persons holding lands as joint tenants or as tenants in common may have those lands partitioned,” but that, according to MCL 600.3308, “a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition.” However, the limitation in MCL 600.3308 applies to persons having “only an estate in reversion or remainder” (emphasis added), and thus, does not apply to holders of current possessory rights, whether or not those holders of existing possessory rights also happen to hold rights of reversion or remainder. Here, I believe that the trial court did not err in concluding that, given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust and the subject parcel’s reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, “partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved.”

I would affirm the circuit court’s rulings in their entirety.

/s/ Deborah A. Servitto

-5-
HB 5443 (2018); HB 4922 (2019):

On September 5, 2019, Representatives Steven Johnson, Pamela Hornberger, Matt Hall, Sue Allor, and Beau LaFave introduced House Bill 4922 to repeal the Michigan estate tax act, 1899 PA 188, MCL 205.201 to 205.256. Representatives Johnson and Hornberger had previously introduced HB 5443 on January 24, 2018. The bills are identical and brief.

**Michigan Inheritance Tax Regime**

Prior to the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") in 2005, federal estate tax allowed deductions for estate taxes assessed by and paid to states.

Before October 1, 1993, Michigan applied an inheritance tax regime. The inheritance tax statutes are located at MCL 205.201 – 223. The inheritance tax was imposed upon the beneficiaries of a decedent’s assets and used a seemingly complicated set of rules to determine the tax liability owed. Very Generally, there were different exemptions available to different types of beneficiaries depending upon when a person died and the beneficiary’s relationship to the decedent. For example, if the beneficiary were a child of a decedent who died in 1993, the child would get a $15,000 exemption and would pay taxes on at rates of:

- 2% on the first $50,000 over the exemption;
- 4% on the next $250,000;
- 7% on the next $500,000;
- 8% on the next $750,000; and
- 10% on anything over $750,000.

MCL 205.202(1)-(4). However, if the beneficiary was of no relation to the decedent, then the beneficiary would get no exemption, and would pay taxes at rates of:

- 12% on the first $50,000;
- 14% on the next $500,000; and
- 17% on everything over $500,000.

MCL 205.202(5). That is just a general example and there are a lot of other statutes and rules that would play into any specific scenario.

**Michigan Current Estate Tax Regime**

Eventually, Michigan began taxing the estate, rather than the actual inheritance, for persons dying after September 30, 1993. The amount of the tax was based on the amount of the credit that the federal government allowed the decedent’s estate for inheritance or estate taxes paid at the state level. See
MCL 205.223 – 205.256. This greatly simplified the process of calculating the taxes owed. The Michigan estate tax act was known as a “pick up tax” or “sponge tax” because it soaked up whatever federal credit was allowed. It allowed Michigan to share in the estate tax that was collected by the federal government without increasing the actual amount of taxes paid by the estate. If a decedent’s estate owed $200 in federal estate tax, and there was a $2 federal credit limit available for state-level estate taxes paid, then the estate would pay $198 federal estate tax and $2 to the state of Michigan for estate tax. The total would still be $200.

Through the enactment of EGTRRA in 2005, the federal government got rid of the credit allowed for estate and inheritance taxes paid to the states. Because Michigan computes its estate tax solely on the amount of the federal estate tax credit available, and because the federal credit was no longer allowed, EGTRRA effectively repealed Michigan’s estate and inheritance tax laws for Michigan resident’s dying after 2005, and for other states that were solely applying a pick up tax or sponge tax.

This new bill, HB 4922, would totally repeal the above tax regimes. The bill was referred to the Committee on Tax Policy, and is still there.

**Ponderings**

One person who was involved in establishing the Michigan estate tax, and who has considerable experience practicing under it when it was more applicable, expresses the view that the repeal attempt is more of a political stunt and that the politicians involved don’t really understand the way the law works. The person seems to favor leaving the estate tax act in place, so that if in the future the federal government allows a credit for state-level estate taxes paid, then Michigan and its residents will not lose out on what is viewed as free money.

Another person felt that this bill could serve a benefit by simplifying the lives of those persons or estates where an asset or inheritance/estate tax issue is discovered many years later. Simply getting rid of the entire act may remove the problems that can arise in these situations. For example, there are no readily available forms or processes for dealing with the inheritance/estate tax. Moreover, there is a general lack of knowledge and experience among practitioners and regulators regarding the estate and inheritance tax regimes applied in the past decades. All this makes enforcement and compliance costly and difficult. It is not clear how often this issue arises, but it does appear to happen.

It could be a political play to feed on fears of a death tax revival, or to make a show of cutting tax laws. However, Michigan effectively does not apply an estate tax at this time. Alternatively, it could cost Michiganders money if the federal tax credit returns. There does not appear to be a major push to revive a federal credit for state-level estate taxes paid, and the state and practitioners are not pushing too hard for or against the bill, so the real cost either way may not be very significant.
## Tax Conference, 33rd Annual

**Thursday, May 21, 2020**  
Inn at St. John’s, Plymouth

**Due date is November 19, 2019**

### Full Schedule

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>9:00am - 10:00am</td>
<td>Continental Breakfast, Exhibitor Showcase, and Registration</td>
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<tr>
<td>9:00am - 9:50am</td>
<td>Early Bird Session: Tax Accounting Topic (?)</td>
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<td>• Bullets</td>
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<td>(Speakers TBD)</td>
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<tr>
<td>9:50am - 10:00pm</td>
<td>Vendor Visits and Networking Break</td>
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<tr>
<td>10:00am - 10:10am</td>
<td>Welcome and Introductions</td>
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<td><strong>James H. Combs</strong></td>
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<td>Chair, State Bar of Michigan Taxation Section Council</td>
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<td>Honigman LLP</td>
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<td>Detroit</td>
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<td><strong>Brian Thomas Gallagher</strong></td>
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<td>Chair, Tax Conference</td>
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<td>Fraser Trebilcock</td>
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<td>Lansing</td>
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<td><strong>NOTE:</strong> Everything is final.</td>
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<tr>
<td>10:10am - 11:10am</td>
<td>Washington Update: Current Tax Legislative Developments</td>
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<td></td>
<td>• Implementation of tax reform</td>
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<td>• Makeup and priorities of the new Congress</td>
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**Tax reform primer**
- Possible federal tax changes
- Where we stand on tax reform guidance
- What the future holds

**Patrick Robertson**
Confluence Government Relations
Washington, DC

**NOTE:** confirmed Robertson 7-29-19. Everything is final.

| **11:10am - 12:00pm** | **Emerging Cannabis Tax Issues**
| --- | --- |
|  | - Application of Section 280E to Michigan cannabis businesses
|  | - International issues especially relating to Canadian companies
| (Speaker TBD) |  |

| **12:00pm - 1:15pm** | **Networking Lunch On-Site**
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| **1:15pm - 1:50pm** | **State and Local Tax Committee Breakout #1**
| --- | --- |
|  | - Bullets
| (Speaker TBD) |  |

| **1:15pm - 1:50pm** | **Federal Income Tax Committee Breakout #2**
| --- | --- |
|  | - Bullets
| (Speaker TBD) |  |

| **1:50pm -** | **Estates & Trusts Committee**
| --- | --- |
| **Income Tax Issues Relating to Step Up In Basis for Surviving Spouses and Other Heirs**
|  | - Four benefits from basis step up on death
|  | - Planning for basis step up on first spousal death in a nuclear family
|  | - Planning for basis step on the second spousal death with A/B Trusts.
|  | - Planning for basis step up on second spousal death with blended marriages
| Neal Nusholtz |  |

| **1:50pm -** | **Employee Benefits Committee**
| --- | --- |
| **Everything You Must Know about the SECURE Act**
|  | - Bullets
<p>| (Speaker TBD) |  |</p>
<table>
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<tr>
<th>Time</th>
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<th>Speaker</th>
<th>Topic Title</th>
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<tbody>
<tr>
<td>1:50pm - 2:05pm</td>
<td>Vendor Visits and Networking Break</td>
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<tr>
<td>2:05pm - 2:40pm</td>
<td>State and Local Tax Committee Breakout #5</td>
<td>Neal Nusholtz PC Troy</td>
<td>Estates &amp; Trusts Committee Charitable Entities in Estate Planning</td>
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<td>(Speaker TBD)</td>
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<td>Employee Benefits Committee Employee Benefits Issues in the Cannabis Industry</td>
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<td>(Speaker TBD)</td>
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<td>NOTE: confirmed Nusholtz via Brian 10-16-19. Everything is final.</td>
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<td>2:40pm - 2:55pm</td>
<td>Vendor Visits and Networking Break</td>
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<tr>
<td>2:55pm - 3:30pm</td>
<td>State and Local Tax Committee Breakout #9</td>
<td>Robin D. Ferriby Clark Hill PLC Birmingham</td>
<td>Estates &amp; Trusts and Employee Benefits Committees – Jointly Estate Planning with Retirement Assets</td>
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<td>3:30pm - 3:45pm</td>
<td>Vendor Visits and Networking Break</td>
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<td>3:45pm - 4:30pm</td>
<td>Michigan Tax Policy and Administration 2020</td>
<td>Eric W. Gregory Dickinson Wright PLLC Detroit</td>
<td>Michigan Tax Policy and Administration 2020</td>
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<td>• What’s new at Treasury</td>
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<td>• Legislative update</td>
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<tr>
<td>4:30pm -</td>
<td>Networking Reception</td>
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- Administrative update
- Looking ahead

**Lance R. Wilkinson**  
Michigan Department of Treasury  
Lansing

**Stewart Binke**  
Michigan Department of Treasury  
Lansing