PROBATE & ESTATE PLANNING SECTION

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

Saturday, November 7, 2015

9:00 am

University Club

3435 Forest Road

Lansing, Michigan 48910

Probate and Estate Planning Section of the State Bar of Michigan

Notice of Meetings

Meeting of the Section's Committee on Special Projects (CSP)

And

Meeting of the Council of the Probate and Estate Planning Section

November 7, 2015
9:00 a.m.
University Club
3435 Forest Road
Lansing, Michigan 48910

The above stated meetings of the Section will be held at the University Club, on Saturday, November 7, 2015. The Section's **Committee on Special Projects (CSP)** meeting will begin at 9:00 am, followed immediately by the meeting of the **Council of the Section.** 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.

Marguerite Munson Lentz, Secretary

Bodman PLC
1901 St. Antoine Street
6th Floor at Ford Field
Detroit, Michigan 48226
Phone: (313) 393-7589
Fax: (313) 393-7579
Email: mlentz@bodmanlaw.com

Schedule and Location of Future Meetings

Probate and Estate Planning Section

Of the

State Bar of Michigan

Unless otherwise noted, CSP meetings are held at 9:00 a.m., immediately followed by the Council meeting for the Section at approximately 10:15 a.m., at the University Club, 3435 Forest Road, Lansing, Michigan 48910.

Meeting Schedule for 2015-2016

December 19, 2015

January 16, 2016

February 13, 2016

March 12, 2016

April 16, 2016

June 4, 2016

September 10, 2016 (Annual Section Meeting)

CALL FOR MATERIALS

Council Meetings of the Probate and Estate Planning Section

Schedule of Dates for Materials for Committee on Special Projects

All materials are due on or before 5:00 p.m. of the Thursday falling 9 days before the next CSP meeting. CSP materials are to be sent to David P. Lucas, Chair of CSP (dlucas@vcflaw.com).

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

December 10, 2015
January 7, 2016
February 4, 2016
March 3, 2016
April 7, 2016
May 26, 2016
September 1, 2016 (Annual Section Meeting)

Schedule of Dates for Materials for Council Meeting

All materials are due on or before 11:00 p.m. of the Friday falling 8 days before the next Council meeting. Council materials are to be sent to Meg Lentz, Secretary (mlentz@bodmanlaw.com).

Schedule of dates for Council materials, by 11:00 p.m.:

December 11, 2015
January 8, 2016
February 5, 2016
March 4, 2016
April 8, 2016
May 27, 2016
September 2, 2016

STATE BAR OF MICHIGAN
PROBATE AND ESTATE PLANNING SECTION COUNCIL

Officers for 2015-2016 Term

Officer	Position
Chairperson	Shaheen I. Imami
Chairperson Elect	James B. Steward
Vice Chairperson	Marlaine C. Teahan
Secretary	Marguerite Munson Lentz
Treasurer	Christopher A. Ballard

Council Members for 2015-2016 Term

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term expires	Eligible after Current Term?
Allan, Susan M.	2010 (2nd term)	2016	No
Brigman, Constance L.	2010 (2nd term)	2016	No
Mills, Richard C.	2014 (1st partial term)	2016	Yes (2 terms)
Marquardt, Michele C.	2013 (1st term)	2016	Yes (1 term)
New, Lorraine F.	2013 (1st term)	2016	Yes (1 term)
Vernon, Geoffrey R.	2013 (1st term)	2016	Yes (1 term)
Bearup, George F.	2014 (2nd term)	2017	No
Welber, Nancy H.	2014 (2nd term)	2017	No
Jaconette, Hon Michael L.	2014 (1st term)	2017	Yes (1 term)
Kellogg, Mark E.	2014 (1st term)	2017	Yes (1 term)
Malviya, Raj A.	2014 (1st term)	2017	Yes (1 term)
Lichterman, Michael G.	2015 (1st partial term)	2017	Yes (2 terms)
Clark-Kreuer, Rhonda M.	2015 (2nd term)	2018	No
Lucas, David P.	2015 (2nd term)	2018	No
Skidmore, David L.J.M.	2015 (2nd term)	2018	No
Caldwell, Christopher J.	2015 (1st term)	2018	Yes (1 term)
Goetsch, Kathleen M.	2015 (1st term)	2018	Yes (1 term)
Lynwood, Katie	2015 (1st term)	2018	Yes (1 term)

Ex Officio Members

John E. Bos

Robert D. Brower, Jr.

Douglas G. Chalgian

George W. Gregory

Henry M. Grix

Mark K. Harder

Hon. Philip E. Harter

Dirk C. Hoffius

Brian V. Howe

Raymond T. Huetteman, Jr.

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

Thomas F. Sweeney

Fredric A. Sytsma

Lauren M. Underwood

W. Michael Van Haren

Susan S. Westerman

Everett R. Zack

Michael W. Irish Award

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

Recipients

1995 Joe C. Foster, Jr.

1996 John H. Martin

1997 Harold A. Draper

1998 Douglas J. Rasmussen

1999 James A. Kendall

2000 NO AWARD PRESENTED

2001 John E. Bos

2002 Everett R. Zack

2003 NO AWARD PRESENTED

2004 Brian V. Howe

2005 NO AWARD PRESENTED

2006 Hon. Phillip E. Harter

2007 George Cooney (April 3, 2007)

2008 Susan A. Westerman

2009 Russell M. Paquette (posthumously)

2010 Fredric A. Sytsma

2011 John A. Scott

2012 NO AWARD PRESENTED

2013 Michael J. McClory

2014 Sebastian V. Grassi, Jr.

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

The George A. Cooney Society

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

Who: As of November 2015, there have been five recipients:

John E. Bos (2007)
Everett R. Zack (2009)
John H. Martin (2011)
John A. Scott (2013)
Phillip E. Harter (2015)

When: This award is not necessarily given every year. So far we've given awards in 2007, 2009, 2011, 2013, and 2015.

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

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

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

Guidelines for Selection:

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

Probate & Estate Planning Section Committees 2015-2016

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

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

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

James B. Steward

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

Nancy H. Welber, Chair
Christopher A. Ballard
Edward Goldman
Robert M. O'Reilly
James P. Spica
Lawrence W. Waggoner

Awards Committee
Mission: To periodically award the Michael Irish Award to a deserving recipient and to consult with ICLE concerning periodic induction of members in the George A. Cooney Society

Amy N. Morrissey, Chair
Robert D. Brower, Jr.
George W. Gregory
Phillip E. Harter
Nancy L. Little

Budget Committee
Mission: To develop the annual budget and to alert the Council to revenue and spending trends

Marguerite Munson Lentz, Chair
Marlaine C. Teahan
Christopher A. Ballard

Bylaws Committee
Mission: To review the Section Bylaws and recommend changes to ensure compliance with State Bar requirements, best practices for similar organizations and assure conformity of the Bylaws to current practices and procedures of the Section and the Council

Nancy H. Welber, Chair
Christopher A. Ballard
John Roy Castillo
David P. Lucas

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

Christopher J. Caldwell, Chair
Christopher A. Ballard
Michael W. Bartnik
William R. Bloomfield
Robin D. Ferriby
Richard C. Mills
Nazneen H. Syed

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

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

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

David P. Lucas, Chair

Community Property Trusts Ad Hoc Committee *Mission: To review the statutes, case law, and legislative analysis of Michigan and other jurisdictions (including pending legislation) concerning community property trusts and, if advisable, to recommend changes to Michigan law in this area*

Neal Nusholtz, Chair
George W. Gregory
Lorraine F. New
Patricia M. Ouellette
Nicholas A. Reister

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

Michael G. Lichterman, Chair
William J. Ard
Nancy L. Little
Amy N. Morrissey
Jeanne Murphy (Liaison to ICLE)
Neal Nusholtz
Michael L. Rutkowski
Serene K. Zeni

Ethics & Unauthorized Practice of Law Committee
Mission: To consider and recommend to the Council action with respect to the Michigan Rules of Professional Conduct and their interpretation, application, and amendment, including identifying the unauthorized practices of law, reporting of such practices to the appropriate authorities, and educating the public regarding the inherent problems relying on non-lawyers

Katie Lynwood, Chair
William J. Ard
Raymond A. Harris
J. David Kerr
Robert M. Taylor
Amy Rombyer Tripp

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

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

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

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

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

Michele C. Marquardt, Chair
Christopher A. Ballard
Ryan Bourjaily
Georgette E. David
Mark E. Kellogg
Harold G. Schuitmaker

Legislation Development & Drafting Committee
Mission: To review, revise, communicate and recommend Michigan's trusts and estates law with the goal of achieving and maintaining leadership in promulgating probate laws in changing times. May work alone or in conjunction with other substantive standing or ad hoc committees.

Geoffrey R. Vernon, Chair
Susan M. Allan
Howard H. Collens
Georgette David
Henry P. Lee
Marguerite Munson Lentz
Michael G. Lichterman
Sueann Mitchell
Kurt A. Olson
Nathan Piwowarski
James P. Spica
Robert P. Tiplady, II

Litigation, Proceedings, and Forms Committee
Mission: To consider and recommend to the Council action with respect to contested and uncontested proceedings, the Michigan Court Rules, and published court forms, including the interpretation, use, and amendment of them

David L.J.M. Skidmore, Chair
James F. ("JV") Anderton
Constance L. Brigman (Liaison to SCAO for Guardianship, Conservatorship, and Protective Proceedings Workgroup)
Rhonda M. Clark-Kreuer
Phillip E. Harter
Michael D. Holmes
Shaheen I. Imami
Hon. Michael L. Jaconette
Hon. David M. Murkowski
Rebecca A. Schnelz (Liaison to SCAO for Mental Health/Commitment Workgroup and to Guardianship, Conservatorship, and Protective Proceedings Workgroup)

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

Raj A. Malviya, Chair
David Borst
Ryan Bourjaily
Christopher J. Caldwell
Nicholas R. Dekker
Daniel A. Kosmowski
Robert O'Reilly
Nicholas A. Reister
Theresa Rose
Joseph J. Viviano

Nominating Committee
Mission: To annually nominate candidates to stand for election as the officers of the Section and members of the Council

Mark K. Harder, Chair
Thomas F. Sweeney
Amy N. Morrissey

Planning Committee
Mission: To periodically review and update the Section's Strategic Plan and to annually prepare and update the Council's Biennial Plan of Work

James B. Steward, Chair

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

Marlaine C. Teahan

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

Mark E. Kellogg, Chair
Jeffrey S. Ammon
William J. Ard
George F. Bearup
John Roy Castillo
David S. Fry
J. David Kerr
Michael G. Lichterman
David P. Lucas
Melisa M. W. Mysliwiec
James T. Ramer
James B. Steward

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

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

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

Lorraine F. New, Chair
Robert B. Labe
Marguerite Munson Lentz
Geoffrey R. Vernon
Nancy H. Welber

SBM | PROBATE & ESTATE PLANNING SECTION

Probate & Estate Planning Section Liaisons 2015-2016

Alternative Dispute Resolution Section Liaison

Milton L. Mack, Jr.

Business Law Section Liaison *Mission: The liaison to the Business Law Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Business Law Section on matters of mutual interest and concern*

John R. Dresser

Elder Law and Disability Rights Section Liaison
Mission: The liaison to the Elder Law and Disability Rights Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Elder Law Section on matters of mutual interest and concern

Amy Rombyer Tripp

Family Law Section Liaison
Mission: The liaison to the Family Law Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Family law Section on matters of mutual interest and concern

Patricia M. Ouellette

ICLE Liaison
Mission: The liaison to ICLE is responsible for developing and maintaining bilateral communication between the Section and the Institute for Continuing Legal Education

Jeanne Murphy

Law Schools Liaison
Mission: The Law Schools Liaison is responsible for developing and maintaining bilateral communication between the Section and the law schools located in the State of Michigan in matters of mutual interest and concern

William J. Ard

Michigan Bankers Association Liaison
Mission: The liaison to the Michigan Bankers Association is responsible for developing and maintaining bilateral communication between the Section and the Michigan Bankers Association in matters of mutual interest and concern

Susan M. Allan

Probate Judges Association Liaisons *Mission: The liaisons to the MPJA are responsible for developing and maintaining bilateral communication between the Section and the MPJA on matters of mutual interest and concern*

Hon. David M. Murkowski
Hon. Michael L. Jaconette

Probate Registers Liaison
Mission: The liaison to the Michigan Probate and Juvenile Registers Association is responsible for developing and maintaining bilateral communication between the Section and the Probate and Juvenile Registers Association on matters of mutual interest and concern

Rebecca A. Schnelz

SCAO Liaisons
Mission: The liaisons to SCAO are responsible for developing and maintaining communications between the Section and SCAO on matters of mutual interest and concern

Constance L. Brigman
(Guardianship, Conservatorship, and Protective Proceedings Workgroup)
Michele C. Marquardt
(Estates & Trusts Workgroup)
Rebecca A. Schnelz
(Mental Health/Commitment Workgroup and Guardianship, Conservatorship, and Protective Proceedings Workgroup)

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

Kathleen M. Goetsch

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

Richard J. Siriani

Taxation Section Liaison
Mission: The liaison to the Taxation Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Taxation Section on matters of mutual interest and concern

George W. Gregory

Probate & Estate Planning Section
Biennial Plan of Work
10/1/2014 - 9/30/2016

	Statutory/Legislative	**Court Rules, Procedures and Forms**	**Council Organization & Internal Procedures**	**Professional Responsibility**	**Education & Service to the Public & Members**
Action Pending	-Prop tax uncapping exempt. (HB5552) -Fiduciary Access to Digital Assets (HB5366-5370) -PR access to online accts (SB 293) -Hearings minors < 18 (SB 144 & 177) -Funeral Representative (HB 5162/SB 731)		-Supreme Court Task Force Report -Bylaw Update		-"Who Should I Trust?" Program -55th Annual P&EP Institute
Priority Items	-Domestic Asset Protection Trusts -ILIT Trustee Liability Protection -Artificial Reproductive Technology -Charitable Trust -Probate Appeals	-SCAO Meetings*			-Communications with members* -Social media & website* -Brochures* -Annual Institute/ICLE seminars* -Section Journal*
Secondary Priority	-EPIC/MTC Updates -Directed Investment Trusts -TBE Trusts -ADR Revision -Property tax on trust property -Uniform Real Property TOD Act			-Inventory Lawyer	-Opportunities with ICLE -Digital Journal
Priority To Be Determined	-Dignified Death (Family Consent) Act -Pooled income trust exclusion -Neglect Legislation -Foreign Guardians -Inheritance Tax -Estate Recovery -PRE after death & nursing home		-Budget Reporting -Action on SC recommendations		-Probate Court Opinion Bank -Mentor program

*ongoing

Probate and Estate Planning Council
Committee on Special Projects
Meeting Agenda
November 7, 2015
9:00 a.m.

1 Legislation Development & Drafting Committee – Geoffrey R. Vernon
proposed Tenancy By the Entirety Property (trusts) legislation (MCL 700.7509) (Exhibit A)

2 Artificial Reproductive Technology Ad Hoc Committee - Nancy Welber
report/update - if available

Probate and Estate Planning Council
Committee on Special Projects
Meeting Agenda
November 7, 2015
9:00 a.m.

Exhibit A

proposed Tenancy By the Entirety Property (trusts) legislation

ARTICLE VII: MICHIGAN TRUST CODE
PART 5: CREDITOR'S CLAIMS: SPENDTHRIFT, SUPPORT, AND DISCRETIONARY TRUSTS
700.7509 TENANCY BY THE ENTIRETY PROPERTY

(1) As used in this section:

(a) "Property" means real or personal property and any interest in real or personal property.

(b) "Proceeds" means:

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

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

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

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

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

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

(2) While both spouses are still living, any property once held by the spouses as tenants by the entirety and subsequently conveyed as tenants by the entirety to a trustee of one or more trusts, and the proceeds of that property, shall have the same immunity from the claims of each spouse's separate creditors as would exist if the spouses retained the property or its proceeds as tenants by the entirety, so long as all of the following apply:

(a) The spouses remain married.

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

(c) The trust or trusts are revocable by either spouse or both spouses, acting together.

(d) Each spouse is a distributee or permissible distributee of the trust or trusts.

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

(3) Upon the death of the first spouse:

(a) All property held in trust that, under subsection (2), was immune from the claims of the deceased spouse's creditors immediately prior to his or her death shall continue to have immunity from the claims of the decedent's separate creditors as if both spouses were still alive.

(b) To the extent that the surviving spouse remains a distributee or permissible distributee of the trust or trusts and has the power, exercisable in his or her individual capacity, to vest individually in the surviving spouse title to the property that, under subsection (2), was immune from the claims of the separate creditors of the decedent, the property shall be subject to the claims of the separate creditors of the surviving spouse.

(c) If the surviving spouse remains a distributee or permissible distributee of the trust or trusts, but does not have the power, exercisable in his or her individual capacity, to vest individually in the surviving spouse title to the property that, under subsection (2), was immune from claims of the spouses' separate creditors, that property shall continue to have immunity from the claims of the separate creditors of the surviving spouse.

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

(5) Except as provided in subsection (6), immunity from the claims of separate creditors under subsections (2) and (3) shall be waived if both of the following are true:

(a) A trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property held in trust that is immune from the claims of separate creditors.

(b) The separate creditors claiming that the immunity provided by this section was waived by the spouses detrimentally relied upon the failure of the trustee to disclose (as provided in subsection (5)(a) above) in extending credit to the spouse.

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

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

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

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

(d) A certificate of trust existence existence and authority under MCL 565.431 et. seq. or a certificate of trust under MCL 700.7913.

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

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

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

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

(8) In any dispute relating to the immunity of trust property from the claims of either spouse’s separate creditor, the creditor has the burden of proving, by clear and convincing evidence, that the trust property is not immune from the creditor's claims.

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

property held in the trust shall be deemed for all purposes to be held by both spouses as tenants by the entirety.

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

(11) If property is transferred to a trustee of a trust as provided under subsection (2), the trustee may transfer such trust property to the spouses as tenants by the entirety.

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

END OF CSP MATERIALS

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

November 7, 2015
Lansing, Michigan

Agenda

I. **Call to Order**

II. **Excused Absences**

III. **Introduction of Guests**

IV. **Minutes of October 10, 2015, Meeting of the Council**

See Attachment 1

V. **Treasurer's Report – Christopher Ballard**

See Attachment 2

VI. **Chairperson's Report – Shaheen I. Imami**

See Attachment 3 –

- Discussion concerning dower bill
- Copyright registration for Patient's Guide
- Recent cases of interest
  - In re Brown Estate
  - In re Duke Estate
  - In re Jajuga Estate
- Public Policy Reports concerning votes taken at October Council meeting

VII. **Report of the Committee on Special Projects – David P. Lucas**

VIII. **Report of Standing Committees**

A. **Internal Governance**

1. Budget – Marguerite Munson Lentz

See Attachment 4

2. Bylaws – Nancy H. Welber

3. Awards – Amy N. Morrissey

4. Planning – James B. Steward

5. Nominating – Mark K. Harder

6. Annual Meeting – James B. Steward

B. **Legislation and Lobbying**

1. Legislative Analysis & Monitoring Committee – Michele C. Marquardt

2. Legislation Development & Drafting Committee – Geoffrey R. Vernon

See Attachment 5

3. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon

4. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber

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

1. Amicus Curiae – David L. Skidmore

See Attachment 6

2. Probate Institute – Marlaine C. Teahan

3. State Bar and Section Journals – Richard C. Mills

4. Citizens Outreach – Constance L. Brigman

5. Electronic Communications – Michael G. Lichterman

6. Membership – Raj A. Malviya

D. **Ethics and Professional Standards**

1. Ethics & Unauthorized Practice of Law– Katie Lynwood

E. **Administration of Justice**

1. Litigation, Proceedings, and Forms – David L. Skidmore

F. **Areas of Practice**

1. Real Estate – Mark E. Kellogg
See Attachment 7

2. Transfer Tax Committee – Lorraine F. New

See Attachment 8

3. Charitable and Exempt Organization – Christopher J. Caldwell

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

IX. **Other Reports**

A. **Liaisons**

1. Alternative Dispute Resolution Section Liaison –Milton J. Mack, Jr.

2. Business Law Section Liaison – John R. Dresser

3. Elder Law and Disability Rights Section Liaison – Amy R. Tripp

4. Family Law Section Liaison – Patricia M. Ouellette

5. ICLE Liaison – Jeanne Murphy

6. Law Schools Liaison – William J. Ard

7. Michigan Bankers Association Liaison – Susan M. Allan

8. Michigan Probate Judges Association Liaisons – Hon. Judge David M. Murkowski, Hon. Michael L. Jaconette

9. Probate Registers Liaison – Rebecca A. Schnelz

10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz

11. Solutions on Self-Help Task Force Liaison – Kathleen M. Goetsch

12. State Bar Liaison – Richard J. Siriani

13. Taxation Section Liaison – George W. Gregory

X. **Other Business**

XI. **Hot Topics**

XII. **Adjournment**

ATTACHMENT 1

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

October 10, 2015
Lansing, Michigan

Minutes

XIII. **Call to Order**

The Chair of the Section, Shaheen I. Imami, called the meeting to order at 10:01 a.m.

XIV. **Attendance**

A. **The following officers and members of Council were in attendance:**

Shaheen I. Imami
James B. Steward
Marlaine C. Teahan
Marguerite Munson Lentz
Christopher A. Ballard
Christopher J. Caldwell
Kathleen M. Goetsch
Hon. Michael L. Jaconette
Mark E. Kellogg
David P. Lucas
Katie Lynwood
Raj A. Malviya
Michaele Marquadt
Richard C. Mills
Lorraine F. New
David L.J.M. Skidmore
Geoffrey R. Vernon

A total of 17 council members and officers were present, representing a quorum.

B. **The following officers and members of Council were absent with excuse:**

Susan M. Allan
George F. Bearup
Constance L. Brigman
Rhonda Clark-Kreuer
Michael G. Lichterman
Nancy H. Welber

C. **The following officers and members of Council were absent without excuse:**

None.

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

John E. Bos
Robert D. Brower, Jr.
Douglas G. Chalgian
George W. Gregory
Mark K. Harder
Kenneth E. Konop
Harold Schuitmaker

E. **Others in attendance:**

Jeanne Murphy
Neal Nusholtz
James Spica
Andrew Mayoras
Mayra Rodriquez
Dan Kosmowski
Ken Grifka
Rebecca Bechler
Kurt A. Olson
Tess Sullivan
Robert O'Reilly
Brad Martin
Rob Labe
Dean Patrick

XV. Minutes of the September 12, 2015 Meeting of the Council

The minutes of the September 12, 2015 Meeting of the Council were included with the Agenda for the October meeting, which was posted on the Section's webpage prior to the meeting. Ms. Lentz moved that the minutes be approved with two non-substantive changes. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions. The amended minutes will be posted to the Section webpage on the State Bar web site.

Ms. Lentz thanked Marlaine Teahan for the printed tent cards.

XVI. Treasurer's Report – Christopher Ballard

The income/expense report through August 2015 was included with the October agenda.

XVII. Chairperson's Report – Shaheen I. Imami

Mr. Imami reported that:

- Gift of Life responded to the letter sent from Ms. Morrissey regarding proposed changes to the Peace of Mind registry. A copy of the response was included with the October agenda.
- By electronic vote, the Council voted to file an amicus brief in *In re Cliffman* and a public policy position was filed, both of which were included with the October agenda.
- Public policy positions were filed with respect to SB 0270 and Treasury RAB 2015-XX, both of which were included with the October agenda.
- The contract with ICLE was signed and returned to us.
- There will be a Section orientation on October 15, 2015, and Marlaine Teahan will attend.
- The Michigan Court of Appeals issued its opinion in *In re Mardigian* that a violation of RPC 1.8(c) does not automatically void the applicable will or trust. Mr. Imami requested that the amicus committee review whether an amicus brief should be filed.

Mr. Imami requested that the Legislation Development & Drafting Committee review EPIC/MTC for any necessary or desirable changes. Anyone with suggested changes to EPIC/MTC should send them to Geoffrey Vernon, Chair of the committee. Mr. Imami requested that the Litigation, Proceedings, and Forms Committee review for any changes needed to the Michigan Court Rules. Anyone with suggested changes to the court rules should send them to David Skidmore, Chair of the committee.

XVIII. Report of the Committee on Special Projects – David P. Lucas

Mr. Lucas reported that the CSP reviewed a report from the Community Property Trusts Ad Hoc Committee and CSP voted to recommend that the Council support the proposed community property trust legislation. Mr. Lucas moved that the Council support the community property trust act. The Council approved the motion: 17 in favor, 0 opposed, and 0 abstentions. (A copy of the proposed legislation was included with the October agenda.)

Mr. Lucas also reported that CSP reviewed the latest draft from the Legislation Development & Drafting Committee concerning what kinds of property may be held as tenants by the entireties and vote to recommend that the Council support the proposed legislation. After discussion, Mr. Lucas moved that the Council approve the draft with changes suggested during the Council meeting and give Mr. Vernon the ability to make nonsubstantive changes. The Council approved the motion: 17 in favor, 0 opposed, and 0 abstentions. (A copy of the proposed legislation, as amended, will be included with the agenda for the November meeting.)

XIX. Standing Committee Reports

A. Internal Governance

1. Budget – Marguerite Munson Lentz

Ms. Lentz is waiting for final income/disbursement numbers for fiscal year ending

September 30, 2015 and will present the budget for 2015-2016 at the November Council meeting.

2. Bylaws – Nancy H. Welber – No report.

3. Awards – Amy N. Morrissey – No report.

4. Planning – James B. Steward – No report.

5. Nominating – Mark K. Harder – No report.

6. Annual Meeting – James B. Steward – No report.

B. **Legislation and Lobbying**

1. Legislation Analysis and Monitoring Committee – Michele C. Marquardt

Ms. Marquardt reported that SB 551, which would allow a person to designate a representative regarding the person's funeral, was recently introduced. After discussion, John Bos moved to support the bill in principal, which was seconded. The Council voted in favor of supporting the bill in principal: 17 in favor, 0 opposed, 0 abstentions.

2. Legislation Development & Drafting Committee – Geoffrey R. Vernon

Mr. Vernon delivered the report. The most recent version of the digital assets proposed legislation was included with the October agenda. The committee was hopeful that Rep. Forlini would introduce that version soon. The committee was also hopeful that the Qualified Dispositions in Trust Act would be introduced by Sen. Schuitmaker soon.

The committee reviewed and proposed changes to draft legislation to eliminate dower. The bills were introduced as SB 558, 559, and 560. Marked up drafts were included with the October agenda. Mr. Vernon moved that the Council support these bills and Mr. Imami stated that an electronic vote would be taken within the next few days. The report of the electronic vote will be included with the November agenda.

Ms. Teahan reported that work on a bill to modify probate appeals is progressing and she hopes to have legislation introduced soon.

3. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon

Mr. Vernon reported that work on legislation to provide exoneration for trustees of irrevocable life insurance trusts is continuing. The Michigan Bankers Association recommended changes which were not substantive. Mr. Vernon moved for permission to make non-substantive changes to the proposed legislation. The motion was passed by the Council by vote voice, with no nays and no abstentions.

4. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber –No report.

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

1. Amicus Curiae – David L. Skidmore

Previously, the Council approved a motion to file an amicus brief in *In re Cliffman*. A copy of the amicus brief that was filed was included with the October agenda.

Kurt Olsen presented the report of the committee with respect to *Perry v Cotton* as Mr. Skidmore was recused. Mr. Olsen moved that the Section file an amicus brief taking the position that, based on MCR 5.117(A), the attorney for the fiduciary represents the fiduciary, not any beneficiary of the estate or the estate. The motion was approved: 16 in favor, 0 opposed, 1 abstention (recused).

Mr. Andrew Mayoras volunteered to write the amicus brief. A motion was made and approved by voice vote with no nays (and one recusal) to hire Mr. Mayoras to write the amicus brief. A motion was made to authorize $10,000 for preparation of this amicus brief. This motion was also approved by voice vote with no nays (and one recusal).

2. Probate Institute – Marlaine C. Teahan – No report.

3. State Bar and Section Journals – Richard C. Mills

Mr. Mills reported that the committee is working on a copyright license agreement.

4. Citizens Outreach – Constance L. Brigman – No report.

5. Electronic Communications – Michael G. Lichterman – No report.

6. Membership – Raj A. Malviya

Mr. Malviya reported that for 2013-14, there were 3481 section members. For the 2014-15 year, there were 3762 section members.

D. **Ethics and Professional Standards**

1. Ethics & Unauthorized Practice of Law– Katie Lynwood

Ms. Lynwood reported on *In re Mardigian*.

E. **Administration of Justice**

1. Litigation, Proceedings, and Forms – David L. Skidmore – No report.

F. **Areas of Practice**

1. Real Estate – Mark E. Kellogg

Mr. Kellogg gave a status report on HB bill 4645 (uncapping with respect to transfers to and from limited liability companies). The Treasury Department is opposed to this bill.

HB 4930 (dealing with Lady Bird deeds) was just introduced. Mr. Kellogg did not request any action from Council.

2. Transfer Tax Committee – Lorraine F. New

Ms. New reported on *Steinberg v Commissioner,* dealing with gift taxes on a net gift. The Tax nugget was included with the October agenda.

3. Charitable and Exempt Organization – Christopher J. Caldwell – No report.

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer – No report.

XX. **Other Reports**

G. **Liaisons**

1. Alternative Dispute Resolution Section Liaison – Milton L. Mack, Jr. – No report.

2. Business Law Section Liaison – John R. Dresser – No report.

3. Elder Law and Disability Rights Section Liaison – Amy R. Tripp

Mr. Douglas Chalgian reported that Elder Law Institute was successful, with over 240 attending.

4. Family Law Section Liaison – Patricia M. Ouellette – No report.

5. ICLE Liaison – Jeanne Murphy

Ms. Murphy reported that usage on website is down. There is no link from the Section's webpage on the State Bar web site to the Probate Journal on the ICLE website. Ms. Murphy will follow up with Ms. Lentz about approaching the State Bar for a link.

6. Law Schools Liaison – William J. Ard – No report.

7. Michigan Bankers Association Liaison – Susan M. Allan – No report.

8. Michigan Probate Judges Association Liaisons – Hon. Judge David M. Murkowski, Hon. Michael L. Jaconette – No report.

9. Probate Registers Liaison – Rebecca A. Schnelz – No report.

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

11. Solutions on Self-Help Task Force Liaison – Kathleen M. Goetsch – No report.

12. State Bar Liaison – Richard J. Siriani – No report.

13. Taxation Section Liaison – George W. Gregory

Mr. Gregory reported on the activities of the Taxation Section. His written report was included with the October agenda.

XXI. **Other Business**

None

XXII. **Hot Topics**

None

XXIII. **Adjournment**

The meeting was adjourned by Chairperson Shaheen I. Imami at 11:10 am.

ATTACHMENT 2

PROBATE AND ESTATE PLANNING COUNCIL
Treasurer's Report
November 7, 2015

Income/Expense Reports

Attached is the income/expense report for the fiscal year ended September 2015. The State bar has not provided the October figures yet.

Mileage Reimbursement Rate Effective 1/1/2015

The IRS business mileage reimbursement rate for 2015 is $0.575 per mile. If you are eligible for reimbursement of your mileage for Probate Council business, please use this rate on your SBM expense reimbursement forms. The SBM forms and instructions are attached. Please note that the forms were revised to reflect the new mileage rate.

Expense Reimbursement Requests

- For instructions or forms, use www.michbar.org/sections/home and scroll down to Section Leadership, and then Section Treasurer Information and click on Expense Reimbursement Form | Instructions or use the attached.
- Email forms to cballard@honigman.com or provide paper copies in person or by mail.

Chris Ballard, Treasurer
Probate and Estate Planning Section

Treasurer Contact Information:

Christopher A. Ballard
Honigman Miller Schwartz & Cohn LLP
315 E. Eisenhower Pkwy Ste 100
Ann Arbor, Michigan 48108
office: 734-418-4248
fax: 734-418-4249
email: cballard@honigman.com

Probate and Estate Planning Section
Treasurer's Report through
September 2015

	Beginning Fiscal Year 2014-2015		FY to Date			
General Fund	$ 186,741.33		$ 193,454.27			
Amicus Fund (reserve)	$ 35,423.50		$ 35,248.50			
Total fund	$ 222,164.83		$ 228,702.77			

		Sep-15	FY to Date Actual	Budget 2014-2015	Variance	Year to Date Percentage
Revenue	**Subcategories**					
Membership Dues			$ 115,815.00	$ 115,000.00	815.00	100.71%
Publishing Agreements			$ 650.00	$ 650.00	-	100.00%
Other			$ -	$ -	-	
Total Receipts			**$ 116,465.00**	**$ 115,650.00**	815.00	100.70%
Disbursements						
Journal (1)				$ 12,225.00	(250.00)	97.96%
	E-blast		$ 225.00			
	ICLE (formatting)		$ 11,750.00			
Chairperson's Dinner(2)				$ 7,000.00	425.63	106.08%
	Plaques		$ 456.30			
	Gavel		$ 138.08			
	Chair's Dinner--food		$ 6,198.25			
	Chair's Dinner-venue		$ 633.00			
Travel		2,116.94	$ 16,338.05	$ 18,500.00	(2,161.95)	88.31%
Lobbying			$ 30,000.00	$ 30,000.00	-	100.00%
Meetings(3)				$ 15,000.00	(4,384.95)	70.77%
	Mtg with Chair's Dinner		$ 966.38			
	Monthly	1,032.00	$ 7,394.70			
	Officers conference (including travel)		$ 2,176.97			
	Officers lunch	77.00	$ 77.00			
Long-range Planning			$ -	$ 1,000.00	(1,000.00)	0.00%
Support for Annual Institute				$ 14,000.00	-	100.00%
	Contribution to institute		$ 5,000.00			
	Speaker's Dinner		$ 9,000.00			
Amicus Briefs		10,175.00	$ 10,175.00	$ 10,000.00	175.00	101.75%
Seminars			$ 4,000.00	$ 4,000.00	-	100.00%
ICLE (Small Firm and Solo Institute) -- scholarships (7)					-	
ICLE (Small Firm and Solo Institute) -- general support (7)					-	
Electronics communications (4)				$ 2,825.00	(1,722.61)	39.02%
	List serve	150.00	$ 900.00			
	E-blast		$ 75.00			
	Telephone		$ 127.39			
Other(5)				$ 1,100.00	(961.22)	12.6%
	Copying		$ 138.78			
	Postage		$ -			
	Young Lawyer's Conference		$ -		-	
Membership Activities (6)				$ 4,000.00	157.16	103.93%
	Postage		$ 34.30			
	Reception		$ 1,761.50			
	Printing		$ 824.66			
	Lunch at Cooley/posters for institute/drawing items		$ 660.65			
	Probate banner		$ 453.21			
	E-blasts		$ 150.00			
	Table Throw		$ 272.84			
Total Disbursements		**$ 13,550.94**	**$ 109,927.06**	**$ 119,650.00**	(9,722.94)	**91.87%**

Net Increase (Decrease)		$	6,537.94	$ (4,000.00)

Footnotes

(1)Includes e-blast for the Journal
(2)Includes plaques for outgoing Chair and Council Members
(3)includes October meeting in connection with Chair's Dinner and SBM Leadership Conference expenses for incoming Chair and Chair Elect
(4)includes ListServ, telephone, e-blast & other electronic communications
(5)includes copying costs and $750 for Young Lawyers' Conference
(6) New budget item approved at March probate council meeting.
(7) New budget itesm approved at April probate council meeting to provide $1000 for scholarships for October 2015 solo and small firm institute and $1500 for general support for the institute. Per State Bar, the payment will be in next fiscal year (10/1/2015 through 9/30/2016) becuase the expense will be incurred in next fiscal year.

Paid this year but charged to next year's budget

2015-2016 Chair's Dinner	Big Rock $1,000

Amicus Reconcilliation

Beginning balance	$	35,423.50
Plus 2014-2015 budgeted	$	10,000.00
Less 2014-2015 expense	$	(10,175.00)
Ending Balance	$	35,248.50

Payee Name	
Street	
City	
State	Zip Code
E-Mail	
Phone	
Section	Probate & Estate Planning Section

SBM
State Bar of Michigan

306 Townsend St., Lansing MI 48931-2012, (800) 968-1442

Section Expense Reimbursement Form

Staple receipts to back of form as required. For electronic transmittal, scan and PDF receipts and send with form by e-mail. Policies and procedures on reverse side.

Please provide account no.	Amount
Amount Total	$ 0.00

Date	Description & Purpose (Note start and end point for mileage)	Mileage Rate	Mileage	Reimbursement	Lodging/Other Travel	Meals (Self + attach list of guests)	Miscellaneous (i.e. copying, phone, etc.)	Total
		0.575		0				$ 0.00
		0.575		0				$ 0.00
		0.575		0				$ 0.00
		0.575		0				$ 0.00
		0.575		0				$ 0.00
		0.575		0				$ 0.00
		0.575		0				$ 0.00

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

Date	Title	Signature

Date	Title	Approved by (Signature)

Grand Total $ 0.00

Reset Form

Print

State Bar of Michigan
Section Expense Reimbursement Policies and Procedures

General Policies

1. Requests for reimbursement of individual expenses should be submitted as soon as practical after being incurred, but not to exceed 45 days. However, at the end of the fiscal year, any remaining expense reimbursement requests for the fiscal year just ended must be submitted by the 3rd workday in October. The State Bar reserves the right to deny a reimbursement request that is untimely or where the State Bar's ability to verify an expense has been compromised due to any delay. Expense reimbursement forms, along with instructions for completing and transmitting expense reimbursement forms, are found on the State Bar of Michigan website at: http://michbar.org/programs/forms

2. All out of pocket expenses must be itemized. Each reimbursed expense must be clearly described and the business purpose indicated.

3. Reimbursement in all instances is limited to reasonable and necessary expenses.

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

5. An itemized receipt is required before reimbursement will be made for any meal. The reimbursement request must identify whether the meal is a breakfast, lunch or dinner. If the receipt covers more than one person, the reimbursement request must identify the names of all those in attendance for whom reimbursement is claimed, and the business purpose of the meal. If the receipt includes charges for guests for whom reimbursement is not claimed, the guests need not be identified by name, but their presence and number should be noted. Reimbursed meals while traveling (except group meals) are taxable if no overnight stay is required.

   For subsidized sections (Young Lawyers Section, Master Lawyers Section, and Judicial Section) the presumptive limits on meal reimbursement are the per diem amounts published on the State of Michigan Department of Technology, Management and Budget's website at http://www.michigan.gov/dtmb/0,5552,7-150-9141_13132---,00.html referencing Travel Rates and Select Cities for the current fiscal year. This policy applies to each individual meal - breakfast, lunch and/or dinner. Meal reimbursements exceeding the per diem amounts due to special circumstances must be approved by the section treasurer or section chair, whenever possible in advance of the expenditure. Reimbursement for meals exceeding the presumptive limits without an acceptable explanation of special circumstances will be limited to the published per diem amount. The presumptive limit on meal reimbursement applies to any meal expense (individual or group) reimbursed under this policy, but does not apply to meals for group meetings and seminars invoiced directly to the SBM. For all other sections, the amount of the meal reimbursement shall be deemed what is reasonable and necessary.

6. Spouse expenses are not reimbursable.

7. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursed mileage for traveling on State Bar business is limited to actual distance traveled for business purposes.

8. Receipts for lodging expenses must be supported by a copy of the itemized bill showing per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid. Barring special circumstances such as the need for handicap accessibility accommodations, for conference attendance, the reimbursement will be limited to the least expensive available standard room conference hotel rate.

9. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.

   A. Tickets should be at the best rate available for as direct a path as possible. The use of travel websites such as Travelocity, Priceline and Hotwire are recommended to identify the most economical airfare alternatives.

   B. Reimbursement of airfare will be limited to the cost of coach class tickets available for the trip at the time the tickets are purchased. The additional cost of business class or first class airfare will not be reimbursed.

   C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.

   D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

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

11. Outside speakers must be advised in advance of the need for receipts and the above requirements.

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

13. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

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

15. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of the Finance Department. The State Bar of Michigan is paying your expenses or reimbursing you for a conference and you are aware you will receive a refund, please notify the finance department staff at the time you submit your request for payment.

16. Gift cards (Visa, AMEX) that are reimbursed are taxable for any amount, and tangible gifts (other than recognition items such as plaques, gavels, etc.) and gift certificates (for restaurants, department stores, etc.) purchased and reimbursed are considered taxable if greater than $100.

Specific Policies

1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.

ATTACHMENT 3

From: April Alleman
Sent: Thursday, October 29, 2015 9:51 AM
To: Jessica Averill <JAverill@senate.michigan.gov>
Subject: RE: EPIC SB 560

Hey Jess,

Yep – so my boss and I heard from a Law Professor at Cooley who was reading through EPIC and realized that this language was still in there. She used the hypothesis that for example there is a widower who marries another woman and sometime later he passes away. Now the widower has children from the previous marriage and his children end up contesting the will and claim that certain gifts given to the new wife during their marriage should come out of her share.

Now they might not win on this ground because of the language at the end of 7(a) I'm assuming that says to the extent the gift is subject to estate or gift tax, but it is a sort of a loophole that could potentially be exploited.

Let me know if that made sense or if you need clarification.

April Alleman
Legislative Director
Senator David Robertson
(517)373-1636

From: Jessica Averill
Sent: Thursday, October 29, 2015 9:23 AM
To: April Alleman <AAlleman@senate.michigan.gov>
Subject: FW: EPIC SB 560

Do you have any more background info?
Jess

From: Shaheen Imami [mailto:SII@ProbatePrince.com]
Sent: Thursday, October 29, 2015 9:10 AM
To: Jessica Averill <JAverill@senate.michigan.gov>; 'BaumannJ@courts.mi.gov' <BaumannJ@courts.mi.gov>; David Pierson <dpierson@malansing.com>; Bill Kandler (kandlerw@krkm.com) <kandlerw@krkm.com>; 'tabitha@karoubassociates.com' <tabitha@karoubassociates.com>
Subject: RE: EPIC SB 560

Jess:

Before responding, I'd be interested in understanding the motivation for the proposed deletion of MCL 700.2202(7)(a). Admittedly, there are few situations to which this section might apply given the status of the federal estate tax framework and the number of spouses who take an elective share (this is my personal and initial take); however, it's not an issue that the Probate and Estate Planning Section has discussed to any degree, so I don't

think that I can commit to a deletion without running it past my other council members. We have a meeting scheduled for November 7th, so if you can get me more information by the beginning of next week, I can put it on the meeting agenda and probably get a position taken.

Let me know what you think. Thanks.

Shaheen

-----Original Message-----
From: Jessica Averill [mailto:JAverill@senate.michigan.gov]
Sent: Wednesday, October 28, 2015 2:41 PM
To: 'BaumannJ@courts.mi.gov'; David Pierson; Shaheen Imami; Bill Kandler (kandlerw@krkm.com); 'tabitha@karoubassociates.com'
Subject: FW: EPIC SB 560

Hi all,
I wanted to run this question past the group. Sen. Robertson's office reached out to us and asked if we could in SB 560, strike section 2202 (7)(a). I wanted to get your thoughts.

Thanks!

Jess Averill
Legislative Director
State Senator Rick Jones - 24th District
Direct: 517-373-5047
javerill@senate.michigan.org

-----Original Message-----
From: April Alleman
Sent: Wednesday, October 28, 2015 2:33 PM
To: Jessica Averill <JAverill@senate.michigan.gov>
Subject: RE: EPIC

My boss was looking at introducing legislation to strike the language in section 2202 (7)(a).

It looks like this language must have predated the Unlimited Marital Deduction and doesn't make any sense anymore sense a decedent can give an unlimited amount to his/her spouse estate/gift tax free under the Unlimited Marital Deduction.

So I am wondering if you guys would be okay with striking that language?

April Alleman
Legislative Director
Senator David Robertson
(517)373-1636

SENATE BILL No. 560

October 13, 2015, Introduced by Senator JONES and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled

"Estates and protected individuals code,"

by amending sections 1303, 2202, 2205, and 3807 (MCL 700.1303, 700.2202, 700.2205, and 700.3807), sections 1303, 2202, and 2205 as amended by 2000 PA 54 and section 3807 as amended by 2000 PA 177.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1303. (1) In addition to the jurisdiction conferred by section 1302 and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:

(a) Determine a property right or interest.

(b) Authorize partition of property.

(c) Authorize or compel specific performance of a contract in a joint or mutual will or of a contract to leave property by will.

(d) Ascertain if individuals have survived as provided in this

SENATE BILL No. 560

act.

(e) Determine cy-pres or a gift, grant, bequest, or devise in trust or otherwise as provided in 1915 PA 280, MCL 554.351 to 554.353.

(f) Hear and decide an action or proceeding against a distributee of a fiduciary of the estate to enforce liability that arises because the estate was liable upon some claim or demand before distribution of the estate.

(g) Impose a constructive trust.

(h) Hear and decide a claim by or against a fiduciary or trustee for the return of property.

(i) Hear and decide a contract proceeding or action by or against an estate, trust, or ward.

(j) Require, hear, or settle an accounting of an agent under a power of attorney.

~~(k) Bar an incapacitated or minor wife of her dower right.~~

(2) If the probate court has concurrent jurisdiction of an action or proceeding that is pending in another court, on the motion of a party to the action or proceeding and after a finding and order on the jurisdictional issue, the other court may order removal of the action or proceeding to the probate court. If the action or proceeding is removed to the probate court, the other court shall forward to the probate court the original of all papers in the action or proceeding. After that transfer, the other court shall not hear the action or proceeding, except by appeal or review as provided by law or supreme court rule, and the action or proceeding ~~shall~~ **MUST** be prosecuted in the probate court as a

probate court proceeding.

(3) The underlying purpose and policy of this section is to simplify the disposition of an action or proceeding involving a decedent's, a protected individual's, a ward's, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court.

Sec. 2202. (1) The surviving widow of a decedent who was domiciled in this state and who dies intestate may file with the court an election in writing that she elects to take 1 of the following:

(a) Her intestate share under section 2102.

(b) ~~Her~~ **IF THE DECEDENT DIED BEFORE THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED SECTION 30 TO 1846 RS 66, HER** dower right under sections 1 to 29 of 1846 RS 66, MCL 558.1 to 558.29.

(2) The surviving spouse of a decedent who was domiciled in this state and who dies testate may file with the court an election in writing that the spouse elects 1 of the following:

(a) That the spouse will abide by the terms of the will.

(b) That the spouse will take 1/2 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by 1/2 of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death.

(c) If a widow, **AND IF THE DECEDENT DIED BEFORE THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED SECTION 30 TO 1846 RS 66,** that she will take her dower right under sections 1 to 29 of 1846 RS 66, MCL 558.1 to 558.29.

(3) The surviving spouse electing under subsection (1) is limited to 1 choice. Unless the testator's will plainly shows a contrary intent, the surviving spouse electing under subsection (2) is limited to 1 choice. The right of election of the surviving spouse **UNDER THIS SECTION** must be exercised during the lifetime of the surviving spouse. The election must be made within 63 days after the date for presentment of claims or within 63 days after service of the inventory upon the surviving spouse, whichever is later.

(4) Notice of right of election ~~shall~~ **MUST** be served ~~upon~~ **ON** the decedent's spouse, if any, as provided in section 3705(5), and proof of that notice ~~shall~~ **MUST** be filed with the court. An election as provided by this section may be filed instead of service of notice and filing of proof.

(5) ~~In the case of~~ **FOR** a legally incapacitated person, the right of election may be exercised only by order of the court in which a proceeding as to that person's property is pending, after finding that exercise is necessary to provide adequate support for the legally incapacitated person during that person's life expectancy.

(6) The surviving spouse of a decedent who was not domiciled in this state is entitled to election against the intestate estate or against the will only as may be provided by the law of the place in which the decedent was domiciled at the time of death.

(7) As used in subsection (2), "property derived by the spouse from the decedent" includes all of the following transfers:

(a) A transfer made within 2 years before the decedent's death

to the extent that the transfer is subject to federal gift or estate taxes.

(b) A transfer made before the date of death subject to a power retained by the decedent that would make the property, or a portion of the property, subject to federal estate tax.

(c) A transfer effectuated by the decedent's death through joint ownership, tenancy by the entireties, insurance beneficiary, or similar means.

Sec. 2205. The rights of the surviving spouse to a share under intestate succession, homestead allowance, election, ~~dower,~~ exempt property, or family allowance may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separate maintenance is a waiver of all rights to homestead allowance, election, ~~dower,~~ exempt property, and family allowance by the spouse in the property of the other and is an irrevocable renunciation by the spouse of all benefits that would otherwise pass to the spouse from the other spouse by intestate succession or by virtue of a will executed before the waiver or property settlement.

Sec. 3807. (1) Upon the expiration of 4 months after the publication date of the notice to creditors, and after providing for administration costs and expenses, for reasonable funeral and burial expenses, ~~for dower,~~ for the homestead, family, and exempt

property allowances, for claims already presented that have not yet been allowed or whose allowance has been appealed, and for unbarred claims that may yet be presented, including costs and expenses of administration, the personal representative shall pay the claims allowed against the estate in the order of priority as provided in this act. A claimant whose claim has been allowed, but not paid as provided in this section, may petition the court to secure an order directing the personal representative to pay the claim to the extent that property of the estate is available for the payment.

(2) The personal representative may pay a claim that is not barred at any time, with or without formal presentation, but is individually liable to another claimant whose claim is allowed and who is injured by the payment if either of the following occurs:

(a) Payment is made before the expiration of the time limit stated in subsection (1) and the personal representative fails to require the payee to give adequate security for the refund of any of the payment necessary to pay another claimant.

(b) Payment is made, due to the negligence or willful fault of the personal representative, in a manner that deprives the injured claimant of priority.

(3) If a claim is allowed, but the claimant's whereabouts are unknown at the time the personal representative attempts to pay the claim, upon petition by the personal representative and after notice that the court considers advisable, the court may disallow the claim. If the court disallows a claim under this subsection, the claim is barred.

Enacting section 1. This amendatory act does not take effect

unless Senate Bill No. 558

of the 98th Legislature is enacted into law.

CLARK HILL

Clark Hill PLC
151 South Old Woodward Avenue
Suite 200
Birmingham, MI 48009
T 248.642.9692
F 248.642.2174

clarkhill.com

Thomas F. Sweeney
T 248.988.5867
F 248.988.2327
Email: tsweeney@clarkhill.com

May 27, 2015

Marlaine C. Teahan
Secretary – Probate and Estate Planning Council
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan Street, Suite 1000
Lansing, MI 48933

Re: Copyright Registration
Patient's Guide to Health Care Decision Making

Dear Marlaine:

I assume the council's secretary is the correct custodian for this long awaited copyright registration received earlier this month after its filing in August 2014. The registration process is simple, if there is only one author, and since Connie's draft constituted the largest part of the final document, I named her as the author, even though others contributed to the final product.

I am sending copies of the registration to Connie and Amy. I am also enclosing a copy of the paper with a copyright notice added.

Very truly yours,

CLARK HILL PLC

Thomas F. Sweeney

TFS:ts
Enclosure
Cc: Constance L. Brigman, Esq. (w/enc.)
Amy Morrisey, Esq. (w/enc.)

PATIENT'S GUIDE

TO HEALTH CARE DECISION-MAKING

PREPARED FOR PATIENTS, PATIENT ADVOCATES AND GUARDIANS
BY
THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

2014

The Probate and Estate Planning Section of the State Bar of Michigan has received inquiries from health care providers seeking clarification concerning health care decision-making for patients, patient advocates and guardians because of their receipt of lengthy and sometimes confusing or inaccurate information from other sources. The purpose of this document is to provide a user-friendly guide that reflects current Michigan law regarding the following:

1. Who can make health care decisions for a patient?

2. What health care decisions can be made for a patient?

3. Can a patient advocate or guardian request a patient's health care information?

This guide has been prepared and published as a public service to provide general information. It is not intended to cover every circumstance or legal question that may occur involving health care decision-making. It does not replace the role of a qualified attorney providing advice with respect to particular legal questions that may arise regarding patient decision-making.

Introduction

Who should read this guide?

This guide is for patients or patient advocates or guardians acting for a patient receiving medical treatment in Michigan. Because this guide is about health care decision-making, it uses the word "patient" to refer to anyone receiving medical care, including a nursing home resident. This guide does not include the special rules for health care decisions made by legal guardians of persons with developmental disabilities.

Can the patient, patient advocate or guardian request information about the patient's medical condition and proposed treatment?

Yes. Before a healthcare provider begins any non-emergency treatment or procedure, the provider must explain the treatment or procedure and ask whether the patient consents.[1] If a patient advocate or guardian is asked to provide consent for a patient, then that person may exercise the patient's right to request the information that is necessary to make an informed decision about the patient's medical treatment.

Adults Who Have the Ability to Make Informed Decisions

Do all adult patients have a right to make their own health care decisions?

Yes. Patients have a *right* to make their own health care decisions, but a patient may not always have the *ability* to do so. If that is the case, then the patient advocate or guardian must exercise the patient's rights. The role of a patient advocate or guardian is restricted to exercising the *patient's* right to make his or her own health care decisions.[2]

What is decision-making capacity for a health care decision?

It has three components and all three must exist in order for a patient to make a decision that meets the criteria of informed consent:

(1) the ability to be *informed* means the ability to comprehend and appreciate the nature and consequences (benefits and risks) of the proposed health care treatment;

(2) the ability to make a *competent* decision which means the patient can apply reasoning and reach an informed decision; and

(3) the decision is a *voluntary* one.[3]

Who decides whether a patient has decision-making capacity?

The patient's attending physician.[4] If the attending physician doubts that a patient has the capacity to provide informed consent, the physician will examine the patient and document in the patient's medical chart that the patient cannot provide informed consent to the proposed treatment because the patient lacks the decision-making capacity to do so. If there is no

documentation that this has been done, then it is presumed that the patient has decision-making capacity.

May a family member serve as a patient advocate or guardian?

A family member may serve as a patient advocate or guardian for a patient when designated as the patient advocate or appointed as the guardian. Many patients do not have a guardian or an executed patient advocate designation. In these cases, healthcare providers often allow family members to provide consent to ordinary and routine medical procedures to help the patient receive low risk, medically necessary medical treatment. Michigan law is not clear when and the extent to which a family member may consent on behalf of a patient to receive medical treatment. [5]

Advance Directives

What is an advance directive?

An advance directive is a *written* instruction about health care made by an adult patient prior to losing decision-making capacity. [6] Michigan refers to its statutory advance directive as a patient advocate designation.[7]

What decisions can a patient advocate make?

It depends on the instructions in the patient advocate designation. The patient advocate cannot make a decision to withdraw or withhold life-sustaining treatment unless the patient advocate designation clearly gives the patient advocate that decision making authority.[8]

Does the patient advocate need to ask the patient what he or she wants?

The patient advocate must take reasonable steps to follow the patient's instructions that were given at a time the patient had the capacity to make health care decisions.[9] Also, the patient advocate must try to learn the patient's current wishes.[10] If it is not in the patient's best interest to honor the patient's instructions, Michigan law does not require the patient advocate to do so.[11]

Can the patient disagree with the patient advocate's decision?

Yes. The patient can override the patient advocate's decision to:

(1) withdraw or withhold a life-sustaining treatment,[12] or

(2) revoke the patient advocate designation (thereby cancelling the patient advocate's authority).[13] A patient may do either of these even when the patient no longer has the capacity to make his or her health care decisions.[14]

What if the patient has a patient advocate *and* a guardian?

If the patient advocate designation is a legally valid document and it gives the patient advocate authority to make a particular health care decision, then the patient advocate has exclusive legal authority to do so. A guardian may not make a decision if the patient advocate has authority under a patient advocate designation to make that decision.[15]

What if the patient advocate is not available or is unable or unwilling to make the decision?
If this happens, the successor patient advocate should be contacted to make the decision.[16]

May a patient advocate name someone else to make health care decisions if or when the initial patient advocate is absent?
Yes. If the patient advocate designation expressly authorizes a successor patient advocate to act in the absence of the initial patient advocate.[17]

If the patient advocate is unable or unwilling, to make a timely decision then is that patient advocate disqualified?
Yes. In such a situation, the patient advocate is by-passed and the successor patient advocate is notified and asked to make a decision.[18]

Can a patient, patient advocate or guardian change a decision?
Yes. Any prior treatment decision may be revoked but the revocation must be documented. The medical facility's staff will need to document in the patient's medical chart the date and time of the revocation as well as the reasons for it.

Decisions to Withhold or Withdraw Life-Sustaining Treatment in Nursing Homes

Life-sustaining treatment means that the attending physician believes the patient will die within a relatively short time if the patient does not get the medical treatment or procedure.

What is a decision to withhold or withdraw life-sustaining treatment?
A treatment is withheld when the treatment was refused *before* it was provided to the patient. A treatment is withdrawn when a decision is made to remove the treatment *after* it has been started. Every adult patient has the right to refuse a treatment after being fully informed and *understanding* the probable consequences of such actions.

What is CPR?
CPR (cardiopulmonary resuscitation) is a medical procedure that attempts to restart a patient's heart or breathing after either or both have ceased. The simplest CPR is given with mouth-to-mouth breathing and forceful compressions of the patient's chest. In a medical facility it often involves electric shocks (defibrillation); insertion of a tube down the throat into the windpipe (intubation); and placing the patient on a breathing machine (ventilator).

How does a nursing home carry out a decision to withhold a life-sustaining treatment?
The attending physician directs staff *not* to provide certain medicines, treatments or procedures. There are several life-sustaining treatments that may be separately considered:

(1) Do Not Intubate ("DNI"). This is an order to not intubate the patient. A DNI will prevent the patient from being connected to a ventilator to provide breathing support.

(2) Do Not Resuscitate ("DNR"). A DNR order is a physician order to not attempt CPR and may only be issued by a physician.

(3) No artificial nutrition or hydration. This is an order to not provide tube feeding or IV fluids. Tube feeding is provided through a tube inserted in the patient's stomach. IV fluids are provided through a tube inserted into the patient's vein.

(4) Other orders may also be written such as an order to not provide dialysis.

If an order is written to not provide life-sustaining treatment will all medical treatment be stopped?

No. The order is limited to the treatments that it specifically addresses. It could be a DNR order only and all other medical treatments must be provided.

When may a patient have a DNR order?

A patient or patient advocate or guardian previously authorized may request a DNR order. However, only the patient's attending physician may write and place a DNR order in a patient's medical chart.[19]

What happens to a DNR order if the patient leaves the nursing home?

Whenever the patient's medical circumstances change, the patient's DNR order is one of the many physicians' orders that are reviewed to be renewed, modified or cancelled. If the patient moved to a different physician's care, the new attending physician will need to re-authorize the orders, including a DNR order. A patient, patient advocate or guardian previously authorized may request that the DNR order be again authorized.

Is Michigan law different for hospitals and nursing homes when it comes to DNRs?

No. Michigan law is that only a patient, patient advocate or guardian may make health care decisions for an adult who is unable to give informed consent. If a hospital accepts family consent, but a nursing home does not, it is not because Michigan laws for hospitals and nursing homes are different. Many nursing homes do not accept family consent to a DNR order under any circumstances. The State of Michigan inspects nursing homes and issues a citation for each DNR order that does not have the proper consent signatures.

When the patient is discharged home, is a DNR request in a health care power of attorney or similar instrument sufficient?

No. Only a DNR that is in compliance with the Michigan Do Not Resuscitate Procedures Act is sufficient to stop emergency medical services (EMS) from providing CPR if they are called to a residence. Michigan law has established a statutory form of DNR order for use outside of a hospital or nursing home. This statutory form is the standard to be followed in such circumstances.

Decision-Making Standards for Patient Advocates and Guardians

What does it mean for a patient advocate or guardian to honor the patient's wishes?
The patient has a right to make his or her own health care decisions. A patient advocate or guardian must honor the patient's right to do so by reasonably following the patient's wishes.

Do patient advocates and guardians have the same decision-making authority?
No. The patient appoints a patient advocate and the probate court appoints a guardian. The decision boundaries of a patient advocate or guardian are specified in the document or order that appoints them.

The general rule is that the patient advocate may rely on either verbal or written instructions from the patient. However, decisions regarding life sustaining medical treatment are an exception to the general rule. A patient advocate cannot refuse life sustaining medical treatment for a patient unless the patient advocate designation clearly grants this authority. It must give the patient advocate the authority to refuse life sustaining medical treatment and it must acknowledge that the patient advocate's decision could or would allow the patient to die. Michigan courts have interpreted this part of the statute to also mean that the patient advocate designation must articulate the medical conditions under which the patient advocate's authority may be exercised. An example might be: "If I am terminally ill, then please do not provide me with CPR or any other life sustaining medical treatment."

A guardian may not refuse a life sustaining medical treatment for the patient unless the guardian has been previously authorized to do so by the court. A court's authorization may be based on either clear and convincing evidence of the patient's wishes or an objective standard so long as the decision is consistent with the patient's values and beliefs.

Can the family make this decision on the patient's behalf?
Michigan law does not provide clear authority to next of kin to refuse life-sustaining medical treatment.[20]

Must an Ethics Review Committee agree with a decision by a patient advocate or guardian.
An Ethics Review Committee in a health care facility is advisory only. If the Ethics Review Committee does not support the decision of a patient advocate or guardian, the patient may be moved to a different hospital or nursing home. The patient advocate or guardian should ask if the hospital or nursing home has a medical futility policy. Medical care is considered futile if there is no reasonable hope that it will either benefit or cure the patient. Specifically, the patient advocate or guardian may ask if there is an institutional policy that allows a doctor to write an order against providing a medical treatment to the patient, even though the patient advocate or guardian requested treatment because the Ethics Review Committee considers the treatment to be medically futile.

[1] *In re Martin,* 450 Mich 204, (1995) at 217. The Martin opinion concurs with *In re Estate of Rosebush,* 195 Mich App 675 (1992) that Michigan recognizes a patient's right to informed consent and that this right arises from an individual's common law right to freedom from unwanted interference with his or her bodily integrity.

[2] "...a person's right to refuse life-sustaining medical treatment survives incompetency and may be discharged by a surrogate decision-maker..." Id. at 219. "A third person must implement an incompetent patient's previously expressed decisions."

[3] Charles P. Sabatino, Advance Directives and Advance Care Planning: Legal and Policy Issues, prepared for U.S. Department of Health and Human Services Contract #HHS-100-03-0023, Oct. 2007. The Michigan statute for a patient advocate designation (Michigan's health care power of attorney law) refers to the ability to provide informed consent as the patient's "ability to participate in medical decisions." MCL 700.5508.

[4] MCL 700.5508. The doctrine of informed consent places a legal obligation on the physician to provide adequate disclosures and to obtain informed consent from the patient.

[5] MCL 400.66h is applicable to a person " who is "not of sound mind or is not in a condition to make decisions for himself." . It requires physicians to obtain consent from a guardian or nearest relative of a patient who is not of sound mind. "Nothing in this act shall be construed as empowering any physician or surgeon, or any officer or representative of the state or county departments of social welfare, in carrying out the provisions of this act, to compel any person, either child or adult, to undergo a surgical operation, or to accept any form of medical treatment contrary to the wishes of said person. If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person's nearest relative, or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given. This provision is not intended to prevent temporary first aid from being given in case of an accident or sudden acute illness where the consent of those concerned cannot be immediately obtained." (emphasis added)

[6] The Patient Self Determination Act (PSDA) of 1990 defines an advance directive as a written instruction, such as living will or durable power of attorney for healthcare, that is recognized under state law (whether statutory or as recognized by the courts of the State), relating to the provision of health care when the individual is incapacitated. 42 U.S.C. § 1395cc(f)(3).

[7] MCL 700.5506

[8] *Martin* at 233 and 234. The word "clearly" in this case is clear and convincing evidence. The *Martin* Court said "However, where the surrogate decision-maker can establish by clear and convincing evidence that the conscious incapacitated individual, while competent, made a statement of his desire to refuse life-sustaining medical treatment under these circumstances, then the surrogate must be allowed to effectuate the incapacitated individual's expressed preference."

[9] MCL 700.5509(1)

[10] MCL 700.5511(1)

[11] MCL 700.5511(1)

[12] MCL 700.5510(1)(d)

[13] MCL 700.5510(1)(d)

[14] MCL 700.5306(5)

[15] MCL 700.5509(g)

[16] MCL 333.1501 et seq.

[17] Neither the Michigan Social Welfare Act nor the Michigan Dignified Death Act specifically addresses surrogate refusal of life sustaining medical treatment. When the legislature creates surrogate authority, it articulates the powers and duties, the priority to serve, and the priority of different surrogates, as it did in the patient advocate and the guardian statutes.

[18] The successor ordinarily steps up if the prior patient advocate will not sign an acceptance. MCL 700.5507(2). However, a medical provider is not obligated to follow the instructions of a patient advocate who is not in compliance with the statute. MCL 700.5511(3). The patient advocate must act in the patient's best interest. If a patient advocate is not performing his duties, then MCL 700.5511(5) allows a provider to petition the probate court to remove the patient advocate.

[19] Medline definitions. "DNR", http://www.nim.nih.govimedlineplusiency/patientinstructions/000473.htm. See also, Cleveland Clinic patient information page at http://my.clevelandclinic.org/healthy living/healthcare/hic do not resuscitate orders and comfort care.aspx.

[20] The *Martin* decision did not hold that a guardian may not make a decision for a ward using an objective standard: "Thus, while the facts of the present case do not require that we decide whether the state's *parens patriae* authority may be expansive enough to encompass a best interest analysis, we do note that such an analysis cannot be based on the common law right of informed consent." *Martin* at 222. The facts presented did not meet the criteria for an objective standard: "Thus, while the clearly expressed wishes of a patient, while competent, should be honored regardless of the patient's condition, we find nothing that prevents the state from grounding any objective analysis on a threshold requirement of pain, terminal illness, foreseeable death, a persistent vegetative state, or affliction of a similar genre." *Martin* at 222-223.

Registration #: TX0008013250
Service Request #: 1-1705133191

Clark Hill PLC
Thomas Sweeney
151 S. Old Woodward Ave.
Suite 200
Birmingham, MI 48009 United States

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Register of Copyrights, United States of America

Registration Number
TX 8-013-250
Effective Date of Registration:
September 04, 2014

Title

Title of Work: Patient's Guide to Health Care Decision Making

Completion/Publication

Year of Completion: 2014
Date of 1st Publication: June 01, 2014
Nation of 1st Publication: United States

Author

- **Author:** ConstanceL. L. Brigman
Author Created: text
Citizen of: United States
Domiciled in: United States

Copyright Claimant

Copyright Claimant: ConstanceL. L. Brigman
1428 44th St. SW, Suite B, Wyoming, MI, 49509

Rights and Permissions

Organization Name: Probate and Estate Planning Section
Address: State Bar of Michigan
306 Townsend St.
Lansing, MI 48933 United States

Certification

Name: Thomas F. Sweeney
Date: August 29, 2014

STATE OF MICHIGAN

COURT OF APPEALS

BILL and DENA BROWN TRUST, by MARK BROWN, Trustee,

Plaintiff-Appellant,

v

GERI GARCIA,

Defendant-Appellee.

FOR PUBLICATION
October 20, 2015
9:00 a.m.

No. 322401
Montmorency Circuit Court
LC No. 13-003254-CH

In re Estate of BILLIE MAX BROWN.

MARK BROWN,

Appellant,

v

GERI GARCIA,

Appellee.

No. 322402
Montmorency Probate Court
LC No. 13-007003

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In these consolidated cases involving an action to quiet title in Docket No. 322401 and a will contest in Docket No. 322402, plaintiff Mark Brown appeals by right the trial court's order granting defendant Geri Garcia summary disposition with respect to plaintiff's claim that the trust agreement did not authorize the trustee's deed at issue. Plaintiff also appeals by right the trial court's order granting summary disposition with respect to plaintiff's claim of undue influence. For the reasons discussed in this opinion, we affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

Bill Brown (Bill) and Dena Brown (Dena) established an irrevocable trust as part of their estate planning that was intended to distribute their assets to various beneficiaries after both had died. After Dena passed away, Bill became the sole trustee of the trust. Bill, as trustee, conveyed the marital home that was a trust asset to himself by means of a "Lady Bird" quitclaim deed,[1] which provided that the property would pass to defendant Geri Garcia on his death if Bill did not otherwise dispose of the property during his lifetime. Bill did not otherwise dispose of the property before his death. Plaintiff Mark Brown , the successor trustee, asserts that Bill did not have the authority to convey the property to himself after Dena died because doing so was contrary to the intent of the trust that the property pass to the trust beneficiaries after the death of both original settlors. According to plaintiff, the "Lady Bird" deed, in essence, partially revoked an irrevocable trust. Plaintiff argues in his first issue that the trial court erred by ruling the terms of the trust permitted Bill's action.

Plaintiff argues in his second issue that defendant Geri Garcia was in a fiduciary relationship with Bill and exercised undue influence over Bill with respect to executing the "Lady Bird" deed. Plaintiff asserts that the trial court erred by granting defendant summary disposition regarding his undue influence claim because questions of material fact remain.

On June 8, 2007, Bill and Dena as husband and wife created the Living Trust Agreement of Bill M. Brown and Dena G. Brown (the trust). Bill and Dena also executed, on the same day, identical wills that provided for transfer of property to the trust, or if the testator's spouse did not survive and the trust no longer existed, then specific distribution provisions mirrored those of the trust. A year later, on June 11, 2008, Bill and Dena exercised their authority under the terms of the trust by amending it and their wills to alter the named beneficiaries. These amendments did not alter the terms of the trust at issue in this appeal.

On February 28, 2008, Bill and Dena acquired the subject property located at 10395 South Airport Road, Avery Township, Montmorency County, for $180,000. The former owners[2] conveyed the property by warranty deed to Bill and Dena as trustees of the trust. The Browns, because Dena had cancer, moved to this home to be closer to Bill's former daughter-in-law, Eunice Ruth Dahn (Ruth), who was a caregiver for both. Dena died on August 10, 2008.

---

[1] "It is named after Lady Bird Johnson, because allegedly President Johnson once used this type of deed to convey some land to Lady Bird." *In re Tobias Estate*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2012 (Docket No. 304852), op at 5 (citation omitted). A "Lady Bird" quitclaim deed conveys an enhanced life estate that reserves to the grantor "the rights to sell, commit waste, and almost everything else[.] *Id*. See also Black's Legal Dictionary (10th ed), defining a "Lady Bird" deed as "[a] deed that allows a property owner to transfer ownership of the property to another while retaining the right to hold and occupy the property and use it as if the transferor were still the sole owner."

[2] One of the property's former owners was Yvonne Currie, who came to know the Browns as customers at the bank where she worked.

Defendant Geri Garcia was born in California on April 22, 1983, and immediately placed for adoption. In October 2009, Garcia was contacted by her birth mother, Pam Altz, who informed Garcia that her natural father was John Brown, the brother of Bill. Thereafter, Garcia contacted John, who rejected Garcia'a assertion that he was her natural father and also refused to provide a genetic sample for the purpose of testing.

At some point, Altz provided Garcia's telephone number to Bill, and he called Garcia. After Garcia wrote Bill a letter about herself and her family on August 19, 2010, Bill and Garcia regularly communicated by telephone and mail. In June 2011, Garcia flew from California to Michigan and visited Bill at his home. On January 12, 2012, Bill submitted genetic material for testing and comparison to samples from Garcia. The test results excluded Bill as being the possible father of Garcia but concluded that the probability the two were related was 97.7%, and that the "likelihood that the alleged relative is the biological relative of the tested child is 43 to 1." Bill apparently provided the test results to John, who responded in a March 8, 2012 letter indicating he thought that the information showed that Bill was Garcia's real father.

In February 2012, Garcia traveled from California to Michigan for her second visit with Bill. On February 10, 2012, Bill and Garcia went to a local branch of PNC Bank, where Bill added Garcia as a joint owner with rights of survivorship to various accounts. Bill and Garcia then went to the office of attorney Benjamin Bolser; Eunice Ruth Dahn joined Bill and Garcia at Bolser's office. Bill had previously consulted with Bolser and various documents were ready for signature. Geri Garcia, and if unable to serve, Eunice Ruth Dahn, were named as Bill's attorney-in-fact (durable power of attorney); Garcia and Dahn were similarly appointed as Bill's patient advocate (durable power of attorney for health care). Bill executed a last will and testament that (1) disinherited his two children and their children, (2) devised and bequeathed all the residue of his estate to Geri Garcia, and (3) appointed Geri Garcia the personal representative of his estate. Bill also signed a living will that directed the withholding of medical treatment in certain circumstances. Finally, Bill, as the sole surviving settlor-trustee, conveyed the Airport Road property to himself as an individual via a "Lady Bird" quitclaim deed that would pass the property to Geri Garcia if Bill did not otherwise dispose of it during his lifetime.

After February 2012, Garcia accompanied by various members of her family, visited Bill for short periods of no more than 5 days in March, April, August, and October 2012. John Brown continued to disbelieve Garcia's claim of paternity. He wrote to his brother Bill on October 31, 2012, and admonished Bill to not give anyone his cell phone number: "I'm not going to be called and harassed anymore by all those so called kids of mine who read about me and are after my money . . . ." Mark Brown, John's son, became the successor trustee of the Bill and Dena Brown trust after Bill passed away on January 16, 2013.

Mark Brown, as successor trustee, filed an action in circuit court on February 1, 2013 to quiet title in the trust to Airport Road property (Docket No. 322401; LC No. 13-003254-CH). This case requested that the "Lady Bird" deed be declared null and void because it was in contradiction to the terms of trust. Defendant Garcia filed an answer on March 1, 2013, denying that the deed was contrary to the terms of the trust. In later proceedings, plaintiff developed his alternative theory that Garcia used undue influence to cause Bill to execute the deed. This case was assigned to Circuit Judge Michael G. Mack.

On March 8, 2013, Garcia, as Bill's nominated personal representative in his February 10, 2012 will, filed a petition in probate court for formal appointment as personal representative and for determination of heirs (Docket No. 322402; LC-13-007003-DE). Mark Brown appeared by counsel on March 25, 2013. At a hearing held on April 4, 2013 before Probate Judge Benjamin Bolser, the parties stipulated to the entry of an order maintaining the status quo. Judge Bolser, because of his prior involvement as an attorney and witness to the matters in controversy, disqualified himself from hearing the matter. The State Court Administrator assigned this case to Circuit Court Judge Mack. On April 22, 2013, Mark Brown filed a petition contesting probate of the February 10, 2012 will on the basis that it was the product of undue influence and sought instead to probate Bill Brown's June 11, 2008 will. On May 13, 2013, the parties and Judge Mack agreed to consolidate the two actions.

In June 2013, Mark Brown moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), and Geri Garcia responded with her own motion for summary disposition under MCR 2.116(I). Judge Mack held a hearing on the motions on July 15, 2013. The trial court took the motions under advisement and subsequently issued an opinion and order on August 8, 2013, granting in part Garcia's motion and denying Mark Brown's motion. The trial court concluded the terms of the trust authorized Bill Brown as the surviving settlor-trust to execute the "Lady Bird" deed. In particular, the trial court relied on Article VII of the trust, which provided that "[d]uring Settlor's lifetime, however, Settlor may direct Trustee with respect to any matter concerning the . . . distribution . . . of trust assets." Although Article II prohibited the surviving settlor from revoking or amending the trust in any way, the court found persuasive that Article VII powers referred to a singular settlor. Thus, the court ruled that "[w]hen [Bill] Brown executed the Lady Bird deed on February [10], 2012 he was properly acting under the authority granted to him in Article VII. Additionally, Section 7.10 allowed him, as trustee, to 'deal in real property . . . without regard to the duration of such interest.'"

The undue influence claim, however, remained pending, and following further discovery, defendant Geri Garcia moved for summary disposition regarding that claim. After the parties presented oral arguments and further briefing, the trial court issued an opinion and order on May 8, 2014, granting defendant Garcia's motion. The trial court relied primarily on the deposition of bank employee Yvonne Currie, who assisted Bill Brown in making Garcia a joint owner of various accounts, and the testimony of then attorney Benjamin Bolser, who drafted and witnessed the various documents executed at his office on February 10, 2012. The trial court ruled that "all of the testimony supports the conclusion that Bill Brown was acting of his own volition and not subject to any undue influence [and that plaintiff] has presented no evidence to the contrary." The trial court also rejected consideration of a presumption of undue influence because "the evidence has not demonstrated a confidential or fiduciary relationship between Geri Garcia and Bill Brown." The trial court entered an opinion and order denying plaintiff's motion for reconsideration on June 5, 2014. Plaintiff Mark Brown now appeals by right.

II. THE TRUST

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under

MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence, the substance or content of which would be admissible at trial. *Id*. at 120-121; *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120. A court should grant the motion when the submitted evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the undisputed evidence shows that any party is entitled as a matter of law, the court may enter judgment for that party. MCR 2.116(I)(1) and (2); *In re Baldwin Trust*, 480 Mich 915; 739 NW2d 868 (2007).

The interpretation of a trust agreement is also a question of law reviewed de novo on appeal. *In re Herbert Trust*, 303 Mich App 456, 458; 844 NW2d 163 (2013). "A court must ascertain and give effect to the settlor's intent when resolving a dispute concerning the meaning of a trust." *Id*. The settlor's intent is ascertained by looking to the words of the trust itself. *In re Perry Trust*, 299 Mich App 525, 530; 831 NW2d 251 (2013). If the trust's terms are ambiguous, a court may look outside the document to determine the settlor's intent, and consider the circumstances surrounding the creation of the trust and the general rules of construction. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). The fact that litigants disagree regarding the meaning of a trust, however, does not mean that it is ambiguous. See *Detroit Wabeek Bank & Trust Co v City of Adrian*, 349 Mich 136, 143; 84 NW2d 441 (1957) (noting litigants espousing different positions regarding the proper interpretation of a will did not render its terms ambiguous); *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005) ("The rules of construction applicable to wills also apply to the interpretation of trust documents."). A court must also read a trust as a whole, harmonizing and giving effect to all its terms, if at all possible. *In re Raymond Estate*, 483 Mich 48, 52; 764 NW2d 1 (2009). In sum, a court must enforce the plain and unambiguous terms of a trust as they are written. *Id*.; *In re Reisman Estate*, 266 Mich App at 527.

B. DISCUSSION

The trust's plain terms authorize a settlor serving as trustee to engage in self-dealing and also plainly authorize a settlor to direct the trustee "with respect to any matter concerning the administration, [or] distribution . . . of trust assets." The trust further authorizes the trustee to "[m]ake distribution or division of trust assets in cash or in kind," to "deal in real property, or any interest therein, as Trustee deems appropriate and without regard to the duration of such interests," and to "[e]xecute and deliver an instrument that accomplishes or facilitates the exercise of a power vested in Trustee." Consequently, the trial court correctly ruled that the trust granted Bill Brown as the surviving settlor-trustee the authority under Article VII to execute the February 10, 2012 "Lady Bird" deed quitclaiming the Airport Road property to himself, with a remainder to Geri Garcia. Further, the trial court correctly ruled that the conveyance did not alter or amend any part of the trust. Thus, the trial court properly granted defendant summary disposition regarding plaintiff's action to quiet title with respect to the Airport Road property.

Plaintiff's arguments to the contrary lack merit. First, plaintiff asserts that the February 10, 2012 quitclaim deed is contrary to the purpose of the trust to distribute the trust's assets to various named beneficiary after the death of both settlors. While plaintiff contends that the quitclaim deed effectively modified or partially revoked the trust, this is simply not true as the trust's terms remain unchanged from the time that Bill Brown and Dena Brown last jointly amended it. While the quitclaim deed clearly diminishes the amount of property subject to distribution according to its terms, the trust itself was not modified. Nevertheless, plaintiff asserts, without citation to any provision in the trust, that "neither Bill Brown nor Dena Brown could unilaterally remove" the Airport Road property from the trust. But plaintiff fails to cite any authority to support his argument that when a married couple establishes an estate plan that includes a trust, the surviving settlor/trustee is precluded from transferring property from the trust even if doing so is within the discretion vested in the settlor or trustee by the terms of the trust document. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008). "And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Plaintiff also posits that because Bill Brown and Dena Brown could have taken title to the Airport Road property as joint tenants with rights of survivorship but instead took title to the property as co-trustees they intended the property to remain in the trust. This argument is unavailing. What the settlors might have, but did not do, does not establish the settlors' intent with respect to the trust. Rather, the plain terms of the trust establish the settlors' intent. *In re Raymond Estate*, 483 Mich at 52; *In re Reisman Estate*, 266 Mich App at 527. As discussed already, the terms of the trust plainly accord the surviving settlor/trustee broad authority to engage in self-dealing, to distribute trust asset in cash or kind, to deal in real estate, and to execute such instruments on such terms as the trustee deems appropriate. The trustee's exercise of these powers that has the effect of diminishing trust assets available for distribution after the death of the last surviving settlor is nowhere prohibited by the terms of the trust. This is not an absurd result, as plaintiff argues, but one the settlors plainly contemplated. Paragraph 4.2 of the trust provides that the trustee may "pay to Settlors or apply for Settlors' benefit amounts of principal (even to the exhaustion of the trust) as Trustee, in Trustee's discretion, deems necessary or advisable to maintain Settlors' customary standard of living." While this provision does not specifically authorize the quitclaim deed at issue, it demonstrates that the trust was first and foremost drafted for the settlors' benefit during their lifetimes. It provides no guarantee that "other" beneficiaries under Article V would receive any distribution after the death of the last surviving settlor.

Moreover, in a similar context of a married couple's estate plan, this Court has rejected imposing restrictions on the surviving spouse's ability to dispose of the couple's property after the death of a spouse unless the estate planning documents specifically impose restrictions. *In re Leix Estate*, 289 Mich App 574, 590-591; 797 NW2d 673 (2010). The *Leix* case concerned an agreement to make mutual wills that would provide on the death of the survivor all of the survivor's property would go into a trust for a granddaughter for her life and on the granddaughter's death, the remainder would be divided into three equal shares for the granddaughter's issue and two other heirs or their issue. *Id*. at 578. After the death of his spouse, the survivor transferred nearly all his assets into accounts held jointly with the

granddaughter and also transferred real estate to himself and the granddaughter as joint tenants with survivorship rights. *Id*. at 576. "One of the effects of the transfers was to divest the trust of assets that the contingent trust beneficiaries might have received upon [the granddaughter's] death." *Id*. at 578. The other heirs brought an action to impose a constructive trust, contending that the survivor's lifetime transfers violated the agreement to execute mutual wills. The trial court granted summary disposition to the granddaughter because "nothing in the agreement put any restrictions on what the surviving party could do with the parties' assets;" therefore, the asset transfers did not breach the agreement. *Id*. at 577.

On appeal, this Court first held that the agreement to execute mutual wills was valid and became binding on the death of the first spouse. *Id*. 578-579, citing *Schondelmayer v Schondelmayer*, 320 Mich 565, 572; 31 NW2d 721 (1948). However, the mutual will agreement did not apply to specific property and did not restrict the survivor's ability to dispose of property during the survivor's lifetime. After surveying conflicting case law from other jurisdictions, the Court rejected the "appellant's invitation to recognize implied limitations on the transfer of assets by the surviving spouse in the case of an agreement to make mutual wills." *In re Leix Estate*, 289 Mich App at 590. The Court reasoned that "[a]n unambiguous contract must be enforced according to its terms." *Id*., quoting *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004). Further, courts must enforce an agreement as written absent an unusual circumstance, such as the contract violating the law or because it is contrary to public policy. *Id*. at 590-591. The *Leix* Court held that these contract principles applied to the contract to make a mutual will. Consequently, the Court held that "[r]egardless of whether the [survivor's asset] transfers were made for the purpose of avoiding the testamentary disposition, the agreement did not restrict [the survivor] from disposing of the assets as he saw fit." *Id*. at 591.

In the present case, nothing in the trust or other testamentary documents restricted the surviving settlor-trustee from disposing of trust assets as the surviving settlor-trustee deemed appropriate. Indeed, the trust specifically authorized Bill, as the surviving settlor-trustee, to engage in self-dealing, to distribute trust assets in cash or kind, to deal in real estate, and to execute any instruments as the trustee considered appropriate to carry out these powers. The trust agreement must be enforced as written. *In re Raymond Estate*, 483 Mich at 52; *In re Leix Estate*, 289 Mich App at 590-591; *In re Reisman Estate*, 266 Mich App at 527. The trial court correctly ruled that defendant Geri Garcia was entitled to summary disposition regarding plaintiff's action to quiet title with respect to the Airport Road property.

III. THE UNDUE INFLUENCE CLAIM

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Maiden*, 461 Mich at 118. A trial court properly grants the motion when the submitted evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *In re Leix Estate*, 289 Mich App at 577.

A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion, which occurs when the court's decision falls outside the range of principled outcomes. *Yoost v Caspari*, 295 Mich App 209, 219-220; 813 NW2d 783 (2012).

B. DISCUSSION

We affirm the trial court on this issue because plaintiff failed to produce any evidence creating a material question of fact that either the "Lady Bird" deed or the last will and testament were the product of Geri Garcia's undue influence over the free will of Bill Brown. The trial court also correctly ruled that no evidence was presented to establish a confidential or fiduciary relationship between Bill Brown and Geri Garcia so as to invoke the presumption of undue influence with respect to the documents executed on February 10, 2012. Therefore, the trial court properly granted Geri Garcia summary disposition and did not abuse its discretion denying plaintiff's motion for reconsideration.

The party alleging undue influence in the execution of a testamentary instrument must present evidence "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *Kar v Hogan,* 399 Mich 529, 537; 251 NW2d 77 (1976). Proof of motive, opportunity, or even of the ability to control the grantor are not sufficient to establish undue influence in the absence of affirmative proof that it was exercised. *Id.*; *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003). Plaintiff presented no evidence to the trial court that Geri Garcia exerted undue influence over Bill Brown, and on appeal, plaintiff points to none. Indeed, the affirmative evidence shows that Bill Brown's actions on February 10, 2012, in his individual capacity and as the surviving settlor-trustee of the Bill and Dena Brown trust, were Bill Brown's free and voluntary choice. Further, no evidence was presented that Geri Garcia influenced Bill Brown to create joint bank accounts with her, to execute a new will naming Garcia as his personal representative and beneficiary, to name Garcia his attorney-in-fact for both general purposes and health care decisions, or to execute the "Lady Bird" quitclaim deed at issue.

Because plaintiff bore the ultimate burden of proof and failed to produce any evidence to raise a material question of fact regarding the elements of undue influence, the trial court properly granted summary disposition to defendant Geri Garcia on this claim. *Kar*, 399 Mich at 438 ("The ultimate burden of proof in undue influence cases does not shift; it remains with the plaintiff throughout trial."); *In re Leix Estate*, 289 Mich App at 577 (summary disposition is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law). Plaintiff's main assertion of error regarding the trial court's grant of summary disposition is that trial court failed to consider that the circumstances raised a presumption of undue influence because there was evidence of a confidential or fiduciary relationship between Bill Brown and Geri Garcia. This argument is without merit.

A presumption of undue influence exists when evidence establishes (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary or an interest represented by the fiduciary benefits from a transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in the transaction. *Kar*, 399 Mich at 537. Even when the presumption arises, the ultimate burden of proving undue influence remains on the party alleging that it occurred. *Id.* at 538. But the presumption satisfies the burden of persuasion, so if a party opposing the allegation of undue influence "fails to offer sufficient rebuttal evidence," then the party alleging undue influence will have met its burden of persuasion, i.e., its burden of showing the occurrence of undue influence. *Id.* at 542. Generally,

the fact finder must assess whether sufficient evidence has been presented to rebut a presumption of undue influence. *In re Peterson Estate*, 193 Mich App 257, 262; 483 NW2d 624 (1992).

Plaintiff points to no evidence of a confidential or fiduciary relationship between Bill Brown and Geri Garcia that existed before the execution of the questioned documents. Instead, plaintiff asserts a bootstrap argument that conflates the fact that the grant of a power of attorney will create a fiduciary relationship, citing *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002), with the general evidentiary principle that subsequent acts may be circumstantial evidence regarding earlier events, citing *In re Persons Estate*, 346 Mich 517, 532; 78 NW2d 235 (1956) and *Walts v Walts*, 127 Mich 607, 610; 86 NW 1030 (1901). Plaintiff contends that Bill Brown's creating a fiduciary relationship is sufficient to raise a question of fact regarding undue influence as to the execution of contemporaneous or prior documents. This argument fails, as discussed below.

First, plaintiff cites no authority for the premise of his argument that the creation of fiduciary relationship retroactively extends a presumption of undue influence to acts that took place before the fiduciary relationship was created. Moreover, the cases plaintiff cites do not so hold. *Persons Estate*, 346 Mich at 532, holds only that the conduct of the chief beneficiary of a will before or after the will's execution may be relevant to whether undue influence was exerted in procuring the making of the will. The case says nothing about a presumption of undue influence applying retroactively to times before the creation of a fiduciary relationship. Similarly, *Walts* states the unremarkable evidentiary principle that subsequent events may be circumstantially relevant evidence to explain earlier conduct. Thus, the evidence relates to prove a fact in existence at an earlier time. Specifically, the Court stated that "evidence showing acts of undue influence at a date subsequent to the execution of the will is competent, in connection with other facts and circumstances, in support of the charge of undue influence exerted at the earlier date." *Walts*, 127 Mich at 610. This case also does not hold that a presumption of undue influence may be applied retroactively to times before the creation of a fiduciary relationship. An issue is deemed abandoned where a party fails to cite any supporting legal authority for its position. *Prince*, 237 Mich App at 197.

Second, our Supreme Court, in discussing the elements necessary to establish a presumption of undue influence clearly states that for the presumption to be "brought to life," i.e., to apply, evidence must be introduced that would establish "the existence of a confidential or fiduciary relationship between the grantor and a fiduciary . . . ." *Kar*, 399 Mich at 537. Stated otherwise, the presumption of undue influence cannot be applied to questioned documents that were created before "the existence of a confidential or fiduciary relationship." Thus, the creation of a fiduciary relationship cannot shift the burden of persuasion with respect to undue influence that is alleged to have been exerted before the fiduciary relationship was created. Because the burden of production never shifted in this case from plaintiff to defendant with respect to the questioned documents, and plaintiff failed to present evidence to create a question of fact as to whether the questioned documents were the product of undue influence, the trial court properly granted defendant summary disposition. *Id*. at 539-540; *In re Leix Estate*, 289 Mich App at 577.

Even if we were to assume that a presumption of undue influence arising from the creation of the power of attorney could be applied retroactively, we recognize that the presumption creates only a permissible inference that may be rebutted by the introduction of

evidence to the contrary. *Kar*, 399 Mich at 541. The ultimate burden of proof regarding undue influence remains with the party who alleges that it occurred. *Id.* at 539. In the present case, no evidence was presented of undue influence and, in fact, the evidence showed that Bill Brown's actions were the result his own free will. So, even if a presumption of undue influence applied retroactively stemming from the creation of a power of attorney in Geri Garcia, the presumption was rebutted such that a reasonable trier of fact could only conclude that the questioned documents were not the product of undue influence. They were the result of Bill Brown's free will. See, e.g., *Id*. at 537, 541, 543-544 (a directed verdict is appropriate when a defendant's rebuttal evidence overcomes the presumption).[3] Therefore, based on the evidence submitted to the trial court, even if a presumption of undue influence existed at the time the question documents were created, the evidence presented to the trial court, giving the benefit of reasonable doubt to plaintiff, does not leave open a question of undue influence on which reasonable minds might differ. *Id*. at 543-544; *West*, 469 Mich at 183.

Plaintiff also argues that the trial court erred in granting summary disposition to defendant regarding undue influence because it relied on "conclusory opinion" testimony of then attorney Benjamin Bolser and bank employee Yvonne Currie. Both witnesses testified in their depositions that they believed Bill Brown was acting of his own volition when executing the questioned documents and that they saw nothing to indicate otherwise. A trial court may only consider documentary evidence on a motion for summary disposition under MCR 2.116(C)(10), "to the extent that the content or substance would be admissible as evidence." MCR 2.116(G)(6); see also *Maiden*, 461 Mich at 121. Plaintiff's argument in this regard lacks merit. To the extent Bolser's and Currie's testimony amounted to lay opinions, it would be substantively admissible because it was "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. "Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996).

In sum, the trial court properly granted defendant Geri Garcia summary disposition regarding plaintiff's claim of undue influence with respect to the questioned documents. *In re Leix Estate*, 289 Mich App at 577. Furthermore, the trial court also did not abuse its discretion denying plaintiff's motion for reconsideration. *Yoost*, 295 Mich App at 219-220.

[3] The standard applicable to directed verdicts is the same as that for a motion under MCR 2.116(C)(10), i.e., "whether reasonable minds, taking the evidence in a light most favorable to the nonmovant, could reach different conclusions regarding a material fact." *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CHARLES E. DUKE.

CRYSTAL CLARK, CHARLES F. DUKE, AND MAREGA DELIZIO,

Petitioners-Appellees,

v

ROBERT DUKE,

Respondent-Appellant.

FOR PUBLICATION
October 13, 2015
9:00 a.m.

No. 321234
Wayne Probate Court
LC No. 2010-753078-DE

Before: WILDER, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

WILDER, P.J.

Respondent, Robert Duke, appeals as of right a probate court order granting the petition filed by petitioners, Crystal Clark, Charles Franklin Duke ("Frank"), and Marega Delizio, to determine title to real estate located in Huron Township, Michigan, and set aside the quitclaim deed that allegedly conveyed the property at issue in this case. We reverse and remand for further proceedings consistent with this opinion.

I

Before his death, decedent Charles E. Duke ("decedent") executed a quitclaim deed that conveyed an approximately 40-acre parcel of land on Inkster Road in Huron Township, Michigan ("Inkster Road Property") to Frank and respondent, his sons. According to the notations on the document, the deed was acknowledged by decedent, petitioner Frank, and respondent on May 14, 2007, before "EA Labadie," a notary public whose commission would expire on December 30, 2014. On September 23, 2009, decedent passed away. In January 2010, respondent recorded the quitclaim deed with the Wayne County Register of Deeds. On April 28, 2010, respondent was appointed personal representative of decedent's estate. When respondent

filed his initial inventory of the estate on September 7, 2011, he did not include the Inkster Road Property.[1]

On January 9, 2014, petitioners filed a petition to determine title to the Inkster Road Property and set aside the quitclaim deed, arguing that the Inkster Road Property is property of decedent's estate. Petitioners first argued that the quitclaim deed was fraudulent and void under MCL 565.46 and MCL 565.47 because it was improperly notarized and, as a result, could not be validly recorded as a conveyance of real estate under MCL 565.201(1)(c). Petitioners contended that the alleged notary, E.A. Labadie, was not a notary public as of May 14, 2007, providing printouts from the Michigan Department of State website indicating that Labadie became a notary public on October 15, 2008. Next, petitioners argued that respondent procured the "notarization" of the quitclaim deed to benefit himself because Labadie was an employee of respondent. Finally, petitioners argued that there was no evidence that the deed was actually delivered, as the deed was not recorded during decedent's lifetime and, instead, was hidden away until respondent recorded the deed after decedent's death. Thus, because a court may invalidate under MCL 55.307(2) any notarial act that is not performed in compliance with the Michigan Notary Public Act, petitioners requested that the probate court enter an order holding that the quitclaim deed was void and, therefore, did not transfer title of the Inkster Road Property from decedent. Additionally, petitioners asserted that respondent "must be charged with knowledge of the falsity of the notarization of the quit-claim deed" because Labadie was respondent's employee, and because respondent authorized Labadie to use his business address and phone number in her application to become a notary public in 2008.

On February 10, 2014, Labadie executed an affidavit averring that she witnessed decedent execute the quitclaim deed "on or about April 13, 2009," and that the date written and printed on the deed was incorrect. She also stated "[t]hat following execution of the deed, at the direction of [decedent], I made two copies of the deed and delivered the original to [respondent], and gave the copies to [petitioner Frank] and [decedent]."

On or about February 14, 2014, petitioners filed a brief in support of their petition. Petitioners raised the same arguments as those discussed in their initial petition and supporting brief, but they also argued, *inter alia*, that the deed constituted a gift because it was not supported by consideration, such that it should be governed by the law applicable to gifts, not the more lenient standards for real estate conveyances that are supported by paid consideration. Additionally, petitioners asserted that the deed was not a valid gift under Michigan law. Finally, petitioners argued that the deed was statutorily defective and that the "savings statute" under MCL 565.604 was not applicable because the statute only applies when a deed is "made in good faith and upon a valuable consideration." Specifically, petitioners contended that, despite the fact that Labadie was a notary public, nevertheless, the circumstances in which respondent arranged to have his employee sign the quitclaim deed, for no consideration, evidences that the deed was executed in bad faith.

[1] In the meantime, a dispute arose between the parties related to respondent's purported failure to comply with reporting and inventory requirements.

On February 26, 2014, Labadie's affidavit was recorded with the Wayne County Register of Deeds. Also on or about February 26, 2014, respondent filed a brief in response to petitioners' petition. Respondent asserted that decedent had signed a preprinted deed prepared by attorney Renee Schattler Burke in 2007 and dated May 14, 2007, but that the quitclaim deed was actually executed on or about April 13, 2009. Additionally, respondent claimed that when the deed was signed on or about April 13, 2009, Labadie was, at that time, a notary public; the deed was signed in Labadie's presence; and Labadie erroneously conformed the date in her notary block to the date printed on the deed. Furthermore, respondent indicated "[t]hat upon realizing [that] the date on the notary block (and the deed itself) was incorrect, Ms. Labadie prepared and recorded an [a]ffidavit of correction, as allowed by MCL 565.202, correcting the date of the deed, the restrictive agreement, and her notary block to April 13, 2009," attaching a copy of the recorded affidavit to his response. Respondent also argued that the burden of proof with regard to delivery had shifted to petitioners based on the contents of Labadie's affidavit. Finally, respondent argued that the court should hold the deed valid, even if the affidavit of correction was insufficient to correct the defects in the acknowledgment, as the only evidence presented to the court indicated that decedent intended to convey the property through the deed, and the deed was sufficient to provide notice of the conveyance. He argued that Michigan courts seek to carry out the parties' intentions, even if a deed is incomplete or ambiguous, and provided a business letter from attorney Daniel Keith in order to demonstrate that decedent had intended to transfer the property to respondent and petitioner Frank as early as 2001.

On March 5, 2014, the probate court held a hearing on the petition, and the parties presented arguments consistent with those raised in their briefs. In addition, petitioners contested respondent's claim that petitioner Frank was present when the deed was purportedly executed in April 2009, indicating that petitioner Frank was present and willing to testify to that fact. Although the court did not ask him to testify, petitioner Frank—who was sworn as a witness at the beginning of the hearing but was never examined by petitioners' or respondent's counsel—briefly confirmed on the record that he was not present in April 2009. Regarding recordation under MCL 565.46, respondent argued that there is a difference between executing a valid conveyance and making a deed eligible for recording, arguing that there is no dispute that a valid conveyance occurred in the instant case. The probate court stated that Burke's affidavit was not "particularly persuasive" or "clear and convincing" as to the date on which the deed was actually executed, and that it did not believe that Labadie notarized the deed in April 2009. Instead, the court stated that it believed that the deed was actually executed on May 14, 2007, in light of its disbelief that a notary would sign the deed while ignoring, and failing to correct, the numerous places on the deed that included the May 14, 2007 date. Accordingly, the probate court set aside the deed and held that the Inkster Road Property was property of decedent's estate, indicating that it would issue a written order and opinion with its reasoning.

On March 17, 2014, the probate court entered an opinion and order consistent with its statements on the record. The court set aside the quitclaim deed based on its authority to invalidate a notarial act under MCL 55.307(2), noting that a deed must be acknowledged before a notary public in order to be validly recorded, and finding that the deed was not validly notarized given the uncontroverted evidence that Labadie was not a notary public on May 14, 2007. Additionally, the court indicated that it gave no credence to Burke's affidavit, and that respondent cannot now claim that he was unaware of Labadie's credentials, as he procured her as a notary. Furthermore, the court noted there was some question regarding whether the deed was

properly delivered, but it declined to rule on this issue given its decision to set aside the quitclaim deed on the basis that the deed was invalidly notarized.

II

This Court reviews a probate court's conclusions of law de novo. *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). Likewise, "[t]his Court reviews de novo equitable actions to quiet title." *Special Prop VI v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007). However, when a probate court sits without a jury, this Court reviews its factual findings for clear error. *In re Estate of Bennett*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Estate of Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993), citing MCR 2.613(C).

III

We first address respondent's argument that the trial court erred in setting aside the deed because the "only evidence submitted" indicates that the deed was properly executed—and, therefore, recordable—because it was executed on or about April 13, 2009, at which time Labadie was a notary public. In support of this argument, respondent asserts that Labadie's affidavit was adequate to correct the alleged errors in the dates of execution and acknowledgment pursuant to MCL 565.202.[2] We disagree.

MCL 565.202 provides:

> The register of deeds shall, however, receive any such instrument for record, *although the same does not comply with the requirements of this act*: Provided, There is recorded therewith an affidavit of some person having personal knowledge of the facts, which affidavit shall be either printed or typewritten, shall comply with the requirements of this act, and shall state therein:
>
> (a) The correct name of any person, the name of whom was not printed, typewritten or stamped upon such instrument as required by this act;

[2] Respondent also argues that petitioners failed to provide any support for their suspicion related to Labadie's participation in the conveyance based on the facts that she was employed by respondent and that the address that she provided to the State of Michigan in conjunction with her notary public commission was respondent's address. Because the probate court did not consider this argument, or the existence of bad faith more generally, and because we are remanding for further proceedings, we decline to review this issue in the interests of judicial economy. See *People v Trakhtenberg*, 493 Mich 38, 55 n 11; 826 NW2d 126 (2012), citing *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

> (b) In case such instrument does not comply with the requirements of paragraph (b) of section 1, the correct name of such person and shall state that each of the names used in such instrument refer to such person. [Emphasis added.]

MCL 565.202 has only been cited in one opinion, *Cipriano v Tocco*, 757 F Supp 1484, 1491 (ED Mich, 1991), in a context that is not applicable to the instant case. Thus, we determine here as a matter of first impression whether, consistent with MCL 565.202, Labadie's affidavit was sufficient to correct the purported error in the date of acknowledgment.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature, *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217; 801 NW2d 35 (2011), as inferred from the specific language of the statute, *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; 795 NW2d 101 (2009). "If the statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed[,] and further construction is neither required nor permitted." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). "[T]he interpretation to be given to a particular word in one section [is] arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 160; 627 NW2d 247 (2001) (quotation marks and citation omitted).

In reading the plain language of MCL 565.202 in context with the other sections of the act, *Macomb Co Prosecutor*, 464 Mich at 160, we conclude that a "saving affidavit" under MCL 565.202 only applies to errors or discrepancies in a person's name. It is evident that the reference to "the requirements of this act" in MCL 565.202 refers to the requirements in the Recording Requirements Act, MCL 565.201 *et seq*. The requirements are delineated in MCL 565.201,[3] which sets forth the "[r]requirements for recording with [the] register of deeds," and MCL 565.201a, which delineates the recording requirements related to the "scrivener's name and address on recorded documents." Neither MCL 565.201 nor MCL 565.201a mention any requirements regarding the date on which an instrument is executed or acknowledged. Instead, MCL 565.201(1) includes, *inter alia*, specific requirements regarding the name of each person purporting to execute an instrument, including that an individual's name must be printed, typewritten, or stamped under his or her signature, and that a discrepancy may not exist between the individuals' names as printed, typewritten, or stamped under their signatures and their names as indicated in the acknowledgment or jurat. Similarly, MCL 565.201a provides, "Each instrument described in section 1 executed after January 1, 1964 shall contain the name of the person who drafted the instrument and the business address of such person."

Moreover, MCL 565.202 requires that an affidavit "*shall* state therein" the correct name of a person when that person's name was not printed, typewritten, or stamped upon the

[3] Because MCL 565.201 was amended, effective October 17, 2014, the references to the statute in this opinion refer to the version that was in effect in March 2014, at which time the probate court ruled on the petition.

instrument, or when there were discrepancies between that person's name as printed, typewritten, or stamped underneath his or her signature and as stated in the acknowledgment or jurat. (Emphasis added.) "The word 'shall' is generally used to designate a mandatory provision . . . ." *Old Kent Bank v Kal Kustom, Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Thus, because an affidavit *shall* include such a provision, it follows that an affidavit may only be recorded under MCL 565.202 to correct errors or omissions with regard to a person's name, but not other errors such as the date on which an instrument was executed or acknowledged. Compare MCL 565.202, with MCL 565.201(1) and MCL 565.201a. Therefore, contrary to respondent's argument that "MCL [] 565.202 allows for the broad correction of errors on recorded documents by subsequently recording an affidavit," we find that Labadie's affidavit was insufficient to correct the purported errors in the deed.

IV

Respondent also asserts that the probate court improperly focused on the recordability of the deed instead of whether the deed effectuated a valid conveyance, thereby failing to recognize that his unrebutted evidence demonstrated that the property was validly conveyed through a quitclaim deed that was properly delivered. For reasons other than those argued by respondent, we remand to the probate court for further proceedings.[4]

The probate court accurately recognized that a deed transferring title is presumed to be valid if it is in writing, signed by the grantor, witnessed, and notarized, see MCL 565.47; MCL 565.152, and that improperly acknowledged deeds shall not be recorded. See MCL 565.8; MCL

[4] The trial court expressly declined to rule on whether proper delivery was completed in this case. As such, we decline to review this issue. Given that issues of fact not decided by the lower court must first be addressed, the interests of judicial economy are not well served by an initial ruling on this question by this Court. See *Trakhtenberg*, 493 Mich at 55 n 11, citing *Peterman* 446 Mich at 183. However, on remand, the probate court is not precluded from addressing this or any other relevant issue it did not previously address.

565.46; MCL 565.47; MCL 565.201(1)(c).[5] Additionally, as the probate court indicated, a court is permitted to invalidate an improper notarial act pursuant to MCL 55.307(2):

> (1) Subject to subsection (2) and in the courts of this state, the certificate of a notary public of official acts performed in the capacity of a notary public, under the seal of office, is presumptive evidence of the facts contained in the certificate except that the certificate is not evidence of a notice of nonacceptance or nonpayment in any case in which a defendant attaches to his or her pleadings an affidavit denying the fact of having received that notice of nonacceptance or nonpayment.
>
> (2) Notwithstanding subsection (1), the court may invalidate any notarial act not performed in compliance with this act. [MCL 55.307.]

However, the probate court failed to recognize that under Michigan law, an invalid acknowledgment does not render void an otherwise valid conveyance of real estate. It is well settled that

---

[5] MCL 565.46 states, "The preceding sections of this chapter to procure, enforce and obtain the proof and acknowledgment of deeds, shall be, and the same are hereby made applicable to all instruments in writing in any wise affecting the title to lands which are required or authorized to be acknowledged, or acknowledged and recorded." MCL 565.47 provides, "A deed, mortgage, or other instrument in writing that by law is required to be acknowledged affecting the title to lands, or any interest therein, *shall not be recorded by the register of deeds* of any county unless the deed, mortgage, or other instrument is *acknowledged or proved* as provided by this chapter." (Emphasis added.) Within the chapter, MCL 565.8 provides, in relevant part:

> Deeds executed within this state of lands, or any interest in lands, *shall be acknowledged* before any judge, clerk of a court of record, or notary public within this state. The officer taking the acknowledgment shall endorse on the deed a certificate of the acknowledgment, and *the true date of taking the acknowledgment*, under his or her hand. [Emphasis added.]

Additionally, MCL 565.201(1)(c) states:

> (1) An instrument executed after October 29, 1937 by which the title to or any interest in real estate is conveyed, assigned, encumbered, or otherwise disposed of shall not be received for record by the register of deeds of any county of this state unless that instrument complies with each of the following requirements:
>
> * * *
>
> (c) The name of any notary public whose signature appears upon the instrument is legibly printed, typewritten, or stamped upon the instrument immediately beneath the signature of that notary public.

> [d]eeds of real estate, to be entitled to record, must be acknowledged, but an acknowledgment is not a part of the conveyance. Title to real estate may be transferred by conveyances not acknowledged. Deeds, in order to be recorded, should be witnessed, but a deed not witnessed is good between the parties. [*Kerschensteiner v N Mich Land Co*, 244 Mich 403, 417; 221 NW 322 (1928).]

Likewise, in the absence of fraud, duress, or coercion, "[t]his court has upon many occasions held that an acknowledgment is not necessary to give validity to a conveyance, the purpose of acknowledgment being to entitle the instrument to record." *Turner v Peoples State Bank*, 299 Mich 438, 449-450; 300 NW 353 (1941). See also *Irvine v Irvine*, 337 Mich 344, 352; 60 NW2d 298 (1953) ("It is well settled by prior decisions of this Court that an instrument of conveyance is good as between the parties even though not executed with such formalities as to permit it to be recorded."); *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70, 82; 308 NW2d 440 (1981).

Furthermore, MCL 565.604 expressly provides that a deed may remain valid even if the acknowledgment is defective. In relevant part, MCL 565.604 states:

> No conveyance of land or instrument intended to operate as such conveyance, made in good faith and upon a valuable consideration, whether heretofore made or hereafter to be made, shall be wholly void by reason of any defect in any statutory requisite in the sealing, signing, attestation, *acknowledgment*, or certificate of acknowledgment thereof; . . . but the same, when not otherwise effectual to the purposes intended, may be allowed to operate as an agreement for a proper and lawful conveyance of the premises in question, and may be enforced specifically by suit in equity in any court of competent jurisdiction, subject to the rights of subsequent purchasers in good faith and for a valuable consideration; and when any such defective instrument has been or shall hereafter be recorded in the office of the register of deeds of the county in which such lands are situate, such record shall hereafter operate as legal notice of all the rights secured by such instrument. [Emphasis added.]

In the probate court, petitioners argued that this "savings statute" is inapplicable in the instant case because the deed was not made in good faith and upon a valuable consideration. The court, however, did not make any findings regarding whether good faith and valuable consideration were present. Therefore, given the relevant caselaw and the text of MCL 565.604, we conclude that the probate court erred in setting aside the deed solely due to a defect in the acknowledgement without also finding a lack of good faith or valuable consideration, or the presence of another invalidating circumstance, such as fraud, mistake of fact, coercion, or undue influence. See *Schmalzriedt v Titsworth*, 305 Mich 109, 118-120; 9 NW2d 24 (1943). Accordingly, we reverse the probate court's order and remand this case for further evidence to be taken on the issues of good faith, , consideration, and any other relevant issues. MCR 7.216(A)(5).

In concluding that remand is necessary in this case, we decline to accept petitioners' argument that it is clear that the conveyance was not supported by valuable consideration. Petitioners assert that, because the deed states that it was executed upon "valuable consideration

in the amount of One ($1.00) Dollars[,]" the deed is a gift on its face. In general, "[t]o have consideration there must be a bargained-for exchange." *Gen Motors Corp v Dept of Treasury, Revenue Div*, 466 Mich 231, 238; 644 NW2d 734 (2002). "Courts do not generally inquire into the *sufficiency* of consideration. It has been said [a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Id*. at 239 (quotation marks and citations omitted). However,

> *[t]he rule in Michigan is [also] that a deed's recital of valuable consideration is not conclusive regarding whether the property was actually sold for value.* "The consideration recited in a deed is not conclusive, but can afterwards be inquired into." And with respect to the issue of parol evidence, our Supreme Court has specifically held that "[w]hile the consideration expressed in a written instrument is prima facie to be taken as the actual consideration, the rule is well settled by abundant authority that parol evidence is admissible to show that the true consideration was . . . different from that expressed." [*In re Rudell Estate*, 286 Mich App 391, 410; 780 NW2d 884 (2009) (citations omitted; emphasis added).]

Petitioners cite to *Daane v Lovell*, 83 Mich App 282, 292; 268 NW2d 377 (1978), in support of their contention that the deed is a gift. In *Daane*, the stated consideration for the deed at issue was "One Dollar ($1.00) and other valuable considerations less than Ten Dollars ($10.00)." *Id*. at 296 (HOLBROOK, J., dissenting). This Court found that, "*[u]pon reviewing the entire record*, we are satisfied that the transaction was intended as a gift." *Id*. at 292 (opinion of the Court; emphasis added). The majority opinion includes no discussion of whether such consideration was actually paid, and the dissenting opinion suggests that it was evident from the testimony that no consideration was actually paid. *Id*. at 296, 304-306 (HOLBROOK, J., dissenting). Additionally, the circumstances of the case did not involve a deed that was defective due a deficiency in the sealing, signing, attestation, acknowledgment, or certificate of acknowledgment, and whether valuable consideration was present for purposes of MCL 565.604 was not at issue. Accordingly, we conclude that this Court's holding in *Daane* does not require the finding as a matter of law in this case that the deed in dispute here was a gift unsupported by consideration.[6]

Therefore, because the probate court did not consider the circumstances surrounding the stated consideration or whether *in fact* consideration was provided in exchange for the

---

[6] Accord *Takacs v Takacs*, 317 Mich 72, 82; 26 NW2d 712 (1947) (finding that a conveyance of property was a gift when the deed recited consideration of one dollar in a case where the parties "*conceded* . . . that the grantees made no payment of any kind of plaintiff, nor was there any [a]greement on their part to support him in the future, or otherwise to do anything for his benefit"); *Fischer v Union Trust Co*, 138 Mich 612, 614; 101 NW 852 (1904) ("To say that the one dollar was the real, or such valuable consideration as would of itself sustain a deed of land worth several thousand dollars, is not in accord with reason or common sense. The passing of the dollar by the brother to his sister, and by her to her father, *was treated rather as a joke* than as any actual consideration. . . . The deed was a gift . . . ." [Emphasis added.]).

conveyance, we find that remand is necessary for the trial court to factually determine whether the deed was made upon a valuable consideration, and whether the deed was made in good faith, for purposes of MCL 565.604.

V

Finally, defendant argues that the probate court erred in granting petitioners' petition "in summary fashion" because it evaluated credibility and made factual findings regarding the date on which the deed was executed without holding an evidentiary hearing. Given our conclusion, for the reasons stated above, that remand is necessary for further evidence to be taken on the issues of good faith and consideration, MCR 7.216(A)(5), we need not consider the merits of this argument.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No party having prevailed in full, no costs may be taxed. MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of SHELBY JEAN JAJUGA.

JOANN CHELENYAK, Personal Representative,

Respondent-Appellant,

v

SUSAN P. VEITH,

Petitioner-Appellee.

FOR PUBLICATION
October 20, 2015
9:05 a.m.

No. 322522
Clare Probate Court
LC No. 13-016382-DE

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

RIORDAN, J.

Respondent, Joann Chelenyak, who is the personal representative of the estate of Shelby Jean Jajuga ("decedent"), appeals as of right a probate court order granting the petition for exempt property filed by petitioner, Susan P. Veith. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

The relevant facts are undisputed in this case. Petitioner is the sole surviving child of decedent, Shelby Jean Jajuga. Decedent drafted her last will and testament on January 16, 2002, under which her estate was to be divided in equal parts between three beneficiaries: (1) Mike and Joanne Chelenysk, who constituted a single, joint beneficiary, (2) Jeanette Mullins, and (3) Sherry Snyder. She further directed that petitioner and her other children, who were still living at the time, were to "inherit nothing from [her] estate." Decedent explained in the will that her decision to disinherit her children was "not because of any lack of love and affection I hold toward them but because they have either received compensation in advance of my death or because I do not believe it would be in their best interest that they inherit." The decedent later filed a codicil to her will, appointing respondent as personal representative and directing that her estate shall be divided equally between two, rather than three, named beneficiaries. The codicil reaffirmed the remainder of the will and did not alter the provision that disinherited petitioner.

Following decedent's death, petitioner filed an objection to the final account "on the basis that the Personal Representative has refused to pay Petitioner the exempt property allowance as required by MCL 700.2404 . . . ." Petitioner asked the court to award the exempt property that

she had selected from the estate (i.e., (1) a 2000 Buick 4-door valued at $4,500, (2) a John Deere tractor valued at $2,500, and (3) $7,000 in cash) or, in the alternative, $14,000 in cash, plus $1,000 in attorney fees. In response, respondent contended that petitioner was not entitled to exempt property because she was specifically disinherited under the will.

After holding a hearing on petitioner's objection to the final account and requesting supplemental briefing from the parties, the probate court held, as an issue of first impression in Michigan, that petitioner was entitled to the exempt property that she had requested. In light of the statutory language of MCL 700.2404, other provisions of the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 *et seq*., and cases from other jurisdictions construing similar language, the court concluded that a testator cannot preclude a child from taking exempt property through a disinheriting provision in a will. The Court found that the meaning of "entitled" under MCL 700.2404 was ambiguous, but concluded, based on the definition of "entitle" in *Black's Law Dictionary* (9th ed), that the Legislature intended to establish a "legal right" to exempt property under MCL 700.2404 for a surviving spouse or the children of a decedent in the absence of a surviving spouse. In support of its conclusion that "entitle" denoted a legal right, the court found that the phrase "in addition to" under MCL 700.2404 means "supplemental" and, therefore, did not establish a condition precedent that a child must be eligible to receive a distribution from the estate in order to claim exempt property.

Furthermore, the court acknowledged respondent's argument that the statute does not expressly "require exempt property to be distributed to an adult child in contradiction to the express language" of the will, but it further noted that the statute does not directly "*prohibit* exempt property from being distributed" in cases where a child had been disinherited, concluding that the Legislature would have included such a provision if it had intended to implement that limitation. The court also recognized that a semantic difference exists between an "allowance" and an "exemption" under the EPIC, but held that the distinction was not dispositive to the court's construction of "entitle," noting that (1) both an allowance and an exemption can constitute a right, (2) Michigan caselaw has traditionally recognized that allowances are rights and personal privileges, and (3) the similarity between MCL 700.2402, MCL 700.2403, and MCL 700.2404 clearly indicated that the Legislature intended for those provisions to operate in a parallel manner. Additionally, the court rejected respondent's argument that interpreting the exempt property provision as a right would conflict with MCL 700.2102(2) and MCL 700.2302(2)(a), or render those provisions inconsequential. The court also held that the public policy underlying the exempt property statute was the protection of spouses and children, and that the statute was a remedial statute that should be liberally construed in favor of those benefitted under the statute. Finally, the court concluded that the rights of surviving children to exempt property are equal to those of a surviving spouse.

II. STANDARDS OF REVIEW

This Court reviews de novo an issue of statutory interpretation as a question of law. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). However, "appeals from a probate court decision are on the record, not de novo." *Id*., citing MCL 700.1305; MCL 600.866(1); MCR 5.802(B)(1); *In re Webb H Coe Marital and Residuary Trusts,* 233 Mich App 525, 531; 593 NW2d 190 (1999). We review the probate court's factual findings for clear error

and its dispositional rulings for an abuse of discretion. *Id.* A "court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *Id*.

III. WHETHER A DECEDENT MAY LIMIT OR MODIFY A SURVIVING CHILD'S CLAIM TO EXEMPT PROPERTY UNDER MCL 700.2404

On appeal, respondent asserts that the probate court erred in granting petitioner's claim of exempt property. The gravamen of respondent's claims is that a decedent may—through a provision that expressly disinherits a child under a will—eliminate an adult child's claim to exempt property under MCL 700.2404 when there is no surviving spouse. On the facts of this case, we disagree and conclude that the disinheriting language in decedent's will did not eliminate petitioner's statutory right to exempt property under MCL 700.2404.

A. APPLICABLE LAW

This is an issue of first impression under Michigan law, which requires this Court to interpret MCL 700.2404 in the context of the EPIC.[1] We restated the following principles of statutory interpretation in *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 840 NW2d 743 (2013):

> The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. 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. The courts may not read into the statute a requirement that the Legislature has seen fit to omit. When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another. . . . [Quotation marks and citations omitted; alteration in original.]

[1] The EPIC is modeled on the Uniform Probate Code. *In re Estate of Sprenkle-Hill*, 265 Mich App 254, 259; 703 NW2d 191 (2005).

MCL 700.1201 delineates specific rules of construction that should be applied when interpreting the EPIC:

> This act shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following:
>
> (a) To simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals.
>
> (b) To discover and make effective a decedent's intent in distribution of the decedent's property.
>
> (c) To promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors.
>
> (d) To make the law uniform among the various jurisdictions, both within and outside of this state.

MCL 700.2404 pertains to "exempt property":

> (1) The decedent's surviving spouse is also entitled to household furniture, automobiles, furnishings, appliances, and personal effects from the estate up to a value not to exceed $10,000.00 more than the amount of any security interests to which the property is subject. If there is no surviving spouse, the decedent's children are entitled jointly to the same value.
>
> (2) If encumbered assets are selected and the value in excess of security interests, plus that of other exempt property, is less than $10,000.00, or if there is not $10,000.00 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $10,000.00 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to assets to make up a deficiency of exempt property abates as necessary to permit payment of all of the following in the following order:
>
> (a) Administration costs and expenses.
>
> (b) Reasonable funeral and burial expenses.
>
> (c) Homestead allowance.
>
> (d) Family allowance.
>
> (3) The rights under this section are in addition to a benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by elective share. The $10,000.00 amount expressed in this section shall be adjusted as provided in section 1210.

As a preliminary matter, we recognize that respondent emphasizes the rule of construction indicating that the primary role of the court is to ascertain the intent of the testator and, if permissible under the law, effectuate that intent: "In will cases the primary rule of construction and the primary function of courts is to ascertain from the four corners of a will the intent of the testator and, if legally possible, that intent must prevail." *Hay v Hay*, 317 Mich 370, 397; 26 NW2d 908 (1947); see also *Foster v Stevens*, 146 Mich 131, 136; 109 NW 265 (1906). In the instant case, however, we are concerned with interpreting and applying a statute, not discerning decedent's testamentary intent. Nevertheless, that rule of construction is consistent with the rule of construction applicable to the EPIC under MCL 700.1201(b), i.e., to liberally construe and apply the act in a way that promotes the discovery and execution of a decedent's intent in the distribution of the decedent's property. There is no dispute that decedent intended that petitioner would inherit nothing from her estate.

However, it is important to recognize that MCL 700.3101 provides:

> *An individual's power to leave property by will*, and the rights of creditors, devisees, and heirs to his or her property, *are subject to the restrictions and limitations contained in this act to facilitate the prompt settlement of estates. Upon an individual's death, the decedent's property devolves to the persons to whom the property is devised by the decedent's last will* or to those indicated as substitutes for them in cases involving lapse, disclaimer, or other circumstances affecting devolution of a testate estate, or in the absence of testamentary disposition, to the decedent's heirs or to those indicated as substitutes for them in cases involving disclaimer or other circumstances affecting devolution of an intestate estate, ***subject to*** homestead allowance, family allowance, *and exempt property*, to rights of creditors, to the surviving spouse's elective share, and to administration. [Emphasis added.]

Accordingly, it is apparent that effectuating a decedent's testamentary intent should not be our sole focus in construing MCL 700.2404, as the EPIC clearly provides that an individual's power to leave property by will is subject to the exempt property provisions under MCL 700.2404.

Thus, we reject respondent's argument that "[i]t is counterproductive to permit the decedent to disinherit an adult child on one hand and then grant the disinherited adult child rights in exempt property greater than the right of the decedent to devise his or her property." Instead, it appears that the limitations under MCL 700.3101 specifically allow for such a situation. Likewise, we do not agree that "the statutory language is silent as to whether or not [an] adult child's 'rights' to exempt property ha[ve] a first priority over the decedent's devise or other intended distribution from the estate." Again, MCL 700.3101 expressly provides that a decedent's devises are *subject to* exempt property, which clearly indicates that a decedent's intended distribution of estate property is limited by the provisions of the exempt property statute. Therefore, given that the language of an act is the most reliable evidence of the Legislature's intent, *Book-Gilbert*, 302 Mich App at 541-542, we reject respondent's claim that there is no statutory support for the court's ruling that exempt property may be distributed to an adult child in contradiction to the express language disinheriting the child under the will. For the same reasons, we reject respondent's public policy claims regarding whether the exempt

property provision under MCL 700.2404 has priority over a decedent's power to devise his or her property in light of the unambiguous language in MCL 700.3101.

Additionally, respondent contends that resolution of this appeal requires the construction of MCL 700.2101 because MCL 700.2101(2) and MCL 700.2404 appear to conflict, and construing MCL 700.2404 in a way that establishes a right to exempt property that cannot be eliminated by express testamentary language would render MCL 700.2101(2) inconsequential or trivial. We disagree and conclude that the language of MCL 700.2101(2) is inapposite to determining the nature of an adult child's entitlement to exempt property under MCL 700.2404.

MCL 700.2101 provides:

> (1) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this act, except as modified by the decedent's will.
>
> (2) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent that passes by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his or her intestate share.

Whereas MCL 700.2101 governs property distributions when the decedent died intestate or did not provide for the distribution of part of the estate in the will, MCL 700.2404 is applicable to both intestate and testate estates. See MCL 700.2404(3). As such, it is implicit in the plain language of MCL 700.2404(3) that a distribution of exempt property does not constitute the passage of property by "intestate succession." Instead, given the clear language that exempt property is *in addition to* property that passes by intestate succession, it is evident that exempt property passes by a means other than intestate succession. This conclusion is further supported by the fact that MCL 700.3101 states that the passage of a decedent's property through intestacy is "*subject to* homestead allowance, family allowance, *and exempt property*, to rights of creditors, to the surviving spouse's elective share, and to administration." (Emphasis added.) In addition, a decedent may limit the right of an individual who would have taken under the laws of intestate succession pursuant to MCL 700.2101 without necessarily affecting the right of a surviving spouse or child to exempt property under MCL 700.2404.

In this case, there is no dispute that decedent died testate and that the will provided that her entire estate was to be divided equally between her designated beneficiaries. Thus, because her entire estate was "effectively disposed of" by her will, MCL 700.2101 is not applicable to this case. See MCL 700.2101(1).[2] Likewise, for the foregoing reasons, we reject respondent's

[2] While the Reporter's Comment to MCL 700.2402 cites MCL 700.2101(2) as a provision that "points to the fact that a decedent could omit a child not only from taking anything under the decedent's will but also from receiving allowances as well," the comment later states that "it is

claim that a conflict arises between MCL 700.2101 and MCL 700.2404 if a disinherited child is permitted to claim exempt property, as the statutes pertain to different types of property transfers.

B. STATUTORY LANGUAGE UNDER MCL 700.2404

1. MEANING OF "ENTITLED "UNDER MCL 700.2404(1) AND (2)

Respondent contends that the probate court erred in finding that the Legislature's use of the term "entitled" in MCL 700.2404(1) establishes that a decedent's children have a statutory right to exempt property when there is no surviving spouse. We disagree.

"Entitled" is not defined by statute. "When the Legislature has not defined a statute's terms, we may consider dictionary definitions to aid our interpretation." *Autodie, LLC v City of Grand Rapids*, 305 Mich App 423, 434; 852 NW2d 650 (2014). "Entitle" means "to furnish with proper grounds for seeking or claiming something." *Merriam-Webster's Collegiate Dictionary* (2014). Similarly, "entitle" has been defined as "[t]o grant a legal right to or qualify for." *Black's Law Dictionary* (10th ed). In considering both definitions, we conclude that the plain meaning of "entitled" in this context is having a legal right to exempt property, or meeting the qualifications to claim exempt property as a matter of law.

Respondent, however, asserts that "[t]he plain and ordinary meaning of 'entitled' is one of eligibility as to the right of priority" and does not establish an "absolute right to exempt property." Construing "entitled" in the manner advocated by respondent is inconsistent with the context of the word "entitled" in the statute, as MCL 700.2404(3) refers a surviving spouse's entitlement (or, if there is no surviving spouse, the entitlement of the decedent's children) to the property delineated in the statute as "rights" without indicating that the rights themselves are merely procedural rights of priority that arise once a child is eligible to claim exempt property. See *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." [Quotation marks and citation omitted.]); *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009) ("[W]hen considering the correct interpretation, [a] statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." [Footnotes omitted.]). Instead, the language first describes the property to which a surviving spouse (or, if there is no surviving spouse, the decedent's children) is *entitled* and subsequently states that *those rights themselves* have "have priority over all claims against the estate," not that the rights only constitute rights of priority. MCL 700.2404(1), (2). Furthermore, the fact that the devises in a testator's will are *subject to* exempt property pursuant to MCL 700.3101 further suggests that surviving spouses or children have a legal right to—not

---

unclear whether the decedent may modify or eliminate these exemptions and allowances by will." *Estates & Protected Individuals Code with Reporter's Commentary* (ICLE, 2015 ed), p 79. However, based on the plain reading of the statutes, we conclude that MCL 700.2102(2) is not dispositive in the instant case. See also MCL 700.2205 (referring to a share passing by intestate succession and exempt property as two separate rights or entities).

just a right of priority as to—exempt property under MCL 700.2404. Thus, in reading the EPIC as a whole, see *GC Timmis*, 468 Mich at 421 (stating that individual phrases of a statute "must be read in context with the entire act"); *Book-Gilbert*, 302 Mich App at 541, we conclude that the term "entitled" does, in fact, establish a right in a decedent's child to claim exempt property.[3]

This conclusion is supported by the Reporter's Comments to the EPIC. "While not binding, the Reporter's Comments to the EPIC aid in the interpretation of a statute or rule." *In re Conservatorship of Bittner*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 320688); slip op at 8 (quotation marks and citation omitted). The commentary to MCL 700.2404 provides, in relevant part: "Like the homestead allowance, the exempt property allowance does not need to be elected. *The surviving spouse is (or children are) entitled to the allowance, and the personal representative has an obligation to pay it*." *Estates & Protected Individuals Code with Reporter's Commentary* (ICLE, 2015 ed), p 82 (emphasis added) (hereinafter *EPIC with Reporter's Commentary)*. Likewise, the Reporter's Comments concerning MCL 700.2402, which are cross-referenced under the commentary to MCL 700.2404, state, in pertinent part:

> There is no statutory or court rule provision requiring the personal representative to give notice of the homestead allowance (or exempt property allowance) to the surviving spouse (or children if there is no surviving spouse). None is needed. These allowances are not elective. Subject to possible modification by the testator or spousal agreement (as explained below), *they stand as statutorily mandated transfers of a portion of the decedent's property*. . . . [*Id*. at 78.]

Therefore, for the reasons stated above, we conclude that the Legislature's use of the word "entitled" in MCL 700.2404(1), especially when read in context, establishes a statutory right to a mandatory transfer of exempt property, not merely a right of priority.[4]

---

[3] Although we agree with respondent that the right to exempt property may be restricted to a certain extent, as it must abate as necessary for the costs, expenses, and allowances delineated under MCL 700.2404(2), this fact does not preclude a finding that a legal right exists. Furthermore, as discussed *infra*, courts from other jurisdictions which have interpreted strikingly similar statutory language have concluded that the right to exempt property is "absolute." See *In re Estate of Peterson*, 254 Neb 334, 340-341; 576 NW2d 767 (1998); *Matter of Estate of Wagley*, 760 P2d 316, 318 (Utah, 1988); *Matter of Dunlap's Estate*, 199 Mont 488, 490-491; 649 P2d 1303 (1982).

[4] Because we find that MCL 700.2404 establishes a statutory right regardless of whether the statute is remedial in nature, we need not consider respondent's argument that the trial court erroneously relied on a finding that MCL 700.2404 was a remedial statute in determining whether petitioner had a statutory right to exempt property. Nevertheless, we note that Michigan Courts have distinguished remedial statutes from statutes that confer substantive rights. See, e.g., *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 585; 624 NW2d 180 (2001); *Rookledge v Garwood*, 340 Mich 444, 453; 65 NW2d 785 (1954).

2. MEANING OF "IN ADDITION TO" AND "UNLESS OTHERWISE PROVIDED" UNDER MCL 700.2404(3)

Respondent argues that a plain reading of MCL 700.2404 reveals a preliminary assumption that an adult child must actually receive a benefit or share of the estate in order to claim exempt property. We disagree.

The plain language of the statute states that "the rights" to which a surviving spouse, or a decedent's child, is entitled under MCL 700.2404 "*are in addition to* a benefit or share passing to the surviving spouse or children by the decedent's will, *unless otherwise provided*, by intestate succession, or by elective share." MCL 700.2404(3) (emphasis added). As the probate court concluded, we find that the plain meaning of this language is that a child's ability to claim exempt property is *separate* from, *independent* of, or *supplemental* to any benefit or share received—or not received—under a will. We discern no indication of a condition precedent or requirement that a child must receive a devise under a will in order to claim exempt property. Likewise, this conclusion is consistent with the fact that a decedent's devises under a will are *subject to* exempt property, MCL 700.3101, which indicates that the operation of the exempt property statute is separate and distinct from the specific devises of a will, and the decisions of other state courts interpreting language strikingly similar to MCL 700.2404, see Part III.C, *infra*.

Additionally, respondent argues that language expressly stating that an adult child is to receive nothing under a will is sufficient to trigger the "unless otherwise provided" language under MCL 700.2404, such that petitioner was not entitled to exempt property under MCL 700.2404 given the disinheriting language in the will. We disagree.

Given the existence of a right to exempt property under MCL 700.2404 that is separate from any property devised under the will, we conclude that the language in decedent's will that generally disinherited petitioner was not sufficient under MCL 700.2404 to eliminate petitioner's *statutory right* to exempt property, as the disinheriting language included no reference to petitioner's statutory rights.[5]

---

[5] By analogy, the Reporter's Comment to MCL 700.2404 provides, "A specific devise of personal property to the spouse or children without a further indication that it replaces this exemption should not be interpreted as within the phrase 'unless otherwise provided.' " *EPIC with Reporter's Commentary*, pp 81-82.

The Reporter's Comment to MCL 700.2402 also states the following with regard to the "unless otherwise provided" language, ultimately concluding that it is unclear whether a decedent may modify or eliminate an exemption by will:

> The phrase "unless otherwise provided" in the last sentence of §2402 permits a testator to stipulate that the allowance is to be treated as part of the share given by will to the spouse (or other recipient). The allowances in §§2402, 2043, and 2404, MCL 700.2403, .2404, are certainly intended to offer some economic protection to the surviving spouse and to children when they are eligible. May the

C. CASELAW FROM OTHER JURISDICTIONS

Our reasoning above is consistent with caselaw from other jurisdictions that considered statutes strikingly similar to MCL 700.2404.[6] In *Matter of Dunlap's Estate*, 199 Mont 488, 489; 649 P2d 1303 (1982), the decedent, whose husband predeceased her, executed a will under which she specifically disinherited her son, who sought to claim exempt property. "The sole issue before [the court was] whether a child specifically disinherited by will may take under [Mont Code Ann 72-2-802] which provides exempt property for certain heirs." *Id*. At the time, the exempt property statute provided:

> (1) In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value is excess of security interests,

---

> decedent, however, stipulate in his or her will that one or more of the allowances not be paid? In other words, can a spouse or a child be omitted from coverage by these allowances? It seems clear that a spouse may not be denied these allowances through unilateral action by the decedent. Section 2205, MCL 700.2205, appears to state the only methods by which the spouse may be excluded from receiving the allowances. All require consent of the spouse. Other provisions point to the fact that a decedent could omit a child not only from taking anything under the decedent's will but also from receiving allowances as well. These sections are MCL 700.2101(2) (permitting exclusion from receiving an intestate share), and §2302, MCL 700.2302 (providing no share for a child who is deliberately or inadvertently excluded from a will, except in very limited situations). The inclusion of dependent children in the coverage of §§ 2402 and 2403 arguably is based on a public policy of providing a minimal benefit in all events for the one or those who have an economic need. Because children who may take exempt property under §2404 need not be dependent children, their inclusion may be based on simple fairness, not economic necessity. *Whatever the policy reason for including children within the coverage of these provisions, it is unclear whether the decedent may modify or eliminate these exemptions and allowances by will.* [*Id*. at 78-79 (emphasis added).]

[6] "Cases from other jurisdictions, although not binding, may be persuasive." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 529 n 2; 791 NW2d 724 (2010). We find this caselaw especially significant given that one of the rules of construction under MCL 700.1201(d)—in accordance with which "[the EPIC] shall be liberally construed and applied to promote"—is "[t]o make the law uniform among the various jurisdictions, both within and outside of this state." MCL 700.1201(d). Although the statutes construed in the cases from other jurisdictions cited in this opinion were subsequently amended, we find that interpreting MCL 700.2404 in a manner analogous to the interpretations of the similar, albeit prior, statutes advances the uniformity and predictability of the law.

> plus that of other exempt property, is less than $3,500 or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value.
>
> (2) Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance.
>
> (3) These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. [*Id*. at 489-490, quoting Mont Code Ann 72-2-802 (now Mont Code Ann 72-2-413) (quotation marks and emphasis omitted).]

As in the instant case, the estate argued "(1) that testator's intent governs the above section, and (2) that the statutory language in subsection (3) above, 'unless otherwise provided,' includes the will of the testator by disinheriting the son and hence the son cannot be the recipient of exempt property." *Id*. at 490. Like us, the Montana Supreme Court disagreed and affirmed the district court's order granting the disinherited son's petition for exempt property. *Id*. at 488-489, 492. The court stated, "We agree . . . that the governing rule in construction or interpretation of a testamentary disposition is the intention of the testator and must prevail; however, that is not our case here." *Id*. at 490. The Court reasoned that the phrase "unless otherwise provided" must be considered in light of the section as a whole, concluding, based on the language of the entire statute and caselaw interpreting a surviving spouse's right to exempt property and the homestead allowance, that either the surviving spouse or the decedent's children have an absolute right to exempt property. *Id*. at 490-491. The court specifically found that "[t]he statute embodies a priority right in the surviving spouse as against the surviving children of the decedent, but does not grant a surviving spouse any greater right to exempt property than the surviving children." *Id*. at 491. Moreover, the Court determined that exempt property assets "are protected from creditors so that property and money can be distributed to those people whom Montana's legislature has determined to protect." *Id*. Further, the Court stated that "[t]he family protection provisions of the Uniform Probate Code"—including the "statutory rights vested in the surviving spouse and certain children" to exempt property and allowances—"were intended by the drafters to protect a surviving spouse and children from disinheritance by a decedent." *Id*. at 491-492.[7] Finally, the court noted that "the decedent's will did no more than

[7] Respondent appears to contest this conclusion by arguing that the trial court erred in failing to distinguish between "allowances" and "exemptions" under the EPIC, arguing that "allowances" are separate and distinct from "exempt property" under the EPIC. However, we decline to address this argument because it has no bearing on our construction of the right to exempt property under MCL 700.2404, and respondent expressly concedes that "[t]he issue before this Court is limited only to the Exempt Property [sic] provisions under MCL 700.2404, as they apply to a disinherited adult child." Nevertheless, the Reporter's Comments expressly refer to the exempt property provision as "the exempt property allowance" and reference "the

disinherit the child and expressed no intent as to statutory rights," in upholding the child's claim of exempt property. *Id*. at 492. See also *Matter of Estate of Herr*, 460 NW2d 699, 705-706 (ND, 1990) (citing with approval the court's holding and reasoning in *Matter of Dunlap's Estate* and quoting a provision similar to MCL 700.3101 in determining that a child was entitled to exempt property under a statute similar to MCL 700.4204 even though she received nothing under the decedent's will).

Similarly, Nebraska's Supreme Court construed a prior version of its exempt property statute, which was similar to MCL 700.2404, in order to determine "whether an adult, emancipated son of a testator is entitled to an exempt property allowance of $5,000 pursuant to [Neb Rev Stat] 30–2323 (Reissue 1995) when the will specifically provided that under no circumstance should any share of the testator's estate go to his son." *In re Estate of Peterson*, 254 Neb 334, 335; 576 NW2d 767 (1998). At the time, the exempt property statute provided:

> In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than five thousand dollars, or if there is not five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the five thousand dollars value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except for costs and expenses of administration, and except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. *These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided therein, by intestate succession, or by way of elective share.* [*Id*. at 336-337, quoting Neb Rev Stat 30–2323 (Reissue 1995).]

The court "conclude[d] that the plain and unambiguous language of § 30–2323 creates a statutory right that accrues to the surviving spouse or the surviving children jointly if there is no surviving spouse upon the death of the testator." *Id*. at 339. In determining whether "this right is indefeasibly vested or whether it may be abrogated by will," the court considered *Matter of Dunlap's Estate*, 199 Mont 488, and noted that other jurisdictions allowing a testator to provide for a bequest instead of a statutory allowance have indicated that the testator's intent to do so "must be clear from the language of the will before the court will bar the statutory grant." *In re Estate of Peterson*, 254 Neb at 339-340. The court ultimately held:

---

allowances" under MCL 700.2404, MCL 700.2403, *and* MCL 700.2404, which strongly suggests that respondent has developed a false distinction. See *EPIC with Reporter's Commentary*, pp 78-83.

> In construing the language of § 30–2323, we conclude that the statutory rights granted therein are vested and indefeasible. The clear intent of § 30–2323 is to provide an exempt property allowance, which benefit is "in addition to" any benefits passing to the surviving spouse or surviving children by will, by intestate succession, or by way of elective share. Unless a testator clearly provides in the will that the devises and bequests are in lieu of exempt property, then the spouse or children are entitled to both. . . . [*Id*. at 340.]

Finally, the court wrote:

> If the will of a testator clearly provides otherwise, then an exempt property allowance is not "in addition to" any benefit by will, intestate succession, or elective share. Regardless, the rights set forth in § 30–2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance.
>
> The county court erred in finding that [the disinherited son] was not entitled to an exempt property allowance. The testator disinherited [the son], but [the son] is entitled to an exempt property allowance in accordance with § 30–2323. [*Id*. at 341.][8]

Even though the Nebraska Legislature subsequently amended Neb Rev Stat 30–2323 after the *In re Estate of Peterson* decision was issued to expressly prevent children disinherited under a will from claiming exempt property, we conclude that the reasoning applied by the Nebraska Supreme Court in *Peterson*, and the Montana Supreme Court in *Matter of Dunlap's Estate*, with respect to statutes strikingly similar to MCL 700.2404 confirms that our holding is consistent with the plain language of MCL 700.2404 as it stands today.[9] Furthermore, cases from other jurisdictions interpreting an exempt property statute with language similar to MCL 700.2404 in regard to a surviving spouse and a homestead allowance provision similar to MCL 700.2402, which also included entitlement language that mirrors MCL 700.2404, have determined that the statutes unambiguously establish an entitlement or absolute right as a matter

---

[8] Although the *In re Estate of Peterson* court did not expressly mention the rules of construction in place under the probate code, when the case was decided, Nebraska's probate code included rules of construction that were nearly identical to Michigan's rules of construction under MCL 700.1201—most notably, "to discover and make effective the intent of a decedent in distribution of his or her property[.]" Neb Rev Stat 30-2202.

[9] Respondent concedes that an amendment to MCL 700.2404, as was done in Nebraska, would give her the outcome that she seeks in this appeal. But, since a legislative fix is not available to her, she would like this Court to rewrite the statute. We decline to do so, as this is a function of the Legislature.

of law. See *In re Estate of Martelle*, 306 Mont 253, 257, 261; 32 P3d 758 (2001); *Matter of Estate of Wagley*, 760 P2d 316, 317-318 (Utah, 1988).[10]

Therefore, in light of the plain language of the statute and caselaw from other jurisdictions interpreting provisions similar to the EPIC, we hold that petitioner has a statutory right to exempt property under MCL 700.7404 that was not eliminated by the disinheriting language in decedent's will, which included no expression of intent as to petitioner's statutory right to exempt property.

D. DISTINCTION BETWEEN RIGHTS OF SURVIVING SPOUSES AND ADULT, NON-DEPENDENT CHILDREN

Lastly, respondent contends that the trial court erred in failing to distinguish between the rights of a surviving spouse and the rights of adult, non-dependent children in applying MCL 700.2404. She argues, based on the language of MCL 700.2205, that the Legislature did not intend for the rights granted to a surviving spouse under MCL 700.2402 through MCL 700.2404 to be equal to the rights granted to an adult child when there is no surviving spouse. Although we agree that the statutory text supports the conclusion that there is a distinction between the rights of a surviving spouse and the rights of an adult child, we are not persuaded that MCL 700.2205, on its own, demonstrates that the rights of an adult child to exempt property are not "vested."

Respondent is correct that MCL 700.2205 expressly provides for the waiver of exempt property by a surviving spouse and that no other provision allows for such a waiver by an adult child. MCL 700.2205 states:

> The rights of the surviving spouse to a share under intestate succession, homestead allowance, election, dower, exempt property, or family allowance may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separate maintenance is a waiver of all rights to homestead allowance, election, dower, exempt property, and family allowance by the spouse in the property of the other and is an irrevocable renunciation by the spouse of all benefits that would otherwise pass to the spouse from the other spouse by intestate succession or by virtue of a will executed before the waiver or property settlement.

Based on this, respondent argues that we should infer that a surviving spouse has a vested right to exempt property that cannot be waived without the consent of the spouse, while a non-

[10] As discussed *infra*, we perceive no indication in the statutory text that a qualifying child has less of a right to exempt property than a surviving spouse under MCL 700.2404.

dependent adult child does not have the same vested right, such that his or her consent is not required for his or her right to exempt property to be modified or eliminated by a decedent's will.

Given the significant legal differences between—and implications of—a martial relationship as opposed to a parent-child relationship, we disagree that the express possibility of waiver "by a written contract, agreement, or waiver signed by the party waiving after fair disclosure" under MCL 700.2205 necessarily establishes that a decedent's surviving spouse has a "*vested* right" while a decedent's adult child does not. Moreover, we find that such a conclusion is tenuous in light of the statutory text. Apart from possibility of spousal waiver established under MCL 700.2205, we discern no indication that the Legislature intended for children to have different or limited rights to exempt property as compared to a surviving spouse. In light of the significant consequences of such a conclusion, we find that the Legislature, if it wished, could have expressly included such a distinction between the rights in the text if it had intended for that distinction to exist. Cf. *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 269-270; 660 NW2d 97 (2003) (reasoning that the Legislature would have expressed an intention more clearly if it had intended to implement such a provision). It is not the role of the Court to judicially legislate by adding language to a statute, *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997), and this Court may not engraft a limitation of a right, which is not included by the Legislature, "under the guise of statutory construction," see *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 39-40; 645 NW2d 59 (2002).[11]

Therefore, we reject respondent's argument that MCL 700.2205 indicates that an adult child has an inferior right to exempt property compared to a surviving spouse.

IV. CONCLUSION

Although it may have been prudent for the Legislature to specifically prescribe the way in which a statement of a decedent's intent to disinherit a child under a will affects the child's claim to exempt property, especially given that one of the express purposes and policies of the EPIC is "[t]o discover and make effective a decedent's intent in distribution of the decedent's property," MCL 700.1201(b), it is not our role to do so. "When the Legislature fails to address a concern in [a] statute with a specific provision, the courts cannot insert a provision simply because it would

---

[11] Contrary to the inference drawn by respondent, the Reporter's Comment to MCL 700.2205 also appears to draw an opposite inference:

> This section permits only a spouse to waive allowances and the right to exempt property (as well as other rights). An adult dependent child may be entitled to homestead and family allowances under MCL 700.2402 and .2403. An adult child may be entitled to an exempt property allowance under MCL 700.2404. *These apparently are rights that may not be waived*. It is uncertain whether they may be modified or eliminated by the decedent's will. . . . [*EPIC with Reporter's Commentary*, p 72 (emphasis added); see also *In re Conservatorship of Bittner*, ___ Mich App at ___; slip op at 8].

have been wise of the Legislature to do so to effect the statute's purpose." *Book-Gilbert*, 302 Mich App at 542 (quotation marks and citations omitted).

Here, if the Legislature wished to extend the testator's intent in disinheriting a child to the child's *statutory* right to exempt property, it could have expressly stated its intention in the statute. However, the statute is silent in this regard. Thus, for the reasons stated above, we conclude that petitioner has a right to exempt property under MCL 700.2404 that was not eliminated by the disinheriting language in decedent's will.

Affirmed.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

*

Proposed Addition to Michigan Trust Code to Add Community Property Trust

*

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

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

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

The total membership of the Probate & Estate Planning Section is 3,473.

The position was adopted after a discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 17. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Marguerite Munson Lentz

E-Mail:
mlentz@bodmanlaw.com

Regarding:
Proposed addition to Michigan Trust Code to add community property trust

Date position was adopted:
October 10, 2015

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

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
17 Voted for position
0 Voted against position
0 Abstained from vote
6 Did not vote (absent)

Position:
Support

Explanation of the position, including any recommended amendments:
Advocate the introduction and passage of proposed legislation to amend the Michigan Trust Code, MCL 700.7101, by adding provisions to permit community property trusts, and conforming amendments to other statutes.

Michigan Community Property Trust Committee
Proposed Statute

700.7616.**The Michigan Community Property Trust Act**.

(1) Definitions. As used in this section**:**

a. "Michigan Common Law Ownership by Married Spouses" is the ownership of marital property other than property owned by a Michigan Community Property Trust.
b. "Michigan Community Debt" is debt incurred by both married spouses during the Period of the Michigan Community Property Estate.
c. "Michigan Community Property" is that property held by a Michigan Community Property Trust that has been placed in said Trust during the Period of the Michigan Community Estate. On documents of ownership, where the full name of the trust as a Community Property Trust is not included, the trustee of a Michigan Community Property Trust should be titled as either a "Community Property Trustee" or as a "CP Trustee." . Michigan Community Property includes:
    1. property transferred to the Michigan Community Property Trust; or
    2. property transferred to the Michigan Community Property Trustee; or,
    3. property or rights to property made payable to a Michigan Community Property Trust or titled either in the name of the Michigan Community Property Trust or in the name of the Michigan Community Property Trustee as Trustee for the Michigan Community Property Trust; and.
    4. Income, earnings or appreciation associated with said property.
d. "Michigan Community Property Trust" ("CP Trust"). A Michigan Community Property Trust is a trust that bears the name "Community Property Trust" or "CP Trust" in its title and is subject to the provisions of 700.7616(2).
e. "Michigan Community Property Trustee" (or a "CP Trustee") is a trustee or co-trustee of a Michigan Community Property Trust.

f. "Period of the Michigan Community Estate". The Michigan Community Estate exists during the period of time that both married spouses are domiciled in the State of Michigan. The Michigan Community Estate commences the moment before property is transferred to a Michigan Community Property Trust for the first time and ends on the first of the following events:
    a. Both spouses are no longer domiciled in Michigan.
    b. Death of one spouse
    c. Divorce
    d. Annulment.

    In regard to the rights and interests of a spouse in Michigan Community Property Trust property, the character of Michigan Community Property in a Michigan Community Property Trust shall continue to exist after the Period of the Michigan Community Estate has ended, although future contributions to a Michigan Property Trust after the Period of the Michigan Community Estate has ended will not qualify as Michigan Community Property and joint debts of married spouses after the Period of the Michigan Community Estate has ended will not qualify as Michigan Community Debt.

g. "Transmutation of Michigan Common law ownership into Michigan Community Property" by married spouses occurs when Michigan Common Law property held by married spouses is transferred to a Michigan Community Property Trust during the Period of the Michigan Community Property Estate.

(2) Michigan Community Property Trust. A trust qualifies as a Michigan Community Property Trust only if it:

a. Contains property placed in the Michigan Community Property Trust by married spouses during the Period of the Michigan Community Estate;
b. Expressly declares it is a Michigan Community Property Trust;
c. Has the phrase "Community Property Trust" or has the phrase "CP Trust" in its title;
d. Has been executed by married spouses; and
e. Contains the following paragraph:

    THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND

YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE.

(3) **Michigan Community Property Trust; Community Spousal Rights**. Each married spouse will have the following rights in property placed in a Michigan Community Property Trust during the Period of the Michigan Community Estate:

a. Each spouse shall have a one half (1/2) interest in Michigan Community Trust Property during their lifetime and on death.
b. Each spouse may bequest or devise one half (1/2) of the property in a Michigan Community Property Trust both as expressed in the original trust document and in subsequent amendments separate from the trust document signed by the spouse amending their bequest or devise. Spouses may join together in making such devises. Valuations of property, when necessary to achieve a one half distribution on death, may be fairly made by the Michigan Community Property Trustee.
c. Expenses of a Michigan Community Property Trust shall be treated as one-half (1/2) belonging to each spouse.
d. Property of a Michigan Community Property Trust shall be distributed out of the Trust equally to both spouses. Property which cannot be divided shall be held as tenants in common upon distribution unless otherwise agreed by both spouses. Unless otherwise expressly agreed in the Michigan Community property Trust, or ordered by a court having jurisdiction over a Michigan Community property Trust, distributions by a Michigan Community Property Trustee from a Michigan Community Property Trust shall only occur by joint consent of the spouses either in the original Michigan Community Property Trust document or by other agreement or restatement of the Michigan Community Property Trust.
e. All rights in Michigan Community Property Trust Property are equal regardless of the source of funds used to buy such property, regardless of who transferred property into the trust, including by third parties, and

regardless of whose labor relates to its acquisition or its appreciation in value. Other than devises or bequests of a spouse's one half interest, amendments to or revocation of a Michigan Community Property Trust require consent of both spouses. A third party gift to a Michigan Community Property Trust shall be considered to be a gift to the community of the marriage.

f. All property placed in a Michigan Community Property Trust during the Period of the Michigan Community Estate shall be considered community property subject to the provisions herein even after the Period of the Michigan Community Estate has ended.
g. Michigan Community Property is subject to joint control.
    (1) Each spouse may authorize the other spouse to unilaterally manage the Michigan Community Property Trust as a sole Michigan Community Property Trustee by declaring so in a Michigan Community Property Trust or by separate document. Similarly, both spouses may authorize a third party to act as a Michigan Community Property Trustee. Unless both spouses agree otherwise, removal of Michigan Community Property Trustees and reappointment of Michigan Community Property Trustees must be made jointly by spouses during their joint lifetimes and singularly in the event of the death of one spouse. Spouses may revoke specific grants of authority to the Michigan Property Trustee at any time and may provide new grants of authority at any time, although spouses may otherwise agree that revocations of authority must be made jointly. Unless specifically provided in a Michigan Community Property Trust, neither spouse shall sell, convey, or encumber the real property in the Michigan Community Property Trust without the other spouse either: (1) joining as a Michigan Community Property Co-Trustee in the execution of the deed or other document by which the real estate is sold, conveyed, or encumbered, or (2) executing some other document authorizing a Michigan Community Property Trustee or Co-Trustees the execute documents selling, conveying or encumbering real estate.
    (2) A Michigan Community Property Trustee or Co-Trustee shall not, sell, convey, or encumber the assets, including real estate or the

goodwill of a business held in the Michigan Community Property Trust where both spouses participate in its management unless there has been the consent of both spouses to do so. Where only one spouse participates in such management of a business, the Michigan Community Property Trustee may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.

h. Neither spouse may gift property of the Michigan Community Property Trust without the express consent of the other spouse provided in the Michigan Community Property Trust or by separate document.
i. Property transferred to a Michigan Community Property Trust during the Period of the Michigan Community Estate is treated for all purposes as if it were acquired by either or both spouses during their marriage on the date the property is transferred to the trust.
j. A spouse serving as a Michigan Community Property Trustee is liable to the other spouse for any loss or damage caused by fraud or bad faith in the management of the Michigan Community Property.

Judicial Proceedings

700.7212. Community Property Trust and Divorce. In the event of a court proceeding involving divorce or separation, the court with jurisdiction over the divorce or separation shall have exclusive jurisdiction over the Michigan Community Property Trust, property held by the Michigan Community Property Trust or property payable to the Michigan Community Property Trust. A spouse may file a petition for determination of abandonment by or disappearance of a spouse and that court will also have exclusive jurisdiction over the trust. A court having jurisdiction may enter an order allowing a co-trustee spouse to have exclusive management and control over part or all of a Michigan Community Property Trust. (a) The court may:

(1) impose any condition and restriction the court deems necessary to protect the rights of a spouse;
(2) require a bond conditioned on the faithful administration of the property; and

(3) require payment to an agent of the court of all or a portion of the proceeds of the sale of the property, to be disbursed in accordance with the court's further directions. The court has continuing jurisdiction over the court's order rendered under this subchapter.

(b) On the motion of either spouse, the court shall amend or vacate the original order after notice and hearing if:

(1) the spouse who disappeared reappears;

(2) the abandonment or permanent separation ends; or

(3) a spouse who was reported to be a prisoner of war or missing on public service returns.

(1) In the event of a divorce, the court having jurisdiction over said divorce shall treat each spouse's one-half share in a Michigan Community Property Trust in the same manner as all other marital property and may cause distributions from the Trust to occur in accordance with its allocation of property of the spouses in a divorce. Further, in such divorce proceedings, the distributions from a Michigan Community Property Trust may be the subject of a property settlement agreement (in conjunction with the divorce) where the distributions from the Michigan Community Property Trust are allocated in any manner in which the spouses decide.

700.7510. Michigan Community Debt. Michigan Community Debt may be collected from the assets of a Michigan Community Property Trust without any claim of contribution or indemnification between spouses; and action for such payment may be brought directly against a Michigan Community Property Trust. In the case of debt which is the debt of a single spouse or in the case of joint debt which has not been incurred during the Period of the Michigan Community Estate, the Michigan Community Property Trustee may either be joined in a suit against the spouse or spouses having such debt; or, in the alternative, an action against the Michigan Community Property Trust may be brought in a subsequent proceeding after a judgment has been obtained against that spouse individually or both spouse's jointly.

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

*

Amicus Brief in Perry v. Cotton, COA #322069

*

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

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

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

The total membership of the Probate & Estate Planning Section is 3,473.

The position was adopted after a discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 16. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Marguerite Munson Lentz

E-Mail:
mlentz@bodmanlaw.com

Regarding:
Amicus Brief in Perry v. Cotton, COA #322069

Date position was adopted:
October 10, 2015

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

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
16 Voted for position
0 Voted against position
1 Abstained from vote
6 Did not vote (absent)

Explanation of the position, including any recommended amendments:
It is the Council's position that the Court of Appeals in Perry v Cotton, COA #322069, wrongly decided that an attorney who represented the personal representative of an estate also represented the beneficiaries of the estate. It is the Council's opinion that, based upon MCR 5.117(A), an attorney representing the personal representative of an estate only represents the personal representative and does not represent the estate or the beneficiaries of the estate. The Council supports overruling Perry v Cotton on this issue.

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

*

SB 0558, SB 0559, and SB 0560

*

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

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

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

The total membership of the Probate & Estate Planning Section is 3,473.

The position was adopted after electronic discussion and vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 20. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Marguerite Munson Lentz

E-Mail:
mlentz@bodmanlaw.com

Bill Numbers:
SB 0558 (Jones) Probate; other; dower rights; repeal. Amends 1846 RS 66 (MCL 558.1 - 558.29), by adding sec. 30 & repeals secs. 2931 & 2933 of 1961 PA 236 (MCL 600.2931 & 600.2933).

SB 0559 (Jones) Family law; marriage and divorce; requirement that judgment of divorce contain provisions regarding wife's dower rights; eliminate. Amends sec. 1 of 1909 PA 259 (MCL 552.101).

SB 0560 (Jones) Probate; wills and estates; reference to dower in estates and protected individuals code; revise to reflect abolition of dower. Amends secs. 1303, 2202, 2205 & 3807 of 1998 PA 386 (MCL 700.1303 et seq.).

Date position was adopted:
October 12-15, 2015

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

Number of members in the decision-making body:
23

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

Position:
Support

Explanation of the position, including any recommended amendments:
Support the passage of SB 558, 559, and 560.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://legislature.mi.gov/doc.aspx?2015-SB-0558
http://legislature.mi.gov/doc.aspx?2015-SB-0559
http://legislature.mi.gov/doc.aspx?2015-SB-0560

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

*

SB 0551

*

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

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

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

The total membership of the Probate & Estate Planning Section is 3,473.

The position was adopted after a discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 17. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Marguerite Munson Lentz

E-Mail:
mlentz@bodmanlaw.com

Bill Number:
SB 0551 (Schuitmaker) Probate; wills and estates; designation of a funeral representative to make disposition arrangements for decedent; provide for. Amends secs. 1104, 2801, 2803, 2807, 3206, 3207, 3209, 3614 & 3701 of 1998 PA 386 (MCL 700.1104 et seq.), adds secs. 3206a & 3206b & repeal sec. 3208 of 1998 PA 386 (MCL 700.3208).

Date position was adopted:
October 13, 2015

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

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
17 Voted for position
0 Voted against position
0 Abstained from vote
6 Did not vote (absent)

Position:
Support in Concept

Explanation of the position, including any recommended amendments:
The Council's position is that it supports SB 551 in concept. The Council has not yet had an opportunity to review the language and may have suggested changes after it has done so.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://legislature.mi.gov/doc.aspx?2015-SB-0551

ATTACHMENT 4

	Budget 2010-11	Actual 2010-11	Budget 2011-12	Actual 2011-12	Budget 2012-13	Actual 2012-13	Budget 2013-14	Actual 2013-2014	Budget 2014-15	Actual 2014-2015	Budget 2015-2016
Revenue											
Membership Dues	$115,000	$116,650	$115,000	$116,060	$ 115,000.00	$116,655	$115,000	$ 115,640.00	$ 115,000.00	$ 115,815.00	$ 115,000.00
Publishing Agreements	$500	$374	$350	$500	$ 350.00	$500	$650	$ 650.00	$ 650.00	$ 650.00	$ 650.00
Other	$450	$350	$350	$3,460	$ 350.00	$620	$350	$ 35.00	$ -	$ -	$ -
Total Receipts	$115,950	$117,374	$115,700	$120,020	$ 115,700.00	$117,775	$116,000	$ 116,325.00	$ 115,650.00	$ 116,465.00	$ 115,650.00
Disbursements											
Journal (1)	$35,000	$24,171	$27,500	$27,378	$ 27,500.00	$25,445	$25,000	$ 24,167.11	$ 12,225.00	$ 11,975.00	$ 12,225.00
Chairperson's Dinner (2)	$6,000	$4,768	$6,000	$4,842	$ 6,500.00	$4,406	$6,500	$ 5,745.55	$ 7,000.00	$ 7,425.63	$ 7,000.00
Travel	$16,000	$14,629	$16,500	$17,142	$ 18,000.00	$16,967	$18,500	$ 15,476.48	$ 18,500.00	$ 16,338.05	$ 18,500.00
Lobbying	$26,600	$24,000	$30,000	$29,500	$ 30,000.00	$30,000	$30,000	$ 30,000.00	$ 30,000.00	$ 30,000.00	$ 30,000.00
Meetings (3)	$12,000	$9,770	$12,000	$10,899	$ 12,000.00	$10,601	$14,000	$ 11,789.09	$ 15,000.00	$ 10,615.05	$ 12,000.00
Long-range Planning	$2,500	$0	$2,500	$0	$ 1,000.00	$0	$1,000	$ -	$ 1,000.00	$ -	$ -
Support for Annual Institute	$11,000	$9,853	$12,000	$11,557	$ 13,000.00	$13,688	$14,000	$ 11,911.68	$ 14,000.00	$ 14,000.00	$ 14,000.00
Amicus Briefs	$10,000	$0	$10,000	$0	$ 10,000.00	$9,215	$10,000	$ 361.50	$ 10,000.00	$ 10,175.00	$ 10,000.00
Seminars (4)							$	$ -	$ 4,000.00	$ 4,000.00	$ 6,500.00
Electronic Communications (5)	$850	$840	$850	$880	$ 1,400.00	$1,275	$1,400	$ 984.03	$ 2,825.00	$ 1,102.39	$ 1,200.00
List serve											
E-blast											
Telephone	$500	$437	$500	$93	$ 250.00	$206	$250	-	-		
Postage	$100	$0	$100	$0	$ 100.00	$1	$100	$ -	-		
Membership (6)										$ 4,157.16	$ 7,000.00
Publishing and copyright (7)											$ 5,000.00
Other (8)	$500	$137	$300	$236	$ 100.00	$680	$1,000	$ 21.33	$ 1,100.00	$ 138.78	$ 400.00
Total Disbursements	$121,050	$88,605	$118,250	$102,527	$ 119,850.00	$112,484	$121,750	$ 100,456.77	$ 115,650.00	$ 109,927.06	$ 123,825.00
Net Funds Remaining	-$5,100	$28,769	-$2,550	$17,493	$ (4,150.00)	$5,291	-$5,750	$ 15,868.23	$ -	$ 6,537.94	$ (8,175.00)

(1) includes eblasts for Journal
(2) Includes gavel for incoming chair and plaques for outgoing chair and council members
(3) includes registration fees, travel, meals, and lodging for Chjair-Elect and Vice-Chair to attend the annual Leadership Conference on Mackiinac Island.
(4) During 2014-2015 agreed to contribute towards Solo and Small Firm Insititute in November 2015 (included in 2015-2016 budget):$1000 for scholarships, $1500 for general support. Plus $4000 for experts in estate plannning.
(5) includes teleconference charges, listserve, e-blast, and other electronic communications to members
(6) new category added during 2014-2015 year with initial budget of $4000.
(7) new category added for 2015-2016 budget
(8) includes copying, postage and Young Lawyers Conference

The toal fund balance at the end of fiscal year 2013-2014 is:

General Fund beginning of 2013-2014	$	180,511.60
Amicus Fund beginning of 2013-2014	$	25,785.00
Total Beginning Fund	$	206,296.60
Plus receipts	$	116,325.00
Less disbursements	$	(100,456.77)
Ending Total Fund close of 2013-2014	$	222,164.83

includes disbursements from Amicus Fuind

Computation of Amicus Fund end of fiscal year 2013-2014 is:

Amicus Fund beginning 2013-2014	$	25,785.00
Plus budget from 2013-2014		$10,000

ATTACHMENT 5

HOUSE BILL No. 5034

October 28, 2015, Introduced by Reps. Forlini, Lane, Franz and Glenn and referred to the Committee on Communications and Technology.

A bill to provide for fiduciary access to digital assets; and to provide for the powers and procedures of the court that has jurisdiction over these matters.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "fiduciary access to digital assets act".

Sec. 2. As used in this act:

(a) "Account" means an arrangement under a terms-of-service agreement in which the digital custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(b) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(c) "Carries" means engaging in the transmission of an electronic communication.

(d) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic

communication, the time and date of the communication, and the electronic address of the person.

(e) "Conservator" means a person that is appointed by a court to manage all or part of the estate of a protected person or a parent for the parent's minor child if no conservator, plenary guardian, or partial guardian has been appointed for the minor child. Conservator includes, but is not limited to, any of the following:

(*i*) A conservator as that term is defined in section 1103 of the estates and protected individuals code, 1998 PA 386, MCL 700.1103.

(*ii*) A plenary guardian as that term is defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.

(*iii*) A partial guardian as that term is defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.

(*iv*) A special fiduciary appointed to take possession of and administer a protected person's property.

(*v*) A special conservator appointed under section 5408 of the estates and protected individuals code, 1998 PA 386, MCL 700.5408.

(*vi*) A guardian if no conservator has been appointed.

(f) "Content of an electronic communication" means information concerning the substance or meaning of an electronic communication to which all of the following apply:

(*i*) The information has been sent or received by a user.

(*ii*) The information is in electronic storage by a digital custodian providing an electronic communication service to the public or is carried or maintained by a digital custodian providing a remote-computing service to the public.

(*iii*) The information is not readily accessible to the public.

(g) "Court" means the probate court or, when applicable, the

circuit court.

(h) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(i) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a.

(j) "Digital asset" means an electronic record in which a user has a right or interest. Digital asset does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(k) "Digital custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(*l*) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(m) "Electronic communication" means that term as defined in 18 USC 2510.

(n) "Electronic communication service" means a digital custodian that provides to a user the ability to send or receive an electronic communication.

(o) "Electronic communication system" means that term as defined in 18 USC 2510.

(p) "Fiduciary" means a person who is an original, additional, or successor personal representative, conservator, agent, or trustee.

(q) "Guardian" means that term as defined in section 1104 of the estates and protected individuals code, 1998 PA 386, MCL 700.1104.

(r) "Governing instrument" means a will, a trust, an instrument creating a power of attorney, or other dispositive or

nominative instrument.

(s) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(t) "Interested person" or "person interested in an estate" means those terms as defined in section 1105 of the estates and protected individuals code, 1998 PA 386, MCL 700.1105.

(u) "Legally incapacitated individual" means that term as defined in section 1105 of the estates and protected individuals code, 1998 PA 386, MCL 700.1105.

(v) "Letters" means that term as described in section 1105 of the estates and protected individuals code, 1998 PA 386, MCL 700.1105.

(w) "Minor" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(x) "Online tool" means an electronic service provided by a digital custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the digital custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(y) "Person" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(z) "Personal representative" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106. Personal representative also includes a special fiduciary appointed to take possession of and administer the property of a decedent's estate.

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

(bb) "Principal" means a person that grants authority to an agent in a power of attorney.

(cc) "Proceeding" means that term as defined in section 1106

of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(dd) "Protected individual" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(ee) "Protected person" includes any of the following:

(*i*) A protected individual.

(*ii*) A legally incapacitated individual.

(*iii*) A minor for whom a guardian has been appointed but no conservator has been appointed.

(*iv*) An individual who has a developmental disability.

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

(gg) "Remote-computing service" means a digital custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system.

(hh) "Settlor" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(ii) "Special fiduciary" means a special fiduciary appointed by the court under sections 1308, 1309, 7704, 7815, and 7901 of the estates and protected individuals code, 1998 PA 386, MCL 700.1308, 700.1309, 700.7704, 700.7815, and 700.7901.

(jj) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a digital custodian.

(kk) "Trust" means that term as defined in section 1107 of the estates and protected individuals code, 1998 PA 386, MCL 700.1107.

(*ll*) "Trustee" means that term as defined in section 1107 of the estates and protected individuals code, 1998 PA 386, MCL

700.1107. Trustee also includes a special fiduciary that controls all or part of a trust.

(mm) "User" means a person that has an account with a digital custodian.

(nn) "Will" means that term as defined in section 1108 of the estates and protected individuals code, 1998 PA 386, MCL 700.1108.

Sec. 3. (1) Subject to subsections (2), (3), and (4), this act applies to all of the following:

(a) A fiduciary acting under a will or power of attorney executed before, on, or after the effective date of this act.

(b) A personal representative acting for a decedent who died before, on, or after the effective date of this act.

(c) A proceeding involving a conservator commenced before, on, or after the effective date of this act.

(d) A trustee acting under a trust created before, on, or after the effective date of this act.

(2) This act applies to a digital custodian if the user resides in this state or resided in this state at the time of the user's death.

(3) This act does not impair an accrued right or an action taken in a proceeding before the effective date of this act.

(4) This act does not apply to a digital asset of an employer used by an employee in the ordinary course of business.

Sec. 4. (1) A user may use an online tool to direct the digital custodian to disclose or not to disclose some or all of the user's digital assets, including the contents of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(2) If a user has not used an online tool to give direction under subsection (1) or if the digital custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record disclosure of some or all of the user's digital assets, including the contents of electronic communications sent or received by the user.

(3) A user's direction under subsection (1) or (2) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms-of-service agreement.

Sec. 5. (1) This act does not change or impair a right of a digital custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(2) This act does not give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary acts or who the fiduciary represents.

(3) A fiduciary's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under section 4.

Sec. 6. (1) When disclosing the digital assets of a user under this act, the digital custodian may at its sole discretion do any of the following:

(a) Grant a fiduciary or designated recipient full access to the user's account.

(b) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged.

(c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the digital custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the

account.

(2) A digital custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this act.

(3) A digital custodian is not required to disclose under this act a digital asset deleted by a user.

(4) If a user directs or a fiduciary requests a digital custodian to disclose under this act some, but not all, of the user's digital assets, the digital custodian is not required to disclose the requested digital assets if segregation of the requested digital assets would impose an undue burden on the digital custodian. If the digital custodian believes the direction or request imposes an undue burden, the digital custodian or fiduciary may seek an order from the court to disclose any of the following:

(a) A subset limited by date of the user's digital assets.

(b) All of the user's digital assets to the fiduciary or designated recipient.

(c) None of the user's digital assets.

(d) All of the user's digital assets to the court for review in camera.

Sec. 7. If a deceased user consented to or a court directs disclosure of the contents of electronic communications of the user, a digital custodian shall disclose to the personal representative of the user the content of an electronic communication sent or received by the user if the personal representative gives the digital custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A copy of the death certificate of the user.

(c) A certified copy of the letters of authority of the

personal representative, a small-estate affidavit, or other court order.

(d) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the contents of electronic communications.

(e) If requested by the digital custodian, any of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.

(*ii*) Evidence linking the account to the user.

(*iii*) A finding by the court that:

(A) The user had a specific account with the digital custodian, identifiable by the information specified in subparagraph (*i*).

(B) Disclosure of the content of electronic communications of the user would not violate 18 USC 2701 to 2707, 47 USC 222, or other applicable law.

(C) Unless the user provided direction using an online tool, the user consented to disclosure of the contents of electronic communications.

(D) Disclosure of the contents of electronic communications of the user is reasonably necessary for administration of the estate.

Sec. 8. Unless the user prohibited disclosure of digital assets or the court directs otherwise, a digital custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user if the personal representative gives

the digital custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A copy of the death certificate of the user.

(c) A certified copy of the letters of authority of the personal representative, a small-estate affidavit, or a court order.

(d) If requested by the digital custodian, any of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.

(*ii*) Evidence linking the account to the user.

(*iii*) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate.

(*iv*) A finding of the court that:

(A) The user had a specific account with the digital custodian, identifiable by the information specified in subparagraph (*i*).

(B) Disclosure of the contents of electronic communications of a user is reasonably necessary for administration of the estate.

Sec. 9. To the extent a power of attorney grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a digital custodian shall disclose to the agent the content of electronic communication if the agent gives the digital custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) An original or copy of the power of attorney granting the agent the authority over the content of electronic communications of the principal.

(c) An affidavit from the agent under section 5505 of the estates and protected individuals code, 1998 PA 386, MCL 700.5505.

(d) If requested by the digital custodian, any of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the principal's account.

(*ii*) Evidence linking the account to the principal.

Sec. 10. Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a digital custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and any digital assets, other than the content of electronic communications, of the principal if the agent gives to the digital custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) An original or a copy of the power of attorney that gives the agent authority over digital assets or general authority to act on behalf of the principal.

(c) An affidavit from the agent under section 5505 of the estates and protected individuals code, 1998 PA 386, MCL 700.5505.

(d) If requested by the digital custodian, any of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify

the principal's account.

(*ii*) Evidence linking the account to the principal.

Sec. 11. Unless otherwise ordered by the court or provided in a trust, a digital custodian shall disclose to the trustee that is an original user of an account any digital assets of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

Sec. 12. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a digital custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the digital custodian in the account of the trust if the trustee gives to the digital custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certificate of the trust under section 7913 of the estates and protected individuals code, 1998 PA 386, MCL 700.7913,

that includes consent to disclosure of the contents of electronic communications to the trustee.

(c) A certification of the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust.

(d) If requested by the digital custodian, any of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account.

(*ii*) Evidence linking the account to the trust.

Sec. 13. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a digital custodian shall disclose to a trustee that is not an original user of an account a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the digital custodian in the account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the digital custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certificate of the trust under section 7913 of the estates and protected individuals code, 1998 PA 386, MCL 700.7913.

(c) A certification of the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust.

(d) If requested by the digital custodian, all of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account.

(*ii*) Evidence linking the account to the trust.

Sec. 14. (1) After an opportunity for a hearing, the court may grant a conservator access to the digital assets of a protected person.

(2) Unless otherwise ordered by the court or directed by the user, a digital custodian shall disclose to a conservator the catalogue of electronic communications sent or received by the protected person and any digital asset, other than the content of electronic communications, in which the protected person has a

right or interest if the conservator gives the digital custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certified copy of the court order that gives the conservator authority over the digital assets of the protected person.

(c) If requested by the digital custodian, any of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the account of the protected person.

(*ii*) Evidence linking the account to the protected person.

(3) A conservator may request a digital custodian of digital assets of a protected person to suspend or terminate an account of the protected person for good cause. A request made under this subsection must be accompanied by a certified copy of the conservator's letters of authority or other order appointing the conservator.

Sec. 15. (1) The legal duties imposed on a fiduciary charged with managing tangible personal property apply to the management of digital assets, including all of the following:

(a) The duty of care.

(b) The duty of loyalty.

(c) The duty of confidentiality.

(2) All of the following apply to a fiduciary's authority with respect to a digital asset of a user:

(a) Except as otherwise provided in section 4, it is subject to the applicable terms-of-service agreement.

(b) It is subject to other applicable laws, including

copyright law.

(c) It is limited to the scope of the fiduciary's duties.

(d) It may not be used to impersonate the user.

(3) A fiduciary with authority over the property of a decedent, protected person, principal, or settlor has the right to access any digital asset in which the decedent, protected person, principal, or settlor had a right or interest and that is not held by a digital custodian or subject to a terms-of-service agreement.

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including, but not limited to, all of the following:

(a) Section 5 of 1979 PA 53, MCL 752.795.

(b) Section 540 of the Michigan penal code, 1931 PA 328, MCL 750.540.

(c) Section 157n of the Michigan penal code, 1931 PA 328, MCL 750.157n, to the extent that the property is a financial transaction device as that term is defined in section 157m of the Michigan penal code, 1931 PA 328, MCL 750.157m.

(5) All of the following apply to a fiduciary with authority over tangible personal property of a decedent, protected person, principal, or settlor:

(a) The fiduciary has the right to access the property and any digital asset stored in it.

(b) The fiduciary is an authorized user for the purposes of computer fraud and unauthorized computer access laws, including, but not limited to, all of the following:

(*i*) Section 5 of 1979 PA 53, MCL 752.795.

(*ii*) Section 540 of the Michigan penal code, 1931 PA 328, MCL

750.540.

(*iii*) Section 157n of the Michigan penal code, 1931 PA 328, MCL 750.157n, to the extent that the tangible personal property is a financial transaction device as that term is defined in section 157m of the Michigan penal code, 1931 PA 328, MCL 750.157m.

(6) A digital custodian may disclose information in an account to a fiduciary of the user if the information is required to terminate an account used to access digital assets licensed to the user.

(7) A fiduciary of a user may request a digital custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by all of the following:

(a) If the user is deceased, a copy of the death certificate of the user.

(b) A certified copy of the letters of authority of the personal representative, small-estate affidavit, or court order, power of attorney, or trust giving the fiduciary authority over the account.

(c) If requested by the digital custodian, any of the following:

(*i*) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.

(*ii*) Evidence linking the account to the user.

(*iii*) A finding of the court that the user had a specific account with the digital custodian, identifiable by the information specified in subparagraph (*i*).

Sec. 16. (1) Not later than 56 days after receipt of the information required under sections 7 to 14, a digital custodian

shall comply with a request under this act from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the digital custodian fails to comply, the fiduciary or designated recipient may petition or otherwise apply to the court for an order directing compliance.

(2) An order under subsection (1) directing compliance must contain a finding that compliance is not in violation of 18 USC 2702.

(3) A digital custodian that receives a certificate of trust under section 12 or 13 may require the trustee to provide copies of excerpts from the original trust instrument and later amendments that designate the trustee and, if the trustee is requesting content of electronic communications, that includes consent to disclosure of the contents of electronic communications to the trustee.

(4) A digital custodian or other person that demands the trust instrument in addition to a certificate of trust under section 12 or 13 or demands excerpts under subsection (3) is liable for damages to the same extent the digital custodian or other person would be liable under section 7913 of the estates and protected individuals code, 1998 PA 386, MCL 700.7913.

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

(6) A digital custodian may notify the user that a request for disclosure or to terminate an account was made under this act.

(7) A digital custodian may deny a request under this act from a fiduciary or designated recipient for disclosure or to terminate an account if the digital custodian is aware of any lawful access to the account following the receipt of the request.

(8) This act does not limit the digital custodian's ability to obtain or to require a fiduciary or designated recipient requesting disclosure or termination of an account under this act to obtain a court order that does any of the following:

(a) Specifies that an account belongs to the protected person or principal.

(b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure.

(c) Contains a finding required by law other than this act.

(9) A digital custodian and its officers, employees, and agents are immune from liability for an action done in good faith in compliance with this act.

Sec. 17. Notwithstanding section 7 or 8, an interested person may file a petition in the court for an order to limit, eliminate, or modify the personal representative's powers with respect to the decedent's digital assets. On receipt of a petition under this section, the court shall set a date for a hearing on the petition. The hearing date must not be less than 14 days or more than 56 days after the date the petition is filed, except for good cause.

Sec. 18. This act modifies, limits, or supersedes the electronic signatures in the global and national commerce act, 15 USC 7001 to 7006, but does not modify, limit, or supersede 15 USC 7001(c) or authorize electronic delivery of any of the notices described in 15 USC 7003(b).

ATTACHMENT 6

Probate and Estate Planning Section of the State Bar of Michigan
Policy Regarding Consideration of Amicus Curiae Matters

The Amicus Curiae Committee ("Amicus Committee") of the Probate and Estate Planning Section of the State Bar of Michigan (the "Section") reviews and considers requests to the Section to file an amicus curiae brief, makes recommendations to the Section's Council whether to file an amicus curiae brief, identifies legal counsel to prepare an amicus curiae brief, and oversees the work of legal counsel doing so.

It is the policy of the Section that amicus curiae briefs shall only be filed by the Section in cases pending in the Michigan Court of Appeals or the Michigan Supreme Court and which involve issues of significance in the areas of estate planning, trusts, probate, nonprobate estate settlement, guardianships, and conservatorships, or which involve Cases related to the practice of law in these areas. The Section does not file amicus curiae briefs in cases pending in a probate or circuit court and ordinarily does not file amicus curiae briefs in cases pending in federal court unless dealing directly with issues of Michigan law in the above mentioned areas.

The Amicus Committee reviews and considers requests for an amicus curiae brief (1) upon receipt of an *Application for Consideration* from a party to the litigation, (2) in response to an invitation to file an amicus curiae brief that is received by the Section from the court before which a case involving an issue of significance to the Section is pending, (3) upon the request of a Council member at the discretion of the Chair of the Committee or (4) by the Committee at its own discretion.

In determining whether to file an amicus curiae brief the Amicus Committee and the Section's Council will consider all factors they consider relevant, including the anticipated impact of the lower court and appellate court(s) opinions on the Section's attorneys and their clients, whether the lower court erred, the perceived likelihood a court to which leave to appeal has been sought will accept the case, whether the lower court's opinion is a published opinion, whether the case involves facts that are likely to recur, whether a higher court is likely to grant leave to appeal in a particular case, and the financial resources of the Section. Examples of cases in which the Section favors filing an amicus curiae brief are (a) cases involving facts or principles with widespread applicability, (b) cases that affect the practice of law by members of the Section, and (c) cases in which the Michigan court of appeals has erred in a published opinion.

In determining whether to file an amicus curiae brief, the Amicus Committee will contact the legal counsel for the parties in the particular case to determine the facts and legal principles involved, obtain and review all relevant pleadings, independently review the applicable law, and evaluate possible positions the Section might wish to take in the matter. After completing its review, the Amicus Committee will submit a written report and recommendation to the Section's Council regarding whether an amicus curiae brief should be filed by the Section and what position(s) the Section should take on the issues presented. In general, the Section will take positions and advocate for what the Section believes the law is or should be and will not advocate or favor a result for any particular party to the litigation.

When time permits, the Amicus Committee will submit its written report and recommendations before the Council's next regularly scheduled meeting following receipt of the request by the Amicus Committee. When time permits, a decision regarding whether to file an amicus curiae brief will be made by the Council at the meeting at which the Amicus Committee's recommendation is presented.

At meetings of the Section's Council, or at meetings of the Section's Committee on Special Projects ("CSP") when a request for an amicus curiae brief has been referred by the Council to the CSP, the Amicus Committee will present the facts of the case, discuss the legal principles and issues involved, and offer the Committee's recommendation.

Attorneys for the parties in the case will be permitted to offer written submissions to the Council and CSP and to answer specific questions from members of the Council or CSP, but oral presentations by attorneys for the parties will not be permitted at CSP or Council meetings unless requested by a vote of the Council members. Attorneys representing parties in the proceeding (including attorneys affiliated with law firms representing the parties) shall identify themselves at the commencement of the Amicus Committee's presentation of the matter and shall excuse themselves and shall not be present during the Council's or CSP's discussions nor during the CSP's and/or Council's vote whether to accept the Amicus Committee's recommendation.

All votes by the Council to accept the Amicus Committee's report and recommendation, to file an amicus curiae brief, and to determine the position(s) to be taken in the brief shall be by show of hands and the votes for, against, and in abstention shall be recorded in the minutes by the Secretary of the Section or the acting secretary of the meeting of the Council if the Secretary of the Section is not present.

Notwithstanding any discussion or vote by CSP or otherwise, the Section's Council retains final authority to determine whether the Section will file an amicus curiae brief and the position(s) that the Section will take. Where possible the Section will seek opportunities to file joint amicus curiae briefs and share in the cost of their preparation with other sections of the State Bar of Michigan or other interested organizations. The Section will pay the costs of preparing and filing amicus curiae briefs from Section funds, and shall not accept contributions to defray the costs from any party to the proceeding.

In connection with any case in which the Section's Council votes to file an amicus curiae brief, the Council ordinarily shall authorize the Amicus Committee to retain legal counsel, and shall authorize a sum, ordinarily not to exceed $5,000 per case, to be paid to legal counsel, to file a brief on behalf of the Section setting forth the Section's position(s) in the case.

This policy is subject to change by vote of the Section's Council.

Adopted 9/19/09

Amicus Curiae Committee
Probate and Estate Planning Section of the State Bar of Michigan

Application for Consideration

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

Date October 19, 2015

Name Richard Mills P Number P68618

Disclosure of conflict - The applicant is a member of the Probate and Estate Planning Council and will recuse himself from all discussion of this application, if it is recommended to the Committee on Special Projects or the Council.

Firm Name Law Offices of Richard C. Mills & Associates (of counsel to Marcoux, Allen, Bower, Nichols & Kendall, P.C.)

Address 145 S. Jackson St.

City Jackson State Michigan Zip Code 49201

Phone Number (517) 513-8915 Fax Number (888) 719-6926

E-mail address rick@richardmillsandassociates.com

Attach Additional Sheets as Required

Name of Case In the Matter of William D. Jacob (Jency Marcantel v William Jacob) Michigan Court of Appeals Case No. 329390 and Jackson County Probate Court File No. 10-12119-CA

Parties Involved William Jacob (Respondent), Jency Marcantel (Petitioner and Respondent's Sister), Daniel Jacob (Respondent's Father), Gayle Jacob (Respondent's Mother), Attorney Jennifer Kelly (Respondent's Conservator)

Current Status: Respondent has appealed the Jackson County Probate Court's appointment of a Conservator on September 3, 2015 to the Michigan Court of Appeals. Attorney Kevin Thomson (trial counsel) has appeared on behalf of the Appellee/Petitioner.

Deadlines: Appellant's brief is due November 13, 2015

Issue(s) Presented: Whether sufficient evidence was presented to support a finding by clear and convincing evidence that the Appellant/Respondent was unable to manage his property or business affairs effectively. No medical evidence or evidence of any other kind of "inability" was admitted. The Court based its finding solely on a finding of the conditions of "chronic use of drugs" and "chronic intoxication," under MCL 700.5401(3)(a), and its conclusion that the Appellant/Respondent had "wasted or dissipated" his resources in the past (by expending some of his income on drugs and alcohol), under MCL 700.5401(3)(b), and was likely to do so in the future. This finding was made despite evidence that he was living within his means, his bills were not left unpaid, and the Court's statement that it "had no reason to not find his father's testimony credible that he's actually brilliant and intelligent." See Transcript at Page 208.

Michigan Statute(s) or Court Rule(s) at Issue: MCL 700.5401(3).

Common Law Issues/Cases at Issue: ***Bittner-Korbus v Bittner (In re Bittner)*, 2015 Mich.App. LEXIS 1666, September 8, 2015 (MCOA Case No. 320688)** - In this recent published case (issued five days after this trial) the Michigan Court of Appeals reversed the probate court's appointment of a conservator, finding insufficient evidence of inability to manage property or business affairs.

***Townsend v Townsend (In re Townsend)*, 293 Mich App 182 (2011)** -The Michigan Court of Appeals reversed the probate court's appointment of a conservator for a woman alleged to be a "vulnerable adult" under the Social Welfare Act because "the evidence did not show that [she] was vulnerable because, as found by the probate court, she did not have mental or physical impairment and there was no evidence from which to conclude that her inability to say no was related to her age."

***Brickman v Brickman*, 2008 Mich.App. LEXIS 2036 (MCOA No. 278403)** - The Michigan Court of Appeals ruled that medical evidence is not required for the probate court to find inability to manage affairs as a result of mental deficiency. The Court affirmed the probate court's appointment of a conservator because the testimony showed the respondent didn't "fully comprehend her financial affairs."

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? As the Committee is aware, Guardianship and conservatorship cases are rarely appealed because the respondent typically lacks sufficient means to fund an appeal. Consequently, there are few cases on what is a very common issue. It is common in this attorney's experience as a guardian ad litem and private practice probate attorney for probate courts to struggle to distinguish between the underlying conditions listed in MCL 700.5401(3)(a) and the actual "inability" to manage property or business affairs. Probate courts, like this one, often conflate the underlying condition and inability, especially in cases of drug use and chronic intoxication, which naturally elicit sympathy for the family struggling with a loved one with a substance or alcohol abuse problem. This probate court used a finding of past "waste and dissipation" (The Respondent spent a portion of his considerable income on drugs while still living within his means) as proof of inability, despite the fact that the likelihood of future "waste

and dissipation" under MCL 700.5401(3)(b) (the practical need for a conservator to manage property even where the individual has demonstrated inability) is an *additional* requirement for the appointment of a conservator, *after* the court has found inability by clear and convincing evidence under MCL 700.5401(3)(a). The probate court explicitly skipped over a finding of inability (see Page 220 of the transcript) and in fact stated that, "I have no reason not to find his father's testimony credible that he's actually brilliant and intelligent, and the best of both worlds would be for his son and [the Respondent's] sister to be able to repair the fences, so to speak, in the dynamics of the family and run a successful business." See the Transcript at Pages 208-209. Following this court's reasoning a conservator can be appointed for every otherwise "brilliant and intelligent" individual who struggles with substance abuse.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? Yes. The Michigan probate courts receive many thousands of guardianship and conservatorship filings each year, many of which are filed pro per, but there is little case law in this area and there are rare opportunities for the court to develop the case law, given the paucity of appeals. Given the rarity of guardianship and conservatorship appeals there is considerable risk of the Court of Appeals getting it wrong. EPIC does not clarify what type of evidence is necessary to prove inability to manage property and business affairs by clear and convincing evidence, although it is clear that the finding of one of the conditions listed in MCL 700.5401(3)(a) is only the first step. While it is typical to have medical evidence, under *Brickman*, medical evidence is not required if there is other evidence of inability to manage property or business affairs, of which there was none in this case. It is easy for probate courts to make the same mistake this court did without case law to the contrary. There is also risk that the

Court of Appeals will endorse the probate court's conflation of condition and inability and its bootstrap argument regarding "waste and dissipation" without guidance from the Section.

Probate and Estate Planning Section of the State Bar of Michigan
Policy Regarding Consideration of Amicus Curiae Matters

The Amicus Curiae Committee ("Amicus Committee") of the Probate and Estate Planning Section of the State Bar of Michigan (the "Section") reviews and considers requests to the Section to file an amicus curiae brief, makes recommendations to the Section's Council whether to file an amicus curiae brief, identifies legal counsel to prepare an amicus curiae brief, and oversees the work of legal counsel doing so.

It is the policy of the Section that amicus curiae briefs shall only be filed by the Section in cases pending in the Michigan Court of Appeals or the Michigan Supreme Court and which involve issues of significance in the areas of estate planning, trusts, probate, nonprobate estate settlement, guardianships, and conservatorships, or which involve Cases related to the practice of law in these areas. The Section does not file amicus curiae briefs in cases pending in a probate or circuit court and ordinarily does not file amicus curiae briefs in cases pending in federal court unless dealing directly with issues of Michigan law in the above mentioned areas.

The Amicus Committee reviews and considers requests for an amicus curiae brief (1) upon receipt of an *Application for Consideration* from a party to the litigation, (2) in response to an invitation to file an amicus curiae brief that is received by the Section from the court before which a case involving an issue of significance to the Section is pending, (3) upon the request of a Council member at the discretion of the Chair of the Committee or (4) by the Committee at its own discretion.

In determining whether to file an amicus curiae brief the Amicus Committee and the Section's Council will consider all factors they consider relevant, including the anticipated impact of the lower court and appellate court(s) opinions on the Section's attorneys and their clients, whether the lower court erred, the perceived likelihood a court to which leave to appeal has been sought will accept the case, whether the lower court's opinion is a published opinion, whether the case involves facts that are likely to recur, whether a higher court is likely to grant leave to appeal in a particular case, and the financial resources of the Section. Examples of cases in which the Section favors filing an amicus curiae brief are (a) cases involving facts or principles with widespread applicability, (b) cases that affect the practice of law by members of the Section, and (c) cases in which the Michigan court of appeals has erred in a published opinion.

In determining whether to file an amicus curiae brief, the Amicus Committee will contact the legal counsel for the parties in the particular case to determine the facts and legal principles involved, obtain and review all relevant pleadings, independently review the applicable law, and evaluate possible positions the Section might wish to take in the matter. After completing its review, the Amicus Committee will submit a written report and recommendation to the Section's Council regarding whether an amicus curiae brief should be filed by the Section and what position(s) the Section should take on the issues presented. In general, the Section will take positions and advocate for what the Section believes the law is or should be and will not advocate or favor a result for any particular party to the litigation.

When time permits, the Amicus Committee will submit its written report and recommendations before the Council's next regularly scheduled meeting following receipt of the request by the Amicus Committee. When time permits, a decision regarding whether to file an amicus curiae brief will be made by the Council at the meeting at which the Amicus Committee's recommendation is presented.

At meetings of the Section's Council, or at meetings of the Section's Committee on Special Projects ("CSP") when a request for an amicus curiae brief has been referred by the Council to the CSP, the Amicus Committee will present the facts of the case, discuss the legal principles and issues involved, and offer the Committee's recommendation.

Attorneys for the parties in the case will be permitted to offer written submissions to the Council and CSP and to answer specific questions from members of the Council or CSP, but oral presentations by attorneys for the parties will not be permitted at CSP or Council meetings unless requested by a vote of the Council members. Attorneys representing parties in the proceeding (including attorneys affiliated with law firms representing the parties) shall identify themselves at the commencement of the Amicus Committee's presentation of the matter and shall excuse themselves and shall not be present during the Council's or CSP's discussions nor during the CSP's and/or Council's vote whether to accept the Amicus Committee's recommendation.

All votes by the Council to accept the Amicus Committee's report and recommendation, to file an amicus curiae brief, and to determine the position(s) to be taken in the brief shall be by show of hands and the votes for, against, and in abstention shall be recorded in the minutes by the Secretary of the Section or the acting secretary of the meeting of the Council if the Secretary of the Section is not present.

Notwithstanding any discussion or vote by CSP or otherwise, the Section's Council retains final authority to determine whether the Section will file an amicus curiae brief and the position(s) that the Section will take. Where possible the Section will seek opportunities to file joint amicus curiae briefs and share in the cost of their preparation with other sections of the State Bar of Michigan or other interested organizations. The Section will pay the costs of preparing and filing amicus curiae briefs from Section funds, and shall not accept contributions to defray the costs from any party to the proceeding.

In connection with any case in which the Section's Council votes to file an amicus curiae brief, the Council ordinarily shall authorize the Amicus Committee to retain legal counsel, and shall authorize a sum, ordinarily not to exceed $5,000 per case, to be paid to legal counsel, to file a brief on behalf of the Section setting forth the Section's position(s) in the case.

This policy is subject to change by vote of the Section's Council.

Adopted 9/19/09

Amicus Curiae Committee
Probate and Estate Planning Section of the State Bar of Michigan

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 10/30/15

Name Kurt A Olson on behalf of the Amicus Commitee (sua sponte)

P Number P38321

Firm Name: Law Office of Kurt A Olson

Address 682 Deer

City Plymouth State MI Zip Code 48170

Phone Number 734-459-6911 Fax Number 734-927-1999

E-mail address kaolson@tds.net

Attach Additional Sheets as Required

Name of Case In Re: Mardigian

Parties Involved Mark S Papazian,Executor for the Estate of Robert Douglas Mardigian

Appellant, Melissa Goldberg, Susan V Luken, Nancy Varbedian, Edward Mardigian,Grant

Mardigian, Matthew Mardifian and JP Morgan Chase Bank Appellees

Current Status: Case : Case released for Publication October 8, 2015

Deadlines:_N/A

Issue(s) Presented: Whether a trust drafted in violation of MRPC 1.8 (c) in which the attorrney who drafted the trust and his children are the major beneficiaries, is void or terminated as a matter of public policy

Michigan Statute(s) or Court Rule(s) at Issue: MRPC 1.8 (c) ; MCL 700.7410 (1) MCL 700.2705; MCLA 700.2501

Common Law Issues/Cases at Issue: In Re Estate of Powers 375 Mich 150 (1965) ; Krabatian's Estate Hnot 17 Mich App 541 (1969); Terrien v Zwit 467 Mich 56 (2002);,In Re: Skoog's Estate 373 Mich 27 (1964)

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section?_ This is a question to which every attorney drafting trusts must know

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? It will guide every drafter of trusts and will establish the public's perception of attorneys

ATTACHMENT 7

MEMORANDUM

To: Probate and Estate Planning Council

From: Mark E. Kellogg
Real Estate Committee

Date: November 7, 2015

RE: PEPC Real Estate Committee Meeting Report

The Real Estate Committee met on October 29, 2015. Participants in the meeting were Mark Kellogg, Jim Ramar, David Kerr, George Bearup, Melissa Mysliwiec, Jim Steward, David Fry and Josh Ard.

David Fry provided a summary of his committee's work with the legislature regarding P.A. 497 2012 and P.A. 310 2014 regarding Proposal A and uncapping provisions.

More recently, David (assisted by a subcommittee of Jim Ramar, Jeff Ammon, and George Bearup) has been working with Representative Pettalia's office regarding amendments to MCL 211.27a.

See attached documents:

1. Summary of Proposed Changes to MCL 211.27a
2. June 2015 Proposed Amendments to MCL 211.27a

The proposed amendments have been submitted to the Legislative Services Bureau the week of October 19, 2015 for formatting and presentation as a House Bill. It is expected that the proposal will be issued as a draft House Bill by the end of the week of November 2, 2015.

It was discussed that other Sections of the State Bar – the Elder Law Section and the Real Property Section – are also working on various proposals relating to amendments to MCL 211.27a. The Real Property Section apparently is already in discussions with a lobbying firm to present other proposals. There was concern expressed that the presentation of multiple proposals could hinder the passage of any proposed amendments. It was observed that it would be beneficial to reach out to the Elder Law Section and the Real Property Section, and along with the Probate and Estate Planning Section to work toward a mutual agreement and support one proposal. As the proposal submitted on behalf of the PEPC is much further along than that of any other Section, it is anticipated that we will continue pursuing our proposed amendments and seek the input of the other Sections. Mark Kellogg will contact Melissa Collar, the Chair of the Real Estate Section, and John

Payne, the Chair of the Elder Law Section to discuss our progress and encourage their participation and support of our proposal.

Committee members also discussed concerns regarding language in the recently enacted legislation under MCL 211.27a(6)(c)(ii), which added "adopted son" and "adopted daughter" as relationships which is exempt from uncapping, but does not include "adopted grandson" or "adopted granddaughter." It should be note that transferee relationships under this section did include "grandson" and "granddaughter." There was no resolution on this issue. This will be further discussed at subsequent meetings.

We also discussed current HB 4645 regarding uncapping and LLC entities and HB 4930 regarding uncapping and life estate deeds.

David Fry has advised that the most recent draft of HB 4645 with proposed changes submitted by the Treasury effectively minimizes, if not eviscerates, any benefits of HB 4645 (see HB 4645 attached).

With regard to HB 4930, the committee agreed that we should support the bill in concept, but prefer the language in the proposal submitted by the Probate Council.

Accordingly, with regard to HB 4656 and HB 4930, the committee recommends that the Council consider the following policy positions:

1. Take a position against HB 4645 as amended by Treasury.
2. With regard to HB 4930, take a position in support of the Bill in concept but prefer the proposed language submitted by the Council as part of the 2015 proposed amendments to MCL 211.27a.

LAW OFFICES OF
DAVID S. FRY, PLC
COTTAGE LAW CENTER

DAVID S. FRY, ESQ.

6739 Courtland Dr., N.E., Ste. 101
Rockford, MI 49341-7217
Phone: (616) 874-1200
Fax: (616) 874-1201
www.cottagelaw.com
david@cottagelaw.com

SUMMARY OF PROPOSED CHANGES
TO
MICHIGAN COMPILED LAWS SECTION 211.27a
From
Real Estate Committee of Probate and Estate Planning Section
Of the State Bar of Michigan

1. Provide exemption from uncapping for transfers of property to limited liability companies, corporations, partnerships, sole proprietorships, limited liability partnerships, or other legal entities (shortened to "LLCs") where ownership of the LLC after the transfer is identical to ownership of property before the transfer. MCL 211.27a (7)(w).

2. Provide exemption from uncapping for transfers of property at the end of a life estate where the parties to the transfer are in the same group of individuals as those who are already covered by the current exemption for lifetime transfers and transfers by inheritance. MCL 211.27a (7)(c).

3. Provide exemption from uncapping for transfers of ownership interests in LLC's between and among same group of individuals as those already covered by current exemption for transfers of property. MCL 211.27a (6)(h).

4. Change current prohibition on "any commercial use" of property to requirement that the "classification of the property does not change" following the transfer in order to qualify for exemptions from uncapping. MCL 211.27a (6)(c), (d), (e), (f), (h), 7(c), (f), (t), (u).

5. Change terminology from "settlor" of a trust to "transferor" in exemption for transfers to and from trusts to clarify that exemption applies to persons who actually make the transfers. MCL 211.27a (6)(c), 7(f), 11(h).

JUNE, 2015 PROPOSED AMENDMENTS TO

THE GENERAL PROPERTY TAX ACT (EXCERPT)
Act 206 of 1893

211.27a.amended Property tax assessment; determining taxable value; adjustment; exception; "transfer of ownership" defined; qualified agricultural property; notice of transfer of property; applicability of subsection (10) to certain personal property; definitions.

Sec. 27a.

(1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.

(2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:

(a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.

(b) The property's current state equalized valuation.

(3) Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer.

(4) If the taxable value of property is adjusted under subsection (3), a subsequent increase in the property's taxable value is subject to the limitation set forth in subsection (2) until a subsequent transfer of ownership occurs. If the taxable value of property is adjusted under subsection (3) and the assessor determines that there had not been a transfer of ownership, the taxable value of the property shall be adjusted at the July or December board of review. Notwithstanding the limitation provided in section 53b(1) on the number of years for which a correction may be made, the July or December board of review may adjust the taxable value of property under this subsection for the current year and for the 3 immediately preceding calendar years. A corrected tax bill shall be issued for each tax year for which the taxable value is adjusted by the local tax collecting unit if the local tax collecting unit has possession of the tax roll or by the county treasurer if the county has possession of the tax roll. For purposes of section 53b, an adjustment under this subsection shall be considered the correction of a clerical error.

(5) Assessment of property, as required in this section and section 27, is inapplicable to the assessment of property subject to the levy of ad valorem taxes within voted tax limitation increases to pay principal and interest on limited tax bonds issued by any governmental unit,

including a county, township, community college district, or school district, before January 1, 1964, if the assessment required to be made under this act would be less than the assessment as state equalized prevailing on the property at the time of the issuance of the bonds. This inapplicability shall continue until levy of taxes to pay principal and interest on the bonds is no longer required. The assessment of property required by this act shall be applicable for all other purposes.

(6) As used in this act, "transfer of ownership" means the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. Transfer of ownership of property includes, but is not limited to, the following:

(a) A conveyance by deed.

(b) A conveyance by land contract. The taxable value of property conveyed by a land contract executed after December 31, 1994 shall be adjusted under subsection (3) for the calendar year following the year in which the contract is entered into and shall not be subsequently adjusted under subsection (3) when the deed conveying title to the property is recorded in the office of the register of deeds in the county in which the property is located.

(c) A conveyance to a trust after December 31, 1994, except under any of the following conditions:

(i) If the ~~settlor~~ TRANSFEROR or the ~~settlor's~~ TRANSFEROR'S spouse, or both, conveys the property to the trust and the sole present beneficiary or beneficiaries are the ~~settlor~~ TRANSFEROR or the ~~settlor's~~ TRANSFEROR'S spouse, or both.

(ii) Beginning December 31, 2014, for residential real property, if the ~~settlor~~ TRANSFEROR or the ~~settlor's~~ TRANSFEROR'S spouse, or both, conveys the residential real property to the trust and the sole present beneficiary or beneficiaries are the ~~settlor~~ TRANSFEROR or the ~~settlor's~~ TRANSFEROR'S spouse's ESTATE, mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property ~~is not used for any commercial purpose~~ CLASSIFICATION UNDER SECTION 34c DOES NOT CHANGE following the conveyance. Upon request by the department of treasury or the assessor, the sole present beneficiary or beneficiaries shall furnish proof within 30 days that the sole present beneficiary or beneficiaries meet the requirements of this subparagraph. If a present beneficiary fails to comply with a request by the department of treasury or assessor under this subparagraph, that present beneficiary is subject to a fine of $200.00.

(d) A conveyance by distribution from a trust, except under any of the following conditions:

(i) If the distributee is the sole present beneficiary or the spouse of the sole present beneficiary, or both.

(ii) Beginning December 31, 2014, a distribution of residential real property if the distributee is the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son,

adopted daughter, grandson, or granddaughter and the residential real property ~~is not used for any commercial purpose~~ CLASSIFICATION UNDER SECTION 34c DOES NOT CHANGE following the conveyance. Upon request by the department of treasury or the assessor, the sole present beneficiary or beneficiaries shall furnish proof within 30 days that the sole present beneficiary or beneficiaries meet the requirements of this subparagraph. If a present beneficiary fails to comply with a request by the department of treasury or assessor under this subparagraph, that present beneficiary is subject to a fine of $200.00.

(e) A change in the sole present beneficiary or beneficiaries of a trust, except under any of the following conditions:

(i) A change that adds or substitutes the spouse of the sole present beneficiary.

(ii) Beginning December 31, 2014, for residential real property, a change that adds or substitutes the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property ~~is not used for any commercial purpose~~ CLASSIFICATION UNDER SECTION 34c DOES NOT CHANGE following the conveyance. Upon request by the department of treasury or the assessor, the sole present beneficiary or beneficiaries shall furnish proof within 30 days that the sole present beneficiary or beneficiaries meet the requirements of this subparagraph. If a present beneficiary fails to comply with a request by the department of treasury or assessor under this subparagraph, that present beneficiary is subject to a fine of $200.00.

(f) A conveyance by distribution under a will or by intestate succession, except under any of the following conditions:

(i) If the distributee is the decedent's spouse.

(ii) Beginning December 31, 2014, for residential real property, if the distributee is the decedent's or the decedent's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property ~~is not used for any commercial purpose~~ CLASSIFICATION UNDER SECTION 34c DOES NOT CHANGE following the conveyance. Upon request by the department of treasury or the assessor, the sole present beneficiary or beneficiaries shall furnish proof within 30 days that the sole present beneficiary or beneficiaries meet the requirements of this subparagraph. If a present beneficiary fails to comply with a request by the department of treasury or assessor under this subparagraph, that present beneficiary is subject to a fine of $200.00.

(g) A conveyance by lease if the total duration of the lease, including the initial term and all options for renewal, is more than 35 years or the lease grants the lessee a bargain purchase option. As used in this subdivision, "bargain purchase option" means the right to purchase the property at the termination of the lease for not more than 80% of the property's projected true cash value at the termination of the lease. After December 31, 1994, the taxable value of property conveyed by a lease with a total duration of more than 35 years or with a bargain purchase option shall be adjusted under subsection (3) for the calendar year following the year in which the lease is entered into. This subdivision does not apply to personal property except

buildings described in section 14(6) and personal property described in section 8(h), (i), and (j). This subdivision does not apply to that portion of the property not subject to the leasehold interest conveyed.

(h) Except as otherwise provided in this subdivision, a conveyance of an ownership interest in a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity if the ownership interest conveyed is more than 50% of the corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity. BEGINNING ON DECEMBER 31, 2014, THE PRECEEDING SENTENCE SHALL NOT APPLY TO A CONVEYANCE OF AN OWNERSHIP INTEREST IN AN ENTITY WHERE THE TRANSFEREE IS THE TRANSFEROR'S SPOUSE, OR THE TRANSFEROR'S OR SPOUSE'S MOTHER, FATHER, BROTHER, SISTER, SON, DAUGHTER, ADOPTED SON, ADOPTED DAUGHTER, GRANDSON OR GRANDDAUGHTER, OR TO A TRUST WHERE THE SOLE PRESENT BENEFICIARY OR BENEFICIARIES IS ONE OR MORE OF SAID INDIVIDUALS, AND ANY SUCH CONVEYANCE SHALL NOT CONSTITUTE A CONVEYANCE OF AN OWNERSHIP INTEREST FOR PURPOSES OF THIS SUBDIVISION SO LONG AS THE RESIDENTIAL REAL PROPERTY ~~IS NOT USED FOR ANY COMMERCIAL PURPOSE~~ CLASSIFICATION UNDER SECTION 34C DOES NOT CHANGE FOLLOWING THE CONVEYANCE.

Unless notification is provided under subsection (10), the corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity shall notify the assessing officer on a form provided by the state tax commission not more than 45 days after a conveyance of an ownership interest that constitutes a transfer of ownership under this subdivision. Both of the following apply to a corporation subject to 1897 PA 230, MCL 455.1 to 455.24:

(i) A transfer of stock of the corporation is a transfer of ownership only with respect to the real property that is assessed to the transferor lessee stockholder.

(ii) A cumulative conveyance of more than 50% of the corporation's stock does not constitute a transfer of ownership of the corporation's real property.

(i) A transfer of property held as a tenancy in common, except that portion of the property not subject to the ownership interest conveyed.

(j) A conveyance of an ownership interest in a cooperative housing corporation, except that portion of the property not subject to the ownership interest conveyed.

(7) Transfer of ownership does not include the following:

(a) The transfer of property from 1 spouse to the other spouse or from a decedent to a surviving spouse.

(b) A transfer from a husband, a wife, or a husband and wife creating or disjoining a tenancy by the entireties in the grantors or the grantor and his or her spouse.

(c) A transfer of that portion of property subject to a life estate or life lease retained by the transferor, until expiration or termination of the life estate or life lease. EXCEPT, BEGINNING ON DECEMBER 31, 2014, FOR RESIDENTIAL PROPERTY WHERE THE TRANSFEREE IS THE TRANSFEROR'S SPOUSE, OR THE TRANSFEROR'S OR SPOUSE'S MOTHER, FATHER, BROTHER, SISTER, SON, DAUGHTER, ADOPTED SON, ADOPTED DAUGHTER, GRANDSON OR GRANDDAUGHTER AND THE RESIDENTIAL REAL PROPERTY ~~IS NOT USED FOR ANY COMMERCIAL PURPOSE~~ CLASSIFICATION UNDER SECTION 34C DOES NOT CHANGE FOLLOWING THE CONVEYANCE. That portion of property transferred that is not subject to a life lease shall be adjusted under subsection (3).

(d) A transfer through foreclosure or forfeiture of a recorded instrument under chapter 31, 32, or 57 of the revised judicature act of 1961, 1961 PA 236, MCL 600.3101 to 600.3285 and MCL 600.5701 to 600.5759, or through deed or conveyance in lieu of a foreclosure or forfeiture, until the mortgagee or land contract vendor subsequently transfers the property. If a mortgagee does not transfer the property within 1 year of the expiration of any applicable redemption period, the property shall be adjusted under subsection (3).

(e) A transfer by redemption by the person to whom taxes are assessed of property previously sold for delinquent taxes.

(f) A conveyance to a trust if the ~~settlor~~ TRANSFEROR or the ~~settlor's~~ TRANSFEROR'S spouse, OR THE TRANSFEROR'S LEGAL REPRESENTATIVE, conveys the property to the trust and any of the following conditions are satisfied:

(i) If the sole present beneficiary of the trust is the ~~settlor~~ TRANSFEROR or the ~~settlor's~~ TRANSFEROR'S spouse, or both.

(ii) Beginning December 31, 2014, for residential real property, if the sole present beneficiary of the trust is the ~~settlor's~~ TRANSFEROR'S or the ~~settlor's~~ TRANSFEROR'S spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property ~~is not used for any commercial purpose~~ CLASSIFICATION UNDER SECTION 34c DOES NOT CHANGE following the conveyance. Upon request by the department of treasury or the assessor, the sole present beneficiary or beneficiaries shall furnish proof within 30 days that the sole present beneficiary or beneficiaries meet the requirements of this subparagraph. If a present beneficiary fails to comply with a request by the department of treasury or assessor under this subparagraph, that present beneficiary is subject to a fine of $200.00.

(g) A transfer pursuant to a judgment or order of a court of record making or ordering a transfer, unless a specific monetary consideration is specified or ordered by the court for the transfer.

(h) A transfer creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created. A joint owner at the time of the last transfer of ownership of the property is an original owner of the property. For purposes of this subdivision, a person is an original owner of property owned by that person's spouse.

(i) A transfer for security or an assignment or discharge of a security interest.

(j) A transfer of real property or other ownership interests among members of an affiliated group. As used in this subsection, "affiliated group" means 1 or more corporations connected by stock ownership to a common parent corporation. Upon request by the state tax commission, a corporation shall furnish proof within 45 days that a transfer meets the requirements of this subdivision. A corporation that fails to comply with a request by the state tax commission under this subdivision is subject to a fine of $200.00.

(k) Normal public trading of shares of stock or other ownership interests that, over any period of time, cumulatively represent more than 50% of the total ownership interest in a corporation or other legal entity and are traded in multiple transactions involving unrelated individuals, institutions, or other legal entities.

(l) A transfer of real property or other ownership interests among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entities if the entities involved are commonly controlled. Upon request by the state tax commission, a corporation, partnership, limited liability company, limited liability partnership, or other legal entity shall furnish proof within 45 days that a transfer meets the requirements of this subdivision. A corporation, partnership, limited liability company, limited liability partnership, or other legal entity that fails to comply with a request by the state tax commission under this subdivision is subject to a fine of $200.00.

(m) A direct or indirect transfer of real property or other ownership interests resulting from a transaction that qualifies as a tax-free reorganization under section 368 of the internal revenue code, 26 USC 368. Upon request by the state tax commission, a property owner shall furnish proof within 45 days that a transfer meets the requirements of this subdivision. A property owner who fails to comply with a request by the state tax commission under this subdivision is subject to a fine of $200.00.

(n) A transfer of qualified agricultural property, if the person to whom the qualified agricultural property is transferred files an affidavit with the assessor of the local tax collecting unit in which the qualified agricultural property is located and with the register of deeds for the county in which the qualified agricultural property is located attesting that the qualified agricultural property shall remain qualified agricultural property. The affidavit under this subdivision shall be in a form prescribed by the department of treasury. An owner of qualified agricultural property shall inform a prospective buyer of that qualified agricultural property that the qualified agricultural property is subject to the recapture tax provided in the agricultural property recapture

act, 2000 PA 261, MCL 211.1001 to 211.1007, if the qualified agricultural property is converted by a change in use, as that term is defined in section 2 of the agricultural property recapture act, 2000 PA 261, MCL 211.1002. If property ceases to be qualified agricultural property at any time after being transferred, all of the following shall occur:

(i) The taxable value of that property shall be adjusted under subsection (3) as of the December 31 in the year that the property ceases to be qualified agricultural property.

(ii) The property is subject to the recapture tax provided for under the agricultural property recapture act, 2000 PA 261, MCL 211.1001 to 211.1007.

(o) A transfer of qualified forest property, if the person to whom the qualified forest property is transferred files a qualified forest taxable value affidavit with the assessor of the local tax collecting unit in which the qualified forest property is located and with the register of deeds for the county in which the qualified forest property is located attesting that the qualified forest property shall remain qualified forest property. The qualified forest taxable value affidavit under this subdivision shall be in a form prescribed by the department of agriculture and rural development. The qualified forest taxable value affidavit shall include a legal description of the qualified forest property, the name of the new property owner, the year the transfer of the property occurred, a statement indicating that the property owner is attesting that the property for which the exemption is claimed is qualified forest property and will be managed according to the approved forest management plan, and any other information pertinent to the parcel and the property owner. The property owner shall provide a copy of the qualified forest taxable value affidavit to the department. The department shall provide 1 copy of the qualified forest taxable value affidavit to the local tax collecting unit, 1 copy to the conservation district, and 1 copy to the department of treasury. These copies may be sent electronically. The exception to the recognition of a transfer of ownership, as herein stated, shall extend to the land only of the qualified forest property. If qualified forest property is improved by buildings, structures, or land improvements, then those improvements shall be recognized as a transfer of ownership, in accordance with the provisions of section 7jj[1]. An owner of qualified forest property shall inform a prospective buyer of that qualified forest property that the qualified forest property is subject to the recapture tax provided in the qualified forest property recapture tax act, 2006 PA 379, MCL 211.1031 to 211.1036, if the qualified forest property is converted by a change in use, as that term is defined in section 2 of the qualified forest property recapture tax act, 2006 PA 379, MCL 211.1032. If property ceases to be qualified forest property at any time after being transferred, all of the following shall occur:

(i) The taxable value of that property shall be adjusted under subsection (3) as of the December 31 in the year that the property ceases to be qualified forest property, except to the extent that the transfer of the qualified forest property would not have been considered a transfer of ownership under this subsection.

(ii) Except as otherwise provided in subparagraph (iii), the property is subject to the recapture tax provided for under the qualified forest property recapture tax act, 2006 PA 379, MCL 211.1031 to 211.1036.

(iii) Beginning June 1, 2013 and ending November 30, 2013, owners of property enrolled as qualified forest property prior to January 1, 2013 may execute a new qualified forest taxable value affidavit with the department of agriculture and rural development. If a landowner elects to execute a qualified forest taxable value affidavit, that owner is not required to pay the $50.00 fee required under section 7jj[1](2). If a landowner elects not to execute a qualified forest taxable value affidavit, the existing affidavit shall be rescinded, without subjecting the property to the recapture tax provided for under the qualified forest property recapture tax act, 2006 PA 379, MCL 211.1031 to 211.1036, and the taxable value of that property shall be adjusted under subsection (3).

(p) Beginning on December 8, 2006, a transfer of land, but not buildings or structures located on the land, which meets 1 or more of the following requirements:

(i) The land is subject to a conservation easement under subpart 11 of part 21 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140 to 324.2144. As used in this subparagraph, "conservation easement" means that term as defined in section 2140 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140.

(ii) A transfer of ownership of the land or a transfer of an interest in the land is eligible for a deduction as a qualified conservation contribution under section 170(h) of the internal revenue code, 26 USC 170.

(q) A transfer of real property or other ownership interests resulting from a consolidation or merger of a domestic nonprofit corporation that is a boy or girl scout or camp fire girls organization, a 4-H club or foundation, a young men's Christian association, or a young women's Christian association and at least 50% of the members of that organization or association are residents of this state.

(r) A change to the assessment roll or tax roll resulting from the application of section 16a of 1897 PA 230, MCL 455.16a.

(s) Beginning December 31, 2013 through December 30, 2014, a transfer of residential real property if the transferee is related to the transferor by blood or affinity to the first degree and the use of the residential real property does not change following the transfer.

(t) Beginning December 31, 2014, a transfer of residential real property if the transferee is the transferor's or the transferor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property ~~is not used for any commercial purpose~~ CLASSIFICATION UNDER SECTION 34c DOES NOT CHANGE following the conveyance. Upon request by the department of treasury or the assessor, the transferee shall furnish proof within 30 days that the transferee meets the requirements of this subdivision. If a transferee fails to comply with a request by the department of treasury or assessor under this subdivision, that transferee is subject to a fine of $200.00.

(u) Beginning December 31, 2014, for residential real property, a conveyance from a trust if the person to whom the residential real property is conveyed is the settlor's or the settlor's spouse's

mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property ~~is not used for any commercial purpose~~ CLASSIFICATION UNDER SECTION 34c DOES NOT CHANGE following the conveyance. Upon request by the department of treasury or the assessor, the sole present beneficiary or beneficiaries shall furnish proof within 30 days that the sole present beneficiary or beneficiaries meet the requirements of this subdivision. If a present beneficiary fails to comply with a request by the department of treasury or assessor under this subdivision, that present beneficiary is subject to a fine of $200.00.

(v) Beginning on the effective date of the amendatory act that added this subdivision, a conveyance of land by distribution under a will or trust or by intestate succession, but not buildings or structures located on the land, which meets 1 or more of the following requirements:

(i) The land is made subject to a conservation easement under subpart 11 of part 21 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140 to 324.2144, prior to the conveyance by distribution under a will or trust or by intestate succession. As used in this subparagraph, "conservation easement" means that term as defined in section 2140 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140.

(ii) The land or an interest in the land is made eligible for a deduction as a qualified conservation contribution under section 170(h) of the internal revenue code, 26 USC 170, prior to the conveyance by distribution under a will or trust or by intestate succession.

(w) BEGINNING DECEMBER 31, 2014, THE TRANSFER OF AN OWNERSHIP INTEREST IN REAL PROPERTY TO OR FROM A CORPORATION, PARTNERSHIP, SOLE PROPRIETORSHIP, LIMITED LIABILITY COMPANY, LIMITED LIABILITY PARTNERSHIP, OR OTHER LEGAL ENTITY, IF THE OWNERSHIP OF THE ENTITY OR REAL PROPERTY AFTER THE TRANSFER IS IDENTICAL TO THE OWNERSHIP OF THE REAL PROPERTY OR ENTITY BEFORE THE TRANSFER, BOTH IN THE IDENTITY OF THE OWNER(S) AND THE PERCENTAGE ~~OF THE ENTITY~~ OWNED IF OWNED BY MORE THAN ONE PERSON.

(8) If all of the following conditions are satisfied, the local tax collecting unit shall revise the taxable value of qualified agricultural property taxable on the tax roll in the possession of that local tax collecting unit to the taxable value that qualified agricultural property would have had if there had been no transfer of ownership of that qualified agricultural property since December 31, 1999 and there had been no adjustment of that qualified agricultural property's taxable value under subsection (3) since December 31, 1999:

(a) The qualified agricultural property was qualified agricultural property for taxes levied in 1999 and each year after 1999.

(b) The owner of the qualified agricultural property files an affidavit with the assessor of the local tax collecting unit under subsection (7)(n).

(9) If the taxable value of qualified agricultural property is adjusted under subsection (8), the owner of that qualified agricultural property shall not be entitled to a refund for any property taxes collected under this act on that qualified agricultural property before the adjustment under subsection (8).

(10) The register of deeds of the county where deeds or other title documents are recorded shall notify the assessing officer of the appropriate local taxing unit not less than once each month of any recorded transaction involving the ownership of property and shall make any recorded deeds or other title documents available to that county's tax or equalization department. Unless notification is provided under subsection (6), the buyer, grantee, or other transferee of the property shall notify the appropriate assessing office in the local unit of government in which the property is located of the transfer of ownership of the property within 45 days of the transfer of ownership, on a form prescribed by the state tax commission that states the parties to the transfer, the date of the transfer, the actual consideration for the transfer, and the property's parcel identification number or legal description. Forms filed in the assessing office of a local unit of government under this subsection shall be made available to the county tax or equalization department for the county in which that local unit of government is located. This subsection does not apply to personal property except buildings described in section 14(6) and personal property described in section 8(h), (i), and (j).

(11) As used in this section:

(a) "Additions" means that term as defined in section 34d.

(b) "Beneficial use" means the right to possession, use, and enjoyment of property, limited only by encumbrances, easements, and restrictions of record.

(c) "Inflation rate" means that term as defined in section 34d.

(d) "Losses" means that term as defined in section 34d.

(e) "Qualified agricultural property" means that term as defined in section 7dd.

(f) "Qualified forest property" means that term as defined in section 7jj[1].

(g) "Residential real property" means real property classified as residential real property under section 34c.

(h) "TRANSFEROR" MEANS A PERSON WHO MAKES A TRANSFER AND INCLUDES, BUT IS NOT LIMITED TO, THE SETTLOR OF A TRUST, AND A LEGAL REPRESENTATIVE ACTING IN A FIDUCIARY CAPACITY.

History: Add. 1982, Act 539, Eff. Mar. 30, 1983 ;-- Am. 1993, Act 145, Imd. Eff. Aug. 19, 1993 ;-- Am. 1993, Act 313, Eff. Mar. 15, 1994 ;-- Am. 1994, Act 415, Imd. Eff. Dec. 29, 1994 ;-- Am. 1996, Act 476, Imd. Eff. Dec. 26, 1996 ;-- Am. 2000, Act 260, Eff. Mar. 28, 2001 ;-- Am. 2005, Act 23, Imd. Eff. May 23, 2005 ;-- Am. 2006, Act 378, Imd. Eff. Sept. 27, 2006 ;-- Am. 2006, Act 446, Imd. Eff. Dec. 8, 2006 ;-- Am. 2008, Act 506, Imd. Eff. Jan.

13, 2009 ;-- Am. 2012, Act 47, Imd. Eff. Mar. 13, 2012 ;-- Am. 2012, Act 497, Imd. Eff. Dec. 28, 2012 ;-- Am. 2013, Act 50, Imd. Eff. June 6, 2013 ;-- Am. 2014, Act 310, Imd. Eff. Oct. 10, 2014 ;-- Am. 2014, Act 535, Eff. Mar. 31, 2015

Popular Name: Act 206

Rendered 3/30/2015 08:43:50

T:\COTTAGE LAW\Mich Property taxes\2015 Amendments to Uncapping\2015 PROPOSED AMENDMENTS TO MCL 211 V 6-3-2015 Final.docx

HB 4645
Sec. 27a. (7) :

(X) BEGINNING ON THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED THIS SUBDIVISION, A TRANSFER OF RESIDENTIAL REAL PROPERTY IF THE TRANSFEROR OR TRANSFEREE IS A LIMITED LIABILITY COMPANY, **WHOSE MEMBERS ARE ALL CLOSELY RELATED FOR THE DURATION OF THE LIMITED LIABLITY COMPANY**, THE OTHER PARTY TO THE TRANSFER IS CLOSELY RELATED TO ~~AT LEAST~~ **ALL THE** ~~1~~ MEMBER**S** OF THE LIMITED LIABILITY COMPANY, AND THE RESIDENTIAL REAL PROPERTY IS NOT USED FOR ANY COMMERCIAL PURPOSE **AFTER** ~~FOLLOWING~~ THE TRANSFER. FOR PURPOSES OF THIS SUBDIVISION, THE OTHER PARTY TO THE TRANSFER IS CLOSELY RELATED TO A MEMBER OF THE LIMITED LIABILITY COMPANY IF THAT PARTY AND THE MEMBER ARE SPOUSES OR IF THAT PARTY IS THE MEMBER'S OR THE MEMBER'S SPOUSE'S MOTHER, FATHER, BROTHER, SISTER, SON, DAUGHTER, ADOPTED SON, ADOPTED DAUGHTER, GRANDSON, OR GRANDDAUGHTER. AS USED IN THIS SUBDIVISION, "MEMBER" MEANS THAT TERM AS DEFINED IN SECTION 102 OF THE MICHIGAN LIMITED LIABILITY

Formatted: Font: Not Bold
Formatted: Line spacing: 1.5 lines
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold, Strikethroug
Formatted: Font: Not Bold
Formatted: Line spacing: 1.5 lines, Don adjust space between Latin and Asian te
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold, All caps
Formatted: Line spacing: 1.5 lines
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Line spacing: 1.5 lines, Don adjust space between Latin and Asian te
Formatted: Font: Not Bold
Formatted: Font: Not Bold, Strikethroug
Formatted: Font: Not Bold
Formatted: Font: Not Bold, All caps
Formatted: Line spacing: 1.5 lines
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold

COMPANY ACT, 1993 PA 23, MCL 450.4102. UPON REQUEST BY THE DEPARTMENT OF TREASURY OR THE ASSESSOR, THE TRANSFEREE SHALL FURNISH PROOF WITHIN 30 DAYS THAT THE TRANSFEREE MEETS THE REQUIREMENTS OF THIS SUBDIVISION. IF A TRANSFEREE FAILS TO COMPLY WITH A REQUEST BY THE DEPARTMENT OF TREASURY OR ASSESSOR UNDER THIS SUBDIVISION, THAT TRANSFEREE IS SUBJECT TO A FINE OF ~~$200.00~~ OF **$500 IF THE TRUE CASH VALUE OF THE TRANSFER OF RESIDENTIAL REAL PROPERTY IS LESS THAN $200,000, $750 IF THE TRUE CASH VALUE OF RESIDENTIAL REAL PROPERTY IS GREATER THAN OR EQUAL TO $200,000 BUT LESS THAN OR EQUAL TO $500,000, $1,000 IF THE TRUE CASH VALUE OF THE TRANSFER OF RESIDENTIAL REAL PROPERTY IS GREATER THAN $500,000. THE TRANSFEREE SHALL ANNUALLY VERIFY TO THE ASSESSOR OF THE LOCAL TAX COLLECTING UNIT ON OR BEFORE DECEMBER 31 THAT THE PROPERTY MEETS THE REQUIREMENTS OF THIS SUBDIVISION ON A FORM PRESCRIBED BY THE STATE TAX COMMISSION. FAILURE TO FILE THE REQUIRED ANNUAL VERIFICATION FORM SHALL RESULT IN THE PROPERTY BEING ADJUSTED UNDER SUBSECTION (3).**

(11) AS USED IN THIS SECTION:

"COMMERCIAL PURPOSE" MEANS USED IN CONNECTION WITH ANY BUSINESS OR OTHER UNDERTAKING INTENDED FOR PROFIT. COMMERCIAL PURPOSE DOES NOT INCLUDE THE RENTAL OF THE RESIDENTIAL REAL PROPERTY FOR A PERIOD OF LESS THAN 15 DAYS IN A CALENDAR YEAR.

Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Font: Not Bold, All caps
Formatted: Font: Not Bold
Formatted: Line spacing: 1.5 lines
Formatted: Font: Not Bold
Formatted: Line spacing: 1.5 lines, Don adjust space between Latin and Asian te
Formatted: Font: Not Bold, Strikethrou
Formatted: Font: Not Bold
Formatted: Font: Not Bold
Formatted: Line spacing: 1.5 lines
Formatted: Font: Bold
Formatted: Font: (Default) Courier New 11.5 pt, Bold

ATTACHMENT 8

TAX NUGGET
NOVEMBER 2015

1. Rev. Proc. 2015-53 sets forth various annual inflation adjustments including the following:

a. **TABLE 5 – Section 1(e) - Estates and Trusts**

If Taxable Income Is:	***The Tax Is:***
Not over $2,550	15% of the taxable income
Over $2,550 but not over $5,950	$382.50 plus 25% of the excess over $2,550
Over $5,950 but not over $9,050	$1,232.50 plus 28% of the excess over $5,950
Over $9,050 but not over $12,400	$2,100.50 plus 33% of the excess over $9,050
Over $12,400	$3,206 plus 39.6% of the excess over $12,400

b. Basic Exclusion Amount.

For an estate of a decedent dying in calendar year 2016, the basic exclusion amount is $5,450,000. The basic exclusion amount in 2015 was $5,430,000.

c. Annual Exclusion for Gifts.

(i) For calendar year 2016, the annual exclusion amount for gifts is $14,000. The annual exclusion amount remains unchanged from 2015. Section 2503(b) of the Internal Revenue Code excludes the first $14,000 of gifts per donee, per year, other than gifts of future interests, in calculating the donor's taxable gifts. The donee must have a present interest in the gifted property to qualify for the annual exclusion.

(ii) In lieu of a gift tax marital deduction for a non-citizen spouse the amount of the annual exclusion is increased for transfers to a non-citizen spouse under Section 2523(i). Instead of a base amount of $10,000 adjusted for inflation under Section 2503(b), the base amount for the annual exclusion gift is $100,000 for gifts of present interests to non-citizen spouses. For calendar year 2016 the annual exclusion gift to a spouse who is not a citizen of the United States is $148,000. The annual exclusion to a non U.S. citizen spouse is $147,000 in 2015.

d. Top Individual Income Tax Rate in 2016.

The highest individual income tax rate of 39.6% impacts unmarried individuals (other than surviving spouses and heads of household) whose income exceed $415,050 and married taxpayers filing a joint return whose income exceeds $466,950 up from $413,200 and $464,850 respectively in 2015.

2. The Internal Revenue service released Proposed Regulations (REG – 148998-13) Defining Terms Relating to Martial Status.

The IRS, in response to the decisions in Obergefell v. Hodges, 135 S Ct. 2584 (2015) and Windsor v. United States, 133 S Ct. 2675 (2013), has released proposed regulations that would amend the current regulations under Section 301.7001-18. The proposed regulations clarify for federal tax purposes the treatment of same sex marriages.

In *Windsor*, the Internal Revenue Service denied the martial deduction claimed on Edith Windsor's federal estate tax return since the property passed to a legally married same sex spouse. The Internal Revenue Service denied the marital deduction based on the Defense of Marriage Act ("DOMA"). Marriage in DOMA in Section is defined as a union between a man and a woman. The Supreme Court in *Windsor* held that Section 3 of DOMA is unconstitutional. In response to Windsor Revenue Ruling 2013-17 was released that stated legally married same sex couples will be treated as married for all federal tax purposes, including income and gift and estate taxes. In *Obergefell*, the Supreme Court determined that state laws are "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" and "that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character." Proposed Treasury regulation quoting *Obergefell* at 576 U.S. at 23,28.

Proposed Treasury Regulation §301.7701-18 reads as follows:

> "§301.7701-18 Definitions, spouse, husband and wife, husband, wife, marriage.
>
> (a) *In general*. For federal tax purposes, the terms *spouse, husband*, and *wife* mean an individual lawfully married to another individual. The term *husband* and *wife* means two individuals lawfully married to each other.
>
> (b) *Persons who are married for federal tax purposes.* A marriage of two individuals is recognized for federal tax purposes if the marriage would be recognized by any state, possession, or territory of the United States.
>
> (c) *Persons who are not married for federal tax purposes.* The terms *spouse, husband,* and *wife* do not include individuals who have entered into a registered domestic partnership, civil union, or other similar relationship not denominated as a marriage under the law of a state, possession, or territory of the United States. The term *husband and wife* does not include couples who have entered into such a relationship, and the term *marriage* does not include such relationships.
>
> (d) *Effective/applicability date.* The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register."**

Under proposed Treasury Regulation §301.7701-18, if a marriage performed in a foreign jurisdiction is recognized by at least one state, possession or territory of the United States, it will be recognized for federal tax purposes.

Robert B. Labe is a Shareholder with Williams, Williams, Rattner & Plunkett, P.C. in Birmingham, Michigan. Labe practices in the areas of estate planning, trusts and estates, probate disputes, tax law and business law. He has been included in the Michigan Super Lawyers since 2009, is listed in Best Lawyer's in America and is also designated as a Leading Lawyer by the Chicago Law Bulletin. Labe has made multiple presentations on business planning, estate planning and estate and trust law for the Institute of Continuing Legal Education and State Bar of Michigan. Labe is a fellow of the American Bar Foundation.