



## 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, December 15, 2018

9:00 a.m.

University Club of MSU

3435 Forest Road

Lansing, Michigan 48910

**Probate and Estate Planning Section of the  
State Bar of Michigan**

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

December 15, 2018  
9:00 a.m.

University Club of MSU  
3435 Forest Road  
Lansing, Michigan 48910

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

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STATE BAR OF MICHIGAN  
PROBATE AND ESTATE PLANNING SECTION COUNCIL  
**Council and CSP Meeting Schedule for 2018-2019**

Saturday, December 15, 2018, University Club, Lansing, Michigan\*\*

**Note the remainder of the meetings are on Fridays**

Friday, January 25, 2019, University Club, Lansing, Michigan\*\*

Friday, February 15, 2019, University Club, Lansing, Michigan\*\*

Friday, March 8, 2019, University Club, Lansing, Michigan\*\*

Friday, April 12, 2019, University Club, Lansing, Michigan\*\*

Friday, June 14, 2019, University Club, Lansing, Michigan\*\*

Friday, September 20, 2019, University Club, Lansing, Michigan\*\*

\*\*University Club, 3435 Forest Road, Lansing, Michigan 48909

Each meeting starts with the Committee on Special Projects at 9:00am, followed by the meeting of the Council of the Probate & Estate Planning Section.

**Call for materials**

***Due dates for Materials for Committee on Special Projects***

All materials are due on or before 5:00 p.m. of the date falling 9 days before the next CSP meeting. CSP materials are to be sent to Katie Lynwood, Chair of CSP (klynwood@billhlaw.com)

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

Thursday, December 6, 2018 (for Saturday, December 15, 2018 meeting)

Wednesday, January 16, 2019 (for Friday, January 25, 2019 meeting)

Wednesday, February 6, 2019 (for Friday, February 15, 2019 meeting)

Wednesday, February 27, 2019 (for Friday, March 8, 2019 meeting)

Wednesday, April 3, 2019 (for Friday, April 12, 2019 meeting)

Wednesday, June 5, 2019 (for Friday, June 14, 2019 meeting)

Wednesday, September 11, 2019 (for Friday, September 20, 2019 meeting)

***Due dates for Materials for Council Meeting***

All materials are due on or before 5:00 p.m. of the date falling 8 days before the next Council meeting. Council materials are to be sent to David Skidmore (dskidmore@wnj.com).

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

Friday, December 7, 2018 (for Saturday, December 15, 2018 meeting)

Thursday, January 17, 2019 (for Friday, January 25, 2019 meeting)

Thursday, February 7, 2019 (for Friday, February 15, 2019 meeting)

Thursday, February 28, 2019 (for Friday, March 8, 2019 meeting)

Thursday, April 4, 2019 (for Friday, April 12, 2019 meeting)

Thursday, June 6, 2019 (for Friday, June 14, 2019 meeting)

Thursday, September 12, 2019 (for Friday, September 20, 2019 meeting)

**Officers of the Council  
for 2018-2019 Term**

Office	Officer
Chairperson	Marguerite Munson Lentz
Chairperson Elect	Christopher A. Ballard
Vice Chairperson	David P. Lucas
Secretary	David L.J.M. Skidmore
Treasurer	Mark E. Kellogg

**Council Members  
for 2018-2019 Term**

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term Expires	Eligible after Current Term?
Anderton, James F.	2018 (1st term)	2020	Yes (2 terms)
Jaconette, Hon. Michael L.	2017 (2nd term)	2020	No
Lichterman, Michael G.	2017 (1st term)	2020	Yes
Malviya, Raj A.	2017 (2nd term)	2020	No
Olson, Kurt A.	2017 (1st term)	2020	Yes
Savage, Christine M.	2017 (1st term)	2020	Yes
Caldwell, Christopher J.	2018 (2nd term)	2021	No
Goetsch, Kathleen M.	2018 (2nd term)	2021	No
Hentkowski, Angela M.	2018 (1st term)	2021	Yes
Lynwood, Katie	2018 (2nd term)	2021	No
Mysliwec, Melisa M. W.	2018 (1st term)	2021	Yes
Nusholtz, Neal	2018 (1st term)	2021	Yes
Labe, Robert C.	2016 (1st term)	2019	Yes (1 term)
Mayoras, Andrew W.	2018 (to fill Geoff Vernon's seat)	2019	Yes (2 terms)
Mills, Richard C.	2016 (1st full term)	2019	Yes (1 term)
New, Lorraine F.	2016 (2nd term)	2019	No
Piwowarski, Nathan R.	2016 (1st term)	2019	Yes (1 term)
Syed, Nazneen H.	2016 (1st term)	2019	Yes (1 term)

**Ex Officio Members of the Council**

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

**Probate and Estate Planning Section  
2018-2019 Plan of Work**

	<b>Section Initiatives</b>	<b>Respond to Others' Initiatives</b>	<b>Outreach to Section or Community</b>
<b>Fall 2018 priority</b>	Obtain passage of: \$ Omnibus EPIC \$ ART, SB 1056, 1057, 1058 \$ Certificate of Trust, HB 5362, 5398 \$ Modify Voidable Transfers Act to fix glitch \$ Divided and Directed Trustees act, HB 6129, 6130, 6131 \$ Uncapping bill, SB 540, HB 5546	\$ Respond if needed to HB 4751, 4969 \$ Respond re HB 4684, 4996 (visitation of isolated adults)	\$ State Bar Journal theme issue (Nov. 2018) \$ Consider initiatives for involving younger lawyers, increasing diversity. \$ Promote "Who Should I Trust" in October 2018? \$ Update information regarding members, committees, etc. on web site
<b>Spring 2019 priority</b>	\$ Lawyer drafter/beneficiary \$ TBE Trusts \$ Community Property Trusts \$ Premarital property act \$ Undisclosed trusts		\$ Annual Probate Institute (May/June 2019)
<b>Ongoing</b>	\$ SCAO meetings \$ Review of forms and court rules for changes needed by legislative changes	\$ State Bar 21 <sup>st</sup> Century Task Force \$ Modest Means Work Group \$ E-filing in courts	\$ Social events for members \$ Joint event with other bars like the taxation section or business law section? \$ Review brochures on web site. Need to be updated?
<b>Secondary priority</b>	\$ Review Uniform Fiduciary Income and Principal Act \$ No liability for trustee of ILIT (SB 644 stalled)		
<b>Future projects</b>	\$ Legislative fix for who does attorney represent when attorney represents fiduciary \$ Update supervision of charitable trusts act? \$ Revise nonprofit corporation act so charity can clearly act as trustee \$ Statutory authority for private trust companies.	\$ Electronic Wills	

(2018 – 12-15)

# CSP Materials

**MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE  
COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION  
OF THE STATE BAR OF MICHIGAN**

**AGENDA**

December 15, 2018

East Lansing, Michigan

9:00 – 10:15 AM

**1. Aaron Bartell and Nathan Piwowarski – Prebate Proceedings**

See attached memorandum and chart of prebate proceedings in other states.



## MEMORANDUM

**TO:** Probate and Estate Planning Council  
**FROM:** Legislative Drafting Committee  
**RE:** Ante-Mortem Statute  
**DATE:** December 7, 2018

### I. ISSUE

Should the Section draft legislation to establish a process for the Probate Court to determine issues of capacity and undue influence prior to the death of a testator?

Most states contemplate only post-mortem probate. There are at least eight (8) states that have some form of ante-mortem statute for wills and/or trusts. See attached MEMO, Prebate – Other States.

### II. ADVANTAGE AND DISADVANTAGES OF ANTE-MORTEM PROCESS

#### A. Advantages

1. Certainty. Ante-mortem validation would ensure that the testator's wishes are followed after death, which would give the testator added peace of mind and substantially increase the real value of the documents drafted by estate planning practitioners.
2. Reduced contested proceedings in Probate. Ante-mortem probate would decrease frivolous litigation. If a document is ratified during an ante-mortem procedure, the determination would be final. Heirs at law are less likely to challenge a testator during lifetime than they are to challenge another beneficiary after the testator's death.
3. Dead men tell no tales. Typical issues in post-mortem litigation involve mental capacity, undue influence, and fraud. The trier of fact must determine the condition of the testator's mind by making inferences from evidence of past conduct and circumstances surrounding the testator. The evidentiary problems are both complex and numerous because the testator is deceased and cannot testify. The best evidence available may come from the testator during lifetime. An ante-mortem process would prevent the "worst evidence rule," a term coined by Yale Law professor John H. Langbein. In ante-mortem proceedings, the testator would participate fully and would attest to mental capacity, intent, and free will. Additionally, the testator could be medically evaluated.

4. Opportunity to remedy. If the instrument is deemed invalid in an ante-mortem proceeding for want of formality, the testator would have the opportunity to cure the source of the invalidity.
5. Lost wills. The ante-mortem process would help prevent lost wills since it would be on file at the courthouse once it is ratified.

## **B. Disadvantages**

1. The truth will out, but maybe not today. Evidence of undue influence and fraud might surface only after death. Therefore, an ante-mortem procedure may overvalue finality and cause injustice.
2. Damned if you do. The heirs at law are put in a no-win situation if they genuinely believe the will is not valid. Either they contest the ante-mortem procedure and destroy their relationship with the testator, or they submit to the purported wishes of the testator.
3. Protective repercussion. A potential heir may initiate conservatorship and guardianship proceedings in response to an ante-mortem proceeding. Certain courts are very liberal in determining that a person lacks capacity.
4. Spectacle. An ante-mortem procedure would necessarily be a public hearing or at a minimum, provide notice to heirs at law. The testator might be compelled to reveal their testamentary intent to persons who have no current legal claims to their property. Those heirs at law may then subject the testator to ruinous costs and delays.
5. Non-probate problems. Assuming the court validates the will, the chance still exists for all of that effort to be undone by non-probate assets. The contemplated legislation would likely be limited in scope and not address designations on accounts, creation of survivorship rights in personal and real property, deeds, or the making of gifts *mortis causa*.
6. Costly. The contemplated ante-mortem process could be in the form of a hearing before the probate court. It may be an unnecessary expense, and may even end in costly litigation.
7. Perhaps Michigan already has an ante-mortem procedure. Two statutes, MCL 700.5408 and MCL 700.7604, arguably accomplish the same intent as the ante-mortem statute. Since these two devices are available, there is no need for the ante-mortem statute:
  - a. MCL 700.5408 and 5401 addresses conservator appointment or another protective order. Arguably, if an individual recognizes age-related decline, disability or vulnerability, or if there are questions regarding the individual's ability to conduct their financial affairs and the individual is concerned that their assets are or will be

at risk *during lifetime*, then the individual can petition to the Court for a protective order to confirm the validity of an estate planning document.

- b. A companion statute deals with the statute of repose for Trusts, MCL 700.7604(1)(b). This statute, along with the reading of *In re Brody Trust*, 321 Mich App 304 (2017) could plausibly lead to the conclusion that if a Trustee puts the heirs on notice with a copy of the document along with all requirements held in MCL 700.7604(1)(b)(i) -(vii), and if the heirs do not bring an action within six (6) months, the heirs would be barred from bringing an action.

However, there are counter-arguments that MCL 700.5408 and MCL 700.7604 cannot accomplish the full intent of the proposed ante-mortem statute:

- a. Perhaps the above reading of the protective proceedings statutes may be rejected by some judges.
  - b. For a court to have jurisdiction under MCL 700.5408, the individual must fall within one of the categories delineated in MCL 700.5401 (unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance). Accordingly, this procedure is not available to everyone, only persons who have a listed vulnerability.
  - c. Further, some may argue (unconvincingly to the author of this memorandum) that under MCL 700.7604, the statute of repose does not apply until the settlor is deceased.
  - d. MCL 700.7604 clearly applies only to Trusts and not other estate planning documents.
  - e. Finally, MCL 700.7604 only applies to the validity of the Trust itself; it would not necessarily apply to transfers into or out of Trust.
8. Reciprocity. Most states do not allow ante-mortem probate. Therefore, if the settlor resides in another state at the time of death, the sister-state might not honor the Michigan procedure.
  9. Malpractice. The availability of the ante-mortem procedure may create a malpractice trap. Proper documentation regarding the client's knowledge and waiver of the ante-mortem process may be appropriate.

### **III. IF ANTE-MORTEM STATUTE IS DRAFTED, THEN WHAT SHOULD IT INCLUDE?**

- A. Should the ante-mortem statute apply to:
  1. Wills only?
  2. Trusts?

3. Deeds?
  4. Other non-probate transfers?
- B. Who may use or initiate an ante-mortem proceeding?
1. Testator only?
  2. A nominated personal representative or fiduciary?
  3. Any interested party?
- C. Who are the interested parties?
1. Only the testator?
  2. Heirs at law?
  3. Persons entitled to notice in a proceeding related to the type of document at issue under MCR 5.125?
  4. Extended family members?
- D. What will be the appropriate venue?
1. The county where the testator is domiciled?
  2. Where the testator has real property?
  3. Where the testator has substantial contacts?
  4. Where the testator drafted the will or trust?
- E. What kind of mechanism will be enacted?
1. A proceeding started by a petition, and ending with a public hearing?
  2. A simple written notice to the heirs at law followed by a statue of repose? If so, how long?
- F. What type of notice should be given and what should be included in the notice?
1. Should the subject instrument be given to interested parties?
  2. Should just a general description of what is in the drafted instrument be given to interested parties?
  3. 14 day notice in writing before a hearing?
- G. What must be established at a hearing?
1. Should a guardian ad litem represent the interested persons at the hearing if they do not retain counsel?

2. Will it be a declaration from the court that the testator duly executed the will, had the requisite capacity, and was free from undue influence? Or should the declaration be a different combination?
3. If no one opposes the petition, can the Court declare that the document is valid on the strength of the pleadings, or are affirmative findings required?
4. Who has the burden of proof?
5. Who has the burden of persuasion?
6. Is the hearing closed to the public?

H. What is the effect of the statute?

1. Should the same proceedings be used to amend or revoke the document, or should the testator be allowed to just remove the document from the court file to satisfy revocation?
2. Do the proceedings affect interested persons not receiving notice?
  - a) If an interested person was not given notice of the proceedings, would that individual still have standing to object at a later time? If so, how much time should that individual have and a mechanism to object at a later date?
3. Should the document be on file with the Court?
  - a) Should the instrument be private or public?
  - b) Should the document simply be kept in a private place (i.e. safe deposit box, filing cabinet, etc.)?

I. Use of evidence/findings

1. Can evidence, testimony, and/or the findings be used in subsequent hearings, or is the evidence, testimony, and/or findings to have no collateral effect in other judicial proceedings, including other probate court hearings?
2. Would any adverse inference be allowed if a testator chose not to use this statute?
3. Would an in-terrorem clause in the will/trust be enforceable against a person opposing the petition?

**To: Legislation Development and Drafting Committee**  
**From: Nathan Piowowski**  
**Re: Prebate – Other States**  
**Date: July 20, 2018**

State	Applies to	Who may use	Mechanism	What may be established	Parties	Effect	Collateral use of evidence/findings	Case annotations?
North Dakota <sup>1</sup>	Wills	Testator only	Proceeding	Formalities, capacity, lack of undue influence	Devises; present intestate successors	Will put on file with court with order; will be binding in ND unless plaintiff-testator executes new will <i>and</i> institutes new proceeding	Findings and evidence cannot be used in other proceeding	Yes <sup>2</sup>
North Dakota <sup>3</sup>	Trusts	Challenging party to proceeding; trustee (as to	Proceeding ; 120-day statute of repose upon notice	Validity	Settlor; beneficiary; settlor's present intestate successors	Claim bar	Can have collateral effects on prior distributions	

<sup>1</sup> § 30.1-08.1-01, West's North Dakota Century Code Annotated

<sup>2</sup> Bartusch v. Hager, 623 N.W.2d 720 (N.D. 2001).

<sup>3</sup> § 59-10.1-01, West's North Dakota Century Code Annotated

Delaware e <sup>4</sup>	Trusts	Trustee	120-day statute of repose upon notice		Those served	Claim bar	Can have collateral effects on prior distributions Includes provision for powers of appointment issues, too; law states no adverse inference for <i>not</i> using procedure	Yes <sup>5</sup>
Delaware e <sup>6</sup>	Wills	Testator	120-day statute of repose upon notice		Those served			
Alaska <sup>7</sup>	Wills	Testator, nominated PR, or nominee of testator	Proceeding	Formalities; Capacity; freedom from undue influence	Those served		Determination does not force any party to return to court to revoke or amend instrument	Yes <sup>8</sup>

<sup>4</sup> § 3546, West's Delaware Code Annotated

<sup>5</sup> IMO Restatement of Declaration of Trust Created Under the Ravet Family Trust Dated Feb. 9, 2012, C.A. No. 7743-VCG, V.C. Glasscock (June 4, 2014). Held that petitioner's claim against the co-trustees of the trust was time-barred because notice under 12 Del. C. § 3546 was delivered to the beneficiary's last known address and petitioner failed to challenge the trust within 120 days.

<sup>6</sup> § 1311, West's Delaware Code Annotated

<sup>7</sup> T. 13, Ch. 12, Art. 6, West's Alaska Statutes Annotated

<sup>8</sup> Matter of Estate of Baker, 386 P3d 1228 (Alas, 2016). Law does not require a testator to petition a court to validate her will; it merely provides that an interested party may petition the court to determine before the testator's death that the will is a valid will.

Alaska <sup>9</sup>	Trusts	Settlor or trustee	Proceeding . If AK trustee is nominated, can use their forum even if settlor isn't an AK resident.	Formalities; Capacity; freedom from undue influence	Those served		Determination does not force any party to return to court to revoke or amend instrument	
Ohio <sup>10</sup>	Will	Testator	Complaint proceeding	Validity based on formalities, capacity, lack of undue influence	Devisees; present intestate successors	Filed with probate court in sealed envelope along with the will; filed will available during testator's lifetime to only testator; testator may remove the will and nullify the declaration	Not subject to collateral attack, except by a person who should have been named a party defendant in the initial action (or modification) then court proceeds as if will or modification had not been	Yes. <sup>11</sup>

<sup>9</sup> § 13.12.535, West's Alaska Statutes Annotated.

<sup>10</sup> R.C. § 2107.081

<sup>11</sup> Cooper v Woodard, No. CA-1724, 1983 Ohio App. LEXIS 13477 (Ohio Ct. App. July 28, 1983). The court noted nothing was in the record to rebut the presumption that the ante-mortem probate statute is constitutional. The Court emphasized the sole purpose of the proceeding was to adjudicate a will's validity. It appears since Cooper, Ohio's ante-mortem probate legislation has been repeatedly applied by state courts. See Sull v. Kaim, 172 Ohio App. 3d 297, 301 (Ohio Ct. App. 2007); see also Hartman v. Hurley, No. 04CA9, 2005 Ohio App. LEXIS 1510, at \*2-3 (Ohio Ct. App. Apr. 5, 2005); Aunspaw v. Gunnoe, No. 18361, 2001 Ohio App. LEXIS 3934, at \*6 (Ohio Ct. App. July 28, 1983).



Ohio	Trust-None							previously declared valid; no adverse inference for <i>not</i> using procedure; fact findings cannot be used elsewhere	
Arkansas <sup>12</sup>	Will	Testator	Declaratory action proceeding	Validity based on formalities, capacity, lack of undue influence, then will is placed on file	Devises; present intestate successors	Findings of fact made in proceedings are admissible in subsequent proceedings	Determination does not force any party to return to court to revoke or amend instrument, but appears that revocation of validated wills could be revoked if codicils are not validated		
Arkansas	Trust-None								
New Hampshire <sup>13</sup>	Will	Testator	Proceeding	Validity of will and make other findings of fact	Spouse; Devises; present	Will conclusively deemed proved	Have to return to court to modify or	None	

<sup>12</sup> A.C.A. § 28-40-201.

<sup>13</sup> N.H. Rev. Stat. § 552:18

New Hampshire	Trust <sup>14</sup>	Settlor	Proceeding	Validity of will and make other findings of fact and conclusions of law that are appropriate under circumstances	Spouse; Devisees; present intestate successors; executors named in will; director of charitable trusts	Trust conclusively deemed proved (except to extent modified or revoked)	Have to return to court to revoke trust; no adverse inference for <i>not</i> using procedure	None
North Carolina <sup>15</sup>	Will	Testator	Proceeding	Validity of the will; Petitioner must produce evidence necessary to establish the will would be admitted to probate if petitioner were deceased	Interested party	Will proved and parties to proceeding bared; caveat: clear and convincing evidence that petitioner was subject to financial or physical duress or coercion	Have to return to court to modify or revoke trust if want bar to contest validity; petitioner can request that court order that any revocation or modification or subsequent w/	Yes <sup>16</sup>

<sup>14</sup> 2 N.H. Rev. Stat. 564-B:4-406

<sup>15</sup> N.C.G.S.A. § 28A-2B-1

<sup>16</sup> Hauser v. Hauser, No. COA16-606 (N.C. App. Feb. 21, 2017). Court held that a beneficiary's claim for tortious interference with expected inheritance was not legally viable while the testator was still alive.

North Carolina	Trust- None						before or during hearing; after entry of judgment file can be sealed and kept confidential	no court action would be void; No adverse inference for <i>not</i> using procedure	
Nevada 17	Will	Testator; legal representative	Proceeding	Validity; Any question regarding construction of document	All parties who have an interest affected by declaration	Final judgment; Declarations do not prejudice non-parties	Judgment or decree may be reviewed as other judgment or decree; Can petition court for further relief based on judgment and show cause adverse party why relief should not be granted		
Nevada 18	Trust	Testator; Legal representative	Proceeding	Validity; Any question regarding construction of document	All parties who have an interest affected by declaration	Final judgment; Declarations do not prejudice non-parties	Judgment or decree may be reviewed as other judgment or decree; Can petition court for further relief		

<sup>17</sup> Nev. Rev. Stat. 30.040(2)

<sup>18</sup> Nev. R. Stat. § 30.040(2)



# Council Materials

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

December 15, 2018

**Agenda**

- I. Call to Order
- II. Introduction of Guests
- III. Excused Absences
- IV. Lobbyist Report—Public Affairs Associates
- V. Monthly Reports:
  - A. Minutes of Prior Council Meeting -- Attachment 1
  - B. Chair's Report – Attachment 2
    - 1. Updated committee list.
    - 2. Updated public policy position on the loser-pay bills.
    - 3. Recent Bill Hound Report.
    - 4. Bill to allow the Legislature to intervene in any action.
    - 5. Legal Services Association of Michigan proposed list of non-fee generating cases.
  - C. Treasurer's Report – Attachment 3
  - D. Committee on Special Projects
- VI. Other Committees Presenting Oral Reports
  - A. Amicus Curiae Committee – Andrew Mayoras – Attachment 4
  - B. Electronic Communications Committee – Michael Lichterman – Attachment 5
  - C. Guardianships, Conservatorships, & End of Life Committee – Kathleen Goetsch
  - D. Probate Institute – David Lucas
  - E. Tax Committee – Raj A. Malviya – Attachment 6
- VII. Other Committees Presenting Written Reports Only
  - A. Legislation Development & Drafting Committee – Nathan Piwowarski – Attachment 7
  - B. Divided and Directed Trusteeships Ad Hoc Committee – James Spica – Attachment 8
- VIII. Other Business
- IX. Adjournment

Next Probate Council Meeting: January 25, 2019 (Note: switch to Friday)

1

**Meeting of the Council of the  
Probate and Estate Planning Section of the  
State Bar of Michigan**

**November 17, 2018  
East Lansing, Michigan**

**Minutes**

I. Call to Order

The Chair of the Council, Marguerite Munson Lentz, called the meeting to order at 10:15 a.m.

II. Introduction of Guests

A. Meeting attendees introduced themselves.

B. The following officers and members of the Council were present: Marguerite Munson Lentz, Chair; Christopher A. Ballard, Chair Elect; David L.J.M. Skidmore, Secretary; Mark E. Kellogg, Treasurer; Kathleen M. Goetsch; Michael G. Lichterman; Katie Lynwood; Raj A. Malviya; Richard C. Mills; Melisa M.W. Mysliwicz; Lorraine F. New; Kurt A. Olson; Nathan R. Piwowarski; James F. Anderton; and Neal Nusholtz. A total of 15 Council officers and members were present, constituting a quorum.

C. The following ex officio members of the Council were present: George W. Gregory; and Douglas A. Mielock.

D. The following liaisons to the Council were present: Jeanne Murphy (ICLE).

E. Others present: Ken Silver; Robert Nemzin; Alex Mallory; Ryan Bourjaily; Aaron Bartell; Georgette E. David; Warren Krueger; Cynthia Andrews; Joe Weiler; and Ernschie Augustin.

III. Excused Absences

The following officers and members of the Council were absent: Christopher J. Caldwell; Angela M. Hentkowski; Hon. Michael L. Jaconette; Robert C. Labe; David P. Lucas; Andrew W. Mayoras; Christine M. Savage; and Nazneen H. Syed.

IV. Lobbyist Report – Public Affairs Associates

Becky Bechler of Public Affairs Associates reported that (1) she is hopeful that HB 6129, 6130, and 6131, the divided and directed trusteeship bills, and HB 5362 and 5398, the certificate of trust bills, will be passed during the remaining days of the legislative session; (2) bills not passed this session will be re-introduced in January 2019; and (3) during the next legislative session both the House and Senate judiciary committees will have new chairs who have not been identified yet.



V. Monthly Reports

- A. Minutes of Prior Council Meeting (David L.J.M. Skidmore): It was moved and seconded to approve the Minutes of the October 13, 2018 meeting of the Council, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.
- B. Treasurer's Report (Mark E. Kellogg): It was reported that the expense reimbursement form was included in the meeting agenda materials.
- C. Chair's Report (Marguerite Munson Lentz): It was reported that an updated list of chairs and members of the Council's committees, and an updated list of liaisons to the Council, were included in the meeting agenda materials. It was reported that Nancy Little sent the Chair a thank-you note for her receipt of the 2018 Michael Irish Award. It was reported that the tax and consumer law sections had asked permission to send their e-blasts to our section members at their expense. The Chair asked committee chairs to advise her informally whether additional members are needed on their respective committees, because attendees at the annual drafting seminar may be asked to express interest in serving on a committee.
- D. Committee on Special Projects (Katie Lynwood):

Katie Lynwood reported on the discussion at the Committee on Special Projects meeting.

The Committee made the following motion:

The Probate and Estate Planning Section supports amending the Michigan Court Rules to make clear that the limited scope representation rules apply to probate proceedings; amending MCR 5.117(B)(1) to provide: "In General. An attorney may appear generally by an act indicating that the attorney represents an interested person in the proceeding. A limited appearance may be made only BY AN ATTORNEY FOR AN INTERESTED PERSON IN A CIVIL ACTION OR A PROCEEDING as provided in MCR 2.117(B)(2)(c), EXCEPT THAT ANY REFERENCE TO PARTIES OF RECORD IN MCR 2.117(B)(2)(c) SHALL INSTEAD REFER TO INTERESTED PERSONS. An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person."; and amending MCR 5.117(C)(5) to provide: "Limited Scope Appearances. Notwithstanding other provisions in this section, limited appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3), EXCEPT THAT ANY REFERENCE TO PARTIES OF RECORD IN MCR 2.117(B)(2)(c) SHALL INSTEAD REFER TO INTERESTED PERSONS."

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

The Committee also made the following motion:

Unless the State Bar of Michigan takes a position on the legislation, the Probate and Estate Planning Section opposes Senate Bills 1182 and 1183 regarding assessing the prevailing party's attorney fees against the non-prevailing party in civil litigation.

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

## VI. Other Committees Presenting Oral Reports

### A. Electronic Communications

Michael Lichterman reported regarding the transition of the former list serve to SBM Connect. It is possible for the former listserv to be archived on SBM Connect at a cost of \$500. The committee is also looking into options for remote attendance at Probate Council meetings.

### B. State Bar & Section Journals Committee

Richard Mills reported that the trust and estate theme issue of the SBM Journal was published in November, and he thanked those who contributed articles.

### C. Tax Committee

J.V. Anderton reported on a tax nugget, which was included with the meeting materials.

### D. Budget Committee

David Skidmore reported that the Budget Committee will present a proposed budget for the next fiscal year, upon receipt of audited financials from the SBM.

## VII. Other Committees Presenting Written Reports Only

The Chair stated that there were written reports from the following committees:

A. Legislative Development and Drafting Committee

B. Liaison to the Uniform Law Commission

VIII. Other Business

None.

IX. Adjournment

Seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 10:42 a.m.

Respectfully submitted,  
David L.J.M. Skidmore, Secretary

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**Probate and Estate Planning Section**

2018-2019 Proposed Committee Chairs

<b>Committee/Mission</b>	<b>Chair</b>	<b>Other Members</b>
<p><b>Amicus Curiae Committee</b> 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.</p>	Andrew W. Mayoras	Ryan P. Bourjaily Nazneen Hasan Kurt A. Olson Patricia M. Ouellette David L.J.M. Skidmore Trevor J. Weston Timothy White
<p><b>Annual Meeting</b> 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.</p>	Christopher A. Ballard	
<p><b>Assisted Reproductive Technology Ad Hoc Committee</b> 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.</p>	Nancy Welber	Christopher A. Ballard Edward Goldman James P. Spica Lawrence W. Waggoner
<p><b>Awards Committee</b> 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.</p>	Amy Morrissey	Mark Harder Thomas Sweeney
<p><b>Budget Committee</b> To develop the annual budget and to alert the Council to revenue and spending trends.</p>	David L.J.M. Skidmore	David P. Lucas Mark Kellogg
<p><b>Bylaws Committee</b> To review the Section Bylaws and recommend changes to ensure compliance with State</p>	David Lucas	Christopher A. Ballard Nazneen Hasan John Roy Castillo

Bar requirements, best practices for similar organizations and assure conformity of the Bylaws to current practices and procedures of the Section and the Council.		
<b>Charitable &amp; Exempt Organization Committee</b> 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	Celeste E. Arduino Christopher A. Ballard Michael W. Bartnik William R. Bloomfield Robin D. Ferriby Mark E. Kellogg Richard C. Mills
<b>Citizens Outreach Committee</b> 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.	Kathleen M. Goetsch	Michael J. McClory Neal Nusholtz Jessica M. Schilling Nicholas J. Vontroba
<b>Committee on Special Projects</b> To consider and study in depth a limited number of topics and make recommendations to the Council of the Section with respect to those matters considered by the Committee.	Katie Lynwood	All members of the Section who attend a meeting of the Committee on Special Projects ("CSP") are considered members of CSP and are entitled to vote on any matter brought before the CSP.
<b>Community Property Trusts Ad Hoc Committee</b> 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	Brandon Dornbusch George W. Gregory Lorraine F. New Nicholas A. Reister Rebecca K. Wrock

<p><b>Court Rules, Forms, &amp; Proceedings Committee</b> To consider and recommend to the Council action with respect to contested and uncontested proceedings, the Michigan Court Rules, and published court forms, including their development, interpretation, use, and amendment.</p>	<p>Melisa M.W. Mysliwec</p>	<p>James F. (J.V.) Anderton Susan Chalgian Phillip E. Harter Hon. Michael L. Jaconette Warren H. Krueger, III Michael J. McClory Andrew W. Mayoras Shaina Reed Marlaine Teahan</p>
<p><b>Divided and Directed Trusteeships Ad Hoc Committee</b> To review the Uniform Directed Trust Act and other legislative proposals concerning the division of fiduciary labor and responsibility among non-trustee directors, co-trustees, and divided trusteehips and, if advisable, to recommend changes to Michigan law in this area.</p>	<p>James P. Spica</p>	<p>Judith M. Grace Marguerite Munson Lentz Gabrielle M. McKee Ray A. Malviya Richard C. Mills Jeffrey A. Robbins Robert P. Tiplady</p>
<p><b>Drafter/beneficiary ad hoc committee</b> To make recommendations for possible statutory changes to deal with the situation where a drafter (whether a lawyer or a non-lawyer) prepares an instrument for a non-relative which includes a gift to that drafter or members of that drafter's family.</p>	<p>Andrew Mayoras</p>	<p>Erica Berezny George W. Gregory Kenneth Silver David P. Lucas Kurt A. Olson</p>
<p><b>Electronics Communications Committee</b> To oversee all forms of electronic communications with and among members of the Section, including communication via the Section's web site (SBM Connect site) and the ICLE Online Community site, to identify emerging technological trends of important to the Section and its members, and to recommend to the Council of</p>	<p>Michael G. Lichterman</p>	<p>William J. Ard Amy N. Morrissey Jeanne Murphy (Liaison to ICLE) Neal Nusholtz Marlaine Teahan</p>

the Section best practices to take advantage of technology in carrying out the Section's and Council's mission and work.		
<b>Electronic Wills Ad Hoc Committee</b> To study the proposal on electronic wills of the Uniform Law Commission, determine problems and pitfalls of the formation, validity, and recognition of electronic wills, and be prepared to respond to both the Uniform Law Commission's proposal and any related legislation introduced in Michigan.	Kurt A. Olson	Kimberly Browning Douglas A. Mielock Neal Nusholtz Christine Savage James P. Spica (Special Advisor)
<b>Ethics &amp; Unauthorized Practice of Law</b> 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.	Kurt A. Olson	William J. Ard Raymond A. Harris J. David Kerr Robert M. Taylor Amy Rombyer Tripp
<b>Fiduciary Exception to the Attorney Client Privilege Ad Hoc Committee</b> To determine whether to develop legislation to determine the extent (if any) to which a fiduciary exception should exist to the attorney client privilege and if so, draft proposed legislation.	Warren H. Krueger, III	Aaron A. Bartell Ryan P. Bourjaily
<b>Guardianships, Conservatorships, &amp; End of Life Committee</b> To monitor the need for, and make recommendations with respect to, statutory and court	Kathleen M. Goetsch	William J. Ard Michael W. Bartnik Kimberly Browning Raymond A. Harris Phillip E. Harter Hon. Michael L. Jaconette



<p>rule changes in Michigan related to the areas of legally incapacitated individuals, guardianships, and conservatorships.</p>		<p>Michael J. McClory Kurt A. Olson James B. Steward Paul S. Vaidya</p>
<p><b>Legislative Analysis &amp; Monitoring Committee</b> 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 action on legislation not otherwise assigned to another committee of the Section.</p>	<p>Daniel S. Hilker</p>	<p>Christopher A. Ballard Ryan P. Bourjaily Georgette E. David Mark E. Kellogg Jonathan R. Nahhat</p>
<p><b>Legislation Development &amp; Drafting Committee</b> To review, revise, communicate, and recommend proposed legislation affecting Michigan's trusts and estates law with the goal of achieving and maintaining leadership in promulgating trusts and estates laws in changing times.</p>	<p>Nathan Piwowarski</p>	<p>Heidi Aull Aaron A. Bartell Howard H. Collens Georgette E. David Kathleen M. Goetsch Daniel S. Hilker Henry P. Lee Michael G. Lichterman David P. Lucas Katie Lynwood Richard C. Mills Kurt A. Olson Christine M. Savage James P. Spica Marlaine Teahan Robert P. Tiplady II</p>
<p><b>Legislative Testimony Committee</b> To testify on behalf of the Section regarding pending bills before Michigan House or Senate Committees and to promote and explain the Council's Public Policy Positions to Michigan Representatives and Senators or members of their staff.</p>	<p>Marguerite Munson Lentz</p>	<p>Gary Bauer Susan L. Chalgian Howard Collens Mark T. Evely Ashley Gorman Raymond A. Harris Mark E. Kellogg Carol Kramer Katie Lynwood Amy E. Peterman Nathan Piwowarski Kenneth Silver</p>

		Marlaine C. Teahan Robert W. Thomas
<b>Membership Committee</b> To strengthen relations with Section members, encourage new membership, and promote awareness of and participation in Section activities.	Nicholas A. Reister	Daniel S. Hilker, Vice-Chair Daniel W. Borst Ryan P. Bourjaily Nicholas R. Dekker Angela Hentkowski David A. Kosmowski Robert B. Labe Raj A. Malviya Ryan S. Mills Robert O'Reilly Theresa A. Rose
<b>Nominating Committee</b> To annual nominate candidates for election as the officers of the Section and members of the Council.	Shaheen I. Imami	James B. Steward Marlaine C. Teahan
<b>Planning Committee</b> To review and update the Council's Plan of Work	Marguerite Munson Lentz	Christopher A. Ballard David P. Lucas David L.J.M. Skidmore Mark E. Kellogg
<b>Premarital Agreements Legislation Ad Hoc Committee</b> To review and compare Michigan's statutes and case law (particularly the <i>Allard</i> decision) regarding enforcement and potential effects on estate planning and estate administration with the Uniform Premarital and Marital Agreements Act and similar acts from other states and, if advisable, recommend changes to Michigan law in this regard.	Christine Savage	Kathleen M. Goetsch Patricia M. Ouellette (Family Law Liaison) Rebecca Wrock
<b>Probate Institute</b> To consult with ICLE in the planning and execution of the Annual Probate and Estate Planning Institute.	David P. Lucas	
<b>Real Estate Committee</b> To recommend new legislation related to real estate matters of interest and concern to the Section and its members.	Mark E. Kellogg	Jeffrey S. Ammon William J. Ard David S. Fry J. David Kerr Michael G. Lichterman

		James T. Ramer James B. Steward
<b>State Bar &amp; Section Journals Committee</b> 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 trusts.	Richard C. Mills	Nancy L. Little, Managing Editor Melisa M.W. Mysliwec, Associate Editor.
<b>Tax Committee</b> To monitor, provide regular updates on, and deliver select educational programs concerning federal and state income and transfer taxes and, if applicable, to recommend appropriate actions by the Section in response to developments.	Raj A. Malviya	James F. (J.V.) Anderton Christopher J. Caldwell Mark J. DeLuca Angela Hentkowski Robert B. Labe Richard C. Mills Lorraine F. New Christine M. Savage Michael David Shelton James P. Spica Timothy White
<b>Uniform Fiduciary Income &amp; Principal Ad Hoc Committee</b> To review the Uniform Law Commission's draft and final version of the Uniform Fiduciary and Principal Act, and, if advisable, to recommend changes to Michigan law in this area.	James P. Spica	Anthony J. Belloli Marguerite Munson Lentz Raj A. Malviya Gabrielle M. McKee Richard C. Mills Robert P. Tiplady Joseph Viviano

**Public Policy Position  
SB 1182 and SB 1183**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,280 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. The State Bar's position on this legislation is to oppose SB 1182 and SB 1183.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On November 17, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 15 members voted in favor of the Section's position on SB 1182 and SB 1183, 0 members voted against this position, 0 members abstained, 7 members did not vote.

**OPPOSE****Explanation:**

Unless the State Bar of Michigan takes a position on the legislation, the Probate and Estate Planning Section opposes Senate Bills 1182 and 1183 regarding assessing the prevailing party's attorney fees against the non-prevailing party in civil litigation.

**Contact Person:** David Skidmore

**Email:** [dskidmore@wnj.com](mailto:dskidmore@wnj.com)

**PROBATE**

**HB 4171 PA 155** - PROBATE, Guardians and Conservators, Authorize a guardian to sign physician orders for scope of treatment form. (Cox, Laura (R), 02/07/17)  
(Status: 11/09/2017 - approved by the Governor 11/8/2017 @ 11:56 AM)

**HB 4410 PA 143** - PROBATE, Wills and Estates, Allow exempt property decedent to exclude adult child by written instrument. (Lucido, Peter J. (R), 03/23/17)  
(Status: 05/10/2018 - assigned PA 143'18 with immediate effect)

**HB 4684** - PROBATE, Guardians and Conservators, Allow limited guardianship to supervise access to incapacitated individuals relative. (Lucido, Peter J. (R), 05/31/17)  
(Status: 06/06/2017 - bill electronically reproduced 05/31/2017)

**HB 4751** - FAMILY LAW, Marriage and Divorce, Clarify enforceability of prenuptial agreements. (Kesto, Klint (R), 06/13/17)  
(Status: 01/30/2018 - REPORTED BY COMMITTEE OF THE WHOLE FAVORABLY WITH SUBSTITUTE S-1)

**HB 4752 PA 33** - PROBATE, Wills and Estates, Revise fee ratio and reporting requirement and remove sunset (Kesto, Klint (R), 06/08/17)  
(Status: 02/22/2018 - approved by the Governor 2/20/2018 @ 12:27 PM)

**HB 4821 PA 13** - PROBATE, Wills and Estates, Require appointment of the state or county public administrator as personal representative of a decedents estate in a formal proceeding and modify powers and duties of public administrators acting as personal representatives. (Runestad, Jim (R), 07/12/17)  
(Status: 02/06/2018 - presented to the Governor 2/2/2018 @ 3:35 PM)

**HB 4822 PA 14** - PROBATE, Wills and Estates, Require appointment of the state or county public administrator as personal representative of a decedents estate in a formal proceeding and modify powers and duties of public administrators acting as personal representatives. (Ellison, Jim (D), 07/12/17)  
(Status: 02/06/2018 - assigned PA 14'18 with immediate effect)

**HB 4905 PA 133** - PROPERTY TAX, Principal Residence Exemption, Modify principal residence exemption for individual residing in nursing home or assisted living facility (Lucido, Peter J. (R), 09/07/17)  
(Status: 05/03/2018 - assigned PA 133'18 with immediate effect)

**HB 4959** - FAMILY LAW, Marriage and Divorce, Require prenuptial and postnuptial agreements to be enforceable. (Hoitenga, Michelc (R), 09/14/17)  
(Status: 09/19/2017 - bill electronically reproduced 09/14/2017)

**HB 4996** - PROBATE, Guardians and Conservators, Expand notification requirement of guardians. (Kosowski, Robert L. (D), 09/20/17)  
(Status: 09/26/2017 - bill electronically reproduced 09/20/2017)

**HB 5037** - PROBATE, Guardians and Conservators, Provide for power of guardian to implant a tracking device with a ward. (Lucido, Peter J. (R), 09/27/17)  
(Status: 09/28/2017 - bill electronically reproduced 09/27/2017)

**HB 5075** - PROBATE, Patient Advocates, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patients best interest. (Cole, Triston (R), 10/10/17)  
(Status: 10/11/2017 - bill electronically reproduced 10/10/2017)

**HB 5076 - HEALTH, Other.** Establish procedure to require physician and hospital to obtain the consent of certain persons to withhold or withdraw a life-sustaining treatment. (Noble, Jeff (R), 10/10/17)  
(Status: 10/11/2017 - bill electronically reproduced 10/10/2017)

**HB 5152 - HEALTH, Patient Directives.** Create non-opioid directive form. (Singh, Sam (D), 10/19/17)  
(Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

**HB 5153 - PROBATE, Guardians and Conservators.** Allow a guardian to execute a non-opioid directive form. (Canfield, Edward (R), 10/19/17)  
(Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

**HB 5323 - CRIMINAL PROCEDURE, Pretrial Procedure.** Modify process for expunction and destruction of DNA samples and identification profiles. (Lucido, Peter J. (R), 12/06/17)  
(Status: 12/12/2017 - bill electronically reproduced 12/06/2017)

**HB 5362 - PROBATE, Trusts.** Modify information required in a certificate of trust. (Lucido, Peter J. (R), 12/13/17)  
(Status: 12/04/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

**HB 5398 - PROBATE, Trusts.** Allow use of a certificate of trust under the estates and protected individuals code for a trust that affects real property. (Lucido, Peter J. (R), 01/11/18)  
(Status: 12/04/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

**HB 5443 - TAXATION, Estates.** Repeal Michigan estate tax act. (Johnson, Steven (R), 01/24/18)  
(Status: 01/25/2018 - bill electronically reproduced 01/24/2018)

**HB 5813 - LAW ENFORCEMENT, Investigations.** Require use of standard investigation form involving the physical or financial abuse of a vulnerable adult or elder adult. (Runestad, Jim (R), 04/17/18)  
(Status: 06/07/2018 - reported with recommendation without amendment)

**HB 5819 - MENTAL HEALTH, Other.** Allow authority to consent to mental health treatment. (Kesto, Klint (R), 04/17/18)  
(Status: 06/05/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

**HB 5820 - MENTAL HEALTH, Code.** Revise procedure for involuntary mental health treatment and judicial admissions. (Kesto, Klint (R), 04/17/18)  
(Status: 06/05/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

**HB 5821 - CRIMINAL PROCEDURE, Records.** Allow setting aside of convictions for veterans completing probation. (Kesto, Klint (R), 04/17/18)  
(Status: 04/18/2018 - bill electronically reproduced 04/17/2018)

**HB 6129 - PROBATE, Trusts.** Provide powers and duties of a directed trustee. (Kesto, Klint (R), 06/07/18)  
(Status: 11/29/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

**HB 6130 - PROBATE, Trusts.** Provide powers and duties of a directed trustee. (Calley, Julie (R), 06/07/18)  
(Status: 11/29/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

**HB 6131 - PROBATE, Trusts.** Provide powers and duties of a directed trustee. (Iden, Brandt (R), 06/07/18)  
(Status: 11/29/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

**HB 6467 - PROBATE, Other.** Modifies amount of transfers allowed in uniform transfers to minors act. (Lucido, Peter J. (R), 11/07/18)  
(Status: 11/07/2018 - REFERRED TO THE COMMITTEE ON JUDICIARY)

**HB 6468 - PROBATE, Other.** Provides for general amendments to the estates and protected individuals code. (Lucido, Peter J. (R), 11/07/18)  
(Status: 11/07/2018 - REFERRED TO THE COMMITTEE ON JUDICIARY)

**HB 6470 - WATERCRAFT, Other.** Increases maximum value of watercraft eligible for issuance of certificate of title transferring deceased owner's interest (Elder, Brian (D), 11/07/18)  
(Status: 11/08/2018 - bill electronically reproduced 11/07/2018)

- HB 6471** - **PROBATE, Trusts**, Provides for general amendments to the estates and protected individuals code. (Elder, Brian (D), 11/07/18)  
(Status: 11/08/2018 - bill electronically reproduced 11/07/2018)
- SB 0049 PA 136** - **PROBATE, Guardians and Conservators**, Modify provision related to compensation for professional guardian or professional conservator. (Booher, Darwin (R), 01/18/17)  
(Status: 10/31/2017 - ASSIGNED PA 0136'17 WITH IMMEDIATE EFFECT)
- SB 0284** - **PROPERTY, Recording**, Remove requirement statement of marital status in instruments conveying or mortgaging real estate. (Jones, Rick (R), 03/29/17)  
(Status: 04/26/2017 - referred to Committee on Financial Services)
- SB 0378 PA 167** - **SENIOR CITIZENS, Housing**, Amend home for the aged definition and create an exemption from licensing. (Knollenberg, Marty (R), 05/16/17)  
(Status: 11/28/2017 - APPROVED BY GOVERNOR 11/9/2017 @ 11:15 AM)
- SB 0540** - **PROPERTY TAX, Assessments**, Modify definition of transfer of ownership and certain excluded transfers. (Schuitmaker, Tonya (R), 09/07/17)  
(Status: 09/07/2017 - INTRODUCED BY SENATOR TONYA SCHUITMAKER)
- SB 0597** - **HEALTH, Other**, Establish procedure to withhold or withdraw a life-sustaining treatment to require physician and hospital to obtain the consent of certain persons. (Proos, John (R), 09/28/17)  
(Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS)
- SB 0598** - **PROBATE, Patient Advocates**, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patient's best interest (Proos, John (R), 09/28/17)  
(Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS)
- SB 0644** - **TORTS, Liability**, Enact insurance agents liability act. (Jones, Rick (R), 11/01/17)  
(Status: 11/01/2017 - INTRODUCED BY SENATOR RICK JONES)
- SB 0713** - **PROBATE, Guardians and Conservators**, Provide for visitation procedures for isolated adults. (Marleau, Jim (R), 12/06/17)  
(Status: 06/07/2018 - PLACED ON ORDER OF THIRD READING WITH SUBSTITUTE S-2)
- SB 0732 PA 192** - **PROPERTY, Recording**, Modify recording waiver of mortgage priority. (Zorn, Dale (R), 12/13/17)  
(Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:02 PM)
- SB 0733 PA 193** - **LAND USE, Other**, Modify certified survey map requirements. (Zorn, Dale (R), 12/13/17)  
(Status: 09/05/2018 - ASSIGNED PA 193'18 WITH IMMEDIATE EFFECT)
- SB 0734 PA 194** - **PROPERTY, Recording**, Require trust to be recorded separately under conveyance of a trust. (Conyers, Ian (D), 12/13/17)  
(Status: 09/05/2018 - ASSIGNED PA 194'18 WITH IMMEDIATE EFFECT)
- SB 0736 PA 196** - **PROPERTY, Recording**, Remove recording requirements from exception for wills. (Hertel Jr., Curtis (D), 12/13/17)  
(Status: 09/05/2018 - APPROVED BY GOVERNOR 6/19/2018 @ 8:10 PM)
- SB 0784** - **HEALTH, Emergency Response**, Allow a parent or guardian to execute do-not-resuscitate order on behalf of a minor child. (Warren, Rebekah (D), 01/25/18)  
(Status: 06/12/2018 - SUBSTITUTE S-3 ADOPTED)
- SB 0785** - **EDUCATION, School Districts**, Establish filing, storage, and notice rules regarding do-not-resuscitate orders and revocations of do-not-resuscitate orders. (Jones, Rick (R), 01/25/18)  
(Status: 01/25/2018 - INTRODUCED BY SENATOR RICK JONES)
- SB 0786** - **PROBATE, Guardians and Conservators**, Authorize a guardian of a minor to execute a do-not-resuscitate order. (Warren, Rebekah (D), 01/25/18)  
(Status: 06/12/2018 - PASSED ROLL CALL # 508 YEAS 36 NAYS 0 EXCUSED 1 NOT VOTING 0)
- SB 0798** - **CHILDREN, Other**, Create safe families program to allow a parent or guardian to delegate temporary care of minor child via power of attorney. (MacGregor, Peter (R), 01/30/18)  
(Status: 11/29/2018 - referred to second reading)

**SB 0905** - PROBATE, Trusts. Allow trust property treated as property held as tenants by the entirety under certain circumstances. (Jones, Rick (R), 03/15/18)

*(Status: 03/15/2018 - INTRODUCED BY SENATOR RICK JONES)*



**FW: NEWS UPDATE--Bill Would Allow Legislature To Intervene In Any Court Proceeding**

1 message

Becky Bechler <bechler@paaonline.com>

Thu, Nov 29, 2018 at 1:02 PM

To: Meg Lentz <meglentz@gmail.com>, "James P. Spica" (JSpica@dickinson-wright.com)"

<JSpica@dickinson-wright.com>

**From:** gongwerreports@gongwer.com [mailto:gongwerreports@gongwer.com]

**Sent:** Thursday, November 29, 2018 12:46 PM

**To:** updates@gongwer.com

**Subject:** NEWS UPDATE--Bill Would Allow Legislature To Intervene In Any Court Proceeding

NEWS UPDATE

[View in a browser](#)

**News**

**Bill Tracking**

**Legislation**

Thursday, November 29, 2018, 12:44 PM

**Bill Would Allow Legislature To Intervene In Any Court Proceeding**

A bill set to be introduced today would allow the Legislature to intervene in any action in any state court when either the House or Senate deems it necessary, a move that appears designed to assure the Republican legislative majorities can have their perspective heard in court once Democratic Governor-elect Gretchen Whitmer and Democratic Attorney General-elect Dana Nessel take office.

Under HB 6553, both the House and Senate would be empowered to prosecute an appeal, apply for a re-hearing "or take any other action or step whatsoever that is had or possessed by any of the parties to such litigation." The bill will be sponsored by Rep. Robert VerHeulen (R-Walker).

Each chamber would be permitted to adopt rules or policies to facilitate operation of the bill.

The bill would appear to give Republicans a fallback to argue the defense of laws passed on their watch in the event Ms. Whitmer and Ms. Nessel decide to drop the state's defense of a case. It also would allow the Legislature to assure its arguments are heard in the event that the attorneys Ms. Nessel assigns make other arguments.

One case that could be affected is the lawsuit challenging the repeal of the state's prevailing wage law. Court of Claims Judge Cynthia Stephens denied motions earlier this month from legislative entities to intervene in the case. That leaves the State of Michigan and the Department of Licensing and Regulatory Affairs as the lone defendants, and in January Ms. Whitmer and Ms. Nessel will be in charge of defending the case. Democrats have denounced the repeal of the prevailing wage law, so their interest in continuing the state's defense would be in doubt.

When asked about the prevailing wage lawsuit, Mr. VerHeulen said the bill would authorize the Legislature to get involved if it chooses.

Mr. VerHeulen said he doesn't think the bill would give the Legislature the opportunity to circumvent the incoming governor, secretary of state or attorney general, who will all be Democrats next year.

"I don't view it as partisan, I view it as institutional," he said. "It is a voice for the Legislature independent of the executive to express its views in a court room."

Mr. VerHeulen said the bill is not intended to supplant the roles of the executive branch.

"It doesn't replace the role of the AG, but there may be a unique position that the House or the Senate or both of them wish to express to the court," he said.

Gongwer News Service will have more on this story in Thursday's Michigan Report.

Please send all correspondence to [gongwer@gongwer.com](mailto:gongwer@gongwer.com). This mailbox is not regularly monitored.

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# HOUSE BILL No. 6553

November 29, 2018, Introduced by Rep. VerHeulen and referred to the Committee on Government Operations.

A bill to amend 1846 RS 2, entitled  
"Of the legislature,"  
(MCL 4.82 to 4.85) by adding section 3a.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

**SEC. 3A. (1) THE LEGISLATURE AND EACH HOUSE OF THE LEGISLATURE IS HEREBY AUTHORIZED AND EMPOWERED TO INTERVENE IN ANY ACTION COMMENCED IN ANY COURT OF THIS STATE WHENEVER THE LEGISLATURE OR A HOUSE OF THE LEGISLATURE DEEMS SUCH INTERVENTION NECESSARY IN ORDER TO PROTECT ANY RIGHT OR INTEREST OF THIS STATE, OR OF THAT BODY. SUCH RIGHT OF INTERVENTION SHALL EXIST AT ANY STAGE OF THE PROCEEDING, AND THE LEGISLATURE AND EACH HOUSE OF THE LEGISLATURE SHALL HAVE THE SAME RIGHT TO PROSECUTE AN APPEAL, OR TO APPLY FOR A RE-HEARING OR TO TAKE ANY OTHER ACTION OR STEP WHATSOEVER THAT IS HAD OR POSSESSED BY ANY OF THE PARTIES TO SUCH LITIGATION.**

**(2) THE RIGHT OF INTERVENTION GRANTED UNDER THIS SECTION**

APPLIES TO ALL MATTERS PENDING IN ANY COURT OF THIS STATE AS OF THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED THIS SECTION OR LATER FILED IN ANY COURT IN THIS STATE.

(3) THIS SECTION IS SELF-EXECUTING BUT EACH HOUSE OF THE LEGISLATURE MAY ADOPT RULES OR POLICIES TO FACILITATE OPERATION OF THIS SECTION.

## Lentz, Marguerite

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**From:** Kathryn Hennessey (Carrie Sharlow) <CSHARLOW@michbar.org>  
**Sent:** Friday, November 30, 2018 3:14 PM  
**To:** paylward@allegiantlegal.com; Lentz, Marguerite; Scavone, Nicholas; cpatterson@fsbrlaw.com; michiganbk@gmail.com; Robert Raitt; smith@mielderlaw.com; crapko@millercafield.com; bob.treat@qdroexpressllc.com; salvatore@spplawyers.com  
**Subject:** Referral of Letter Proposing List of Non-Fee Generating Cases: Comments Due January 4, 2018  
**Attachments:** Ltr re Cases Qualifying for Legal Services Verification.pdf

The State Bar of Michigan Board of Commissioners requests your section's review of the attached letter from the Legal Services Association of Michigan (LSAM), proposing a list of non-fee generating cases.

In 1998, the State Bar entered into an understanding with LSAM in which the State Bar would agree to a list of non-fee generating cases. This list satisfies a requirement imposed by the Legal Services Corporation on federally-funded legal aid organizations and allows those organizations to run more efficiently by not having to refer and document each individual case to establish that it is not a fee generating case.

**Please submit your section's comments by January 4, 2018.**

Comments should be submitted via a [template](#) located at the [Public Policy Resource Center](#).

Please contact me if you have any questions.

**Kathryn Loncarich Hennessey**  
Public Policy Counsel

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STATE BAR OF MICHIGAN  
Michael Franck Building  
306 Townsend Street  
Lansing, MI 48933-2012  
T: (517) 346-6359  
[khennessey@michbar.org](mailto:khennessey@michbar.org)  
[www.michbar.org](http://www.michbar.org)

+-----+  
The State Bar of Michigan has changed our email domain name. Mail addressed to @mail.michbar.org will still be delivered. New mail sent from our staff will come from @michbar.org

**E-mail Notice:** If you think you received this e-mail by mistake, please do not use it in any way. It may contain confidential or legally protected information. Please delete the e-mail, destroy any copies, and immediately notify us by reply e-mail or by phone (800-968-1442).

**E-mail Warning :** This e-mail was swept for computer viruses, but we cannot guarantee that it is virus-free or accept

**LEGAL SERVICES ASSOCIATION OF MICHIGAN**

September 12, 2018

**Juan Salazar**  
Co-chair  
89 Ionia Ave., NW  
Suite 400  
Grand Rapids, MI 49503

**Ann Rouff**  
Co-chair  
420 North 4th Avenue  
Ann Arbor, MI 48104

**Kenneth Penokle**  
Secretary/Treasurer

**Lorray Brown**  
**Valerie Newman**  
Co-Chairs  
Justice Policy Initiative  
State Bar of Michigan  
306 Townsend St.  
Lansing, MI 48909

Re: 45 CFR 1609

Dear Lorray and Valerie,

We're writing to you on behalf of the Legal Services Association of Michigan (LSAM).

As you know, several LSAM members are funded in part by the Legal Services Corporation ("LSC"). One of the LSC regulations, 45 CFR 1609, prohibits LSC grantees from accepting cases that private attorneys regularly accept for a fee. As you know, all LSC grantees have systems in place to assure that any cases that can be directly referred to private lawyers are referred.

Beginning in 1998, LSC adopted a regulation relating to possible fee generating cases. Under the LSC system, programs are required to either: (1) develop an understanding with the Bar that certain categories of cases are non-fee-generating; or (2) provide documentation in each file that a referral to a private attorney was attempted but was unsuccessful. The LSC policy is problematic under Michigan law, since Michigan provides for a nominal attorney fee (usually under \$40) in almost every case, see MCL 600.2441. Thus, virtually every case in which an attorney appears for a Plaintiff or a Defendant in any Michigan court could be a "potentially fee generating case".

In 1998, LSAM developed an understanding with the State Bar that the following categories of cases were "non-fee-generating". We've updated these understandings from time to time—most recently in 2010. We're writing to again renew these understandings. LSAM reviewed and discussed possible revisions to the 2010 list at its July 2018 meeting.

- (1) In general, civil cases where the only fee is a statutory attorney fee under \$200 are not fee generating cases.
- (2) Eviction and foreclosure prevention cases including summary proceedings actions, lock out actions, and Circuit Court suits to prevent foreclosure are not fee generating cases. These suits may be handled even if a damage claim or counterclaim may be filed on behalf of the legal

services client. Non-fee-generating real property and personal property cases also include Probate Court and quiet title actions where the primary goal of the litigation is to preserve a home or personal property (such as a mobile home or an automobile) for a low income client.

(3) Domestic violence cases and other family law cases (e.g., Personal Protection Order cases, child support enforcement or defense or custody cases, Indian Child Welfare Act cases) for low income individuals. These cases may be handled even if a money or property claim may be made.

(4) Cases seeking benefits through needs-based public benefits programs.

(5) Consumer cases where the primary object of the case is to prevent attachment or garnishment of an individual's income or bank account or cases that challenge a policy or practice affecting numerous low income consumers.

(6) The defense of tort or general civil litigation claims on behalf of low income persons—even when that defense might include a money counterclaim or a claim under a fee shifting statute.

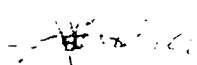
(7) Wage claim cases or other affirmative damage suits where the amount of wages or damages claimed by each individual client is under \$10,000.

We'd note that these categories of cases include cases in all Michigan Courts, in the federal courts in Michigan, and in tribal courts in Michigan. These general principals—cases for low income persons or families where there is no expectation of significant monetary damages—apply across all courts.

We're sure you understand that the purpose of this policy is to avoid file-by-file documentation and fruitless referrals to private lawyers in hundreds of cases each year. As you know, before a case is accepted for staff representation, it is screened for client and case eligibility. Any case that a program feels can be referred—through LRIS or through a pro bono or a low bono program—is referred.

We would appreciate it if you would, on behalf of the Bar, acknowledge your agreement that the case categories described above are cases that private attorneys do not normally accept. If you feel that should be reviewed by a different Bar committee, please refer us to the appropriate committee. If you have any questions or if you would like to meet to discuss this, please contact either of us.

Sincerely,

  
Juan Salazar  
Chair

  
Ann Routt  
Chair

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# 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 3<sup>rd</sup> 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](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 Howwire 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.
4. Payments to vendors for \$5,000 or greater are not reimbursable. Payments to vendors for \$5,000 or greater should be paid directly by the State Bar.

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## MEMORANDUM

**To:** Probate Council  
**From:** Andrew W. Mayoras  
**Subject:** Application for Amicus Brief - Rhea Brody Conservatorship  
**Date:** November 19, 2018

### Background

Based on a prior Amicus Brief from the Probate Section, the Supreme Court reversed and remanded to the Court of Appeals to consider the Probate Section's Amicus Brief regarding standing in a trust dispute. The Court of Appeals did so and essentially adopted the position that the Probate Section advocated in its prior Brief.

The Appellants have now filed a new application for to the Supreme Court challenging the Court of Appeals' ruling and the position taken by the Probate Section previously – namely, that there is standing in that particular trust dispute. One of the Appellees has submitted an application requesting that the Section file an additional amicus brief.

The Amicus Committee has discussed it and recommends that no new amicus brief be filed at this time, but plans to revisit the issue if the Supreme Court does grant leave to appeal a second time. We believe that the Court of Appeals' decision is correct and proper and that if we were to submit a new amicus brief at this time, it may increase the chances of the Supreme Court granting leave rather than simply allowing the second Court of Appeals' decision to stand as is.

### Recommendation

We recommend that if the Supreme Court does grant leave to appeal, then the Amicus Committee should reconsider the matter and we would submit a new recommendation to Council at that time.

**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 10/31/2018

Name Kenneth F. Silver P Number P35546

Firm Name Hertz Schram PC

Address 1760 S. Telegraph Road

City Bloomfield Hills State MI Zip Code 48302

Phone Number 248-335-5000 Fax Number 248-335-3346

E-mail address ksilver@hertzschram.com

**Attach Additional Sheets as Required**

Name of Case In Re Rhea Brody Trust

Parties Involved Rhea Brody, Robert Brody, Cathy Deutchman, Jay Brody, Mary Lyneis

Current Status Application for Leave to Appeal to the Supreme Court is pending

Deadlines Response to Application for Leave due from Appellee November 15, 2018

Issue(s) Presented See *In Re Rhea Brody Trust*. The Michigan Court of Appeals in *Brody II* agreed with the analysis of the Probate and Estate Planning Section as to the standing of an adult daughter to challenge the conduct of the Trustee of a revocable trust where the Settlor is incapacitated and the Trustee is also Settlor’s agent.

Michigan Statute(s) or Court Rule(s) at Issue MCR 5.125, MCL 70.7103, MCL 700.7603,  
MCL 700.1105

Common Law Issues/Cases at Issue \_\_\_\_\_

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? The possibility of a decision overturning the Court of Appeals in Brody II would have a profound and negative impact upon the ability of interested persons to protect the interests of the Settlor during periods of Settlor's incapacity as well as their own interests.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? Yes, because an important check against unscrupulous trustees will be removed. During Settlor's lifetime, even while Settlor is incapacitated, the conduct of the Trustee could not be challenged.

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## MEMORANDUM

**TO:** PROBATE AND ESTATE PLANNING COUNCIL  
**FROM:** MICHAEL LICHTERMAN – CHAIR, ELECTRONIC COMMUNICATIONS COMMITTEE  
**SUBJECT:** PROPOSED TECHNOLOGY FOR REMOTE ATTENDANCE AT COUNCIL MEETINGS  
**DATE:** DECEMBER 15, 2018

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As the Council is aware, we are looking into technology to allow remote attendance at Council meetings. To that end, we have investigated several remote attendance software options, talked with individuals who have used each of them, and believe the best option for our Section at this time is Zoom (<https://zoom.us/>). I recommend the Section sign up for a “Pro” account with Zoom. The “Pro” account costs \$15 per month when paid annually up front. The “Pro” account allows for up to 100 remote participants. A “Pro” account is the lowest cost account that does not have a time length restriction for the remote participation. A free account is limited to 40 minutes per session.

I had a conversation with Aaron Algrim from the University Club’s (the “Club”) IT department on December 6, 2018. MSU regularly uses Zoom and he spoke very highly of it. We also discussed what audio solutions the Club has available. They have an eight-microphone system that he believes will work well for our meeting layout and the Zoom software. They have successfully used this microphone system in the Club rooms that we typically use. The cost for the microphone system is \$150 per meeting. That adds up to \$1,350 annually for the 9 meetings we have each year. They would also provide access to a faster and more reliable version of their wireless network for the computer serving as the “host” for the Zoom conference.

If Council approves of the cost for a “Pro” Zoom account and the Club’s microphone system, I anticipate a test run of the system at January’s Council meeting. We would need at least a few individuals willing to connect to the Zoom conference from outside the Council meeting (their office, home, etc.) and provide their feedback on how well the microphones pick up the conversation and their overall experience. We can tweak the system based on their feedback, with the hope of opening it up to all Section members starting in February. I envision providing the Zoom conference registration link for each meeting in the Section’s SBM Connect meeting announcement that goes out to all Section members. I will coordinate with the Section Secretary to provide the Zoom conference registration link for each meeting.

I am requesting that the Council approve the above expenditures for Zoom and the microphone system, and the proposed plan for moving forward with testing and using both systems. I welcome questions and discussion on any of these items.

Respectfully,



Michael Lichterman

Electronic Communications Committee Chair



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**Tax Committee: Tax Nugget**  
**December 15, 2018**

**The Twelve Days before Christmas: An Estate Planner's View**

By Raj A. Malviya

1. On the twelfth day before Christmas, a client said to me: ... You explained that the recent Tax Cuts and Jobs Act<sup>1</sup> impacts our estate plan and also creates planning opportunities... I'm ready to update my plan and follow your recommendations from January.
2. On the eleventh day before Christmas, a client said to me: You explained that with increased exemptions, we should make lifetime transfers before the exemption returns to pre-2018 levels, subject to any clawback risk, which has since been resolved through the recent release of IRS proposed regulations... I'm ready to update my plan and follow your recommendations from January.
3. On the tenth day before Christmas, a client said to me: You explained that I can no longer take miscellaneous itemized deductions through 2025, with the exception of my grandfathered existing mortgage interest, state and local taxes capped at \$10,000, and charitable contributions, with an increase in the deduction cap to 60% of AGI for cash contributions to charity... I'm ready to update my plan and follow your recommendations from January.
4. On the ninth day before Christmas, a client said to me: You explained that the Qualified Charitable Distribution (QCD) rules were extended, and if I'm age 70½ or older, I can transfer up to \$100,000 annually from my IRA directly to a public charity without recognizing that amount as taxable income, and allowing this amount to absorb my RMD's for the year... I'm ready to update my plan and follow your recommendations from January.
5. On the eighth day before Christmas, a client said to me: You explained the inflation adjusted annual gift exclusion is now \$15,000 per person and something about a "Crummey notice" if we setup a trust for their benefit and make gifts to the trust. (I'm at a loss as to why keep saying your planning vehicles are defective and crummy, suggesting they won't work properly?) We have 5 children, 15 grandchildren, and 25 grandchildren... I'm ready to update my plan and follow your recommendations from January.
6. On the seventh day before Christmas, a client said to me: You explained that the proposed regulations eliminating valuation discounts had been withdrawn as overly burdensome and unduly complex, therefore re-enforcing the opportunity to value our closely held company and make transfers of our nonvoting business interests in trusts for our children.... I'm ready to update my plan and follow your recommendations from January.
7. On the sixth day before Christmas, a client said to me: You explained that the basis step up of assets to FMV at death was preserved under the new Tax Act, and that with increased

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<sup>1</sup> See The 2017 Tax Cuts and Jobs Act (PL 115-97, 12/22/2017).

exemptions, I should consider pulling assets out of my deceased spouse's family trust to receive a basis step up at my death, assuming I will not be taxable. You also mentioned if the Trust didn't have flexible enough language for a withdrawal, that a nonjudicial settlement agreement or potential probate court approval may be necessary to authorize the withdrawal...I'm ready to update my plan and follow your recommendations from January.

8. On the fifth day before Christmas, a client said to me: You explained the power of establishing a grantor trust with my spouse as a lifetime beneficiary, and how selling my appreciating assets with built in gain would not trigger capital gain recognition upon the sale, and allow me the flexibility to substitute assets of equivalent value subsequent to the transfer should market or planning conditions change...I'm ready to update my plan and follow your recommendations from January.
9. On the fourth day before Christmas, a client said to me: You explained that after a review of our planning, there is an existing irrevocable Trust that probably has an inclusion ratio for generation skipping tax of greater than zero, and with increased transfer tax exemptions, including GST exemption, I can make a late allocation of my increased GST exemption to the Trust to bring its inclusion ratio to zero to insulate it from any GST tax in the future...I'm ready to update my plan and follow your recommendations from January.
10. On the third day before Christmas, a client said to me: You explained my sibling's nongrantor trust which is ready to be terminated, and that since all miscellaneous itemized deductions have been suspended through 2025, any excess deductions at the trust level that pass out on a Schedule K-1 to beneficiaries will not be able to be used by any beneficiaries who itemize deductions, because they are treated as miscellaneous itemized deductions in the beneficiary's hands. To save the deductions, you thus recommended selling some assets in the trust to recognize gain or alternatively, prolong the trust administration for another year. ...I'm ready to update my plan and follow your recommendations from January.
11. On the second day before Christmas, a client said to me: You explained the new 20% deduction on qualified business income (QBI) earned in a qualified trade or business and that while my brother, a physician, and sister, a lawyer, were screwed under the QBI deduction, but that it may be beneficial to me given my business. You suggested that I have my CPA run projections to compare it to the new 21% tax rate that would apply if my business is a C Corporation...I'm ready to update our plan and follow your recommendations from January.
12. On the first day before Christmas, a client said to me: You explained that if I get divorced, the expected alimony I will pay, which will be significant and I'll definitely need as a deduction, will no longer be deductible if the divorce is finalized or separation agreement is executed after December 31, 2018...I'm ready to update my plan and follow your recommendations from January.

**Happy Year-End.**

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**To: Probate and Estate Planning Council**

**From: Legislation Development and Drafting Committee**

**Re: December 2018 Committee Report**

Our Committee offers the following updates:

- **Omnibus.** The EPIC Omnibus has been introduced in the form of HB 6467, 6468, 6470, and 6471. We've received no updates regarding these bills, but have provisional plans for offering testimony on short notice, if necessary. If this does not pass this legislative session, our sponsors will still be in the Legislature.
- **Certificates of trust (HB 5362 and 5398).** These bills passed in the House and have been assigned to the Senate Judiciary Committee. If this does not pass this legislative session, our sponsors will still be in the Legislature.
- **Probate.** Aaron Bartell and Dan Hilker have drafted a "decision document." The CSP will likely review the decision memo this month. Our committee will likely begin answering some of the questions posed in Aaron and Dan's memo.
- **Entireties trusts (SB 905).** Nothing to report. We are keeping this in mind for next session. The sponsor, Rick Jones, is term-limited out of the House and Senate, so a new sponsor would be needed.
- **Attorney-in-Fact's Authority to Create a Trust.** Nothing to report. This will not be included in the EPIC omnibus. We are keeping this in mind for next session.
- **SLATs.** Nothing to report. We are keeping this in mind for next session.
- **Protective order notice fix.** At our last meeting, Heidi Aull presented an interesting potential project involving notice deficiencies in PO proceedings that alter a person's estate planning arrangements. This could entail statutory or court rule amendments. More to come.

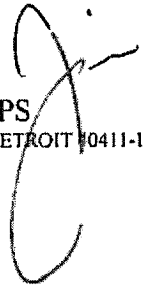
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M E M O R A N D U M

**To:** Council of the Probate and Estate Planning Section of the State Bar of Michigan  
**From:** James P. Spica  
**Re:** Divided and Directed Trusteeships *ad Hoc* Committee (DDTC) Chair's Report  
**Date:** December 7, 2018

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House Bills 6129, 6130, and 6131(embodying the DDTC legislative proposal) passed in the House—Yeas 109, Nays 0—on November 28. The bills were referred to the Senate Committee on Judiciary and placed on the agenda for the Committee's December 11 meeting. I shall be there to testify—with fingers crossed and time's winged chariot at my back.

  
JPS  
DETROIT #0411-1 1416471v11