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 16, 2017
9:00 am
University Club
3435 Forest Road
Lansing, Michigan 48910
Probate and Estate Planning Section of the
State Bar of Michigan

Notice of Meetings

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

December 16, 2017
9:00 a.m.
University Club
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.

David P. Lucas, Secretary

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

Meeting Schedule for 2017-2018

December 16, 2017
January 20, 2018
February 17, 2018
March 24, 2018
April 21, 2018
June 16, 2018
September 8, 2018 (Annual Section Meeting)
CALL FOR MATERIALS

Council Meetings of the Probate and Estate Planning Section

Due dates for Materials for Committee on Special Projects

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

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

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

Due dates for Materials for Council Meeting

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

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

January 12, 2018
February 9, 2018
March 16, 2018
April 13, 2018
June 8, 2018
August 31, 2018
## Officers of the Council for 2017-2018 Term

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

## Council Members for 2017-2018 Term

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

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; 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
<table>
<thead>
<tr>
<th>Action Pending</th>
<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Priority Items</th>
<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Directed and Divided Trusts - EPIC/MTC Updates (with COLA) - MTC Notice Fix</td>
<td>- e-filing in courts - SCAO Meetings* - New forms based on EPIC/MTC updates legislation</td>
<td>- who does the attorney for the fiduciary represent? - Mardigian legislative fix</td>
<td>- Communications with members* - Social events for Section members - Liaise with local bar associations - Social media &amp; website* - Brochures* - Annual Institute/ICLE seminars*</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Secondary Priority</th>
<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Standby Guardians for minors and LIs - Premarital and Marital Agreements Act - Guardianship, Conservatorship, and Other protective Arrangements Act - Expand Personal Residence Exemption - attorney for the fiduciary (Perry v Cotton issue) - Agents to settle trusts - Breakey fix – PRE</td>
<td>- Review Ch. 5 of MCR for potential updates (incl. attorney representation, but not fiduciary exception)</td>
<td>- -</td>
<td>- Opportunities with ICLE -</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Priority To Be Determined</th>
<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
</tr>
</thead>
</table>
- HB 4589 / SB 345?—financial exploitation; 65 y.o. vulnerable adults in financial transactions
- HB 5037 implanting tracking device in wards
- SB 49 compensation for professional guardian
- ??Dignified Death (Family Consent) Act
- HB 4905PRE after death & nursing home
- Passed in the 2015-16 Legislative Session but we want to review/suggest changes:
  - Probate court jurisdiction over G/C proceedings (SB 270 (PA 498 of 2016) which added Sections 5301b & 5402a to EPIC.
- ??Update to uniform voidable transactions act (SB 982 (PA 552 of 2016) which amended secs. 1-3 of MCL 566.31 and adds secs. 14-15.
- Did not pass in the 2015-16 Session and will need to be reintroduced:
  - ILIT trustee exoneration bill (SB 1010)
- Pending/working with Bankers:
  - Tenants by Entirety Property bill

*ongoing
Updated Bills or Resolutions:

- HB 4171 of 2017
  Probate; guardians and conservators; physician orders for scope of treatment form; authorize a guardian to sign. Amends secs. 1106, 5303, 5305 & 5314 of 1998 PA 386 (MCL 700.1106 et seq.). TIE BAR WITH: HB 4170'17
  Last Action: 2/8/2017 bill electronically reproduced 02/07/2017

Updated Bills or Resolutions 2-16-17:

- SB 0039 of 2017
  Probate; other; exceptions to definition of surviving spouse in relation to a funeral representative; revise. Amends sec. 2801 of 1998 PA 386 (MCL 700.2801).
  Last Action: 2/14/2017 referred to Committee on Judiciary

- SB 0049 of 2017
  Probate; guardians and conservators; provision related to compensation for professional guardian or professional conservator; modify.
  Last Action: 2/15/2017 PLACED ON ORDER OF THIRD READING

House Bill 4021 (2017) rss

Sponsor
Robert Kosowski
(click name to see bills sponsored by that person)

Categories
Probate: guardians and conservators; Juveniles: other;
Probate; guardians and conservators; guardianship petitions; allow probate judges to schedule certain hearings before minor turns 18 years of age. Amends secs. 5303 & 5306 of 1998 PA 386 (MCL 700.5303 & 700.5306).

History
(House actions in lowercase, Senate actions in UPPERCASE)

<table>
<thead>
<tr>
<th>Date</th>
<th>Journal</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/12/2017</td>
<td>HJ 2 Pg. 33</td>
<td>introduced by Representative Robert Kosowski</td>
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<tr>
<td>1/12/2017</td>
<td>HJ 2 Pg. 33</td>
<td>read a first time</td>
</tr>
<tr>
<td>1/12/2017</td>
<td>HJ 2 Pg. 33</td>
<td>referred to Committee on Judiciary</td>
</tr>
<tr>
<td>1/18/2017</td>
<td>HJ 4 Pg. 55</td>
<td>bill electronically reproduced 01/12/2017</td>
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</table>
Sponsors
Leslie Love - (primary)Wendell Byrd, Abdullah Hammoud, Bronna Kahle, Jeffrey Noble, Steve Marino, Bettie Cook Scott, Sheldon Neeley, Hank Vaupel, Peter Lucido, Erika Geiss
(click name to see bills sponsored by that person)

Categories
Criminal procedure: evidence; Counties: employees and officers; Property: recording; Criminal procedure: records;

Criminal procedure; evidence; presumption that certain documents affecting real property are forged or counterfeit; create. Amends sec. 248b of 1931 PA 328 (MCL 750.248b).

History
(House actions in lowercase, Senate actions in UPPERCASE)

<table>
<thead>
<tr>
<th>Date</th>
<th>Journal</th>
<th>Action</th>
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</thead>
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<tr>
<td>3/2/2017</td>
<td>HJ 22</td>
<td>Pg. 212 introduced by Representative Leslie Love</td>
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<tr>
<td>3/2/2017</td>
<td>HJ 22</td>
<td>Pg. 212 read a first time</td>
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<td>HJ 22</td>
<td>Pg. 212 referred to Committee on Judiciary</td>
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<tr>
<td>3/7/2017</td>
<td>Expected in HJ 23</td>
<td>bill electronically reproduced 03/02/2017</td>
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CSP Materials
PROBATE & ESTATE PLANNING COUNCIL
AGENDA FOR
COMMITTEE ON SPECIAL PROJECTS

December 16, 2017

Legislation Development and Drafting Committee (9:00 - 9:55 am). Further discussion of the omnibus EPIC legislation. See attached materials and the following outline:

- **Subsequent administration** (since our recommendations concerning section 3959 weren’t included in the prior month’s materials)
- **Standby guardians**
  - 531new (primary statute)
  - 5301 (appointment of guardian by will or other writing)
  - 5310 (petition to modify guardianship)
  - 5313 (priority and qualification to serve as guardian)
  - 5314 (guardians duties, particularly reporting requirement concerning standby’s continued willingness to serve)
- **Jumbo small estate procedure** (3982)
- **Other increased financial thresholds and COLA**
  - 1210(2) (general COLA mechanism)
  - 2519 (facility of payment in statutory wills)
  - 3605 (demand for bond)
  - 3916 (disposition of unclaimed assets)
  - 3917 (handling of unclaimed assets by county treasurer)
  - 3918 (distribution out of a decedent’s estate to a disabled person)
  - 3981 (delivery of modest amounts of cash and wearing apparel)
  - 3983 (collection of personal property by affidavit)
  - 5102 (management of assets for a disabled person without appointment of a conservator)
  - 257.236 (MVC provision for administratively transferring decedent’s vehicle titles)
  - 324.80312 (NREPA provision for administratively transferring decedent’s watercraft titles)
  - 554.530 UTMA threshold
- **Pet and purpose trusts** (2722 (current version—to be repealed), 7408 (primary statute—pet trust), 7409 (primary section—noncharitable purpose trust), 7105 (nonwaivable provisions of MTC, particularly re durational limits for purpose and pet trusts), 7110 (others treated as qualified beneficiaries), 7402 (requirements for creating trust))
- **MTC Notice fix** (7103)
- **Previously-approved technical fixes**
  - 1106(1)(r) (re powers of appointment)
  - 2806 (gender-neutral language)
  - 7302 (re powers of appointment/virtual representation)
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>MCL 700.1106</td>
<td>Definitions; M to P</td>
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<tr>
<td>MCL 700.1210</td>
<td>Cost-of-living adjustment</td>
</tr>
<tr>
<td>MCL 700.2519</td>
<td>Statutory will</td>
</tr>
<tr>
<td>MCL 700.3605</td>
<td>Demand for bond by interested person</td>
</tr>
<tr>
<td>MCL 700.2722</td>
<td>Honorary trusts; trusts for pets</td>
</tr>
<tr>
<td>MCL 700.2806</td>
<td>Definitions relating to revocation of probate and nonprobate transfers by divorce; revocation by other changes of circumstances</td>
</tr>
<tr>
<td>MCL 700.3916</td>
<td>Disposition of unclaimed assets</td>
</tr>
<tr>
<td>MCL 700.3917</td>
<td>Duties of county treasurer</td>
</tr>
<tr>
<td>MCL 700.3918</td>
<td>Distribution to person under disability</td>
</tr>
<tr>
<td>MCL 700.3959</td>
<td>Subsequent administration</td>
</tr>
<tr>
<td>MCL 700.3981</td>
<td>Delivery of modest amounts of cash not exceeding $500 and decedent’s wearing apparel</td>
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<tr>
<td>MCL 700.3982</td>
<td>Court order distributing small estates</td>
</tr>
<tr>
<td>MCL 700.3983</td>
<td>Collection of personal property by sworn statement</td>
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<tr>
<td>MCL 700.5102</td>
<td>Payment or delivery</td>
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<tr>
<td>MCL 700.5301</td>
<td>Appointment of guardian for incapacitated individual by will or other writing</td>
</tr>
<tr>
<td>MCL 700.5310</td>
<td>Resignation or removal of guardian</td>
</tr>
<tr>
<td>MCL 700.5313</td>
<td>Guardian; qualifications</td>
</tr>
<tr>
<td>MCL 700.5314</td>
<td>Powers and duties of guardian</td>
</tr>
<tr>
<td>MCL 700.7103</td>
<td>Definitions</td>
</tr>
<tr>
<td>MCL 700.7105</td>
<td>Duties and powers of trustee; provisions of law prevailing over terms of trust</td>
</tr>
<tr>
<td>MCL 700.7110</td>
<td>Others treated as qualified beneficiaries</td>
</tr>
<tr>
<td>MCL 700.7302</td>
<td>Representation; holder of power of appointment</td>
</tr>
<tr>
<td>MCL 700.7402</td>
<td>Creating trust; requirements</td>
</tr>
<tr>
<td>MCL 700.7408</td>
<td>Trust for care of pet</td>
</tr>
<tr>
<td>MCL 700.7409</td>
<td>Noncharitable purpose trust</td>
</tr>
<tr>
<td>MCL 257.236</td>
<td>Procuring title to vehicle acquired by operation of law; validity of registration upon death of owner; application for title by surviving spouse or heir; proof of death; certification; petition</td>
</tr>
<tr>
<td>MCL 324.80312</td>
<td>Certificate of title for watercraft; issuance; compliance; transfer of ownership; requirements; petition for watercraft not owned; proof of ownership and right of possession; statement of lien</td>
</tr>
<tr>
<td>MCL 554.530</td>
<td>Absence of will or authorization to make irrevocable transfer; transfer by personal representative, trustee, or conservator; conditions</td>
</tr>
</tbody>
</table>
MCL 700.1106  Definitions; M to P

(1) As used in this act:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Before February 1, 2001, and annually after 2001 thereafter, the department of treasury shall publish the cost-of-living adjustment factor to be applied to the specific dollar amounts referred to in subsection (1) for decedents who die during that calendar year and in section 7414 for trusts the value of the property of which is insufficient to justify the cost of administration. A product resulting from application of the cost-of-living adjustment factor to a specific dollar amount shall be rounded to the nearest $1,000.00 amount.

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

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

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

MICHIGAN STATUTORY WILL NOTICE

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

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

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

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

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

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

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

INSTRUCTIONS:

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

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

MICHIGAN STATUTORY WILL OF

__________________________________________
(Print or type your full name)

ARTICLE 1. DECLARATIONS

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

I live in ___________________________ County, Michigan.

My spouse is ___________________________________________.
(Insert spouse’s name or write “none”)

My children now living are:

______________________ ______________________
______________________ ______________________
______________________ ______________________
(Insert names or write “none”)

ARTICLE 2. DISPOSITION OF MY ASSETS

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

____________________________________
(Insert name of person or charity)

____________________________________
(Insert address)

AMOUNT OF GIFT (In figures): $ ________________________________

AMOUNT OF GIFT (In words): ____________________________ Dollars

____________________________________
(Your signature)

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

____________________________________
(Insert name of person or charity)

____________________________________
(Insert address)

AMOUNT OF GIFT (In figures): $ ________________________________

AMOUNT OF GIFT (In words): ____________________________ Dollars

____________________________________
(Your signature)

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

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

2.3 ALL OTHER ASSETS.

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

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

(Select only 1)

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

________________________________________________________________________

(Your signature)

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

________________________________________________________________________

(Your signature)

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

3.1 PERSONAL REPRESENTATIVE.

(Name at least 1)

I nominate ____________________________________________

(Insert name of person or eligible financial institution)

of __________________________ to serve as personal representative.

(Insert address)

If my first choice does not serve, I nominate ____________________

________________________________________

(Insert name of person or eligible financial institution)

of __________________________ to serve as personal representative.

(Insert address)

3.2 GUARDIAN AND CONSERVATOR.

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

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

(Insert name of individual)
of ____________________________________________ as guardian and
(Insert address)
_____________________________________________________________

__(Insert name of individual or eligible financial institution) of
____________________________________ to serve as conservator.
(Insert address)

If my first choice cannot serve, I nominate

______________________________________________
(Insert name of individual) of
___________________________________________ as guardian and
(Insert address)

_____________________________________________________________

__(Insert name of individual or eligible financial institution)
of ____________________________________ to serve as conservator.
(Insert address)

3.3 BOND.

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

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

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

_________________________________
(Your signature)

3.4 DEFINITIONS AND ADDITIONAL CLAUSES.
Definitions and additional clauses found at the end of this form are part of this will.

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

_________________________________
(Your signature)

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

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

_________________________________
(Print Name)

_________________________________
(Signature of witness)
The following definitions and rules of construction apply to this Michigan statutory will:

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

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

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

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

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

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

(h) “Person” includes individuals and institutions.

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

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

ADDITIONAL CLAUSES
Powers of personal representative

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

2. The personal representative may distribute estate assets otherwise distributable to a minor beneficiary to the minor’s conservator or, in amounts not exceeding $5,000.00 $25,000\(^{10}\) per year, either to the minor, if married; to a parent or another adult with whom the minor resides and who has the care, custody, or control of the minor; or to the guardian. The personal representative is free of liability and is discharged from further accountability for distributing assets in compliance with the provisions of this paragraph.

POWERS OF GUARDIAN AND CONSERVATOR

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

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

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

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

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

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

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

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

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

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

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

(ii) To the settlor, if then living.

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

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

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

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

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

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

(h) The trust is not subject to the uniform statutory rule against perpetuities, 1988 PA 418, MCL 554.71 to 554.78.
MCL 700.2806  Definitions relating to revocation of probate and nonprobate transfers by divorce; revocation by other changes of circumstances.

As used in this section and sections 2807 to 2809:

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

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

(c) “Divorced individual” includes, but is not limited to, an individual whose marriage has been annulled.

(d) “Governing instrument” means a governing instrument executed by a divorced individual before the divorce from, or annulment of his or her marriage to, his or her former spouse.

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

(f) “Revocable” means, with respect to a disposition, appointment, provision, or nomination, one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his or her former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself or herself in place of his or her former spouse or in place of his or her former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.
MCL 700.3916 Disposition of unclaimed assets

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

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

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

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

(2) As an alternative to deposit with the county treasurer under subsection (1), if the amount involved for a person described under subsection (1)(a) or (b) is $250.00\(^\text{12}\) $1,000.00 or less, the fiduciary may distribute the amount as part of the residue of the decedent’s estate or to those entitled to the trust fund balance. If the fiduciary has property other than money that belongs to a person described in subsection (1)(a) or (b), the fiduciary may sell the property for the purpose of reducing it to money to be deposited with the county treasurer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

      ii) The distribution is in amounts not exceeding $5,000.00$25,000.00 a year or property not exceeding $5,000.00$25,000.00 in value, unless the court authorizes a higher amount or value.\textsuperscript{15}

\textsuperscript{14} If this figure were subject to COLA under section 1210, it would be $7,475.00 today.
\textsuperscript{15} We believe that it is appropriate to revise mandatory bond and restricted account requirements. Currently, Section 3982 is statutorily tied to section 5410, which requires a conservator to be bonded.
A person receiving money or property for an individual under legal
disability shall use the money or property only for that individual’s support
and for reimbursement of out-of-pocket expenses for goods and services
necessary for that individual’s support. Excess money and property shall be
preserved for the individual’s future support. The personal representative is
not responsible for the proper use of money or property by the recipient if
distribution is made under the authority of this section.

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

Under the committee’s proposal, a probate court will not be required to impose a bond or restrict account
requirement on a conservator if the liquid assets are less than $100,000. To be clear, the Committee’s
proposal would maintain probate courts’ discretion to impose these requirements. The Committee is
suggesting these changes for three reasons:
(a) Bond can be uneconomical, particularly in smaller matters. In some regions, insurers are
routinely requiring that attorneys be the signatories on even smaller accounts. Between the cost of bond
and mandatory lawyer involvement, this statute can impose costs disproportionate to the risks mitigated.
(b) While restricted accounts are a good alternative, practitioners occasionally experience
significant difficulties in getting a financial institution to agree to hold a restricted account for the
fiduciary.
(c) Fundamentally, the Committee believes that probate judges are well able to evaluate the
risks and benefits of bond requirements without the current heavy-handed statutory mandate. In many if
not most cases, we expect that probate courts will still impose bond, but our suggested change will give
probate courts a bit more latitude.
MCL 700.3959 Subsequent administration.

If estate property is discovered after an estate is settled and either the personal representative is discharged or 1 year has expired after a closing statement is filed, or if there is other good cause to reopen a previously administered estate, including an estate administratively closed, upon petition of an interested person and notice as the court directs, the court may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this act apply as appropriate. A claim previously barred shall not be asserted in the subsequent administration.

(1) The court may reopen an estate if any of the following is true:

(a) Estate property is discovered after the estate is settled and either the personal representative is discharged or 1 year has expired after a closing statement is filed.

(b) There is other good cause to reopen a previously administered estate, including an estate administratively closed, upon petition of an interested person and notice as the court directs.

(2) The court may appoint the same or a successor personal representative to administer the estate.

(3) If a new appointment is made, unless the court orders otherwise, the provisions of this act apply as appropriate.

(4) A claim previously barred shall not be asserted in the subsequent administration.

Commented [NP2]: This language has, in at least one circumstance, caused unnecessary mischief. The clear import of this statute—and the implementing SCAO form, PC 607—is to allow reopening of an estate if it was not completely administered, even if there is no newly-discovered property. The balance of the suggested changes aim to improve readability.

Commented [NP3]: We may recommend some additional changes, here, before we ask for a CSP vote. The existing statute’s framework regarding applications vs. petitions is somewhat muddled and does not align particularly well with the SCAO form, which does work well in practice.
MCL 700.3981 Delivery of modest amounts of cash not exceeding $500 and
decedent’s wearing apparel

(1) A hospital, convalescent or nursing home, morgue, or law enforcement
agency holding $500.00\(^{16}\) $1,000.00 or less and wearing apparel of a
decedent may deliver the money and wearing apparel to an individual
furnishing identification and a sworn statement that the individual is the
decedent’s spouse, child, or parent and that there is no application or petition
pending for administration of the decedent’s estate. The hospital, home,
morgue, or law enforcement agency making the delivery is released to the
same extent as if delivery were made to a legally qualified personal
representative of the decedent’s estate and is not required to see to the
property’s disposition. The individual to whom delivery is made is
answerable for the property to a person with a prior right and accountable to
a personal representative of the decedent’s estate appointed after the
delivery.

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

\(^{16}\) If this figure were subject to COLA under section 1210, it would be $747.50 today.
MCL 700.3982 Court order distributing small estates

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

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

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

(1) Upon the filing of a petition under this section, upon a showing of evidence, satisfactory to the court, that this section’s requirements have been satisfied, the court may enter an order allowing immediate distribution of a decedent’s assets to the persons entitled to them.

(2) To obtain an order under this section, petitioner must make a satisfactory showing of the following:

(a) The decedent was domiciled in the county at the time of death, or if not a Michigan resident, owned property located in the county at the time of death.
The following have been paid, or will be paid under the order, up to the value of the assets described in the petition: (i) the reasonable costs of administration, (ii) the decedent’s funeral and burial expenses, (iii) all applicable exemptions and allowances, and (iv) the decedent’s debts.

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

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

(a) The petitioner’s interest.
(b) The decedent’s name, place and date of death, and age.
(c) The decedent’s county and state of domicile at the time of death.
(d) The names and addresses of the spouse, children, devisees, and heirs with the ages of those who are minors so far as known or ascertainable with reasonable diligence by the petitioner.
(e) If the decedent was not domiciled in the state at the time of the decedent’s death, a statement showing venue.
(f) If the decedent appears to have died with a valid will, all of the following:¹⁷

(i) That the original of the decedent’s last will is in the court’s possession or accompanies the petition, or that an authenticated copy of a will in the possession of the probate court or county clerk of another jurisdiction accompanies the petition.
(ii) That, to the best of the petitioner’s knowledge, the will was validly executed.
(iii) That, after the exercise of reasonable diligence, the petitioner is unaware of an instrument revoking the will and

¹⁷ These provisions are intended to track with EPIC’s informal opening procedure.
that the petitioner believes the instrument is the decedent’s last will.

(iv) The name of the person who would hold priority to appointment as personal representative under section 3203.

(g) A description of the property right or interest that the petitioner seeks to have determined, including, the legal description of any real property and the decedent’s interest in it.

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

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

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

(k) Either of the following, as applicable:

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

(ii) The decedent appears to have died testate, an application or petition for the appointment of a personal representative is not pending or has not been granted in any jurisdiction, and the person who has priority to serve as personal representative under the decedent’s will has consented in writing to use of this procedure.\(^{18}\)

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

\(^{18}\) This is an innovation to address the personal representative’s priority to serve.
The proposed distributees are entitled to distribution of the property under section 3101 of the Estates and Protected Individuals Code, subject to the limitations described in subsection (6).

The following shall accompany the petition:

(a) The decedent’s original will, if applicable.

(b) A certified copy of the decedent’s death certificate.

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

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

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

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

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

Another innovation to ensure that the PR with priority consent to the use of this procedure.

To protect creditors’ interests, and as a counterbalance the speed and ease of this procedure, this notice requirement is included. This reference to known creditors is intended to take on the same meaning as in MCL 700.3801(1) (“For purposes of this section, the personal representative knows a creditor of the decedent if the personal representative has actual notice of the creditor or the creditor’s existence is reasonably ascertainable by the personal representative based on an investigation of the decedent’s available records for the 2 years immediately preceding death and mail following death.”).
(6) Up to the value of property received under this section, every distributee is responsible for: (a) the reasonable costs of administration, (b) the expenses for the decedent’s funeral and burial, (c) all applicable exemptions and allowances, and (d) the decedent’s unsatisfied debts that become known up to 63 days after the date of the order. The court shall state in the order the condition on the distribution of property provided by this subsection.

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

(8) If an interested person, or a person who has a right or cause of action that cannot be enforced without administration, objects to the transfer of the decedent’s assets under section: (a) petitioner shall be required to commence formal proceedings of the decedent’s estate under Article III, Part 4, and (b) the opposing party shall state all objections under section 3404.

(9) If a decedent’s estate meets the criteria for using the procedure under either this section or section 3983 and if a person is authorized by this act to use either procedure, a person, other than the court, shall not require the authorized person to use 1 procedure rather than the other.

(10) A dollar amount prescribed by this section shall be adjusted as provided in section 1210.
MCL 700.3983  Collection of personal property by sworn statement

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

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

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

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

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

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

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

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

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

(1) A person under a duty to pay or deliver money or personal property to a minor may perform this duty by paying or delivering the money or property, in an aggregate value that does not exceed $5,000.0021 $25,000.00 each year, to any of the following:

(a) The minor if he or she is married.

(b) An individual having the care and custody of the minor with whom the minor resides.

(c) A guardian of the minor.

(d) A financial institution incident to a deposit in a state or federally insured savings account in the sole name of the minor with notice of the deposit to the minor.

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

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

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

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

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

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

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

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

(5) A standby guardian has no authority to act unless the guardian dies, becomes either permanently or temporarily unavailable, or one of the following occurs:

(a) the guardian dies.

(b) the guardian becomes permanently unavailable, or

(c) the guardian is temporarily unavailable.

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

Upon assuming office, the standby guardian shall promptly notify the court, any known agent appointed under a power of attorney executed pursuant to section 5103, and interested persons. Upon receiving notice, the court may enter an order appointing the standby guardian as guardian without the need for additional proceedings. The guardian shall serve this order on the interested persons.
MCL 700.5301  Appointment of guardian for incapacitated individual by will or other writing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) If none of the persons as designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106.
Whenever meaningful communication is possible, a legally incapacitated individual’s guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward’s care, custody, and control, but is not liable to third persons by reason of that responsibility for the ward’s acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) Medical treatment received by the ward.

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

(vii) Services received by the ward.

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

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

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

As used in this article:

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

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

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

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

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

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

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

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

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

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

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

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

(Except as provided in subparagraph (iv), “qualified trust beneficiary” means a trust beneficiary the settlor’s (or settlors’) intent to benefit whom is a material purpose of the trust and at least 1 of at least one of subparagraphs (i) through (iii) applies to whom 1 or more of the following apply on the date the trust beneficiary’s qualification is determined:

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

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

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

(iv) If on the date the trust beneficiary’s qualification is determined, there is no beneficiary of the trust described in subparagraph (i), (ii), or (iii) the settlor’s (or settlors’) intent to benefit whom is a material purpose of the trust, then the term qualified trust beneficiary means merely a trust beneficiary to whom at least 1 of subparagraphs (i) through (iii) applies on that date.

22 The intuitive idea here is just that if the settlor authorizes a distribution to a beneficiary B merely to avoid a resulting trust, the benefit to B is incidental to the trust’s purposes.
(h) “Revocable”, as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

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

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

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

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

   (i) The person has a present or future beneficial interest in a trust, vested or contingent.
   
   (ii) The person holds a power of appointment over trust property in a capacity other than that of trustee.

(m) “Trust instrument” means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.
(n) “Trust protector” means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

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

   (ii) The holder of a power of appointment, if the holder does not hold the power in a fiduciary capacity.²³

²³ The changes in subsection 14 have already been approved by Council. In its current form, Michigan Trust Code (MTC) section 7103’s definition of ‘trust protector’ excludes the settlor of a trust and the holder of a power of appointment. Yet a decanting trustee (an attorney-in-fact who creates a trust pursuant to a durable power of attorney, a conservator, etc.) may find it in the beneficiaries’ (the principal’s, the protected individual’s, etc.) best interest (1) to transfer assets to an independent trustee, (2) to retain powers to direct that trustee, and (3) to expect to exercise the retained powers in a fiduciary capacity. Furthermore many of the powers settlors grant nontrustee “protectors” amount to powers of appointment within the meaning of the Powers of Appointment Act. It is hard to see why trust beneficiaries and settlors in these cases should be deprived of the facility and protections of MTC section 7809. The following proposed amendments to section 7103 are designed to allow settlors who create trusts while acting as fiduciaries and the holders of fiduciary powers of appointment to be treated as “trust protectors” within the meaning of the MTC
Duties and powers of trustee; provisions of law prevailing over terms of trust

(1) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

(2) The terms of a trust prevail over any provision of this article except the following:

(a) The requirements under section 7401 for creating a trust.

(b) The duty of a trustee to administer a trust in accordance with section 7801.

(c) The requirement under section 7404 that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(d) The durational limits specified in section 7408 for trusts for the care of animals and in section 7409 for other noncharitable purpose trusts.

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

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

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

(h) The power of the court under section 7708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.

(i) Except as permitted under section 7809(2), the obligations imposed on a trust protector in section 7809(1).
(j) The duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.

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

(l) The effect of an exculpatory term under section 7809(8) or 7908.

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

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

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

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

(q) The requirement under section 7113 that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.
(1) A charitable organization expressly named in the terms of a trust to receive distributions under the terms of a charitable trust has the rights of a qualified trust beneficiary under this article if 1 or more of the following are applicable to the charitable organization on the date the charitable organization's qualification is being determined:

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

(b) The charitable organization would be a distributee or permissible distributee of trust income or principal on the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions.

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

(2) A person appointed to enforce a trust created for the care of an animal under section 7408 or another noncharitable purpose as provided in section 2722 trust under section 7409 has the rights of a qualified trust beneficiary under this article.

(3) The attorney general of this state has the following rights with respect to a charitable trust having its principal place of administration in this state:

(a) The rights provided in the supervision of trustees for charitable purposes act, 1961 PA 101, MCL 14.251 to 14.266.

(b) The right to notice of any judicial proceeding and any nonjudicial settlement agreement under section 7111.
MCL 700.7302 Representation; holder of power of revocation or amendment or power of appointment.

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

(2) For purposes of this section:

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

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

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

(1) A trust is created only if all of the following apply:

(a) The settlor has capacity to create a trust.

(b) The settlor indicates an intention to create the trust.

(c) The trust has a definite beneficiary or is either of the following:

(i) A charitable trust.

(ii) A trust for a noncharitable purpose under section 7409 or a trust for the care of an animal under section 7408, as provided in section 2722.

(2) The trustee has duties to perform.

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

(1) A trust may be created to provide for the care of a designated domestic or pet animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than 1 domestic or pet animal alive during the settlor’s lifetime, upon the death of the last surviving such animal.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal(s) for which the trust is created may request the court to appoint a person to enforce the trust or to remove a person appointed.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.
MCL 700.7409

Noncharitable purpose trust

Except as otherwise provided in section 7408 or by another statute, the following rules apply:

(a) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may be performed by the trustee according to the trust’s terms for up to 25 years, but no longer, whether or not the terms of the trust contemplate a longer duration.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.

Commented [NP12]: Please see Jim Spica’s introductory memo, which is included in your CSP materials.
MCL 257.236 [Motor Vehicle Code; Administration, Registration, Certificate of Title and Anti-Theft] Procuring title to vehicle acquired by operation of law; validity of registration upon death of owner; application for title by surviving spouse or heir; proof of death; certification; petition

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

(2) If an owner of 1 or more vehicles, which vehicles do not have a total value of more than $60,000.00\(^{25}\) $100,000.00, dies and the owner does not leave other property that requires issuance of letters as provided in section 3103 of the estates and protected individuals code, 1998 PA 386, MCL 700.3103, the owner’s surviving spouse, or an heir of the owner in the order specified in section 2103 of the estates and protected individuals code, 1998 PA 386, MCL 700.2103, may apply for a title, after furnishing the secretary of state with proper proof of the death of the registered owner, attaching to the proof a certification setting forth the fact that the applicant is the surviving spouse or an heir. Upon proper petition, the secretary of state shall furnish the applicant with a certificate of title.

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

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\(^{25}\) If this figure were subject to COLA under section 1210, it would be $89,700.00 today.
“Cost-of-living adjustment factor” means a fraction, the numerator of which is the United States consumer price index for the prior calendar year and the denominator of which is the United States consumer price index for 2017. As used in this subdivision, “United States consumer price index” means the annual average of the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics, or its successor agency, and as certified by the state treasurer.

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

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

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

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

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

(d) As provided in subsection (3).

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

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

(b) Pay the fee prescribed in section 80311.

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

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

(a) The record owner of the registered watercraft dies without leaving other property that requires the procurement of letters under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102.
(b) The total value of the deceased owner’s interest in all watercraft subject to the petition for a certificate or certificates of title under this section is $100,000.00\textsuperscript{26}$ or less, as adjusted for each calendar year beginning January 1, 2017.

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

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

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

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

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

(i) The surviving spouse of the watercraft owner.

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

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

\textsuperscript{26} If this figure were subject to COLA under section 1210, it would be $149,500.00 today.
(i) The death of the owner of each watercraft for which a certificate of title is sought.

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

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

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

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

(3) A transfer under subsection (1) or (2) may be made only if the personal representative, trustee, or conservator considers the transfer to be in the best interest of the minor; the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument; and, if the transfer exceeds $10,000.00 $50,000.00 in value, the transfer is authorized by the court.
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan Legislation Development & Drafting Committee

From: James P. Spica

Re: Pet and Other Noncharitable Purpose Trusts Proposal

Date: October 24, 2017

I. Preferring the UTC Provisions for Pet and Other Noncharitable Purpose Trusts to Those of the UPC

Estates and Protected Individuals Code (EPIC) section 2722\(^1\) needs fixing up as a statutory home for the pet trusts and other noncharitable purpose trusts\(^2\) it currently purports to authorize.\(^3\) That is largely due to the improvidence of section 2722(3)(h), which provides: “The trust is not subject to the uniform statutory rule against perpetuities.”\(^4\) That subsection, which has no counterpart in the Uniform Probate Code (UPC) provision—UPC section 2-907—on which section 2722 is otherwise modeled,\(^5\) has two unwelcome effects: (1) it deprives the holder of a special power of appointment (over a Michigan pet or other noncharitable purpose trust) of protection against the so-called Delaware tax trap\(^6\) that would otherwise be provided directly by the Michigan uniform statutory rule against perpetuities (USRAP) (with respect to real property)\(^7\) and indirectly through the Michigan personal property trust perpetuities act (PPTPA) (with respect to personal property);\(^8\) and (2) it arguably sanctions pet trusts of (potentially) infinite duration.\(^9\)

\(^1\) MICH. COMP. LAWS § 700.2722(1).


\(^3\) See Mich. Comp. Laws § 700.2722(1)-(2).

\(^4\) Id. § 700.2722(3)(h).


\(^7\) See Mich. Comp. Laws §§ 556.124(1) (relation-back rule for special powers of appointment), 554.72(1) (specifying alternative finite perpetuities testing periods for property subject to USRAP), 554.93 (PPTPA’s exemption from USRAP applicable only to personal property held in trust).

\(^8\) See id. § 554.93 (PPTPA’s anti-Delaware-tax-trap provision invoking amended USRAP provisions for finite testing period).

\(^9\) “[A] trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust.” Id. § 700.2722(2) (emphasis added). The second sentence just quoted arguably rules out an interpretation of the first sentence that would prevent a breeder, for example, from creating a pet trust for several distinguished “show” animals and the progeny of each. Cf. Unif. Trust Code § 408(1), 7C U.L.A. 490 (2006) (pet trust may be created to provide for care of an animal alive during the settlor’s lifetime).
Both of those problems can be averted by simply repealing subsection (3)(h), but they and some other problems that are, perhaps, practically less significant can also be avoided by the wholesale repeal of section 2722 in favor of the more recently promulgated Uniform Trust Code (UTC) provisions on pet and other noncharitable purpose trusts, UTC sections 408 and 409. The Committee considers the confluence of these UTC provisions a more elegant implementation (and statutory positioning, for a UTC state) of the policies currently expressed in Michigan by EPIC section 2722 apart from subsection (3)(h). Therefore, section 2722 is supplanted in the proposal below by two new Michigan trust code (MTC) provisions, sections 7408 and 7409, which import the UTC provisions for pet and other noncharitable purpose trusts.

II. Measuring the Lives of Noncharitable Purposes

In substituting the UTC provisions on pet and other noncharitable purpose trusts for those of the UPC (on the latter of which EPIC section 2722 is based), the Committee has accepted the Uniform Law Commission’s invitation—delivered in the form of brackets (“[ . . . ]”) in the texts of both UPC section 2-907 and UTC section 409—to consider whether, as a matter of policy, twenty-one years is the appropriate tolerance for non-pet, noncharitable purpose trusts. EPIC section 2722’s twenty-one year tolerance is presumably a reference to the testing periods of the common-law rules against perpetuities and accumulation of income and of the former statutory rule against suspension of absolute ownership or the power of alienation. But excepting personal property previously held in certain trusts that were irrevocable on September 25, 1985 (which trusts the statute tags “special appointee trusts”), PPTPA makes all of those rules irrelevant to the validity of interests in personal property held in trusts created after May 28, 2008. And for interests in “special appointee trusts,” in personal property in pre-May 28, 2008 trusts, in personal property not held in trust, and in real property, the USRAP provides a ninety-year wait-and-see period as an alternative to the common-law testing period. So, a reference in this context to the common-law perpetuities testing period as such is unmeaning.

The Committee has therefore resisted complacency: in the proposal below, new MTC section 7409 provides that a non-pet, noncharitable purpose trust can be performed for up to twenty-five years. Of course, the number twenty-five is no more magical in this context than the
number twenty-one, but rounding down (to twenty years) would deprive enthusiasts of the trusts in question of a whole year of liberty to which they would have been entitled had the Committee resolved on complacency—had the Committee preferred, that is, to continue the now pointless tradition of adverting in this context to the perpetuities testing period. The Committee has therefore preferred to round up.

A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by deleting (and reserving the numerical designation of) section 2722, by amending sections 7105, 7110, and 7402 as amended by 2009 PA 46 and 2010 PA 325, and by adding new sections 7408 and 7409.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700. 7222[Reserved] Honorary trusts; trusts for pets

Sec. 2722.[Reserved] (1) Except as provided by another statute and subject to subsection (3), if a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee, and if there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for 21 years, but no longer, whether or not the terms of the trust contemplate a longer duration.

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

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

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

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

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

(ii) To the settlor, if then living.

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

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

(c) For the purposes of sections 2714 to 2716, the residuary clause is treated as creating a future interest under the terms of a trust.

(d) The intended use of the principal or income may be enforced by an individual designated for that purpose in the terms of the trust or, if none, by an individual appointed by a court upon petition to it by an individual. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or remove a person appointed.
(e) Except as ordered by the court or required by the terms of the trust, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

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

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

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

700.7105 Duties and powers of trustee; provisions of law prevailing over terms of trust

Sec. 7105. (1) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

(2) The terms of a trust prevail over any provision of this article except the following:

(a) The requirements under section 7401 for creating a trust.

(b) The duty of a trustee to administer a trust in accordance with section 7801.

(c) The requirement under section 7404 that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(d) The durational limits specified in section 7408 for trusts for the care of animals and in section 7409 for other noncharitable purpose trusts.

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

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

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

(gh) The power of the court under section 7708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.

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

(i) The duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.

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

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

(lm) The rights under sections 7910 to 7913 of a person other than a trustee or beneficiary.
Periods of limitation under this article for commencing a judicial proceeding.
The power of the court to take action and exercise jurisdiction.
The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 7203 and 7204.
The requirement under section 7113 that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

700.7110 Others treated as qualified beneficiaries

Sec. 7110. (1) A charitable organization expressly named in the terms of a trust to receive distributions under the terms of a charitable trust has the rights of a qualified trust beneficiary under this article if 1 or more of the following are applicable to the charitable organization on the date the charitable organization's qualification is being determined:
(a) The charitable organization is a distributee or permissibl e distributee of trust income or principal.
(b) The charitable organization would be a distributee or permissibl e distributee of trust income or principal on the termination of the interests of other distributees or permissibl e distributees then receiving or eligible to receive distributions.
(c) The charitable organization would be a distributee or permissibl e distributee of trust income or principal if the trust terminated on that date.
(2) A person appointed to enforce a trust created for the care of an animal under section 7408 or another noncharitable purpose as provided in section 2722 has the rights of a qualified trust beneficiary under this article.
(3) The attorney general of this state has the following rights with respect to a charitable trust having its principal place of administration in this state:
(a) The rights provided in the supervision of trustees for charitable purposes act, 1961 PA 101, MCL 14.251 to 14.266.
(b) The right to notice of any judicial proceeding and any nonjudicial settlement agreement under section 7111.

700.7402 Creating trust; requirements

Sec. 7402. (1) A trust is created only if all of the following apply:
(a) The settlor has capacity to create a trust.
(b) The settlor indicates an intention to create the trust.
(c) The trust has a definite beneficiary or is either of the following:
(i) A charitable trust.
(ii) A trust for a noncharitable purpose under section 7409 or a trust for the care of an animal as provided in section 7408 as provided in section 2722.
(d) The trustee has duties to perform.
(e) The same person is not the sole trustee and sole beneficiary.
(2) A trust beneficiary is definite if the trust beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(3) A power in a trustee to select a trust beneficiary from an indefinite class is valid only in a charitable trust.

**700.7408 Trust for care of pet**

Sec. 7408. (1) A trust may be created to provide for the care of a designated domestic or pet animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than 1 domestic or pet animal alive during the settlor’s lifetime, upon the death of the last surviving such animal.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal(s) for which the trust is created may request the court to appoint a person to enforce the trust or to remove a person appointed.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.

**700.7409 Noncharitable purpose trust**

Sec. 7409. Except as otherwise provided in section 7408 or by another statute, the following rules apply:

(a) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may be performed by the trustee according to the trust’s terms for up to 25 years, but no longer, whether or not the terms of the trust contemplate a longer duration.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

December 16, 2017
Lansing, Michigan

Agenda
10:15-12:00

1. Call to Order
2. Introduction of Guests
3. Excused Absences
4. Minutes of November 11, 2017 Meeting of the Council
   Attachment 1
   Attachment 2
   Vote of Council to approve Budget
6. Chairperson’s Report – Marlaine Teahan
   Attachment 3
7. Presentation on SBM Connect -- Andrew Marks
   Attachment 4
   15 minutes presentation, 5-10 minutes questions
8. Committee Reports
   A. Tax Committee – Raj Malviya
      Oral Report and Tax Nugget, Attachment 5
      10 minutes
   B. Amicus Curiae Committee – David Skidmore
      Requesting a vote to file a motion for leave to file an amicus brief in the Erwin case. Attachment 6 includes a Committee report and a minority view from a Committee member.
      Public Policy Position
      15 minutes
C. Court Rules, Forms, & Proceedings Committee – Melisa Mysliwiec

Attachment 7, Committee’s report including request for Council vote opposing HB 5073 in its current form and suggesting revisions to be finalized in January (see pages 2-3 of Committee report), updates on new SCAO Court Forms, and updates on HB 4821 and 4822.
Public Policy Position for HB 5073
15 minutes

D. Guardianship, Conservatorship, and End of Life Committee – Rhonda Clark

Attachment 8, Committee’s report including request for Council vote opposing in their current form HB 5075, HB 5076, and SB 713; and suggestion of taking no position on the proposed change to MCR 3.903.
Public Policy Position for HB 5075 and HB 5076 and SB 713
20 minutes

E. State Bar & Section Journals Committee – Rick Mills

Attachment 9, Council vote needed approving publication of Section's Journal.

9. Written Reports Without Oral Presentation

- Divided and Directed Trusteeship Committee Attachment 10
- Uniform Law Commission Liaison Report Attachment 11
- Tax Section Liaison Report Attachment 12
- Legislative Monitoring Committee – Report of Bills being watched – report is attached to the SBM Connect Section Library.

10. Other Business -- Mardigian update (If time permits.)

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

November 11, 2017
Lansing, Michigan

Minutes

1. Call to Order: The Chair of the Section, Marlaine C. Teahan, called the meeting to order at 10:30 am.

2. Introduction of Guests and attendance.
   a. meeting attendees introduced themselves
   b. The following officers and members of the Council were present:
      Marlaine C. Teahan, Chair
      Marguerite Munson Lentz, Chair Elect
      Christopher A. Ballard, Vice Chair
      David P. Lucas, Secretary
      David L.J.M. Skidmore, Treasurer
      Rhonda M. Clark-Kreuer
      Kathleen M. Goetsch
      Nazneen Hasan
      Angela M. Hentkowski
      Michael L. Jaconette
      Robert B. Labe
      Michael G. Lichterman
      Raj A. Malviya
      Richard C. Mills
      Melisa M.W. Mysliwiec
      Lorraine F. New
      Kurt A. Olson
      Nathan R. Piwowarski
      Christine M. Savage
      Geoffrey R. Vernon
      A total of 20 Council officers and members were present, constituting a quorum

3. Absences
   a. The following officers and members of the Council were absent with excuse:
      Christopher J. Caldwell
      Mark E. Kellogg
      Katie Lynwood

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

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Probate and Estate Planning Section of
the State Bar of Michigan
on November 11, 2017

   c. The following ex-officio members of the Council were present:
      George W. Gregory
      Michael J. McClory

d. The following liaisons to the Council were present:
   Jeff Kirkey
   James P. Spica

e. Others present:
   Aaron Bartell
   Ryan Bourjaily
   Daniel Borst
   Kim Browning
   Ellen “Molly” Burns
   Georgette David
   Daniel Hilker
   J. David Kerr
   Andy Mayoras
   Gabrielle Mckee
   Sueann T. Mitchell
   Neal Nusholtz
   Scott Robbins
   Jim Ryan
   Mike Shelton
   Joan Skrzyniarz

4. Minutes of October 14, 2017 Meeting of the Council: it was moved and seconded to approve the Minutes of the October 14, 2017 meeting of the Council, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

5. Chair’s Report – Marlaine C. Teahan: The Chair reviewed the Chair’s Report which was included with the meeting agenda materials. There was discussion regarding the Report, including the Chair’s appointment of Dan Borst as the Council’s liaison to the Michigan Bankers Association. The Treasurer of the Council, David L.J.M. Skidmore, requested that Council members contribute $35 as an annual contribution to the Council’s Hearts and Flowers Fund.

6. Report of the Committee on Special Projects – Geoffrey R. Vernon: Mr. Vernon discussed the meeting of the Committee on Special Projects which had immediately preceded the meeting of the Council. Mr. Vernon reported that the Committee on Special Projects had discussed a report from the Divided and Directed Trusteeships Ad Hoc Committee, including a proposed bill to amend the estates and protected individuals code, in the form of Legislative Proposal September 28, 2017, as

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Minutes of the Meeting of the Council of the Probate and Estate Planning Section of the State Bar of Michigan on November 11, 2017

included in the Committee on Special Projects agenda materials and presented to the Committee on Special Projects meeting, and Mr. Vernon presented the proposed bill to the meeting. The Committee’s motion is:

the Probate and Estate Planning Section supports a proposed bill to amend the estates and protected individuals code, in the form of a Legislative Proposal September 28, 2017, as prepared by, and included in a report from, the Divided and Directed Ad Hoc Committee, and included in the Committee on Special Projects agenda materials, with authority granted to James Spica, Chair of the Divided and Directed Trusteeships Ad Hoc Committee, to make non-substantive changes to such Proposal.

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 20 yes, 0 no, 0 abstain, and 3 not voting. The Chair declared the motion approved.

7. Committee reports

a. Community Property Trusts Ad Hoc Committee - Neal Nusholtz: Mr. Nusholtz presented a Memorandum from the Committee, dated October 29, 2017, including a proposed Bill to amend the Estates and protected individual code, which Memorandum and proposed bill is included in the Council agenda meeting materials. The Committee’s motion is:

the Probate and Estate Planning Section supports a proposed bill to amend the estates and protected individuals code, in the form of a proposed Bill, as prepared by, and included in a Memorandum from, the Community Property Trusts Ad Hoc Committee, which Memorandum and proposed Bill are included in the Council agenda materials.

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 20 yes, 0 no, 0 abstain, and 3 not voting. The Chair declared the motion approved.

b. Amicus Curiae Committee - David L.J.M. Skidmore: Mr. Skidmore stated that the Committee would report to the Council on three matters. At that time, Robert B. Labe excused himself from the meeting due to a potential conflict of interest.

i. Estate of James Erwin: Mr. Skidmore discussed the Estate of James Erwin. Following discussion, Mr. Skidmore informed the Council that the Committee would make a further presentation to the Council at a future meeting. The Chair requested a report before the December meeting so that, if it appears practical to do so, an email vote can be conducted on whether an amicus should be filed in this matter.
ii. **Brody Trust**: On behalf of the Committee, David Skidmore discussed the *Brody Trust* case in the Michigan Court of Appeals, and that the Committee’s concern regarding the Court of Appeals’ holding that, irrespective of the capacity of the settlor of the Trust, every remainder beneficiary of the Trust has standing in the matter. Procedurally, an application for leave to appeal is being submitted to the Michigan Supreme Court. The Committee’s motion is:

the Probate and Estate Planning Section authorizes (i) the filing of an *amicus curiae* brief supporting the grant of leave to appeal, with the position that the remainder beneficiary of a trust might be an interested person in a proceeding regarding such trust if the settlor of such trust is incapacitated or deceased, but such remainder beneficiary is not an interested person in a proceeding regarding such trust if the settlor is alive with legal capacity; and (ii) the payment of up to $15,000 in legal fees and costs for the preparation and submission of such brief on behalf of the Section; and (iii) the engagement of Warner Norcross & Judd (“WNJ”) to prepare and submit such brief.

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. Mr. Mayoras reported that the Committee’s recommendation regarding engagement of the preparer was made without the involvement of Mr. Skidmore, who is a member of WNJ. Following discussion, the Chair called the question and the Secretary recorded the vote of 19 yes, 0 no, 0 abstain, and 4 not voting; Mr. Skidmore did not vote on the matter. The Chair declared the motion approved.

iii. **Brody Conservatorship**: On behalf of the Committee, Andy Mayoras discussed the *Brody Conservatorship* case in the Michigan Court of Appeals, which is a companion case to the *Brody Trust*, and that the Committee’s concern regarding the Court of Appeals’ holding that the conservator priority-of-appointment provisions of EPIC are only guidelines, and that the person of highest priority under EPIC could not be appointed without the Probate Court’s consideration of an independent fiduciary and that the independent fiduciary was unsuitable. Procedurally, an application for leave to appeal is being submitted to the Michigan Supreme Court. The Committee’s motion is:

the Probate and Estate Planning Section authorizes (i) the filing of an *amicus curiae* brief supporting the grant of leave to appeal, with the position that the statutory scheme of priority of appointment is not simply a guideline but must be followed by the Court, subject to any finding of unsuitability pursuant to MCL...
Minutes of the Meeting of the Council of the
Probate and Estate Planning Section of
the State Bar of Michigan
on November 11, 2017

700.5409(1)(h); and (ii) the payment of up to $15,000 in
legal fees and costs for the preparation and submission of
such brief on behalf of the Section; and (iii) the
engagement of the Chalgian and Tripp law firm to prepare
and submit such brief.

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 19 yes, 0 no, 0 abstain,
and 4 not voting. The Chair declared the motion approved.

c. Court Rules, Forms & Proceedings Committee - Melisa Mysliwiec: Ms. Mysliwiec stated that
the Committee would report on three matters:

i. ADM File No. 2002-37 (MCR amendments for e-filing and electronic records): Ms.
Mysliwiec presented her memorandum, dated November 3, 2017 (the “CRFPC
Memorandum”), including a discussion of ADM File No. 2002-37, regarding e-filing,
which was included in the Council agenda meeting materials. The Committee’s
motion is:

the Probate and Estate Planning Section has approved the
submission of the comments regarding ADM File No.
2002-37 which appear in the CRFPC Memorandum.

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 19 yes, 0 no, 0 abstain,
and 4 not voting. The Chair declared the motion approved.

ii. Civil discovery draft rule proposals: Ms. Mysliwiec stated that the CRFPC
Memorandum includes comments to Civil Discovery Draft Rule Proposals which are
due by December 1, 2017. The Committee’s motion is:

the Probate and Estate Planning Section has approved the
submission of the comments regarding a variety of
proposed changes to the Michigan Court Rules which
appear in the CRFPC Memorandum.

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 19 yes, 0 no, 0 abstain,
and 4 not voting. The Chair declared the motion approved.

iii. Update on HB 4821 and HB 4822: Ms. Mysliwiec gave an oral report on the status
of HB 4821 and HB 4822, and stated that, at this time, the Committee was not
requesting any change to the Section’s previously-taken public policy position.
Minutes of the Meeting of the Council of the Probate and Estate Planning Section of the State Bar of Michigan on November 11, 2017

d. Oral report on HB 4751 - Christine Savage: Ms. Savage gave an oral report on the status of HB 4751, regarding nuptial agreements. No action was requested of, nor taken by, the Council at this time on HB 4751.

e. Insurance Legislation Committee - Geoff Vernon: Mr. Vernon gave a report to the Council on SB 644, regarding the liability of, and claims and actions against, insurance agents and agencies. No action was requested of, nor taken by, the Council at this time on SB 644. The Chair will contact the Insurance Section’s Chair to be sure that they are aware of this bill.

f. Tax Committee - Robert B. Labe: Mr. Labe gave a report to the Council regarding Revenue Procedure 2017 - 58, which sets forth various annual inflation adjustments under the Internal Revenue Code.

8. Liaison Reports - The Chair stated that there were no Liaison reports to be presented to the Council.

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

10. Adjournment: seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 12:14 pm.

Respectfully submitted,
David P. Lucas, Secretary

(2017 - 12 - b) (November 11, 2017)
## Probate and Estate Planning Section

**2017 - 2018 Budget**

### Revenue

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### Expense

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### Net Increase (Decrease)

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<th>Ending Fiscal Year 2017 - 2018</th>
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<td>$153,943.24</td>
<td>$145,833.24</td>
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<td>Amicus Fund (reserve - per Section)</td>
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<td><strong>Total fund (at 2017-10-01) - per State</strong></td>
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<td><strong>Amicus Brief (reserve)</strong></td>
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<tr>
<td>Beg 2017-18 year</td>
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<tr>
<td>Add in 2017-18</td>
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<td>End 2017-18</td>
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**Beginning Fiscal Year 2017-2018**

- General Fund: $153,943.24
- Amicus Fund (reserve - per Section): $70,248.50
- Total fund (at 2017-10-01) - per State: $224,191.74

**Ending Fiscal Year 2017 - 2018**

- General Fund: $145,833.24
- Amicus Fund (reserve - per Section): $30,248.50
- Total fund: $176,081.74

**Amicus Brief (reserve)**

- Beg 2017-18 year: $70,248.50
- Add in 2017-18: $20,000.00
- Expend in 2017-18: $60,000.00
- End 2017-18: $30,248.50
1. **New Ideas, Comments, Questions.** Please email or call me with your thoughts and ideas for the following:
   - projects our Section should tackle – legislative or otherwise;
   - new ways to benefit our Section Members;
   - new social events for our Section Members, guests, and those interested in joining our Section;
   - anything you would like to discuss; and
   - your questions -- If I can't answer your question, I will find someone who can.

2. **Membership Committee.** The Membership Committee is looking for some new members from around the State to help discuss and plan regional activities. To join the Committee contact the Committee Chair, Nick Reister (nreister@shrr.com) or Marlaine C. Teahan (mteahan@fraserlawfirm.com).

3. **Correspondence.** On December 4, 2017, I contacted Larry W. Bennett, Chair of the Insurance and Indemnity Law Section Council, by email regarding our concerns with SB 644 and to be sure that their Section's Council was aware of this bill. I am awaiting his reply and will follow up by phone in the coming month.

4. **SBM Presentation on SBM Connect.** Our Section Committees are now using SBM Connect more and more. Training on how to utilize Connect's resources for our Committee work will be given at our December meeting. Attendees will be able to ask questions of Andrew Marks, the presenter. Mr. Marks will give a PowerPoint® presentation showing exactly how to use Connect. Committee documents can be saved in each committee’s Library, eliminating the need to save all documents on your own computer/server but allowing saving documents if you prefer. If you like to respond to all Committee email in your Inbox, you can do that, or you can go to the SBM Connect website and interact with Committee members there. Having a list of Committee members with email addresses and telephone numbers is really handy.

   Connect will be a great tool for our Section's Discussions as well. Many Sections use Connect Communities exclusively for their Discussions. There are many benefits that will be explored in Mr. Marks' presentation. In addition to demonstrating how to use Connect on the SBM website, he will also demonstrate how to use Connect within email to respond to the Discussion using only email.

5. **We took Public Policy Positions in November on the following:**
   - We approved the form of proposed legislation related to the Divided and Directed Trusteeships;
   - We approved the form of proposed legislation related to the Optional Community Property Trust Act;
   - We submitted comments relative to e-filing Michigan Court Rules in ADM File No. 2002-37 to the State Bar of Michigan;
   - We submitted comments regarding the SBM's Civil Discovery Court Rule Review Special Committee’s Report;
We will write an amicus brief in the Brody Trust matter; and
We will write an amicus brief in the Brody Conservatorship matter.

Reports are posted online at http://connect.michbar.org/probate/reports/policy

6. **Mardigian.** Oral argument was held in the Mardigian case. An oral report will be given at the Council meeting, time permitting. Once again, many thanks to Andy Mayoras and Kurt Olson for drafting the amicus brief.

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

8. **Upcoming Seminars ICLE/SBM – www.icle.org**

   • Dec. 7 - Experts in Estate Planning: Estate and Distribution Planning for Retirement Benefits, Plymouth -This was an excellent seminar. If you missed it, you may wish to catch the webcast.


   • Jan. 18 - Drafting Estate Planning Documents, 27th Annual, Grand Rapids (Live)

   • Feb. 15 - Drafting Estate Planning Documents, 27th Annual, Plymouth (Live)

   • Apr. 10 - Medicaid and Health Care Planning Update 2018, Plymouth (Live)

   • May 16 - Income Tax Planning for Family LPs, LLCs, and Disregarded Entities (Probate Institute add-on seminar), Acme (Live)

   • May 17-19 - Probate & Estate Planning Institute, 58th Annual, Acme (Live) – registration is open!

   • June 14-15 - Probate & Estate Planning Institute, 58th Annual, Plymouth (Live) -- registration is open and note that the Plymouth location of the Institute will be held on Thursday and Friday this year — due to popular demand.
Using SBM Connect to Connect with Other Probate & Estate Planning Section Lawyers

What is SBM Connect?
SBM Connect offers communities the ability to communicate with their members in an interactive format. connect.michbar.org

Features
- Discussion area with e-mailed digests—can replace a listserv
- Library—share meeting agendas, newsletters, minutes
- Seminar materials—visible to registrants only
- Announcements
- Event calendar—seminars & meeting dates
- Member Directory
Using Discussion through the Section
- Advice and research
- Combined knowledge and experience
- Shared questions and answers
- An open forum for all section members

Discussion

Discussion Page > Post New Message
This e-mail address will allow you to automatically start a thread on the Probate & Estate Planning discussion board from your own personal e-mail client.

NOTE: However, the e-mail that you are sending from must be the e-mail address that we have tied to your Member Directory record or an SBM Connect "Override" address.
Using Discussion through Committees
Delivering the Future TODAY
The Tax Committee is going to try some new things this upcoming bar year, which are modeled after some of the tax committees housed under the Real Property Trust & Estate (“RPTE”) Section of the American Bar Association. Our goal is to become more visible within the Probate and Estate Planning Section and create several opportunities outside of Council meetings for practitioners to learn, participate and network. Below is a summary of three objectives our Committee endeavors to accomplish in 2018:

1. Conduct several substantive conference calls over the course of the bar year where section members can call in and listen for practice guidance. The calls will be hosted by our Committee and we will invite an expert on a certain estate planning related tax topic to present during the call. This will not be CLE, but rather, an informal discussion of the presenter’s perspectives with limited time for Q&A. We can either bring in a national speaker, a state bar member with experience/expertise or an “up and coming” lawyer who is looking for a platform to shine. With the Committee’s connections, we are confident we can find practitioners who will volunteer their time. The State Bar will offer its resources to provide a conference line and “email blast” invitation to section members to promote calls. The cost per blast is nominal ($75). The Committee respectfully requests a nominal budget to accomplish this objective.

2. Commit to at least 2 articles for our State Bar technical journals (Michigan Tax Lawyer and Probate & EP Journal). With the additional numbers we have on our Committee this year, there should be plenty of hands on deck to contribute directly and recruit others to contribute.

3. Work with ICLE to design one presentation/panel at the annual ICLE Probate & Estate Planning Institute in Acme/Plymouth. Our Committee would come up with the tax focused topic and bring in the speaker. This would help take some work off of the planning chair’s docket. On behalf of the Committee, Raj A. Malviya discussed this idea with Jeff Kirkey of ICLE and he approves. Moreover, he welcomes our assistance and resources to create tax-focused, interesting and robust ICLE programming for the Trusts & Estates community.
Probate and Estate Planning Council: Tax Committee:
Vice-Chair Report (Part 2)
December 16, 2017

H.R. 1 TAX CUTS AND JOBS ACT: SUMMARY AND COMPARISON BETWEEN HOUSE AND SENATE BILLS

By Raj A. Malviya

Legislative Timeline

- November 1, 2017: House Ways and Means Committee announced legislative text forthcoming
- November 2, 2017: House of Representatives released its first draft of Bill
- November 9, 2017: Senate Finance Committee released its draft proposal of Bill
- November 16, 2017: House of Representatives passed its Bill in 227-205 vote
- December 2, 2017: Senate passed its modified version of the House Bill in 51-49 vote
- December 7, 2017: Joint Committee on Taxation released comparison of the provisions of both versions of the Bill
- In progress... Congress Conference Committee from both houses reviewing both versions of Bill to reconcile and issue a conference report
- TBD: Senate approves conference report
- TBD: House approves conference report
- TBD: President signs reconciled Bill into law

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1 These materials were prepared on December 7, 2017 and are reflective of activity as of that date. There will likely be several changes to both versions of the H.R. 1 bills, as passed by the House and modified one by the Senate, and potentially a final bill signed into law, by the time this report is given to Council on December 16, 2017.
## Tax Cuts and Jobs Act

The Tax Cuts and Jobs Act is a comprehensive tax reform law that significantly reduces individual and corporate tax rates, eliminates the alternative minimum tax (AMT) for corporations, and modifies the standard deduction and child tax credits. Below is a summary of the key changes in the law compared to current law in various categories:

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<th>Category</th>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Retained individual AMT with higher exemptions/phase outs *expires 2026</td>
</tr>
<tr>
<td><strong>Standard Deduction</strong></td>
<td>$6,350 (S), $12,700 (J) Indexed for inflation</td>
<td>Increase to $12,200 (S), $24,400 (J) Indexed for inflation</td>
<td>Increase to $12,000 (S), $24,000 (J). Indexed for inflation *expires 2026</td>
</tr>
<tr>
<td><strong>Personal and Dependent Exemptions</strong></td>
<td>$4,050 per person indexed for inflation</td>
<td>Repealed</td>
<td>Repealed</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*expires 2026</td>
</tr>
<tr>
<td><strong>Child Tax Credits</strong></td>
<td>Yes, $1,000 per qualifying child under 17 with phase out beginning at $75,000 (S), $110,000 (J), refundable portion</td>
<td>Yes. Slight increase to $1,600 per qualifying child under 17; slightly higher phase outs; new $300 credit for parent and nonchild dependent</td>
<td>Yes. Slight increase to $2,000 per qualifying child under 18; slightly higher phase outs; special rules for refundable portion *expires 2026</td>
</tr>
<tr>
<td><strong>Higher Education</strong></td>
<td>American Opportunity Tax Credit; Lifetime Learning Credit; Student Loan Interest Deduction</td>
<td>American Opportunity Tax Credit limited; Other credits and deductions repealed</td>
<td>Unchanged</td>
</tr>
<tr>
<td><strong>State/Local Tax Deduction (Itemized)</strong></td>
<td>Yes. Real estate, personal property, income or sales taxes</td>
<td>Yes, but limited to real estate taxes up to $10K</td>
<td>Yes, but limited to real estate taxes up to $10K *expires 2026</td>
</tr>
<tr>
<td><strong>Mortgage Interest Deduction (Itemized)</strong></td>
<td>Yes. Interest on up to $1.1 MM of qualified mortgage debt deductible on PR and one other residence; Interest on $100K of HELOC deductible</td>
<td>Yes, but limited as to debt incurred after effective date and up to $500K on PR only *mortgage debt incurred before November 2, 2017 grandfathered</td>
<td>Yes. Rules generally unchanged but interest on HELOC no longer deductible *expires 2026</td>
</tr>
<tr>
<td><strong>Medical Expense Deduction (Itemized)</strong></td>
<td>Yes. Out of pocket in excess of 10% AGI</td>
<td>Repealed</td>
<td>Yes. Out of pocket in excess of 7.5% AGI deductible in 2017 and 2018; reverts to current law in 2019</td>
</tr>
<tr>
<td><strong>Cap on Itemized Deductions</strong></td>
<td>Phase out begins at AGI of $261,500 (S); $313,800 (J). Indexed for inflation</td>
<td>Repealed</td>
<td>Repealed</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*expires 2026</td>
</tr>
<tr>
<td><strong>Top Cap Gains Rate</strong></td>
<td>20%</td>
<td>Unchanged</td>
<td>Unchanged</td>
</tr>
<tr>
<td><strong>Net Investment Income Tax</strong></td>
<td>Yes. Generally calculated as 3.8% on lesser of NII or amount MAGI exceeds statutory thresholds</td>
<td>Unchanged</td>
<td>Unchanged</td>
</tr>
</tbody>
</table>

*H.R. 1. –115th Congress (2017-2018). This is not a comprehensive summary of all tax items addressed in each version of the Act. Only select categories that directly or indirectly relate to the Trusts & Estates practice are addressed.*
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Status</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACA mandate penalty</td>
<td>Individuals w/out adequate health coverage pay penalty or claim exemption</td>
<td>Unchanged</td>
<td>Repealed, beginning in 2019</td>
</tr>
<tr>
<td>Top Rate (Pass Throughs)</td>
<td>39.6% (top rate of individuals)</td>
<td>25% for business income</td>
<td>Top rate of 39.6% applies but up to 23% deduction of “qualified business income”</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No preferential rate for compensation income</td>
<td>No deduction or preferential rate for compensation income</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unchanged for personal service income</td>
<td>Unchanged for personal service income</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Personal Service Corporations organized as C corps taxed at 25%</td>
<td>Personal Service Corporations organized as C corps taxed at 20%</td>
</tr>
<tr>
<td>Top Rate (C Corps)</td>
<td>35%</td>
<td>20%</td>
<td>20% *beginning in 2019</td>
</tr>
<tr>
<td>Partner Selling Carried (Profits) Interest</td>
<td>Capital gain treatment if interest held for more than year</td>
<td>Capital gain treatment only if interest held for three years or greater</td>
<td>Capital gain treatment only if interest held for three years or greater</td>
</tr>
<tr>
<td>1031 Exchanges</td>
<td>Can exchange like kind real estate and personal property (planes, vessels, fleets, livestock, art, etc.)</td>
<td>Nonrecognition under 1031 limited to real property only</td>
<td>Nonrecognition under 1031 limited to real property only</td>
</tr>
<tr>
<td></td>
<td></td>
<td>*2017 transactions grandfathered</td>
<td>*2017 transactions grandfathered</td>
</tr>
<tr>
<td>Business Interest Deduction</td>
<td>Yes. Generally fully deductible</td>
<td>Disallowed for interest in excess of 30% of business income; exemption for businesses with gross receipts of $25MM or less</td>
<td>Disallowed for interest in excess of 30% of business income; exemption for businesses with gross receipts of $15MM or less</td>
</tr>
<tr>
<td>Tax Regime for Companies Holding Earnings Abroad</td>
<td>Worldwide system with deferral and FTC (earnings not taxed until repatriated to US)</td>
<td>Modified Territorial system; excise tax on certain payments to foreign corporations; one-time deemed tax on unrepatriated foreign earnings at 7% (14% for cash)</td>
<td>Modified Territorial system; “anti-abuse” tax on certain payments to foreign corporations; one-time tax on unrepatriated foreign earnings at 7.5% (14.5% for cash)</td>
</tr>
<tr>
<td>Cash Donations to Public Charities</td>
<td>Yes. Deduction limited to 50% of AGI</td>
<td>Yes. Deduction limited to 60% of AGI</td>
<td>Yes. Deduction limited to 60% of AGI *expires 2026</td>
</tr>
<tr>
<td>Ability to Recharacterize Traditional or Roth IRA Contribution</td>
<td>Yes, but must be done within certain period after contribution made</td>
<td>Repealed</td>
<td>Repealed</td>
</tr>
<tr>
<td>529 Plans</td>
<td>Qualifying higher education expenses only</td>
<td>Expanded to allow for K-12 expenses w/$10K annual limit</td>
<td>Expanded to allow for K-12 and homeschool expenses w/$10K annual limit</td>
</tr>
<tr>
<td>Principal Residence Gain Exclusion</td>
<td>Yes. Exclusion up to $500K of capital gain (M) $250K of capital gain (S)</td>
<td>Yes, but exclusion phased out if AGI over $500K (M) / $250K (S)</td>
<td>Yes, but requires 5 out of 8 years as PE</td>
</tr>
<tr>
<td><strong>Alimony deduction</strong></td>
<td><strong>Requires 2 out of 5 years as PE</strong></td>
<td><strong>Requires 5 out of 8 years as PE</strong></td>
<td><strong>New holding period as PE is N/A for homes under contract in 2017</strong></td>
</tr>
<tr>
<td>----------------------</td>
<td>-----------------------------------</td>
<td>-----------------------------------</td>
<td>---------------------------------------------------------------</td>
</tr>
<tr>
<td>Alimony deduction</td>
<td>Yes, above the line deduction and taxable income to payee</td>
<td>Repealed: no deduction and corresponding exclusion from income</td>
<td>No mention</td>
</tr>
<tr>
<td><strong>Estate Tax (U.S. citizens/residents)</strong></td>
<td><strong>Yes. Top rate of 40% above exemption amount of $5MM/person indexed for inflation ($5.49 MM for 2017)</strong></td>
<td><strong>Yes. Top rate of 40% on estates above exemption amount of $10MM/person, indexed for inflation</strong></td>
<td><strong>Yes. Top rate of 40% on estates above exemption amount of $10MM/person, indexed for inflation</strong></td>
</tr>
<tr>
<td><strong>Gift Tax (US citizens and residents)</strong></td>
<td><strong>Yes. Top rate of 40% above exemption amount of $5MM/person indexed for inflation ($5.49 MM for 2017)</strong></td>
<td><strong>Yes. Top rate of 40% on transfers above exemption amount of $10MM/person, indexed for inflation</strong></td>
<td><strong>Yes. Top rate of 40% on transfers above exemption amount of $10MM/person, indexed for inflation</strong></td>
</tr>
<tr>
<td><strong>GST Tax (U.S. citizens/residents)</strong></td>
<td><strong>Yes. Top rate of 40% above exemption amount of $5MM/person indexed for inflation ($5.49 MM for 2017)</strong></td>
<td><strong>Yes. Top rate of 40% on GST transfers above exemption amount of $10MM/person, indexed for inflation</strong></td>
<td><strong>Yes. Top rate of 40% on GST transfers above exemption amount of $10MM/person, indexed for inflation</strong></td>
</tr>
<tr>
<td><strong>Estate Tax on Qualified Domestic Trust (QDOT) Distributions</strong></td>
<td><strong>Yes. Estate tax (at first deceased spouse rate) applied on principal distributions (with some exceptions) and value remaining in QDOT at surviving spouse death</strong></td>
<td><strong>Repealed as to principal distributions from QDOT created on/ before 2024 after 10th anniversary of the creation of the QDOT. If surviving spouse dies after 2023, no estate tax on QDOT value remaining</strong></td>
<td><strong>No mention</strong></td>
</tr>
<tr>
<td><strong>Estate Tax (nonresidents)</strong></td>
<td><strong>Yes. Top rate of 40% above exemption amount of $60K/ person</strong></td>
<td><strong>Unchanged</strong></td>
<td><strong>Unchanged</strong></td>
</tr>
<tr>
<td><strong>Estate and Trust Income Tax Rates</strong></td>
<td><strong>5 tax brackets ranging from 15% to 39.6%</strong></td>
<td><strong>4 tax brackets ranging from 12% to 39.6%</strong></td>
<td><strong>4 tax brackets ranging from 10% to 38.5%</strong></td>
</tr>
<tr>
<td><strong>Annual Exclusion gifts</strong></td>
<td><strong>Yes. Inflation adjusted</strong></td>
<td><strong>Unchanged</strong></td>
<td><strong>Unchanged</strong></td>
</tr>
<tr>
<td><strong>Basis step up to FMV for assets includable in gross estate at death</strong></td>
<td><strong>Yes</strong></td>
<td><strong>Unchanged</strong></td>
<td><strong>Unchanged</strong></td>
</tr>
<tr>
<td><strong>S Corp Stock and Trusts: Electing Small Business Trust (ESBT)</strong></td>
<td><strong>Cannot have nonresident beneficiaries; otherwise, disqualify ESBT as qualified S shareholder</strong></td>
<td><strong>Unchanged</strong></td>
<td><strong>Look through rules for beneficiaries don’t apply; NRAs can be beneficiaries</strong></td>
</tr>
</tbody>
</table>
MEMORANDUM

TO: Marlaine C. Teahan, Chair, Probate Council
FROM: David L.J.M. Skidmore, Chair, Amicus Committee
DATE: November 21, 2017

RE: Opportunity to File Amicus Brief – In re Estate of James Erwin, Sr.

INTRODUCTION

The Michigan Supreme Court has granted leave to appeal the Michigan Court of Appeals’ judgment entered in In re Estate of James Erwin, Sr., Nos 323387 & 329264, 2016 WL 2731058 (Mich Ct App May 10 2016) (unpublished) (attached as Exhibit A). The Michigan Supreme Court has invited interested persons or groups to move for permission to file amicus briefs regarding (1) whether the “willfully absent” provision in MCL 700.2801(2)(e)(i) is defined exclusively by physical separation, or whether it includes consideration of the emotional bonds and connections between spouses; and (2) whether MCL 700.28091(2)(e)(i) requires proof that a spouse intends to abandon his or her marital rights.

MCL 700.2801

A spouse who engaged in certain conduct towards the decedent spouse before his or her death may be ineligible to assert various spousal rights under EPIC. MCL 700.2801(e) (attached as Exhibit B) provides that “a surviving spouse does not include ... an individual who did any of the following for 1 year or more before the death of the deceased person: (i) Was willfully absent from the decedent spouse[;] (ii) Deserted the decedent spouse[; or] (iii) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.”

PREDECESSOR CASE: HARRIS ESTATE


Trial Court’s Ruling: The personal representative of Wilhelmena’s estate denied Norvel’s claim to spousal allowances on the grounds that he was not a “surviving spouse” for purposes of MCL 700.282 (the predecessor statute to MCL 700.2801). Norvel challenged this determination before the probate court.
“The personal representative claimed that Norvel fell under the provisions of [MCL 700.290]. Testimony of Wilhelmena's son indicated that she had filed for a divorce but the divorce had not been granted because of her death. He further testified that Norvel had resided at Wilhelmena's house for only short periods of time during the year prior to her death and that Norvel had refused to finance a trip to the Mayo Clinic for the purpose of treating Wilhelmena's cancer. Consequently, her son paid for both Norvel's and Wilhelmena's transportation to the Mayo Clinic.” Id. at 784. “[T]he personal representative argued that the surviving spouse’s emotional absence or desertion should be sufficient to extinguish such rights in the estate.” Id.

“At the hearing to determine whether Norvel's claims should be allowed, the probate court excluded any evidence of the relationship between Norvel and Wilhelmena, finding that the only issue under the statute was whether the surviving spouse was physically absent, physically deserted the other, or wilfully neglected to provide legally required support for the other for one continuous year or more immediately preceding Wilhelmena's death.” Id. at 783. Under this construction of the statute, the probate court held that Norvel was a surviving spouse for purposes of claiming his spousal allowances.

Court of Appeals’ Construction of Statute: “[W]e turn to the question of whether the language in the forfeiture statute, [MCL 700.290], encompasses emotional as well as physical absence from or desertion of the decedent spouse.” Id. at 784–85. “The lower court referred to the definition of ‘absent’ in Black's Law Dictionary (5th ed.), p. 8, which states: ‘Being away from; at a distance from, not in company with’. We agree with the court that this definition indicates physical absence.” Id. at 785.

“We further find the alternative definition in Webster's New Collegiate Dictionary, (1st ed.), p. 4, referring to inattentiveness to be inapplicable to the statute at issue. Where an absurd result is reached through a literal construction of the statute, an exception or qualification is presumed to have been intended. ... Since all of us are subject to inattentiveness, whether wilful or not, at some time or another, such an interpretation of absent would render the statute so broad in application as to put in jeopardy every surviving spouse's right to election under the Revised Probate Code. We do not believe that this was the intent of the Legislature.” Id. (internal citation omitted).

“The same logic is applicable to the interpretation of ‘desert’ under the statute. The dictionary meaning of this word is to withdraw from or leave with an intention to cause a permanent separation. Black's, supra, p. 307. Unless the meaning of ‘desert’ is confined to physical separation, we doubt that an intent to cause a permanent separation could ever be fairly inferred.” Id.

“Moreover, we find that the wording of the statute mandates that the physical abandonment or desertion be continuous for at least one year. In construing a statute, effect must be given to every phrase, clause and word as far as possible; one part of the statute should not be construed so as to render another part nugatory.” Id. at 785–86 (internal citation omitted).

“The statute at issue requires the unacceptable behavior of the surviving spouse to have been ‘for one year or more previous to the death of the deceased spouse’. The use of the word
‘for’, combined with the words ‘or more’, indicates that the unacceptable behavior must have occurred continuously for one year or more directly prior to the death of the deceased spouse. As the probate court properly observed, common usage would require the use of the words ‘during’ or ‘in’ if a lesser proof was intended to satisfy the statute.” *Id.* at 786 (internal citation omitted).

“We believe our construction of the statute comports with the Legislature's intent in enacting it. Michigan is not the only jurisdiction which allows a surviving spouse to elect against the deceased spouse's will and select certain statutory allowances. These statutes limit the testator's power to deprive the surviving spouse of his or her common-law or statutory rights in the testator's estate.” *Id.* (internal citation omitted).

“Given that forfeitures are not favored in law[,] this Court reads the forfeiture statute in [MCL 700.290] as showing an intent by the Legislature that a spouse must intend to give up his rights in the marriage before such can be lost. [T]he requisite intent in the statute is shown by actions indicating a conscious decision to permanently no longer be involved in the marriage.” *Id.* at 786–87 (internal citation omitted).

“Physical presence in the marital home is strong evidence that the party remains involved in the marriage to some degree and has not intentionally given up any rights thereof. Although it is conceivable that a party may return to the marital home solely for the purpose of destroying what remains of the marriage, it appears unlikely that this will be true in most cases. Rather, we perceive the statute as providing a ‘locus penitentiae’ of at least one year for the husband and wife to become reconciled or fulfill a legal obligation of support before the rights can be terminated.” *Id.* at 787 (internal citation omitted).

**Court of Appeals’ Application of Statute to Facts:** “Under this construction of the forfeiture statute[,] we conclude that Norvel did not forfeit his statutory rights to elect against the will or to claim allowances[,] The estate’s proofs failed to show that Norvel wilfully and physically absented himself from or deserted Wilhelmena for a continuous period of one year or more directly prior to her death. The allegations of wilful nonsupport likewise remain unestablished as the proofs did not indicate that Norvel in fact failed to support Wilhelmena when he had the means to do so.” *Id.* (affirming probate court’s ruling).

**PREDECESSOR CASE: PETERSON ESTATE**

**Facts:** *In re Peterson Estate*, 315 Mich App 423; 889 NW2d 753 (2016) (attached as Exhibit D), involved the marriage of Lyle Peterson (“Lyle”) and Arbutus Peterson (“Arbutus”). In 1959, Lyle and Arbutus were married. In the early 1990s, Lyle began a long-term extramarital affair with Susan Strieter (“Susan”). Arbutus knew about the affair, but she did not make an issue of it. Lyle and Arbutus continued to live together, and Arbutus continued to provide benefits to Lyle consistent with the marriage as it existed before the affair began. In 2006, Lyle moved out of the marital residence (which also included a store operated by Arbutus) and into a cabin which he and Arbutus owned. In 2007, Lyle moved into Susan’s residence. After moving in with Susan, Lyle visited Arbutus at the store and helped Arbutus to maintain the store. Arbutus interacted with Lyle and cooked for him during his visits. Lyle developed dementia and was no longer able to visit
Arbutus at the store. Arbutus did not visit or contact Lyle when he was at Susan’s residence and unable to visit Arbutus due to his dementia. Lyle died in September 2011. *Id.* at 426–27.

**Trial Court’s Ruling:** Lyle’s daughter from a prior relationship petitioned the probate court to determine that Arbutus was not a “surviving spouse” for purposes of EPIC because Arbutus was “willfully absent” from Lyle for one year or more before his death. MCL 700.2801(2)(e). The probate court found “that it was reasonable for Arbutus to avoid calling Lyle under the circumstances: ‘I can’t imagine a spouse feeling that, oh, I’m gonna call my husband up at his mistress’s. That makes absolutely no sense, whatsoever.’” *Id.* at 429. Therefore, the probate court ruled that Arbutus was not “willfully absent” and that she qualified as a “surviving spouse.” *Id.* Lyle’s daughter appealed.

**Court of Appeals’ Construction of Statute:** “We agree with this Court’s conclusion in *In re Harris Estate* that the phrase ‘[w]as willfully absent,’ as used in MCL 700.2801(2)(e)(i), refers to physical absence. The word ‘absent’ ordinarily refers to being physically away. See *The Oxford English Dictionary* (2d ed, 1991) (defining the adjective ‘absent’ as ‘[b]eing away, withdrawn from, or not present (at a place)’ and defining the verb ‘absent,’ in relevant part, to mean ‘[t]o be or stay away; to withdraw’). Undoubtedly, the term ‘absent’ can be used in ordinary speech to refer to mental or emotional absence; a person who is physically absent generally does not provide emotional support, and so, figuratively speaking, one may refer to a person who does not provide emotional support as being emotionally ‘absent.’ However, whether the term is used in this way, rather than in the ordinary sense, will normally follow from the context. And, in the absence of context indicating such use, we will give the term its ordinary meaning. Here, the statute refers to someone who ‘did’ certain acts, including being ‘willfully absent,’ deserting, or willfully neglecting or refusing to support the decedent spouse for ‘1 year or more’ before the deceased spouse’s death. See MCL 700.2801(2)(e). This context suggests physical separation. ... We also agree that the physical separation must be continuous because the Legislature provided that the individual must have done ‘any of the following for 1 year or more....’ MCL 700.2802(2)(e). The preposition ‘for’ establishes that the phrase refers to a continuous span of time.” *Id.* at 432–33 (internal citation and emphasis omitted).

“We do not, however, agree that the statute requires proof of intent to abandon one’s marital rights. The majority in *In re Harris Estate* held that a surviving spouse cannot forfeit his or her marital rights in the absence of evidence that the surviving spouse took acts ‘indicating a conscious decision to permanently no longer be involved in the marriage.’ *In re Harris Estate*, 151 Mich.App. at 787, 391 N.W.2d 487. The Legislature provided that an individual will not be deemed a surviving spouse if he or she ‘[w]as willfully absent from the decedent spouse.’ MCL 700.2801(2)(e)(i). The Legislature’s use of the term ‘willfully’ established the requisite intent that the individual must have in order to be disqualified as a surviving spouse: the individual must have acted with the specific intent to bring about the particular result addressed in the statute. ... Specifically, in order for an individual to be ‘willfully absent’ within the meaning of MCL 700.2801(2)(e)(i), the individual must have done something with the intent to bring about his or her absence from the deceased spouse.” *Id.* at 433 (internal citation omitted).

**Court of Appeals’ Application of Statute to Facts:** “[W]e agree with [appellant’s] contention that the probate court erred when it determined that she had to show that Arbutus
intended to give up her marital rights before MCL 700.2801(2)(e)(i) would apply. The Legislature did not include such a requirement, and we are not at liberty to read one into the statute.” *Id.* (internal citation omitted).

“[Appellant] argued before the probate court that Arbutus’s failure to make an effort to contact Lyle, visit Lyle, or otherwise be a part of his life is evidence that she was willfully absent from him. She similarly argues that the statute does not preclude the possibility that both spouses might be willfully absent from each other. We agree that both spouses can be willfully absent from each other, but we do not agree that the Legislature intended to require a deserted or abandoned spouse to make a continuous effort to restore cohabitation or maintain the marital relationship or risk being deemed ‘willfully absent’ from his or her spouse within the meaning of MCL 700.2801(2)(e)(i). The Legislature stated that an individual ‘who did’ certain acts would not be deemed a surviving spouse. MCL 700.2801(2)(e). The word ‘did’ suggests acts rather than omissions. Similarly, the word ‘willfully’ in the phrase ‘[w]as willfully absent’ indicates that the individual must act or fail to act with the intent to bring about a specific result—in this context, to bring about physical separation from his or her spouse. Therefore, even accepting that a spouse can deliberately fail to act with the required intent, we conclude that mere omissions do not amount to being ‘willfully absent’ unless the failure to act caused the continued separation. MCL 700.2801(2)(e)(i).” *Id.* at 433–34.

“In this case, there is no evidence that Arbutus took some act or failed to act with the intent to cause her physical separation from Lyle—that is, there was no evidence that she ‘[w]as willfully absent’ from him during the year preceding his death. MCL 700.2801(2)(e)(i). There is no evidence that she forced Lyle from the marital home or that she removed herself from his presence. All the evidence showed that Lyle absented himself from Arbutus and that Arbutus remained faithful to the marriage. She continued to interact with Lyle when he came around the store, she prepared him meals, operated the store, and used her own funds to maintain the marital property.” *Id.* at 434–35.

“It is true that the evidence demonstrated that Arbutus did not contact or visit Lyle during the last year of his life, but it was also undisputed that she did not do so because Lyle did not want her involved with his extramarital life. Nothing within the statute requires an innocent spouse to repeatedly attempt to reconcile or maintain physical proximity to his or her spouse against his or her spouse’s wishes.” *Id.* at 435.

“Although there was evidence that Lyle and Arbutus were physically separated for one year or more before his death, the evidence amply demonstrated that Lyle left the marital home and that he alone caused the continued separation. While Arbutus may have acquiesced to the separation, her decision to acquiesce to Lyle’s wishes was not sufficient to establish that she ‘[w]as willfully absent’ from Lyle within the meaning of MCL 700.2801(2)(e)(i). Given the undisputed evidence, the trial court’s imposition of an erroneous intent requirement does not warrant relief.” *Id.* at 435 (internal citation omitted).

“The probate court erred when it construed MCL 700.2801(2)(e)(i) to require proof that a spouse intended to give up his or her marital rights before he or she will be deemed not to be a surviving spouse under that statute. Nevertheless, because the undisputed evidence showed that
CURRENT CASE: **ERWIN ESTATE**

**Facts:** *Erwin Estate* involved the marriage of James Erwin, Sr. ("James") and Maggie Erwin ("Maggie"). James and Maggie were married in 1968. They had four children together. They lived together for several years after their marriage, but they did not live together after 1976. In February 1976, Maggie petitioned the Saginaw Circuit Court for support for herself and her four children, but neither James nor Maggie ever filed for divorce.

In 2010, James and Maggie jointly sued General Motors, alleging in their complaint that they were married and that “the life of Maggie Erwin . . . would be irreplaceable for her husband.” Maggie was also the beneficiary of James’s life insurance policy. The record is otherwise unclear regarding the extent of their relationship while they lived apart.

James died intestate on October 12, 2012, survived by Maggie, his and Maggie’s four children, and six children from his prior marriage.

**Trial Court’s Ruling:** There was litigation before the Saginaw County Probate Court between Maggie and her stepchildren over whether Maggie qualified as James’ “surviving spouse” for purposes of MCL 700.2801(2)(e)(i). The probate court “ultimately determined that, because there were indications that James and Maggie had contact and an ongoing relationship during their separated years, Maggie had not willfully abandoned James for the purposes of MCL 700.2801(2)(e).” *Id.* at *1. “The trial court specifically relied on statements made during their 2010 lawsuit.” *Id.*

**Court of Appeals’ Construction of Statute:** The Court of Appeals construed MCL 700.2801(2)(e) as follows.

“Reading the willful absence provision in context with the desertion and willful neglect provisions, it is clear that the provisions include some level of intent as well as physical distance. When used as a verb, to ‘desert’ means ‘to withdraw from or leave usu. without intent to return.’ *Merriam–Webster's Collegiate Dictionary* (11th ed). To ‘neglect’ means ‘to give little attention or respect to’ or ‘to leave undone or unattended to esp. through carelessness.’ *Id.* There is no indication that the Legislature intended any of the terms in this section to apply in cases of sole physical separation.” *Id.* at *3.

“Case law supports this interpretation. Considering the language of the now-repealed MCL 700.290, which was different from the language of MCL 700.2801 in only minor ways, this Court determined that the similarly worded statute encompassed ‘emotional as well as physical absence from or desertion of the decedent spouse.’ *In re Harris Estate,* 151 Mich App 780, 785; 391 NW2d 487 (1986). In that case, this Court reasoned that ‘[p]hysical presence in the marital home is strong evidence that the party remains involved in the marriage to some degree....’ However, the Court also considered the party's intent in ending the marriage, stating that the party seeking to establish the spouse was a non-surviving spouse must show ‘actions indicating a conscious decision to permanently no longer be involved in the marriage.’ While a party's presence in the marital home
is one part of a fact-based analysis, physical presence was not the sole legal consideration. Because the statutory language involved in that case bore only minor distinctions from the language involved in this case, we find this opinion persuasive.” *Id.* at *3 (internal citations omitted).

“In *Tkachik v. Mandeville*, 487 Mich. 38, 40–41; 790 NW2d 260 (2010), the Michigan Supreme Court considered a case of equitable contribution in which the husband frequently left the country and was absent for the 18 months before the decedent wife's death. The husband knew that the wife was seriously ill, but did not attempt to call or communicate with her, and he did not attend her funeral. The decedent wife executed a trust and will that disinherited the husband. Although we recognize that the Michigan Supreme Court was not construing MCL 700.2801, it noted that the trial court deemed the husband a non-surviving spouse under MCL 700.2801(2)(e)(i). The fact-specific inquiry in *Tkachik* supports that spousal relationships are best viewed as factual questions.” *Id.* (internal citations omitted).

“For these reasons, we conclude that the trial court should determine whether a spouse is willfully absent from the decedent spouse under MCL 700.2801(2)(e)(i) by considering all the facts and circumstances of the case. A physical separation may provide factual support for a determination that one spouse was willfully absent from another, but it does not necessarily preclude a spouse as a surviving spouse under MCL 700.2801(2)(e)(i). A physical separation is only one piece of evidence that the trial court may consider and weigh when determining whether one spouse was willfully absent from another.” *Id.*

“We note that this construction avoids several practical concerns. If MCL 700.2801(2)(e)(i) precluded inheritance solely on the basis of physical absence, what about spouses whose jobs, pursuit of education, or family situations require them to live for extended periods of time in another part of the country, or in a foreign country? A spouse who moves to a foreign country to assist a parent during his or her declining years? A spouse who must seek medical treatments in a distant state and who, unlike the circumstances presented in *Tkachik*, decide to live apart for convenience or to avoid taking joint children out of school? Under King's proposed interpretation, even if these spouses remained emotionally intimate, the mere fact that they chose not to live in a joint household would legally sever them from inheritance. These scenarios should not be resolved as a purely legal matter, and the language of the statute does not require it.” *Id.* at *4.

**Court of Appeals’ Application of Statute to Facts:** The Court of Appeals affirmed the trial court’s ruling that Maggie was the surviving spouse of James for purposes of intestate succession and MCL 700.2801(2)(e). “In this case, it is undisputed that James and Maggie did not live as a single household after 1976. King presented three affidavits supporting that James and Maggie had not cohabitated since 1976. However, their physical separation did not operate to foreclose a continued emotional intimacy. Maggie presented evidence that as late as 2010, more than 30 years after their physical separation, James considered he and Maggie still married and stated that Maggie's life was ‘irreplaceable.’ While the record is sparse in this case, the burden was on King to establish that Maggie was not a surviving spouse. See *In re Koehler Estate*, 314 Mich App 667, 681; 888 NW2d 432 (2016) (stating the burden is on the party asserting an exception to establish it). King did not do so. We are not definitely and firmly convinced the trial court made a mistake when it found that Maggie was entitled to inherit as James's surviving spouse.” *Id.* (footnotes omitted).
a. Whether “Willfully Absent” is Defined Exclusively by Physical Separation.

The first issue on which the Michigan Supreme Court has invited amicus briefs is whether the “willfully absent” provision in MCL 700.2801(2)(e)(i) is defined exclusively by physical separation, or whether it includes consideration of the emotional bonds and connections between spouses. The Michigan Supreme Court specifically requested that amici compare the Court of Appeals’ holding in Erwin Estate, supra, with In re Peterson Estate, 315 Mich App 423; 889 NW2d 753 (2016).

The Amicus Committee found this to be a challenging question.

On the one hand, the Committee is concerned that construing this statute to be triggered by “consideration of the emotional bonds and connections between spouses” could open the floodgates to litigation between decedent’s surviving spouse and children from a prior relationship. The Committee is also concerned that the Court is not best-suited to decide whether “consideration of the emotional bonds and connections between spouses” amounts to figurative absence or desertion.

The temporal requirement (one year) suggests that the Legislature considered the negative conduct to be such as could be objectively verifiable by the Court. It would be relatively straightforward for a Court to determine whether one spouse was physically absent from the other spouse for at least one year. In contrast, it would be highly subjective and difficult for a court to determine whether one spouse was mentally or emotionally absent from the other spouse (albeit physically present) for at least one year.

Interpreting the statute to require physical separation would not necessarily require that the spouses live in the same residence. Ongoing personal interaction between the spouses would seemingly negate an alleged absence or an alleged desertion, even if the spouses did not live in the same residence.

On the other hand, the Committee recognizes that there may be circumstances where a spouse is physically present in some way, yet has irrefutably repudiated his or her commitment to the other spouse. Marital relationships and arrangements may take a variety of forms, and an exclusive focus on physical separation may result in unjust outcomes.

The Committee notes that that Legislature made a distinction between (1) being “willfully absent from the decedent spouse” for at least one year prior to death, and (2) “desert[ing] the decedent spouse” for at least one year prior to death. The Legislature must have believed that these terms had different meanings. The Legislature would not have used two different terms to both denote physical separation. Perhaps “willfully absent” was intended to refer to physical absence, while “desertion” was intended to refer to other types of marital inattention.

On balance, a majority of the members of the Committee concludes that “absent” and “desertion” both should be deemed to refer to physical separation. The analysis of this issue in Harris Estate is persuasive to a majority of the members of the Committee.
b. Whether Proof is Required that a Spouse Intends to Abandon His or Her Marital Rights.

The second issue on which the Michigan Supreme Court has invited amicus briefs is whether MCL 700.28091(2)(e)(i) requires proof that a spouse intends to abandon his or her marital rights.

In the opinion of the Amicus Committee, the statute in question does not require proof that a spouse intends to abandon his or her marital rights. The Committee agrees with the analysis and ruling from the *Peterson Estate* on this issue.

**CONCLUSION**

In conclusion, the Amicus Committee recommends that the Probate Council file an amicus brief in *In re Estate of Erwin* requesting that the Michigan Supreme Court (1) hold that the “absent” portion of the “willfully absent” provision in MCL 700.2801(2)(e)(i) is defined exclusively by physical absence; (2) hold that the “willfully” portion of the “willfully absent” provision in MCL 700.2801(2)(e)(i) permits consideration of mental and emotional bonds and connections; and (3) hold that MCL 700.2801(2)(e)(i) does not require proof that a spouse intends to abandon his or her marital rights.

DLJMS
MEMORANDUM

To: Marlaine C. Teahan, Chair, Probate Council
From: Andrew W. Mayoras
Subject: Alternative Perspective re Erwin Estate amicus submission
Date: November 29, 2017

Overview

The Supreme Court has invited interested groups to file motions asking for permission to file amicus briefs on the issue of how to interpret 700.2801(2) as it pertains to when a spouse should be deemed to be “willfully absent.” This portion of the statute causes a forfeiture of spouse’s intestate rights if the spouse, for 1 year or more, was willfully absent, deserted, or willfully neglected a deceased person. The key issue is whether a physical absence is the sole determining factor, or if a spouse can be deemed not to be willfully absent even in light of physical separation (or, alternatively, be physically present but still be willfully absent).

There is also a second issue as to whether a spouse must intend to abandon marital rights in order to trigger the forfeiture, based on the meaning of “willful”.

As to the first issue, the majority of the Amicus Committee recommends filing a brief that takes the position that a bright line test of physical separation is the appropriate reading, relying on the word “willful” to protect against a spouse who is intentionally absent for a compelling reason but does not intend to sever the marital relationship. While advocating for a bright line test has merit, my fear is that this does not allow probate judges enough flexibility to examine the true nature of the marital relationship and may result in too many inequitable outcomes of physically-separated spouses who should still be deemed eligible to receive intestate inheritances, as well as those who live under the same roof but no longer have an emotional attachment as spouses. I am concerned that the only way to read “willful” is based on a willful absence, and that this position would not protect spouses who live apart for reasons other than intending to sever the marital relationship. As such, I submit this memorandum separately to propose an alternate position for the council’s consideration on the first issue.

As to the second issue, I agree with the majority’s recommendation that this clause can be triggered even without an intent to abandon marital rights. If an intent to abandon marital rights was required, then it would be almost impossible to establish forfeiture in any case, even when physical absence was willful and related to a desire to sever the marital relationship. In other words, this holding of Harris went too far, as everyone on the Committee agreed.
Can Courts Consider Other Factors Than Physical Separation In Determining Willful Absence?

There are three important court of appeals decisions that address this issue, which are described in detail in David Skidmore’s memorandum. First, there was the published opinion in *Harris Estate*, 151 Mich App 780 (1986), which favored reliance on physical separation alone but required a second showing that the absent spouse intended to abandon marital rights. Second, there was the published opinion in *Peterson Estate*, 315 Mich App 423 (2016), which agreed with the physical separation demarcation, but disagreed that a showing of intent to abandon marital rights was required. Third, there is the unpublished court of appeals decision in this case (*Erwin*), which ruled that physical separation alone was not the only factor to consider as to willful absence. Interestingly, *Erwin* was issued shortly before *Peterson*.

While I share the concern of the majority of committee members that expanding the definition of “absent” to more than physical proximity could invite litigation, and I have significant concerns that the court of appeals erred in the *Erwin* decision, I believe that the *Erwin* decision raises valid points that a rigid application of physical absence could led to unjust results. As the majority opinion noted, reliance on a strict physical application could unfairly punish spouses who are not physically present, albeit intentionally, but for valid reasons unrelated to the marriage. These include a spouse pursuing a job, education, medical treatment, or whose family dynamics (such as caring for an elderly parent) require them to reside in a different state or country. As the opinion notes, often families do not want to disturb residences of children for school reasons, but the couple still considers themselves married.

I fear that relying on the “willful” component of this test to exclude these spouses from forfeiture would not work. Spouses in situations like this may be physically and intentionally absent, even without abandoning the marital relationship. So I agree with the court of appeals in *Erwin* that while physical absence is the primary factor, it should not be the only one.

However, I also believe it important to stress that these unusual situations should the exception, not the rule. Expanding the test too broadly could result in excessive litigation and inequitable results that favor the missing spouse. *Erwin* actually appears to present a compelling example of that. The spouses lived apart for 30 years, and the judge relied – almost exclusively – on a joint lawsuit they filed in 2010 against General Motors for breach of contract (which appears to have been done to seek medical insurance coverage, according to one of the party’s appellate briefs). The probate judge and court of appeals required the family seeking forfeiture to carry the burden of proof and ruled it failed to do so. Given the sustained length of the absence of the spouse, this application seemed to turn the doctrine on its head.

Instead, I would favor a finding that while probate courts can consider emotional connections and other factors beyond physical separation, that any finding that varies from reliance on physical
absence should be rarely applied, and only then in unusual circumstances. Indeed, I would favor advocating for a presumption that physical separation means willful absence, unless proofs were submitted to the contrary. I would certainly advocate for a reversal of the holding in *Erwin* that the party seeking forfeiture has the burden of proof on this element. Instead, the party seeking to overcome the logical presumption of physical separation should carry the burdens of both proof and persuasion.

This approach would foster flexibility to address the unusual situations of physical separation that do not equate to a disruption of the marital relationship, but still discourage excessive litigation and unfair results in favor of the physically-absent spouse. It would also enable flexibility to address the opposite situation, where a couple remains under the same roof but are no longer emotionally-connected as spouses. In other words, some couples remain legally married because divorce is not financially feasible or to benefit minor children, but no longer sleep in the same bedroom or otherwise do not act as a married couple. While, again, these situations should be rarely invoked, and only then if a presumption of physical connection is overcome.

My concern is that a strict application of physical separation and reliance on the word “willful” to save marital relationships that involve spouses living separately for valid reasons outside of their relationship is not a proper way to apply the statutory language. The statute provides for forfeiture for a spouse who is “willfully absent.” It does not require a reason why or why not. Further, the term “willfully absent” must be something other than “deserted”, or there would not be a separate exception for that term. I think the only way to square the language of the statute with the reality that not all physically-separated spouses should lose intestate inheritance rights is to define “absent” more broadly than merely physically-absent, but only if qualifiers are put in place to discourage unnecessary litigation and to guard against bizarre outcomes, like the *Erwin* opinion seems to encourage.

**Conclusion**

While I agree with the majority of Committee members’ concern of discouraging excessive litigation, I suggest the section should advocate that physical separation is a critically-important factor in the test for “willfully absent”, but not the exclusive one. I propose that we advocate for the Supreme Court to create and apply a presumption in favor of physical proximity or separation, requiring the party seeking a contrary result to carry both the burdens of proof and proximity.

I agree with the majority recommendation that the statute does not require proof of an intent to abandon marital rights, which would be going too far and be nearly impossible to establish in the vast majority of cases.
To: Probate and Estate Planning Council Members
From: Melisa M. W. Mysliwiec
RE: Updates
Date: December 8, 2017

1. December 2017 Release of SCAO-Approved Court Forms:
   http://courts.mi.gov/Administration/SCAO/Forms/Documents/RecentRevisions/2017DecemberExplanationofChanges.pdf

   A full report will be provided in January. Of particular interest:

   PC 556, Petition and Order for Assignment
   A new item 8 was added to the form to allow for denial or dismissal/withdrawal of a petition.
   Standards were applied.

   PC 593, Petition for Complete Estate Settlement, Testacy Previously Adjudicated
   Forms PC 593, Petition for Complete Estate Settlement, Testacy Previously Adjudicated and
   PC 594, Petition for Adjudication of Testacy and Complete Estate Settlement were combined
   to help petitioners file the correct petition, thereby reducing adjournments and delays in
   finalizing estate administration.

   PC 594, Petition for Adjudication of Testacy and Complete Estate Settlement
   This form was deleted and merged with PC 593.

2. Mediation Legislation: HB 5073
   See attached analysis

3. HB 4821 and 4822

   The Senate Judiciary Committee reported HB 4821 favorably with S-1
   (http://www.legislature.mi.gov/(S(jlhjzuajoh5fwtyit0kbcdvy))/documents/2017-2018/billcurrentversion/House/PDF/2017-HCVBS-4821-7592.PDF)
   and recommended immediate effect. The Senate Judiciary Committee reported HB 4822 favorably with S-1
   (http://www.legislature.mi.gov/(S(ilhjzuajoh5fwtyit0kbcdvy))/documents/2017-2018/billcurrentversion/House/PDF/2017-HCVBS-4822-7593.PDF)
   and recommended immediate effect. Both were referred to Committee of the Whole on November 30.

   We submitted comments/suggested edits to the Senate Majority Leader in line with our
   Public Policy Position. See attached.

   Respectfully submitted,

   [Signature]

   Melisa M. W. Mysliwiec
HB 5073 was introduced on 10\10\17 and has been referred to the Committee on Law and Justice.

It creates a new Chapter 49 of the Revised Judicature Act (RJA) – Mediation and Case Evaluation. Chapter 49A of the RJA would be repealed.

Absent an objection, all civil nondomestic relations actions claiming damages over $25,000 and contested probate proceedings must be referred to mediation. Sec. 4902(1).

Observation: Huge problem for probate courts due to the unique character of probate litigation. Unlike civil cases, with defined adverse parties, probate proceedings involve giving notice to a group of interested persons who have the right to appear and provide input and objections (verbal or written) at the hearing. Many cases involve objections to only a part of the proceeding – i.e., who should serve as guardian, access to ward, authority to be given to guardian, etc. Requiring mandatory mediation will increase costs and slow down the adjudication of probate cases without appreciable benefits.

The following actions would not be referred to mediation:

- A party to the action is subject to a protection order protecting another party to the action.
- A party to the action seeking protection order against another party.
- A party to the action involved in abuse\neglect proceeding.
- Allegation that party to action abused another party.
- DHHS investigation request of party to action.

Sec. 4902(2).

Observation\Suggestion: The following provision could be added to this section: “For contested probate proceedings, upon a finding of good cause that mediation would not be appropriate.” This would maintain status quo, allowing a case to be referred to mediation where a judge believes it to be beneficial.

The above restrictions on referring a matter to mediation are inapplicable if the court determines mediation appropriate or mediation requested by protected party, party seeking protection, or party who is alleged victim of abuse. Sec. 4902(3).

Unless objection timely filed, judge must refer action to mediation within 30 days after response to complaint filed. Sec. 4902(4).

Observation: What is a response to a complaint in probate court? Complaint is not defined in bill. Per MCR 5.101, all probate actions are proceedings except for the extremely small number
of civil actions. An argument could be made that this legislation is only applicable to civil actions, but insertion of “safety valve” language in bill most prudent approach. Responses are not filed in the vast majority of probate cases – an interested person may simply appear and verbally object to an aspect of the proceeding at the hearing.

If a party objects to mediation, they must either notify the court that it is not appropriate per MCL 600.1035 (domestic relations action) or file a written objection containing facts to establish good cause. Good cause includes, but not limited to, the following:

- Child abuse\neglect.
- Domestic abuse.
- Inability of one\both parties to negotiate for themselves.
- Reason to believe health\safety of parties would be endangered by mediation participation.
- Inability to afford mediation fees\costs.
- Stipulation of all mediation parties.
- Unnecessary re: matter resolved.
- Matter assigned to another alternative dispute resolution process.

Objection must be filed and served on all attorneys\in pro per parties within 14 days of order for mediation. Hearing on removal motion must be held within 14 days of filing, unless adjourned via agreement or court orders otherwise. Removal motion must be heard before action mediated.

Sec. 4902(7).

The proposed legislation has additional provisions relating to private nature of proceedings, and guidelines for disclosure of mediation communications. Secs. 4902(8)-(12).

Language in medical malpractice sections changed from mediation to case evaluation. Secs. 4903-4923.
To: Becky Bechler  
From: Rules, Forms, and Procedures Committee of the Probate and Estate Planning Council of the State Bar of Michigan  
Date: November 21, 2017

The Council’s public policy position is attached. Further comments are below.

HB 4821:

1. We oppose changing the 42 day timeframe under MCL 700.3203 in any way (i.e. we are not okay with moving it to 63 days vs. 91 days as a compromise).

2. We oppose the addition of subsection (6) to MCL 700.3414 pertaining to criminal penalties for a public administrator; however, we would be okay with having MCL 700.3414 reference back to the current statute re: penalties a public administrator is subject to:

   (6) A STATE OR COUNTY PUBLIC ADMINISTRATOR WHO KNOWINGLY FAILS TO PROVIDE THE NOTICES REQUIRED UNDER SUBSECTION (5) IS GUILTY OF A 21 Misdemeanor punishable by imprisonment for not more than 90 days or 22 a fine of not more than $1,000.00, or both, may be found in violation of MCL 750.478.

3. We would like to see MCL 700.3414(5)(A)(ii) modified to state only “that the heir may object to the petitioner’s appointment.” This would satisfy the MPJA comment that no petition is required to object.

   A NOTICE REQUIRED UNDER THIS SUBDIVISION MUST BE IN A FORM APPROVED BY THE SUPREME COURT AND MUST INCLUDE ALL OF THE FOLLOWING INFORMATION:
   ***
   (ii) THAT THE HEIR MAY PETITION THE COURT TO OBJECT TO THE PETITIONER'S APPOINTMENT.

HB 4822 Draft 2 S-1 Markups:

1. We are satisfied with the modification to MCL 700.3715(2)(A), which eliminates the requirement to obtain written approval of the state court administrator before a probate court may approve a sale of decedent’s real property. We are okay with the new proposed subsection (A) to be inserted at Page 12 Line 16, which would change the current subparagraph (A) to (B). We do suggest non-substantive changes in the language to (B), though. We propose substituting the language "and provide a copy of" in place of "along with" in Line 21. See next page.
2. We oppose all suggested amendments to MCL 700.3721.
PROBATE & ESTATE PLANNING SECTION
Public Policy Position
HB 4821 and HB 4822

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,544 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. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On October 14, 2017, the Section adopted its position after discussion and vote at a scheduled meeting. 18 members voted in favor of the Section’s position on HB 4821 and HB 4822, 0 members voted against this position, 0 members abstained, 5 members did not vote.

The Probate & Estate Planning Section Opposes HB 4821 and HB 4822 with Recommended Amendments.

SB HB 4821 (H-1): The Section opposes all suggested amendments to MCL 700.3203 as well as the addition of subsection (6) to MCL 700.3414 pertaining to criminal penalties for a public administrator who knowingly fails to provide certain notices.

SB HB 4822 (H-1): The Section opposes all suggested amendments to MCL 700.3721 as well as the portion of MCL 700.3715(2)(A) requiring written approval of the state court administrator before a probate court may approve a sale of decedent’s real property.

Explanation of Position

1. Substitute HB 4821

Substitute HB 4821 amends MCL 700.3203, 700.3204, and 700.3414. It amends MCL 700.3203 to extend the timeframe before a public administrator can step in and administer an estate from 42 days to 91 days, except where exigent circumstances exist a court may appoint a public administrator after 42 days but before 91 days. The committee opposes all suggested amendments to MCL 700.3203.

Substitute HB 4821 amends MCL 700.3204 to require a public administrator be appointed only in a formal proceeding. The committee is agreeable to the amendments to MCL 700.3204.
Substitute HB 4821 amends MCL 700.3414 to create specific notice requirements where a public administrator is seeking appointment as personal representative and has knowledge that the decedent's real property is subject to a mortgage foreclosure or has delinquent property taxes. It also amends MCL 700.3414 to create criminal penalties for a public administrator who knowingly fails to provide the notices required.

The committee is agreeable to the amendments to MCL 700.3414 added as a new subsection (5), but the committee opposes the addition of subsection (6) pertaining to criminal penalties.

2. Substitute SB HB 4822
Substitute HB 4822 amends MCL 700.3705, 700.3715, and 700.3721. It amends MCL 700.3705 to require notice of appointment be given to the county treasurer when the public administrator is the personal representative and the decedent's real property is subject to a tax foreclosure. The committee is indifferent to this.

Substitute HB 4822 amends MCL 700.3715 to require public administrators to obtain court approval before sale of a decedent's real property. It also goes on to prohibit a court from approving such a sale when the real property is occupied by an heir of the decedent unless the state public administrator provides written approval. The committee is agreeable to requiring court approval to sell real property, but opposes the remainder of subsection (2)(A) requiring written approval of the state court administrator before a court may approve a sale. It also amends MCL 700.3715 to provide that all court filing fees associated with administration of the estate be advanced by the personal representative unless waived by the court. The committee doesn't believe this provision adds anything new as this is likely the standard practice currently; therefore, we are indifferent.

Finally, Substitute HB 4822 amends MCL 700.3721 to require court review of the propriety of employment of any person hired by the personal representative when the personal representative is the public administrator. It also provides that real estate fees or fees related to identifying real property subject to foreclosure that are in excess of 10% of the net proceeds payable to the estate are considered excessive where decedent's real property is subject to tax or mortgage foreclosure. The committee doesn't believe these amendments are necessary; and, therefore, opposes the amendments to MCL 700.3721. Heirs are already protected in that they can object to fees under other provisions of EPIC already if they believe they are excessive. Where there are no known heirs and the AG has been served with notice of hearing on the petition for probate, the AG must be served with notice pertaining to sale of the real estate as well. It would be up to the AG to object to fees. To require the probate court to evaluate fees in each and every case, especially where there are no objections being raised, puts too much on the courts. It adds an extra layer to the process with no benefit to the public.

Contact Person: David P. Lucas
Email: dluca@vcflaw.com
HOUSE BILL No. 5073

October 10, 2017, Introduced by Reps. Kesto, Chang, Liberati, Lucido, Lilly and Yaroch and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled "Revised judicature act of 1961," by amending the heading of chapter 49 and sections 4901, 4903, 4905, 4907, 4909, 4911, 4913, 4915, 4917, 4919, 4921, and 4923 (MCL 600.4901, 600.4903, 600.4905, 600.4907, 600.4909, 600.4911, 600.4913, 600.4915, 600.4917, 600.4919, 600.4921, and 600.4923), as added by 1986 PA 178, and by adding section 4902; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER 49

MEDIATION AND CASE EVALUATION

Sec. 4901. (1) THIS CHAPTER PROVIDES FOR MEDIATION OF NONDOMESTIC RELATIONS DISPUTES IN COURTS IN THIS STATE. MEDIATION
IS ALSO GOVERNED BY MICHIGAN COURT RULES.

(2) As used in this chapter:

(A) "ADR CLERK" MEANS THE ALTERNATIVE DISPUTE RESOLUTION CLERK FOR THE COURT.

(B) "ALTERNATIVE DISPUTE RESOLUTION PROCESS" MEANS A PROCESS DESIGNED TO RESOLVE A LEGAL DISPUTE IN THE PLACE OF COURT ADJUDICATION.

(C) "CASE EVALUATION" MEANS A PROCESS IN WHICH 3 NEUTRAL ATTORNEYS ARE APPOINTED BY THE COURT TO REVIEW THE FACTS AND LAW IN A COURT CASE, HEAR THE POSITIONS OF THE PARTIES, AND RENDER AN AWARD THAT CAN BE ACCEPTED OR REJECTED BY THE PARTIES AND IS GOVERNED BY THE MICHIGAN COURT RULES.

(D) "MEDIATION" MEANS A PROCESS IN WHICH A NEUTRAL THIRD PARTY FACILITATES COMMUNICATION BETWEEN PARTIES TO, ASSISTS IN IDENTIFYING ISSUES IN, AND HELPS EXPLORE SOLUTIONS TO PROMOTE A MUTUALLY ACCEPTABLE SETTLEMENT OF A DISPUTE AND IS GOVERNED BY THE MICHIGAN COURT RULES.

(E) "MEDIATION COMMUNICATIONS" INCLUDES STATEMENTS, WHETHER ORAL OR IN A RECORD, VERBAL OR NONVERBAL, THAT OCCUR DURING THE MEDIATION PROCESS OR ARE MADE FOR PURPOSES OF RETAINING A MEDIATOR OR CONSIDERING, INITIATING, PREPARING FOR, CONDUCTING, PARTICIPATING IN, CONTINUING, ADJOURNING, CONCLUDING, OR RECONVENCING A MEDIATION.

(F) "MEDIATION PARTICIPANT" MEANS A MEDIATION PARTY, A NONPARTY, AN ATTORNEY FOR A PARTY, OR A MEDIATOR WHO PARTICIPATES IN OR IS PRESENT AT A MEDIATION.

(G) "MEDIATION PARTY" MEANS A PERSON THAT PARTICIPATES IN A MATTERS
MEDIATION AND WHOSE AGREEMENT IS NECESSARY TO RESOLVE THE DISPUTE.

(H) "MEDIATOR" MEANS AN INDIVIDUAL WHO CONDUCTS A MEDIATION.

(I) "PANEL" MEANS A MEDIATION CASE EVALUATION PANEL SELECTED PURSUANT TO SECTION 4905.

(J) "PERSON" MEANS AN INDIVIDUAL, PARTNERSHIP, CORPORATION, ASSOCIATION, GOVERNMENTAL ENTITY, OR OTHER LEGAL ENTITY.

(K) "PROTECTED INDIVIDUAL" MEANS THAT TERM AS DEFINED IN SECTION 1106 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.1106.

(L) "VULNERABLE" MEANS THAT TERM AS DEFINED IN SECTION 11 OF THE SOCIAL WELFARE ACT, 1939 PA 280, MCL 400.11.

SEC. 4902. (1) EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION AND UNLESS THERE IS AN OBJECTION TO MEDIATION, IN A COUNTY WITH AN ALTERNATIVE DISPUTE RESOLUTION PLAN APPROVED BY THE STATE COURT ADMINISTRATIVE OFFICE, THE FOLLOWING ACTIONS AND PROCEEDINGS MUST BE REFERRED TO MEDIATION, ABSENT AN OBJECTION TO MEDIATION:

(A) A CIVIL NONDOMESTIC RELATIONS ACTION IN WHICH IT IS CLAIMED THAT DAMAGES EXCEED $25,000.00.

(B) A CONTESTED PROBATE PROCEEDING.

(2) SUBJECT TO SUBSECTION (3), A COURT SHALL NOT REFER AN ACTION TO WHICH ANY OF THE FOLLOWING APPLY TO MEDIATION:

(A) A PARTY TO THE ACTION IS SUBJECT TO A PROTECTION ORDER PROTECTING ANOTHER PARTY TO THE ACTION.

(B) A PARTY TO THE ACTION IS SEEKING ENTRY OF A PROTECTION ORDER AGAINST ANOTHER PARTY TO THE ACTION.

(C) A PARTY TO THE ACTION IS INVOLVED IN AN ABUSE OR NEGLECT PROCEEDING.
(D) There is an allegation that a party to the action abused another party to the action.

(E) There is a request for investigation of a party to the action pending with the Department of Health and Human Services.

(3) Subsection (2) does not apply in either of the following circumstances:

(A) The court has determined that mediation of the action is appropriate.

(B) The protected party, party seeking protection, or party to the action who is allegedly the victim of the abuse requests mediation.

(4) The judge to whom an action described in subsection (1) is assigned or the chief judge shall refer the action to mediation by written order within 30 days after a response to the complaint is filed, unless an objection to mediation is timely filed.

(5) The mediator shall facilitate communication between the mediation parties, assisting the parties in reaching any agreements they wish to discuss, including, but not limited to, settlement, narrowing of issues, defining discovery parameters, and establishing any deadlines that do not conflict with deadlines imposed by court rule or court order.

(6) Additional mediation sessions may be held if agreed by all mediation parties.

(7) All of the following apply to objections to mediation:

(A) To object to mediation, a mediation party must either notify the court that the matter is not appropriate for mediation, as provided in section 1035, or file a written objection to
MEDIATION CONTAINING FACTS TO ESTABLISH GOOD CAUSE, INCLUDING, BUT NOT LIMITED TO, ANY OF THE FOLLOWING:

(i) CHILD ABUSE OR CHILD NEGLECT.

(ii) DOMESTIC ABUSE.

(iii) INABILITY OF 1 OR BOTH MEDIATION PARTIES TO NEGOTIATE FOR THEMSELVES AT THE MEDIATION.

(iv) REASON TO BELIEVE ANY MEDIATION PARTY'S HEALTH OR SAFETY WOULD BE ENDANGERED BY PARTICIPATION IN MEDIATION.

(v) INABILITY TO AFFORD THE FEES AND COSTS OF MEDIATION.

(vi) LACK OF JURISDICTION OR IMPROPER VENUE.

(vii) STIPULATION OF ALL MEDIATION PARTIES.

(viii) MEDIATION IS UNNECESSARY BECAUSE THE MATTER IS RESOLVED.

(ix) THE MATTER WAS ASSIGNED TO ANOTHER ALTERNATIVE DISPUTE RESOLUTION PROCESS.

(B) A COPY OF THE OBJECTION OR MOTION TO REMOVE THE ACTION FROM MEDIATION MUST BE FILED WITH THE COURT AND SERVED ON ALL ATTORNEYS OF RECORD AND PRO SE PARTIES WITHIN 14 DAYS AFTER ENTRY OF AN ORDER ASSIGNING THE ACTION TO MEDIATION.

(C) THE MOTION TO REMOVE THE ACTION FROM MEDIATION MUST BE SET FOR HEARING WITHIN 14 DAYS AFTER IT IS FILED, UNLESS THE HEARING IS ADJOURNED BY AGREEMENT OF COUNSEL OR THE COURT ORDERS OTHERWISE.

(D) A TIMELY FILED MOTION MUST BE HEARD BEFORE THE ACTION IS MEDIATED.

(8) MEDIATION MUST BE CONDUCTED IN ACCORDANCE WITH THE MICHIGAN STANDARDS OF CONDUCT FOR MEDIATORS, OR SUCCESSOR STANDARDS ADOPTED BY THE STATE COURT ADMINISTRATIVE OFFICE, AND APPLICABLE...
MICHIGAN COURT RULES.

(9) MEDIATION PROCEEDINGS MUST BE HELD IN PRIVATE, AND MEDIATION COMMUNICATIONS MUST BE CONFIDENTIAL AND PRIVILEGED. EXCEPT AS OTHERWISE PROVIDED IN THIS CHAPTER, PRIVILEGED MEDIATION COMMUNICATIONS ARE NOT SUBJECT TO DISCOVERY AND ARE INADMISSIBLE IN ANY PROCEEDING.

(10) EXCEPT AS OTHERWISE PROVIDED IN THIS CHAPTER, A MEDIATOR, A MEDIATION PARTY, AND ANY OTHER INDIVIDUAL INVOLVED IN MEDIATION ARE NOT COMPETENT TO TESTIFY TO CONFIDENTIAL MEDIATION COMMUNICATIONS.

(11) MEDIATION COMMUNICATIONS MAY BE DISCLOSED UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

(A) ALL MEDIATION PARTIES AGREE IN WRITING TO DISCLOSURE.

(B) A STATUTE OR COURT RULE REQUIRES DISCLOSURE.

(C) THE MEDIATION COMMUNICATION IS PART OF THE MEDIATOR'S REPORT APPROVED UNDER MICHIGAN COURT RULES.

(D) THE DISCLOSURE IS NECESSARY FOR A COURT TO RESOLVE DISPUTES ABOUT THE MEDIATOR'S FEE.

(E) THE DISCLOSURE IS NECESSARY FOR A COURT TO CONSIDER ORDERING SANCTIONS UNDER MICHIGAN COURT RULES FOR A MEDIATION PARTY'S FAILURE TO ATTEND.

(F) THE DISCLOSURE IS MADE DURING A MEDIATION SESSION THAT IS OR IS REQUIRED BY LAW TO BE OPEN TO THE PUBLIC.

(G) COURT PERSONNEL REASONABLY REQUIRE DISCLOSURE TO ADMINISTER AND EVALUATE THE MEDIATION PROGRAM.

(H) THE MEDIATION COMMUNICATION IS A THREAT TO INFlict BODILy INJURY OR COMMIT A CRIME, A STATEMENT OF A PLAN TO INFlict BODILy
INJURY OR COMMIT A CRIME, OR USED TO PLAN A CRIME, ATTEMPT TO
COMMIT OR COMMIT A CRIME, OR CONCEAL A CRIME.

(I) ALL OF THE FOLLOWING APPLY TO THE DISCLOSURE:

(i) THE DISCLOSURE INVOLVES A CLAIM OF ABUSE OR NEGLECT OF A
CHILD, A PROTECTED INDIVIDUAL, OR A VULNERABLE ADULT.

(ii) THE DISCLOSURE IS INCLUDED IN A REPORT ABOUT THE CLAIM OR
SUGHT OR OFFERED TO PROVE OR DISPROVE THE CLAIM.

(iii) THE DISCLOSURE IS MADE TO A GOVERNMENTAL AGENCY OR LAW
ENFORCEMENT OFFICIAL RESPONSIBLE FOR PROTECTION AGAINST SUCH
CONDUCT OR IS MADE IN A SUBSEQUENT OR RELATED PROCEEDING BASED ON
THE DISCLOSURE.

(J) THE DISCLOSURE IS INCLUDED IN A REPORT OF PROFESSIONAL
MISCONDUCT FILED AGAINST A MEDIATION PARTICIPANT OR IS SUGHT OR
OFFERED TO PROVE OR DISPROVE MISCONDUCT ALLEGATIONS IN THE ATTORNEY
DISCIPLINARY PROCESS.

(K) THE MEDIATION COMMUNICATION OCCURS IN AN ACTION OUT OF
WHICH A CLAIM OF MALPRACTICE ARISES AGAINST A MEDIATION PARTICIPANT
AND THE DISCLOSURE IS SOUGHT OR OFFERED TO PROVE OR DISPROVE THE
CLAIM OF MALPRACTICE.

(L) THE DISCLOSURE IS IN A PROCEEDING TO ENFORCE, RESCIND,
REFORM, OR AVOID LIABILITY ON A DOCUMENT SIGNED BY THE MEDIATION
PARTIES OR ACKNOWLEDGED BY THE MEDIATION PARTIES ON AN AUDIO OR
VIDEO RECORDING THAT AROSE OUT OF MEDIATION, IF THE COURT FINDS,
AFTER AN IN CAMERA HEARING, THAT THE PARTY SEEKING DISCOVERY OR THE
PROONENT OF THE EVIDENCE HAS SHOWN THAT THE EVIDENCE IS NOT
OTHERWISE AVAILABLE, AND THAT THE NEED FOR THE EVIDENCE
SUBSTANTIALLY OUTWEIGHS THE INTEREST IN PROTECTING CONFIDENTIALITY.
(12) ALL OF THE FOLLOWING APPLY TO THE DISCLOSURE OF A MEDIATION COMMUNICATION:

(A) IF THE DISCLOSURE IS UNDER AN EXCEPTION UNDER SUBSECTION (9), ONLY THE PORTION OF THE COMMUNICATION NECESSARY FOR THE APPLICATION OF THE EXCEPTION MAY BE DISCLOSED.

(B) DISCLOSURE UNDER SUBSECTION (11) DOES NOT RENDER THE MEDIATION COMMUNICATION SUBJECT TO DISCLOSURE FOR ANOTHER PURPOSE.

(C) EVIDENCE OR INFORMATION THAT IS OTHERWISE ADMISSIBLE OR SUBJECT TO DISCOVERY DOES NOT BECOME INADMISSIBLE OR PROTECTED FROM DISCOVERY SOLELY BECAUSE OF ITS DISCLOSURE OR USE IN MEDIATION.

Sec. 4903. (1) An action alleging medical malpractice shall be mediated pursuant to EVALUATED AS PROVIDED IN this chapter. (2) The judge to whom an action alleging medical malpractice is assigned or the chief judge shall refer the action to mediation CASE EVALUATION by written order not less than WITHIN 91 days after the filing of the answer or answers ARE FILED.

(3) An action referred to mediation pursuant to CASE EVALUATION UNDER subsection (2) shall be heard by a mediation panel selected pursuant to UNDER section 4905.

Sec. 4905. (1) A mediation CASE EVALUATION panel shall be composed of 5 voting members, 3 of whom shall be licensed attorneys, 1 of whom shall be a licensed or registered health care provider selected by the defendant or defendants, and 1 of whom shall be a licensed or registered health care provider selected by the plaintiff or plaintiffs. If a defendant is a specialist, the health care provider members of the panel shall MUST specialize in the same or a related, relevant area of health
care as the defendant.

(2) Except as otherwise provided in subsection (1), the procedure for selecting mediation panel members and their qualifications shall be as prescribed by the Michigan court rules or local court rules.

(3) A judge may be selected as a member of a mediation panel, but may not preside at the trial of any action in which he or she served as a mediator.

(4) The grounds for disqualification of a mediator are the same as those provided in the Michigan court rules for the disqualification of a judge.

Sec. 4907. (1) The court shall designate the clerk of the court, the court administrator, the assignment clerk, or some other person to serve as the mediation clerk.

(2) The mediation clerk shall set a time and place for the mediation hearing and send notice to the mediators and the attorneys of record at least 28 days before the date set for the mediation hearing.

(3) Adjournments of mediation hearings shall be granted only for good cause, in accordance with the Michigan court rules.

Sec. 4909. (1) Within 14 days after the mailing of the notice of the mediation hearing, each party shall submit payment to the mediation clerk of a mediation fee of $75.00 in the manner specified in the notice of the mediation hearing. However, if a judge is a member
of the panel, the fee shall be $50.00. Only a single fee is required of each party, even if there are counterclaims, cross-claims, or third-party claims. The mediation ADR clerk shall arrange payment to the mediators EVALUATORS.

(2) If a claim is derivative of another claim, the claims shall MUST be treated as a single claim, with 1 fee to be paid and a single award made by the mediators EVALUATORS.

(3) In the case of IF THE ACTION ALLEGES multiple injuries to members of a single family, the plaintiffs may elect to treat the action as involving 1 claim, with the payment of 1 fee and the rendering of 1 lump sum LUMP-SUM award to be accepted or rejected. If such an election is not made, THE PLAINTIFFS SHALL PAY a separate fee shall be paid for each plaintiff and the mediation panel shall then make separate awards for each claim, which may be individually accepted or rejected.

Sec. 4911. (1) At least 7 days before the mediation CASE EVALUATION hearing date, each party shall submit to the mediation ADR clerk 5 copies of the documents pertaining to the issues to be mediated EVALUATED and 5 copies of a concise brief or summary setting forth that THE party's factual or legal position on issues presented by the action. In addition, THE PARTY SHALL SERVE 1 copy of each shall be served on each attorney of record.

(2) Failure to submit the materials to the mediation ADR clerk as prescribed in subsection (1) shall subject SUBJECTS the offending party to a $60.00 penalty to be paid at the time of the mediation CASE EVALUATION hearing and distributed equally among the mediators EVALUATORS.
Sec. 4913. (1) A party has the right, but is not required, to attend a mediation hearing. If scars, disfigurement, or other unusual conditions exist, they may be demonstrated to the mediation panel by a personal appearance; however, testimony shall not be taken or permitted of any party.

(2) The Michigan rules of evidence shall not apply before the mediation panel. Factual information having a bearing on damages or liability shall be supported by documentary evidence, if possible.

(3) Oral presentation is limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. The mediation panel may request information on applicable insurance policy limits and may inquire about settlement negotiations, unless a party objects.

(4) Statements by the attorneys and the briefs or summaries in a case evaluation hearing are not admissible in any subsequent court or evidentiary proceeding.

Sec. 4915. (1) Except as otherwise provided in subsection (2), within 14 days after the mediation hearing, the panel shall make an evaluation and notify the attorney for each party of its evaluation in writing. The evaluation shall include a specific finding on the applicable standard of care. If an award is not unanimous, the evaluation shall so indicate.

(2) If the panel unanimously determines that a complete action or defense is frivolous as to any party, the panel shall so state as to that party. If the action proceeds to trial, the party who
has been determined to have a frivolous action or defense shall post a cash or surety bond, approved by the court, in the amount of $5,000.00 for each party against whom the action or defense was determined to be frivolous. If judgment is entered against the party who posted the bond, the bond shall be used to pay all reasonable costs incurred by the other parties and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) The evaluation shall include a separate award as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subsection, all such claims filed by any 1 party against any other party shall be treated as a single claim.

Sec. 4917. (1) Each party shall file a written acceptance or rejection of the mediation panel's evaluation with the mediation ADR clerk within 28 days after service of the panel's evaluation. The failure to file a written acceptance or rejection within the 28 days constitutes acceptance.

(2) A party's acceptance or rejection of the panel's evaluation shall not be disclosed until the expiration of the 28-day period, at which time the mediation ADR clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

(3) In mediations involving multiple parties, the following rules apply:

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some
and rejecting others. However, as to any particular opposing party, the party shall either accept or reject the evaluation in its entirety.

(b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if all opposing parties accept. If this limitation is not included in the acceptance, an accepting party is considered to have agreed to entry of judgment as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject.

(c) If a party makes a limited acceptance under subdivision (b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of section 4921, the party who made the limited acceptance is considered to have rejected as to those opposing parties who accept.

Sec. 4919. (1) If all the parties accept the mediation panel's evaluation, THE COURT SHALL ENTER judgment shall be entered in that amount, which shall include all fees, costs, and interest to the date of judgment.

(2) In a case involving multiple parties, THE COURT SHALL ENTER judgment shall be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them.

(3) Except as otherwise provided in this chapter for multiple parties, if all or part of the evaluation of the mediation panel is rejected, the action shall proceed to trial.

(4) The mediation ADR clerk shall place a copy of the
mediation A CASE evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. In a nonjury action, the envelope shall MUST not be opened and the parties shall not reveal the amount of the evaluation until the judge has rendered judgment.

(5) If the mediation CASE evaluation of an action pending in the circuit court does not exceed the jurisdictional limitation of the district court, the mediation ADR clerk shall so inform the trial judge.

Sec. 4921. (1) If a party has rejected an A CASE evaluation and the action proceeds to trial, that THE party shall pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation CASE evaluation. However, if the opposing party has also rejected the CASE evaluation, that THE OPPOSING party is entitled to costs only if the verdict is more favorable to that THE OPPOSING party than the mediation CASE evaluation.

(2) For the purpose of subsection (1), a verdict shall MUST be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation CASE evaluation. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10% below the evaluation, and is considered more favorable to the plaintiff if it is more than 10% above the evaluation.

(3) For the purpose of this section, actual costs include those costs taxable in any civil action and a reasonable attorney fee as determined by the trial judge for services necessitated by
the rejection of the mediation CASE evaluation.

(4) Costs THE COURT shall not be awarded AWARD COSTS UNDER THIS SECTION if the mediation CASE EVALUATION award was not unanimous.

Sec. 4923. A COURT SHALL NOT DELAY A trial date scheduled in advance of the date set for a mediation CASE EVALUATION hearing shall not be delayed because the mediation CASE EVALUATION hearing was not held, unless the court finds that the interests of justice are WILL BE served by the mediation CASE EVALUATION proceeding. This section shall DOES not apply if the mediation CASE EVALUATION hearing was adjourned under section 4907(3).

Enacting section 1. Chapter 49A of the revised judicature act of 1961, 1961 PA 236, MCL 600.4951 to 600.4969, is repealed.
MINUTES OF NOVEMBER 25 & DECEMBER 1, 2017

1. **MCR 3.903.** Currently, the juvenile guardianship file is public (which includes the identifying information of the guardian) but the court rule, as written, makes the guardian-identifying information non-public. The proposed change to the rule makes the court rule and statute consistent and clears up the conflict. The proposed change makes this rule consistent. The committee saw no problem with the proposed rule change.

   The committee recommends that we take no position.

2. **HB 5076.** On the surface, the first impression of the bill seemed innocuous and one that could be supported. Doctors’ needing to obtain consent before withholding or withdrawing life sustaining treatment seems to be a concept that could be supported. However, the committee determined that the bill, as drafted, is more complicated. First, there is no definition of “medical order” and it would appear to cover all situations, even in the emergency or operating room. For example, imagine a doctor is operating on a patient and when the doctor opens the patient up, the doctor discovers that there is no hope for the patient. Must the doctor now find the appropriate person to give consent before closing up the patient? Or, consider a trauma center in a hospital, where doctors have to decide quickly whom they can save, whom they should spend time working on, and who can be kept comfortable. This bill seems troubling in these examples.

   It should be noted that the Elder Law and Disability Rights Section opposes this bill in its current form. Also worth noting is that the POST (Physician Orders for Scope of Treatment) bill did pass and was signed into law. This bill would conflict with the POST bill and would undermine the POST document.

   A unanimous consensus of the members present does not support this bill in its current form.

   The committee recommends that Council oppose HB 5076.
3. **HB 5075.** Many significant problems exist with HB 5075. It is unlikely any fix will make this bill acceptable. First, it conflicts with existing statutes which allow a judge to appoint a guardian when a patient advocate is not acting in the best interest of the patient. To the contrary, HB 5075 prevents a judge from appointing a temporary guardian and also suspends a patient advocate’s right to withdraw life-sustaining treatment. This leaves the patient in a situation where no one can act on her behalf. Second, current statutes only permit family and medical providers to file a petition to address an improperly signed patient advocate designation or if a patient advocate is not acting in the best interest of the patient. To the contrary, HB 5075 opens up the ability for anyone, including persons only interested in a political agenda, to file a petition. Third, it adds a rebuttable presumption that it’s in the best interest of the patient to continue to live. This bill appears to be designed to trump a patient’s clearly expressed wishes to the contrary. Moreover, it is designed to bar a patient’s wishes to terminate life support. Notice that timing is critical in many of these decisions. If a decision to terminate life support is deferred it may no longer be viable whenever the litigation ends. The committee unanimously opposes this bill.

According to our lobbyist and confirmed by the Elder Law Section, HB 5075 and HB 5076 are moving more quickly than initially thought.

The committee recommends that Council oppose HB 5075.

4. **Uniform Act.** Josh Ard and Jim Steward perused the extensive uniform guardian and conservator act. Both conclude that given Michigan’s bifurcated guardianship law between legally incapacitated adults and developmentally disabled guardianships, with the addition of conservatorships, it makes it very difficult to adopt the uniform act in its entirety. Moreover, appears that there would be opposition from the Probate Judge’s Association, presenting a large obstacle for its passing. The suggestion is that the uniform act be reviewed to determine if there are some parts that would be beneficial to bolster our existing law. This would be more of a “nugget mining” project rather than a massive overhaul of our existing guardian and conservator law. We have less reason to expect automatic opposition from the judges to such changes.

Respectfully Submitted,

**Rhonda M. Clark-Kreuer**

Chair, Guardian, Conservator and End of Life Committee
A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending sections 5306, 5311, and 5508 (MCL 700.5306, 700.5311, and 700.5508), section 5306 as amended by 2004 PA 532 and section 5508 as amended by 2008 PA 41.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 5306. (1) The court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record. Alternately, the court may dismiss the proceeding or enter another appropriate order.

(2) The court shall grant a guardian only those powers and
only for that period of time as is necessary to provide for the
demonstrated need of the incapacitated individual. The court shall
design the guardianship to encourage the development of maximum
self-reliance and independence in the individual. If the court is
aware that an individual has executed a patient advocate
designation under section 5506, the court shall not grant a
guardian any of the same powers that are held by the patient
advocate. A court order establishing a guardianship shall specify
any limitations on the guardian's powers and any time limits on the
guardianship.

(3) If the court finds by clear and convincing evidence that
an individual is incapacitated and lacks the capacity to do some,
but not all, of the tasks necessary to care for himself or herself,
the court may appoint a limited guardian to provide guardianship
services to the individual, but the court shall not appoint a full
guardian.

(4) If the court finds by clear and convincing evidence that
the individual is incapacitated and is totally without capacity to
care for himself or herself, the court shall specify that finding
of fact in an order and may appoint a full guardian.

(5) If an individual executed a patient advocate designation
under section 5506 before the time the court determines that he or
she became a legally incapacitated individual, a guardian does not
have and shall not exercise the power or duty of making medical or
mental health treatment decisions that the patient advocate is
designated to make. If, however, a petition for guardianship or for
modification under section 5310 alleges and the court finds BY
CLEAR AND CONVINCING EVIDENCE that the patient advocate designation
was not executed in compliance with section 5506, that the patient
advocate is not complying with the terms of the designation or with
the applicable provisions of sections 5506 to 5515, or that the
patient advocate is not acting consistent with the ward's best
interests, the court may APPOINT A GUARDIAN OR modify the
guardianship's terms to grant those powers to the guardian. THE
COURT SHALL NOT APPOINT A TEMPORARY GUARDIAN UNDER SECTION 5312
WHILE CONSIDERING A PETITION UNDER THIS SUBSECTION. DURING THE
PENDENCY OF A PETITION UNDER THIS SUBSECTION, THE PATIENT ADVOCATE
OR PETITIONER SHALL NOT AUTHORIZE OR EFFECTUATE A MEDICAL TREATMENT
DECISION TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING TREATMENT. FOR THE
PURPOSES OF THIS SUBSECTION, THERE IS A REBUTTABLE PRESUMPTION THAT
THE WARD'S BEST INTERESTS INCLUDE THE WARD CONTINUING TO LIVE.

Sec. 5311. (1) In a proceeding for the appointment or removal
of an incapacitated individual's guardian, other than the
appointment of a temporary guardian or temporary suspension of a
guardian, notice of hearing must be given to each of the following:
(a) The ward or the individual alleged to be incapacitated and
that individual's spouse, parents, and adult children.
(b) A person who is serving as the guardian or conservator or
who has the individual's care and custody.
(c) If known, a person named as attorney in fact under a
durable power of attorney OR A PATIENT ADVOCATE DESIGNATED UNDER
SECTION 5506.
(d) If no other person is notified under subdivision (a), (b),
or (c), at least 1 of the individual's closest adult relatives, if
any can be found.

(2) Notice must be served personally on the alleged incapacitated individual. Notice to all other persons must be given as prescribed by court rule. Waiver of notice by the individual alleged to be incapacitated is not effective unless the individual attends the hearing or a waiver of notice is confirmed in an interview with the visitor.

(3) In a proceeding for a guardian's appointment under sections 5303 and 5304, a copy of the petition must be attached to the hearing notice, and the notice to the alleged incapacitated individual must contain all of the following information:

(a) The nature, purpose, and legal effects of the appointment of a guardian.

(b) The alleged incapacitated individual's rights in the proceeding, including the right to appointed legal counsel.

Sec. 5508. (1) Except as provided under subsection (2), the authority under a patient advocate designation is exercisable by a patient advocate only when the patient is unable to participate in medical treatment or, as applicable, mental health treatment decisions. The patient's attending physician and another physician or licensed psychologist shall determine upon examination of the patient whether the patient is unable to participate in medical treatment decisions, shall put the determination in writing, shall make the determination part of the patient's medical record, and shall review the determination not less than annually. If the patient's religious beliefs prohibit an examination and this is stated in the designation, the patient must indicate in the
designation how the determination under this subsection MUST be made. The determination of the patient's ability to make mental health treatment decisions MUST be made under section 5515.

(2) If a dispute arises as to whether the patient is unable to participate in medical or mental health treatment decisions, a petition may be filed with the court in the county in which the patient resides or is located requesting the court's determination as to whether the patient is unable to participate in decisions regarding medical treatment or mental health treatment, as applicable. If a petition is filed under this subsection, the court shall appoint a guardian ad litem to represent the patient for the purposes of this subsection. The SUBJECT TO SUBSECTION (4), THE court shall conduct a hearing on a petition under this subsection as soon as possible and not later than 7 days after the court receives the petition. As soon as possible and not later than 7 days after the hearing, the court shall determine whether or not the patient is able to participate in decisions regarding medical treatment or mental health treatment, as applicable. DURING THE PENDENCY OF A PETITION UNDER THIS SUBSECTION, THE PATIENT ADVOCATE OR THE PETITIONER SHALL NOT AUTHORIZE OR IMPLEMENT A MEDICAL TREATMENT DECISION TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING TREATMENT. If the court determines that the patient is unable to participate in the decisions, the patient advocate's authority, rights, and responsibilities are effective. If the court determines that the patient is able to participate in the decisions, the patient advocate's authority, rights, and responsibilities are not effective.
(3) IF A DISPUTE ARISES AS TO WHETHER THE PATIENT ADVOCATE IS COMPLYING WITH THE TERMS OF THE PATIENT ADVOCATE DESIGNATION OR WITH THE APPLICABLE PROVISIONS OF SECTIONS 5506 TO 5515, OR WHETHER THE PATIENT ADVOCATE IS ACTING CONSISTENT WITH THE PATIENT'S BEST INTERESTS, A PETITION MAY BE FILED WITH THE COURT IN THE COUNTY IN WHICH THE PATIENT RESIDES OR IS LOCATED REQUESTING THE COURT TO DETERMINE WHETHER THE PATIENT ADVOCATE IS ACTING CONSISTENT WITH HIS OR HER DESIGNATED AUTHORITY OR WITH THE PATIENT'S BEST INTERESTS. IF THE PETITION IS FILED UNDER THIS SUBSECTION, THE COURT SHALL APPOINT A GUARDIAN AD LITEM TO REPRESENT THE PATIENT FOR THE PURPOSES OF THIS SUBSECTION. SUBJECT TO SUBSECTION (4), THE COURT SHALL CONDUCT A HEARING ON A PETITION UNDER THIS SUBSECTION AS SOON AS POSSIBLE AND NOT LATER THAN 7 DAYS AFTER THE COURT RECEIVES THE PETITION. AS SOON AS POSSIBLE AND NOT LATER THAN 7 DAYS AFTER THE HEARING, THE COURT SHALL DETERMINE WHETHER OR NOT THE PATIENT ADVOCATE IS ACTING CONSISTENT WITH HIS OR HER DESIGNATED AUTHORITY OR WITH THE PATIENT'S BEST INTERESTS. DURING THE PENDENCY OF THE PETITION UNDER THIS SUBSECTION, THE PATIENT ADVOCATE OR A PETITIONER SHALL NOT AUTHORIZE OR IMPLEMENT A MEDICAL TREATMENT DECISION TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING TREATMENT.

(4) THE COURT SHALL PROVIDE NOTICE OF HEARING UNDER A PETITION FILED UNDER SUBSECTION (2) OR (3) TO EACH OF THE FOLLOWING:

(A) THE PATIENT AND THE PATIENT'S SPOUSE, PARENTS, AND ADULT CHILDREN.

(B) A PERSON WHO HAS THE PATIENT'S CARE OR CUSTODY.

(C) IF KNOWN, A PERSON NAMED AS ATTORNEY IN FACT UNDER A
DURABLE POWER OF ATTORNEY.

(D) IF NO OTHER PERSON IS NOTIFIED UNDER SUBDIVISION (A), (B), OR (C), AT LEAST 1 OF THE PATIENT'S CLOSEST ADULT RELATIVES, IF ANY, CAN BE FOUND.

(5) A NOTICE UNDER SUBSECTION (4) MUST BE SERVED PERSONALLY ON THE PATIENT. NOTICE TO ALL OTHER PERSONS MUST BE GIVEN AS PRESCRIBED BY COURT RULE.

(6) (3) In the case of a FOR A patient advocate designation that authorizes a patient advocate to make an anatomical gift of all or part of the patient's body, the patient advocate shall act on the patient's behalf in accordance with part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10123, and may do so only after the patient has been declared unable to participate in medical treatment decisions as provided in subsection (1) or declared dead by a licensed physician. The patient advocate's authority to make an anatomical gift remains exercisable after the patient's death.

(7) FOR PURPOSES OF THIS SECTION, THERE IS A REBUTTABLE PRESUMPTION THAT THE PATIENT'S BEST INTERESTS INCLUDE THE PATIENT CONTINUING TO LIVE.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.
A bill to amend 1978 PA 368, entitled
"Public health code,"
(MCL 333.1101 to 333.25211) by adding sections 17019, 17519, and
20407.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SEC. 17019. (1) A PHYSICIAN SHALL NOT ISSUE A MEDICAL ORDER,
ORALLY OR IN WRITING, TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING
TREATMENT FROM A PATIENT OR TO NOT RESUSCITATE A PATIENT WITHOUT
FIRST OBTAINING THE CONSENT OF 1 OF THE FOLLOWING:

(A) THE PATIENT.

(B) IF THE PATIENT IS A MINOR, A PARENT OF THE MINOR.

(C) IF THE PATIENT HAS DESIGNATED A PATIENT ADVOCATE AND IS
UNABLE TO PARTICIPATE IN MEDICAL TREATMENT DECISIONS, SUBJECT TO SECTION 5509(1)(E) OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.5509, THE PATIENT ADVOCATE.

(D) IF THE PATIENT IS A WARD FOR WHOM A GUARDIAN HAS BEEN APPOINTED, THE GUARDIAN.

(2) AS USED IN THIS SECTION:

(A) "GUARDIAN" MEANS A PERSON WHO HAS QUALIFIED AS A GUARDIAN OF A MINOR OR A LEGALLY INCAPACITATED INDIVIDUAL UNDER A COURT ORDER ISSUED UNDER SECTION 5204, 5205, OR 5306 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.5204, 700.5205, AND 700.5306.

(B) "LIFE-SUSTAINING TREATMENT" MEANS A MEDICAL PROCEDURE, MEDICATION, HYDRATION, OR NUTRITION THAT, IF WITHHELD OR WITHDRAWN, WOULD IN A PHYSICIAN'S REASONABLE MEDICAL JUDGMENT DIRECTLY RESULT IN OR INTENTIONALLY HASTEN A PATIENT'S DEATH.

(C) "PATIENT ADVOCATE" MEANS THAT TERM AS DESCRIBED AND USED IN SECTIONS 5506 TO 5515 OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.5506 TO 700.5515.

SEC. 17519. (1) A PHYSICIAN SHALL NOT ISSUE A MEDICAL ORDER, ORALLY OR IN WRITING, TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING TREATMENT FROM A PATIENT OR TO NOT RESUSCITATE A PATIENT WITHOUT FIRST OBTAINING THE CONSENT OF 1 OF THE FOLLOWING:

(A) THE PATIENT.

(B) IF THE PATIENT IS A MINOR, A PARENT OF THE MINOR.

(C) IF THE PATIENT HAS DESIGNATED A PATIENT ADVOCATE AND IS UNABLE TO PARTICIPATE IN MEDICAL TREATMENT DECISIONS, SUBJECT TO SECTION 5509(1)(E) OF THE ESTATES AND PROTECTED INDIVIDUALS CODE,
1 1998 PA 386, MCL 700.5509, THE PATIENT ADVOCATE.
2
3 (D) IF THE PATIENT IS A WARD FOR WHOM A GUARDIAN HAS BEEN
4 APPOINTED, THE GUARDIAN.
5
6 (2) AS USED IN THIS SECTION:
7
8 (A) "GUARDIAN" MEANS A PERSON WHO HAS QUALIFIED AS A GUARDIAN
9 OF A MINOR OR A LEGALLY INCAPACITATED INDIVIDUAL UNDER A COURT
10 ORDER ISSUED UNDER SECTION 5204, 5205, OR 5306 OF THE ESTATES AND
11 PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.5204, 700.5205,
12 AND 700.5306.
13
14 (B) "LIFE-SUSTAINING TREATMENT" MEANS A MEDICAL PROCEDURE,
15 MEDICATION, HYDRATION, OR NUTRITION THAT, IF WITHHELD OR WITHDRAWN,
16 WOULD IN A PHYSICIAN'S REASONABLE MEDICAL JUDGMENT DIRECTLY RESULT
17 IN OR INTENTIONALLY HASTEN A PATIENT'S DEATH.
18
19 (C) "PATIENT ADVOCATE" MEANS THAT TERM AS DESCRIBED AND USED
20 IN SECTIONS 5506 TO 5515 OF THE ESTATES AND PROTECTED INDIVIDUALS
21 CODE, 1998 PA 386, MCL 700.5506 TO 700.5515.
22
23 SEC. 20407. (1) A HEALTH FACILITY OR AGENCY SHALL NOT
24 IMPLEMENT A MEDICAL ORDER TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING
25 TREATMENT FROM A PATIENT OR RESIDENT OR TO NOT RESUSCITATE A
26 PATIENT OR RESIDENT WITHOUT FIRST OBTAINING THE CONSENT OF 1 OF THE
27 FOLLOWING:
28
29 (A) THE PATIENT OR RESIDENT.
30
31 (B) IF THE PATIENT OR RESIDENT IS A MINOR OR WARD, A PARENT OR
32 LEGAL GUARDIAN OF THE PATIENT OR RESIDENT.
33
34 (C) IF THE PATIENT OR RESIDENT HAS DESIGNATED A PATIENT
35 ADVOCATE AND IS UNABLE TO PARTICIPATE IN MEDICAL TREATMENT
36 DECISIONS, SUBJECT TO SECTION 5509(1)(E) OF THE ESTATES AND
PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL 700.5509, THE PATIENT
ADVOCATE.

(2) AS USED IN THIS SECTION:

(A) "LIFE-SUSTAINING TREATMENT" MEANS A MEDICAL PROCEDURE,
MEDICATION, HYDRATION, OR NUTRITION THAT, IF WITHHELD OR WITHDRAWN,
WOULD IN A PHYSICIAN'S REASONABLE MEDICAL JUDGMENT DIRECTLY RESULT
IN OR INTENTIONALLY HASTEN A PATIENT'S OR RESIDENT'S DEATH.

(B) "PATIENT ADVOCATE" MEANS THAT TERM AS DESCRIBED AND USED
IN SECTIONS 5506 TO 5515 OF THE ESTATES AND PROTECTED INDIVIDUALS
CODE, 1998 PA 386, MCL 700.5506 TO 700.5515.

Enacting section 1. This amendatory act takes effect 90 days
after the date it is enacted into law.
SENATE BILL No. 713

December 6, 2017, Introduced by Senators MARLEAU, KNOLLENBERG, KOWALL, JONES, BOOHER, EMMONS, COLBECK, ROCCA, CASPERSON, O’BRIEN, HUNE, GREEN, ROBERTSON, STAMAS, BRANDENBURG, BIEDA, GREGORY, HERTEL, MACGREGOR, NOFS, HANSEN, HORN, HILDENBRAND and SCHMIDT and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 5101, 5305, 5306, 5306a, 5310, and 5507 (MCL 700.5101, 700.5305, 700.5306, 700.5306a, 700.5310, and 700.5507), sections 5101 and 5310 as amended by 2000 PA 54, section 5305 as amended by 2013 PA 157, section 5306 as amended by 2004 PA 532, section 5306a as added by 2012 PA 173, and section 5507 as amended by 2008 PA 41, and by adding part 6 to article V.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 5101. As used in parts 1 to 4 of this article:
2 (a) "Best interests of the minor" means the sum total of the
3 following factors to be considered, evaluated, and determined by
4 the court:
(i) The love, affection, and other emotional ties existing between the parties involved and the child.

(ii) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue educating and raising the child in the child's religion or creed, if any.

(iii) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(iv) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(v) The permanence, as a family unit, of the existing or proposed custodial home.

(vi) The moral fitness of the parties involved.

(vii) The mental and physical health of the parties involved.

(viii) The child's home, school, and community record.

(ix) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.

(x) The party's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents.

(xi) Domestic violence regardless of whether the violence is directed against or witnessed by the child.

(xii) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship,
removal of a guardian, or parenting time.

(b) "Claim" includes, in respect to a protected individual, a liability of the protected individual, whether arising in contract, tort, or otherwise, and a liability of the estate that arises at or after the appointment of a conservator, including expenses of administration.

(c) "Conservator" includes, but is not limited to, a limited conservator described in section 5419(1).

(D) "ISOLATED ADULT" MEANS AN INDIVIDUAL WHO IS 18 YEARS OF AGE OR OLDER, INCLUDING A WARD, AND WHO HAS BEEN DENIED VISITATION WITH A QUALIFIED PERSON BY ANOTHER PERSON.

(E) "QUALIFIED PERSON" MEANS ANY OF THE FOLLOWING:

(i) THE SPOUSE, CHILD, GRANDCHILD, PARENT, OR SIBLING OF AN ALLEGEDLY ISOLATED ADULT.

(ii) AN INDIVIDUAL WHO HAS A SIGNIFICANT AND ONGOING RELATIONSHIP WITH AN ALLEGEDLY ISOLATED ADULT.

(iii) AN INDIVIDUAL WHOM THE ALLEGEDLY ISOLATED ADULT NAMED IN HIS OR HER PATIENT ADVOCATE DESIGNATION WITH WHOM THE ALLEGEDLY ISOLATED ADULT WOULD LIKE TO VISIT.

(F) "Visitor" means an individual appointed in a guardianship or protective proceeding who is trained in law, nursing, or social work, is an officer, employee, or special appointee of the court, and has no personal interest in the proceeding.

Sec. 5305. (1) The duties of a guardian ad litem appointed for an individual alleged to be incapacitated include all of the following:
(a) Personally visiting the individual.

(b) Explaining to the individual the nature, purpose, and legal effects of a guardian's appointment.

(c) Explaining to the individual the hearing procedure and the individual's rights in the hearing procedure, including, but not limited to, all of the following:

(i) The right to contest the petition.

(ii) The right to request limits on the guardian's powers, including a limitation on the guardian's power to execute a do-not-resuscitate order on behalf of the ward.

(iii) The right to object to a particular person being appointed guardian.

(iv) The right to be present at the hearing.

(v) The right to be represented by legal counsel.

(vi) The right to have legal counsel appointed for the individual if he or she is unable to afford legal counsel.

(d) Informing the individual that if a guardian is appointed, the guardian may have the power to execute a do-not-resuscitate order on behalf of the individual and, if meaningful communication is possible, discern if the individual objects to having a do-not-resuscitate order executed on his or her behalf.

(e) Informing the individual of the name of each person known to be seeking appointment as guardian.

(f) Asking the individual and the petitioner about the amount of cash and property readily convertible into cash that is in the individual's estate.

(g) Making determinations, and informing the court of those
determinations, on all of the following:

(i) Whether there are 1 or more appropriate alternatives to the appointment of a full guardian or whether 1 or more actions should be taken in addition to the appointment of a guardian. Before informing the court of his or her determination under this subparagraph, the guardian ad litem shall consider the appropriateness of at least each of the following as alternatives or additional actions:

(A) Appointment of a limited guardian, including the specific powers and limitations on those powers that the guardian ad litem believes to be appropriate.

(B) Appointment of a conservator or another protective order under part 4 of this article. In the report informing the court of the determinations under this subdivision, the guardian ad litem shall include an estimate of the amount of cash and property readily convertible into cash that is in the individual's estate.

(C) Execution of a patient advocate designation, do-not-resuscitate order, or durable power of attorney with or without limitations on purpose, authority, or duration.

(ii) Whether a disagreement or dispute related to the guardianship petition might be resolved through court ordered mediation.

(iii) Whether the individual wishes to be present at the hearing.

(iv) Whether the individual wishes to contest the petition.

(v) Whether the individual wishes limits placed on the guardian's powers.
(vi) Whether the individual objects to having a do-not-resuscitate order executed on his or her behalf.

(vii) Whether the individual objects to a particular person being appointed guardian.

(viii) WITH WHOM THE INDIVIDUAL WISHES TO COMMUNICATE AND VISIT, AND IF THE INDIVIDUAL NAMED ANOTHER INDIVIDUAL IN A PATIENT ADVOCATE DESIGNATION WITH WHOM THE INDIVIDUAL WOULD LIKE TO VISIT AND COMMUNICATE, THE IDENTITY OF THAT INDIVIDUAL.

(ix) WHETHER IT IS APPROPRIATE FOR THE INDIVIDUAL TO VISIT OR COMMUNICATE WITH AN INDIVIDUAL DESCRIBED IN SUBPARAGRAPH (viii).

(2) The court shall not order compensation of the guardian ad litem unless the guardian ad litem states on the record or in the guardian ad litem's written report that he or she has complied with subsection (1).

(3) If the individual alleged to be incapacitated wishes to contest the petition, to have limits placed on the guardian's powers, or to object to a particular person being appointed guardian and if legal counsel has not been secured, the court shall appoint legal counsel to represent the individual alleged to be incapacitated. If the individual alleged to be incapacitated is indigent, the state shall bear the expense of legal counsel.

(4) If the individual alleged to be incapacitated requests legal counsel or the guardian ad litem determines it is in the individual's best interest to have legal counsel, and if legal counsel has not been secured, the court shall appoint legal counsel. If the individual alleged to be incapacitated is indigent, the state shall bear the expense of legal counsel.
(5) If the individual alleged to be incapacitated has legal
counsel appointed under subsection (3) or (4), the appointment of a
guardian ad litem terminates.

Sec. 5306. (1) The court may appoint a guardian if the court
finds by clear and convincing evidence both that the individual for
whom a guardian is sought is an incapacitated individual and that
the appointment is necessary as a means of providing continuing
care and supervision of the incapacitated individual, with each
finding supported separately on the record. Alternately, the court
may dismiss the proceeding or enter another appropriate order.

(2) The court shall grant a guardian only those powers and
only for that period of time as is necessary to provide for the
demonstrated need of the incapacitated individual. The court shall
design the guardianship to encourage the development of maximum
self-reliance and independence in the individual AND TO CONTINUE
THE EXISTING RELATIONSHIPS WITH QUALIFIED PERSONS. If the court is
aware that an individual has executed a patient advocate
designation under section 5506, the court shall not grant a
guardian any of the same powers that are held by the patient
advocate. A court order establishing a guardianship shall MUST
specify any limitations on the guardian's powers and any time
limits on the guardianship.

(3) If the court finds by clear and convincing evidence that
an individual is incapacitated and lacks the capacity to do some,
but not all, of the tasks necessary to care for himself or herself,
the court may appoint a limited guardian to provide guardianship
services to the individual, but the court shall not appoint a full
(4) If the court finds by clear and convincing evidence that the individual is incapacitated and is totally without capacity to care for himself or herself, the court shall specify that finding of fact in an order and may appoint a full guardian.

(5) If an individual executed a patient advocate designation under section 5506 before the time the court determines that he or she became a legally incapacitated individual, a guardian does not have and shall not exercise the power or duty of making medical or mental health treatment decisions that the patient advocate is designated to make. If, however, a petition for guardianship or for modification under section 5310 alleges and the court finds that the patient advocate designation was not executed in compliance with section 5506, that the patient advocate is not complying with the terms of the designation or with the applicable provisions of sections 5506 to 5515, or that the patient advocate is not acting consistent with the ward's best interests, the court may modify the guardianship's terms to grant those powers to the guardian.

Sec. 5306a. (1) An individual for whom a guardian is sought or has been appointed under section 5306 has all of the following rights:

(a) To object to the appointment of a successor guardian by will or other writing, as provided in section 5301.

(b) To have the guardianship proceeding commenced and conducted in the place where the individual resides or is present or, if the individual is admitted to an institution by a court, in the county in which the court is located, as provided in section
(c) To petition on his or her own behalf for the appointment of a guardian, as provided in section 5303.

(d) To have legal counsel of his or her own choice represent him or her on the petition to appoint a guardian, as provided in sections 5303, 5304, and 5305.

(e) If he or she is not represented by legal counsel, to the appointment of a guardian ad litem to represent the individual on the petition to appoint a guardian, as provided in section 5303.

(f) To an independent evaluation of his or her capacity by a physician or mental health professional, at public expense if he or she is indigent, as provided in section 5304.

(g) To be present at the hearing on the petition to appoint a guardian and to have all practical steps taken to ensure this, including, if necessary, moving the hearing site, as provided by section 5304.

(h) To see or hear all the evidence presented in the hearing on the petition to appoint a guardian, as provided in section 5304.

(i) To present evidence and cross-examine witnesses in the hearing on the petition to appoint a guardian, as provided in section 5304.

(j) To a trial by jury on the petition to appoint a guardian, as provided in section 5304.

(k) To a closed hearing on the petition to appoint a guardian, as provided in section 5304.

(l) If a guardian ad litem is appointed, to be personally visited by the guardian ad litem, as provided in section 5305.
(m) If a guardian ad litem is appointed, to an explanation by the guardian ad litem of the nature, purpose, and legal effects of a guardian's appointment, as provided in section 5305.

(n) If a guardian ad litem is appointed, to an explanation by the guardian ad litem of the individual's rights in the hearing procedure, as provided in section 5305.

(o) If a guardian ad litem is appointed, to be informed by the guardian ad litem of the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, to be represented by legal counsel, and to have legal counsel appointed if the individual is unable to afford legal counsel, as provided in section 5305.

(p) To be informed of the name of each person known to be seeking appointment as guardian, including, if a guardian ad litem is appointed, to be informed of the names by the guardian ad litem as provided in section 5305.

(q) To require that proof of incapacity and the need for a guardian be proven by clear and convincing evidence, as provided in section 5306.

(r) To the limitation of the powers and period of time of a guardianship to only the amount and time that is necessary, as provided in section 5306.

(s) To a guardianship designed to encourage the development of maximum self-reliance and independence as provided in section 5306.

(t) To prevent the grant of powers to a guardian if those powers are already held by a valid patient advocate, as provided in
section 5306.

(u) To periodic review of the guardianship by the court, including the right to a hearing and the appointment of an attorney if issues arise upon the review of the guardianship, as provided in section 5309.

(v) To, at any time, seek modification or termination of the guardianship by informal letter to the judge, as provided in section 5310.

(w) To a hearing within 28 days of requesting a review, modification, or termination of the guardianship, as provided in section 5310.

(x) To the same rights on a petition for modification or termination of the guardianship including the appointment of a visitor as apply to a petition for appointment of a guardian, as provided in section 5310.

(y) To personal notice of a petition for appointment or removal of a guardian, as provided in section 5311.

(z) To written notice of the nature, purpose, and legal effects of the appointment of a guardian, as provided in section 5311.

(aa) To choose the person who will serve as guardian, if the chosen person is suitable and willing to serve, as provided in section 5313.

(bb) To consult with the guardian about major decisions affecting the individual, if meaningful conversation is possible, as provided in section 5314.

(cc) To quarterly visits by the guardian, as provided in
section 5314.

(dd) To have the guardian notify the court within 14 days of a change in the individual's residence, as provided in section 5314.

(ee) To have the guardian secure services to restore the individual to the best possible state of mental and physical well-being so that the individual can return to self-management at the earliest possible time, as provided in section 5314.

(ff) To have the guardian take reasonable care of the individual's clothing, furniture, vehicles, and other personal effects, as provided in section 5314.

(GG) IF THE INDIVIDUAL IS ABLE TO EXPRESS HIS OR HER PREFERENCE, TO VISIT AND COMMUNICATE WITH INDIVIDUALS OF HIS OR HER CHOICE. IF THE INDIVIDUAL IS UNABLE TO EXPRESS HIS OR HER PREFERENCES, AND IF THE INDIVIDUAL NAMED ANOTHER INDIVIDUAL IN A PATIENT ADVOCATE DESIGNATION WITH WHOM THE INDIVIDUAL WOULD LIKE TO VISIT AND COMMUNICATE, THE INDIVIDUAL HAS THE RIGHT TO VISIT AND COMMUNICATE WITH THAT OTHER INDIVIDUAL.

(2) A guardian ad litem shall inform the ward in writing of his or her rights enumerated in this section. The state court administrative office and the ADULT SERVICES AGENCY created in section 5 of the older Michigamians act, 1981 PA 180, MCL 400.585, shall promulgate a form to be used to give the written notice under this section, which shall MUST include space for the court to include information on how to contact the court or other relevant personnel with respect to the rights enumerated in this section.

Sec. 5310. (1) On petition of the guardian and subject to the
filing and approval of a report prepared as required by section 5314, the court shall accept the guardian's resignation and make any other order that is appropriate.

(2) The ward or a person interested in the ward's welfare may petition THE COURT for an order removing the guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating the guardianship. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this kind of request to the court or judge is subject to a finding of contempt of court.

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

(4) Before removing a guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating a guardianship, and following the same procedures to safeguard the ward's rights as apply to a petition for a guardian's appointment, the court may send a visitor to the present guardian's residence and to the place where the ward resides or is detained to observe conditions and report in writing to the court.
(5) A QUALIFIED PERSON MAY PETITION THE COURT FOR A FINDING THAT THE WARD IS AN ISOLATED ADULT AND FOR AN ORDER OF VISITATION WITH THE WARD UNDER SECTION 5603. A QUALIFIED PERSON MAY ALSO PETITION THE COURT FOR AN ORDER THAT REQUIRES THE GUARDIAN TO NOTIFY THE QUALIFIED PERSON IN WRITING WITHIN 14 DAYS AFTER EITHER OF THE FOLLOWING EVENTS:

(A) A CHANGE OF THE WARD'S RESIDENCE.

(B) THE WARD'S ADMISSION TO A HOSPITAL OR SKILLED NURSING FACILITY. AS USED IN THIS SUBDIVISION, "SKILLED NURSING FACILITY" MEANS THAT TERM AS DEFINED IN SECTION 20109 OF THE PUBLIC HEALTH CODE, 1978 PA 368, MCL 333.20109.

Sec. 5507. (1) A patient advocate designation may include a statement of the patient's desires on care, custody, COMMUNICATION AND VISITATION WITH OTHERS, and medical treatment or mental health treatment, or both. A patient advocate designation may also include a statement of the patient's desires on the making of an anatomical gift of all or part of the patient's body under part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10123. The statement regarding an anatomical gift under this subsection may include a statement of the patient's desires regarding the resolution of a conflict between the terms of the advance health care directive and the administration of means necessary to ensure the medical suitability of the anatomical gift. The patient may authorize the patient advocate to exercise 1 or more powers concerning the patient's care, custody, medical treatment, OR mental health treatment, the making of an anatomical gift, or the resolution of a conflict between the terms of the advance health care directive and the administration of means necessary to ensure the medical suitability of the anatomical gift.
care directive and the administration of means necessary to ensure
the medical suitability of the anatomical gift that the patient
could have exercised on his or her own behalf.

(2) A patient may designate in the patient advocate
designation a successor individual as a patient advocate who may
exercise the powers described in subsection (1) for the patient if
the first individual named as patient advocate does not accept, is
incapacitated, resigns, or is removed.

(3) Before a patient advocate designation is implemented, a
copy of the patient advocate designation must be given to the
proposed patient advocate and must be given to a successor patient
advocate before the successor acts as patient advocate. Before
acting as a patient advocate, the proposed patient advocate must
sign an acceptance of the patient advocate designation.

(4) The acceptance of a designation as a patient advocate must
include substantially all of the following statements:

1. This patient advocate designation is not effective unless
the patient is unable to participate in decisions regarding the
patient's medical or mental health, as applicable. If this patient
advocate designation includes the authority to make an anatomical
gift as described in section 5506, the authority remains
exercisable after the patient's death.

2. A patient advocate shall not exercise powers concerning the
patient's care, custody, and medical or mental health treatment
that the patient, if the patient were able to participate in the
decision, could not have exercised on his or her own behalf.

3. This patient advocate designation cannot be used to make a
medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.

4. A patient advocate may make a decision to withhold or withdraw treatment that would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.

5. A patient advocate shall not receive compensation for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.

6. A patient advocate shall act in accordance with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical or mental health treatment decisions are presumed to be in the patient's best interests.

7. A patient may revoke his or her patient advocate designation at any time and in any manner sufficient to communicate an intent to revoke.

8. A patient may waive his or her right to revoke the patient advocate designation as to the power to make mental health treatment decisions, and if such a waiver is made, his or her
ability to revoke as to certain treatment will be delayed for 30
days after the patient communicates his or her intent to revoke.

9. A patient advocate may revoke his or her acceptance of the
patient advocate designation at any time and in any manner
sufficient to communicate an intent to revoke.

10. A patient admitted to a health facility or agency has the
rights enumerated in section 20201 of the public health code, 1978
PA 368, MCL 333.20201.

PART 6

ISOLATED ADULTS

SEC. 5601. THE VENUE FOR A VISITATION PROCEEDING UNDER SECTION
5603 IS IN THE COUNTY WHERE THE ALLEGEDLY ISOLATED ADULT RESIDES OR
IS PRESENT.

SEC. 5603. (1) A QUALIFIED PERSON MAY PETITION THE COURT FOR A
FINDING THAT AN INDIVIDUAL WHO IS AT LEAST 18 YEARS OF AGE IS BEING
ISOLATED FROM A QUALIFIED PERSON BY ANOTHER INDIVIDUAL.

(2) A PETITION UNDER THIS SECTION MUST INCLUDE ALL OF THE
FOLLOWING:

(A) THE PETITIONER'S INTEREST AS A QUALIFIED PERSON.

(B) THE RESIDENCE OF THE ALLEGEDLY ISOLATED ADULT OR WHERE HE
OR SHE IS PRESENT.

(C) A STATEMENT OF FACTS AS TO WHY THE PETITIONER'S VISITATION
WITH THE ALLEGEDLY ISOLATED ADULT IS BEING INTERFERED WITH OR
DENIED.

(D) THE IDENTITY OF ANY PERSON ALLEGED TO BE INTERFERING WITH
OR DENYING VISITATION BETWEEN THE PETITIONER AND THE ALLEGEDLY
ISOLATED ADULT UNDER SUBDIVISION (C).
(3) IN A PROCEEDING UNDER THIS SECTION, NOTICE OF HEARING MUST BE GIVEN TO EACH OF THE FOLLOWING:

(A) THE ALLEGEDLY ISOLATED ADULT.

(B) THE RESPONDENT.

(4) NOTICE MUST BE SERVED PERSONALLY ON THE ALLEGEDLY ISOLATED ADULT. NOTICE TO ALL OTHER PERSONS MUST BE GIVEN AS PRESCRIBED BY COURT RULE.

(5) A COPY OF THE PETITION UNDER THIS SECTION MUST BE ATTACHED TO THE NOTICE OF HEARING.

(6) ON THE FILING OF A PETITION UNDER SUBSECTION (1), THE COURT SHALL SET A DATE FOR HEARING ON THE ISSUE OF ISOLATION.

(7) IT IS PRESUMED THAT IT IS IN THE BEST INTEREST OF AN ALLEGEDLY ISOLATED ADULT TO VISIT WITH A QUALIFIED PERSON. THE RESPONDENT MAY REBUT THE PRESUMPTION UNDER THIS SUBSECTION WITH CLEAR AND CONVINCING EVIDENCE OF ANY OF THE FOLLOWING:

(A) THAT THE PETITIONER COMMITTED MENTAL, PHYSICAL, OR FINANCIAL ABUSE AGAINST THE ALLEGEDLY ISOLATED ADULT.

(B) THAT VISITATION BETWEEN THE PETITIONER AND THE ALLEGEDLY ISOLATED ADULT WOULD BE HARMFUL TO THE ALLEGEDLY ISOLATED ADULT'S HEALTH OR MENTAL WELL-BEING.

(8) IF AN ALLEGEDLY ISOLATED ADULT WHO IS THE SUBJECT OF A PETITION UNDER THIS SECTION OBJECTS TO VISITATION WITH THE PETITIONER, THE PETITIONER MUST DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT THE ALLEGEDLY ISOLATED ADULT'S OBJECTION RESULTED FROM THE RESPONDENT'S UNDUE INFLUENCE OVER THE ALLEGEDLY ISOLATED ADULT. IF THE PETITIONER DEMONSTRATES CLEAR AND CONVINCING EVIDENCE UNDER THIS SUBSECTION, THE COURT SHALL GRANT THE PETITIONER
REASONABLE VISITATION AND NOTICE OF CHANGE IN RESIDENCY AS PROVIDED IN SUBSECTION (9).

(9) IF THE COURT FINDS THAT THE PETITIONER IS A QUALIFIED PERSON, THAT THE INDIVIDUAL SUBJECT TO A PETITION UNDER THIS SECTION IS AN ISOLATED ADULT, AND THAT VISITATION BETWEEN THE ISOLATED ADULT AND THE PETITIONER IS BEING DENIED, THE COURT MAY ENTER AN ORDER THAT DOES ANY OF THE FOLLOWING:

(A) ESTABLISHES REASONABLE TIMES FOR THE PETITIONER TO VISIT THE ISOLATED ADULT.

(B) REQUIRES THE RESPONDENT TO NOTIFY THE PETITIONER WITHIN 14 DAYS AFTER ANY OF THE FOLLOWING:

(i) A CHANGE IN THE ISOLATED ADULT'S RESIDENCE.

(ii) THE ISOLATED ADULT'S ADMISSION TO A HOSPITAL OR SKILLED NURSING FACILITY. AS USED IN THIS SUBPARAGRAPH, "SKILLED NURSING FACILITY" MEANS THAT TERM AS DEFINED IN SECTION 20109 OF THE PUBLIC HEALTH CODE, 1978 PA 368, MCL 333.20109.

(10) IF THE COURT DETERMINES THAT A PETITIONER FILED A PETITION UNDER THIS SECTION IN BAD FAITH, THE COURT MAY ASSESS REASONABLE ATTORNEY FEES INCURRED BY THE RESPONDENT AND ANY GUARDIAN AD LITEM COST AGAINST THE PETITIONER.

(11) IF THE COURT GRANTS THE PETITIONER'S PETITION, THE COURT MAY ASSESS AGAINST THE RESPONDENT ANY OF THE FOLLOWING:

(A) THE COST OF FILING AND SERVING THE PETITION.

(B) ANY COST FOR A GUARDIAN AD LITEM.

(C) REASONABLE ATTORNEY FEES INCURRED BY THE PETITIONER.

(12) AS USED IN THIS SECTION, "RESPONDENT" MEANS AN INDIVIDUAL ALLEGED TO HAVE INTERFERED WITH OR DENIED VISITATION BETWEEN AN
ALLEGEDLY ISOLATED ADULT AND A PETITIONER UNDER THIS SECTION.
MEMORANDUM

TO: Probate and Estate Planning Council
FROM: State Bar and Section Journals Committee
DATE: December 11, 2017
RE: Report to the Council re the State Bar Journal Theme Issue and Michigan Probate & Estate Planning Journal Publication Agreement with the Institute of Continuing Legal Education

The State Bar and Section Journals Committee is currently planning the Section’s theme issue of the Michigan Bar Journal, which is scheduled to be published in November of 2018. The Committee has chosen topics and is currently reaching out to potential authors. The Committee also plans to use the Section’s theme issue as an opportunity to highlight the legislative, appellate, and educational work of the Council on behalf of Section members.

The Committee has also been in discussion with the Institute of Continuing Legal Education with regard to the renewal of the Section’s agreement with ICLE for publication of the Michigan Probate & Estate Planning Journal. The Committee received a proposed renewal of the existing publication agreement with no changes to the current agreement with the exception of the dates. See attached as Exhibit A the proposed agreement. Nancy Little, the Managing Editor of the Journal, and Committee Chair Richard Mills spoke with Cindy Huss, Director of Publications and Online Resources for ICLE, regarding ICLE’s services with regard to the Journal. The Committee also received a proposal from the State Bar to publish the Journal on the Section’s behalf, which was considered by the Committee as well.

Mrs. Little and the Committee generally are pleased with the current relationship with ICLE. Now that the Journal is only printed digitally the publication process is significantly streamlined from years past and Mrs. Little has reported a strong working relationship with ICLE staff. While the price quoted by ICLE exceeds the proposal from the State Bar, the Committee believes that ICLE has proven to be a good partner with regard the Section and provides value to account for the price difference.

Council Action Requested: The Committee recommends the approval of the proposed renewal of the existing agreement with ICLE for publication of the Michigan Probate & Estate Planning Journal.

Respectfully Submitted,

Richard C. Mills
Chair, State Bar and Section Journals Committee
Publishing Agreement for the Probate Journal (Fifth Renewal)

The Regents of the University of Michigan on behalf of its Institute of Continuing Legal Education ("ICLE") and the Probate and Estate Planning Section of the State Bar of Michigan (the "Section") agree on the following terms for producing The Michigan Probate & Estate Planning Journal (the "Journal").

I. Publication. ICLE will publish 3 evenly spaced issues each year. Publication is scheduled for December, April and August of each year. Each issue is anticipated to be approximately 60 pages, 8½ x 11 inches, emailed to Section members and available in electronic form through the Section’s State Bar web site and through the Section member area on ICLE’s web site.

II. The Section’s Responsibilities. The Section shall:

a. Appoint a Section contact person (the "Journal Editor") who will be responsible for planning the contents of the Journal and trouble-shooting major issues. The Journal Editor is responsible for promptly providing ICLE with the list of articles, features and authors and for reviewing articles/features and proofs in a timely way.

b. Take primary responsibility for determining the theme of each issue, the recurring features, the number of articles, the topics for articles, and the authors of articles and features.

c. Cooperate with ICLE staff in determining the schedule for the year and for each issue.

d. Be responsible for email distribution of the Journal to Section members.

III. ICLE’s Responsibilities. ICLE shall:

a. Appoint an ICLE editor (the "ICLE Editor") who is the Section’s primary contact at ICLE for the Journal. ICLE will assign the ICLE Editor to devote adequate time to produce the Journal.

b. Assign an ICLE staff lawyer (the "ICLE Lawyer") to review each issue of the Journal for substantive errors or omissions. If requested by the Journal Editor, the ICLE Lawyer will participate in planning meetings with the Journal Editor and/or an Editorial Board, assist in determining topics for articles, including suggesting existing material submitted to ICLE that might form the basis of an article and suggesting possible authors.

c. If requested by the Journal Editor, the ICLE Editor will regularly remind the authors of deadlines and obtain their articles and features. The ICLE Editor will promptly inform the Journal Editor of any serious problems anticipated in meeting the agreed schedule. The Journal Editor will review articles and features before ICLE begins processing them.
d. The ICLE Editor will cite-check and lightly copyedit (review for grammatical and stylistic issues) the articles and features. Within two weeks after the last article or feature is received, the ICLE Editor will send a final, typeset proof of the entire issue to the Journal Editor for review and approval.

e. Handle all typesetting for the Journal. If the Section desires a redesign of the Journal, ICLE will oversee the redesign process and recommend, hire and supervise any outside designer.

f. Provide the Section with electronic files in PDF or other format agreed on by the parties for email distribution and posting on the Section’s State Bar website.

i. Prepare the articles and features in XML or similar format as needed for posting on the Section member area of the ICLE website.

IV. Term; Payment; Relation to Other Projects.

a. The term of this Agreement shall begin January 1, 2018 and end December 31, 2020.

b. The Section will pay ICLE $4,000 for each issue of the Journal published during the term of this agreement, beginning with the April 2018 issue and ending with the December 2020 issue. The parties acknowledge that this amount does not compensate ICLE for expected staff and overhead costs. This charge is reduced in light of the value ICLE receives as a result of the Section’s strong support and contributions to ICLE’s probate seminars and resources, which have yielded strong audience response and income.

c. Payments will be due at the time each issue of the Journal is sent to the Section for email distribution and posting. ICLE will send an invoice to the Treasurer of the Probate Section.

V. Other Issues.

a. In order to minimize scheduling delays, ICLE and the Journal Editor will agree on the minimum number and type of articles and features that make up an acceptable issue (for example, that every issue must include at least 3 of the 6 regular columns (Chairperson’s letter, recent decisions, legislative report, ethics update, EPIC Q&A, and digest of opinions), the list of officers and committees, and 3 substantive articles). If four weeks pass after the submission deadline set for articles, ICLE will prepare and publish the issue as long as it includes the minimum number of articles and features. ICLE will remind the Journal Editor as this deadline approaches and will keep the Journal Editor informed of
the status of submissions for each edition.

b. Producing 3 issues each year will require the cooperative efforts of Section personnel and ICLE. ICLE will use its best efforts to ensure that three issues will be produced each year, but cannot guarantee this if authors or Journal Editors do not meet agreed deadlines for the minimum agreed contents. ICLE does promise to monitor the schedule, vigorously remind contributors and the Journal Editor of deadlines, and alert the Journal Editor and Section Chairperson in a timely way of problems that may have a significant impact on the schedule.

c. ICLE will be allotted two pages in each issue to advertise ICLE resources of interest to probate and estate planning practitioners. The Section’s and Section leaders’ participation in creating and making these resources available will be featured.

d. A regular feature of the Journal will be brief articles that explain the ICLE Partnership’s probate and estate planning resources, including its most recent additions. The role of the Probate Section and its leaders in creating these resources will be featured.

e. Either party may terminate this Agreement for the other party’s material breach, after notice and a reasonable opportunity to cure the breach.

The foregoing is agreed to by ICLE and the Section.

REGENTS OF THE UNIVERSITY OF MICHIGAN ON BEHALF OF THE INSTITUTE OF CONTINUING LEGAL EDUCATION

By ____________________________________________

Date:____________________________________________

THE PROBATE & ESTATEPLANNING SECTION OF THE STATE BAR OF MICHIGAN

By ____________________________________________

It’s Chairperson

Date:____________________________________________
MEMORANDUM

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 Chair’s Report

Date: December 5, 2017

Becky Bechler and I are meeting Representative Klint Kesto on December 13, to discuss his sponsoring the DDTC legislative proposal that the Council approved on November 11.

JPS
DEtroIT 40411-1 1416471v4 - 12/5/2017 10:45:12 AM
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan

From: James P. Spica

Re: Uniform Law Commission Liaison Report

Date: December 5, 2017

The ULC's Fiduciary Income and Principal Act Drafting Committee had a two-day, face-to-face meeting in Washington, D.C., on November 17 and 18. The draft Act we worked on at that meeting is posted at:


But the Committee made so many basic changes to that draft that the thing is hardly worth looking at now—better to wait for the next iteration, which should be forthcoming in January. (The next draft will present a more unified treatment of the power to adjust, on the one hand, and the power to switch to (and from) unitrust, on the other.) Please stand by.

JPS

DETROIT 40411-1 1416338v5 - 12/5/2017 10:41:39 AM
Taxation Section Liaison
Report to the Probate & Estate Planning Section
December 2017

The last meeting of the Taxation Section Council was December 7 2017

There are over 63 people attended the Taxation Section’s Fundamentals of Taxation Seminar. Plans are to repeat it next year. Other dates are being considered. Send any thoughts about this to Brian Gallagher at bgallagher@fraserlawfirm.com

The 2018 Annual Tax Conference is scheduled for May 24, 2018 at the Inn at St. Johns, Plymouth, MI. Presenters include Patrick Robertson, a Washington D.C. consultant will discuss Current Tax Legislative Developments (Federal), Alton Pscholka, Michigan State Budget Director, John Mashni of Foster Swift who will address Cybersecurity and Data Breaches, Heather Fick of the State Tax Commission on State Tax Commission and Property Tax Developments, and Aaron Stumpf of Stout who will address Controversial Tax Issues in Business Valuation for Estate & Gift Tax Purposes. The Full Schedule is attached.

A Michigan House Bill 4976 would allow settlements at informal conference on Michigan tax issues.

The probate Sections SB540, sponsored by Tanya Schuitmaker, generated some interest. The Chair of the Taxation Section thinks it is not going anywhere.

The Fall issue of the Michigan Tax Lawyer included articles by Sean Cook on the new partnership audit rules, Lorraine New on some IRS procedural changes, Carolee Kvoriak Smith on Michigan Informal Conferences and an article on Entity Selection.

The Winter issue will have articles on Estates & Trusts and Employee Benefits.

The Taxation Section has landing pages for all of its Committees, including Estate & Trusts, for Section members who sign up for it.

The Michigan Tax Tribunal Reform Bill (HB 4412) has passed the House but appears to be dead.

The Taxation Section has a social media presence on both Facebook (with pictures) and on LinkedIn. Both can be accessed by searching Taxation Section of the State Bar of Michigan.

George W. Gregory, Liaison
<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
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<tbody>
<tr>
<td>8:00am -</td>
<td>Welcome and Introductions</td>
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<tr>
<td>8:00am -</td>
<td>Optional Morning Session: Accounting and Auditing for Income Taxes</td>
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<tr>
<td>8:00am -</td>
<td>Continental Breakfast, Exhibitor Showcase, and Registration</td>
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<tr>
<td>9:00am -</td>
<td>Grand Rapids</td>
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<tr>
<td>9:00am -</td>
<td>Milka Meyer PLC</td>
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<tr>
<td>9:00am -</td>
<td>Chalmers Tax Conference 2018</td>
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<tr>
<td>9:00am -</td>
<td>Andrea D. Cumberbatch</td>
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<td>9:00am -</td>
<td>Jackson</td>
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<td>9:00am -</td>
<td>Consumers Energy</td>
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<td>9:00am -</td>
<td>Chair, State Bar of Michigan Taxation Section Council</td>
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<td>9:00am -</td>
<td>Carolle Koryn Smith</td>
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</tbody>
</table>

**Full Schedule**

**Tax Conference, 31st Annual**

iran at 1st John's, Plymouth

Thursday, May 4, 2016
<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>10:15am</td>
<td>A View from the Tax Court</td>
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<td></td>
<td>Patrick Robertson</td>
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<td>11:10am</td>
<td>C2 Group/FTC Consulting</td>
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<td>State and Local Tax Committee</td>
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<td>Lunch</td>
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<td>State of Michigan State Budget Director</td>
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<td>State of Michigan State Budget Director</td>
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<td>State and Local Tax Committee</td>
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<td>State and Local Tax Committee</td>
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<td>2:30pm</td>
<td>Lunch</td>
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<td></td>
<td>State and Local Tax Committee</td>
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### Event Details

- **Valuing & Corporations and Other Pass-through Entities**
  - Purpose: Provider issues scrutinized by the IRS

- **Controversial Tax Issues in Business Valuation for Estate & Gift Tax**
  - Discuss current state of Michigan's economy and budget
  - Focus on leadership's accomplishments and data breaches
  - Federal Income Tax Committee

- **Federal Income Tax Committee**
  - Evolving taxation
  - Foster Swit Collins & Smith PC
  - John W. Maslim
  - Preventative and remedial steps for incident response
  - IRS and tax consequences when a data breach occurs
  - Requirements for non-tax issues including state and federal notifications
  - Basis of data breaches every lawyer should understand
<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
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<tbody>
<tr>
<td>9:45am</td>
<td>Networking Reception and Drawing (Must be present to win @ 9:55)</td>
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<td>10:00am</td>
<td>Nick A. Knott: Improving the administration of the state and local tax system</td>
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<td>Tax policy issues in Lansing</td>
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<td></td>
<td>Where do we go from here?</td>
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<td></td>
<td>Michigan Tax Policy and Administration</td>
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<td>11:00am</td>
<td>Vendor Visits and Networking Break</td>
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<td></td>
<td>Grand Rapids: Foster Swift Collins &amp; Smith PC</td>
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<td>Chemical Bank Wealth Management</td>
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<td>New York, NY</td>
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<td>Mayer Brown LLP</td>
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<td>Douglas G. Ulrich</td>
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<td>11:45am</td>
<td>Leah S. Robinson</td>
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<td>Mayer Brown LLP</td>
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<td>Press-through/disregarded entity review</td>
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<td>Treatment of net operating losses</td>
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<td>Applicable issues</td>
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<td>Section 472 at the state level</td>
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<td>Nexus update</td>
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<td>National State Tax Developments</td>
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<td>Michigan State Tax Developments</td>
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<tr>
<td>12:30pm</td>
<td>Vendor Visits and Networking Break</td>
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<td>Chicago: Aaron M. Stumpf</td>
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<td>State Tax Commission</td>
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<td></td>
<td>Heather S. Fick</td>
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<td>New Procedures</td>
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<td>Treatment of built-in capital gains taxes</td>
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