Agendas & Attachments for

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

Saturday, February 14, 2015
9:00 a.m.
University Club
Lansing, Michigan
Probate and Estate Planning Section of the
State Bar of Michigan

Notice of Meetings

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

and

Meeting of the Council of the Probate and Estate Planning Section

February 14, 2015
9:00 a.m.
University Club
3435 Forest Road
Lansing, Michigan 48910

The above stated meetings of the Section will be held at the MSU University Club, 3435 Forest Road, Lansing, Michigan, Saturday, February 14, 2015. The Section's Committee on Special Projects (CSP) meeting will begin at 9:00 a.m., followed immediately by the meeting of the Council of the Section. 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.

Marlaine C. Teahan
Secretary

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

Unless otherwise noted, meetings are held at 9:00 a.m. at the University Club, 3435 Forest Road, Lansing, Michigan 48910.

The following is a list of the remaining meetings for 2014-15:
March 14, 2015
April 11, 2015
June 13, 2015
September 12, 2015 (Annual Section Meeting)

Tentative meeting schedule for 2015-16:
October Location TBD
November 7, 2015
December 12, 2015
January 16, 2016
February 13, 2016
March 12, 2016
April 16, 2016
June 4, 2016
September 10, 2016 (Annual Section Meeting)
CALL FOR MATERIALS
CSP and Council Meetings of the
Probate and Estate Planning Section
of the
State Bar of Michigan

All materials are due on or before **5 p.m.** on the Thursday falling 10
days before the next Council meeting. Committee Chairs should
typically plan to hold monthly committee meetings before the due
dates listed below so that these deadlines can be met.

**CSP materials** are to be sent to Chris Ballard, Chair of the Committee on
Special Projects (cballard@honigman.com).

**Council materials** are to be sent to Marlaine C. Teahan, Secretary of the
Section (mteahan@fraserlawfirm.com).

**Schedule of due dates for materials – by 5 p.m.**

- March 5, 2015
- April 2, 2015
- June 4, 2015
- September 3, 2015 (Annual Section Meeting)
# Officers for 2014-2015 Term

<table>
<thead>
<tr>
<th>Officer</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson</td>
<td>Amy N. Morrissey</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>Shaheen I. Imami</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>James B. Steward</td>
</tr>
<tr>
<td>Secretary</td>
<td>Marlaine C. Teahan</td>
</tr>
<tr>
<td>Treasurer</td>
<td>Lentz, Marguerite Munson</td>
</tr>
</tbody>
</table>

## Council Members for 2014-2015 Terms

<table>
<thead>
<tr>
<th>Council Member</th>
<th>Year elected to current term (partial, first or second full term)</th>
<th>Current term expires</th>
<th>Eligible after Current term?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ard, W. Josh.</td>
<td>2012 (2nd term)</td>
<td>2015</td>
<td>No</td>
</tr>
<tr>
<td>Ouellette, Patricia M.</td>
<td>2012 (2nd term)</td>
<td>2015</td>
<td>No</td>
</tr>
<tr>
<td>Spica, James P.</td>
<td>2012 (2nd term)</td>
<td>2015</td>
<td>No</td>
</tr>
<tr>
<td>Clark-Kreuer, Rhonda M.</td>
<td>2012 (1st term)</td>
<td>2015</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Lucas, David P.</td>
<td>2012 (1st term)</td>
<td>2015</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Skidmore, David L.J.M.</td>
<td>2012 (1st term)</td>
<td>2015</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Brigman, Constance L.</td>
<td>2010 (2nd term)</td>
<td>2016</td>
<td>No</td>
</tr>
<tr>
<td>Allan, Susan M.</td>
<td>2010 (2nd term)</td>
<td>2016</td>
<td>No</td>
</tr>
<tr>
<td>Mills, Richard C.</td>
<td>2014 (1st partial term)</td>
<td>2016</td>
<td>Yes (2 terms)</td>
</tr>
<tr>
<td>Marquart, Michele C.</td>
<td>2013 (1st term)</td>
<td>2016</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>New, Lorraine F.</td>
<td>2013 (1st term)</td>
<td>2016</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Vernon, Geoffrey R.</td>
<td>2013 (1st term)</td>
<td>2016</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Ballard, Christopher A.</td>
<td>2014 (2nd term)</td>
<td>2017</td>
<td>No</td>
</tr>
<tr>
<td>Bearup, George F.</td>
<td>2014 (2nd term)</td>
<td>2017</td>
<td>No</td>
</tr>
<tr>
<td>Welber, Nancy H.</td>
<td>2014 (2nd term)</td>
<td>2017</td>
<td>No</td>
</tr>
<tr>
<td>Jaconette, Hon Michael L.</td>
<td>2014 (1st term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Kellogg, Mark E.</td>
<td>2014 (1st term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Malviya, Raj A.</td>
<td>2014 (1st term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
</tbody>
</table>
Ex Officio Members

John E. Bos
Robert D. Brower, Jr.
Douglas G. Chalgian
George W. Gregory
Henry M. Grix
Mark K. Harder
Hon. Philip E. Harter
Dirk C. Hoffius
Brian V. Howe
Raymond T. Huetteman, Jr.
Stephen W. Jones
Robert B. Joslyn
James A. Kendall
Kenneth E. Konop
Nancy L. Little
James H. LoPrete

Richard C. Lowe
John D. Mabley
John H. Martin
Michael J. McClory
Douglas A. Mielock
Russell M. Paquette
Patricia Gormely Prince
Douglas J. Rasmussen
Harold G. Schuitmaker
John A. Scott
Fredric A. Sytsma
Thomas F. Sweeney
Lauren M. Underwood
W. Michael Van Haren
Susan S. Westerman
Everett R. Zack
Michael W. Irish Award

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

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

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

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

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

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

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

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

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

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

Guidelines for Selection:
- Significant CLE contributions to probate and estate planning over a substantial period of time.
- Outstanding quality of contributions.
- A wide range of contributions, e.g. multiple contributions for the following: speaker, author, editor, advisory board member, curriculum advisor, creating case study scenarios, preparing Top Tips, How-To Kits or other online resources, etc.
- Generous mentorship and assistance to colleagues with their probate and estate planning career development as well as activities and active involvement with the Probate & Estate Planning Section of the State Bar of Michigan.
Probate & Estate Planning Section Committees 2014-2015

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

Marlaine C. Teahan, Chair  
Marguerite Munson Lentz  
James B. Steward

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

Shaheen I. Imami

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

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

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

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

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

Shaheen I. Imami, Chair

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

Christopher A. Ballard, Chair

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

George W. Gregory, Chair  
Mark K. Harder  
Thomas F. Sweeney
Probate & Estate Planning Section Committees 2014-2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Geoffrey R. Vernon, Chair
Robert P. Tiplady, II, Vice Chair
Susan M. Allan
Howard H. Collens
Georgette E. David
Shawn P. Eyestone
Mark K. Harder
Raymond A. Harris
Shaheen I. Imami
Robert B. Labe
Henry P. Lee
Marguerite Munson Lentz
Michael G. Lichterman
Raj A. Malviya
Sueann T. Mitchell
Nathan R. Piwowarski
James P. Spica

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

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

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

Raj A. Malviya, Chair
Christopher J. Caldwell
Nicholas R. Dekker

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

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

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

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

2-9-15
Probate & Estate Planning Section Committees 2014-2015

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

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

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

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

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

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

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

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

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

Lorraine F. New, Chair
Christopher A. Ballard
Michael W. Bartnik
William R. Bloomfield
Robin D. Ferriby
Richard C. Mills
Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee

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

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

Alternative Dispute Resolution Section Liaison
vacant

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

John R. Dresser

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

Amy Rombyer Tripp

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

Patricia M. Ouellette

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

Jeanne Murphy

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

William J. Ard

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

J. David Kerr

2-9-15
Michigan Bankers Association Liaison  
*Mission: The liaison to the Michigan Bankers Association is responsible for developing and maintaining bilateral communication between the Section and the Michigan Bankers Association in matters of mutual interest and concern*

Susan M. Allan

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

Rebecca A. Schnelz

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

Constance L. Brigman  
Michele C. Marquardt  
Rebecca A. Schnelz

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

Rebecca A. Schnelz

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

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

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

Richard J. Siriani

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

George W. Gregory
Probate and Estate Planning Council  
Committee on Special Projects Agenda  

February 14, 2015  
9:00 a.m.  

1. Artificial Reproductive Technology ("ART") Committee – Nancy Welber  
Summary of Proposed Changes (Exhibit A)  
Draft statutory changes will be circulated in March  

2. Community Property Trusts Committee – Neal Nusholtz  
Summary of Issue (Exhibit B)  

3. Insurance Committee – Geoffrey Vernon  
Exculpation of trustees of life insurance trusts from liabilities related to the administration of policies held in the trust  
Proposed MCL 700.1513 (Exhibit C)  

4. Updating Michigan Law Committee – Geoffrey Vernon  
Proposed tenancy by the entireties statutes  
New Materials  
MCL 557.151, new version (Exhibit D-1)  
MCL 700.7509, new version (Exhibit D-2)  
Please see the January CSP Materials for copies of the following:  
MCL 554.44, 554.45 (Jan Exhibit B-1)  
MCL 557.151 (current) (Jan Exhibit B-2)  
MCL 557.151 (replacement), previous version (Jan Exhibit B-3)  
MCL 557.101, 557.102, 565.48, 565.49 (Jan Exhibit B-4)  
MCL 600.2807 (Jan Exhibit B-5)  
MCL 600.6023a (Jan Exhibit B-6)  
MCL 700.2801, 700.2806, 700.2114, 700.2519 (Jan Exhibit B-7)  
MCL 700.7509, previous version (Jan Exhibit B-8)  
Please see the December CSP Materials for copies of the following:  
ACTEC Chart Summarizing the state law (Dec Exhibit B-6)  
Sample State Statutes (Dec Exhibit B-7)
The Artificial Reproductive Technology ("ART") Committee has prepared draft amendments to EPIC to incorporate several of the 2008 modifications to the Uniform Probate Code. The changes include the following:

*Execution of Wills.* There is a proposed change to allow notarized wills as an alternative to wills that are attested by two witnesses.

*Class Gifts.* The rules of construction contained in this area were revised to be substantially consistent with the rules of construction contained in the Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.5 through 14.9. These sections of the Restatement apply to the treatment for class-gift purposes of an adoptee, a nonmarital child, a child of assisted reproduction, a gestational child, and a relative by marriage.

*Reformation and Modification.* New sections in EPIC broaden the class of documents that can use the reformation and modification sections now contained in the Michigan Trust Code.

*Parent-Child Relationships.* The revised statute contains several new or substantially revised sections. New Section 2-115 contains definitions of terms that are used in this area. New Section 2-116 is an umbrella section declaring that, except as otherwise provided in Section 2-119(b) through (e), if a parent-child relationship exists or is established under this subpart 2, the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession. Section 2-117 continues the rule that, except as otherwise provided in Sections 2-120 and 2-121, a parent-child relationship exists between a child and the child’s genetic parents, regardless of their marital status. Regarding adopted children, Section 2-118 continues the rule that adoption establishes a parent-child relationship between the adoptive parents and the adoptee for purposes of intestacy. Section 2-119 addresses the extent to which an adoption severs the parent-child relationship with the adoptee’s genetic parents. New Sections 2-120 and 2-121 turn to various parent-child relationships resulting from assisted reproductive technologies in forming families. As one researcher reported: “Roughly 10 to 15 percent of all adults experience some form of infertility.” Debora L. Spar, The Baby Business 31 (2006). Infertility, coupled with the desire of unmarried individuals to have children, have led to increased questions concerning children of assisted reproduction. Sections 2-120 and 2-121 address inheritance rights in cases of children of assisted reproduction, whether the birth mother is the one who parents the child or is a gestational carrier who bears the child for an intended parent or intended parents. As two authors have noted: “Parents, whether they are in a married or unmarried union with another, whether they are a single parent, whether they procreate by sexual intercourse or by assisted reproductive technology, are entitled to the respect the law gives to family choice.” Charles P. Kindregan, Jr. & Maureen McBrien, Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science 6-7 (2006). The final section, new Section 2-122, provides that nothing contained in this part of EPIC should be construed as affecting application of the judicial doctrine of equitable adoption.
The Community Property Trust Committee Task

The tax cost of something is called your basis. If a spouse dies with entireties property, the new basis for the survivor is one half of fair market value at the time of death and one half of the original basis (House bought for $50,000 now worth $400,000; new basis = $225,000). In community property jurisdictions, the survivor’s stepped up basis is full fair market value ($400,000.00) which means lower taxes on sale. See (1014)(b)(6). Alaska and Tennessee, both non-community property states, have statutes allowing husband and wife to place property in a trust and label it as “community property.” Alaska also allows spouses to identify certain property in writing as community property without having to place it in a trust. Use of an agreement to make community property is more complicated because of issues involving mixed types property, control over the property, and sales to bona fide purchasers. (The Alaska statute is 33 pages and the Tennessee statute is only 9 pages.) IRS has provided no assurances that either the Agreement or the Community Property Trust will work in non-community property jurisdictions.

Terminology

Husband and wife ownership is either Community Property S or Common Law. The Supreme Court labeled an Oklahoma law as an “optional community property law” when that law converted Common Law ownership into Community Property by agreement between husband and wife (in a case where a husband and wife in Oklahoma tried unsuccessfully to split income). Community Property that arises from an agreement is called consensual community property. Community Property that is “a result of State policy, and without any act on the part of either spouse” is called legal community property. Commissioner vs. Harmon, 323 U.S. 44 (1944). Harmon held that a husband and wife cannot split income on separately held property with a consensual community property agreement. The process of converting common law property to community property is called transmutation; and the IRS has modified the Harmon case to provide that splitting income under a community property agreement cannot be done without “affecting such separate property itself”. See General Counsel Memorandum 36483 discussing Rev. Rul. 77-359.

Today’s Question

What information will help the Council decide whether the statute should or should not include both CP Trusts and CP Agreements?
700.1513 Duties of a trustee with respect to the acquisition, retention, and ownership of life insurance policies

Sec. 1513 (1) As used in this Section, the term “irrevocable life insurance trust” (hereinafter “ILIT”) means a trust of which both [all] of the following are true:

(a) The trust is not revocable within the meaning of MCL 700.7103(h).

(b) The settlor(s) created the trust with the intent that the trustee(s) acquire, by purchase or assignment, at least one life insurance policy as a trust asset.

[(c) The trust is not a charitable trust within the meaning of MCL 700.7103(c).]

(2) The intent described in paragraph (b) of subsection (1) is presumed if either of the following is true:

(a) The trustee(s) acquire(s) a life insurance policy as a trust asset within 6 months of the trust's creation.

(b) For the duration of any period before the trustee(s) acquire a life insurance policy as a trust asset, the only trust assets are cash or cash equivalents.

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

(a) Determine whether the trustee or ILIT beneficiaries have an insurable interest in the insured in accordance with the provisions of MCL 700.7114.

(b) Determine whether any life insurance policy is or remains a proper trust investment.

(c) Investigate the financial strength or changes in the financial strength of the life insurance company issuing or maintaining the policy.

(d) Inquire about changes in the health or financial condition of the insured.

(e) Diversify the investment in the policy relative to any other life insurance policies or any other trust assets.
(f) Pay policy premiums unless there is sufficient cash or other readily marketable assets held by the trust that were designated for this purpose by the settlor or a third party.

(g) Exercise or not exercise any option available under the policy regardless of whether the exercise or nonexercise results in the lapse or termination of the policy.

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

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

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

(7) Except as otherwise provided in the terms of the ILIT, this section applies to an ILIT established before, on, or after [the effective date of this section] and to a life insurance policy acquired, retained, or owned by a trustee before, on, or after such date.
Tenancy by Entireties in Real and Personal Property

Sec. 1
Any interest in real property may be held jointly by an individual and his or her spouse as tenants by the entireties. All interests in real property jointly held by persons married to each other shall be presumed to be held by the spouses as tenants by the entireties, unless the deed or other instrument of conveyance expressly provides for some other form of ownership. It is the intent of the legislature that this subsection be a codification of the common law of this state in effect before the effective date of the public act that added this subsection.

Sec. 2
After [effective date], any interest in tangible or intangible personal property may be held jointly by an individual and his or her spouse as tenants by the entireties.

Sec. 3
With respect to all tangible and intangible personal property transferred to or acquired by an individual and his or her spouse after [effective date]:

(a) If there is a written instrument of conveyance, title, other writing evidencing ownership by the spouses, or a written agreement made between the spouses (whether such agreement was made before or during the marriage) the property shall be presumed to be held by the spouses as tenants by the entireties unless such instrument of conveyance, title, other writing evidencing ownership, or a written agreement made between the spouses (whether such agreement was made before or during the marriage) expressly provides for some other kind of ownership.

(b) If there is no written instrument of conveyance, title, other writing evidencing ownership, or a written agreement made between the spouses (whether such agreement was made before or during the marriage):

   (i) Tangible personal property transferred to or acquired for the use of both spouses (such as furniture and furnishings) shall be presumed to be held by the spouses as tenants by the entireties.

   (ii) Tangible personal property transferred to or acquired for the use of only one of the spouses (such as jewelry or clothing) shall be presumed not to be held by the spouses as tenants by the entireties.

   (iii) There shall be no presumption with respect to intangible personal property.

(c) All presumptions in this Section 3 are rebuttable presumptions.

Sec. 4
The term "tenants by the entireties" shall mean the same as "tenants by the entirety," "tenancy by the entirety," "tenancy by the entireties," "tenancies by the entirety," and "tenancies by the entireties".
Sec. 5
Nothing in this section is intended to alter the rights, restrictions, consequences, and conditions of:

(a) An individual and his or her spouse jointly holding real or personal property as tenants by the entireties, including the full right of survivorship upon the death of either.

(b) Any agreement made between an individual and his or her spouse (whether such agreement was made before or during the marriage) with regard to the ownership and disposition of tangible or intangible personal property.

Sec. 6
This section shall be effective on [effective date].

Sec 7
Nothing in this act shall affect the application of MCL 557.151 to personal property transferred to or acquired by persons married to each other prior to [effective date] or held by such married persons as tenants by the entireties on [effective date].
EXHIBIT D-2
ARTICLE VII: MICHIGAN TRUST CODE
PART 5: CREDITOR'S CLAIMS: SPENDTHRIFT, SUPPORT, AND DISCRETIONARY TRUSTS
700.7509 TENANCY BY THE ENTIRETY PROPERTY

(1) As used in this section:

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

(b) "Proceeds" means:

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

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

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

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

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

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

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

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

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

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

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

(3) Upon the death of the first spouse:

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

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

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

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

(5) Except as provided in subsection (6), immunity from the claims of separate creditors under subsections (2) and (3) shall be waived if a trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property held in trust that is immune from the claims of separate creditors.
Immunity is not waived under subsection (5) if the identity of the property that is immune from the claims of separate creditors and evidence of such immunity is otherwise reasonably disclosed by any of the following:

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

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

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

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

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

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

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

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

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

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

(12) This section may not be construed to affect existing state law with respect to tenancies by the entirety. This section applies only to tenancy by the entirety property conveyed to a trustee on or after _________ ____, 2014.
End of CSP Materials
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN

February 14, 2015
Lansing, Michigan

AGENDA

I. Call to Order

II. Excused Absences

III. Introduction of Guests

IV. Minutes of the January 17, 2014 Meeting of the Council

See Attachment 1 with four exhibits not available for inclusion in the January agenda:

- Attachment A, December 2014 Treasurer report
- Attachment B, The ABLE Act – Section 529 Disability Savings Plan memo by Amy Tripp to the Probate and Estate Planning Council, January 17, 2015
- Attachment C, Janet Welch on the Future of Legal Services in Michigan, Jackson County Legal News, December 25, 2014
- Attachment D, Tenancy by the Entireties and Personal Property memo by Geoffrey R. Vernon to the Updating Michigan Law Committee, January 10, 2015

V. Treasurer's Report – Marguerite Munson Lentz

See Attachment 2 including a February written report, SBM reimbursement forms and instructions.

VI. Chairperson's Report – Amy N. Morrissey

See Attachment 3

- Pollack v Barron (In re Pollack Trust), __ Mich App __ ; __ NW2d __ (2015)
  (Oakland Probate Court, No. 309796, January 29, 2015)

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

VIII. Standing Committee Reports

A. Internal Governance

1. Budget – Marlaine C. Teahan
2. Bylaws – Nancy H. Welber
3. Awards – Douglas A. Mielock
4. Planning – Shaheen I. Imami
5. Nominating – George W. Gregory
6. Annual Meeting – Shaheen I. Imami

B. Legislation and Lobbying

1. Legislation – William J. Ard/Public Affairs Associates

See Attachment 4 – Report of Public Affairs Associates, pending legislation of interest to the Probate and Estate Planning Section

2. Updating Michigan Law – Geoffrey R. Vernon

3. Community Property Trusts Ad Hoc Committee – Neal Nusholtz

4. Insurance Ad Hoc Committee – Geoffrey R. Vernon

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

6. Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee – George F. Bearup

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L. Skidmore

2. Probate Institute – James B. Steward

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

4. Citizens Outreach – Constance L. Brigman

5. Electronic Communications – William J. Ard

6. Membership – Raj A. Malviya

D. Ethics and Professional Standards

1. Ethics – David P. Lucas

2. Unauthorized Practice of Law & Multidisciplinary Practice – Patricia M. Ouellette

3. Specialization and Certification Ad Hoc Committee – James B. Steward

E. Administration of Justice

1. Court Rules, Procedures and Forms – Michele C. Marquardt

F. Areas of Practice

1. Real Estate – George F. Bearup

2. Transfer Tax Committee – Lorraine F. New

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

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

IX. Other Business

X. Hot Topics

XI. Adjournment – After the Council meeting adjourns, if there is time, and at the discretion of the Chair, we may return to the CSP agenda.
ATTACHMENT 1
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

January 17, 2015
Lansing, Michigan

MINUTES

I. Call to Order. The Chair called the meeting of the Council of the Probate and Estate Planning Section to order at 10:20 a.m.

II. Attendance. Guests were introduced.

A total of 5 officers and 15 members of the Council were present, representing a quorum.

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

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

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

Susan M. Allan        Michele C. Marquardt
W. Josh Ard           Richard C. Mills
George F. Bearup      Lorraine F. New
Constance L. Brigman  Patricia M. Ouellette
Hon. Michael L. Jaconette James P. Spica
Mark E. Kellogg       Geoffrey R. Vernon
Rhonda M. Clark-Kreuer Nancy H. Welber
David P. Lucas

C. The following 3 members were absent with excuse:

Christopher A. Ballard David L.J.M. Skidmore
Raj A. Malviya

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

George W. Gregory Phillip E. Harter
Mark K. Harder
E. The following guests were in attendance:

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Rebecca Bechler</td>
<td>Robert O'Reilly</td>
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<td>Chris Cadwell</td>
<td>Kurt A. Olson</td>
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<td>Georgette E. David</td>
<td>Julie Paquette</td>
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<td>Kathleen Goetsch</td>
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<td>J. David Kerr</td>
<td>Jessica M. Schilling</td>
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<td>Michael G. Lichterman</td>
<td>Nazneen Syed</td>
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<tr>
<td>Katie Lynwood</td>
<td>Robert M. Taylor</td>
</tr>
<tr>
<td>Marta Manildi</td>
<td>Amy Tripp</td>
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<tr>
<td>Sueann Mitchell</td>
<td>Paul Vaidya</td>
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<tr>
<td>Jeanne Murphy</td>
<td>Joseph J. Viviano</td>
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<tr>
<td>Neal Nusholtz</td>
<td>Nicholas Vontroba</td>
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</tbody>
</table>

III. Consent Agenda – The Chair explained the concept of a consent agenda which will be used from time to time. By request, the Treasurer's Report was removed from the Consent Agenda and addressed separately. The Minutes of the December 13, 2014 Council Meeting were approved as submitted, without correction, by general consent.

IV. Treasurer's Report – Marguerite Munson Lentz. Ms. Lentz just received information from the State Bar of Michigan and prepared a report that was distributed to Council members. See Attachment A. After brief explanation by Ms. Lentz, the Treasurer’s Report was approved without objection.

V. Chairperson's Report – Amy N. Morrissey. Ms. Morrissey welcomed those in attendance and reported on the following items:

- ABLE Act – Amy Tripp reported on the Act and provided a written report. See Attachment B. In December 2014, Congress passed and the President signed into law the Achieving a Better Life Experience Act (ABLE Act of 2014). The ABLE Act provides for special needs and those with disabilities to have tax-free savings accounts. The Act is an amendment to Section 529 of the Internal Revenue Code. These accounts are similar to 529 Plans in a number of ways, but are very different in others. Mr. Steward pointed out a few planning opportunities and pitfalls. Ms. Tripp indicates that there will be rules promulgated that will help us apply the Act. Mr. Gregory pointed out we will probably have two sets of regulations, from both Treasury and the Social Security Administration. In addition, there may be a need to coordinate a review of Michigan law in conjunction with ELDRS Section of the SBM.

- Future of Legal Services in Michigan, article by Janet Welch. See Attachment C. This article was published December 25, 2014 in various newspapers around the State. A forum was held with over 50 leaders in Michigan's legal community that to address the changes and challenges in the delivery of legal services in the future. Ms. Morrissey explained that one goal of the forum was to find innovations to bridge the gap between law school and the delivery of legal services and how to get legal services to those who cannot afford them. Some of the solutions included mobile apps, creating specialties within the SBM, establishing the limited licensing of non-lawyers to work in certain areas of law as other states have done, e.g., Washington. While State Bar Sections were not asked to participate in the forum, Ms. Morrissey did receive a survey that addressed her delivery of
legal services.

• Recent dialogue regarding the Section's listserv vs. SBM Connect discussion forum. More discussion will be held in the Electronic Communications Committee report.

• Community property trusts were established years ago in other states. Tennessee recently enacted enabling legislation. Ms. Morrissey established a Community Property Trust Ad Hoc Committee to be chaired by Neal Nusholtz. The ad hoc committee members will be included in the Committee List in next month's agenda.

• Email received from SCAO regarding a committee to be convened to review ADR rules. Our Section was invited to comment and communicate questions, recommendations regarding trial courts, and suggested ADR resources.

VI. Report of the Committee on Special Projects – Christopher A. Ballard, led by Ms. Morrissey.

There were no action items recommended to Council this month from the Committee on Special Projects (CSP). The focus of CSP was on Tenancy by the Entireties and Personal Property. See Memorandum prepared by Geoffrey R. Vernon, See Attachment D. At CSP, Ms. Lentz discussed several sections. We will return to this next month.

VII. Standing Committee Reports

A. Internal Governance


2. Bylaws – Nancy H. Welber. Our Section's new bylaws are now posted on our Section's website.

3. Awards – Douglas A. Mielock. No report. Ms. Morrissey noted that our Section's awards are now posted on our Section's website.

4. Planning – Shaheen I. Imami. Mr. Imami discussed the SBM regular annual meeting. He has reviewed several issues related to increasing participation electronically. The focus will be on communication among council members instead of on increasing attendance at Council meetings. Different apps were discussed including those used by the ABA, ACTEC, and the SBM. Discussed a possible future app for our Section's journal.

5. Nominating – George W. Gregory. The Nominating Committee consists of Mark Harder, George Gregory and Tom Sweeney. A call was made for those interested in serving on Council to convey that interest to the Nominating Committee. In addition, individuals can be recommended to the Nominating Committee by others.


B. Education and Advocacy Services for Section Members

2. **Probate Institute – James B. Steward** reported that at the Annual Institute, our Section will have a booth staffed by the Membership Committee. Discussed materials to be provided and a possible raffle. Ms. New suggested that Section memberships can be given as raffle prizes. Discussion on sending an E-blast inviting Section members and maybe even State Bar members to the Probate Institute. Discussed Jeff Kirkey's annual survey and the possibility of adding questions related to Section membership. Jim Steward suggested that the Membership Committee look at how the opting out of Section membership works after a State Bar member has completed his or her first free year of Section membership.

3. **State Bar and Section Journals – Richard C. Mills.** Bar journal is on track. Section briefs in the SBM journal discussed. Information for the briefs must be submitted two months before publication. Ms. Morrissey said updates on our Section will be in the February 2015 SBM journal. A suggestion was made that in the E-blast for the Section's journal to include the table of contents with hotlinks to allow people to open each article for review or printing, as they wish. Also discussed an app for the Journal which may be able to provide a notice when a new journal is available.

4. **Citizens Outreach – Constance L. Brigman** reported on the brochures to be added to our website. By general consent, the brochures were approved. Later this year, they will be updated for more readability. Ms. Brigman suggested that our Section's website have both member-only content and content available to the public. Ms. Brigman suggested hotlinks in the tables of contents. Discussion on SEO, how to direct traffic to these brochures, adding last date of revision, and how to design brochures to minimize the amount of “clicks” needed to get to content being searched. Suggestions were made to the committee for improvements. Additional comments or suggestions should be directed to Connie Brigman.

5. **Electronic Communications – William J. Ard.** Discussion held on our Section's listserv and the State Bar's Connect discussion boards. Mr. Ard explained some of the administrative drawbacks of the listserv. The State Bar will be training Sections on its new website. Two officers, Ms. Teahan and Ms. Lentz, will attend this training in February. It was noted that having so many available forums lessen the Section's energy and focus; one forum might be best. For the near future, no changes will be made, information will be gathered, and this discussion will continue.

6. **Membership – Raj A. Malviya, led by Nicholas A. Reister.** The Committee is looking at discounts for the Annual Probate Institute in 2016 and beyond, a Friday night happy hour at this year's Institute, hosted at the Traverse City office of Smith Haughey Rice & Roegge, and meetings at Michigan law schools with 3Ls to explain benefits of Section membership and to encourage students to consider a future career in trusts and estates.
C. Legislation and Lobbying

1. Legislation – William J. Ard. Becky Bechler was present for most of the meeting but had to leave before her report. She will be moved up in the agenda for future meetings. Ms. Bechler provided a report to the Chair including the following legislative projects of Council that will be part of our legislative focus in 2015:

- Fiduciary Access to Digital Assets Act – a meeting was held with Senator Rick Jones, Chair of the Senate Judiciary Committee on Jan. 14, 2015.
- Probate appeals project – Representative Kesto will be the lead sponsor in the House.
- Qualified disposition to trust act

2. Updating Michigan Law – Geoffrey R. Vernon. No further report other than the discussions held during the CSP.

3. Insurance Ad Hoc Committee – Geoffrey R. Vernon. Representative Leonard has taken over the sponsorship of the trustee exoneration statute.


D. Ethics and Professional Standards


E. Administration of Justice

1. Court Rules, Procedures and Forms – Michele C. Marquardt. No report.

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

F. Areas of Practice


2. Transfer Tax Committee – Lorraine F. New. Michigan has a new offer in compromise.


G. Liaisons

1. Alternative Dispute Resolution Section Liaison – VACANT. No report.
5. ICLE Liaison – Jeanne Murphy. No report.
10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz. No report.

VIII. Other Business. None.

IX. Hot Topics. None.

X. Adjournment – Council meeting adjourned at 11:20 a.m. Returned to CSP agenda and adjourned for the day at 12 noon.
### Probate Council Treasurer’s Report

#### Dec-14

**Beginning Fiscal Year 2014-2015**

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#### FY to Date

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<td>$ -</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>$10,990.00</td>
<td>$110,750.00</td>
<td>$115,650.00</td>
<td>(4,900.00)</td>
<td>95.76%</td>
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<table>
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<th>Disbursements Subcategories</th>
<th>Dec-14</th>
<th>FY to Date</th>
<th>Budget 2014-2015</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
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<td>Journal (1)</td>
<td>$12,225.00</td>
<td>(12,150.00)</td>
<td>(12,150.00)</td>
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<td>E-blast</td>
<td>$75.00</td>
<td>$75.00</td>
<td>-</td>
<td>-</td>
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</tr>
<tr>
<td>ICLE (formatting)</td>
<td>$ -</td>
<td>$ -</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Chairperson's Dinner (2)</td>
<td>$7,000.00</td>
<td>(265.49)</td>
<td>(265.49)</td>
<td>96.21%</td>
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</tr>
<tr>
<td>Plaques</td>
<td>$132.50</td>
<td>$103.76</td>
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<tr>
<td>Gavel</td>
<td>$35.82</td>
<td>$132.50</td>
<td>(96.68)</td>
<td>97.56%</td>
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<tr>
<td>Chair's Dinner-food</td>
<td>$6,198.25</td>
<td>$300.00</td>
<td>(5,898.25)</td>
<td>96.21%</td>
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</tr>
<tr>
<td>Chair's Dinner-venue</td>
<td>$300.00</td>
<td>$300.00</td>
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<tr>
<td>Travel</td>
<td>$3,065.08</td>
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<td>(15,434.92)</td>
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<td>Lobbying</td>
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<td>Meetings (3)</td>
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<td>(14,800.00)</td>
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<td>Mtg with Chair’s Dinner</td>
<td>$200.00</td>
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<tr>
<td>Monthly</td>
<td>$ -</td>
<td>-</td>
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<td>-</td>
<td></td>
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<tr>
<td>Officers conference</td>
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<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
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<td>(including travel)</td>
<td>$ -</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
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<tr>
<td>Long-range Planning</td>
<td>$ -</td>
<td>$1,000.00</td>
<td>(1,000.00)</td>
<td>0.00%</td>
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</tr>
<tr>
<td>Support for Annual Institute</td>
<td>$ -</td>
<td>$14,000.00</td>
<td>(14,000.00)</td>
<td>0.00%</td>
<td></td>
</tr>
<tr>
<td>Contribution to institute</td>
<td>$ -</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Speaker's Dinner</td>
<td>$ -</td>
<td>$10,000.00</td>
<td>(10,000.00)</td>
<td>0.00%</td>
<td></td>
</tr>
<tr>
<td>Amicus Briefs</td>
<td>$ -</td>
<td>$ -</td>
<td>(10,000.00)</td>
<td>0.00%</td>
<td></td>
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<tr>
<td>Seminars</td>
<td>$4,000.00</td>
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<td>Electronics communications (4)</td>
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<td>(2,667.09)</td>
<td>(2,667.09)</td>
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<td>List serve</td>
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<td>$150.00</td>
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</tr>
<tr>
<td>E-blast</td>
<td>$ -</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Telephone</td>
<td>$7.91</td>
<td>$7.91</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Other (5)</td>
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<td>(1,095.50)</td>
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<tr>
<td>Total Disbursements</td>
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<td>$21,737.00</td>
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<td>(93,913.00)</td>
<td>18.80%</td>
</tr>
</tbody>
</table>

**Net Increase (Decrease)**

| Net Increase (Decrease) | $89,013.00 | $ -       |

**Footnotes**

1. Includes e-blast for the Journal
2. Includes plaques for outgoing Chair and Council Members
3. Includes October meeting in connection with Chair’s Dinner and SBM Leadership Conference expenses for incoming Chair and Chair Elect
4. Includes ListServ, telephone, e-blast & other electronic communications
5. Includes copying costs and $750 for Young Lawyers’ Conference
THE ABLE ACT - SECTION 529 DISABILITY SAVINGS PLAN

In December of 2014, Congress passed, and the President signed into law, the Achieving a Better Life Experience Act (ABLE Act of 2014). The ABEL Act provides a new opportunity for qualified individuals with special needs and disabilities to have tax-free savings accounts that will support their health and independence while preserving the means-tested government benefits.

The ABLE Act amends Section 529 of the Internal Revenue Code. The new ABLE Accounts will be similar to 529 Plans in a number of ways, but very different in others. Here are some of the highlights:

- A person with a disability can only have an ABLE Account if they were severely disabled by age 26. Someone who was receiving Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI, or SSD) benefits by 26 will qualify. Others may qualify, will need to establish disability.

- Each person with a disability may have just one ABLE Account, and it must be set up in the state where the person with the disability resides.

- Contributions to an ABLE Account may not exceed $14,000 in a given year. That's total contributions — if the person with a disability puts in, say, $4,000, then other family members may not contribute more than $10,000. That figure is indexed to the maximum annual gift tax exclusion amount.

- The maximum size of an ABLE Account will be set by state law. The maximum size to maintain eligibility for SSI is $100,000. The beneficiary will continue to be eligible for Medicaid.
• When the ABLE beneficiary dies, remaining assets in the account go to the state Medicaid program which provided benefits during life (after payment of other pending bills, and limited to the amount the Medicaid program actually paid for the beneficiary's care).

• As long as the ABLE Account funds are used to pay for "qualified disability expenses," there will be no income taxation on the interest or gain in value of the ABLE assets, and the expenditure will not be counted as income to the beneficiary.

• "Qualified Disability Expenses" will need to be defined. The law does say, though, that the categories for "qualified" expenditures will include "education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses".

The major advantage to this Account is that the money in the Account is not a countable asset and, thus, allows the person with a disability to maintain eligibility for government benefits. These accounts can be very helpful for persons with disabilities. It would allow them to save funds that exceed the maximum resource limits of $2,000.

An ABLE account is more like a first party special needs trust (a "Medicaid payback trust"), and would likely have more applications in situations where the person with a disability has their own resources that need to be protected. Because of the payback requirement, planners would not normally recommend these accounts where they are to be funded by someone other than the person with the disability. Accordingly, these accounts would not typically be considered a substitute for a third party discretionary special needs trust.

Accounts cannot yet be set up in Michigan until the legislature passes enabling legislation.

Person’s who have a guardian are currently required to petition the Probate Court for permission to fund a Self-Settled Special Needs Trust and Pooled Account Trust which can be costly for small amounts of excess resources. However, if the legislation allows the guardian to establish and fund an ABLE account this could result in a significant savings and maximize the benefit of this special account.
Janet Welch on the Future of Legal Services in Michigan

By Steve Thorpe

Legal News

More than 50 leaders of Michigan's legal community, including the president of the State Bar of Michigan, the president of the American Bar Association and the chief justice of the Michigan Supreme Court, convened recently to discuss the future of legal services in Michigan. Also attending were law school deans and past presidents of the ABA and the State Bar, the directors of Michigan's attorney discipline agencies, the Michigan State Bar Foundation and the Institute for Continuing Legal Education. Janet Welch is executive director of the State Bar of Michigan.

Thorpe: Tell us about the gathering and its goals.

Welch: The name of the forum was "The Future of Legal Services: Changes and Challenges in the Delivery of Legal Services." Michigan is poised to be a leader because the major institutions responsible for the quality of legal services in Michigan the Michigan Supreme Court, the State Bar of Michigan, the Michigan State Bar Foundation, the Attorney Grievance Commission, the Attorney Discipline Board, and the Institute for Continuing Legal Education have all been or are emerging as national leaders on many of the critical issues affecting the delivery of legal services in the 21st century. On top of that, Michigan's law schools collectively present a composite picture of the challenges and opportunities facing legal education today. The goal of the day was to put together leading thinkers from all of these institutions and begin to formulate a blueprint for the future.

In our plenary session, we heard the president of the American Bar Association, William Hubbard, speak of why the legal profession is at an "inflection point." Despite attorneys' very generous pro bono efforts and financial contributions to access to justice for the poor, Hubbard said that 80 percent of people who are poor, and many others of moderate means, do not get the civil legal assistance they need, and the United States ranks just 27th in the civil justice category among 99 countries in the World Justice Project's 2014 Rule of Law index. Justice Bridget McCormack followed with an optimistic note, underscoring the progress Michigan has made using technology to promote greater accountability within Michigan's court system, including the use of pioneering mobile apps to make interactions with the court more convenient. Seven experts then offered a lightning round describing the major issues
in four categories:
- The Future for Today’s and Tomorrow’s Lawyers, led by Paula Littlewood, Washington State Bar Association, and Candace Crowley, State Bar of Michigan
- Public Access to the Courts/Access to Justice, led by Linda Rexer, Michigan State Bar Foundation, and Prof. Daniel Linna, Jr., MSU College of Law
- Economic Viability of Today’s Law Firm Model, led by Prof. Renee Newman Knake, MSU College of Law
- The Changing Demographics and Economics of the Profession, led by Dennis W. Archer, Dickinson Wright PLLC, and Anne Vrooman, State Bar of Michigan.

From these topics the forum attendees chose the most important issues and then brainstormed ideas and strategies for tackling those issues. Among the top challenges identified by those at the forum were using technology and innovation to increase efficiencies and value in the legal system, creating an ethical and quality system so that self-represented people can get help from a lawyer where and when needed, bridging the gap between law school and legal practice, and regulating and supporting the legal services delivery system in a way that allows more people and businesses to have access. Some of the many innovations reported by the work groups included developing more online apps like a mobile app being used to resolve traffic tickets, adopting a broader limited scope "unbundled" representation rule, creating more certificate of specialty practice area programs and considering the limited licensing of non-lawyers to provide legal services in certain practice areas.

Chief Justice Robert P. Young, Jr., the forum’s lunchtime speaker, emphasized the Supreme Court's commitment to driving Michigan’s court system to improve service to the public, and recognized the State Bar for helping to spur change through its 2011 Judicial Crossroads Task Force Report.

"When it comes to Crossroads, our message is simple: promises made, promises kept," Chief Justice Young said.

The Chief Justice challenged attendees to focus on the problem of newly licensed attorneys being insufficiently ready to serve clients, particularly as solo practitioners, a challenge SBM President Thomas C. Rombach hopes to begin to answer through a newly formed SBM Law School to Practice Committee.

Thorpe: You have been quoted saying "New technologies combined with economic and demographic changes are transforming the marketplace for legal services." What are some of these technologies?

Welch: In my view, the biggest driver for change right now is the rise of the Internet as the foremost tool the public uses to research legal issues, decide whether to contact a lawyer and figure out which lawyer to choose. The Internet opens up new opportunities for lawyers to market their services and their value more effectively, but it also presents big risks to both the public and the profession. At the same time, there are new cost-saving apps arriving every day to make lawyers' work more efficient and effective, the acquisition of legal services more informed and interaction with lawyers, courts and the justice system more convenient. There is astonishing software available for time management, discovery, trial management and billing there is hardly a process in the delivery of legal services for which helpful technology is not already available. The choices can be intimidating and bewildering. Bar associations need to learn how to help lawyers navigate this new world ethically and successfully.

Thorpe: Tell us about the State Bar’s new 21st Century Lawyer committee.
Welch: President Rombach conceived of this new entity as a vehicle for envisioning how the State Bar should tackle the urgent new job of helping our members navigate the emerging legal marketplace and then provide advice to the State Bar leadership on strategies and direction. Its co-chairs, Past Presidents Julie Fershtman and Bruce Courtade, both have active practices and both pushed the State Bar to improve the Bar’s practice-oriented services to our members and thus increase our value to the public. There is no work more urgent, and I commend President Rombach for his leadership in this initiative and for recruiting Julie and Bruce to co-chair it.

Thorpe: How does the work of the state bar on this topic dovetail with similar efforts at the national level?

Welch: The State Bar’s forum was coordinated with the American Bar Association’s Commission on the Future of Legal Services, formed under ABA President William Hubbard. The Commission’s reporter is Prof. Renee Knake, co-director of Michigan State University College of Law’s Kelley Institute of Ethics and the Legal Profession. The Commission is encouraging grass roots meetings around the country, and will study the results to formulate its recommendations to the ABA.

Thorpe: The State Bar of Michigan Judicial Crossroads Task Force issued a report in 2011 that suggested some changes currently underway to streamline and modernize Michigan’s court system. Would you describe those for us?

Welch: As Chief Justice Young observed at the forum, the work of the Future of Legal Services Forum and the Judicial Crossroads Task Force are connected in important ways. The Task Force’s 2011 report contributed to a number of the transformational and cost-saving changes now underway in Michigan’s court system. Included among these reforms:

- Three out of four Michigan counties have concurrent jurisdiction plans to make better use of resources and improve efficiency;  
- A needs-based, phased elimination of 40 judgeships is expected to save the state $167 million;  
- 174 problem-solving courts (mental health, drug and sobriety) are reaching 97 percent of Michigan’s population, dramatically reducing recidivism;  
- Court accountability has measurably increased: the performance of every Michigan court is measured and the results on timeliness and clearance rates are posted online;  
- The state is implementing new language access court rules that provide much greater access to justice for the growing number of people who have limited English proficiency. The forum has opened a new chapter in the work started by the Task Force, focusing on how the profession can better serve the legal needs of the public.

Thorpe: What’s next for the effort?

Welch: The conversation will continue more intensely within the Board of Commissioners, the State Bar Representative Assembly and the 21st Century Practice work. We hope that the forum’s attendees will take the questions, ideas and enthusiasm generated within the forum back into the legal community so that Michigan can continue to be at the forefront of shaping the future of the delivery of legal services.

Published: Thu, Dec 25, 2014

Comments

No comments

Leave a comment
ATTACHMENT D, January 17, 2014 Minutes

MEMORANDUM

TO: Updating Michigan Law Committee
FROM: Geoffrey R. Vernon
RE: Tenancy by the Entireties and Personal Property
DATE: 01/10/15

1. Twenty-two states allow tenancy by the entireties ownership, twelve of which allow personal property to be held as tenants by the entireties.

2. MCL 557.151 was enacted in 1927. It states:

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

Pursuant to the explicit language of the statute, it has been permissible in Michigan for spouses to own certain types of personal property in the same manner as real estate (i.e., certain types of personal property may be owned as tenants by the entirety). Several court cases in Michigan have addressed whether certain types of personal property are included in the above terms:


- A tax refund payable to husband and wife is not "other evidences of indebtedness" so was not held by the spouses as tenants by the entirety. *Jahn v. Regan*, 584 F. Supp. 399 (E.D. Mich. 1984).

- An H&R Block investment account owned by husband and wife was owned as tenancy by the entirety because any distributions from the account must have

- Securities accounts owned by husband and wife as "JTWROS" were tenancy by the entirety property. *Zavradinos v. JTRB Inc. et al*, 482 Mich. 858 (2008).

- A cash management account was not held as tenants by the entirety because the spouses were not married at the time they opened the account. *In re Musilli*, Case No. 06-55963-R, (Bankr. E.D. Mich. 2006).

3. The Michigan Limited Liability Company Act provides, at MCL 450.4504(1), that a membership interest in an LLC (which may own all types of personal property) can be held by spouses as tenants by the entirety, as follows -

"A membership interest is personal property and may be held in any manner in which personal property may be held. A husband and wife may hold a membership interest in joint tenancy in the same manner and subject to the same restrictions, consequences, and conditions that apply to the ownership of real estate held jointly by a husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either."
Income/Expense Reports

I have not yet received the trial balance from the State Bar for January 2015. The income/expense report for January 2015 will be represented at the March probate council meeting.

Mileage Reimbursement Rate Effective 1/1/2015

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

Expense Reimbursement Requests

- Email forms to mlentz@bodmanlaw.com or provide paper copies in person or by mail.

Marguerite Munson Lentz, Treasurer
Probate and Estate Planning Section

Treasurer Contact Information:

Marguerite Munson Lentz
BODMAN PLC
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, Michigan 48226
office: 313-393-7589
fax: 313-393-7579
email: mlentz@bodmanlaw.com
### Expense Reimbursement Form

**State Bar of Michigan**
306 Townsend St., Lansing MI 48935-2012. (800) 968-1442

- **Payee Name**: [Blank]
- **Street**: [Blank]
- **City**: [Blank]
- **State**: Michigan
- **Zip Code**: [Blank]
- **E-mail**: [Blank]
- **Phone**: [Blank]

**Select a Section**

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

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<td>0.575</td>
<td></td>
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<td>$0.00</td>
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</table>

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

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

**Grand Total**: $0.00

- **Date**
- **Title**
- **Approved by (signature)**

**Reset Form**

**Print Form**
Instructions for Section Expense Reimbursement Form

The Expense Reimbursement Form can be prepared on your computer, digitally signed, digitally approved, and e-mailed for processing. All receipts and other required documentation can be scanned and e-mailed along with the form. You should keep a copy for your electronic file, and you will save paper and filing cabinet space as a result. You do not need to print the form and manually fill it out.

1. Type your name & address information. (You may tab after each field).
2. Select a section name from the drop down list.
3. Enter the appropriate expense account number.
4. Enter the amount(s).
5. In the date box, enter the date or pick from the calendar.
6. Type in the description and business purpose of the expense.
7. The form will automatically calculate the mileage, if applicable.
8. Type in the amount of the expense(s) for lodging, meals, miscellaneous.
9. The total expense will be displayed at the right hand side of the form for each line entered.
10. Please make sure the bottom right hand total amount and the upper right hand side total amounts are the same.
11. Date the form.
12. You may now digitally sign your form (placing your cursor over the signature line—it will prompt you through the process). Once you complete your first digital signature, it will be saved for future use.
13. You may save the form on your personal drive or shared drive for future reference.
14. You may enter a title if applicable.
15. Forward the form (by e-mail) along with scanned copies of receipts, list of names, and other required documentation to the treasurer of the section.
16. Once the form is approved, the treasurer will then forward the form/attachments to Alpa Patel in the Finance Department at SBM for processing.

Note: This form replaces any old or existing forms and should be used going forward.

If you have any questions about this form, please contact Alpa Patel at (517) 346-6362 or apatel@mail.michbar.org.
2015 WL 377073
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

In re GERALD L. POLLACK TRUST.
Loren Pollack, Petitioner–Appellant,
and
Leslie Pollack, Petitioner,
v.
Ronald M. Barron and J.P. Morgan Chase, Respondents–Appellees,
and
Cheryl Pollack and Justin Pollack, Appellees,
and
Lori Epstein, Michael McEvilly, Alex Kocoves, and Lisa Chaben, Interested Persons.

In re Estate of Gerald L. Pollack.
Loren Pollack and Leslie Pollack, Appellants,
v.
Ronald M. Barron, J.P. Morgan Chase, and Cheryl Pollack, Appellees,
and
LISA CHABEN, LORI POLLACK a/k/a LORI EPSTEIN, and JUSTIN POLLACK, Interested Persons.

In re GERALD L. POLLACK TRUST.
Loren Pollack and Leslie Pollack, Petitioners–Appellants,
v.
Ronald M. Barron and J.P. Morgan Chase, Respondents–Appellees,
and
Cheryl Pollack and Justin Pollack, Appellees,
and
Lori Epstein, Michael McEvilly, Alex Kocoves, And Lisa Chaben, Interested Persons.

In re Gerald L. Pollack Trust.
Loren Pollack and Leslie Pollack, Petitioners–Appellants,
v.
Ronald M. Barron, Co–Trustee, Respondent–Appellee,
and
J.P. Morgan Chase, Respondent,
and
Lori Epstein, Cheryl Pollack, Michael McEvilly, Alex Kocoves, Lisa Chaben, and Justin Pollack, Interested Persons.


Oakland Probate Court; LC Nos.2010–328587–TV, 2009–324651–DE.

Before: FORT HOOD, P.J., and HOEKSTRA and O’CONNELL, JJ.
Opinion

HOOD, P.J.

In Docket No. 309796, petitioner Loren Pollack (“Loren”) appeals as of right an order granting co-trustee Ronald M. Barron's (“Barron”) motion for summary disposition of Loren's petition to set aside the Gerald L. Pollack Trust (“the Trust” or “the October Trust”), entered on March 15, 2012. In Docket No. 310844, Loren and petitioner Leslie Pollack (“Leslie”) appeal as of right an order granting Cheryl Pollack's (“Cheryl”) motion for summary disposition on Loren and Leslie's petition to set aside Gerald L. Pollack's will (“the Will” or “the October Will”), entered on May 29, 2012. In Docket No. 310846, Loren and Leslie appeal as of right an order granting Barron's motion for summary disposition regarding Leslie's petition to set aside the Trust, Loren's amended petition to modify or reform the Trust, and Leslie's petition to modify or reform the Trust, entered on May 29, 2012. In Docket No. 318883, Loren and Leslie appeal as of right an order granting Barron's motion for summary disposition on Loren and Leslie's petition for removal of Barron as co-trustee of the Trust, entered on October 10, 2013. The four appeals were consolidated to advance the efficient administration of the appellate process. 1 We affirm.

1 In re Gerald L Pollack Trust, unpublished order of the Court of Appeals, entered November 6, 2013 (Docket Nos. 309796, 310844, 310846, 318883).

I. UNDERLYING FACTS

These cases involve extremely contentious probate court litigation arising out of the death of Gerald L. Pollack (“Gerald”) on June 27, 2009, following a protracted battle with brain cancer. Gerald was the owner and director of Gerald L. Pollack & Associates, Inc. (“GLP”), GLP Investment Services (“Investment Services”) and GLP Specialty Services (“Specialty Services”). GLP and Investment Services are investment firms that specialize in selling annuities, insurance products, and securities to public schools and school systems in Michigan. GLP and Investment Services are the primary assets of Gerald's estate. Gerald was survived by his second wife, Cheryl. Justin Pollack is the child of Gerald and Cheryl. Loren, Leslie, Lisa Chaben, and Lori Pollack are Gerald's children from his first marriage. Barron has served as general legal counsel to GLP and Investment Services since the 1980s and was a personal friend of Gerald's. Barron and J.P. Morgan Chase (“JPMC”) are co-personal representatives of Gerald's estate. According to Loren, Chow and a GLP employee named Alex Kocoves were part of Gerald's succession plan for his businesses; Loren and Kocoves were each sold GLP stock by Gerald.

Gerald was diagnosed with brain cancer in the summer of 2008. Following this diagnosis, Barron wrote an August 5, 2008 letter to Gerald recognizing that Loren and Kocoves would continue to co-manage GLP after Gerald's death, that Cheryl and each of Gerald's children would share in the profitability of the businesses, and that Cheryl and each of Gerald's children would receive a portion of the ownership and income from the businesses. In September 2008, Gerald executed a will (“the September Will”) and a trust (“the September Trust”). Barron drafted both of these documents at Gerald's direction and with input from Gerald. According to Loren, the September Will and the September Trust were the culmination of a lengthy and detailed process of preparation by Gerald for the continued wellbeing of his family and businesses following his death, and both September documents carried out Gerald's intent as set forth in numerous other documents prepared as part of his estate plan. According to Barron, however, the August 5, 2008 letter was merely a temporary “band aid” until formal estate planning documents could be prepared; likewise, the September estate planning documents were merely interim documents prepared until proper and permanent documents could be put in place.

In October 2008, attorney Charles Nida was hired to prepare a second will and trust for Gerald. According to Loren, it was Barron who recruited Nida, and Gerald had no contact with Nida until the October Will and the October Trust were executed on October 30, 2008. Loren alleged that Nida took direction from Barron or other attorneys at Barron's law firm. Barron denied Loren's allegations, and asserted that Nida had been in contact with Gerald before the execution of the October estate planning documents. Nida had conversations not only with Barron but also with Gerald's former estate planning attorney, Don
L. Rosenberg, and Gerald's personal banker and former co-trustee, David Clark. On October 30, 2008, Nida visited with Gerald at Gerald's home. The estate documents were already finalized at that point, and Nida reviewed a written summary of the documents with Gerald. Gerald executed the October Will and the October Trust on that date.

Loren alleges that the October Trust differs significantly from the September Trust; in particular, Gerald's children do not receive any immediate benefit from the October Trust until Cheryl's death; Cheryl's life expectancy is 20 years. Also, Loren contends, the October Trust does not provide for the succession planning desired by Gerald in that it does not distribute shares of GLP to Loren or provide for the continued operation of GLP by Loren and Kocoves. Rather, the October Trust directs Gerald's assets to a marital share for Cheryl's benefit up to $10 million; until this marital share is completely funded, or Cheryl dies, Gerald's children may receive nothing. Even after Cheryl dies, Loren would receive only a beneficial share of the trust corpus rather than stock in GLP.

Four actions in relation to Gerald's Will and Trust were filed in the trial court and form the basis of this appeal. The trial court ultimately granted summary disposition in each case, and dismissed the actions. Petitioners now appeal.

II. DOCKET NUMBER 309796

A. STATUTE OF LIMITATIONS

In docket number 309796, Loren argues that the trial court erred in granting Barron's motion for summary disposition based on the expiration of the statute of limitations. We disagree.

“This Court reviews de novo a trial court's decision on a motion for summary disposition.” Hackel v. Macomb Co. Comm., 298 Mich.App 311, 315; 826 NW2d 753 (2012). Summary disposition under MCR 2.116(C)(7) may be granted when a statute of limitations bars a claim. Prins v. Mich. State Police, 291 Mich.App 586, 589; 805 NW2d 619 (2011). If the facts are not in dispute, the issue whether a claim is barred by the applicable statute of limitations presents a question of law that is reviewed de novo. Trentadue v. Buckler Automatic Lawn Sprinkler Co., 479 Mich. 378, 386; 738 NW2d 664 (2007). Questions of statutory interpretation are likewise reviewed de novo. Id. “If the language in a statute is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning, and the statute must be enforced as written. This Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” Bay City v. Bay Co. Treasurer, 292 Mich.App 156, 166–167; 807 NW2d 892 (2011) (quotation marks and citations omitted). In addition, this Court “review[s] de novo constitutional issues and any other questions of law that are raised on appeal.” Cummins v. Robinson Twp., 283 Mich.App 677, 690; 770 NW2d 421 (2009).

The trial court properly granted Barron's motion for summary disposition because Loren's petition to set aside the October Trust was barred by the statute of limitations in the Michigan Trust Code (“MTC”).

The MTC, MCL 700.7101 et seq., which concerns trusts, is Article VII of the Estate and Protected Individuals Code (“EPIC”), MCL 700.700.1101 et seq.; the MTC became effective on April 1, 2010, which was 10 years after EPIC itself went into effect. See MCL 700.7101; MCL 700.7102; 2009 PA 46; 1998 PA 386; Indep Bank v. Hammel Assoc, LLC, 301 Mich.App 502, 509; 836 NW2d 737 (2013). MCL 700.7604(1) is a provision of the MTC that prescribes limitation periods for bringing a challenge to the validity of a trust:

(1) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following:

(a) Two years after the settlor's death.
(b) Six months after the trustee sent the person a notice informing the person of all of the following:

(i ) The trust's existence.

(ii ) The date of the trust instrument.

(iii ) The date of any amendments known to the trustee.

(iv ) A copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust, if any.

(v ) The settlor's name.

(vi ) The trustee's name and address.

(vii ) The time allowed for commencing a proceeding.

Thus, under the MTC, a challenge to the validity of a trust must be brought within two years after the settlor's death or six months after the provision of a notice containing statutorily prescribed information, whichever is earlier.

It is undisputed that, if the statute of limitations in MCL 700.7604(1) applies, then Loren's petition was not timely filed. The settlor, Gerald, died on June 27, 2009. On May 6, 2010, the trustees sent to Loren and the other beneficiaries a written notice containing all of the statutorily prescribed information concerning the Trust. Loren concedes that the notice contained all of the information required by MCL 700.7604(1)(b). The notice explicitly advised Loren: “You have six months to contest the validity of the Trust pursuant to MCL 700.7604(1)(b)(vii). Any contest filed after the six-month period will be time-barred.”

In the summer of 2010, during settlement negotiations that were ultimately unsuccessful, the parties twice expressly agreed to toll the six-month limitations period for bringing a challenge to the Trust, each time for a period of 30 days. In effect, then, the six-month limitations period in MCL 700.7604(1)(b) was tolled for 60 days, moving the statutory deadline for filing a petition challenging the validity of the Trust from November 6, 2010, to January 5, 2011. Loren commenced this proceeding on September 23, 2011, by filing his petition challenging the validity of the Trust. See MCL 700.1106(r) (defining a “[p]roceeding” for purposes of EPIC to include, inter alia, a petition); MCR 5.101(B) (“A proceeding [in probate court] is commenced by filing an application or a petition with the court.”). The proceeding was therefore commenced more than two years after Gerald died and more than eight months (the six-month statutory period and the 60–day tolling period) after the statutory notice concerning the Trust was sent to the beneficiaries. Loren concedes that his petition would be untimely under the MTC limitations period.

Loren contends, however, that the MTC statute of limitations does not apply in this case. In particular, Loren asserts that because the MTC became effective after Loren had already acquired his right to challenge the validity of the Trust, the MTC limitations period cannot apply. It is true that statutes of limitations are generally limited to prospective application unless the Legislature clearly and unequivocally manifests a contrary intent. Davis v. State Employees' Retirement Bd., 272 Mich.App 151, 161; 725 NW2d 56 (2006). “The legislature may pass statutes of limitation and give them retroactive effect.” Evans Prod. Co. v. Fry, 307 Mich. 506, 546; 12 NW2d 448 (1943). In assessing whether this case involves an improper retroactive application of a statute of limitations, it must be remembered that the six-month statutory period set forth in MCL 700.7604(1)(b) did not commence to run until after the MTC's effective date. That is, the six-month period was triggered when the trustees sent to Loren and the other beneficiaries the statutorily prescribed notice concerning the Trust. This notice was sent on May 6, 2010, after the April 1, 2010 effective date of the MTC, and explicitly advised Loren of the six-month statutory period. Because the limitations period did not begin to run until after the MTC's effective date, Loren had the full six-month period to file suit that all other beneficiaries have after the provision of notice under the MTC. Therefore, the statute of limitations in this case did not fail to provide a reasonable time after its passage for the commencement of suit. Cf. Price v. Hopkin, 13 Mich. 318, 324–325 (1865) (“It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.”) (citations omitted).
Moreover, the Legislature has clearly and unequivocally manifested its intent to apply the MTC statute of limitations in the circumstances of this case, where the proceeding was commenced after the effective date of the MTC. MCL 700.8206(1) provides, in relevant part:

(1) Except as otherwise provided in article VII [i.e., the MTC], all of the following apply on the effective date of the amendatory act that added this section:

(a) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all trusts created before, on, or after that effective date.

(b) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all judicial proceedings concerning trusts commenced on or after that effective date.

This provision states that the MTC applies to trusts that were created before, on, or after the effective date of the MTC, thereby encompassing all trusts, and that the MTC applies to all judicial proceedings concerning trusts that are commenced on or after the MTC's effective date. As discussed, the MTC went into effect on April 1, 2010. Loren commenced this proceeding on September 23, 2011, by filing his petition challenging the validity of the Trust. Therefore, this proceeding was commenced after the effective date of the MTC. It follows, then, that under MCL 700.8206(1), the MTC, which includes the limitations periods set forth in MCL 700.7604(1), applies to this case.

MCL 600.5869 states: “All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry.” In docket number 310846, Leslie contends that this provision precludes application of the statute of limitations in MCL 700.7604(1) because his right of action accrued before the MTC’s effective date. We reject Leslie’s claim. “Statutes of limitation operate prospectively unless an intent to have the statute operate retrospectively clearly and unequivocally appears from the context of the statute itself.” Pryber v. Marriott Corp., 98 Mich.App 50, 55; 296 NW2d 597 (1980). In Pryber, this Court held that a statute of limitations enacted after the accrual of the plaintiffs' cause of action was applicable despite the language of MCL 600.5869, because the amended statute at issue in Pryber contained language indicating that it applied “to all actions hereinafter commenced and all actions heretofor commenced now pending in the trial or appellate courts.” Id. at 55, quoting MCL 600.5861. To the extent that the legislative directive in MCL 700.8206(1) irreconcilably conflicts with MCL 600.5869, the more recently enacted MCL 700.8206(1) must be regarded as an exception to or qualification of the directive in MCL 600.5869. Pryber, 98 Mich.App at 56.

Loren contends, however, that the MTC statute of limitations cannot apply in this case in light of MCL 700.8206(2), which states:

The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right or affect an act done before that effective date. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before that effective date, that statute continues to apply to the right even if it has been repealed or superseded.

See also Indep Bank, 301 Mich.App at 509 (“The MTC applies to trusts created before its enactment, but does not impair accrued rights or affect an act done before its effective date.”), citing MCL 700.8206(1)(a) and (2). Loren argues that application of the MTC statute of limitations in this case would impair his accrued right to challenge the validity of the Trust. We disagree and hold that Loren's right to challenge the validity of the Trust did not accrue before the effective date of the MTC, and, even if the right had accrued, the application of the six-month statutory period did not impair that right.

Loren did not have an accrued right to bring his Trust challenge petition before the effective date of the MTC. Neither the MTC nor EPIC defines the term “accrued right.” However, this Court has addressed the meaning of “accrued right” in cases concerning EPIC.
In In re Smith Estate, 252 Mich.App 120, 124–125; 651 NW2d 153 (2002), this Court addressed the applicability of an EPIC provision allowing the admission of extrinsic evidence to prove the existence of testamentary intent with respect to a purported codicil to an existing will. The action was commenced before the effective date of EPIC, but the case remained pending when EPIC took effect. Id. at 127. This Court held that the EPIC provision was applicable. Id. at 126. This Court noted that under MCL 700.8101(2)(b), EPIC applied to a proceeding pending on the date that EPIC became effective, but that under MCL 700.8101(2)(d), EPIC “does not impair an accrued right or an action taken before that date in a proceeding.” Smith, 252 Mich.App at 126. This Court rejected the probate court's conclusion that the decedent's heirs had an accrued right to inherit disputed funds pursuant to the existing will rather than under the purported codicil. Id. Noting that EPIC did not define the term “accrued right,” this Court looked to the Michigan Supreme Court's decision in In re Finlay Estate, 430 Mich. 590, 600, n 10; 424 NW2d 272 (1988), which held that “accrued” was closely analogous to the term “vested” and referred to a right of which a person could not be denied without his assent and which a person could legally assert independent of any future condition of things or subsequent change of existing law. Smith, 252 Mich.App at 127. This Court also noted case law definitions of “vested” as meaning a right so fixed that it is not dependent on any future act or contingency. Id. at 127–128. The Smith Court concluded that no accrued right existed in that case:

Although to some extent a devise under a will is vested upon the death of the testator because the testator can no longer change the will, we conclude that it is not an “accrued right” under the act because it is not so fixed that it cannot be changed. Rather, it can be changed in conjunction with a showing under the EPIC that there is a more recent will or a partial or complete revocation, or an addition or alteration of the decedent's will, or a partial or complete revival of a formerly revoked will or a formerly revoked portion of a will. In other words, in order to avoid rendering other sections of the act nugatory, including subsection 8101(2)(b) providing that the act applies in pending proceedings, an “accrued right” must mean something other than a right under a will upon the testator's death. Rather, in the context of the act, an “accrued right” is a legal right to the exclusion of any other right or claim to it. The rights outlined in a testamentary instrument involved in probate do not so definitely belong to a person that they cannot be impaired or taken away without the person's consent. In the instant case, the rights of respondents under Smith's existing will are contingent upon the pending determination of the relationship of the document at issue to the will under the act. [Id. at 128–129 (citations omitted).]

Likewise, in In re Leete Estate, 290 Mich.App 647, 663–664; 803 NW2d 889 (2010), this Court upheld the applicability of an EPIC provision known as the 120–hour rule or simultaneous death provision, even though the property deed and the will at issue were adopted before the effective date of EPIC. This Court noted that “EPIC applies to a governing instrument executed before EPIC came into effect, as long as it does not affect an accrued right and as long as the governing instrument does not contain a contrary intent.” Id. at 663. This Court held that no accrued right would be impaired by applying EPIC. Id. After noting the definition of “accrued right” set forth in Smith, the Leete Court held that the appellant had obtained no fixed or accrued right by way of the will before the effective date of EPIC. Id. at 663–664. Further, the appellant obtained no such right when the decedents died because the appellant's interest in the property at issue was still subject to change. Id. at 664. Thus, EPIC was applicable. Id.

Although Smith did not involve a statute of limitations issue, Smith explicated the meaning of the term “accrued right” as used in a provision of EPIC. Because the MTC is a component of EPIC, and because the term “accrued right” is also used in the MTC provision at issue here, MCL 700.8206(2), we find it useful to consider the analysis of that term in Smith when determining whether Loren possessed an accrued right before the effective date of the MTC. ³

³ We note that Loren relies on In re Ervin Trust, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2005 (Docket Nos. 249974, 253745, 253824). Unpublished opinions are not binding under the rule of stare decisis. MCR 7.215(C)(1).

Loren contends that he had an accrued right to challenge the October Trust before the MTC became effective, so the MTC statute of limitations cannot be applied to impair that right. However, Loren did not have a right to challenge the Trust that was so fixed that it could not be changed by a future act or contingency. Smith, 252 Mich.App at 127–129. Loren's right to challenge the Trust could be changed or forfeited in various ways. For example, if Loren accepted a partial distribution under the Trust,
he would be estopped from challenging the Trust under the doctrine of election. See In re Beglinger Trust, 221 Mich.App 273, 276–277; 561 NW2d 130 (1997). Other contingencies such as the application of the doctrine of laches, a waiver, or a release could also have changed or taken away Loren's right to challenge the Trust. To the extent that Loren's interest as a Trust beneficiary, as opposed to his right to challenge the Trust, is at issue, that interest also is not so fixed or immutable that it excludes all other interests. Cheryl is the only current beneficiary because the Trust corpus is insufficient to fund the entire marital trust at this time, and Cheryl could deplete the corpus in her lifetime. Accordingly, Loren's interest is not so fixed or immutable that it constitutes an accrued right.

Nonetheless, even assuming that Loren's right to challenge the Trust constituted an accrued right, the application of the MTC statute of limitations did not impair that accrued right. Because the MTC and EPIC do not define the word “impair,” it is permissible to consider a dictionary definition of the term. Bedford Pub. Sch. v. Bedford Ed. Ass'n MEA/NEA, 305 Mich.App 558, 566 n 2; 853 NW2d 452 (2014). The word “impair” means “to make or cause to become worse; weaken; damage.” Random House Webster's College Dictionary (2001). In Finlay, 430 Mich. at 596–600, our Supreme Court upheld the application of a Revised Probate Code (RPC) provision creating a presumption concerning the testator's intent regarding the effect of a divorce, even though the divorce judgment was entered before the effective date of the RPC. A RPC provision provided that “[a]n act done before the effective date [of the RPC] in any proceeding and any accrued right is not impaired by this act.” MCL 700.992(c), repealed by 1998 PA 386. This Court held that the application of the RPC provision regarding the testator's presumed intent “does not impair any ‘act’ of the circuit court in decreeing the divorce of the testator, but merely alters the presumed intent of the testator following her divorce.” Finlay, 430 Mich. at 600.

Likewise, the application of the MTC statute of limitations did not impair, i.e., weaken, worsen, or damage, Loren's right to challenge the Trust. “Statutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants.” Stephens v. Dixon, 449 Mich. 531, 534; 536 NW2d 755 (1995). “They also prevent plaintiffs from sleeping on their rights.” Id. Application of the MTC six-month statutory limitations period did not deprive Loren of his right to challenge the Trust. It merely required him to do so within the procedural framework enacted by the MTC, i.e., within six months after receiving the statutorily prescribed notice from the trustees, with, in this case, an additional 60 days pursuant to the parties' express agreement to toll the six-month limitations period. The six-month period did not begin running until after the MTC went into effect; Loren received the benefit of the full six-month period afforded to all beneficiaries who receive the requisite notice under the MTC. Accordingly, the application of the MTC statute of limitations did not impair any accrued right in this case.

Next, Loren suggests that the application of the MTC statute of limitations is also barred by the second sentence of MCL 700.8206(2); again, that provision states:

The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right or affect an act done before that effective date. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before that effective date, that statute continues to apply to the right even if it has been repealed or superseded. [Emphasis added.]

Loren asserts that the “right” referenced in the second sentence does not have to be an accrued right. He contends that the trial court improperly inserted the word “accrued” into the second sentence of MCL 700.8206(2). However, statutory language “cannot be read in a vacuum.” GC Timmis & Co v. Guardian Alarm Co, 468 Mich. 416, 421; 662 NW2d 710 (2003). “Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. In seeking meaning, words and clauses will not be divorced from those which precede and those which follow.” Id. (quotation marks and citations omitted). It appears evident that the word “right” in the second sentence of MCL 700.8206(2) is a reference to the term “accrued right” used in the immediately preceding sentence. In other words, the second sentence serves to effectuate the first sentence by providing that accrued rights acquired, extinguished, or barred upon the expiration of a prescribed period that began under another statute before the effective date of the MTC continue to be governed by the other statute. 4
In docket number 310846, Leslie further expands on this point and relies on dictum in Finlay, 430 Mich. at 600, stating that a provision of the RPC similar to MCL 700.8206(2) was inapplicable because neither party had acquired any “accrued or nonaccrued” rights. However, there was no analysis in Finlay concerning whether the second sentence was meant to create a separate exception or was merely an effectuation of the first sentence of the analogous RPC provision. The Supreme Court's isolated statement in Finlay regarding “accrued or nonaccrued rights” comprised mere dictum because it was unnecessary to the decision in the case, given that the Court found the analogous RPC provision inapplicable and therefore upheld the application of the new law. See Carr v. City of Lansing, 259 Mich.App 376, 383–384; 674 NW2d 168 (2003) (a judicial comment that was unnecessary to the decision comprised mere dictum that was not binding). Thus, we are not persuaded that the second sentence of MCL 700.8206(2) applies to accrued and nonaccrued rights.

Moreover, even if the second sentence of MCL 700.8206(2) applies to rights that are not accrued, the second sentence does not apply here. Loren has no rights that were acquired, extinguished, or barred upon the expiration of a prescribed period that began to run before the MTC's effective date. Loren asserts that before the adoption of the MTC, the general six-year statute of limitations set forth in MCL 600.5813 applied to a trust challenge, and that this period began to run before the effective date of the MTC. But Loren fails to explain what rights he had that were acquired, extinguished, or barred upon the expiration of that limitations period. Loren fails to explain how his proposed interpretation takes account of the statutory phrase “upon the expiration of” and to address the fact that the supposedly applicable six-year limitations period would not have expired as of the effective date of the MTC. “Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory.” Book–Gilbert v. Greenleaf, 302 Mich.App 538, 541; 840 NW2d 743 (2013). Giving effect to the entire second sentence of MCL 700.8206(2) makes clear that it applies when a right is acquired, extinguished, or barred upon the expiration of a prescribed period under another statute. In other words, if a right was acquired or extinguished when a prior limitations period expired, that right has not been respectively lost or revived by the enactment of the MTC. Loren's right to bring this action was not acquired or extinguished by the expiration of a prior limitations period, rendering his argument premised on the second sentence of MCL 700.8206(2) devoid of merit.

Finally, Loren contends that the application of the MTC statute of limitations violates constitutional due process principles by impairing Loren's vested right to bring his Trust challenge. We disagree. Generally, “[t]he legislature may pass statutes of limitation and give them retroactive effect.” Evans Prod Co, 307 Mich. at 546. Nonetheless, the retroactive application of a statute of limitations may offend due process if a claimant is not afforded a reasonable time to file suit. See Price, 13 Mich. at 324–325 (“It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.”) (citations omitted); see also O'Brien v. Hazelet & Erdal, 410 Mich. 1, 15 n 18; 299 NW2d 336 (1980) (citing Price for the proposition that a statute may deny due process if it fails to afford a reasonable time to bring suit). Loren received the full six-month statutory period to bring his claim after receiving the requisite notice from the trustees, and an additional 60 days pursuant to the parties' tolling agreements. The notice that triggered the six-month period was provided after the effective date of the MTC, and Loren concedes that the notice contained all of the statutorily prescribed information, including the time allowed for commencing the proceeding. Loren was thereby afforded the same notice and the same time in which to file suit as all other beneficiaries under the MTC. Because the application of the MTC statute of limitations afforded Loren a reasonable time to file suit, his due process claim lacks merit.

In sum, the trial court properly granted Barron's motion for summary disposition because Loren's petition to set aside the October Trust was barred by the statute of limitations in the MTC.

III. DOCKET NUMBER 310844

Leslie has filed a separate appellate brief in Docket No. 310844, and adopts the arguments contained in Loren's brief in that appeal. Therefore, we do not separately address the issues in Leslie's brief.
A. UNDUE INFLUENCE

In docket number 310844, petitioners first argue that trial court erred in finding that there was insufficient evidence of benefit to Barron to support the petition to set aside the October Will on grounds of undue influence. We disagree.

“This Court reviews de novo a trial court's decision on a motion for summary disposition.” Hackel, 298 Mich.App at 315. “In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” Walsh v. Taylor, 263 Mich.App 618, 621; 689 NW2d 506 (2004). “Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” Latham v. Barton Malow Co, 480 Mich. 105, 111; 746 NW2d 868 (2008). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” West v. Gen Motors Corp, 469 Mich. 177, 183; 665 NW2d 468 (2003).

The trial court properly granted Cheryl's motion for summary disposition on the petition to set aside the October Will because there was no evidence to establish the benefit element of a presumption of undue influence.

A party contesting a will has the burden of establishing undue influence. MCL 700.3407(1)(c), (d).

To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.

A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [In re Erickson Estate, 202 Mich.App 329, 331; 508 NW2d 181 (1993) (citation omitted).]

On appeal, petitioners do not assert that there was direct evidence of undue influence but contend that there was evidence establishing the elements giving rise to a presumption of undue influence. The primary element in dispute concerns whether Barron benefited from the transaction.

“Appointment of the scrivener as trustee alone does not create a substantial benefit sufficient to raise the presumption of undue influence.” In re Vollbrecht Estate, 26 Mich.App 430, 436; 182 NW2d 609 (1970). “[T]he mere appointment of a fiduciary as executor of the will, or even trustee of a limited testamentary trust, would not alone establish the kind of benefit necessary to raise the presumption [of undue influence].” Id. “The determination should be made in light of all the powers, privileges, and duties given the trustee and all the instruments concerned.” Id. at 437. This Court in Vollbrecht found sufficient evidence for the jury to find a substantial personal benefit necessary to raise the presumption because there was “evidence that the trustees of the charitable foundation have the power to amend the articles of incorporation, determine its activities, and fix their own fees.” Id.

In this case, there was insufficient evidence of personal substantial benefit to Barron to give rise to a presumption of undue influence. Although Barron serves as a co-trustee of the Trust along with JPMC, this fact alone does not comprise a sufficient benefit to give rise to the presumption. Id. at 436. Further, Barron must make all decisions as co-trustee in conjunction with the other co-trustee, JPMC, and petitioners have not alleged that JPMC has exerted undue influence or acted improperly in connection with this matter.

In addition, Barron received no substantial benefit from the October Will that he did not already receive under the September Will, which petitioners conceded reflected Gerald's intent. Although petitioners at one point assert on appeal that there are
“substantial differences” between the September Will and the October Will, petitioners do not explicate any significant differences with respect to the benefits conferred on Barron by the two wills, and petitioners later admit that the October Will reflects little if any change from the September Will in respect to the benefits conferred on Barron. Indeed, petitioners state that the terms of the September Will benefitting Barron were “mostly carried over into the October Will.” Although petitioners assert on appeal that the September Will was also the product of undue influence, petitioners made no such claim in the trial court. Failure to timely raise an issue in the trial court generally waives review of that issue on appeal. *Napier v. Jacobs,* 429 Mich. 222, 227–228; 414 NW2d 862 (1987).

Further, petitioners expressly alleged in the trial court that the September Will and the September Trust carried out Gerald's intent as set forth in a letter by Gerald and in voluminous documents prepared by Gerald in respect to his estate planning. “A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Holmes v. Holmes,* 281 Mich.App 575, 587–588; 760 NW2d 300 (2008) (citation omitted). Because petitioners conceded in the trial court that the September Will and the September Trust reflected Gerald's intent as demonstrated in numerous earlier estate planning documents, and because Barron did not receive a substantial benefit from the October Will that differed from that afforded under the September Will, petitioners have not established that Barron received a benefit from the October Will sufficient to give rise to a presumption of undue influence.

Given that petitioners have not established the benefit prong required to give rise to a presumption of undue influence, it is unnecessary to address the other two prongs.

### B. MISTAKE

Petitioners next argue that the trial court erred in granting Cheryl's motion for summary disposition on the petition to set aside the October Will on the grounds of mistake. We disagree. Again, this Court reviews de novo a motion for summary disposition. *Hackel,* 298 Mich.App at 315.

Petitioners also contend that that Cheryl failed to request summary disposition with respect to the claim of mistake, and, thus, the trial court erred in granting summary disposition on that issue. In the petition to set aside the October Will, petitioners summarily alleged that the October Will was invalid because of a mistake of fact. Cheryl's motion for summary disposition addressed the allegations of undue influence rather than the cursory mistake allegations. Nonetheless, Cheryl's motion asked that the court admit the October Will to probate. In light of this request, it was clear that Cheryl was asking for summary disposition with respect to the entire petition. Moreover, a contestant of a will has the burden of establishing mistake. MCL 700.3407(1)(c), (d). The parties also addressed the issue of mistake in subsequent briefing. For these reasons, we hold that that Cheryl sought summary disposition with respect to the entire petition to set aside the October Will and that the parties had a fair opportunity to litigate the issue of mistake. Therefore, we address only the substantive arguments in relation to this issue.

The trial court properly granted Cheryl's motion for summary disposition on the petition to set aside the October Will because there was no genuine issue of material fact concerning petitioners' claim of mistake.

The allegation of mistake in the petition was that Nida failed to inform Gerald which trust the October Will would fund. There is no evidence in the record that Gerald was mistaken on this point. Clark testified that the operation of the October Trust and the distribution of assets were discussed with Gerald when the October estate documents were executed, that Gerald asked questions, and that the participants made sure Gerald understood what was happening. Nida testified that he asked Gerald at the time of the execution of the October estate documents if Nida had captured Gerald's wishes. The evidence does not present a question of fact concerning whether Gerald was mistaken regarding which trust would be funded by the October Will.

On appeal and in response to the summary disposition motion, petitioners changed the factual basis for the allegation of mistake from that set forth in the petition. Petitioners now contend that Gerald was mistaken regarding the value of his estate, believing it to be worth $75 million to $100 million, and that this mistake affected Gerald's decision to leave the first $10 million to Cheryl
under the marital trust. The record fails to support the view that any mistake regarding the value of the estate affected Gerald's decision. On the contrary, Clark testified that, even after being asked about the possibility that the value of the estate was less than he thought, Gerald adhered to his desire to leave the first $10 million to Cheryl. Thus, there is no genuine issue of material fact concerning whether any mistake regarding the value of the estate affected Gerald's decision to execute the October Will.

IV. DOCKET NUMBER 310846

We note that we decline to address Loren's fourth and final issue raised in docket number 310846 regarding Barron's alternate ground for summary disposition. However, this issue was unpreserved because it was not addressed by the trial court. *Hines v. Volkswagen of America, Inc.*, 265 Mich.App 432, 443; 695 NW2d 84 (2005). This Court “need not address an unpreserved issue.” *Gen Motors Corp v. Dept of Treasury*, 290 Mich.App 355, 387; 803 NW2d 698 (2010). In addition, we also do not address Leslie's claim regarding fraudulent concealment, which was also unpreserved.

A. STANDING

In docket number 310846, Loren first argues that Barron and JPMC lack standing to oppose the petition to modify or reform the Trust. We disagree.

Initially, we note that this issue is unpreserved. To preserve for appellate review an issue regarding standing, the defendant must have raised the issue in its first responsive pleading or motion. MCL 2.116(C)(5); MCR 2.116(D)(2); *Glen Lake–Crystal River Watershed Riparians v. Glen Lake Ass'n.*, 264 Mich.App 523, 528; 695 NW2d 508 (2004). First, we note that Loren's challenge to the trustees' standing is inapt because Barron and JPMC are not plaintiffs or petitioners who filed this petition and Loren is not a defendant or a respondent who was required to raise standing in his first responsive pleading. In addition, Loren raises this issue for the first time on appeal. Loren argues that the issue of standing may be raised for the first time on appeal because it pertains to jurisdiction. “Subject-matter jurisdiction and standing are not the same thing. Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending.” *Altman v. Nelson*, 197 Mich.App 467, 472; 495 NW2d 826 (1992). “Standing, on the other hand, relates to the position or situation of the plaintiff relative to the cause of action and the other parties at the time the plaintiff seeks relief from the court.” *Dep't of Social Servs v. Baayoun*, 204 Mich.App 170, 174; 514 NW2d 522 (1994). Therefore, the decision regarding whether a plaintiff has standing will not affect the trial court's jurisdiction over the subject matter. *Glen Lake*, 264 Mich.App at 528. Thus, this issue is unpreserved.

Whether a party has standing is a question of law that this Court reviews de novo. *Id.* at 527. “Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights.” *Rivette v. Rose–Molina*, 278 Mich.App 327, 329; 750 NW2d 603 (2008).

Loren's argument that Barron and JPMC lack standing to oppose the petition to modify or reform the Trust is devoid of merit.

Initially, we note that the issue of the trustees' standing is moot because Cheryl concurred in Barron's motion for summary disposition and it is undisputed that Cheryl possesses standing to oppose Loren's petition to modify or reform the Trust. “This Court's duty is to consider and decide actual cases and controversies.” *Morales v. Parole Bd.*, 260 Mich.App 29, 32; 676 NW2d 221 (2003). This Court generally does not address moot questions or declare legal principles that have no practical effect in a case. *Id.* “An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy.” *Gen Motors Corp. v. Dept of Treasury*, 290 Mich.App 355, 386; 803 NW2d 698 (2010) (citation omitted). Given that Cheryl concurred in the motion and that Loren has not contested her standing to oppose the petition to modify or reform the Trust, the issue whether Barron or JPMC possessed standing to oppose the petition or to seek summary disposition has no practical legal effect.
in this case. The court was permitted to grant summary disposition, and the issue of the trustees' standing is moot. However, we address the issue for the sake of thoroughness.

In *Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed.*, 487 Mich. 349, 372; 792 NW2d 686 (2010), the Michigan Supreme Court explicated the following principles regarding standing:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [Footnotes omitted.]

It should be noted that the trustees have not asserted a cause of action with respect to this issue. After all, it is Loren who commenced this action by filing his petition to modify the Trust. The trustees merely opposed the petition and moved for summary disposition. In any event, it is clear that the trustees have a special right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large. Although Loren contends that his reformation petition does not seek to invalidate the Trust, and that the trustees therefore have no interest in a dispute between beneficiaries concerning the proper distribution of the Trust's assets, the amended petition itself directly contradicts Loren's argument. The amended petition to modify or reform the Trust explicitly states that Gerald's “execution of the October Trust is invalid due to the ‘mistake of fact’ under which [Gerald] was acting when he executed the October Trust.” The amended petition sought modification or reformation of the Trust to change the distribution of assets and to terminate Barron as a co-trustee. In short, the amended petition asserted the Trust was invalid and sought modification of essential provisions of the Trust concerning the distribution of assets and successor trustees.

Claiming that the Trust is the product of a mistake of fact and seeking to significantly change material provisions concerning the distribution of the Trust's assets and the successor trustees is plainly an attack on the validity of the Trust. The Trust Agreement obligated the trustees to enforce the Trust Agreement in actions challenging the validity of the Trust Agreement. Under the MTC, a trustee is required to administer a trust in accordance with its terms and purposes, MCL 700.7801, and may exercise all of the powers conferred by the terms of the trust, MCL 700.7816(1)(a). See also MCL 700.1105(c) (defining an “[i]nterested person” to include an incumbent fiduciary); MCR 5.125(C)(32)(e) (listing the current trustee as a person interested in the modification or termination of a noncharitable irrevocable trust); MCR 5.125(C)(33)(c) (listing the current trustee as a person interested in a proceeding affecting a trust other than proceedings covered by other subrules).

In *In re Temple Marital Trust*, 278 Mich.App 122, 133–134; 748 NW2d 265 (2008), this Court held that two brothers acting in their capacities as trustees were entitled to recover attorney fees from trust assets for defending against a challenge to the validity of a trust amendment where the outcome of the litigation would determine which brother was the proper successor trustee and the terms of asset distribution. This Court explained:

> The issues and result of the litigation directly affected the trustee's administrative duties because the validity of the amendment determined the proper trust beneficiaries and asset distribution. Distribution of trust property to the proper beneficiary is a primary administrative duty of a trustee. [*Id.* at 133.]

As discussed, the amended petition to modify or reform the Trust was an attack on the validity of the Trust seeking to change the distribution of assets and the co-trustee, and the trustees had an obligation to enforce the Trust Agreement in connection with challenges to the validity of the Trust. It therefore follows that the trustees had a special right or substantial interest different
from the citizenry at large in opposing Loren's amended petition. Accordingly, the trustees possessed standing to seek summary disposition of the amended petition.

B. STATUTE OF LIMITATIONS

Loren next argues that the trial court erred in granting Barron's motion for summary disposition on Loren's petition to modify or reform the trust based on the expiration of the statute of the limitations. We disagree.

Loren asserts two arguments relating to trial court's application of the MTC statute of limitations to his petition for reformation of the Trust. As discussed earlier, MCL 700.7604(1) is a provision of the MTC that prescribes limitation periods for bringing a challenge to the validity of a trust. Loren concedes that he filed his petition to modify or reform the Trust more than two years after Gerald's death and more than six months after the statutorily prescribed notice was sent to Loren. Nonetheless, Loren first contends, the statute of limitations in MCL 700.7604(1) does not apply because his petition to modify or reform the Trust did not commence a judicial proceeding to contest the validity of the Trust. Rather, he argues, his petition was merely seeking to modify or reform the terms of the Trust rather than to invalidate the Trust. We disagree.

“In determining which period of limitations controls, we must first determine the true nature of the claim.” Adams v. Adams (On Reconsideration), 276 Mich.App 704, 710; 742 NW2d 399 (2007). “It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.” Id. at 710–711. “A plaintiff may not evade the appropriate limitation period by artful drafting.... The type of interest allegedly harmed is the focal point in determining which limitation period controls.” Simmons v. Apex Drug Stores, Inc., 201 Mich.App 250, 253; 506 NW2d 562 (1993).

The procedural label that Loren affixed to his petition is one of modification or reformation. But in reading the petition as a whole, it is evident that the true nature of his claim was to contest the validity of the Trust. Loren alleged essentially the same facts in this petition as those used to support his petition to set aside the Trust. The reformation petition alleged that the October Trust was invalid due to a mistake of fact under which Gerald was acting when he executed the document. It asserted that the Trust failed to provide for a distribution of shares of GLP to Loren, which was in contravention of statements Gerald purportedly made after executing the Trust. The petition further alleged that the evidence showed that the October Trust was the product of a mistake of fact and that it should be reformed to conform to Gerald's intentions. It therefore requested modification or reformation of the Trust to provide that Loren shall receive 25% shares in the businesses; that Loren would become a member of the Investment Services board of directors; and that Barron would be terminated as a co-trustee.

Although phrased in terms of modification or reformation, the request for relief effectively sought a wholesale rewriting of the Trust to change its essential provisions concerning distribution of assets and the successor co-trustee. This relief was sought in part on the basis of the petition's allegation that the Trust was invalid as it was a product of Gerald's mistake of fact when he executed the document. The petition did not seek merely to correct a drafting error or to take account of a change of circumstances that occurred after the Trust was executed. Instead, the petition sought to change the most material provisions on the ground that Gerald's execution of the document was induced by a mistake of fact; this same underlying theory was asserted in Loren's petition to set aside the Trust that was dismissed under the statute of limitations. Overall, the true gravamen of the action is that it contests the validity of the Trust. Therefore, the statute of limitations in MCL 700.7604(1) is applicable.

Loren also argues that the statute of limitations in MCL 700.7604(1) does not apply retroactively because he had an accrued or vested right to seek reformation of the October Trust before the MTC became effective. Loren's arguments on this issue are duplicative of his arguments in docket number 309796, discussed earlier. For the reasons stated above, we hold that the trial court properly dismissed Loren's reformation petition because it was barred by the statute of limitations in MCL 700.7604(1).
Leslie also raises two arguments related to the statute of limitations issue in her brief on appeal in docket number 310846. Leslie's arguments were addressed earlier in this opinion, and we adhere to our stated analysis. The trial court properly granted Barron's motion for summary disposition regarding Leslie's petition to modify or reform the Trust because the petition was barred by the MTC statute of limitations.

V. DOCKET NUMBER 318883

A. SUMMARY DISPOSITION

In docket number 318883, petitioners argue that the trial court erred in granting Barron's motion for summary disposition on their petition for removal of Barron as co-trustee. We disagree.

Again, a trial court's decision on a motion for summary disposition is reviewed de novo. Hackel, 298 Mich.App at 315. Questions of statutory interpretation are reviewed de novo. Trentadue, 479 Mich. at 386. “If the language in a statute is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning, and the statute must be enforced as written. This Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” Bay City, 292 Mich.App at 166–167 (quotation marks and citations omitted).

We review de novo a probate court's construction and interpretation of the language used in a will or a trust. When construing a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor. Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust. [In re Stillwell Trust, 299 Mich.App 289, 294; 829 NW2d 353 (2012) (quotation marks and citations omitted)].

The trial court properly granted Barron's motion for summary disposition regarding the removal petition.

A provision of the MTC, MCL 700.7706, provides, in relevant part:

(1) The settlor, a cotrustee, or a qualified trust beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(2) The court may remove a trustee if 1 or more of the following occur:

(a) The trustee commits a serious breach of trust.

(b) Lack of cooperation among cotrustees substantially impairs the administration of the trust.

(c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the purposes of the trust.

(d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of the trust beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

On appeal, petitioners first present an unpreserved argument that the grounds for removal set forth in MCL 700.7706(2) are not exclusive and that a trustee may be removed on additional grounds recognized at common law. In Kelsey v. Detroit Trust Co, 265 Mich. 358, 361–362; 251 NW 555 (1933) (citations omitted), our Supreme Court articulated the grounds on which a trustee could be removed at common law:
The right to remove trustees and to appoint successor trustees existed at common law. If, at common law a trustee could not effectually execute the trust, absconded, became bankrupt, misconducted himself, dealt with the trust fund for his own personal profit and advancement, committed a breach of trust, refused to apply the income as directed, failed to invest as directed, or acted adversely to the interests of the beneficiaries, neglected to use due care in protecting the trust estate, or was guilty of gross misconduct in the execution of the trust, or showed a lack of fidelity to the interests of the trust, or for any good cause, a trustee could be removed and a new trustee substituted in his place by a court of competent jurisdiction.

In the trial court, petitioners affirmatively sought removal on the basis of grounds listed in MCL 700.7706(2) and did not present the argument advanced on appeal that other grounds existing at common law provided an additional basis for removal. In any event, petitioners' unpreserved appellate contention lacks merit.

“It is axiomatic that the Legislature has the authority to abrogate the common law.” Trentadue, 479 Mich. at 389. “In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersed and replace the common law dealing with the subject matter.” Id. at 390 (quotation marks and citations omitted). Further, the MTC is to “be construed and applied to promote its underlying purposes and policies.” MCL 700.8201(1). Among the purposes and policies of the MTC identified by the Legislature are “to make more comprehensive and to clarify the law governing trusts in this state,” MCL 700.8201(2)(a), and “to foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust,” MCL 700.8201(2)(c).

In MCL 700.7706(2), the Legislature comprehensively codified a detailed list of grounds containing specific requirements for the removal of a trustee. The statutory grounds encompass a wide range of possible reasons for removing a trustee. By enacting this comprehensive provision, the Legislature expressed its intent that the statute supersed and replace the common-law grounds for removal. Trentadue, 479 Mich. at 390. If myriad other grounds recognized at common law but not included in MCL 700.7706(2) were to continue to be used to remove trustees, it would undermine the Legislature's efforts to make more comprehensive and to clarify the law concerning removal of a trustee and to foster certainty in this area of law. Further, permitting removal under the common law for “any good cause” as set forth in Kelsey, 265 Mich. at 362, would render ineffectual and essentially nullify the detailed, specific requirements for removal listed in MCL 700.7706(2). “Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory.” Book–Gilbert, 302 Mich.App at 541. Therefore, MCL 700.7706(2) superseded and replaced the common-law bases for removal.

Next, petitioners argue that the trial court erred in requiring that the grounds for removal be established by clear and convincing evidence in accordance with a provision of the October Trust. Paragraph 5 of the Trust provides, in relevant part:

The Trustee shall not be liable ... by reason of any action or omission, whether by the Trustee or any other fiduciary, unless the Trustee has acted in bad faith, notwithstanding [EPIC] or any other law. In the absence of clear and convincing proof to the contrary, each Trustee shall be deemed to have acted within the scope of the Trustee's authority; to have exercised reasonable care, diligence, and prudence; and to have acted impartially as to all interested persons. [Emphasis added.]

Petitioners argue that this provision of the Trust merely absolves the trustee of liability and does not address removal. Moreover, petitioners contend, the MTC bars enforcement of this Trust language. MCL 700.7908 provides:

(1) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that either of the following applies:

(a) The term relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

(b) The term was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
Petitioners further cite MCL 700.7105(2)(n), which provides that the terms of a trust prevail over any provision of the MTC except, inter alia, “[t]he power of the court to take action and exercise jurisdiction.” Petitioners also argue that the trial court improperly weighed evidence in the summary disposition context.

Petitioners’ arguments on this point are ultimately unavailing. We agree with petitioners that ¶ 5 of the Trust is inapplicable. When read in context, the requirement in ¶ 5 of clear and convincing evidence to prove that the trustee failed to act impartially is in reference to a trustee's liability for any act or omission. The term “liable” refers to legal responsibility. Random House Webster's College Dictionary (2001). The issue here does not pertain to holding a trustee legally responsible but instead to the removal of a trustee. However, although the trial court briefly referenced the clear and convincing evidence standard, the court's decision overall reflects that it found no evidence or facts to establish necessary elements of grounds for removal. In particular, the court found that petitioners did not present any facts from which an inference could be drawn that their interests as beneficiaries had been detrimentally affected and that there was no evidence of harm to the Trust corpus. The court also noted that there was no evidence that any conflict of interest on Barron's part harmed petitioners as Trust beneficiaries or affected Trust administration. In other words, the court indicated that any bias or partiality on Barron's part did not affect the Trust corpus or harm petitioners as beneficiaries, which, as discussed later, must be established to warrant removal. Therefore, although the court did briefly reference the clear and convincing evidence standard, the reference was harmless given the court's finding that there was no evidence to support conditions necessary for removal. And because the trial court found that there was no evidence to satisfy these requirements, it did not improperly weigh evidence.

Next, petitioners contend that Barron's purported partiality in favor of some beneficiaries and his hostility toward petitioners is evidence of his “unfitness,” thereby comprising a proper ground for removal under MCL 700.7706(2)(c). We disagree. Petitioners challenge Barron's actions in defending against petitioners' petitions to modify or reform the Trust. Petitioners repeat the arguments Loren advanced in connection with whether Barron possessed standing. As we explained, the petitions to modify or reform the Trust explicitly challenged the validity of the Trust Agreement, and he was required by statutory provisions to administer the Trust in accordance with its terms and purposes and was permitted to exercise all of the powers conferred by the terms of the Trust. Therefore, petitioners' argument that Barron exhibited partiality favoring some beneficiaries or hostility toward petitioners because he opposed their petitions to modify or reform the Trust is devoid of merit.

Even assuming, however, that Barron was hostile toward petitioners or partial in favor of other beneficiaries, petitioners have not established that such hostility or partiality comprised unfitness to administer the Trust effectively or that removal of Barron best serves the purposes of the Trust, both of which must be shown in order to remove Barron, under the plain language of MCL 700.7706(2)(c). Again, there is no evidence that the Trust corpus was in any way affected by Barron's alleged hostility or partiality or that petitioners' interests as Trust beneficiaries, as opposed to employees or associates of GLP or sons of Gerald, were affected.

Petitioners next argue that Barron engaged in conduct that revealed a conflict of interest; they assert that Barron's actions of removing himself as a director of the GLP board of directors with someone subject to his control and to let another attorney take over the circuit court litigation that Barron initiated on GLP's behalf against Loren did not render the conflict of interest moot. Petitioners' arguments are unconvincing. MCL 700.7706(2) does not list a conflict of interest by itself as a ground for removal. Assuming that a conflict of interest could comprise “unfitness” under MCL 700.7706(2)(c), petitioners have again failed to demonstrate that any conflicts affected the administration of the Trust or that removal of Barron best serves the purposes of the Trust. Conflicts of interest or hostility are not grounds for removal of a trustee or a personal representative of an estate unless the administration of the trust or estate was affected. See In re Kramek Estate, 268 Mich.App 565, 576; 710 NW2d 753 (2005); In re Sumpter Estate, 166 Mich.App 48, 52–57; 419 NW2d 765 (1988); In re Gerber Trust, 117 Mich.App 1, 14; 323 NW2d 567 (1982). Again, there is no evidence of any mismanagement or negative effect on the administration of the Trust.

Moreover, Barron did not exhibit a conflict of interest by serving as a director of GLP for a period of time. Paragraph 6C(2)(a)(x) of the Trust Agreement authorized the co-trustees to act as entity owners, including by appointing a co-trustee as a director. The
trial court expressed some concern about Barron's acting as an attorney for GLP in filing the circuit court lawsuit against Loren but ultimately concluded that Barron's resignation as attorney shortly after filing the lawsuit and the circuit court's ultimate disposition in favor of GLP's position ameliorated any concerns. The circuit court action was initiated because of what were perceived to be threats by Loren to take damaging actions against GLP. The mere existence of litigation between a trustee and a beneficiary is not a sufficient reason for removal. See Sumpter, 166 Mich.App at 56; Gerber, 117 Mich.App at 14. Overall, the trial court properly concluded that the alleged conflicts of interest do not require removal given the absence of evidence of any effect on Trust administration or the interests of the beneficiaries.

Thus, the trial court properly granted Barron's motion for summary disposition regarding the removal petition. For the same reasons, we further hold that the trial court did not plainly err in failing to grant summary disposition to petitioners under MCR 2.116(A) or (I)(2).

Affirmed.

O'CONNELL, J., (dissenting).
I respectfully dissent.

In my opinion, the trial court erred when it granted the motion for summary judgment on the petition to set aside the October Will because a question of fact existed regarding whether Ronald Barron exercised undue influence on Gerald Pollack. I would reverse the trial court's order granting the motion for summary disposition and admitting the October Will to probate. I would remand the balance of this case, and its related consolidated cases pending before this Court, for further proceedings consistent with this opinion.

I. FACTS

The majority opinion ably states the facts of this case. However, the following facts are particularly pertinent to this dissent. In the summer of 2008, Gerald Pollack was diagnosed with brain cancer. In September 2008, Ronald Barron, Gerald's good friend and legal counsel, drafted the September Will and the September Trust. Apparently the September documents were five years in the planning stage. In very unusual circumstances, one month later, attorney Charles Nida was employed to draft the October Will and the October Trust. The parties dispute who hired Nida and why he was employed to draft a second will and trust.

Petitioners claim that the October documents differ significantly from the September documents. Pertinent to this appeal, petitioners allege that attorney Ronald Barron was involved in drafting these documents and that he benefitted significantly from them. Barron admits that the October Will is a “pour over” will that transferred Gerald's assets to the October Trust. This is significant because any resolution of the October Will issue has a synergetic effect on seven other cases pending in this Court. Needless to say, this has been a very protracted litigation.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. Hackel v. Macomb Co. Comm., 298 Mich.App 311, 315; 826 NW2d 753 (2012). In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Walsh v. Taylor, 263 Mich.App 618, 621; 689 NW2d 506 (2004). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Latham v. Barton Malow Co., 480 Mich. 105, 111; 746 NW2d 868 (2008). A
genuine issue of material fact exists when the record, viewed in a light favorable to the opposing party, leaves open an issue on which reasonable minds might differ. *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

The central issue in this case is whether the petitioners presented sufficient evidence to create a question of fact regarding whether there was a presumption of undue influence. I conclude that petitioners did present evidence on this element.

A party contesting a will has the burden to establish undue influence. MCL 700.3407(1)(c) and (d).

To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.

A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Erickson Estate*, 202 Mich.App 329, 331; 508 NW2d 181 (1993) (citation omitted).]

On appeal, petitioners contend that there was evidence establishing all three of the elements giving rise to a presumption of undue influence. The trial court agreed that petitioners had established the first element, the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, and the third element, the fiduciary had an opportunity to influence the grantor's decision in that transaction. The parties do not dispute the trial court's findings on these elements. At issue in this case is the second element, the fiduciary, or an interest represented by the fiduciary, benefits from the transaction. The primary dispute is whether Barron benefited from the transaction.

Appointment of the scrivener as trustee “alone, without other factors” does not create a substantial benefit. *In re Vollbrecht Estate*, 26 Mich.App 430, 436; 182 NW2d 609 (1970). The mere appointment of a fiduciary as executor of the will, or even trustee of a limited testamentary trust, does not alone establish the kind of benefit necessary to raise the presumption of undue influence. *Id.* The determination should be made in light of all the powers, privileges, and duties given the trustee and all the instruments concerned. *Id.* at 437.

In *Vollbrecht*, there was sufficient evidence for the jury to find a substantial personal benefit because there was evidence that the trustees of the charitable foundation have the power to amend the articles of incorporation, determine its activities, and fix their own fees. *Id.* Other factors might include “the nature and probable duration of the trust, the amount of property involved, the amount of fees which the trustee would receive, the discretionary powers of the trustee, and the fact that the lawyer-scrivener was the sole trustee.” See *id.* at 436.

In this case, there is sufficient evidence of personal substantial benefit to Barron. First, Barron serves as a co-trustee of the trust. Second, the will authorizes Barron to collect compensation for his services. Third, the will authorizes Barron and the co-trustee to completely control Gerald's estate and his company, to the exclusion of Gerald's children. This power includes the right to vote Gerald's sixty percent of the stock in Gerald L. Pollack & Associates, Inc. (GLP), the main asset in the estate. It also includes the power to name himself a director or officer of the company, to designate a chief operating officer of the company, to pay himself a salary, and to select himself and his law firm as legal counsel for the company. Finally, Barron was the lawyer-scrivener who drafted the September Will and, viewing the record in a light most favorable to petitioners, he hired and provided Nida, who drafted the October Will. 1
The similarity between the September Will and Trust and the October Will and Trust is not a mitigating factor in this case. That Barron, or his law firm, drafted the September Will and Trust is alone suspicious. It is well-established that if the attorney then benefits from the will or trust, a rebuttable presumption of undue influence or impropriety naturally arises. See Donovan v. Bromley, 113 Mich. 53, 54; 71 NW 523 (1897). Attorneys who draft estate documents, or direct the drafting of estate documents, must be careful to avoid impropriety. See MRPC 1.8(c). One wonders why the will and trust had to be redrafted a month after it was initially executed. Was it an attempt to distance the obvious?

In my opinion, the record creates a factual question that was improperly resolved in a motion for summary disposition. The fact that Gerald was diagnosed with brain cancer in 2008, that Barron drafted the September documents and, in essence, selected a new attorney to draft the October documents that clearly gave Barron substantial control, creates at the least a factual issue on the second element. Reasonable minds could differ concerning whether the duration of the trust, the amount of fees Barron receives, and his control over the business benefits him.

The trial court erred when it determined as a matter of law that sufficient evidence was not presented to give rise to the presumption of undue influence. Petitioners presented facts sufficient to create a question on the issue of undue influence and sustain their burden under MCL 700.3407(1)(c).

I would reverse the summary judgment decision of the trial court and remand for further proceedings consistent with this opinion. Because the balance of the issues raised in these appeals depend on the resolution of this issue, this Court cannot address them at this time.
Below are bills that PAA has identified for Council of Probate Section of State Bar of MI

**H 4072** Title: **Digital Assets Act**  
Author: Forlini  
Introduction: 1/27/2015  
Location: House Judiciary Committee  
Summary: Enacts uniform fiduciary access to digital assets act.  
Status: 01/27/2015 INTRODUCED.  
01/27/2015 To HOUSE Committee on JUDICIARY.

**H 4124** Title: **Retirement Income Deduction**  
Author: Townsend  
Introduction: 1/29/2015  
Location: House Tax Policy Committee  
Summary: Clarifies limitations and restrictions on retirement income deduction for a surviving spouse.  
Status: 01/29/2015 INTRODUCED.  
01/29/2015 To HOUSE Committee on TAX POLICY.

**S 24** Title: **Homestead Exemption**  
Author: Nofs  
Introduction: 1/21/2015  
Location: Senate Finance Committee  
Summary: Continues principal residence homestead exemption upon death of a homeowner under certain circumstances.  
Status: 01/21/2015 INTRODUCED.  
01/21/2015 To SENATE Committee on FINANCE.

**S 49** Title: **Crimes Against Elder Adults**  
Author: Smith V  
Introduction: 1/28/2015  
Location: Senate Judiciary Committee
Summary: Increases penalties for certain crimes against a person over 65 years of age.
Status: 01/28/2015 INTRODUCED.
01/28/2015 To SENATE Committee on JUDICIARY.

**S 50**
Title: Elder Abuse
Author: Smith V
Introduction: 1/28/2015
Location: Senate Judiciary Committee
Summary: Provides for sentencing guidelines for elder adult abuse.
Status: 01/28/2015 INTRODUCED.
01/28/2015 To SENATE Committee on JUDICIARY.
TAX NUGGETS
Dated February 14, 2015
By: Robert Labe

PRESIDENT OBAMA’S STATE OF THE UNION PROPOSALS “FOR A SIMPLER FAIRER TAX CODE THAT RESPONSIBLY INVESTS IN MIDDLE CLASS FAMILIES”

The President in his State of the Union address made several proposals that, if enacted, would change our existing tax law. The President's proposals have subsequently been clarified. Some of the proposals for a “Simpler Fairer Tax Code that Responsibly Invests in Middle Class Families” that impact individual and transfer tax planning include the following:

1. Bequests and gifts other than to charitable organizations would be treated as realization events. Gifts or bequests to a spouse would carry the basis of the donor or decedent and capital gain would not be realized by the spouse until the spouse disposes of the assets or dies. The proposal imposes a capital gain tax on appreciated assets at death. As a general rule, presently under Section 1014 of the Internal Revenue Code, assets owned by an individual at death receive a stepped up basis (i.e., the basis of the property acquired from the decedent is the fair market value as of the decedent’s death). Further, under current law, the appreciated portion of the assets are not subject to tax at the time of the individual's death. The Joint Committee on Taxation 2014 Report says this exclusion costs about $32 billion per year.

The proposal to impose a capital gains tax on appreciated assets at death including the following safeguards:

   (a) Assets bequeathed to a surviving spouse receive a carryover basis and are not subject to tax on the first spouse’s death. Capital gain would not be realized by the spouse until the spouse disposes of the assets or dies.

   (b) A $100,000 per person exclusion of capital gain is recognized by reason of death that would be indexed for inflation after 2016. The exclusion would be portable to the decedent’s surviving spouse. In addition to the preceding exemption, married couples are entitled to a $500,000 capital gain exemption for personal residences and individuals are entitled to a $250,000 capital gain exemption. The exemptions would be automatically portable between spouses.

   (c) Tangible personal property other than “expensive art and similar collectibles” are not subject to the capital gains tax.
(d) The President’s proposal excludes from the capital gains tax small, family-owned and operated businesses until the business is sold. Closely-held businesses have the option to pay the tax over 15 years.

2. The capital gain rates and dividend rates on high-income households are raised to 24.2 percent. The 3.8 percent net investment tax would continue to apply as under current law. At present, qualified dividends and long-term capital are taxable at 20% for a taxpayer whose income exceeds $413,200 for a single individual or $464,850 for a married couple.

3. Wealthy individuals are prevented from accumulating very significant amounts of tax-favored retirement benefits. Contributions to and accruals of additional benefits in tax preferred retirement plans and IRAs are prohibited once balances are above $3.4 Million for an individual age 62. The limitation is based on the accumulated retirement benefits in excess of the amount necessary to provide the maximum annuity permitted for a tax-qualified defined benefit plan (currently an annual benefit of $210,000) payable in the form of a joint and 100 percent survivor annuity commencing at age 62.

4. All employers with more than 10 employees that do not currently offer a retirement plan are required to automatically enroll their workers in an IRA. (This is referred to as an Auto-IRA). If the employee does not provide a written participation election, the employee would be enrolled at a default rate of three percent of the employee’s compensation. The employee could elect for a higher or lower contribution percentage up to the IRA dollar limits. The Auto-IRA proposal provides a $3,000 tax credit to any employer with 100 or fewer employees that offers an Auto-IRA. The tax credit for the employer would be $1,000 per year for three years.

5. A new second earner credit of up to $500 for married couples who file as married filing jointly. The credit equals 5% of the first $10,000 of earned income for the lower-earning spouse of a married couple. Earned income includes wages and net earnings from self-employment income. The credit is phased out with couples of income between $120,000 and $210,000.

6. The maximum Child and Dependent Care Tax Credit for families with children under 5 years of age is tripled by increasing it to $3,000 per child. A family is allowed to claim a 50% credit for up to $6,000 of expenses per child under 5 years of age covering up to 50% of the cost of child care for pre-school age children. The maximum credit is available to families with income up to $120,000.

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