



## PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for:

Meeting of the Committee on Special Projects (CSP);

Meeting of the Council of the Probate and Estate Planning Section

Friday, February 15, 2019

9:00 a.m.

University Club of MSU

3435 Forest Road

Lansing, Michigan 48910

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

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

February 15, 2019  
9:00 a.m.

University Club of MSU  
3435 Forest Road  
Lansing, Michigan 48910

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

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STATE BAR OF MICHIGAN  
PROBATE AND ESTATE PLANNING SECTION COUNCIL

**Council and CSP Meeting Schedule for 2018-2019**

Friday, February 15, 2019, University Club, Lansing, Michigan\*\*  
Friday, March 8, 2019, University Club, Lansing, Michigan\*\*  
Friday, April 12, 2019, University Club, Lansing, Michigan\*\*  
Friday, June 14, 2019, University Club, Lansing, Michigan\*\*  
Friday, September 20, 2019, University Club, Lansing, Michigan\*\*

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

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

**Call for materials**

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

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

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

Wednesday, February 6, 2019 (for Friday, February 15, 2019 meeting)  
Wednesday, February 27, 2019 (for Friday, March 8, 2019 meeting)  
Wednesday, April 3, 2019 (for Friday, April 12, 2019 meeting)  
Wednesday, June 5, 2019 (for Friday, June 14, 2019 meeting)  
Wednesday, September 11, 2019 (for Friday, September 20, 2019 meeting)

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

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

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

Thursday, February 7, 2019 (for Friday, February 15, 2019 meeting)  
Thursday, February 28, 2019 (for Friday, March 8, 2019 meeting)  
Thursday, April 4, 2019 (for Friday, April 12, 2019 meeting)  
Thursday, June 6, 2019 (for Friday, June 14, 2019 meeting)  
Thursday, September 12, 2019 (for Friday, September 20, 2019 meeting)

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

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

**Council Members  
for 2018-2019 Term**

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

**Ex Officio Members of the Council**

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

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

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

(2019-02-15)

# CSP Materials

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

**AGENDA**

Friday, February 15, 2019

East Lansing, Michigan

9:00 – 10:15 AM

1. **Nathan Piwowarski – Legislative Development and Drafting Committee – MCL 700.3206 and “Armed Forces” definition – 5 minutes**

See attached proposed redline version of MCL 700.3206(a) referenced in email between Jim Spica and Nathan Piwowarski

2. **Nathan Piwowarski – Legislative Development and Drafting Committee – Standby Guardian provisions of the Omnibus – 20 minutes**

See attached proposed redline version

3. **Nathan Piwowarski – Legislative Development and Drafting Committee – Spousal Lifetime Access Trusts (SLATs) – 20 minutes**

See attached:

- Email from George Bearup
- Proposed redline version of MCL 700.7103 and MCL 700.7506

4. **Kathleen Goetsch – Guardianship, Conservatorship and End of Life Committee – proposed modifications to the Patient Advocate Designation Statutes – 30 minutes**

See attached:

- Memo from the committee dated 1/14/2019
- Memo from Josh Ard with suggestions for improving PAD law dated 2/6/2019
- Proposed redline version of MCL 700.5508



5. **Kathleen Goetsch/Josh Ard – Safe Families for Children Act MCL 722.1551 et seq – remaining time**

See attached Memo from Josh Ard re: Safe Families for Children Act dated January 2019

**From:** Marlaiane Teahan <mteahan@fraserlawfirm.com>

The problem....

**Sent:** Monday, July 30, 2018 3:58 PM

**To:** 'nathan@mwplegal.com' (nathan@mwplegal.com) <nathan@mwplegal.com>; Katie Lynwood <Klynwood@BLLHlaw.com>

**Cc:** Lentz, Marguerite <MLentz@BODMANLAW.COM>

**Subject:** MCL 700.3206 -- Issue for LDDC?

I think there may be an error in EPIC Section 3206. <http://legislature.mi.gov/doc.aspx?mcl-700-3206>

Look at 3206(3)(a) – it references “service member.”

3206(14)(g) defines “service member” to include a member of the armed forces.

3206(14)(a) defines “armed forces” to be defined as THAT TERM is defined in section 2 of the veteran right to employment services act, 1994 PA 39, MCL 35.1092. Look at 1092 and there is no definition in that section and not even in the entire VRES Act of “armed forces.” <http://legislature.mi.gov/doc.aspx?mcl-35-1092>

So – where does that leave the definition of service member that is so important to determining the person with the first priority as funeral representative under 3206(1)??



**Marlaiane C. Teahan** | Shareholder | Fraser Trebilcock  
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w: [fraserlawfirm.com](http://fraserlawfirm.com)



The fix....

**Nathan Piwowarski**

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**From:** James P. Spica <JSpica@dickinson-wright.com>  
**Sent:** Thursday, January 31, 2019 4:05 PM  
**To:** Nathan Piwowarski  
**Subject:** FW: Legislation Development & Drafting Committee : LDDC 02/01/19 agenda  
**Attachments:** 190127%20eml%20re%20MCL%20700.3206.pdf

Apropos of Marlaine Teahan's message of July 30, 2018 (copy attached), Nathan, I think the LDDC should definitely consider the institution of an annual award for (something like) The Most Boring Legislative Suggestion [(or, perhaps) Legislative Glitch Spotting] of the Year. On the other hand, Marlaine does have (an intensely boring!) point. Let me try to greet boredom with (boring!) ingenuity by suggesting that MCL § 700.3206(14)(a) should be amended to read:

(a) "Armed forces" means **the United States Armed Forces, including the reserve components service units referred to that term as defined in section 1 of the veteran right to employment services act, 1994 PA 29, MCL 25.1092.**

Jim

**Legislative Development and Drafting Committee**  
**2019 EPIC Omnibus– Standby Guardian Provisions Only**  
**This document was last edited 02/08/19**

1 MCL 700.531<sup>new</sup> Standby Guardian; qualifications ..... 2  
2 MCL 700.5301 Appointment of guardian for incapacitated individual by will or other writing. 4  
3 MCL 700.5305 Guardian ad litem; duties; compensation; legal counsel..... 6  
4 MCL 700.5306a Rights of individual for whom guardian is sought or appointed; form..... 10  
5 MCL 700.5310 Resignation or removal of guardian..... 14  
6 MCL 700.5311 Appointment or removal of guardian; notice of hearing. .... 15  
7 MCL 700.5313 Guardian; qualifications..... 16  
8 MCL 700.5314 Powers and duties of guardian ..... 18  
9

1 MCL 700.531*new* Standby Guardian; qualifications

- 2 (1) At a hearing convened under this part, the court may designate 1 or  
3 more standby guardians. The court may designate as standby guardian  
4 any competent person who is suitable and willing to serve. [There was  
5 lively discussion in our committee as to whether the legally-  
6 incapacitated person should have the same ability to confer super-  
7 priority on a nominated standby guardian, as is the case for the  
8 nomination of a guardian. We believe that this should be discussed in  
9 CSP.]
- 10 (2) The standby guardian shall receive a copy of the petition nominating  
11 him or her to serve, the court order establishing or modifying the  
12 guardianship, and the order designating the standby guardian.
- 13 (3) A standby guardian shall file an acceptance of his or her designation  
14 under subsection (2) within 28 days of receiving notice of the order  
15 designating the standby guardian.
- 16 (4) If, for any reason, the standby guardian is unable or unwilling to serve,  
17 the standby guardian shall promptly notify the court and interested  
18 persons.
- 19 (5) A standby guardian has no authority to act unless the guardian is  
20 unavailable for any reason, including the following:
- 21 (a) the guardian dies;
- 22 (b) the guardian is permanently or temporarily unavailable; or,
- 23 (c) the guardian is removed or suspended by the court.

- 1 (6) During an emergency affecting the protected person’s welfare when the  
2 guardian is unavailable, the standby guardian may temporarily assume  
3 the powers and duties of the guardian. A person may rely on the  
4 standby guardian’s representation that she has authority to act, if given  
5 the order issued under subsection (2) and acceptance filed under  
6 subsection (3). A person who acts in reliance upon the representations  
7 and documentation described in this subsection without knowledge that  
8 the representations are incorrect is not liable to any person for so acting  
9 and may assume without further inquiry the existence of the standby  
10 guardian’s authority.
- 11 (7) A standby guardian’s appointment as guardian shall become effective  
12 without further proceedings or reiteration of acceptance immediately  
13 upon the guardian’s unavailability as described in subsection (5). The  
14 powers and duties of the standby guardian shall be the same as those of  
15 the prior guardian.
- 16 (8) Upon assuming office, the standby guardian shall promptly notify the  
17 court, any known agent appointed under a power of attorney executed  
18 pursuant to section 5103, and interested persons. Upon receiving notice,  
19 the court may enter an order appointing the standby guardian as  
20 guardian without the need for additional proceedings. The guardian  
21 shall serve this order on the interested persons.

22

1 **MCL 700.5301 Appointment of guardian for incapacitated individual by will or**  
2 **other writing**

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

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

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



1 **MCL 700.5305 Guardian ad litem; duties; compensation; legal counsel.**

2 (1) The duties of a guardian ad litem appointed for an individual alleged  
3 to be incapacitated include all of the following:

4 (a) Personally visiting the individual.

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

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

10 (i) The right to contest the petition.

11 (ii) The right to request limits on the guardian's powers, including a  
12 limitation on the guardian's power to execute on behalf of the  
13 ward either of the following:

14 (A) A do-not-resuscitate order.

15 (B) A physician orders for scope of treatment form.

16 (iii) The right to object to a particular person being appointed  
17 guardian or designated as a standby guardian.

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

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

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

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

- 1 (e) Informing the individual that if a guardian is appointed, the guardian  
2 may have the power to execute a physician orders for scope of  
3 treatment form on behalf of the individual and, if meaningful  
4 communication is possible, discern if the individual objects to  
5 having a physician orders for scope of treatment form executed  
6 on his or her behalf.
- 7 (f) Informing the individual of the name of each person known to be  
8 seeking appointment as guardian or designation as a standby  
9 guardian.
- 10 (g) Asking the individual and the petitioner about the amount of cash and  
11 property readily convertible into cash that is in the individual's estate.
- 12 (h) Making determinations, and informing the court of those  
13 determinations, on all of the following:
- 14 (i) Whether there are 1 or more appropriate alternatives to the  
15 appointment of a full guardian or whether 1 or more actions  
16 should be taken in addition to the appointment of a guardian.  
17 Before informing the court of his or her determination under  
18 this subparagraph, the guardian ad litem shall consider the  
19 appropriateness of at least each of the following as alternatives  
20 or additional actions:

- 1 (A) Appointment of a limited guardian, including the  
2 specific powers and limitation on those powers the  
3 guardian ad litem believes appropriate.
- 4 (B) Appointment of a conservator or another protective  
5 order under part 4 of this article. In the report  
6 informing the court of the determinations under this  
7 subdivision, the guardian ad litem shall include an  
8 estimate of the amount of cash and property readily  
9 convertible into cash that is in the individual’s estate.
- 10 (C) Execution of a patient advocate designation, do-not-  
11 resuscitate order, physician orders for scope of  
12 treatment form, or durable power of attorney with or  
13 without limitations on purpose, authority, or duration.
- 14 (ii) Whether a disagreement or dispute related to the guardianship  
15 petition might be resolved through court ordered mediation.
- 16 (iii) Whether the individual wishes to be present at the hearing.
- 17 (iv) Whether the individual wishes to contest the petition.
- 18 (v) Whether the individual wishes limits placed on the guardian’s  
19 powers.
- 20 (vi) Whether the individual objects to having a do-not-resuscitate  
21 order executed on his or her behalf.
- 22 (vii) Whether the individual objects to having a physician orders for  
23 scope of treatment form executed on his or her behalf.
- 24 (viii) Whether the individual objects to a particular person being  
25 appointed guardian or designated as a standby guardian.
- 26 (2) The court shall not order compensation of the guardian ad litem unless the  
27 guardian ad litem states on the record or in the guardian ad litem’s written  
28 report that he or she has complied with subsection (1).

- 1 (3) If the individual alleged to be incapacitated wishes to contest the petition, to  
2 have limits placed on the guardian’s powers, or to object to a particular  
3 person being appointed guardian or designated as a standby guardian,  
4 and if legal counsel has not been secured, the court shall appoint legal  
5 counsel to represent the individual alleged to be incapacitated. If the  
6 individual alleged to be incapacitated is indigent, this state shall bear the  
7 expense of legal counsel.
- 8 (4) If the individual alleged to be incapacitated requests legal counsel or the  
9 guardian ad litem determines it is in the individual’s best interest to have  
10 legal counsel, and if legal counsel has not been secured, the court shall  
11 appoint legal counsel. If the individual alleged to be incapacitated is  
12 indigent, this state shall bear the expense of legal counsel.
- 13 (5) If the individual alleged to be incapacitated has legal counsel appointed  
14 under subsection (3) or (4), the appointment of a guardian ad litem  
15 terminates.

16

1 **MCL 700.5306a Rights of individual for whom guardian is sought or appointed;**  
2 **form.**

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

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

7 (b) To have the guardianship proceeding commenced and conducted in  
8 the place where the individual resides or is present or, if the individual  
9 is admitted to an institution by a court, in the county in which the  
10 court is located, as provided in section 5302.

11 (c) To petition on his or her own behalf for the appointment of a guardian  
12 or designation of a standby guardian, as provided in section 5303.

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

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

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

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

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

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

Legislative Development and Drafting Committee  
2019 EPIC Omnibus– Standby Guardian Provisions Only  
This document was last edited 02/08/19

- 1 (j) To a trial by jury on the petition to appoint a guardian, as provided in  
2 section 5304.
- 3 (k) To a closed hearing on the petition to appoint a guardian, as provided  
4 in section 5304.
- 5 (l) If a guardian ad litem is appointed, to be personally visited by the  
6 guardian ad litem, as provided in section 5305.
- 7 (m) If a guardian ad litem is appointed, to an explanation by the guardian  
8 ad litem of the nature, purpose, and legal effects of a guardian’s  
9 appointment, as provided in section 5305.
- 10 (n) If a guardian ad litem is appointed, to an explanation by the guardian  
11 ad litem of the individual’s rights in the hearing procedure, as  
12 provided in section 5305.
- 13 (o) If a guardian ad litem is appointed, to be informed by the guardian ad  
14 litem of the right to contest the petition, to request limits on the  
15 guardian’s powers, to object to a particular person being appointed  
16 guardian or designated as a standby guardian, to be present at the  
17 hearing, to be represented by legal counsel, and to have legal counsel  
18 appointed if the individual is unable to afford legal counsel, as  
19 provided in section 5305.
- 20 (p) To be informed of the name of each person known to be seeking  
21 appointment as guardian or designated as a standby guardian,  
22 including, if a guardian ad litem is appointed, to be informed of the  
23 names by the guardian ad litem as provided in section 5305.
- 24 (q) To require that proof of incapacity and the need for a guardian be  
25 proven by clear and convincing evidence, as provided in section 5306.
- 26 (r) To the limitation of the powers and period of time of a guardianship to  
27 only the amount and time that is necessary, as provided in section  
28 5306.
- 29 (s) To a guardianship designed to encourage the development of  
30 maximum self-reliance and independence as provided in section 5306.

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**2019 EPIC Omnibus– Standby Guardian Provisions Only**  
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- 1 (t) To prevent the grant of powers to a guardian if those powers are  
2 already held by a valid patient advocate, as provided in section 5306.
- 3 (u) To periodic review of the guardianship by the court, including the  
4 right to a hearing and the appointment of an attorney if issues arise  
5 upon the review of the guardianship, as provided in section 5309.
- 6 (v) To, at any time, seek modification or termination of the guardianship  
7 by informal letter to the judge, as provided in section 5310.
- 8 (w) To a hearing within 28 days of requesting a review, modification, or  
9 termination of the guardianship, as provided in section 5310.
- 10 (x) To the same rights on a petition for modification or termination of the  
11 guardianship including the appointment of a visitor as apply to a  
12 petition for appointment of a guardian, as provided in section 5310.
- 13 (y) To personal notice of a petition for appointment or removal of a  
14 guardian or a standby guardian, as provided in section 5311.
- 15 (z) To written notice of the nature, purpose, and legal effects of the  
16 appointment of a guardian, as provided in section 5311.
- 17 (aa) To choose the person who will serve as guardian depending on what  
18 CSP and Council decide, we may need to add a reference to  
19 standby guardians here, too, if the chosen person is suitable and  
20 willing to serve, as provided in section 5313.
- 21 (bb) To consult with the guardian about major decisions affecting the  
22 individual, if meaningful conversation is possible, as provided in  
23 section 5314.
- 24 (cc) To quarterly visits by the guardian, as provided in section 5314.
- 25 (dd) To have the guardian notify the court within 14 days of a change in  
26 the individual’s residence, as provided in section 5314.
- 27 (ee) To have the guardian secure services to restore the individual to the  
28 best possible state of mental and physical well-being so that the  
29 individual can return to self-management at the earliest possible time,  
30 as provided in section 5314.

**Legislative Development and Drafting Committee**  
**2019 EPIC Omnibus-- Standby Guardian Provisions Only**  
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- 1           (ff) To have the guardian take reasonable care of the individual's clothing,  
2                   furniture, vehicles, and other personal effects, as provided in section  
3                   5314.
- 4 (2) A guardian ad litem shall inform the ward in writing of his or her rights  
5           enumerated in this section. The state court administrative office and the  
6           office of services to the aging created in section 5 of the older Michigianians  
7           act, 1981 PA 180, MCL 400.585, shall promulgate a form to be used to give  
8           the written notice under this section, which shall include space for the court  
9           to include information on how to contact the court or other relevant  
10           personnel with respect to the rights enumerated in this section.
- 11



1 MCL 700.5310 Resignation or removal of guardian

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

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

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

24 (4) Before removing a guardian, appointing a successor guardian, changing the  
25 designated standby guardian, modifying the guardianship's terms, or  
26 terminating a guardianship, and following the same procedures to safeguard  
27 the ward's rights as apply to a petition for a guardian's appointment, the  
28 court may send a visitor to the present guardian's residence and to the place  
29 where the ward resides or is detained to observe conditions and report in  
30 writing to the court.

31

1 **MCL 700.5311 Appointment or removal of guardian; notice of hearing.**

2 (1) In a proceeding for the appointment or removal of an incapacitated  
3 individual's guardian or the changing of the designated standby  
4 guardian, other than the appointment of a temporary guardian or temporary  
5 suspension of a guardian, notice of hearing must be given to each of the  
6 following:

7 (a) The ward or the individual alleged to be incapacitated and that  
8 individual's spouse, parents, and adult children.

9 (b) A person who is serving as the guardian or conservator or who has the  
10 individual's care and custody.

11 (c) If known, a person named as attorney in fact under a durable power of  
12 attorney.

13 (d) The standby guardian.

14 (e) If no other person is notified under subdivision (a), (b), ~~or (c)~~ or (d),  
15 at least 1 of the individual's closest adult relatives, if any can be  
16 found.

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

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

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

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

1 MCL 700.5313 Guardian; qualifications

- 2 (1) The court may appoint a competent person as guardian of a legally  
3 incapacitated individual. The court shall not appoint as a guardian an  
4 agency, public or private, that financially benefits from directly providing  
5 housing, medical, mental health, or social services to the legally  
6 incapacitated individual. If the court determines that the ward's property  
7 needs protection, the court shall order the guardian to furnish a bond or shall  
8 include restrictions in the letters of guardianship as necessary to protect the  
9 property.
- 10 (2) In appointing a guardian under this section, the court shall appoint a person,  
11 if suitable and willing to serve, in the following order of priority:
- 12 (a) A person previously appointed, qualified, and serving in good  
13 standing as guardian for the legally incapacitated individual in this or  
14 another state.
- 15 (b) A person the individual subject to the petition chooses to serve as  
16 guardian.
- 17 (c) A person nominated as guardian in a durable power of attorney or  
18 other writing by the individual subject to the petition.
- 19 (d) A person named by the individual as a patient advocate or attorney in  
20 fact in a durable power of attorney.
- 21 (e) A person appointed by a parent or spouse of a legally  
22 incapacitated person by will or other writing pursuant to Section  
23 5301.
- 24 (3) If there is no person chosen, nominated, or named under subsection (2), or if  
25 none of the persons listed in subsection (2) are suitable or willing to serve,  
26 the court may appoint as a guardian an individual who is related to the  
27 individual who is the subject of the petition in the following order of  
28 preference:
- 29 (a) The legally incapacitated individual's spouse. This subdivision shall  
30 be considered to include a person nominated by will or other writing  
31 signed by a deceased spouse.

- 1           (b)    An adult child of the legally incapacitated individual.
- 2           (c)    A parent of the legally incapacitated individual. This subdivision shall  
3                be considered to include a person nominated by will or other writing  
4                signed by a deceased parent.
- 5           (d)    A relative of the legally incapacitated individual with whom the  
6                individual has resided for more than 6 months before the filing of the  
7                petition.
- 8           (e)    A person nominated by a person who is caring for the legally  
9                incapacitated individual or paying benefits to the legally incapacitated  
10              individual.
- 11       (4)    If none of the persons as designated or listed in subsection (2) or (3) are  
12              suitable or willing to serve, the court may appoint any competent person  
13              who is suitable and willing to serve, including a professional guardian as  
14              provided in section 5106.

1 **MCL 700.5314 Powers and duties of guardian**

2 Whenever meaningful communication is possible, a legally incapacitated  
3 individual’s guardian shall consult with the legally incapacitated individual  
4 before making a major decision affecting the legally incapacitated  
5 individual. To the extent a guardian of a legally incapacitated individual is  
6 granted powers by the court under section 5306, the guardian is responsible  
7 for the ward’s care, custody, and control, but is not liable to third persons by  
8 reason of that responsibility for the ward’s acts. In particular and without  
9 qualifying the previous sentences, a guardian has all of the following powers  
10 and duties, to the extent granted by court order:

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

18 (b) If entitled to custody of the ward, the duty to make provision for the  
19 ward’s care, comfort, and maintenance and, when appropriate, arrange  
20 for the ward’s training and education. The guardian shall secure  
21 services to restore the ward to the best possible state of mental and  
22 physical well-being so that the ward can return to self-management at  
23 the earliest possible time. Without regard to custodial rights of the  
24 ward’s person, the guardian shall take reasonable care of the ward’s  
25 clothing, furniture, vehicles, and other personal effects and commence  
26 a protective proceeding if the ward’s other property needs protection.  
27 If a guardian commences a protective proceeding because the  
28 guardian believes that it is in the ward’s best interest to sell or  
29 otherwise dispose of the ward’s real property or interest in real  
30 property, the court may appoint the guardian as special conservator  
31 and authorize the special conservator to proceed under section  
32 5423(3). A guardian shall not otherwise sell the ward’s real property  
33 or interest in real property.

- 1 (c) The power to give the consent or approval that is necessary to enable  
2 the ward to receive medical or other professional care, counsel,  
3 treatment, or service. The power of a guardian to execute a do-not-  
4 resuscitate order under subdivision (d) does not affect or limit the  
5 power of a guardian to consent to a physician’s order to withhold  
6 resuscitative measures in a hospital.
- 7 (d) The power of a guardian to execute, reaffirm, and revoke a do-not-  
8 resuscitate order on behalf of a ward is subject to this subdivision. A  
9 guardian shall not execute a do-not-resuscitate order unless the  
10 guardian does all of the following:
- 11 (i) Not more than 14 days before executing the do-not-resuscitate  
12 order, the guardian visits the ward and, if meaningful  
13 communication is possible, consults with the ward about  
14 executing the do-not-resuscitate order.
- 15 (ii) The guardian consults directly with the ward’s attending  
16 physician as to the specific medical indications that warrant the  
17 do-not-resuscitate order.
- 18 (e) If a guardian executes a do-not-resuscitate order under subdivision  
19 (d), not less than annually after the do-not-resuscitate order is first  
20 executed, the guardian shall do all of the following:
- 21 (i) Visit the ward and, if meaningful communication is possible,  
22 consult with the ward about reaffirming the do-not-resuscitate  
23 order.
- 24 (ii) Consult directly with the ward’s attending physician as to  
25 specific medical indications that may warrant reaffirming the  
26 do-not-resuscitate order.
- 27 (f) If a conservator for the ward’s estate is not appointed, the power to do  
28 any of the following:
- 29 (i) Institute a proceeding to compel a person under a duty to  
30 support the ward or to pay money for the ward’s welfare to  
31 perform that duty.

- 1           (ii) Receive money and tangible property deliverable to the ward  
2           and apply the money and property for the ward’s support, care,  
3           and education. The guardian shall not use money from the  
4           ward’s estate for room and board that the guardian or the  
5           guardian’s spouse, parent, or child have furnished the ward  
6           unless a charge for the service is approved by court order made  
7           upon notice to at least 1 of the ward’s next of kin, if notice is  
8           possible. The guardian shall exercise care to conserve any  
9           excess for the ward’s needs.
- 10          (g) The guardian shall report the condition of the ward and the ward’s  
11          estate that is subject to the guardian’s possession or control, as  
12          required by the court, but not less often than annually. The guardian  
13          shall also serve the report required under this subdivision on the ward  
14          and interested persons as specified in the Michigan court rules. A  
15          report under this subdivision shall contain all of the following:
- 16               (i) The ward’s current mental, physical, and social condition.
- 17               (ii) Improvement or deterioration in the ward’s mental, physical,  
18               and social condition that occurred during the past year.
- 19               (iii) The ward’s present living arrangement and changes in his or her  
20               living arrangement that occurred during the past year.
- 21               (iv) Whether the guardian recommends a more suitable living  
22               arrangement for the ward.
- 23               (v) Medical treatment received by the ward.
- 24               (vi) Whether the guardian has executed, reaffirmed, or revoked a  
25               do-not-resuscitate order on behalf of the ward during the past  
26               year.
- 27               (vii) Services received by the ward.
- 28               (viii) A list of the guardian’s visits with, and activities on behalf of,  
29               the ward.
- 30               (ix) A recommendation as to the need for continued guardianship.

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(x) A statement signed by the standby guardian, if any have been appointed, that the standby guardian continues to be willing to serve in the event of the unavailability, death, incapacity, or resignation of the guardian.

(h) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward’s estate received by the guardian in excess of the amount the guardian expends for the ward’s current support, care, and education. The guardian shall account to the conservator for the amount expended.



## Nathan Piwowski

---

**From:** George Bearup <GBearup@greenleaftrust.com>  
**Sent:** Wednesday, March 28, 2018 10:52 AM  
**To:** Nathan Piwowski  
**Cc:** Scott Harvey (sharvey@parkerharvey.com); clulo@traverselaw.com;  
william.meengs@northernmilaw.com  
**Subject:** Probate Council legislation suggestion

Nathan:

I hope all is well.

I have a suggestion for a legislative change for the consideration of the legislative committee of the Probate and Estate Planning Section of the State Bar. This would clearly be a 'back-burner' project, and probably not of much interest to most estate planners, since it would benefit, primarily, wealthy clients who are willing to make large lifetime gifts.

Background:

**Big-Ticket Gifts:** With the new bloated estate, gift and GST exemptions, there is a lot of talk about exploiting the larger exemptions now, through lifetime gifts, before the law changes back (2026) or the Democrats regain control of the White House (maybe in 2021). So this proposal is all about spouses implementing the estate planning strategy of making big-ticket lifetime gifts to exploit the larger transfer tax exemptions (while they last) while hedging against giving away too much during lifetime.

**Lifetime QTIP Trusts:** One possible strategy, of a sorts, is for one spouse to fund a lifetime QTIP Trust for the other. Assets, however, would be taxed on the donee-beneficiary's death with a basis step-up in the QTIP assets at that time. Donor-settlor spouse, if surviving, could then become a lifetime beneficiary of the QTIP trust after the beneficiary spouse dies. In short, the QTIP Trust morphs into a Credit Shelter Trust after the beneficiary-spouse's death. This addresses the perpetual concern that the donor-spouse may someday in the future need access to the previously transferred assets for his/her own support. Key to this planning technique are the Regulations under IRC 2523 (lifetime QTIP transfers.) Those Regulations make it clear, in Example 11, that if the inter-vivos QTIP trust reverts to the settlor spouse, the assets in the former QTIP/now Credit Shelter trust will not be included in the settlor-spouse's taxable estate under either IRC 2036 or 2038. Reg. 25.2523(f)-1(f). In short, the Regulations say that the settlor-spouse will not be subject to estate taxation under either IRC 2036 or 2038. In short, the settlor-spouse can expressly draft the QTIP Trust to permit the settlor to hold a remainder interest in the QTIP Trust after the beneficiary-spouse's death.

**Lifetime SLAT Trusts:** Probably a better strategy is for the spouses to create non-reciprocal Spousal Lifetime Access Trusts (SLATs) for each other. The transfers to those Trusts would not qualify for the marital deduction, but the spouses' bloated gift and GST tax exemptions would be used to shelter the transfers from federal gift and GST taxation, and the transferred assets and all future appreciation in the SLAT's assets, would escape federal estate taxation on the death of either the beneficiary-spouse or the settlor-spouse. The SLATs work well from a transfer tax savings perspective, but again there is the concern of the settlor-spouse that if his/her beneficiary-spouse dies, the settlor's indirect access to the transferred assets and the income they generate (indirect through their beneficiary-spouse while living) will be lost. If the settlor spouse retains any interest in the SLAT he/she created, similar to the QTIP Trust example given above, the SLAT's assets will be subject to estate taxation on the settlor spouse's death- which is obviously a non-starter if the goal is to exploit the larger lifetime gift and GST exemptions while they exist.

**Relation Back Doctrine:** Some SLATs formally give the beneficiary-spouse a testamentary limited power of appointment over the SLAT assets, which could be exercised in favor of the settlor-spouse on the beneficiary-spouses death. But our

friends at the IRS have concocted a legal theory called the Relation Back Doctrine which could be asserted treat the beneficiary-spouse's exercise of the testamentary limited power of appointment over the SLAT as a transfer for the settlor-spouse who initially created that testamentary limited power of appointment, i.e. *'The power of appointment is conceived to be merely an authority to the power holder to an act for the creator of the power.'* Restatement (Second) of Property 4 (1986) Sections 11.1-24.4. Some court cases also acknowledge or create a risk to the settlor-spouse: *'the exercise of a special power of appointment by the original donee spouse constitutes a transfer from the donor of the power, not from the donee.'* *In re Estate of Wylie*, 342 So. 2d at 996-997.

Michigan Law: Currently Michigan's Trust Code contains a section that is intended to implement a lifetime QTIP Trust, that benefits the settlor-spouse on the death of the beneficiary-spouse, without tax or creditor risks, i.e. the risk that if the settlor benefits from an irrevocable trust that he/she created, it will be viewed as a self-settled trust that is subject to the settlor's creditor claims. That Michigan Trust Code Section, in part, follows:

"MCL 700.7506

(4) An individual who creates a trust shall not be considered a settlor with regard to the individual's retained beneficial interest in the trust that follows the termination of the individual spouse's prior beneficial interest in the trust if all of the following apply:

- (a) the individual creates or has created, the trust for the benefit of the individual's spouse.
- (b) The trust is treated as qualified terminable interest property under section 2523(f) of the Internal Revenue Code, 26 USC 2523.
- (c) The individual retains a beneficial interest in the trust income, trust principal, or both, which beneficial interest follows the termination of the individual's spouse's prior beneficial interest in the trust.

In sum, the Regulations prevent the lifetime QTIP Trust from being taxed in the settlor-spouse's estate if he/she survives the beneficiary spouse and continues to have limited access to the QTIP Trust assets. The Michigan Trust Code declares that the settlor-spouse will not be treated as the settlor of the QTIP/Credit Shelter Trust for creditor protection purposes."

But the Michigan Trust Code which legally shifts the settlor status is confined to lifetime QTIP Trusts and does not extend to SLATs. So if a beneficiary-spouse of a SLAT exercises a testamentary limited power of appointment in favor of the settlor-spouse, there is a danger that the IRS will assert the Relation Back Doctrine, and the existing Michigan Trust Code provision cannot be used to prevent estate inclusion on the death of the settlor-spouse.

Four states have attempted to address this situation by legislation. They have adopted statutes that provide that the initial settlor of an inter-vivos irrevocable trust created for the settlor's spouse will not be deemed to have been contributed by the settlor if the settlor is the beneficiary of the trust after the death of the settlor's spouse, even if there is no QTIP election. It would be nice if Michigan expanded the scope of its current MCL 700.7506 to include SLATs. The states that have already expanded their *settlor-shifting* statutes beyond QTIP Trusts follow.

Even if the SLAT is created under Michigan's Qualified Dispositions In Trust Act, there exists the concern that the SLAT assets will be included in the settlor-spouse's estate if they are appointed back to him/her, or if there is the claim of some implied agreement that the assets would revert back to the settlor, or there was a pattern of distributions from the SLAT to the settlor-spouse after the power of appointment was exercised. See PLR 2009440002, where the IRS hedged in commenting upon whether completed gifts to a Alaska asset protection trust would be taxed in the settlor's estate if the settlor was reappointed an interest in the completed gift assets.

Ariz Stat. 14-19595€

Ky Rev. Stat. Ann 386B.5-020(8)(a)(1)-(3)

N.C. Gen Stat 36C-5-505(c)

Tenn. Code Ann 35.15-505(f)

Tex. Prop. Code 112.035(g)

I appreciate your willingness to read this far. The point I am trying to make is that for many moderately wealthy married couples, they may want to exploit the larger tax exemptions while they are available. But they will also be concerned about giving away too much wealth during their lifetimes. SLATs make a lot of sense in that they use the larger exemptions while they exist, and the spouses still have direct, and indirect, access to all of their wealth after the SLATs have been funded. But if they are moderately wealthy, they will still want some assurance that the settlor spouse will have some type of access to the assets that they transferred to the SLAT that they created for their spouse. Expanding the existing Michigan Trust Code section to cover SLATs as well as lifetime QTIP Trusts may not completely address the IRS's inclination to assert the Relation Back Doctrine, it would none-the-less be helpful to have a statute that announces that for state law (and property) purposes, the settlor-spouse will not be treated as the settlor of the SLAT after their spouse's death.

Let me know if you have any questions.

George

**George Bearup**  
Senior Trust Advisor

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## **700.7103 Definitions.**

Sec. 7103.

As used in this article:

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

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

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

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

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

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

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

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

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

(e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.

(f) "Power of withdrawal" means a presently exercisable general power of appointment other than a power that is either of the following:

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

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

(g) "Qualified trust beneficiary" means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:

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

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

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

(h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) Except as provided in section 7506, "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

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

(k) "Support provision" means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to

distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

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

(i) The person has a present or future beneficial interest in a trust, vested or contingent.

(ii) The person holds a power of appointment over trust property in a capacity other than that of trustee.

(m) "Trust instrument" means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) "Trust protector" means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment.

### **700.7506 Creditor's claim against settlor; "settlor" explained.**

Sec. 7506.

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(b) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that at the settlor's death was revocable by the settlor, either alone or in conjunction with another person, is subject to expenses, claims, and allowances as provided in section 7605.

(c) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach no more than the lesser of the following:

(i) The claim of the creditor or assignee.

(ii) The maximum amount that can be distributed to or for the settlor's benefit exclusive of sums to pay the settlor's taxes during the settlor's lifetime.

(2) If a trust has more than 1 settlor, the amount a creditor or assignee of a particular settlor may reach under subsection (1)(c) shall not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) A trust beneficiary is not considered a settlor merely because of a lapse, waiver, or release of a power of withdrawal over the trust property.

(4) An individual who creates a trust shall not be considered a settlor with regard to the individual's retained beneficial interest in the trust that follows the termination of the individual's spouse's prior beneficial interest in the trust if all of the following apply:

~~(a) The individual creates, or has created, the trust for the benefit of the individual's spouse the only distributees or permissible distributees of trust income or principal are either (i) the individual's spouse, or (ii) the individual's spouse and the individual's issue or the issue of the individual's spouse.~~  
(a) During the lifetime of the individual's spouse the only distributees or permissible distributees of trust income or principal are either (i) the individual's spouse, or (ii) the individual's spouse and the individual's issue or the issue of the individual's spouse.

~~(b) The trust is treated as qualified terminable interest property under section 2523(f) of the internal revenue code, 26 USC 2523.~~

~~(c) The individual retains a beneficial interest in the trust income, trust principal, or both, which beneficial interest follows the termination of the individual's spouse's prior beneficial interest in the trust.~~

(5) An individual shall not be considered a settlor of a trust for the benefit of the individual:

(a) if the settlor is the individual's spouse, regardless of whether or when the individual was the settlor of a trust for the benefit of that spouse; or

(b) to the extent that the property of the trust was subject to a general power of appointment in another individual.

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## **MEMORANDUM**

**To:** Probate Council

**From:** Guardianship, Conservatorship &  
End of Life Committee

**Date:** 1/14/2019

**Re:** Proposed Modifications to PAD Statutes

*During the Fall 2018 two issues affecting the PAD statutes were presented to the Committee.*

### **ISSUE # 1 – MULTIPLE CO-ADVOCATES**

*The first issue was raised by an organization Making Choices Michigan (MCM), an organization operating in the Western part of Michigan. They assist individuals in identifying appropriate people to serve as patient advocate and making informed decisions about treatment.*

*MCM questioned the validity of a PAD drafted by an attorney and nominating Co-Advocates to make medical decisions. The drafter is a former member of PEPC and was active in helping draft the standardized PAD available in hospitals and other places).*

**The Problem:** *MCM takes the position that the current PAD statute authorizes ONLY successor appointments, therefore limiting a valid PAD to naming only 1 person to act at any one time. MCM claims physicians and treating personnel prefer not to field calls and inquiries from multiple Co-Advocates. Also naming Co-Advocates can lead to confusion and disagreement among the Co-Advocates, thus making the treating professional's job more difficult.*

**The Discussion:** *The committee does not believe the PAD Statute is so limiting – but understands that Co-Advocates could lead to some confusion and potential problems.*

**The Solution:** Josh Ard undertook the challenge of addressing these concerns. See the attachment "Suggestions for Improving PAD Law Dated 9/22/2018.

*This proposal is submitted to CSP for a recommendation to Council for a up or down vote – and possibly be a part of the EPIC Omnibus*

**ISSUE #2 – DEFINATION OF WHO DETERMINES THE ADVOCATES ABILITY TO ACT.**

*This issue was raised by a general discussion of the application of PAD statutes by medical treatment personnel. The perceived issue is the possibility that medical personnel may be "liberally" construing MCL 700.5508(1), resulting in the statute not being strictly followed and an Advocate being allowed to make medical decisions with less than the required **2 written** certifications. It was also brought to the committee's attention that in some areas of the state a patient's primary treater may be a para-professional – rather than a physician.*

**THE PROBLEM:** *How best to insure that the medical profession is complying with the statute. And can the statute better address the situation where there is not an abundance of "physicians" and/or licensed psychologists.*

**THE DISCUSSION:** *We determined that there is no good way under EPIC to make sure that physicians are properly documenting 2 written certifications. However, we may be able to address the issue of limiting the certification to physicians and licensed psychologist.*

**THE SOLUTION:** *Paul Vaidya explored the definition of "physician" as used in EPIC and the mental health statutes. His findings and recommendations are attached.*

*Howard Collins has offered to Liaison with the Elder Law Section on these two matters.*

**Suggestions for Improving PAD law**  
**February Revision**  
Josh Ard  
February 6, 2019

There are several ways in which Michigan's law governing advance medical directives could be improved. This comment addresses three concerns:

- There is no easy way under current law to enable someone other than the primary patient advocate to act if the primary patient advocate cannot participate in decision making in a timely manner.
- The law is totally silent on how a patient could require a patient advocate to consult with others, whether family members or not, and how the patient could require some sort of consensus if that is what she desires. These are topics that lawyers are particularly skilled in counseling clients about. Most of us know little about medical treatment but know quite a bit about how to facilitate successful decision making.
- Some persons want to appoint a group rather than one individual as a patient advocate. This is probably inadvisable under current laws but becomes more attractive if the two concerns above are addressed satisfactorily.

In this comment, I will first explain the problem in more depth and then offer solutions. In this discussion it is important to recognize that the end users of patient advocate designations are typically persons unskilled in both legal and medical matters and that no contemporary consultation with a lawyer is likely when the document would be used. In particular, it is important to recognize that the law creates default rules and that some defaults are more reasonable than others. Also, it is important to recognize that it is unwise to place any burden on medical facilities to ensure that the patient advocate acts "correctly." Their concern should be medical treatment.

**What happens if the primary patient advocate cannot participate?**

The statute says:

A patient may designate in the patient advocate designation a successor individual as a patient advocate who may exercise the powers described in subsection (1) for the patient if the first individual named as patient advocate does not accept, is incapacitated, resigns, or is removed.MCL 700.5507(2).

Simply not being to get to the hospital quickly enough does not seem to meet any of these four criteria. I realize that in practice, medical facilities might not be so strict and will simply let another person act, but that is risky for both the facility and the person who makes the decision because there is no legal basis for such action.

The statute does give a way to solve this problem, one I use in my documents, but it is a ridiculous kludge. Here's the procedure:

- The acceptance forms for patient advocates say essentially "I delegate my powers, in order, to the patient advocates that follow me in the pecking order" and "I agree to step aside when a higher ranking patient advocate is ready and able to serve."

- The patient advocate designation itself ratifies these delegations.

The statutory basis of this is”

A patient advocate under this section shall not delegate his or her powers to another individual without prior authorization by the patient. MCL 700.5509(1)(g).

No one should expect ordinary laypersons to figure this out.

### What should the law say?

Obviously, I think that the procedure I've described above is what most people want and from discussions with clients I think I'm right, but there ought to be ways of modifying that if the patient prefers. For example, a person with only one child she trusts might name a neighbor as a successor patient advocate but only wants that preferred child to make a major decision. The type of problem here has been described quite thoroughly by Cass Sunstein in his work on nudges.

- There should be a default if the person makes no decision to the contrary.
- The person should be allowed to vary the rule.

In setting defaults, various criteria are possible. Paternalistically, the basis should be the decision that is “best,” either for most people or for society in general. For example, the default in America is that one is not an organ donor unless she affirmatively agrees to be one. In Scandinavia this is reversed—you are an organ donor unless you opt out. Sunstein wanted retirement contributions to be mandatory for employees unless they affirmatively opt out. Persons have choices either way, but in many areas of life we tend to take the easy course and go along with whatever happens if we do not make a choice. One problem with paternalistic decisions choosing the decision maker. Who is to decide what's best?

The other choice is more or less based on popular. The default was changed from *per stirpes* to *per capita by representation* because legal scholars claimed that was what the majority of people wanted after the issue was clearly explained to them. I can't say whether a proper survey was ever done but the result is not unreasonable.

I claim that most people want their secondary patient advocate to act if the primary one is not available but want that secondary patient advocate to step aside when the first patient advocate is available and willing to serve. That is an empirical claim. Nevertheless, the best solution is to have something as the default and make it easy to change.

If the patient insists on a group rather than an individual, this becomes feasible if the patient explains how decision making is to progress but relieves the medical provider of any responsibility or liability to see that the plan was followed and allows the provider to rely on the representations of any person in the group.

### Proposed language.

To replace MCL 5506(1)

Sec. 5506. (1) An individual 18 years of age or older who is of sound mind at the time a patient advocate designation is made may designate in writing another individual or group of individuals who is-are 18 years of age or older to exercise powers concerning

care, custody, and medical or mental health treatment decisions for the individual making the patient advocate designation. An individual making a patient advocate designation under this subsection may include in the patient advocate designation the authority for the designated individual to make an anatomical gift of all or part of the individual's body in accordance with this act and part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10123. The authority regarding an anatomical gift under this subsection may include the authority to resolve a conflict between the terms of the advance health care directive and the administration of means necessary to ensure the medical suitability of the anatomical gift. A person providing care, custody, or medical or mental health treatment to the patient may rely on the representations of any member of the group of individual designated without further inquiry.

To replace MCL 700.5507.

**A patient may designate in the patient advocate designation a successor individual or a series of individuals in a determined order who may exercise the powers described in subsection (1) for the patient if the first individual named as patient advocate is not able to make decisions in a timely manner. The power devolves in the order listed in the patient advocate designation. An acting successor patient advocate must relinquish powers to higher ranking individuals in order if they become available and willing to serve. The patient may modify this devolution of power in the patient advocate designation, such as authorizing the successor to act only if the individual does not accept, is incapacitated, resigns, or is removed.**

#### **Instructions about how decisions should be made**

There is nothing I know of that forbids a patient from requiring that the patient advocate talk with somebody before making a decision or even requiring some sort of family consensus. Likewise, there is nothing that says what responsibility, if any, this places on the treating facility or what remedy there may be if the patient advocate ignores that requirement. Moreover, if instructions about decision making are not addressed in the statute (and even better in standard forms handed out by medical personnel) there is no reason to think that ordinary patients would be aware that they can say anything about that.

I propose to add a new section to 5507 allowing instructions of this sort, but holding medical facilities and personnel harmless from ensuring compliance or even having to query it. The proper place for that is in 5511.

Also, if instructions about decision making are addressed in 5507, then family members have a remedy if the instructions are not followed under 5511(5),

Here goes

**700.5507 Patient advocate designation; statement; acceptance.  
Sec. 5507.**

(1) A patient advocate designation may include a statement of the patient's desires on care, custody, and medical treatment or mental health treatment, or both. A patient advocate designation may also include a statement of the patient's desires on the making of an anatomical gift of all or part of the patient's body under part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10123. The statement regarding an anatomical gift under this subsection may include a statement of the patient's desires regarding the resolution of a conflict between the terms of the advance health care directive and the administration of means necessary to ensure the medical suitability of the anatomical gift. The patient may authorize the patient advocate to exercise 1 or more powers concerning the patient's care, custody, medical treatment, mental health treatment, the making of an anatomical gift, or the resolution of a conflict between the terms of the advance health care directive and the administration of means necessary to ensure the medical suitability of the anatomical gift that the patient could have exercised on his or her own behalf.

(2) A patient advocate designation may also include instructions about how the patient advocate is to make decisions. This includes decisions about what individuals or organizations should be consulted and whether a vote or other sort of consensus should be required for particular decisions.

~~(2) A patient may designate in the patient advocate designation a successor individual as a patient advocate who may exercise the powers described in subsection (1) for the patient if the first individual named as patient advocate does not accept, is incapacitated, resigns, or is removed.~~

(3) A patient may designate in the patient advocate designation a successor individual or a series of individuals in a determined order who may exercise the powers described in subsection (1) for the patient if the first individual named as patient advocate is not able to make decisions in a timely manner. The power devolves in the order listed in the patient advocate designation. An acting successor patient advocate must relinquish powers to higher ranking individuals in order if they become available and willing to serve. The patient may modify this devolution of power in the patient advocate designation, such as authorizing the successor to act only if the individual does not accept, is incapacitated, resigns, or is removed.

~~(3)~~(4) Before a patient advocate designation is implemented, a copy of the patient advocate designation must be given to the proposed patient advocate and must be given to a successor patient advocate before the successor acts as patient advocate. Before acting as a patient advocate, the proposed patient advocate must sign an acceptance of the patient advocate designation.

~~(4)~~ (5) The acceptance of a designation as a patient advocate must include substantially all of the following statements:

1. This patient advocate designation is not effective unless the patient is unable to participate in decisions regarding the patient's medical or mental health, as applicable. If this patient advocate designation includes the authority to make an anatomical gift as described in section 5506, the authority remains exercisable after the patient's death.
2. A patient advocate shall not exercise powers concerning the patient's care, custody, and medical or mental health treatment that the patient, if the patient were able to participate in the decision, could not have exercised on his or her own behalf.
3. This patient advocate designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.
4. A patient advocate may make a decision to withhold or withdraw treatment that would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.
5. A patient advocate shall not receive compensation for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.
6. A patient advocate shall act in accordance with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical or mental health treatment decisions are presumed to be in the patient's best interests.
7. A patient may revoke his or her patient advocate designation at any time and in any manner sufficient to communicate an intent to revoke.
8. A patient may waive his or her right to revoke the patient advocate designation as to the power to make mental health treatment decisions, and if such a waiver is made, his or her ability to revoke as to certain treatment will be delayed for 30 days after the patient communicates his or her intent to revoke.
9. A patient advocate may revoke his or her acceptance of the patient advocate designation at any time and in any manner sufficient to communicate an intent to revoke.
10. A patient admitted to a health facility or agency has the rights enumerated in section 20201 of the public health code, 1978 PA 368, MCL 333.20201.

**700.5511 Binding effect; liability of provider; exception; dispute.**

Sec. 5511.

- (1) Irrespective of a previously expressed or evidenced desire, a current desire by a patient to have provided, and not withheld or withdrawn, a specific life-extending care, custody, or medical treatment is binding on the patient advocate, if known by the patient advocate, regardless of the then ability or inability of the patient to participate in care, custody, or medical treatment decisions or the patient's competency.
- (2) A person providing, performing, withholding, or withdrawing care, custody, or medical or mental health treatment as a result of the decision of an individual who is

reasonably believed to be a patient advocate and who is reasonably believed to be acting within the authority granted by the designation is liable in the same manner and to the same extent as if the patient had made the decision on his or her own behalf.  
(3) A person providing care, custody, or medical or mental health treatment to a patient is bound by sound medical or, if applicable, mental health treatment practice and by a patient advocate's instructions if the patient advocate complies with sections 5506 to 5515, but is not bound by the patient advocate's instructions if the patient advocate does not comply with these sections.

~~(3)~~(4) A person providing care, custody, or medical or mental health treatment to a patient is not required to determine if a patient advocate complies with any instructions authorized by 5507(2) and has no liability if the patient advocate fails to comply.

~~(4)~~ (5) A mental health professional who provides mental health treatment to a patient shall comply with the desires of the patient as expressed in the designation. If 1 or more of the following apply to a desire of the patient as expressed in the designation, the mental health professional is not bound to follow that desire, but shall follow the patient's other desires as expressed in the designation:

(a) In the opinion of the mental health professional, compliance is not consistent with generally accepted community practice standards of treatment.

(b) The treatment requested is not reasonably available.

(c) Compliance is not consistent with applicable law.

(d) Compliance is not consistent with court-ordered treatment.

(e) In the opinion of the mental health professional, there is a psychiatric emergency endangering the life of the patient or another individual and compliance is not appropriate under the circumstances.

~~(5)~~ (6) If a dispute arises as to whether a patient advocate is acting consistent with the patient's best interests or is not complying with sections 5506 to 5515, a petition may be filed with the court in the county in which the patient resides or is located requesting the court's determination as to the continuation of the designation or the removal of the patient advocate.

Finally, there may be a need to modify 5509(1)(g)

A patient advocate under this section shall not delegate his or her powers to another individual without prior authorization by the patient.

The modification could reference that this does not apply to the new scheme under 5507(2). That may be unnecessary because that isn't a delegation created by the patient advocate.



**Suggested Changes to MCL 700.5508 of EPIC:**

**700.5508 Determination of advocate's authority to act.**

Sec. 5508.

(1) Except as provided under subsection ~~(3)~~ (4), the authority under a patient advocate designation is exercisable by a patient advocate only when the patient is unable to participate in medical treatment or, as applicable, mental health treatment decisions. The patient's attending ~~physician~~ medical professional and one other ~~another physician or licensed psychologist~~ medical professional shall determine upon examination of the patient whether the patient is unable to participate in medical treatment decisions, shall put the determination in writing, shall make the determination part of the patient's medical record, and shall review the determination not less than annually. If the patient's religious beliefs prohibit an examination and this is stated in the designation, the patient must indicate in the designation how the determination under this subsection shall be made. The determination of the patient's ability to make mental health treatment decisions shall be made under section 5515.

(2) As used in subsection (1), a "medical professional" means an individual who is one of the following:

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

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

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

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

~~(23)~~ If a dispute arises as to whether the patient is unable to participate in medical or mental health treatment decisions, a petition may be filed with the court in the county in which the patient resides or is located requesting the court's determination as to whether the patient is unable to participate in decisions regarding medical treatment or mental health treatment, as

applicable. If a petition is filed under this subsection, the court shall appoint a guardian ad litem to represent the patient for the purposes of this subsection. The court shall conduct a hearing on a petition under this subsection as soon as possible and not later than 7 days after the court receives the petition. As soon as possible and not later than 7 days after the hearing, the court shall determine whether or not the patient is able to participate in decisions regarding medical treatment or mental health treatment, as applicable. If the court determines that the patient is unable to participate in the decisions, the patient advocate's authority, rights, and responsibilities are effective. If the court determines that the patient is able to participate in the decisions, the patient advocate's authority, rights, and responsibilities are not effective.

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

**What to do about the new Safe Families for Children Act, MCL 722.1551 et seq.**

Josh Ard  
January 2019

Contrary to representations made, the act was not amended before passage to clarify that it does not create more burdens on families who wish to use the existing temporary powers of attorneys authorized under EPIC. Thus, we need to provide suggestions as to how this should be done.

The problem is obvious is looking at the text of the act. In some places, such as in Section 9, the drafters were careful to use language such as “a power of attorney under this act”. In Sections 11 and 13, this clarifying phrase is missing and the act only refers to “a power of attorney”. Sections 11 and 13 place significant burdens both on state government and on families who wish to use powers of attorneys for relatively mundane tasks such as ensuring grandparents’ power to take actions while the parents are out of town for short trips.

There are two logical methods to address the problem:

- ❖ Add a section saying something like “this act does not apply to powers of attorneys created under the authority of MCL 700.5103.
- ❖ Add clarifying language in the new statute where appropriate.

I suggest that the second approach is better for two reasons:

- ❖ There are some cases where protections ought to apply to EPIC powers of attorney, such in Section 15. I don’t know if anybody has ever said that executing a power of attorney under EPIC is in itself a sign of neglect, but it makes sense to make it plain that it does not.
- ❖ Even if a new section is added, some clever lawyers may make something of the fact that “under this act” is found in some section but not others.

Therefore, I submit that we ought to add “under this act” where necessary. Please consider the following, where the added language is in red and underlined.

By the way, I have no idea why some things are in blue and double underlined.

## SAFE FAMILIES FOR CHILDREN ACT

Act 434 of 2018

AN ACT to establish the safe families for children program; to prescribe the powers and duties of certain state departments and public and private agencies; to allow for temporary delegation of a parent's or guardian's powers regarding care, custody, or property of a minor child; and to prescribe procedures for providing host families for the temporary care of children.

722.1551.new Short title.

Sec. 1.

This act shall be known and may be cited as the "safe families for children act".

722.1553.new Definitions.

Sec. 3.

As used in this act:

(a) "Automatic notification system" means a system that stores and retains fingerprints and that provides for an automatic notification to a participant when a fingerprint is submitted into the system that matches an individual whose fingerprints are retained in the system or when the criminal history of an individual whose fingerprints are retained in the system is updated.

(b) "Child placing agency" means that term as defined in section 1 of 1973 PA 116, MCL 722.111.

(c) "Department" means the department of health and human services.

(d) "Family service agency" means an agency that assists a tax-exempt charitable organization recruiting persons and families under section 7 with obtaining and reviewing criminal history records checks required under section 9 and conducting home safety assessments and training as required under sections 11 and 13. A family service agency must also be licensed as a child placing agency.

(e) "FBI automatic notification system" means the automatic notification system that is maintained by the Federal Bureau of Investigation.

(f) "Minor child" means an individual less than 18 years of age.

722.1555.new Temporary delegation of parental power; limitations; revocation or withdrawal.  
Sec. 5.

(1) By a properly executed power of attorney, a parent or guardian of a minor child may temporarily delegate to another person his or her powers regarding care, custody, or property of the minor child under this act. This temporary delegation of power may be for up to 180 days, except that if a parent or guardian is serving in the United States Armed Forces and is deployed to a foreign nation, a power of attorney may be effective until the thirty-first day after the end of the deployment. A person to whom the parent or guardian delegates these powers is required to have undergone the criminal history records check, home safety assessment and inspection, and training required under this act. A parent or guardian cannot delegate, under this act, his or her power to consent to marriage or adoption of the minor child, consent to an abortion or inducement of an abortion to be performed on or for the minor child, or to terminate parental rights to the minor child.

(2) The parent or guardian executing a power of attorney may revoke or withdraw the power of attorney at any time. [I see no reason for this not to apply to EPIC powers of attorney]

722.1557.new Recruitment of persons or families by charitable organizations to serve as resource families.  
Sec. 7.

A tax-exempt charitable organization, including, but not limited to, a church or faith-based organization, may recruit persons or families to whom a temporary power of attorney may be executed under section 5. A tax-exempt charitable organization recruiting persons and families under this section must use the services of a family service agency to assist the tax-exempt charitable organization in obtaining and reviewing criminal history records checks required under section 9 and conducting home safety assessments and training as required under sections 11 and 13.

722.1559.new Recruitment of persons or families by charitable organizations to serve as resource families.  
Sec. 9.

(1) For each person over 18 years of age residing in a home where a minor child may be temporarily hosted according to a power of attorney under this act, a criminal history records check must be conducted as follows:

(a) A family service agency must request the department of state police to do both of the following:

(i) Conduct a criminal history records check on the person.

(ii) Conduct a criminal history records check through the Federal Bureau of Investigation on the person.

(b) Each person must submit his or her fingerprints to the department of state police for the criminal history records check required under this act. Both of the following apply concerning fingerprints submitted to the department of state police under this subdivision:

(i) The department of state police shall store and retain all fingerprints submitted under this section in an automated fingerprint identification system database that searches against latent fingerprints and provides for an automatic notification when a subsequent fingerprint is submitted into the system that matches a set of fingerprints previously submitted under this section or when the criminal history of an individual whose fingerprints are retained in the system is updated. Upon receiving a notification under this subparagraph, the department of state police shall immediately notify the family service agency that requested the criminal history records check under this section. Information in the database maintained under this section is confidential, is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be disclosed to any person except for purposes of this act or for law enforcement purposes.

(ii) The department of state police shall forward all fingerprints submitted to it under this section to the Federal Bureau of Investigation to be retained in the FBI automatic notification system that provides for automatic notification if subsequent criminal history record information matches fingerprints previously submitted to the Federal Bureau of Investigation under this section. The fingerprints retained under this section may be searched by using future submissions to the FBI automatic notification system, including, but not limited to, latent fingerprint searches. This subparagraph does not apply until the department of state police is a participant in the FBI automatic notification system.

(c) A family service agency requesting a criminal history records check under this section shall notify the department of state police within 5 days after the individual for which the criminal history records check was requested is no longer residing in a home where a minor child may be temporarily hosted or the individual's home is no longer hosting or available to host a minor child under this act. After receiving this notice from a family service agency, the department of state police is no longer required to provide any notice to the family service agency under subdivision (b)(i) for that individual.

(2) When a home is hosting or is available to host a minor child according to a power of attorney, each person residing in that home for whom a criminal history records check has been conducted under subsection (1) must report to a family service agency within 3 business days after he or she has been arraigned for 1 or more of the crimes listed in section 5r of 1973

PA 116, MCL 722.115r, or any disqualifying offense under the national child protection act of 1993, Public Law 103-209.

(3) If a person residing in a home in which a minor child is or is proposed to be hosted according to a power of attorney under this act is not of good moral character as that term is defined in and determined under 1974 PA 381, MCL 338.41 to 338.47, or has been arraigned for 1 or more disqualifying offenses under the national child protection act of 1993, Public Law 103-209, a minor child shall not be hosted in that home.

(4) A family service agency may request the criminal history records checks under this section as allowed under state and federal law, including, but not limited to, being a qualified entity under the national child protection act of 1993, Public Law 103-209.

722.1561.new Home safety assessment.  
Sec. 11.

A family service agency shall conduct a home safety assessment and inspection as follows:

(a) A family service agency shall conduct a home safety assessment for each home where a minor child may be temporarily hosted according to a power of attorney under this act. The home safety assessment must include an inspection of the physical dwelling, assessment of the person's or family's financial ability to provide care for the minor child, and assessment of the person's or family's ability and capacity to provide care for the minor child. As part of the home safety assessment, the family service agency shall obtain 3 current references from persons not related to the person or family.

(b) A family service agency shall conduct a home safety assessment every 2 years while a home is hosting or is available to host a minor child according to a power of attorney under this act.

(c) A family service agency shall conduct periodic inspections of a home that is hosting a minor child under this act to monitor the well-being of the minor child and any change impacting the most recent home safety assessment. The family service agency must conduct this inspection within 48 hours after a person or family begins hosting a minor child in a home, 1 day per week for the first month during which a minor child is hosted in the home, and 1 day per month after that for the duration of the period of time that the minor child is being hosted in the home.

(d) A family service agency's home safety assessment and inspection under subdivisions (a), (b), and (c) must result in a determination that a home is safe for a minor child before the home may host or continue to host a minor child under this section.

722.1563.new Training for preparing, developing, training, and supporting resource families.  
Sec. 13.

(1) Before a minor child is hosted in a home according to a power of attorney under this act, a family service agency shall provide training for the persons in that home. The training must be based on a national model for preparing, developing, training, and supporting resource families for the temporary care of minor children and must include training on identifying child maltreatment, understanding grief and loss, behavior management strategies, environmental safety and universal precautions, and unique child-specific needs-based training.

(2) A person to whom power related to a minor child is delegated according to a power of attorney under this act shall not be compensated for serving as the temporary attorney-in-fact. This subsection does not prohibit an individual, private organization, or governmental entity from providing funds to a family service agency for providing services under this act.

722.1565.new Execution of power attorney does not constitute abuse or neglect; services under this act by resource family not subject to licensing or regulation by the department.  
Sec. 15.

(1) A parent or guardian executing a power of attorney does not, by itself, constitute evidence of abandonment, child abuse, child neglect, delinquency, or other maltreatment of a minor child unless the parent or guardian fails to take custody of the minor child when a power of attorney expires. This act does not prevent or delay an investigation of child abuse, child neglect, abandonment, delinquency, or other mistreatment of a minor child.

(2) Executing a power of attorney does not subject a parent, guardian, or person in a home in which a minor child is hosted under this act to any law, rule, or regulation concerning licensing or regulation of foster care or a child care organization. Providing a service under this act does not subject a family service agency to regulation by the department.

722.1567.new Records; availability; liability; rules prohibited; referral.  
Sec. 17.

(1) A family service agency shall maintain records for each criminal history records check, home safety assessment, and training it conducts under this act for a period of not less than 7 years after the minor child attains 18 years of age. The family service agency shall make the records available to any local, state, or federal authority requesting the records as part of an investigation involving the minor child, parent or guardian, or person in a home in which a minor child is or was hosted according to a power of attorney.

(2) The department is not liable for any action arising out of this act.

(3) The department shall not promulgate rules under this act.



(4) The department, a local office of the department, or a law enforcement agency or officer may refer cases or families to a tax-exempt charitable organization that is recruiting persons and families under this act. The services provided under this act are community-based services that may be recommended commensurate with the risk to the child under section 8d(1)(b) and (c) of the child protection law, 1975 PA 238, MCL 722.628d.

# Council Materials

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

February 15, 2019

**Agenda**

- I. Call to Order
- II. Introduction of Guests
- III. Excused Absences
- IV. Lobbyist Report—Public Affairs Associates
- V. Monthly Reports:
  - A. Minutes of Prior Council Meeting -- Attachment 1
  - B. Chair's Report – Attachment 2
    - 1. Updated committee list.
    - 2. Invitation to attend ADR Teleseminars on mediation and Elder Law and Disability Rights Section 17<sup>th</sup> Annual Spring Conference
    - 3. Request for sponsorship of Young Lawyer's Summit.
  - C. Treasurer's Report – Attachment 3
  - D. Committee on Special Projects
- VI. Other Committees Presenting Oral Reports
  - A. Court Rules, Forms, & Proceedings Committee—Melisa M.W. Mysliwicz – Attachment 4
  - B. Electronic Communications Committee – Michael Lichterman
  - C. Guardianships, Conservatorships, & End of Life Committee – Kathleen Goetsch
  - D. Membership Committee – Nicholas A. Reister or Robert B. Labe
  - E. State Bar & Section Journals—Richard C. Mills
  - F. Amicus Curiae Committee—Andrew W. Mayoras – Attachment 5
  - G. Tax Committee – Raj Malviya – Attachment 6
- VII. Other Committees Presenting Written Reports Only
  - A. Tax Liaison—Neal Nusholtz – Attachment 7
- VIII. Other Business
- IX. Adjournment

Next Probate Council Meeting: Friday, March 8, 2019

1

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

**January 25, 2018  
Lansing, Michigan**

**Minutes**

I. Call to Order

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

II. Introduction of Guests

- A. Meeting attendees introduced themselves.
- B. The following officers and members of the Council were present: Marguerite Munson Lentz, Chair; Christopher A. Ballard, Chair Elect; David L.J.M. Skidmore, Secretary (via telephone); Mark E. Kellogg, Treasurer; James F. Anderton; Christopher J. Caldwell (via telephone); Kathleen M. Goetsch; Nazneen S. Hasan (via telephone); Angela M. Hentkowski; Robert B. Labe; Michael G. Lichterman (via telephone); Katie Lynwood; Richard C. Mills; Lorraine F. New (via telephone); Kurt A. Olson; and Christine M. Savage. A total of 16 Council officers and members were present, constituting a quorum.
- C. The following liaisons to the Council were present: Susan L. Chalgian (SCAO); John R. Dresser (Business Law Section); Jeanne Murphy (ICLE); and James P. Spica (Uniform Law Commission).
- D. Others present: Ryan Bourjaily; Sandra D. Glazier; Paul Vaidya; Joe Weiler; Warren H. Krueger; Mark J. DeLuca and Josh Ard.

III. Excused Absences

The following officers and members of the Council were absent: David P. Lucas, Vice Chair Hon. Michael L. Jaconette; Raj A. Malviya; Andrew W. Mayoras; Melisa M.W. Mysliwicz Neal Nusholtz; and Nathan R. Piwowarski.

IV. Lobbyist Report – Public Affairs Associates

Jim Ryan of Public Affairs Associates discussed the reintroduction of bills of interest to the Probate Section in the current legislative session. Senator Lucido will sponsor the EPIC omnibus bill and may sponsor the ART bill.

V. Monthly Reports

- A. Minutes of Prior Council Meeting (David L.J.M. Skidmore):

It was moved and seconded to approve the Minutes of the December 15, 2018 meeting of the Council, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

B. Treasurer's Report (Mark E. Kellogg):

The Treasurer gave a report on the Probate Section's budget for the current fiscal year.

C. Chair's Report (Marguerite Munson Lentz):

The Chair reported on invitations from other SBM sections to the Probate Section to participate in certain initiatives, accomplishments in the past legislative session, and proposed legislation in the current session.

It was moved and seconded to extend the agreement between the Probate Section and ICLE regarding payment for the EPIC/MTC commentary authored by John Martin and Mark Harder, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

D. Committee on Special Projects (Katie Lynwood):

Katie Lynwood reported on the discussion at the Committee on Special Projects meeting. The committee desires to include an additional statutory amendment in the EPIC Omnibus legislation when it is reintroduced in the current legislative session. The committee's motion is:

The Probate and Estate Planning Section supports amending MCL 554.531(3) to increase the limit from \$10,000 to \$50,000 for a transfer by a third party (other than a personal representative, trustee, or conservator) to a custodian under the Uniform Transfers to Minors Act, 1998 PA 433, MCL 554.521 et seq.

The Chair stated that since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded a vote of 16 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 7 not voting.

The committee is considering revisions to the statutes governing patient advocate designations and will make a further report on this matter in the future. The committee is considering whether to propose adoption of the Uniform Premarital and Marital Agreements Act and will make a further report on this matter in the future.

VI. Other Committees Presenting Oral Reports

A. Budget Committee

David Skidmore reported that the committee has prepared a proposed budget for fiscal year 2018-2019. It was moved and seconded to approve the FY 2018-2019 budget. On voice vote, the Chair declared the motion approved.

#### B. Court Rules, Forms & Proceedings Committee

Susan Chalgian reported on SCAO's response to the public policy position previously taken by the Probate Section regarding certain proposed amendments to the Michigan Court Rules. SCAO has made changes to its proposed amendments to the Court Rules in response to the Probate Section's public policy position. However, SCAO is still proposing to amend MCR 5.307(A) to create a new obligation to file the Inventory with the Court, contrary to MCL 700.3706(2). The committee's motion is:

The Probate and Estate Planning Section opposes amending Michigan Court Rule 5.307(A) to require that the inventory be filed with the probate court, because it is contrary to MCL 700.3706(2).

The Chair stated that since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded a vote of 16 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 7 not voting.

#### C. Guardianships, Conservatorships, & End of Life Committee

Kathleen Goetsch reported that the committee is considering revisions to newly enacted legislation regarding appointment of an agent for children. The committee will have a further report in the future.

#### D. Membership Committee

Rob Labe reported that there will be a networking lunch at the annual drafting seminar.

#### E. Tax Committee

Rob Labe provided a tax nugget.

#### VII. Other Committees Presenting Written Reports Only

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

##### A. Electronic Communications Committee

##### B. Legislation Development & Drafting Committee

##### C. Divided and Directed Trusteeships Ad Hoc Committee



The Chair state that the Diviided and Directed Trusteeships Ad Hoc Committee is now disbanded since its work is finished.

VIII. Adjournment

Seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 11:15 a.m.

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

2

## Probate and Estate Planning Section

## 2018-2019 Committee Chairs

<b>Committee/Mission</b>	<b>Chair</b>	<b>Other Members</b>
<b>Amicus Curiae Committee</b> To review requests made to the Section to file, and to identify cases in which the Section should file, amicus briefs in pending appeals and to engage and oversee the work of legal counsel retained by the Section to prepare and file its amicus briefs.	Andrew W. Mayoras	Ryan P. Bourjaily Nazneen Hasan Kurt A. Olson Patricia M. Ouellette David L.J.M. Skidmore Trevor J. Weston Timothy White
<b>Annual Meeting</b> To arrange the annual meeting at a time and place and with an agenda to accomplish all necessary and proper annual business of the Section.	Christopher A. Ballard	
<b>Assisted Reproductive Technology Ad Hoc Committee</b> To review the 2008 Uniform Probate Code Amendments for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction.	Nancy Welber	Christopher A. Ballard Edward Goldman James P. Spica Lawrence W. Waggoner
<b>Awards Committee</b> To periodically award the Michael Irish Award to a deserving recipient and to consult with ICLE concerning periodic induction of members in the George A. Cooney Society.	Amy Morrissey	Mark Harder Thomas Sweeney
<b>Budget Committee</b> To develop the annual budget and to alert the Council to revenue and spending trends.	David L.J.M. Skidmore	David P. Lucas Mark Kellogg
<b>Bylaws Committee</b> To review the Section Bylaws and recommend changes to ensure compliance with State	David Lucas	Christopher A. Ballard Nazneen Hasan John Roy Castillo

Bar requirements, best practices for similar organizations and assure conformity of the Bylaws to current practices and procedures of the Section and the Council.		
<b>Charitable &amp; Exempt Organization Committee</b> To educate the Section about charitable giving and exempt organizations and to make recommendations to the Section concerning federal and state legislative developments and initiatives in the fields of charitable giving and exempt organizations.	Christopher J. Caldwell	Celeste E. Arduino Christopher A. Ballard Michael W. Bartnik William R. Bloomfield Robin D. Ferriby Mark E. Kellogg Richard C. Mills
<b>Citizens Outreach Committee</b> To provide for education of the public on matters related to probate, estate planning, and trust administration, including the publication of pamphlets and online guidance to the public, and coordinating the Section's efforts to educate the public with the efforts of other organizations affiliated with the State Bar of Michigan.	Kathleen M. Goetsch	Michael J. McClory Neal Nusholtz Jessica M. Schilling Nicholas J. Vontroba
<b>Committee on Special Projects</b> To consider and study in depth a limited number of topics and make recommendations to the Council of the Section with respect to those matters considered by the Committee.	Katie Lynwood	All members of the Section who attend a meeting of the Committee on Special Projects ("CSP") are considered members of CSP and are entitled to vote on any matter brought before the CSP.
<b>Community Property Trusts Ad Hoc Committee</b> To review the statutes, case law, and legislative analysis of Michigan and other jurisdictions (including pending legislation) concerning community property trusts and, if advisable, to recommend changes to Michigan law in this area.	Neal Nusholtz	Brandon Dornbusch George W. Gregory Lorraine F. New Nicholas A. Reister Rebecca K. Wrock

<p><b>Court Rules, Forms, &amp; Proceedings Committee</b>  To consider and recommend to the Council action with respect to contested and uncontested proceedings, the Michigan Court Rules, and published court forms, including their development, interpretation, use, and amendment.</p>	<p>Melisa M.W. Mysliwec</p>	<p>James F. (J.V.) Anderton  Susan L. Chalgian  Phillip E. Harter  Hon. Michael L. Jacquette  Warren H. Krueger, III  Michael J. McClory  Andrew W. Mayoras  Shaina Reed  Marlaine Teahan</p>
<p><b>Drafter/beneficiary ad hoc committee</b>  To make recommendations for possible statutory changes to deal with the situation where a drafter (whether a lawyer or a non-lawyer) prepares an instrument for a non-relative which includes a gift to that drafter or members of that drafter's family.</p>	<p>Andrew Mayoras</p>	<p>Erica Berezny  George W. Gregory  Kenneth Silver  David P. Lucas  Kurt A. Olson</p>
<p><b>Electronics Communications Committee</b>  To oversee all forms of electronic communications with and among members of the Section, including communication via the Section's web site (SBM Connect site) and the ICLE Online Community site, to identify emerging technological trends of important to the Section and its members, and to recommend to the Council of the Section best practices to take advantage of technology in carrying out the Section's and Council's mission and work.</p>	<p>Michael G. Lichterman</p>	<p>William J. Ard  Amy N. Morrissey  Jeanne Murphy (Liaison to ICLE)  Neal Nusholtz  Marlaine Teahan</p>
<p><b>Electronic Wills Ad Hoc Committee</b>  To study the proposal on electronic wills of the Uniform Law Commission, determine problems and pitfalls of the formation, validity, and recognition of electronic wills, and be prepared to respond to</p>	<p>Kurt A. Olson</p>	<p>Kimberly Browning  Douglas A. Mielock  Neal Nusholtz  Christine Savage  James P. Spica (Special Advisor)</p>

<p>both the Uniform Law Commission's proposal and any related legislation introduced in Michigan.</p>		
<p><b>Ethics &amp; Unauthorized Practice of Law</b>  To consider and recommend to the Council action with respect to the Michigan Rules of Professional Conduct and their interpretation, application, and amendment, including identifying the unauthorized practices of law, reporting of such practices to the appropriate authorities, and educating the public regarding the inherent problems relying on non-lawyers.</p>	<p>Kurt A. Olson</p>	<p>William J. Ard  Raymond A. Harris  J. David Kerr  Robert M. Taylor  Amy Rombyer Tripp</p>
<p><b>Fiduciary Exception to the Attorney Client Privilege Ad Hoc Committee</b>  To determine whether to develop legislation to determine the extent (if any) to which a fiduciary exception should exist to the attorney client privilege and if so, draft proposed legislation.</p>	<p>Warren H. Krueger, III</p>	<p>Aaron A. Bartell  Ryan P. Bourjaily</p>
<p><b>Guardianships, Conservatorships, &amp; End of Life Committee</b>  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.</p>	<p>Kathleen M. Goetsch</p>	<p>William J. Ard  Michael W. Bartnik  Kimberly Browning  Raymond A. Harris  Phillip E. Harter  Hon. Michael L. Jaconette  Michael J. McClory  Kurt A. Olson  James B. Steward  Paul S. Vaidya</p>
<p><b>Legislative Analysis &amp; Monitoring Committee</b>  In cooperation with the Section's lobbyist, to bring to the attention of the Council recent developments in the Michigan legislature and to further achievement of the</p>	<p>Daniel S. Hilker</p>	<p>Christopher A. Ballard  Ryan P. Bourjaily  Georgette E. David  Mark E. Kellogg  Jonathan R. Nahhat</p>

<p>Section's legislative priorities, as well as to study legislation and recommend action on legislation not otherwise assigned to another committee of the Section.</p>		
<p><b>Legislation Development &amp; Drafting Committee</b> To review, revise, communicate, and recommend proposed legislation affecting Michigan's trusts and estates law with the goal of achieving and maintaining leadership in promulgating trusts and estates laws in changing times.</p>	<p>Nathan Piwowarski</p>	<p>Heidi Aull Aaron A. Bartell Howard H. Collens Georgette E. David Kathleen M. Goetsch Daniel S. Hilker Henry P. Lee Michael G. Lichterman David P. Lucas Katie Lynwood Richard C. Mills Kurt A. Olson Christine M. Savage James P. Spica Marlaine Teahan Robert P. Tiplady II</p>
<p><b>Legislative Testimony Committee</b> To testify on behalf of the Section regarding pending bills before Michigan House or Senate Committees and to promote and explain the Council's Public Policy Positions to Michigan Representatives and Senators or members of their staff.</p>	<p>Marguerite Munson Lentz</p>	<p>Gary Bauer Susan L. Chalgian Howard Collens Mark T. Evelyn Ashley Gorman Raymond A. Harris Mark E. Kellogg Carol Kramer Katie Lynwood Amy E. Peterman Nathan Piwowarski Kenneth Silver Marlaine C. Teahan Robert W. Thomas</p>
<p><b>Membership Committee</b> To strengthen relations with Section members, encourage new membership, and promote awareness of and participation in Section activities.</p>	<p>Nicholas A. Reister</p>	<p>Daniel S. Hilker, Vice-Chair Daniel W. Borst Ryan P. Bourjaily Nicholas R. Dekker Angela Hentkowski David A. Kosmowski Robert B. Labe Raj A. Malviya Ryan S. Mills Robert O'Reilly Theresa A. Rose</p>

<b>Nominating Committee</b> To annual nominate candidates for election as the officers of the Section and members of the Council.	Shaheen I. Imami	James B. Steward Marlaine C. Teahan
<b>Planning Committee</b> To review and update the Council's Plan of Work	Marguerite Munson Lentz	Christopher A. Ballard David P. Lucas David L.J.M. Skidmore Mark E. Kellogg
<b>Premarital Agreements Legislation Ad Hoc Committee</b> To review and compare Michigan's statutes and case law (particularly the <i>Allard</i> decision) regarding enforcement and potential effects on estate planning and estate administration with the Uniform Premarital and Marital Agreements Act and similar acts from other states and, if advisable, recommend changes to Michigan law in this regard.	Christine Savage	Kathleen M. Goetsch Patricia M. Ouellette (Family Law Liaison) Rebecca Wrock
<b>Probate Institute</b> To consult with ICLE in the planning and execution of the Annual Probate and Estate Planning Institute.	David P. Lucas	
<b>Real Estate Committee</b> To recommend new legislation related to real estate matters of interest and concern to the Section and its members.	Mark E. Kellogg	Jeffrey S. Ammon William J. Ard David S. Fry J. David Kerr Michael G. Lichterman James T. Ramer James B. Steward
<b>State Bar &amp; Section Journals Committee</b> To oversee the publication of the Section's Journal and periodic theme issues of the State Bar Journal that are dedicated to probate, estate planning, and trusts.	Richard C. Mills	Nancy L. Little, Managing Editor Melisa M.W. Mysliwicz, Associate Editor.
<b>Tax Committee</b>	Raj A. Malviya	James F. (J.V.) Anderton Christopher J. Caldwell



<p>To monitor, provide regular updates on, and deliver select educational programs concerning federal and state income and transfer taxes and, if applicable, to recommend appropriate actions by the Section in response to developments.</p>		<p>Mark J. DeLuca  Angela Hentkowski  Robert B. Labe  Richard C. Mills  Lorraine F. New  Christine M. Savage  Michael David Shelton  James P. Spica  Timothy White</p>
<p><b>Uniform Fiduciary Income &amp; Principal Ad Hoc Committee</b>  To review the Uniform Law Commission's draft and final version of the Uniform Fiduciary and Principal Act, and, if advisable, to recommend changes to Michigan law in this area.</p>	<p>James P. Spica</p>	<p>Anthony J. Belloli  Marguerite Munson Lentz  Raj A. Malviya  Gabrielle M. McKee  Richard C. Mills  Robert P. Tiplady  Joseph Viviano</p>

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**Fwd: Register Now for Effective Mediation Preparation--A Primer for Advocates  
Teleseminar**

1 message

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**Lentz, Marguerite** <MLentz@bodmanlaw.com>  
To: "meglentz@gmail.com" <meglentz@gmail.com>

Fri, Feb 8, 2019 at 4:24 PM

Sent from my iPhone

Begin forwarded message:

**From:** Alternative Dispute Resolution Section <sbm-member-flash@michbar.org>  
**Date:** February 6, 2019 at 4:42:29 PM EST  
**To:** <mlentz@bodmanlaw.com>  
**Subject:** Register Now for Effective Mediation Preparation--A Primer for Advocates  
Teleseminar

[View Online](#)



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## Effective Mediation Preparation—A Primer for Advocates Teleseminar

*The Family Law, Labor & Employment Law, Probate & Estate Planning, and  
Young Lawyers Sections are invited to attend this informative teleseminar.*

The ADR Section is pleased to invite you to attend this series of informative teleseminars. Each will include a panel discussion with advice and anecdotes from senior, experienced practitioners on best practices, techniques, common mistakes to avoid, and how to best prepare to mediate and arbitrate.

In this first of three teleseminars, three experienced mediators share their best tips for advocates using the mediation process in civil, domestic, and probate disputes. This 90-minute teleseminar will provide tools for proficient mediation advocacy; strategic negotiating techniques; drafting compelling mediation summaries; achieving client goals and objectives at the mediation table; preparing clients for the mediation process; and next steps when your case

doesn't settle in full at the bargaining table. Become the most effective advocate you can be with new ideas, powerful insights, and a fresh approach to achieve better results in your future mediations. This will be directed to advocates.

Additional teleseminars will take place on April 2 and May 2.

**Date:** Thursday, March 7, 2019

**Time:** Noon-1:30 p.m.

**Register:** online or by mail form

**Cost:** ADR Section Members-\$10; Family Law, Labor & Employment Law, Probate & Estate Planning, & Young Lawyers Section Members-\$10; Law Students-\$10; and All Other Registrants-\$40

### **Agenda**

1. Introductions
2. Tips for Making the Most of Mediation
  - Tips for Preparing to Mediate
  - Written Mediation Submission Tips
  - Tips for Making the Most of the Process at the Table
  - If the Dispute Does Not Resolve
3. Questions and Answers

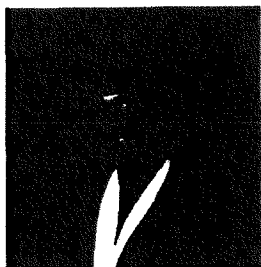
### **Our Panel**



**Michael S. Leib, Moderator:** Michael S. Leib is a mediator with Leib ADR LLC in West Bloomfield, Michigan, and devotes his time to the mediation of business disputes including bankruptcy disputes and participation on the Alternative Dispute Resolution Section Council of the State Bar of Michigan, as well as on the Debtor Creditor Committee of the Business Law Section of the State Bar of Michigan. He

has been an active participant in trial skills education, having written several articles and been a faculty member of ICLE Trial Skills workshops, Federal Bar Association presentations, and ABI workshops. Mr. Leib retired as a business trial lawyer in 2014 after many years as a shareholder at Maddin, Hauser, Roth & Heller, P.C. His practice was divided between litigation in the bankruptcy court and business litigation in the state and federal courts. Mr. Leib has been listed in The Best Lawyers in America and SuperLawyers, and is AV-rated by

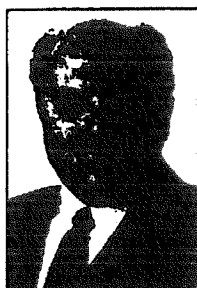
Martindale-Hubbell. He received his B.A. from Kalamazoo College and his MM from the University of Montana, and his JD from Wayne State University Law School.



**Susan Davis** has been an attorney for over 32 years, since receiving her BA, MSW, and JD degrees from the University of Michigan. She is a member of the state bars of Michigan and Arizona. Susan has been a mediator for 12 years. She completed her civil mediation training through ICLE, domestic relations mediation training through the Oakland Mediation Center, and special education mediation training through the Michigan Department of Education. She currently mediates through the Dispute Resolution Center in Ann Arbor where she focuses on domestic relations, probate, and special education matters. For several years she also served as a mediator for the Northern Community Mediation Center in Petoskey.



**Sheldon J. Stark** is a member of the National Academy of Distinguished Neutrals, a distinguished fellow with the International Academy of Mediators, and an employment law panelist for the American Arbitration Association. He is also a member of the Professional Resolution Experts of Michigan. He is past chair of the Alternative Dispute Resolution Section of the State Bar of Michigan and formerly chaired the Skills Action Team. Mr. Stark was a distinguished visiting professor at the University of Detroit Mercy School of Law from August 2010 through May 2012, when he stepped down to focus on his ADR practice. He is the recipient of the Labor and Employment Law Section's Distinguished Service Award and the State Bar Representative Assembly Michael Franck Award.



**Robert E. L. Wright**, attorney/mediator/arbitrator, is a pioneer in mediation and ADR in Michigan. In 2011, he left a large Michigan firm to develop his arbitration and mediation practice, The Peace Talks, PLC. Bob is a member of Professional Resolution Experts of Michigan (PREMi) and heads its Grand Rapids office. Recently named 2016 Arbitrator of the Year by Best Lawyer, Bob has more than 30

years of experience as a litigator, representing clients in mediation, arbitration and trials, and serving as either a neutral or a representative in ADR proceedings. As a neutral mediator and arbitrator, he has helped over 1,000 individuals and businesses resolve their disputes. In addition to his wealth of practical experience, Mr. Wright trains other mediators in both basic and advanced courses and is a member of PREMi, the ADR Section of the State Bar of Michigan (past chair), ACR, ABA Dispute Resolution Section, Grand Rapids Bar Association ADR Section (chair), and volunteers as a mediator for the Dispute Resolution Center of West Michigan.

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[Click here to manage your preferences.](#)

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**Fwd: ADR/PEP Sections Co-Sponsoring Event**

1 message

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**Lentz, Marguerite** <MLentz@bodmanlaw.com>  
To: "meglentz@gmail.com" <meglentz@gmail.com>

Fri, Feb 8, 2019 at 4:23 PM

Sent from my iPhone

Begin forwarded message:

**From:** Mary Anne Parks <parks.maryanne@gmail.com>  
**Date:** January 28, 2019 at 8:30:49 AM EST  
**To:** JV Anderton <jfanderton@loomislaw.com>  
**Cc:** "Lentz, Marguerite" <MLentz@bodmanlaw.com>  
**Subject:** Re: ADR/PEP Sections Co-Sponsoring Event

Hello James,

Here is an explanation for the 3 teleseminars:

The ADR Section is pleased to invite you to attend these informative teleseminars. Each will include a panel discussion with advice and anecdotes from senior, experienced practitioners on best practices, techniques, common mistakes to avoid, and how to best prepare to mediate and arbitrate:

- 1. Thursday, March 7 - Bob Wright and Shel Stark,**  
"Preparing for your First  
Mediation: A Primer" This will be directed to advocates.
- 2. Tuesday, April 2 - Zena Zumeta and Earlene Baggett-Hayes,**  
" How WE  
Prepare for Mediation." This will be directed to mediators and  
beneficial to  
advocates as well.
- 3. Thursday, May 2 - Sam McCargo, Betty Widgeon and  
Marty Weisman,**  
"Preparing for your First Arbitration: A Primer". This will be  
directed  
to advocates.

*All teleseminars will take place from Noon-1:30 p.m. More information and registration information coming soon.*

On Fri, Jan 25, 2019 at 2:30 PM JV Anderton <jfanderton@loomislaw.com> wrote:

Mary Anne – My name is J.V. Anderton and I've volunteered to act as a coordinator from the Probate and Estate Planning Section in a possible joint planning of an event with the ADR Section. Please know that council for the PEP section was very interested in offering this added benefit to our section members, but had some questions before it was willing to sign off. Specifically, two questions I'm aware council wanted more details about were: 1) in addition to the description you provided in your email to Meg Lentz, is there a list of topics that will be hit in this (or other ADR Section events) that will be of particular interest to PEP Section members; and 2) how are your events organized. As background, the PEP section usually co-sponsors with ICLE, and ICLE does a very nice job (in my eyes anyway) of making sure the program and materials are organized in a professional manner. We don't know if the ADR section does something similar, or what steps are taken to assist in the logistics of putting on your programs.

If you would like to have a call to discuss, my direct line is 517-318-9262.

Best,

J.V.

**JAMES F. ANDERTON, V, ESQ.\***

**Loomis, Ewert, Parsley, Davis & Gotting, P.C.**

124 West Allegan, Suite 700

Lansing, Michigan 48933-1525

(p) 517-482-2400

(f) 517-482-4313

*\*Licensed in Michigan and Florida*

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have received this communication in error, please notify us by telephone immediately.  
Thank you.

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Mary Anne Parks  
Section Administrator  
parks.maryanne@gmail.com  
248.895.6400

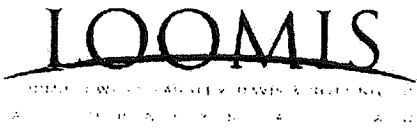


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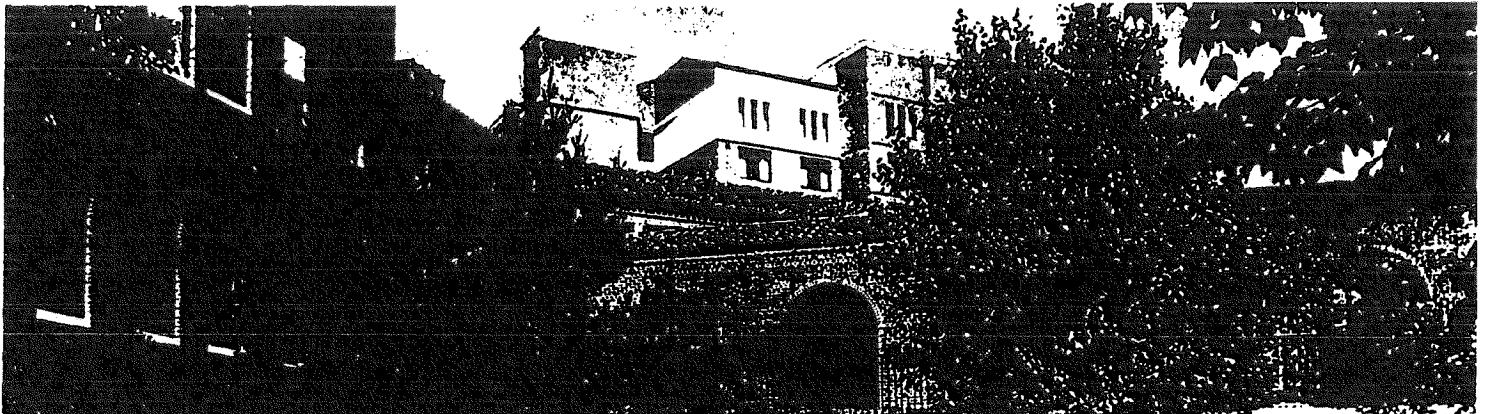


# 17<sup>th</sup> Annual Spring Conference

**Friday, March 15, 2019 | The Inn at St. Johns – Plymouth, Michigan**

- 8:30 a.m. – 9:00 a.m.**      **Registration**
- 9:00 a.m. – 9:45 a.m.**      **Insider's Tips for Caregivers**  
*Dan Kosmowski–Attorney*  
*Harley Manela–Attorney*
- 9:45 a.m. – 10:30 a.m.**      **Understanding Liability Insurance**  
*Michael Hale–Attorney*
- 10:30 a.m. – 10:45 a.m.**      **Break**
- 10:45 a.m. – 11:30 a.m.**      **Practical Tips for Special Education Meetings**  
*Nadia Vann, JD–Special Education Teacher*
- 11:30 a.m. – 1:00 p.m.**      **Lunch**  
*Love That Boy: What Two Presidents, Eight Road Trips, and My Son Taught Me About a Parent's Expectations–Ron Fournier–Author*
- 1:00 p.m. – 2:30 p.m.**      **Getting the Business Today! Practical Issues, Responses and Approaches for Successful Client Meetings**  
*Terrence Quinn–Attorney*
- 2:30 p.m. – 3:00 p.m.**      **Break**
- 3:00 p.m. – 4:30 p.m.**      **Government Benefits Update–Changes: Blowing in the Wind**  
*Robert Mannor–Attorney*  
*Don Rosenberg–Attorney*  
*Sara Schimke–Attorney*

**Reception Following Conclusion of Conference**





# 17<sup>th</sup> Annual Spring Conference

March 15, 2019

8 a.m.-5 p.m. | The Inn at St. Johns, Plymouth, MI

Pre-registration Deadline March 12, 2019. After March 12 you will need to register onsite. (Only checks or money orders will be accepted at onsite registration.)

You can register online at <https://www.eiseverywhere.com/elder19>

P #: \_\_\_\_\_

Name: \_\_\_\_\_

E-mail: \_\_\_\_\_

Your Firm/Organization: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_

Enclosed is check # \_\_\_\_\_ for \$ \_\_\_\_\_

Please make check payable to: STATE BAR OF MICHIGAN

To pay with credit/debit card visit <https://www.eiseverywhere.com/elder19>

### Questions

Contact **Harley D. Manela** at (248) 538-1800 or by e-mail at [hmanela@teclf.com](mailto:hmanela@teclf.com).

### Event Materials

Event materials will be posted in the event library several days before the conference. (Details on your confirmation.)

### Cancellations

All cancellations must be received at least 72 business hours before the start of the event and registration refunds are subject to a \$20 cancellation fee. Cancellations must be received in writing by e-mail ([tbellinger@michbar.org](mailto:tbellinger@michbar.org)), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.) No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar materials.

### Cost

Section Member .....\$150

Join the Section and SAVE!

Join the Section and save money on this event as well as other Section events. Dues are \$40. (Membership will be paid through September 30 of the current fiscal year.)

- To join the Section, complete and submit this form ([https://www.michbar.org/file/sections/pdfs/app\\_03v2\\_exst.pdf](https://www.michbar.org/file/sections/pdfs/app_03v2_exst.pdf))

Non-Section Member .....\$200

Legal Aid Office ..... No charge for program (fee for lunch)

Must Mail your form if you are buying lunch. You can fax this form back, at (517) 372-5921, if you are not paying for lunch.

Patron—Sponsorship .....\$150

Make a \$150 sponsorship to the Elder Law & Disability Rights Section and be recognized as a patron of the section at the Spring Conference. (Checking this box does not register you for the conference. Please check the appropriate box above to register for the conference.)

Luncheon Event with Buffet.....\$30

Love That Boy: What Two Presidents, Eight Road Trips, and My Son Taught Me About a Parent's Expectations

Buffet includes: tomato basil soup, St. John's loaded potato salad, tossed mixed greens salad, grilled vegetable-orecchiette pasta salad, Santa Fe vegetable wrap, warm roast beef and kummelweck, roast turkey sandwich, potato chips, pickles, cherry peppers, brownies and cookies, coffee & hot herbal tea.

Total Cost: \$ \_\_\_\_\_

### Submit Your Registration

Mail your check, and completed registration form to:

State Bar of Michigan, Attn: Seminar Registration  
306 Townsend Street, Lansing, MI 48933

Online at <https://www.eiseverywhere.com/elder19>

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**Fwd: 2019 YLS Summit Sponsorship Opportunity**

1 message

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**Lentz, Marguerite** <MLentz@bodmanlaw.com>  
To: "meglentz@gmail.com" <meglentz@gmail.com>

Fri, Feb 8, 2019 at 4:06 PM

Sent from my iPhone

Begin forwarded message:

**From:** Aaron Sohaski <sohaskia@gmail.com>  
**Date:** February 8, 2019 at 3:07:31 PM EST  
**To:** <mlentz@bodmanlaw.com>  
**Subject:** 2019 YLS Summit Sponsorship Opportunity

Dear Ms. Lentz:

It is with great pleasure that I invite the Probate and Estate Planning Section to participate in the State Bar of Michigan Young Lawyers Section's 12th Annual Summit ("Summit"). The Summit will be held Friday-Sunday, May 17-19, at Motor City Casino and Hotel in Detroit.

We are looking forward to our 2019 Summit and we hope that you will be a part of it. In the past, the young lawyers have offered programs in areas we believed to be especially important and beneficial to new/young lawyers, with an emphasis on litigation, professional and business development, and other areas. This year, we have invited the various sections of the State Bar of Michigan to participate in developing programs of interest to young lawyers and look forward to sharing this with new/young attorneys from across the state.

I am writing to request that your Probate and Estate Planning Section serves as an official sponsor or vendor of the Summit. Past sponsors and vendors have included Thomson West, LexisNexis, ICLE, and Michigan Lawyers Weekly. There are three levels available to you: Gold, Silver, and Vendor. Each level includes a table with table cover, parking, Internet access, breakfast and lunch for one, and attendance at our Friday Welcome Reception.

Prices and additional opportunities are as follows:

- Vendor (\$175.00).
- Silver sponsorship (\$350.00) purchases advertisement space in the official Summit program booklet, and recognition in Summit materials.
- Gold sponsorship (\$500.00) purchases a title sponsor of a Summit room or event, advertisement space in the official Summit program booklet, and recognition in Summit materials.

We ask that you respond to this communication indicating whether the Probate and Estate Planning Section is interested in sponsoring at our 12<sup>th</sup> Annual Summit. If you are interested, I would like to speak to you and send you a registration form. You can reach me at 586.354.5797 or sohaskia@gmail.com.

We look forward to hearing from you soon!

Respectfully,

Aaron Sohaski

—

Aaron P. Sohaski, Esq.  
586.354.5797  
[www.linkedin.com/in/aaronsohaski](http://www.linkedin.com/in/aaronsohaski)

3

Probate and Estate Planning Section: 2018-2019

TREASURER'S MONTHLY ACTIVITY REPORT (DECEMBER)

Revenue		State Bar Activity Report (December)	Cumulative Monthly (through December)	Budget 2018-19	Comments
	1-7-99-775-1050 Probate/Estate Planning Dues	\$ 3,885.00	\$ 104,705.00	\$ 112,000.00	
	1-7-99-775-1055 Probate/Estate Stud/Affil Dues		\$ 840.00	\$ 800.00	
	1-7-99-775-1330 Subscription to Newsletter	\$ -	\$ -	\$ -	
	1-7-99-775-1470 Publishing Agreement Account	\$ -	\$ -	\$ 650.00	
	1-7-99-775-1755 Pamphlet Sales Revenue	\$ -	\$ -	\$ -	
<b>Total Revenue</b>		<b>\$ 3,885.00</b>	<b>\$ 105,545.00</b>	<b>\$ 113,450.00</b>	
Hearts and Flowers Fund (in Fraser Law Trust Acct)		\$ -	\$ 1,038.81	\$ 1,038.81	Not budgeted item, but this is the current carryover balance in Fraser Firm trust account.
<b>Total Fund</b>		<b>\$ -</b>	<b>\$ 1,038.81</b>	<b>\$ 1,038.81</b>	
Expenses					
	1-9-99-775-1127 Multi-Section Lobbying Group	\$ 2,500.00	\$ 7,500.00	\$ 30,000.00	
	1-9-99-775-1145 ListServ	\$ 10.00	\$ 20.00	\$ 225.00	
	1-9-99-775-1276 Meetings		\$ 7,428.62	\$ 16,000.00	
	1-9-99-775-1283 Seminars	\$ -	\$ -	\$ 20,000.00	
	1-9-99-775-1297 Annual Meeting Expenses	\$ -	\$ -	\$ -	
	1-9-99-775-1493 Travel	\$ 311.20	\$ 2,187.84	\$ 15,000.00	
	1-9-99-775-1528 Telephone	\$ -	\$ -	\$ 1,250.00	
	1-9-99-775-1549 Books & Subscriptions	\$ -	\$ -	\$ 750.00	
	1-9-99-775-1822 Litigation-Amicus Curiae Brief	\$ -	\$ -	\$ 55,000.00	
	1-9-99-775-1833 Newsletter		\$ 4,100.00	\$ 10,000.00	
	1-9-99-775-1987 Miscellaneous	\$ 143.10	\$ 143.10	\$ 7,500.00	(networking reception @ Probate Institute) & \$5,000 (networking lunch @ Drafting Estate Planning Documents Seminar) as budget amdmts.
	1-9-99-775-1297 Annual Meeting Expenses	\$ -	\$ -	\$ 1,000.00	
	1-9-99-775-1861 Printing	\$ -	\$ -	\$ 100.00	
	1-9-99-775-1868 Postage	\$ -	\$ -	\$ -	
<b>Total Expenses</b>		<b>\$ 2,964.30</b>	<b>\$ 21,379.56</b>	<b>\$ 156,825.00</b>	
<b>Net Income</b>		<b>\$ 920.70</b>	<b>\$ 84,165.44</b>	<b>\$ (43,375.00)</b>	
Beginning Fund Balance			\$ -		
	1-5-00-775-0001 Fund Bal-Probate/Estate Plan		\$ 172,927.32	\$ 172,927.32	
<b>Ending Fund Balance</b>			<b>\$ 257,092.76</b>	<b>\$ 129,552.32</b>	
Amicus Reserve			\$ -		
	Beginning Fund Balance		\$ 19,167.25	\$ 19,167.25	
	Withdrawals		\$ -		
	Ending Fund Balance		\$ -		
General Fund			\$ 153,760.07	\$ 153,760.07	
<b>Total Fund</b>			<b>\$ 172,927.32</b>	<b>\$ 172,927.32</b>	

4

## Skidmore, David

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**From:** Lentz, Marguerite <MLentz@BODMANLAW.COM>  
**Sent:** Thursday, December 13, 2018 10:51 AM  
**To:** Melisa Mysliwec  
**Subject:** FW: Referral of ADM File No. 2017-28: Comment Due February 22, 2019

Hi Melisa:

I have not looked at this yet. Is this anything we need to be concerned about? More time this time—deadline is February 22, 2019.

Thanks,  
Meg

**Marguerite Munson Lentz**  
BODMAN PLC  
6th Floor at Ford Field  
1901 St. Antoine Street  
Detroit, Michigan 48226  
office: 313-393-7589  
email: [mlentz@bodmanlaw.com](mailto:mlentz@bodmanlaw.com)  
My biography on [bodmanlaw.com](http://bodmanlaw.com)

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*"Diversity-Focused Company"*

# bodman

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**From:** Carrie Sharlow <CSHARLOW@michbar.org>  
**Sent:** Thursday, December 13, 2018 9:03 AM  
**To:** [paylward@allegiantlegal.com](mailto:paylward@allegiantlegal.com); [josh@blanchard.law](mailto:josh@blanchard.law); Lentz, Marguerite <MLentz@BODMANLAW.COM>; Scavone, Nicholas <NScavone@BODMANLAW.COM>; [michiganbk@gmail.com](mailto:michiganbk@gmail.com); [kblock@kerr-russell.com](mailto:kblock@kerr-russell.com); Robert Raitt <[rraitt@michiganautolaw.com](mailto:rraitt@michiganautolaw.com)>; Jackie Cook <[jcook@mikecoxlaw.com](mailto:jcook@mikecoxlaw.com)>; [crapko@millercanfield.com](mailto:crapko@millercanfield.com); [bob.treat@qdroexpressllc.com](mailto:bob.treat@qdroexpressllc.com)  
**Subject:** Referral of ADM File No. 2017-28: Comment Due February 22, 2019

The following proposed court rule amendment was identified as being of interest to your Section. The State Bar may adopt a position on this item. If you wish to submit comments for consideration by the Board of Commissioners, please do so by **February 22, 2019**.

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

[2017-28: Proposed Amendments of MCR 1.109, MCR 8.119, and Administrative Order 1999-41](#)

The proposed amendments would make certain personal identifying information nonpublic and clarify the process regarding redaction.

Your participation in this process is highly valued and appreciated.



Thank you,

**Peter Cunningham**

Assistant Executive Director

Director of Governmental Relations

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**STATE BAR OF MICHIGAN**

Michael Franck Building

306 Townsend Street

Lansing, MI 48933-2012

T: (517) 346-6325

[pcunningham@michbar.org](mailto:pcunningham@michbar.org)

[www.michbar.org](http://www.michbar.org)

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

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+-----mail.michbar.org-----+

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# Order

Michigan Supreme Court  
Lansing, Michigan

December 12, 2018

ADM File No. 2017-28

Proposed Amendment of Rules  
1.109 and 8.119 of the Michigan  
Court Rules, Rescission of Administrative  
Order 2006-2, and Amendment to  
Administrative Order No. 1999-4

Stephen J. Markman,  
Chief Justice

Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano  
Richard H. Bernstein  
Kurtis T. Wilder  
Elizabeth T. Clement,  
Justices

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On order of the Court, this is to advise that the Court is considering amendments of MCR 1.109, MCR 8.119, AO No. 1999-4, and rescission of AO No. 2006-2. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining  
and deleted text is shown by strikeover.]

MCR 1.109 Court Records Defined; Document Defined: Filing Standards; Signatures;  
Electronic Filing and Service; Access

(A)–(C) [Unchanged.]

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) [Unchanged.]

(b) The first part of every document must contain a caption stating:

(i)–(v) [Unchanged.]

(vi) the name, ~~an address, and telephone number~~ of each party appearing without an attorney and an address for each party where documents can be served on that party.

(c)–(f) [Unchanged.]

- (g) Pursuant to ~~Administrative Order No. 2006-2~~subrule (D)(9) a filer is prohibited from filing a document that contains ~~another person's social security number except when the number is required or allowed by statute, court rule, court order, or for purposes of collection activity when it is required for identification.~~protected personal identifying information.

(2)–(8) [Unchanged.]

(9) Personal Identifying Information. Personal identifying information is classified as protected or nonprotected.

(a) Protected Personal Identifying Information. The following personal identifying information is protected and shall not be included in any public document or attachment filed with the court except as provided by these rules:

(i) date of birth,

(ii) social security number or national identification number,

(iii) driver's license number or state-issued personal identification card number,

(iv) passport number,

(v) financial account numbers, and

(vi) home or personal telephone numbers.

(b) All protected personal identifying information required by law or court rule to be filed with the court must be provided in the form and manner established by the State Court Administrative Office. Protected personal identifying information provided under this subrule is nonpublic and available only to the parties to the case and other legally defined interested persons as required for case activity or as otherwise authorized by law or these court rules. The parties may stipulate in writing to allow access to protected personal identifying information to any person.

- (c) If law or court rule requires protected personal identifying information to be included in a public document filed with the court, it must be provided in the following format:
- (i) Date of Birth. Only the year may be included in the following format: XX/XX/1998.
  - (ii) Social Security Number. Only the last four digits may be included in the following format: XXX-XX-1234.
  - (iii) Driver's License Number or State-Issued Personal Identification Card Number. Only the last four digits may be included in the following format: X-XXX-XXX-XX1-234.
  - (iv) Passport Number. Only the last three digits may be included in the following format: XXXXXX123.
  - (v) Financial Account Numbers. Only the last four digits may be included in the following format: XXXXX1234.
  - (vi) Home and Personal Telephone Numbers. Only the last four digits may be included in the following format: XXX-XXX-1234.
- (d) If a party is required to file a public document containing protected personal identifying information listed in subrule (a) or (b), the party may file a redacted document for the public file along with a confidential reference list on a form approved by the State Court Administrative Office. The confidential reference list must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers included in the confidential reference list will be understood to refer to the corresponding complete identifier. A party may amend the reference list as of right.
- (e) If an exhibit offered for hearing or trial contains personal identifying information that is defined as protected personal identifying information in this rule or may be considered personal identifying information by a party, the party offering the exhibit is not required to redact the information. However, the person to whom the information pertains may request that the court redact the personal identifying information under subrule (10).

- (f) Failure to Comply.
- (i) A party waives the protection of personal identifying information as to the party's own protected information by filing it in a public document and not providing it in the form and manner established under this rule.
  - (ii) If a party fails to comply with the requirements of this rule, the court may, upon motion or its own initiative, seal the improperly filed documents and order new redacted documents to be prepared and filed.
  - (iii) If a party fails to comply with the requirements of this rule in regard to another person's protected information, the court may impose reasonable expenses, including attorney fees and costs, or may sanction the conduct as contempt.
- (g) Protected personal identifying information provided to the court as required by subrule (c) shall be entered into the court's case management system in accordance with standards established by the State Court Administrative Office. The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history under MCR 8.119(D)(1).
- (10) Request for Copy of Public Document with Protected Personal Identifying Information; Redacting Personal Identifying Information; Responsibility; Certifying Original Record; Other.
- (a) The responsibility for excluding or redacting protected personal identifying information listed in subrule (9) from all documents filed with or offered to the court rests solely with the parties and their attorneys. The clerk of the court will not review, redact, or screen documents for personal identifying information, protected or otherwise, whether filed electronically or on paper, except in accordance with this subrule.
  - (b) Dissemination of protected personal identifying information by the courts is restricted to the purposes for which its use is authorized by federal or state law or court rule. When a court receives a request for copies of any public document filed on or after January 1, 2021,

the court must review the document and redact all protected personal identifying information. This requirement does not apply to certified copies or true copies when they are required by law, or copies made for those uses for which the personal identifying information was provided.

- (c) Redacting Personal Identifying Information.
- (i) Protected personal identifying information contained in a document and filed with the court shall be redacted by the clerk of the court on written request by the person to whom it applies. The clerk of the court shall process the request promptly. The request does not require a motion fee, must specify the protected personal identifying information to be redacted, shall be maintained in the case file, and is nonpublic.
  - (ii) Except as provided in subrule (i), a party or a person whose personal identifying information is in a public document filed with the court may file an ex parte motion asking the court to direct the clerk to redact the information from that document or to make the information either confidential or nonpublic. The court may schedule a hearing on the motion at its discretion. The motion and order shall be on a form approved by the state court administrative office.
  - (iii) A party or interested person whose protected personal identifying information is in an exhibit offered for hearing or trial may file a written request before the hearing or trial that the information be redacted. The judge shall determine whether the request should be granted.
- (d) Certifying a Record. The clerk of the court may certify a redacted record as a true copy of an original record on file with the court by stating that information has been redacted in accordance with law or court rule, or sealed as ordered by the court.
- (e) Maintenance of Redacted or Restricted Access Personal Identifying Information. A document from which personal identifying information has been redacted shall be maintained in accordance with standards established by the State Court Administrative Office.

(E)-(G) [Unchanged.]

(H) Definitions. The following definitions apply to case records as defined in MCR 8.119(D) and (E).

- (1) “Confidential” means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only as specified in statute or court rule.
- (2) “Nonpublic” means that a case record is not accessible to the public. A nonpublic case record is accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or court rule. A court may not make a record nonpublic by court order.
- (3) “Redact” means to obscure individual items of information within an otherwise publicly accessible document.
- (4) “Redacted document” means a copy of an original document in which items of information have been redacted.
- (5) “Sealed” means that a document or portion of a document is sealed by court order pursuant to MCR 8.119(I). Except as required by statute, an entire case may not be sealed.

MCR 8.119 Court Records and Reports; Duties of Clerks

(A)–(C) [Unchanged.]

(D) [Unchanged.]

(1) [Unchanged.]

- (a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court’s automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan

Trial Court Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action. Protected personal identifying information entered into the court's case management system as required by MCR 1.109(D)(9)(d) shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history, including when transferred to the Archives of Michigan pursuant to law.

(b) [Unchanged.]

(E)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; ~~however, other public information in its case files may be provided through electronic means only upon request; however, the documents cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those documents.~~ If a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(I)-(L) [Unchanged.]

AO No. 1999-4 for Michigan Trial Court ~~Case File~~Records Management Standards



In order to improve the administration of justice; to improve the service to the public, other agencies, and the judiciary; to improve the performance and efficiency of Michigan trial court operations; ~~and~~ to enhance the trial courts' ability to ~~preserve~~ create and maintain an accurate record of the trial courts' proceedings, decisions, orders, and judgments pursuant to statute and court rule, it is ordered that the State Court Administrator establish Michigan Trial Court Case ~~File~~Records Management Standards for data, case records, and other court records and that trial courts conform to those standards. The State Court Administrative Office ~~shall~~must enforce the standards and assist courts in adopting practices to conform to those standards.

Case records under MCR 8.119(D) must be made available electronically to the same extent they are available at the courthouse, provided that certain personal data identifiers are not available to the public. In order to protect privacy and address security concerns, it is ordered that protected personal identifying information, as defined in court rule, filed with the state courts of Michigan in any form or manner and for any purpose must be nonpublic. The State Court Administrative Office must establish standards and develop court forms that ensure all protected personal identifying information necessary to a given court case is provided to the court separately from filed documents except as otherwise required by law.

*Staff Comment:* The proposed amendments would make certain personal identifying information nonpublic and clarify the process regarding redaction.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or [ADMcomment@courts.mi.gov](mailto:ADMcomment@courts.mi.gov). When filing a comment, please refer to ADM File No. 2017-28. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 12, 2018

Clerk

5

**Amicus Curiae Committee**  
Probate and Estate Planning Section of the State Bar of Michigan

**Application for Consideration**

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

Date: January 25, 2019

Name: John E. Anding

P Number: 30356

Firm Name: Drew, Cooper & Anding, P.C.

Address: Aldrich Place, Suite 200, 80 Ottawa Avenue NW

City: Grand Rapids

State: Michigan

Zip Code: 49503

Phone Number: (616) 454-8300

Fax Number: (616) 454-0036

E-mail address: janding@dca-lawyers.com

**Attach Additional Sheets as Required**

Name of Case: JPMorgan Chase Bank, NA v. Larry J. Winget and The Larry J. Winget Living Trust

Parties Involved: JPMorgan Chase Bank, NA (Plaintiff-Appellee); Larry J. Winget and the Larry J. Winget Living Trust (Defendants-Appellants)

Current Status: See attached Supplemental Statement

Deadlines: \_\_\_\_\_

Issue(s) Presented: Whether a revocable trust is a juridical entity such that assets held by the trustee subject to the revocable trust are owned by the trust separately and apart from the settlor, and are not the assets of the settlor.

Michigan Statute(s) or Court Rule(s) at Issue: MCL § 556.128; MCL § 566.131; MCL § 700.7603; MCL § 700.7808

Common Law Issues/Cases at Issue: Revocable trusts; *Bullis v. Downes*, 612 N.W.2d 435 (Mich. App. 2000); *Laurent v. Anderson*, 70 F.2d 819 (6th Cir. 1934); *In re Rhea Brody Living Tr.*, dated January 17, 1978, --NW.2d--, 2018 WL 3746817 (Mich. App. Aug. 7, 2018); *Sebastian J. Mancuso Family Trust v. City of Charleviox*, 831 N.W.2d 907 (Mich. App. 2013); *Sicherman v. Ohio Pub. Employees Deferred Compen. Program (In re Leadbetter)*, 992 F.2d 1216 (6th Cir. 1993); *In re Brock*, 587 Fed Appx 485 (10th Cir. 2014); *Apollinari v. Johnson*, 305 N.W.2d 565 (Mich. App. 1981).

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? This case involves the rights of a settlor in assets held in a revocable trust. It presents an issue key to the understanding of the law of trusts: whether a trust – especially a revocable trust – is a juridical body and whether the assets subject to a trust are separate from those of the settlor of the trust who possesses an unrestricted right to revoke the trust.

The United States District Court for the Eastern District of Michigan improperly held “that the Larry J. Winget Living Trust is a juridical body; that is, it is a legal entity...created under state

statutes. It is a legal entity having a distinct identity and legal rights and obligations under the law.” Transcript of August 15, 2018 Hearing, p. 5, lines 8-13.

The United States District Court’s holding is manifestly incorrect, contrary to centuries of understanding of the law of trusts, and inconsistent with modern trust law embodied in the Restatements of the Law of Trusts, the Uniform Trust Code and its Michigan variation, the Michigan Trust Code, and statutes that touch on or are related to trusts. The conclusion that trusts – especially revocable trusts – are “juridical entities” capable of owning property placed within them undercuts the use of revocable grantor trusts as an estate planning mechanism and a will substitute. This conclusion has caused the District Court to ignore the right of revocation, disregard the fact that the assets of a revocable trust should be treated as indistinguishable from the assets of the settlor because of the retained right of revocation, subordinate the otherwise unrestricted retained rights of the settlor of a revocable trust with respect to trust property to that of the trustee and third parties dealing with the trustee, and elevate the rights of those third parties above retained property rights the settlor never relinquished. The Court’s improper ruling could lead to unintended downstream consequences (and already has with respect to this case), particularly in relation to the application of the common law of trusts and statutory laws not designed for or directly applicable to trusts, such as the fraudulent transfer law or bankruptcy law. It will also cause confusion among practitioners and settlors about the continuing vitality of revocable trusts, both those in existence and those contemplated, and call into question the rights and responsibilities of settlors, trustees and beneficiaries of revocable trusts. As such the Sixth Circuit Court of Appeals should be urged to find the District Court’s conclusion that the trust was a separate juridical entity was a material error and to order the case be reconsidered in light of the

settlor's unrestricted power of revocation over the trust relationship and property entrusted to the trustee.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? Yes, see above answer.

**Supplemental Statement to Application for Consideration  
Submitted to Amicus Curiae Committee  
of the  
Probate and Estate Planning Section of the State Bar of Michigan**

Current Status:

This case is on appeal to the Sixth Circuit Court of Appeals on the issue of whether a revocable trust is a separate juridical body and thus the owner of the property placed in trust by the settlor. The procedural history leading up to this appeal extends back several years.

In 2013 the United States District Court for the Eastern District of Michigan entered a judgment in favor of the Larry J. Winget Living Trust, which is a revocable living trust of the kind commonly used as a will substitute and for the avoidance of probate (the “Trust”), and reformed a guaranty by the trustee of the Trust to make the limits of the trustee’s guaranty identical to limits of the personal guaranty of the settlor of the Trust. On February 20, 2015, the United States Court of Appeals for the Sixth Circuit in *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed. App’x 246 (6th Cir. 2015), reversed the United States District Court (“*Winget I*”). The Sixth Circuit concluded that the reformation was not permitted under Michigan law and directed the lower court to enter judgment in favor of JPMorgan Chase, thereby upholding its claim to enforce without limitation a guaranty against the Trustee and the Trust that as to the settlor was limited to \$50 million.

While the *Winget I* appeal was pending, Larry Winget, as settlor of the Trust, paid Chase the \$50 million he owed under the judgment and then exercised his power to revoke the Trust. The settlor took both of these steps in January 2014. In 2017 the United States District Court for the Eastern District of Michigan found that the settlor’s revocation of his Trust violated Michigan’s Uniform Fraudulent Transfer Act. Thereafter, the settlor rescinded his revocation, revived the Trust, and returned the assets of the Trust to the Trustee.

JPMorgan Chase has now obtained order from the United States District Court for the Eastern District of Michigan imposing charging orders with respect to limited liability company interests held by the trustee and subject to the terms of the Trust. Imposition of the charging orders was based on the holding that the Trust itself is a separate juridical body that owns the property placed in trust by Larry Winget, the settlor. Larry J. Winget, individually and as trustee of the Trust, has appealed this holding to the Sixth Circuit Court of Appeals.



Appeal No. 18-2089

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*In the*  
**United States Court of Appeals**  
*for the*  
**Sixth Circuit**

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JPMORGAN CHASE BANK, NA,

*Plaintiff-Appellee,*

v.

LARRY J. WINGET  
and THE LARRY J. WINGET LIVING TRUST,

*Defendants-Appellants,*

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*Appeal from a Decision of the United States District Court for the  
Eastern District of Michigan  
No. 2:08-cv-13845 - Hon. Avern Cohn*

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**APPELLANTS' PRINCIPAL BRIEF**

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CA. No. 18-2089

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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JPMORGAN CHASE BANK, N.A.,

Plaintiff/Appellee,

v.

LARRY J. WINGET and THE LARRY J.  
WINGET LIVING TRUST,

Defendants/Appellants.

---

**DISCLOSURE OF CORPORATE  
AFFILIATIONS AND FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 26.1, Appellant the Larry J. Winget Living Trust makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

NO.

Dated: December 13, 2018

/s/ John J. Bursch  
Counsel for Appellants

CA. No. 18-2089

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

JPMORGAN CHASE BANK, N.A.,

Plaintiff/Appellee,

v.

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WINGET LIVING TRUST,

Defendants/Appellants.

---

**DISCLOSURE OF CORPORATE  
AFFILIATIONS AND FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 26.1, Appellant Larry J. Winget makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

NO.

Dated: December 13, 2018

/s/ John J. Bursch  
Counsel for Appellants

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	v
STATEMENT IN SUPPORT OF ORAL ARGUMENT .....	x
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	3
I.    INTRODUCTION .....	3
II.   THE REVOCABLE TRUST.....	6
III.  THE GUARANTY .....	7
IV.  THE JUDGMENT .....	8
V.   THE CHARGING ORDERS.....	10
SUMMARY OF THE ARGUMENT .....	12
ARGUMENT .....	14
I.    STANDARD OF REVIEW.....	14
II.   CHARGING ORDERS ATTACH ONLY TO PROPERTY OWNED BY THE JUDGMENT DEBTOR .....	15
III.  THE DISTRICT COURT ERRED IN IMPOSING CHARGING ORDERS ON PROPERTY OWNED BY LARRY WINGET, WHO IS NOT A JUDGMENT DEBTOR .....	17
A.   The district court was correct when it previously ruled Larry Winget owns the property in his Revocable Trust .....	17

B.	Only creditors of the settlor, Larry Winget, can execute upon property held in his Revocable Trust.....	21
IV.	THE DISTRICT COURT ERRED IN IMPOSING CHARGING ORDERS BASED UPON CHASE’S JUDGMENT AGAINST THE REVOCABLE TRUST BECAUSE IT OWNS NOTHING OF ECONOMIC VALUE .....	26
A.	A revocable trust is simply a fiduciary relationship that functions as a will substitute .....	26
B.	A revocable trust, by definition, does not own property .....	29
C.	An unsecured promise by a trustee is not enforceable against the settlor or his property unless the settlor joins in the promise.....	31
D.	A charging order cannot attach to bare legal title in the hands of a trustee because it has no economic value.....	34
	CONCLUSION .....	36
	CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) .....	38
	CERTIFICATE OF SERVICE .....	39
	DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS .....	40

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE(S)</u></b>
<i>Adams Outdoor Advert. v. City of E. Lansing</i> , 614 N.W.2d 634 (Mich. 2000) .....	22, 25
<i>Anderson v. Architectural Glass Constr., Inc. (In re Pfister)</i> , 749 F.3d 294 (4th Cir. 2014) .....	35
<i>Apollinari v. Johnson</i> , 305 N.W.2d 565 (Mich. App. 1981) .....	30
<i>Atlas Portland Cement Co. v. Fox</i> , 265 F. 444 (D.C. Cir. 1920) .....	16, 35
<i>Balfour Beatty Bahamas, Ltd. v. Bush</i> , 170 F.3d 1048 (11th Cir. 1999).....	14
<i>In re Barnes</i> , 264 B.R. 415 (Bankr. E.D. Mich. 2001) .....	30
<i>Begiers v. IRS</i> , 496 U.S. 53 (1990) .....	15
<i>Brewster v. Gage</i> , 30 F.2d 604 (2d Cir. 1929).....	35
<i>In re Brock</i> , 587 Fed. App’x 485 (10th Cir. October 16, 2014) .....	<i>passim</i>
<i>Bullis v. Downes</i> , 612 N.W.2d 435 (Mich. App. 2000).....	19, 27, 28
<i>In re Cannon</i> , 277 F.3d 838 (6th Cir. 2002) .....	16, 34
<i>Cliffs Corp. v. United States</i> , 103 F.2d 77 (6th Cir. 1939) .....	33
<i>In re Cohen</i> , 8 P.3d 429 (Colo. 1999).....	24
<i>JPMorgan Chase Bank, N.A. v. Winget</i> , 08-cv-13845, 2011 WL 6181438 (E.D. Mich. 2011) .....	4, 17
<i>JPMorgan Chase Bank, N.A. v. Winget</i> , 901 F. Supp. 2d 955 (E.D. Mich. 2012) .....	4, 17, 22, 31
<i>JPMorgan Chase Bank, N.A. v. Winget</i> , 602 F. App’x 246 (6th Cir. 2015).....	<i>passim</i>

*Laurent v. Anderson*, 70 F.2d 819 (6th Cir. 1934).....30

*Legg v. Chopra*, 286 F.3d 286 (6th Cir. 2002) .....14

*In re Lewiston*, 539 B.R. 154 (E.D. Mich. 2015).....30

*Markham v. Fay*, 74 F.3d 1347 (1st Cir. 1996) .....32

*In re Marshall*, 392 F.3d 1118 (9th Cir. 2004).....28

*McVay v. W. Plains Serv. Corp.*, 823 F.2d 1395 (10th Cir. 1987).....35

*Meoli v. The Huntington Nat'l Bank*, 848 F.3d 716 (6th Cir. 2017).....16

*In re Moise*, 463 B.R. 197 (Bankr. D. Mass. 2012).....20

*N. Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925).....22, 25

*Nash v. Duncan Park Comm'n*, 848 N.W.2d 435 (Mich. App. 2014) .....29, 30

*Nichols v. Pospiech*, 286 N.W.2d 633 (Mich. 1939).....22, 25

*N.W. ex rel. J.W. v. Boone County Bd. of Educ.*,  
763 F.3d 611 (6th Cir. 2014).....14

*In re Omegas Grp. Inc.*, 16 F.3d 1443 (6th Cir. 1994).....15, 16

*In re Page*, 235 B.R. 755 (Bankr. W.D. Mich. 1999).....31

*In re Rhea Brody Living Tr., dated January 17, 1978*,  
-- N.W.2d --, 2018 WL 3746817 (Mich. App. Aug. 7, 2018).....19

*Roberts v. Hamer*, 655 F.3d 578 (6th Cir. 2011).....14

*Sebastian J. Mancuso Family Trust v. City of Charlevoix*,  
831 N.W.2d 907 (Mich. App. 2013) .....20

*Sicherman v. Ohio Pub. Employees Deferred Compen. Program*  
(*In re Leadbetter*), 992 F.2d 1216 (6th Cir. 1993) .....30, 31

*U.S. v. Whiting Pools*, 462 U.S. 198 (1983) .....34

**STATUTES**

26 CFR 301.7701–3(b) .....21

26 U.S.C.A. § 674(a).....21

28 U.S.C. § 1291 .....1

28 U.S.C. § 1332.....1

MCL § 211.7dd(a)(vi).....20

MCL § 211.27a(6).....20

MCL § 211.27a(7)(g)(i).....20

MCL § 450.4507 .....15

MCL § 450.4507(2) .....15

MCL § 556.128 .....*passim*

MCL § 566.131 .....22

MCL § 700.7103(h) .....26

MCL § 700.7401, Reporter’s Comment .....27

MCL § 700.7506(1)(a).....18, 28

MCL § 700.7603 .....32

MCL § 700.7603(1) .....20

MCL § 700.7816(1) .....31

MCL § 700.7816(2).....32



MCL § 700.7910, Reporter’s Comment .....23

**RULES**

Fed. R. App. P. 4(b) .....1  
 Fed. R. Civ. P. 69 .....14

**OTHER AUTHORITY**

7 C.J.S. Attachment § 78 (2015).....34  
 30 AM. JUR. 2D, *Executions*, § 153 (2005).....36  
 51 AM. JUR. 2D, *Limited Liability Companies*, § 23 (2003 & Supp. 2018).....15, 35  
 76 AM. JUR. 2D, *Trusts*, § 2 (2016) .....27  
 76 AM. JUR. 2D, *Trusts*, § 10 (2016) .....33  
 M. Civ. JI § 179.02 .....26  
 Restatement (Third) of Property, § 7.1 (2003) .....28  
 Restatement (Third) of Property, § 7.1, cmt a (2003) .....28  
 Restatement (Third) of Trusts, § 2 (2003) .....27  
 Restatement (Third) of Trusts, § 2, cmt d (2003) .....29  
 Restatement (Third) of Trusts, § 3 (2003) .....31  
 Restatement (Third) of Trusts, § 3, Reporter’s Notes, cmt b (2003).....30  
 Restatement (Third) of Trusts, § 25, cmt a (2003) .....19  
 Restatement (Third) of Trusts, § 69 (2003) .....31  
 Restatement (Third) of Trusts, § 74, cmt a (2007) .....18, 32

Bogert, THE LAW OF TRUSTS AND TRUSTEES, § 146  
(2d ed. 1984 & 2017 Update) .....16, 36

Bogert, THE LAW OF TRUSTS AND TRUSTEES, § 1061  
(2017 Update) .....28, 29

John H. Langbein, *The Nonprobate Revolution and the Future of  
the Law of Succession*, 97 HARV. L. REV. 1108 (1984) .....19

William P. Lapiana, *The Creation of a Revocable Trust is not a ‘Transfer,’*  
44 EST. PLAN. 44 (2017), 2017 WL 728276.....20

**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Appellants respectfully request oral argument. This case has an exceptionally long and complicated procedural history. And the underlying legal issue—which involves questions regarding who owns the assets held in a revocable trust—is crucially important, not just to the parties but to thousands of Michigan residents who have used a living trust as an estate planning tool. Oral argument will assist the Court in making its determination.

**JURISDICTIONAL STATEMENT**

The district court had diversity jurisdiction over the claims in this case pursuant to 28 U.S.C. § 1332 because Appellants Larry J. Winget and the Larry J. Winget Living Trust are citizens of a different state from Appellee JPMorgan Chase Bank, N.A. (“Chase”) and the matter in controversy exceeds \$75,000.

This Court has jurisdiction to hear the present appeal under 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 4(b) because Winget timely filed a Notice of Appeal on September 14, 2018, from 15 Orders Granting Chase’s Motions for Charging Order. (Orders Granting Mots. for Charging Order, REs 839-853, Page ID ## 27950-27965, 27968-27981; Notice of Appeal, RE 858.)

**STATEMENT OF THE ISSUE**

A charging order is a court-authorized document that grants a judgment creditor the right to attach distributions made from a business entity such as a limited liability company. It is basic debtor-creditor law that a charging order can attach only to property owned by the judgment debtor. Here, Chase's judgment debtor is the Larry J. Winget Living Trust. But Chase's 15 charging orders all attach to certain limited liability company ("LLC") certificates owned by Larry J. Winget individually. And Mr. Winget has already paid Chase \$50 million; he is *not* a judgment debtor. Did the district court err in awarding Chase the charging orders?

## STATEMENT OF THE CASE

### I. INTRODUCTION.

This dispute has a long history before this Court, reflected in a series of decisions beginning with its February 20, 2015 Opinion. *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed. App'x 246 (6th Cir. 2015). Each of those decisions was narrowly focused on interpreting the contract between the parties, a 2002 guaranty, to determine what promises were made. The decisions resulted in entry of a bifurcated Judgment in 2015 against Larry Winget and the “Larry J. Winget Living Trust,” his revocable inter vivos trust (“Revocable Trust”). Chase’s recourse against the Revocable Trust is unlimited; its recourse against Larry Winget is limited to \$50 million.

This bifurcated recourse came about when Chase asked both Larry Winget and his Revocable Trust to provide unlimited, full recourse guaranties in exchange for a loan. Larry Winget refused. So, Chase agreed to take a guaranty under which its recourse against the Revocable Trust was unlimited but its recourse against Larry Winget personally was limited to \$50 million.

This Court held exactly that in its February 20, 2015 decision that directed entry of the Judgment whose enforcement is now on appeal. Crucially, it is undisputed that Larry Winget paid Chase \$50 million in 2014 in satisfaction of all

his obligations under the Judgment. As a result, Chase has no recourse against Larry Winget flowing from that Judgment.

Chase now seeks to enforce the Judgment it has against the Revocable Trust. And so, for the first time, an appeal to this Court will address the legal effect of Chase not having an enforceable judgment against both Larry Winget and his Revocable Trust. Can Chase execute on property owned by Larry Winget but held in his Revocable Trust to satisfy its Judgment against the Revocable Trust where it has no enforceable judgment against Larry Winget? The district court answered yes. And on August 15, 2018, it imposed charging orders on LLC certificates held for Larry Winget under his Revocable Trust. This was error. And the district court's error was inextricably tied to its ruling that the Revocable Trust—set up as an estate planning trust by Larry Winget as settlor—owned the property on which the charging orders were imposed, not Larry Winget.

The district court's decision is contrary to previous rulings in this very case. For example, early in the proceedings, the district court correctly acknowledged that “property in a revocable trust is property of the settlor...[T]he settlor owns the assets in a revocable trust.” *JPMorgan Chase Bank, N.A. v. Winget*, 08-cv-13845, 2011 WL 6181438, at \*10 (E.D. Mich. 2011); accord *JPMorgan Chase Bank, N.A. v. Winget*, 901 F. Supp. 2d 955, 972 (E.D. Mich. 2012) (“Here, Winget was the settlor, trustee, and beneficiary of the Winget Trust. As settlor, Winget owned the assets in

the Winget Trust.”). This Court later agreed, noting that the dispute arises out of “a credit agreement between defendant...Chase *and entities owned and operated by plaintiff Larry Winget*, some assets of which are *held* by the Larry J. Winget Living Trust.” *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed. App’x 246, 248 (6th Cir. 2015) (emphasis added).

These rulings were consistent with well-settled law. A revocable trust is an estate planning tool that functions as a will substitute. A settlor remains the owner of property held in trust while alive, and the beneficiaries named in the trust become the owners only upon the settlor’s death. Furthermore, the settlor may revoke a revocable trust at any time and take the property out of trust, just as a testator could remove property subject to his will. A revocable trust is nothing more than a fiduciary relationship established to hold property, through a trustee, that is owned by someone else (the settlor) for the benefit of someone else (the settlor and his beneficiaries). All of this means that by definition, a revocable trust does *not* own the property entrusted to it. Here, the property held in the Revocable Trust is owned by Larry Winget. So, charging orders may not be imposed on that property unless they arise out of an enforceable judgment against Larry Winget. Chase holds no such judgment.

The previous rulings in this case—as well as the law applicable to trusts, creditor rights, property, and taxes—all make clear that Larry Winget has always



been, and still is, the owner of property he placed in his Revocable Trust. At no time and under no circumstances could the Revocable Trust become the owner of the property Larry Winget entrusted to it as part of his estate planning. The district court's contrary finding was error, as was the imposition of charging orders on property owned by Larry Winget, against whom Chase does not have an enforceable judgment.

Accordingly, Mr. Winget respectfully requests that this Court reverse the district court's charging orders and hold that Chase may not execute on property that Larry Winget owns, including that which is held in his Revocable Trust.

## **II. THE REVOCABLE TRUST.**

Mr. Winget and his wife Alicia have been married for 59 years. They have five children, 19 grandchildren and 23 great grandchildren (with two more on the way). In 1987, Mr. Winget created the "Larry J. Winget Living Trust," by executing a trust instrument of the same name. (Revocable Trust, RE 696-1, Page ID ## 25415-25453.) The trust instrument provided that the trust was revocable by Mr. Winget at any time. Then, as now, revocable inter vivos trusts were commonly used as will substitutes because they allow a settlor's property to be distributed at his death according to his wishes without the need for probate. Mechanically, this meant that Mr. Winget provided the trustee with bare legal title in the property to be held in trust.

the Winget Trust.”). This Court later agreed, noting that the dispute arises out of “a credit agreement between defendant...Chase *and entities owned and operated by plaintiff Larry Winget*, some assets of which are *held* by the Larry J. Winget Living Trust.” *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed. App’x 246, 248 (6th Cir. 2015) (emphasis added).

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The previous rulings in this case—as well as the law applicable to trusts, creditor rights, property, and taxes—all make clear that Larry Winget has always

To account for growth in his family and his estate, Larry Winget revised the trust instrument defining the terms of the Revocable Trust on a few occasions over the years, including revoking it entirely on one occasion in favor of more sophisticated estate planning.<sup>1</sup> But in each iteration of the trust instrument, Mr. Winget has been named the settlor, trustee, and sole lifetime beneficiary. And he has always retained the unrestricted right to revoke the Revocable Trust and take back the property held in trust. Finally, Mr. Winget has always exercised uninterrupted and exclusive dominion and control over the assets held in his Revocable Trust. In other words, he has always been the owner of the assets he placed in the Revocable Trust.

### **III. THE GUARANTY.**

Chase is the administrative agent for a group of lenders that extended credit to one of Larry Winget's companies, Venture Holdings Company, LLC ("Venture"), pursuant to a Credit Agreement signed in 1999. (Credit Agreement, RE 530-1-530-2, Page ID ## 18741-18892.) When Venture's German automotive manufacturing

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<sup>1</sup> In a separate action, Chase asserted that Mr. Winget's revocation of his Revocable Trust in January 2014 constituted a fraudulent conveyance. (E.D. Mich. Case No. 15-cv-13469, Counterclaims, RE 11, Page ID ## 34-67.) That ongoing case is irrelevant in this appeal. Mr. Winget reinstated the Revocable Trust in February 2018, after which Chase began pursuing collection efforts against the assets held within it. The merits of Chase's collection efforts in the post-judgment proceeding against the Revocable Trust are the exclusive focus of this appeal.

operation, Peguform, was placed into insolvency by the German government in 2002, covenant defaults in Venture's Credit Agreement were triggered. (*Id.*) As a result, Chase and Mr. Winget entered into workout negotiations to restructure the loan. This case arises out of a guaranty (the "Guaranty") that was executed as part of that restructuring. (Guaranty, RE 487-1, Page ID ## 16717-16729.)

Larry Winget signed the Guaranty individually. He also provided a pledge of property that was subject to release upon payment of \$50 million. (Pledge, RE 530-5, Page ID ## 18922-18937.) Because the property Larry Winget pledged in support of the Guaranty was held in the Revocable Trust, the trustee of the Revocable Trust also signed the Guaranty and pledge. In 2003, Venture filed for bankruptcy protection. Venture's assets were ultimately liquidated and the proceeds applied to Chase's outstanding debt, leaving a deficiency. Chase then sued Larry Winget personally and the Revocable Trust to enforce their divergent promises under the Guaranty.

#### **IV. THE JUDGMENT.**

In 2008, Chase filed an action to enforce the Guaranty against both Mr. Winget and the Revocable Trust. (Complaint, RE 1.) In its Complaint, Chase conceded that its recourse against Mr. Winget under the Guaranty was limited to \$50 million. (Memo. and Order, RE 671, Page ID # 24907.) But Chase claimed its recourse against the Revocable Trust under the Guaranty was unlimited.

On January 28, 2009, Chase moved for summary judgment on its claim that the Revocable Trust had unlimited liability under the Guaranty. (Motion for Summary Judg., RE 23, Page ID ## 627-656.) The district court denied Chase's motion without prejudice and allowed Winget to file a counterclaim seeking reformation of the Guaranty to comport with the parties' true intent—that the Guaranty be limited to \$50 million as to both Winget *and* the Revocable Trust. On October 17, 2012, after an 11-day bench trial on the counterclaim for reformation, the district court reformed the Guaranty to limit Chase's recourse against the Revocable Trust to \$50 million just as it was limited against Mr. Winget. (Decision on Reformation, RE 365, Page ID # 13835.) After entry of the district court's judgment reforming the Guaranty Mr. Winget paid Chase \$50 million, which released the pledged trust property and extinguished his obligations under the Guaranty.

Chase appealed, and on February 20, 2015 this Court reversed the district court's Order reforming the Guaranty. Although the Court did not take issue with the district court's conclusion that the parties intended the Revocable Trust's maximum exposure to be \$50 million, it held that Michigan does not allow courts to reform unambiguous contracts containing an integration clause, even if reformation may be necessary to effectuate the parties' mutual intent. *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed. App'x 246 at 258.

The mandate instructed the district court to enter judgment on Count I of Chase's Complaint—under which unlimited enforcement of the Guaranty against the Revocable Trust was sought—in favor of Chase. So, Judgment on Count I was entered by the district court in Chase's favor on July 28, 2015 in the amount of \$425,113,115.59, not including costs or interest. (*See* Order Cons. Cases, RE 686, Page ID # 25026.) That Judgment is now final and unappealable.

With Larry Winget's obligations under the Judgment satisfied and extinguished by his own \$50 million payment, Chase began pursuing collection efforts against his Revocable Trust, its sole remaining judgment creditor. (Memo. and Order, RE 751, Page ID ## 26594-26595.) This appeal arises out of those collection efforts.

#### **V. THE CHARGING ORDERS.**

Certificated membership interests in LLCs make up the bulk of the property Larry Winget placed in trust for estate planning purposes. Chase asked the district court to impose charging orders on the LLC membership interests based on its Judgment against the Revocable Trust. Larry Winget objected and asserted his ownership of the certificated interests held in his Revocable Trust. He argued that the Revocable Trust itself—either through its trustee or otherwise—had no ownership interest in the LLC certificates to which charging orders could attach. The district court disagreed, holding that property owned by Mr. Winget as settlor

of the Revocable Trust is “separate from real and personal property owned by” the Revocable Trust. (*See* Hearing Trans., RE 857, Page ID ## 28009-28010, pp. 5:22-6:1).

Having concluded that the “[Revocable] Trust, through its trustee, owned the property titled in its name,” the district court entered 15 charging orders against the LLCs in Chase’s favor in satisfaction of the Judgment. (Memo. and Order, RE 732, Page ID # 26289; Orders Granting Mots. for Charging Order, REs 839-853, Page ID ## 27950-27965, 27968-27981.) The district court did so despite the fact that Larry Winget alone owns the property held in his Revocable Trust, and Chase has no judgment to execute against Larry Winget. This appeal followed.

### SUMMARY OF THE ARGUMENT

On August 15, 2018 the district court imposed charging orders on the certificated interests of 15 LLCs held in Larry Winget's Revocable Trust, which he created in 1987. Charging orders can only attach to property owned by the judgment debtor. Here, Chase's only judgment debtor is the Revocable Trust, which is an estate planning tool—a mere will substitute. It is not an entity. As such, it does not own the property Larry Winget entrusted to it. Larry Winget, as settlor, remains the owner of the property held in trust. The district court held exactly that in two prior rulings in this case issued in 2011 and 2012. To paraphrase those prior rulings: because Larry Winget set up his estate planning trust as a revocable trust, he remained the absolute owner of the property placed within it during his lifetime.

In fact, the only reason Mr. Winget established the Revocable Trust was to avoid an expensive and public probate proceeding and to devise property to his family upon his death. And by so doing, Mr. Winget did not relinquish his ownership of the property he placed in it—he retained it. It could be no other way. By definition, a revocable trust holds property that is owned by another, for the benefit of another. Ownership by a trust of the very property entrusted to it for the benefit of another would eliminate its express purpose and extinguish its existence.

All of this means that a charging order can be imposed on the LLC certificated interests held in trust *only* if Chase has an enforceable judgment against Mr. Winget



individually. But Chase has no such judgment. Mr. Winget paid Chase what he owed under the Judgment. Chase has only a judgment against his Revocable Trust. And the Revocable Trust does not own the property entrusted to it.

This may all seem like a hyper-technicality, one intended to deprive Chase of the money it is owed under the Judgment it has against the Revocable Trust. Not so. From the beginning, Chase knew that it was dealing with a revocable trust, and it assumed the risk of collecting nothing *unless* Larry Winget either: (1) executed a guaranty, like that of the Revocable Trust, with unlimited recourse; or (2) executed a pledge of all the property held in trust in support of the *Revocable Trust's* guaranty. But Chase got neither of these things from Larry Winget. Instead, Chase took only a limited pledge of the property held in trust which, by agreement, was released in 2014 upon Mr. Winget's payment of \$50 million.

When Chase asked for an unlimited guaranty from Larry Winget, he said "no." Chase entered into the deal anyway, eyes wide open. In this appeal, Larry Winget asks this Court, consistent with its prior decisions in this case, to enforce the bargain struck by these two sophisticated parties, reverse the charging orders entered by the district court, and clarify that Larry Winget may revoke his Revocable Trust without adverse consequences as the owner of the property entrusted to it.

## ARGUMENT

### I. STANDARD OF REVIEW.

Post-judgment collection efforts are governed by the practices and procedures of the state of Michigan. Fed. R. Civ. P. 69 (“...The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.”). This appeal presents post-judgment collection issues involving the Michigan Limited Liability Company Act, the Michigan Trust Code, as well as common law. *See Legg v. Chopra*, 286 F.3d 286, 289 (6th Cir. 2002), citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (“In federal diversity actions, state law governs substantive issues and federal law governs procedural issues.”).

Questions concerning statutory interpretation are reviewed *de novo*. *N.W. ex rel. J.W. v. Boone County Bd. of Educ.*, 763 F.3d 611, 615 (6th Cir. 2014) (“Statutory interpretation presents a question of law that we also review *de novo*.”); *Roberts v. Hamer*, 655 F.3d 578, 582 (6th Cir. 2011). More specifically, a district court’s legal conclusions concerning the application of post-judgment collection remedies are reviewed *de novo*. *Balfour Beatty Bahamas, Ltd. v. Bush*, 170 F.3d 1048, 1050 (11th Cir. 1999).

**II. CHARGING ORDERS ATTACH ONLY TO PROPERTY OWNED BY THE JUDGMENT DEBTOR.**

In relevant part, Michigan's charging order statute provides:

(1) If a court of competent jurisdiction receives an application from any judgment creditor of a member of a limited liability company, the court may charge the membership interest of the member with payment of the unsatisfied amount of judgment with interest.

(2) If a limited liability company is served with a charging order and notified of the terms of that order, then to the extent described in the order, the member's judgment creditor described in the order is entitled to receive only any distribution or distributions to which the judgment creditor is entitled with respect to the member's membership interest. [MCL § 450.4507.]

Chase claimed below that it was entitled to charging orders against LLC membership interests held in the Revocable Trust based on its Judgment against the Revocable Trust. The district court agreed. This was reversible error.

Charging orders, like all other creditor attachments, can attach only to ownership interests in property. MCL § 450.4507(2); *see also* 51 AM. JUR. 2D, *Limited Liability Companies*, § 23 (2003 & Supp. 2018) (explaining that a charging order remedy "affords a judgment creditor access to a judgment debtor's rights to profits and distributions from the business entity in which the debtor has an ownership interest"). Property held in trust for another through possession of bare legal title is not an attachable ownership interest. *Begiers v. IRS*, 496 U.S. 53, 59 (1990) (because debtor lacked an equity interest in the property he held in trust for another, the property so held was not available to his creditors); *In re Omegas Grp.*

*Inc.*, 16 F.3d 1443, 1449 (6th Cir. 1994) (A “trustee of an express trust generally has no right to the assets kept in trust, and the trustee in bankruptcy must fork them over to the beneficiary.”); *In re Cannon*, 277 F.3d 838, 850-851 (6th Cir. 2002) (funds held in trust by the debtor for his clients are not reachable by his creditors); *Meoli v. The Huntington Nat'l Bank*, 848 F.3d 716, 725 (6th Cir. 2017), quoting *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 891 (7th Cir. 1988) (holding that a bank receiving property to hold for the benefit of another “received nothing...that it could call its own....”); see also *Atlas Portland Cement Co. v. Fox*, 265 F. 444, 446 (D.C. Cir. 1920) (A “lien of a judgment does not attach the land to which the judgment debtor has only a naked legal title, unaccompanied by any beneficial interest, the equitable and beneficial title being in another.”); Bogert, *THE LAW OF TRUSTS AND TRUSTEES*, § 146 (2d ed. 1984 & 2017 Update) (“The trustee's interest is a bare legal interest, not entitling him to any benefit or profit from the trust property...The beneficial equitable interest is in the beneficiary and the creditors of the trustee cannot attach or garnish that interest.”).

As discussed below, Chase’s only judgment debtor is the Revocable Trust. And all the Revocable Trust possesses—all it *can* possess and still maintain its existence as a trust—is bare legal title in property that is still owned by its settlor, Larry Winget. And Larry Winget is not a judgment debtor to Chase.

**III. THE DISTRICT COURT ERRED IN IMPOSING CHARGING ORDERS ON PROPERTY OWNED BY LARRY WINGET, WHO IS NOT A JUDGMENT DEBTOR.**

**A. The district court was correct when it previously ruled Larry Winget owns the property in his Revocable Trust.**

Chase has a judgment against a revocable trust, but no corresponding enforceable judgment against its settlor, Larry Winget. It is undisputed that Mr. Winget has paid Chase all he owes it, fully satisfying his obligations under the Judgment. (Amended Final Judgment, RE 568, Page ID ## 24046-24048.) So, Larry Winget's Revocable Trust is the only remaining judgment debtor here. And Chase is seeking to enforce its Judgment by executing on property Mr. Winget placed in his Revocable Trust as part of his estate planning.

But Chase's judgment debtor does not own those assets; Mr. Winget does.

The district court so held in a 2011 Order:

Under common law, property in a revocable trust *is property of the settlor* and can be reached by creditors during the settlor's lifetime. See MCL § 700.7506(1)(a). This is so because *the settlor owns the assets in a revocable trust*. See MCL § 556.128. [*JPMorgan Chase Bank, N.A. v. Winget*, 08-cv-13845, 2011 WL 6181438, \*10 (E.D. Mich. 2011) (emphasis added).]

The district court held the same in a 2012 Order: "Here, Winget was the settlor, trustee and beneficiary of the Winget Trust. *As settlor, Winget owned the assets in the [Revocable] Trust.*" *JPMorgan Chase Bank, N.A. v. Winget*, 901 F. Supp. 2d 955, 972 (E.D. Mich. 2012) (emphasis added). And in reviewing the district court's 2012 Order, this Court echoed the lower court's holding regarding

ownership of the assets held in Mr. Winget's Revocable Trust: "This diversity action is...between...Chase and entities *owned and operated by Larry Winget*, some assets of which *are held by* the [Revocable] Trust." *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 248 (6th Cir. 2015) (emphasis added).<sup>2</sup>

These prior holdings were correct and the authority cited by the district court supports its conclusion. MCL § 556.128 ("when the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter *deemed still to be the absolute owner of the estate conveyed...*") (emphasis added); MCL § 700.7506(1)(a) ("During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors."). Both of these statutes make clear the retained power of revocation during the settlor's lifetime means the settlor owns the assets he places in trust. *Accord* Restatement (Third) of Trusts, § 74, cmt a (2007) (the power of revocation is "the equivalent of ownership of the trust property" and

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<sup>2</sup> This statement was dicta because the issue then before the Court was not who owned the assets in Mr. Winget's Revocable Trust. Rather, the issue was whether the district court erred in reforming the Guaranty to limit Chase's recourse against Mr. Winget and his Revocable Trust to \$50 million. This Court ruled that the reformation was error because, notwithstanding the parties' intent, Michigan law does not allow reformation of an integrated, unambiguous contract. This appeal, for the first time, asks whether Mr. Winget owns the assets he placed in his Revocable Trust as part of his estate planning. This Court's previous statement answers this question correctly, just like the district court's previous holdings: Mr. Winget is the owner.

is “held by the settlor or donee individually and not in a fiduciary capacity, even if the power holder also serves as trustee”); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) (“The owner who retains both the equitable life interest and the power to alter and revoke the beneficiary designation has used the trust form to achieve the effect of testation. Only nomenclature distinguishes the remainder interest created by such a trust from the mere expectancy arising under a will.”).

A settlor remains the owner of his assets placed in a revocable trust because the trust instrument is merely a will substitute. This is an immutable principle of law that has been recognized repeatedly by legislatures, courts, the Restatement, and every major treatise on trusts across the country. *E.g. Bullis v. Downes*, 612 N.W.2d 435, 439 (Mich. App. 2000) (“To consider a revocable trust as a traditional instrument fails to recognize that it actually functions as a will...” (citation omitted)); *In re Rhea Brody Living Tr.*, dated January 17, 1978, -- N.W.2d --, 2018 WL 3746817, \*3, n. 3 (Mich. App. Aug. 7, 2018) (Trust “assets...for all effective purposes, still belong to the grantor-settlors and are funded into the ‘trust’ only to avoid the need to probate *unfunded* assets (via a pour-over will) after death.”) (emphasis in original); Restatement (Third) of Trusts, § 25, cmt a (2003) (“...the revocable trust is widely used as a legally accepted substitute for the will as the central document of an estate plan...”).

To put it another way, Mr. Winget gave away nothing at all by creating the trust. William P. Lapiana, *The Creation of a Revocable Trust is not a 'Transfer,'* 44 EST. PLAN. 44, 45 (2017), 2017 WL 728276, \*2 (“The understandable desire to make it an ever-more-perfect will substitute has led to a legal framework that, for practical purposes, actually supports the conclusion...codified in [MCL § 700.7603(1)]...that the grantor has given away nothing at all by creating the trust.”); MCL § 700.7603(1) (“... while a trust is revocable, rights of the trust beneficiaries are subject to the control of ... the settlor.”); *In re Moise*, 463 B.R. 197, 200 (Bankr. D. Mass. 2012) (holding that settlors’ funding of a revocable trust “amounted to nothing more than moving their own money from one pocket to another”). This legal and practical reality is recognized throughout Michigan law, which provides that placing property in a revocable trust does not alter ownership. *See e.g.* MCL § 211.27a(7)(g)(i) (assignment to revocable trust does not change ownership under Michigan’s General Property Tax Act); MCL § 211.7dd(a)(vi) (grantor remains owner of real estate placed in revocable trust); MCL § 211.27a(6) (conveyance by settlor and sole beneficiary to trust is not transfer of ownership); *Sebastian J. Mancuso Family Trust v. City of Charlevoix*, 831 N.W.2d 907, 911 (Mich. App. 2013) (“[I]t is apparent that a transfer of ownership occurs when the property is transferred from one owner to a wholly new owner. Exceptions are made...when the settlor [of a trust] is the sole present beneficiary because ownership in that situation does not change.”). And



Federal law is no different; Larry Winget, from 1987 on, has been required to claim on his personal tax return and pay taxes on all earnings generated by the LLCs, the certificates of which are held in the name of the Revocable Trust. 26 U.S.C.A. § 674(a) (under federal tax law, the settlor of a revocable trust remains the owner of the assets held in trust); 26 CFR 301.7701-3(b) (unless a single-member LLC elects to be taxed as a corporation, it will be disregarded as an entity separate from its owner for tax purposes).

The district court's previous rulings were correct: Larry Winget owns the property he placed in the Revocable Trust. Because this is so, the district court erred in imposing charging orders against that property where Chase does not have an enforceable Judgment against Mr. Winget.

**B. Only creditors of the settlor, Larry Winget, can execute on property held in his Revocable Trust.**

Because the settlor of a revocable trust retains ownership, only creditors of Larry Winget as an individual can reach the property placed in a revocable trust.

MCL § 556.128 says this explicitly:

When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute

owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned.<sup>3</sup>

Similarly, MCL § 566.131 provides:

[A] conveyance ... of property made in trust for the use of the person making the ... conveyance ... is void as against the creditors, existing or subsequent, of the person.

In confirming that the settlor remains the owner of assets placed in a revocable trust, these laws provide predictability for creditors dealing with both settlors and trustees of a revocable trust. Creditors are on notice that a judgment secured against a settlor *can* be satisfied through execution on property he is holding in a revocable trust. Conversely, creditors are on notice that a judgment secured against only the trustee of a revocable trust—or only the trust itself—does *not* give the creditor access to property being held in trust by its debtor. Chase, as a creditor of the Revocable Trust, is charged with this knowledge. *Adams Outdoor Advert. v. City of E. Lansing*, 614 N.W.2d 634, 639, n. 7 (Mich. 2000) (“People are presumed to know the law.”); *N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) (“All persons are charged with knowledge of the provisions of statutes. . .”); *Nichols v. Pospiech*, 286 N.W.2d 633, 636 (Mich. 1939) (“[A]ny person dealing with a trustee must determine

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<sup>3</sup> The district court cited this statute in its 2012 Order to support its prior conclusion that Mr. Winget owned the assets held in his Revocable Trust. *JPMorgan Chase Bank, N.A. v. Winget*, 901 F. Supp. 2d 955, 972 (E.D. Mich. 2012).

at its own risk the authority of such trustee”); *accord, e.g.*, MCL § 700.7910, Reporter’s Comment (“Third parties, who are advised by the trustee that he or she is acting in a representative capacity, are on notice to inquire further into the exact trust with which the third party is interacting and the nature and extent of the assets subject to the trust and the trustee’s powers.”).

So, when Chase took an unlimited guaranty from the Revocable Trust, it knew that any judgment based on that guaranty could *not* be satisfied through execution on Larry Winget’s property *unless* he joined in the Revocable Trust’s unlimited guaranty. It is undisputed that he never did so. Quite the opposite, when Chase asked Larry Winget to provide an unlimited recourse guaranty, he said “no,” and Chase agreed to limit its recourse against Mr. Winget and his property to \$50 million, an amount which he has already paid. Larry Winget is no longer a judgment debtor of Chase, and Chase cannot reach his property to satisfy its Judgment against a different debtor—the Revocable Trust.

The United States Court of Appeals for the Tenth Circuit was presented with a nearly identical scenario in *In re Brock*, 587 Fed. App’x 485 (10th Cir. October 16, 2014). There, a bank likewise took a promise to pay from the trustee of a revocable trust, who was also the settlor, but did not secure the same promise from the revocable trust’s settlors. When the bank, like Chase, sought to enforce that promise by executing on the assets that the revocable trust held, the Tenth Circuit

did not hesitate in holding that the bank could not attach the trust assets to satisfy its claim against the revocable trust. Those assets were owned by the settlors:

As to the merits, the parties ... agree that Colorado law recognizes the general rule that a creditor can reach a debtor's assets placed in trust to the same extent that the debtor is entitled to reach such assets ... *They disagree, however, whether this general rule can be extrapolated to mean ... that the settlor of a trust is liable for obligations incurred by the trust. We agree with the Brocks that it cannot.* [587 Fed. App'x 485 at 489 (emphasis added).]

The Tenth Circuit's logic is consistent with the many authorities cited above, and it applies with equal force here. Like Colorado, Michigan law recognizes the general rule that a creditor can reach a debtor's assets placed in trust because the debtor owns those assets. MCL § 556.128; compare *In re Cohen*, 8 P.3d 429, 432 (Colo. 1999), citing Restatement (Second) of Trusts, § 156 (1959) (finding that a creditor of a settlor may reach property placed in trust by the settlor to satisfy a claim against it). But as the Tenth Circuit correctly observed, this general rule does *not* mean the converse, i.e., that a creditor of a revocable trust *only*, like Chase, can reach property held in trust to satisfy its claim against the revocable trust.

To the contrary, under *Brock*, if a creditor looks solely to a revocable trust as its obligor, then the property held in the trust for the benefit of the settlors cannot be used to satisfy the creditor's claim. This means that while a creditor of the settlor may reach assets that the settlor places in a revocable trust, the opposite is not true. 587 Fed. App'x 485 at 489. And it is not "illogical" to deprive a creditor of the

revocable trust of property held by the trust while simultaneously allowing recovery from that property by creditors of the settlor. “[I]t is what the parties agreed to.” *Id.* (emphasis added).

So too here. Chase agreed to unlimited recourse against the Revocable Trust without obtaining the same unlimited recourse against Larry Winget. Chase knew that the promises were not equivalent. It knew it was dealing with a Revocable Trust, and it went forward with the deal anyway. That Chase did not even bother to review the trust instrument before taking an unsecured promise from the Revocable Trust does not change the result. *Nichols*, 286 N.W.2d 633 at 636 (“Any person dealing with a trustee must determine at its own risk the authority of the trustee.”). Nor can Chase prevail by claiming ignorance of the law that a settlor of a revocable trust owns the property held within it. MCL § 556.128; *Adams*, 614 N.W.2d 634 at 639, n. 7 (“People are presumed to know the law.”); *N. Laramie Land Co.*, 268 U.S. 276 at 283 (“All persons are charged with knowledge of the provisions of statutes...”).

Simply put, because Chase’s recourse against Larry Winget is exhausted, Chase cannot reach *Larry Winget’s property* to satisfy Chase’s Judgment against the Revocable Trust. As the Tenth Circuit recognized, this is not an inequitable result; “it is what the parties agreed to.” In fact, this Court echoed this same admonition when it held at a previous stage of this case that “unambiguous contracts are not

open to judicial construction and must be *enforced as written.*” *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed. App’x 246, 256 (6th Cir. 2015) (citation omitted; emphasis in original).

The district court’s decision here, like the lower court’s decision in *Brock*, should be reversed. This Court should hold that any collection activity under the Judgment against the Revocable Trust cannot include execution upon property owned by Larry Winget, whether inside or outside the Revocable Trust. And it should hold that Larry Winget can revoke his Revocable Trust without adverse consequences. *See* MCL § 700.7103(h) (defining “revocable”, as applied to a trust, to mean “revocable by the settlor without the consent of the trustee *or a person holding an adverse interest*”) (emphasis added).

**IV. THE DISTRICT COURT ERRED IN IMPOSING CHARGING ORDERS BASED UPON CHASE’S JUDGMENT AGAINST THE REVOCABLE TRUST BECAUSE IT OWNS NOTHING OF ECONOMIC VALUE.**

**A. A revocable trust is simply a fiduciary relationship that functions as a will substitute.**

When a settlor moves property into a revocable trust, he is not conveying ownership of that property to someone or something else. All the settlor has accomplished is the creation of “a fiduciary relationship with respect to property.”

M. Civ. JI § 179.02. That relationship *is* the revocable trust:

A trust...is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal

with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee. [Restatement (Third) of Trusts, § 2 (2003).]

In fact, the trust itself, after its creation, does not even become a legally recognized entity:

A trust is not an entity distinct from its trustees and capable of legal action on its own behalf but merely a fiduciary relationship with respect to property. A trust is not a legal ‘person’ which can own property or enter into contracts, rather, a trust is a relationship having certain characteristics. [76 AM. JUR. 2D, *Trusts*, § 2 (2016).]

*Accord*, e.g., MCL § 700.7401, Reporter’s Comment (“The trust is not a separate legal person or entity.”).

In other words, a revocable trust does nothing more than define the settlor’s right to use his property during his life and how it will be devised at his death. The Michigan Court of Appeals confirmed this reality in *Bullis v. Downes*, 612 N.W.2d 435 (Mich. App. 2000), where a plaintiff brought a malpractice action against an attorney who drafted a will and revocable trust for her mother, the decedent. *Id.* at 436. The defendant moved for summary judgment on the basis that the revocable trust was inadmissible extrinsic evidence. *Id.* at 438-39. The lower court agreed, but the Court of Appeals reversed, holding that the revocable trust was part of the decedent’s estate planning:

We believe it is clear ... that the Timm revocable trust was an integral part of the decedent’s estate plan. ‘The revocable trust is a valid will substitute.’ Haskell, Preface to Wills, Trusts & Administration (2d ed., 1994), p. 126. Although not testamentary in nature, the decedent’s trust

functions essentially as a testamentary instrument. *In re Estate of Tisdale*, 171 Misc.2d 716, 719, 655 N.Y.S.2d 809 (Surrogate's Ct. 1997) (“[T]o consider a revocable trust a traditional instrument fails to recognize that it actually functions as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor’s property.’...”). [*Id.* at 439.]

As in *Bullis*, the Revocable Trust did not immediately dispossess Larry Winget of ownership of his property, any more than creating a will alters a testator’s ownership. Establishing the Revocable Trust simply created an “ambulatory instrument that speaks at death to determine the disposition of [Mr. Winget’s] property.” *Id.* at 439; accord MCL § 556.128 (a settlor that retains the right of revocation is the owner of property held in trust); MCL § 700.7506(1)(a) (“During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.”); *In re Marshall*, 392 F.3d 1118, 1135 (9th Cir. 2004) (“An inter vivos trust which disposes of property upon the death of the settlor is a recognized will substitute.”); Restatement (Third) of Property, § 7.1 (2003) (“A will substitute is an arrangement respecting property...that is established during the donor’s life, under which (1) the right to possession or enjoyment of the property...shifts outside of probate to the donee at the donor’s death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.”);<sup>4</sup> Bogert,

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<sup>4</sup> § 7.1, cmt. a (“Common property or contractual arrangements that are used as will substitutes include revocable inter vivos trusts...”).



THE LAW OF TRUSTS AND TRUSTEES, § 1061 (June 2017 Update) (“The revocable living trust is sometimes referred to as a will substitute. The living trust serves the same purpose as a will since they are both designed to dispose of an individual’s assets at the time of his/her death.”).

**B. A revocable trust, by definition, does not own property.**

The district court held that the Revocable Trust owns the property it holds in trust for the settlor, and this property is “separate from real and personal property owned by” Mr. Winget as settlor. (Hearing Trans., RE 857, Page ID ## 28009-28010, pp. 5:22-6:1; Memo. and Order, RE 732, Page ID # 26289.) But as just explained, it is legally impossible for a revocable trust, or its trustee, to become the owner of the property that it holds in trust for the settlor. This is because the trust relationship, by its nature, is established solely for the trustee to hold property owned by, and for the benefit of, another. *Nash v. Duncan Park Comm’n*, 848 N.W.2d 435, 447 (Mich. App. 2014) (“The fundamental characteristics that distinguish a trust from other legal relationships are the existence of a fiduciary relationship and the holding of title to property by one person for the benefit of another.”).

In contrast, an owner holds property for its own benefit. Restatement (Third) of Trusts § 2, cmt d (2003) (“The term ‘owner’ is used in this Restatement to indicate a person by whom one or more interests are held for the person's own benefit.”). So, if a revocable trust were to become the owner of property, it would no longer be

holding it “for the benefit of another.” *Nash*, 848 N.W.2d 435 at 447. One cannot be both a trust and an owner of the same property.

What intuition reveals about how an estate planning trust works is confirmed by the legal mechanics that underpin establishing one. The legal mechanism by which a trustee holds property owned by another and for the benefit of another is the division of title. *In re Barnes*, 264 B.R. 415, 432 (Bankr. E.D. Mich. 2001) (describing the division of title as the “*sine qua non*” of a trust); *Apollinari v. Johnson*, 305 N.W.2d 565, 567 (Mich. App. 1981) (The “separation of legal and equitable title is one of the distinctive features of the trust relationship.”). A trustee is granted legal title to the trust property for the sole purpose of managing it on behalf of the settlor. *In re Lewiston*, 539 B.R. 154, 159 (E.D. Mich. 2015); Restatement (Third) of Trusts § 3, Reporter’s Notes, cmt b (2003) (“Before property can be said to be held in trust by a trustee, the trustee must have legal title. Without legal title the trustee holds nothing in trust.”). The settlor, in turn, remains the owner of the trust property by retaining beneficial and equitable title in the property. *Laurent v. Anderson*, 70 F.2d 819, 824 (6th Cir. 1934) (“The evidence establishes that Banco was in every sense the true and beneficial owner of the national bank stock involved; the trustees holding only the bare legal title to the stock.”).

This division of title is necessary for a trust to exist. If legal title and beneficial title in property are held by the same person, no trust exists. *Sicherman v. Ohio Pub.*

*Employees Deferred Compen. Program (In re Leadbetter)*, 992 F.2d 1216, \*3 (6th Cir. 1993) (“By definition, a trust exists only when one party, the trustee, holds legal title to the corpus, while another party, the beneficiary, holds equitable or beneficial title in the corpus.”);<sup>5</sup> *In re Page*, 239 B.R. 755, 763–64 (Bankr. W.D. Mich. 1999) (“When the same person holds both the legal title and the equitable interest, the trust terminates, as a matter of law.”); Restatement (Third) of Trusts, § 69 (2003). So, the Revocable Trust’s very existence depends on its holding of *only* legal title in property owned by its settlor Larry Winget. This means it is legally impossible for the Revocable Trust to own the property entrusted to it by Mr. Winget. The district court’s decision holding just the opposite should be reversed.

**C. An unsecured promise by a trustee is not enforceable against the settlor or his property unless the settlor joins in the promise.**

Through possession of legal title, a trustee is generally granted the power to act on the “trust property” by selling it, pledging it, or otherwise encumbering it.<sup>6</sup> See generally MCL § 700.7816(1) (trustee powers are limited to acting on “the trust

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<sup>5</sup> As is generally the case with revocable trusts, Larry Winget is both the settlor and the sole beneficiary during his lifetime. *JPMorgan Chase Bank, N.A. v. Winget*, 901 F. Supp. 2d 955, 972 (E.D. Mich. 2012) (“Here, Winget was the settlor, trustee, and beneficiary of the [Revocable] Trust. As settlor, *Winget owned the assets in the [Revocable] Trust.*”) (emphasis added).

<sup>6</sup> “Trust property” as used here is as defined in the Restatement (Third) of Trusts, § 3 (2003) (“The property held in trust is the trust property.”).

property”). These powers do not equal ownership. *Markham v. Fay*, 74 F.3d 1347, 1357–58 (1st Cir. 1996) (“As trustee, Fay has broad powers to manage and control the trust property. The IRS makes much of these powers, but we attribute them no significance whatsoever...As we have held in the estate tax context, a settlor/trustee's administrative and management powers cannot be equated with ownership.”). And in any case, during the settlor’s lifetime and while the trust is revocable, these powers to act on the property held in trust can only be exercised with the settlor’s approval. MCL § 700.7603 (“[W]hile a trust is revocable ... the duties of the trustee are owed exclusively to the settlor.”); MCL § 700.7816(2) (“The exercise of a power [by a trustee] is subject to the fiduciary duties prescribed in this article.”); Restatement (Third) of Trusts, § 74, cmt a (2007) (the power of revocation is “the equivalent of ownership of the trust property” and is “held by the settlor or donee individually and not in a fiduciary capacity, even if the power holder also serves as trustee”).

Here, Larry Winget approved only one act on the trust property; the grant of a pledge that was subject to release upon payment of \$50 million. *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed. App’x 246 at 254. Mr. Winget paid that \$50 million, and Chase released that pledge, before the Judgment against the Revocable Trust was even entered. As such, Chase’s Judgment against the Revocable Trust is unsecured. It is not a judgment against specific property; it is not a claim and

delivery judgment. It is merely an unsecured Judgment against the Revocable Trust itself. This is crucial, because an unsecured promise by a trustee of a revocable trust is *not* enforceable against the trust settlor. A trustee is *not* an agent of the settlor, and has no authority to bind him contractually. 76 AM. JUR. 2D, *Trusts*, § 10 (2016) (“[A] trust and an agency are distinguishable on the basis of the non-representative role of the trustee and the representative role of the agent.”). This Court recognized this reality in *Cliffs Corp. v. United States*, 103 F.2d 77 (6th Cir. 1939):

There is a substantial difference between a trustee and a proxy. The latter is an agent who represents and acts for his principal who is bound by what is done in the discharge of that agency. A trustee is not an agent, but a person in whom there is vested for the benefit of another, some estate, interest, or power in or affecting property. A trustee contracts for and binds only himself as he has no principal. [*Id.* at 80.]

This means that Chase’s Judgment, which is based on an unsecured promise made by the trustee of the Revocable Trust, is not enforceable against the settlor, Larry Winget, or his property unless he joined in the Revocable Trust’s promise. This is true even where the promise by the Revocable Trust is made by a trustee who is also the settlor. *In re Brock*, 587 Fed. App’x 485, 487 (10th Cir. October 16, 2014) (“[T]he Brock Trust Note was between the Trust and the [bank], and executed by the Brocks in their capacities as trustees—not individually.”).

Here, Larry Winget as settlor did *not* join in the promise made by the Revocable Trust. Just the opposite, he flatly refused to provide it. (Trial Trans., RE 494, Page ID # 17188, p. 114:15-18 (“I made it perfectly clear to the Bank on

repeated occasions that my personal assets, other than those directly tied to Venture's operations and the 50 million Guaranty of South Africa and Australia, were off the table.”.) This is why Chase does not have an enforceable judgment against Larry Winget as settlor. And it is because Chase lacks a judgment against him as settlor that it cannot reach property owned by him to satisfy the Judgment against the Revocable Trust. *In re Brock*, 587 Fed. App’x 485 (10th Cir. October 16, 2014); *see also* 7 C.J.S. Attachment § 78 (2015) (“The mere fact that the attachment defendant is in possession of property does not render it subject to the attachment when such possession is held under another who is the true owner.”). The district court’s decision to the contrary was error.

**D. A charging order cannot attach to bare legal title in the hands of a trustee because it has no economic value.**

Because the Revocable Trust held only bare legal title in the property entrusted to it, a charging order cannot attach to that property. This is because legal title is valueless; so says the Supreme Court and every circuit court of appeals, including this Court.

In *U.S. v. Whiting Pools*, 462 U.S. 198 (1983), the Supreme Court characterized bare legal title in the hands of a trustee as a “minor interest” which, when conveyed, provides no “equitable interest in the property.” *Id.* at 204, n. 8. In *In re Cannon*, 277 F.3d 838 (6th Cir. 2002), this Court likewise held that a trustee holding only legal title has no cognizable interest in property. *Id.* at 851-52.

In *McVay v. W. Plains Serv. Corp.*, 823 F.2d 1395 (10th Cir. 1987), the Tenth Circuit held that because the defendant “held no more than a bare legal interest in the note and mortgage in question ... such interest was without value susceptible of attachment.” *Id.* at 1396. In *Brewster v. Gage*, 30 F.2d 604 (2d Cir. 1929), the Second Circuit held that legal title in the hands of a trustee “has no value in and of itself, and, had it been sought to have been made the subject of a sale, carrying no right to equitable title, it would have commanded no price nor interfered with the carrying out of the trust of the administrator.” *Id.* at 605.

As a final example, in *Anderson v. Architectural Glass Constr., Inc. (In re Pfister)*, 749 F.3d 294 (4th Cir. 2014) the Fourth Circuit explained that a “trust severs the legal and equitable interests in property, allowing the debtor to possess *either* the property’s equitable interest (a valuable asset) or bare legal title (a valueless asset).” *Id.* at 297-298 (emphasis in original).

Charging orders can only be imposed on an economic interest in an LLC. 51 AM. JUR. 2D, *Limited Liability Companies*, § 23 (2003 & Supp. 2018) (“A charging order is the postjudgment remedy specifically tailored to obtain and enforce a lien on the economic value that flows from membership in an LLC”). Here, the only economic interest in the LLCs belongs to Larry Winget, as owner. The Revocable Trust, through its trustee, possessed only valueless legal title in the LLCs, which is not an attachable interest. *Atlas Portland Cement Co.*, 265 F. 444 at 446 (“A lien of

a judgment does not attach the land to which the judgment debtor has only a naked legal title, unaccompanied by any beneficial interest, the equitable and beneficial title being in another.”); Bogert, *THE LAW OF TRUSTS AND TRUSTEES*, § 146 (2d ed. 1984 & 2017 Update) (“The trustee's interest is a bare legal interest, not entitling him to any benefit or profit from the trust property...The beneficial equitable interest is in the beneficiary and the creditors of the trustee cannot attach or garnish that interest.”); 30 AM. JUR. 2D, *Executions*, § 153 (2005) (“[A] trustee who holds only the legal title to property but has no equitable interest in it has no interest in the property which may properly pertain to the right to any execution.”). So, the district court’s imposition of charging orders based on the Revocable Trust’s possession of bare legal title in the membership interests in those LLCs was again error.

### CONCLUSION

As noted in the Introduction, this dispute has a long history in the district court and before this Court. The problem with the district court’s ruling on the charging orders is that it not only disregards that history, it is exactly contrary to it. This Court previously enforced the unambiguous language of the Guaranty and directed entry of the bifurcated Judgment that reflected its ruling. Under that bifurcated Judgment, Chase may not attach property owned by Larry Winget. Yet, the district court’s charging orders do just that by attaching Larry Winget’s property held in his revocable estate planning trust. This was error and those charging orders should be



reversed. And because Larry Winget has always owned the property held in his estate planning trust, this Court should also clarify that he has the unencumbered right to revoke the Revocable Trust without any adverse legal consequences. These rulings will end Chase's collection efforts and bring finality to this long running dispute.

Respectfully Submitted,

Dated: December 13, 2018

/s/ John J. Bursch

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CA. No. 18-2089

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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JPMORGAN CHASE BANK, N.A.,

Plaintiff/Appellee,

v.

LARRY J. WINGET and THE LARRY J.  
WINGET LIVING TRUST,

Defendants/Appellants.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)**

Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. R. 32(a)(7)(B), because:

This brief contains 9,028 words, excluding parts of the brief exempted by Fed. R. App. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type and style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Dated: December 13, 2018

/s/ John J. Bursch

Counsel for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 2018, I electronically filed the foregoing document using the ECF system which will send notification of such filing to all counsel of record.

Dated: December 13, 2018

/s/ John J. Bursch

Counsel for Appellants

**DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

<b>Record Entry</b>	<b>Date Entered</b>	<b>Description of Pleading</b>	<b>Page ID #</b>
<i>Case No. 08-cv-13845</i>			
1	09/08/2008	Complaint	1-16
23	01/28/2009	Plaintiff JPMorgan Chase Bank, N.A.'s Motion for Summary Judgment as to Count I	627-656
365	10/17/2012	Decision on Reformation	13809-13840
487-1	01/29/2014	Guaranty and Pledge Agreements	16717-16756
494	02/07/2014	Trial Transcript—Bench Trial, Volume 4, Thursday, August 9, 2012	17075-17190
530-1 – 530-2	05/31/2014	Trial Exhibit C10—1999 Credit Agreement and Amendments 1-7	18741-18892
530-5	05/31/2014	Trial Exhibit C11, Tab 10b—Pledge Agreement of Larry Winget and his Living Trust relating to P.I.M. Management Company	18922-18937
568	07/28/2015	Amended Final Judgment as to all Claims of Plaintiff/Counterdefendant JPMorgan Chase Bank, N.A. and as to Counterclaim of Defendants/Counterplaintiffs Larry J. Winget and the Larry J. Winget Living Trust	24046-24048
671	01/13/2016	Memorandum and Order Granting in Part Chase's Motion for Costs and Expenses of Collection Pursuant to Order of Final Judgment	24903-24923
686	08/01/2016	Order Consolidating Cases and Denying Plaintiff/Counter-Defendant's Motion to Dismiss	25025-25027
696-1	11/15/2016	Exhibit A to JPMorgan Chase Bank, N.A.'s Counterclaims against Larry J. Winget—Larry J. Winget Living Trust	25414-25460
732	07/05/2017	Memorandum and Order Staying Proceedings on Chase's Supplemental Motion for Costs and Expenses of Collection Pursuant to Final Judgment (Doc. 709) and	26279-26304

		Granting Motion for Judgment on the Pleadings (Doc. 699) and Granting Chase's Motion to Compel Compliance with Court Order (Doc. 719) and Granting Chase's Motion to Compel (Doc. 720)	
751	09/13/2017	Memorandum and Order Denying Winget's Motion for Reconsideration (Doc. 734)	26594-26597
839	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27950-27951
840	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27952-27953
841	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27954-27955
842	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27956-27957
843	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27958-27959
844	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27960-27961
845	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27962-27963
846	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27964-27965
847	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27968-27969
848	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27970-27971
849	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27972-27973
850	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27974-27975
851	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27976-27977
852	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27978-27979
853	08/15/2018	Order Granting JPMorgan Chase Bank, N.A.'s Motion for Charging Order	27980-27981
857	08/16/2018	Motion Hearing on Docket 790 and 791-819 Before the Honorable Avern Cohn	28005-28021

858	09/14/2018	Notice of Appeal	28022- 28025
<i>Case No. 15-cv-13469</i>			
11	11/16/2015	Defendant's Answer and Affirmative Defenses to Complaint for Declaratory Relief and Counterclaims Against Plaintiff	34-67

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

---

JPMORGAN CHASE BANK, N.A.,

Plaintiff/Counter-Defendant,

No. 08-cv-13845

v.

Honorable Avern Cohn

LARRY J. WINGET and the  
LARRY J. WINGET LIVING TRUST,

Defendants/Counter-Plaintiffs.

---

**ORDER GRANTING JPMORGAN CHASE BANK, N.A.'S  
MOTION FOR CHARGING ORDER**

It is HEREBY ORDERED that a charging order pursuant to Mich. Comp. Laws § 450.4507 shall issue against all interests held by the Larry J. Winget Living Trust and/or Larry J. Winget, as trustee of the Larry J. Winget Living Trust, in JVIS-USA, LLC for payment of all amounts due to JPMorgan Chase Bank, N.A. on the final judgment entered by this Court on July 28, 2015 in the above-captioned matter.

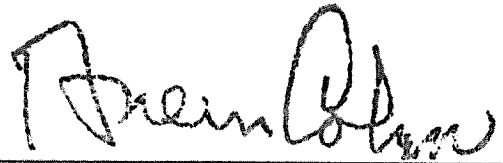
Any membership interest of the Larry J. Winget Living Trust in JVIS-USA, LLC, a Michigan limited liability company with a registered office at 42400 Merrill Rd., Sterling Heights, MI 48314, is hereby charged pursuant to Mich. Comp. Laws § 450.4507 until further order of this Court or a notice of satisfaction

of judgment by JPMorgan Chase Bank, N.A.

A copy of this order shall be served on Timothy Bradley, as registered agent of JVIS-USA, LLC, by JPMorgan Chase Bank, N.A.

IT IS SO ORDERED.

Dated: 8-15-18



Hon. Avern Cohn  
U.S. District Court Judge



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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

JPMORGAN CHASE BANK, N.A., )  
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Plaintiff/Counter-Defendant,) )  
)  
-vs- )  
)  
LARRY J. WINGET and the )  
LARRY J. WINGET LIVING TRUST, )  
)  
Defendants/Counter-Plaintiffs,) )  
)  
Defendants. )

Civil Case No.  
08-cv-13845

MOTION HEARING ON DOCKET 790 and 791-819  
BEFORE THE HONORABLE AVERN COHN  
UNITED STATES DISTRICT JUDGE  
Detroit, Michigan - August 14, 2018

APPEARANCES:

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(Proceedings reported by mechanical stenography. Transcript produced on a CAT system.)

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TABLE OF CONTENTS

PROCEEDINGS:

PAGE:

Appearances	4
Preliminary Matters before Hearing	4
Hearing	
Argument by Mr. Ducayet	7
Response by Mr. Anding	10
Court's Ruling	
Court Reporter's Certificate	

EXHIBITS:

(None offered)

1 Tuesday, August 14, 2018

2 1:58 p.m.

3 -- -- --

4 MR. DUCAYET: Good afternoon, Your Honor. Jim Ducayet  
5 from Sidley Austin on behalf of JPMorgan Chase.

6 MR. PETZ: Scott Petz with Dickinson Wright.

7 THE COURT: You're going to have to keep your voices  
8 up. I forgot my hearing aid. Try it again.

9 MR. PETZ: Scott Petz on behalf of the plaintiff with  
10 Dickinson Wright.

11 MR. ANDING: John Anding on behalf of Mr. Winget.

12 THE COURT: All right.

13 MR. HUBBARD: And Tom Hubbard on behalf of Mr. Winget.

14 THE COURT: Okay. Technically, there are two motions  
15 in the front of me right now. One is a motion for the judicial  
16 liens.

17 MR. DUCAYET: Yes.

18 THE COURT: And the other is to file an amended  
19 counterclaim. I'll be candid with you. For the past year or  
20 two years, as you engaged in an effort to collect on the  
21 judgment, I've really not paid much attention -- the Court has  
22 not paid a lot of attention to this case. And almost all the  
23 papers that I have gone through, I've just gone through. It  
24 was only with these two motions that I began to concentrate on  
25 what is before me.

1           I don't know how to express this, but I will tell, you  
2 in the last hour I chose to look at the docket of this Court,  
3 that's the United States District Court for the Eastern  
4 District of Michigan, and I found two cases in which the Larry  
5 J. Winget Living Trust was a party plaintiff. I found one case  
6 in which it was a party defendant, and I found a fourth case in  
7 which it was a movant. I am satisfied -- and I'm going to make  
8 a statement here in a moment -- that the Larry J. Winget Living  
9 Trust is a juridical body; that is, it is a legal entity  
10 created by the law which is not a natural person, such as a  
11 corporation, created under state statutes. It is a legal  
12 entity having a distinct identity and legal rights and  
13 obligations under the law.

14           Now, unfortunately, I don't think in any of your  
15 papers has anyone used the phrase "juridical body."

16           From the inception of this case, there have been two  
17 defendants, Larry J. Winget and the Larry J. Winget Living  
18 Trust. It is also been clear that the Larry J. Winget Living  
19 Trust is an inter-vivos trust. The creator/sponsor of which is  
20 Larry J. Winget. Winget is also the beneficiary of the trust  
21 and the trustee.

22           Larry J. Winget is an individual, and the Larry J.  
23 Winget Living Trust is a juridical body separated from Larry J.  
24 Winget. Real and personal property owned by Larry J. Winget is  
25 separate from real and personal property owned by the Larry J.

1 Winget Living Trust.

2 Larry J. Winget had an obligation to JPMorgan Chase.  
3 The Larry J. Winget Living Trust had a separate obligation to  
4 JPMorgan Chase. The obligation of Larry J. Winget was capped  
5 at 50 million dollars. The obligation to the Larry J. Winget  
6 Living Trust was not capped. Though the Larry J. Winget trust  
7 obligations were not capped, they are functionally limited by  
8 the assets.

9 What the Court is dealing with now is an effort to  
10 collect on the amended judgment that JPMorgan Chase has against  
11 the Larry J. Winget Living Trust.

12 Now, there are several ways the Court can proceed. It  
13 can indulge you by appointing a special master to deal with  
14 these motions. On the other hand, it can simplify things by  
15 signing the orders for the judicial liens and denying the  
16 motion to amend.

17 I don't know where the case goes after that. I am  
18 satisfied that the papers filed by Larry J. Winget and/or the  
19 Larry J. Winget Living Trust are comparable to James Joyce's  
20 Ulysses. And unless this tomfoolery stops and we have to  
21 proceed, the Larry J. Winget and the Larry J. Winget Living  
22 Trust lawyers expose themselves under 28 U.S.C. -- what is it?  
23 1821 by a personal sanction.

24 Now, I leave the floor open first to you.

25 MR. DUCAYET: Yes, sir.

1 THE COURT: And then I leave it open to Mr. Anding.  
2 What I don't know is if you get the judicial liens, where that  
3 sends you.

4 MR. DUCAYET: Yes, Your Honor. Let me address that.  
5 So first of all, let me say, I think it would be -- excuse me.

6 Your Honor, we would like you to enter the judicial  
7 liens and we would like you to deny the motion for leave to  
8 amend. And where the case goes from here, Your Honor, is once  
9 the judicial liens are imposed, the parties are going to  
10 continue to finish up the discovery with respect to our  
11 fraudulent conveyance claim in which we are proving up the  
12 value of the assets that are held in the trust.

13 THE COURT: Let me interrupt you.

14 MR. DUCAYET: Yes, sir.

15 THE COURT: As I understand it, those assets have been  
16 returned to the Living Trust. So the Living Trust has assets.

17 MR. DUCAYET: Yes.

18 THE COURT: And those assets, except for market  
19 conditions, are presumably equal in value to what they were  
20 before they were removed.

21 MR. DUCAYET: Right.

22 Your Honor, if I could address that point. Your  
23 Honor, they have said that they've transferred the assets back  
24 into the trust. We don't necessarily agree that that was  
25 legally valid. But in any event, even if they did, we would

1 still be entitled to a judgment against Mr. Winget personally  
2 to the extent that there's a difference in value. Because we  
3 were deprived of the ability to recover during the time when  
4 the assets were out of the trust.

5 THE COURT: That's way down the line, sir.

6 MR. DUCAYET: Yes, sir.

7 With respect to the assets that are in the trust, we  
8 would like to impose the charging liens and we'd like to  
9 proceed with respect to those assets that are not LLCs, but  
10 that are corporations. And we believe that Your Honor can  
11 transfer those interests to JPMorgan in satisfaction of the  
12 outstanding obligation.

13 THE COURT: It seems to me what you're telling me, or  
14 should be telling me, is after the assets of the trust. And  
15 for all I know, the trust may have other creditors. So we  
16 don't -- this isn't bankruptcy. We're not dealing with  
17 preference.

18 MR. DUCAYET: Um-hmm.

19 THE COURT: Because, as I understand the record, you  
20 still do not know the value of those assets, the dollar value  
21 of those assets. And you do not know whether it has other  
22 creditors.

23 MR. DUCAYET: So, Your Honor, we've now taken  
24 discovery and we believe there are no other creditors of the  
25 trust. And we have an expert who has now conducted an



1 appraisal of all of the assets in the trust and has concluded  
2 that the value of these assets is in excess of the judgment.

3 THE COURT: I would suggest to you, sir, that  
4 proceeding, I'm thinking -- which I'll hear from Mr. Anding.

5 But what comes to mind is that proceeding against  
6 Larry J. Winget individually for actions taken -- allegedly  
7 taken to remove assets from the trust and then return them be  
8 stayed until after you have completed your collection efforts  
9 against the assets of the Living Trust. Do you understand what  
10 I'm saying?

11 MR. DUCAYET: I do understand what you're saying, Your  
12 Honor.

13 THE COURT: Because that may well disappear.

14 I do have one question intermittently before I listen  
15 to you. There's a reference in the motion for leave to amend,  
16 Document 790, to the Larry J. Winget Revocable Living Trust.  
17 Is that a different entity?

18 MR. ANDING: Same entity, Judge.

19 MR. DUCAYET: Same entity.

20 THE COURT: Because that's the first time I've seen  
21 the words "revocable living trust" in any of the papers.

22 MR. ANDING: It remains a revocable trust, but --

23 THE COURT: It is. But it's denominated the Larry J.  
24 Winget ...

25 MR. DUCAYET: Living Trust.

1 THE COURT: Revocable Living Trust. The word  
2 "revocable" isn't ordinarily present in the nomenclature.

3 MR. DUCAYET: Yes, Your Honor.

4 THE COURT: Okay. Do you have anything more you want  
5 to say?

6 MR. DUCAYET: No, Your Honor.

7 THE COURT: Okay. Mr. Anding?

8 MR. ANDING: Judge, we would advocate for appointment  
9 of a special master.

10 THE COURT: What?

11 MR. ANDING: We would like to have a special master  
12 appointed to address a, I think, unique issue in the context of  
13 the motions as they're framed. That issue is whether a  
14 creditor of a trust has rights against trust property. Trust  
15 property being that which is held by a trustee on behalf of a  
16 settler or not.

17 And the law in the state of Michigan, which we've  
18 cited in our papers, makes clear that the law protects  
19 creditors of the settler, but it does not protect creditors of  
20 a trust. And that's the issue that's before the Court. It's a  
21 creditor's rights issue. And we think that someone who has  
22 peculiar expertise in the creditor's rights arena would be  
23 appropriate to address that issue.

24 THE COURT: Mr. Ducayet?

25 MR. DUCAYET: Yes.

1 THE COURT: If the Court acts in the fashion it  
2 indicated summarily --

3 MR. DUCAYET: Yes.

4 THE COURT: -- by denying the motion to amend and  
5 granting the judicial liens, that's all the Court does at this  
6 moment.

7 MR. DUCAYET: Yes.

8 THE COURT: Because that's all it has to. Because the  
9 only thing before it are the two motions.

10 MR. DUCAYET: Yes, Your Honor.

11 THE COURT: Are you satisfied that the Court can do  
12 that without any further explanation than has been given thus  
13 far?

14 MR. DUCAYET: Yes, I am, Your Honor.

15 THE COURT: And you're prepared to defend it?

16 MR. DUCAYET: Yes, sir.

17 THE COURT: There's no need for a special master. At  
18 this point.

19 MR. DUCAYET: That's correct.

20 THE COURT: I'm not saying at a later point. I'm only  
21 making a preliminary ruling that is deny the motion to amend  
22 and sign the 13 orders for judicial liens. That's all I can do  
23 at this point.

24 At one point I made suggestions in this case, as to  
25 future action.

1 MR. DUCAYET: Yes, sir.

2 THE COURT: Unfortunately, they were frustrated by a  
3 higher authority. I haven't gotten over that, yet. Neither  
4 has Mr. Anding.

5 Okay. No. I am not going to appoint a special master  
6 at this point. I think the case proceeds, but I have given --  
7 put you on notice, sir, that in my judicial opinion the  
8 argument you are raising about creditors is frivolous. A  
9 living trust in Michigan can have creditors.

10 MR. ANDING: Judge, we respectfully disagree. And we  
11 hope the Sixth Circuit will agree with us.

12 THE COURT: I'm not going to comment any further.  
13 Because there's an old phrase, Mr. Anding, if you're stuck in a  
14 hole, digging isn't the solution to your problem.

15 MR. ANDING: I understand that, Judge. Can I turn to  
16 the question of the substance of the order?

17 The orders as submitted by Mr. Ducayet include a  
18 charging order against both the trust and the trustee. The  
19 trustee is not a party to this judgment and no such order may  
20 enter.

21 THE COURT: That's sophistry. I consider that  
22 sophistry.

23 MR. ANDING: I just wanted to make the argument,  
24 Judge.

25 THE COURT: You can make any argument you want.

1 Do you have the orders?

2 MR. DUCAYET: Your Honor, I'm not sure.

3 THE CLERK OF THE COURT: We have them electronically,  
4 Judge.

5 THE COURT: They have to be dug out.

6 THE CLERK OF THE COURT: Were they submitted as part  
7 of your papers?

8 MR. DUCAYET: Yes, they were.

9 THE CLERK OF THE COURT: Then they're in that  
10 notebook.

11 THE COURT: I'm not going to dig them out.

12 You can do whatever you like.

13 I want someone to present the orders as signed.

14 MR. DUCAYET: Yes, Your Honor.

15 THE COURT: There's 14 orders to be entered.

16 MR. DUCAYET: Your Honor, we'll provide those to you.

17 Yes.

18 THE COURT: And the only objection you have is that  
19 they don't distinguish between the trust and the trustee?

20 MR. ANDING: That's correct, Judge. They include  
21 both, where the judgment is against the trust alone. Where  
22 arguments have been made successfully in this case that the  
23 trust and trustees have different interests in the trust  
24 property, we think it would be in error for you to enter that  
25 order, Judge.

1 THE COURT: Mr. Ducayet has considered to defend me or  
2 defend the ruling.

3 MR. DUCAYET: Yes, Your Honor.

4 MR. ANDING: I hope you don't take offense to that,  
5 You know, Judge Holman told me years ago --

6 THE COURT: What?

7 MR. ANDING: Judge Holman told me years ago, he said,  
8 "You know, Counsel, you have a right. You have a right to tell  
9 me when I'm doing something wrong. So I'm only following his  
10 advice.

11 THE COURT: I have no problem with that. You can say  
12 whatever you want. I can also remind you what I told you years  
13 ago when I first saw you in this case. If you had taken my  
14 advice then, this whole thing would have been over a long time  
15 ago. But you chose not to.

16 MR. DUCAYET: Your Honor, we'll submit the orders to  
17 be signed.

18 THE COURT: Keep your voice up.

19 MR. DUCAYET: Excuse me. We'll submit the orders to  
20 be signed, Your Honor.

21 MR. ANDING: On the motion to amend, Judge, are you  
22 open to any argument at all?

23 THE COURT: Nope. Nope. Because I don't think  
24 there's anything to amend. I don't understand that lawsuit. I  
25 really don't understand that lawsuit. You filed it. It's got

1 lots of words. As I've said, I think they're -- what was the  
2 phrase I had?

3 I gave you.

4 THE CLERK OF THE COURT: The James Joyce?

5 THE COURT: What?

6 THE CLERK OF THE COURT: The James Joyce.

7 THE COURT: Yeah, the James Joyce. Your papers are  
8 sometimes referred to as James Joyce pleadings.

9 MR. ANDING: I assume that's not a compliment, Judge.

10 THE COURT: No, it is not a compliment by any means.

11 MR. ANDING: I assumed that. We haven't had many.  
12 compliments in this Court in quite some time.

13 THE COURT: I know. You got one big one you couldn't  
14 hold on to. But that's besides the point.

15 MR. ANDING: Well, he changed a hundred years of  
16 jurisprudence.

17 THE COURT: What?

18 MR. ANDING: He change a hundred years of  
19 jurisprudence.

20 THE COURT: Who did?

21 MR. ANDING: Judge Griffin.

22 THE COURT: Oh, I agree with that. Oh, I agree with  
23 that.

24 MR. ANDING: I'm going to tell you something else.  
25 You're changing a hundred years of jurisprudence with this

1 ruling. But we'll see.

2 THE COURT: I'm -- if you're right, I put a whole  
3 bunch of trust lawyers out of business.

4 MR. ANDING: I don't think so, Judge. If you're  
5 right.

6 THE COURT: Okay. Anything else?

7 MR. DUCAYET: No, sir.

8 THE COURT: Thank you.

9 MR. ANDING: That's it, Judge. Thank you.

10 (At 2:15 p.m., matter concluded.)

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C E R T I F I C A T E

I, Darlene K. May, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

August 15, 2018  
Date

/s/ Darlene K. May  
Darlene K. May, CSR, RPR, CRR, RMR  
Federal Official Court Reporter  
Michigan License No. 6479

6

## MEMORANDUM

**TO:** SBM Probate and Estate Planning Council  
**FROM:** Mark J. DeLuca, on behalf of the Tax Committee  
**RE:** February 2019 Tax Nugget

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This month's Tax Nugget is a summary of *Estate of Sower v. Commissioner of Internal Revenue*, 149 T.C. No. 11 (filed September 11, 2017). In a case of first impression, the Tax Court held that upon the death of a surviving spouse, the IRS may reexamine the estate tax return of the predeceased spouse to determine the correct deceased spousal unused exclusion ("DSUE") amount, regardless of whether the period of limitations on assessment has expired for that return. While IRC §2010(c)(5)(B), Treas. Reg. § 20.2010-2(d), Treas. Reg. § 20.2010-3(d), and IRC § 7602 clearly grant the IRS this authority, the petitioner in this case raised several interesting arguments for the court to address.

Frank Sower died in 2012, survived by his wife Minnie Sower. The executor of Frank's estate filed an estate tax return for Frank, reporting a DSUE amount of approximately \$1.26 million, and elected portability of the DSUE amount. After processing Frank's estate tax return, the IRS issued a closing letter to the executor of Frank's estate indicating that the estate tax return had been accepted as filed. Minnie Sower died in 2013. The executor of Minnie's estate filed an estate tax return, claiming the DSUE amount reported on Frank's previously filed estate tax return. Minnie's original estate tax return reported and paid an estate tax liability of \$369,036. The IRS examined Minnie's estate tax return, and as part of this examination, the IRS also examined Frank's estate tax return. After examining the returns, the IRS determined that Frank's estate tax return failed to report several taxable gifts that Frank had made during his lifetime. Thus, the IRS reduced the DSUE amount by the value of these unreported taxable gifts. As a result of this reduction in the DSUE amount (and adjustments to Minnie's taxable estate based on her own unreported lifetime taxable gifts), the IRS determined an estate tax deficiency of approximately \$788,000 against Minnie's estate.

The executor of Minnie's estate petitioned the Tax Court and advanced several arguments as to why the IRS should be prohibited from considering Frank's estate tax return for the purpose of adjusting the DSUE amount available to Minnie's estate, including, but not limited to, the following arguments:

- (1) The IRS closing letter issued to the executor of Frank's estate should be treated as a closing agreement pursuant to IRC § 7121;
- (2) The IRS conducted an impermissible second examination of Frank's estate tax return; and
- (3) IRC § 2010(c)(5)(B) is "unconstitutional for want of due process of law in that there is no statute of limitations."

With respect to the closing agreement argument advanced by the petitioner, the court noted that IRC § 7121(a) authorizes the IRS to enter into written closing agreements “with any person relating to the liability of such person” and such agreements are final and conclusive. However, the court held that because there was no evidence of an agreement (negotiations, offer and acceptance, etc.) between Frank’s estate and the IRS, the estate tax closing letter did not constitute a closing agreement under IRC § 7121(a).

Regarding the petitioner’s argument that the IRS is prohibited from conducting a second examination of Frank’s estate tax return, the court explained that IRC § 7605(b) does prohibit the IRS from conducting an impermissible second examination of a taxpayer’s return. The Tax Court has previously held that the IRS does not conduct a second examination if the IRS does not obtain any new information. Here, the court held that the IRS did not request or obtain any new information from Frank’s estate, and thus, Frank’s estate tax return was not subject to a second examination. Further, the court went on to explain that even if the IRS had obtained new information and conducted a second examination of Frank’s estate tax return, this would not have changed the outcome because Minnie’s estate is the party claiming protection against a second examination. If Frank’s estate tax return was subject to a second examination, the IRS would have violated IRC § 7605(b) with respect to Frank’s estate, but *not* with respect to Minnie’s estate.

Lastly, the court addressed the due process argument advanced by the petitioner. IRC § 2010(c)(5)(B) provides the following:

Notwithstanding any period of limitation in section 6501, after the time has expired under section 6501 within which a tax may be assessed under chapter 11 or 12 with respect to a deceased spousal unused exclusion amount, the Secretary may examine a return of the deceased spouse to make determinations with respect to such amount for purposes of carrying out this subsection.

The court held that IRC § 2010(c)(5)(B) does not violate due process because while the IRS may examine the return of the predeceased spouse outside of the period of limitations, the IRS is *not* granted the power to assess any tax against the estate of the predeceased spouse outside of the period of limitations. Treas. Reg. § 20.2010-3(d) explicitly states the following:

The IRS's authority to examine returns of a deceased spouse applies with respect to each transfer by the surviving spouse to which a DSUE amount is or has been applied. Upon examination, the IRS may adjust or eliminate the DSUE amount reported on such a return of a deceased spouse; *however, the IRS may assess additional tax on that return only if that tax is assessed within the period of limitations on assessment under section 6501 applicable to the tax shown on that return.* (emphasis added).

7

February 5, 2019

To: Probate Section  
From: Neal Nusholtz, Liaison to the Tax Section  
Re: January 17, 2019 Tax Section Council Meeting

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	PA 0679 of 2018 ( <i>SB 0907 (2018)</i> ): Use Tax – Exemption of school bus. Approved by the Governor 12/28/18.
	SB 1097 (2018): Corporate Income Tax Interest Expense Deduction. Vetoed by the Governor 12/28/18.
	SB 1170 (2018): Taxation of Flow through entities. Vetoed by the Governor 12/28/18.



Final Federal Tax Regulations Issued

<b>TD</b>	<b>Primary Code Section</b>	<b>Description</b>	<b>Date Issued</b>
104226-18 [TD XXXX]	965	Transition Tax	1/15/2019
9845	147	Private Activity Bonds	12/28/2018
9844	6221, et al	Centralized Partnership Audit Regime	12/21/2018
9843	263A	Simplified Method Cost Allocation	11/29/2018

Notices of Proposed Rulemaking - TCJA and other 2018 highlights Vol. 83 (2018)

<b>No.</b>	<b>Date</b>	<b>Description</b>
141739-08	12/31/2018	Retirement Standards for Tax Exempt Bonds
104352-18	12/28/2018	Rules re Hybrid Arrangements under 245A
106089-18	12/28/2018	Limit Deduction for Business Interest Expense
113604-18	12/27/2018	Sale of Partnership Interests under 846
104259-18	12/21/2018	Base Erosion and Anti-Abuse Tax
132884-17	12/18/2018	Reducing Burden under FACTA and Chapter 3
105600-18	12/07/2018	Foreign Tax Credit
106089-18	11/28/2018	Business Interest Expense
106706-18	11/23/2018	Estate and Gift Tax Exclusion "Clawback"
103163-18	11/07/2018	Discounting Rules for Insurance Companies
114540-18	11/05/2018	Controlled Foreign Corporation
115420-18	10/29/2018	Qualified Opportunity Fund
104226-18	10/10/2018	Transition Tax under 965
104390-18	10/10/2018	Global Intangible Low Tax Income (GILTI)
130244-17	9/24/2018	Debt-Equity: Removal of Documentation
112176-18	8/27/2018	Contributions: State and Local Tax Credits
136118-15, 119337-17, 118067-17, 120232-17, 120233-17	8/17/2018	Centralized Partnership Audit Regime
107892-18	8/16/2018	Qualified Business Income Deduction
104226-18	8/09/2018	Repatriation Tax
104397-18	8/08/2018	Additional First Year Depreciation
103474-18	7/18/2018	Preparer Due Diligence
106977-18	6/12/2018	Arbitrage Restrictions on Tax Exempt Bonds
132197-17	2/15/2018	Eliminating Unnecessary Regulations

Notices – TCJA

<b>No.</b>	<b>Date</b>	<b>IRC Section/Topic</b>
2019-11	1/16/2019	6654/Penalty Relief
2019-9	12/31/2018	4960
2019-6	12/19/2018	846
2019-1	12/14/2018	959/Previously Taxed E&P
2018-100	12/10/2018	6655
2018-99	12/10/2018	274
2018-97	12/07/2018	83(i)(2)(c)
2018-76	10/03/2018	274
2018-67	08/21/2018	512(a)(6)
2018-30	05/21/2018	338, 382, 168(k)

Revenue Rulings and Procedures – TCJA

<b>Citation</b>	<b>IRB/CB</b>	<b>IRC Section</b>
Rev Proc 2019-12		162, 170
Rev Proc 2019-10	2019-2 IRB	807(f)
Rev Proc 2019-8	2019-3 IRB	179, 168, 163(j)
Rev Proc 2019-6	2019-2 IRB	846
Rev Proc 2018-59	2018-50 IRB	163(j)

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	SB 0512 (2017): Individual income tax – Tax incentive for contributions made to first time home buyers program. Vetoed by the Governor 12/21/18.
	PA 0673 of 2018 ( <i>SB 0906 (2018)</i> ): Sales Tax – Exemption of school bus. Approved by the Governor 12/28/18.
	PA 0679 of 2018 ( <i>SB 0907 (2018)</i> ): Use Tax – Exemption of school bus. Approved by the Governor 12/28/18.
	SB 1097 (2018): Corporate Income Tax Interest Expense Deduction. Vetoed by the Governor 12/28/18.
	SB 1170 (2018): Taxation of Flow through entities. Vetoed by the Governor 12/28/18.

Final Federal Tax Regulations Issued

<b>TD</b>	<b>Primary Code Section</b>	<b>Description</b>	<b>Date Issued</b>
104226-18 [TD XXXX]	965	Transition Tax	1/15/2019
9845	147	Private Activity Bonds	12/28/2018
9844	6221, et al	Centralized Partnership Audit Regime	12/21/2018
9843	263A	Simplified Method Cost Allocation	11/29/2018

Notices of Proposed Rulemaking - TCJA and other 2018 highlights Vol. 83 (2018)

<b>No.</b>	<b>Date</b>	<b>Description</b>
141739-08	12/31/2018	Retirement Standards for Tax Exempt Bonds
104352-18	12/28/2018	Rules re Hybrid Arrangements under 245A
106089-18	12/28/2018	Limit Deduction for Business Interest Expense
113604-18	12/27/2018	Sale of Partnership Interests under 846
104259-18	12/21/2018	Base Erosion and Anti-Abuse Tax
132884-17	12/18/2018	Reducing Burden under FACTA and Chapter 3
105600-18	12/07/2018	Foreign Tax Credit
106089-18	11/28/2018	Business Interest Expense
106706-18	11/23/2018	Estate and Gift Tax Exclusion "Clawback"
103163-18	11/07/2018	Discounting Rules for Insurance Companies
114540-18	11/05/2018	Controlled Foreign Corporation
115420-18	10/29/2018	Qualified Opportunity Fund
104226-18	10/10/2018	Transition Tax under 965
104390-18	10/10/2018	Global Intangible Low Tax Income (GILTI)
130244-17	9/24/2018	Debt-Equity: Removal of Documentation
112176-18	8/27/2018	Contributions: State and Local Tax Credits
136118-15, 119337-17, 118067-17, 120232-17, 120233-17	8/17/2018	Centralized Partnership Audit Regime
107892-18	8/16/2018	Qualified Business Income Deduction
104226-18	8/09/2018	Repatriation Tax
104397-18	8/08/2018	Additional First Year Depreciation
103474-18	7/18/2018	Preparer Due Diligence
106977-18	6/12/2018	Arbitrage Restrictions on Tax Exempt Bonds
132197-17	2/15/2018	Eliminating Unnecessary Regulations

Notices – TCJA

<b>No.</b>	<b>Date</b>	<b>IRC Section/Topic</b>
2019-11	1/16/2019	6654/Penalty Relief
2019-9	12/31/2018	4960
2019-6	12/19/2018	846
2019-1	12/14/2018	959/Previously Taxed E&P
2018-100	12/10/2018	6655
2018-99	12/10/2018	274
2018-97	12/07/2018	83(i)(2)(c)
2018-76	10/03/2018	274
2018-67	08/21/2018	512(a)(6)
2018-30	05/21/2018	338, 382, 168(k)

Revenue Rulings and Procedures – TCJA

<b>Citation</b>	<b>IRB/CB</b>	<b>IRC Section</b>
Rev Proc 2019-12		162, 170
Rev Proc 2019-10	2019-2 IRB	807(f)
Rev Proc 2019-8	2019-3 IRB	179, 168, 163(j)
Rev Proc 2019-6	2019-2 IRB	846
Rev Proc 2018-59	2018-50 IRB	163(j)