PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for:

MARCH 13, 2020, 9 a.m. MEETING

Meeting of the Committee on Special Projects (CSP)

Meeting of the Council of the Probate and Estate Planning Section

NOTICE FOR REMOTE REGISTERING AND ATTENDANCE:

The registration link for remote attendance for the March Council meeting: https://zoom.us/meeting/register/vJctce-sqDkoU8gf0f7UalxbEWWhiGqydtQ

If you have any difficulty registering for remote attendance, please contact Mike Lichterman at mike@baarlegal.com. Remote attendees are required to register ahead of time. It is a new registration link each month and I will make sure to email it to you before you send out the Section-wide invitation to the meeting.
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

Friday, March 13, 2020
9 a.m.

University Club of MSU
3435 Forest Road
Lansing, MI 48910

The meeting of the Section’s Committee on Special Projects (CSP) meeting will begin at 9 a.m. and will end at approximately 10:15 a.m. The meeting of the Council of the Probate and Estate Planning Section will begin at approximately 10:30 a.m. 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.

Mark E. Kellogg, Secretary
Fraser Trebilcock Davis & Dunlap, P.C.
124 West Allegan Street, Suite 1000
Lansing, Michigan  48933
517-377-0890
Email: mkellogg@fraserlawfirm.com
Each meeting starts with the Committee on Special Projects at 9 a.m., 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 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, April 8, 2020 (for Friday, April 17, 2020 meeting)

Due dates for Materials for Council Meeting
All materials are due on or before 5 p.m. of the date falling 8 days before the next Council meeting. Council materials are to be sent to Mark Kellogg (mkellogg@fraserlawfirm.com).

Schedule of due dates for Council materials, by 5 p.m.:  
Thursday, April 9, 2020 (for Friday, April 17, 2020 meeting)
### Officers of the Council for 2019-2020 Term

<table>
<thead>
<tr>
<th>Office</th>
<th>Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson</td>
<td>Christopher A. Ballard</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>David P. Lucas</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>David L.J.M. Skidmore</td>
</tr>
<tr>
<td>Secretary</td>
<td>Mark E. Kellogg</td>
</tr>
<tr>
<td>Treasurer</td>
<td>James P. Spica</td>
</tr>
</tbody>
</table>

### Council Members for 2019-2020 Term

<table>
<thead>
<tr>
<th>Council Member</th>
<th>Year Elected to Current Term (partial, first or second full term)</th>
<th>Current Term Expires</th>
<th>Eligible after Current Term?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anderton, James F.</td>
<td>2018 (1st term)</td>
<td>2020</td>
<td>Yes (2 terms)</td>
</tr>
<tr>
<td>Jaconette, Hon. Michael L.</td>
<td>2017 (2nd term)</td>
<td>2020</td>
<td>No</td>
</tr>
<tr>
<td>Lichterman, Michael G.</td>
<td>2017 (1st term)</td>
<td>2020</td>
<td>Yes</td>
</tr>
<tr>
<td>Malviya, Raj A.</td>
<td>2017 (2nd term)</td>
<td>2020</td>
<td>No</td>
</tr>
<tr>
<td>Olson, Kurt A.</td>
<td>2017 (1st term)</td>
<td>2020</td>
<td>Yes</td>
</tr>
<tr>
<td>Savage, Christine M.</td>
<td>2017 (1st term)</td>
<td>2020</td>
<td>Yes</td>
</tr>
<tr>
<td>Caldwell, Christopher J.</td>
<td>2018 (2nd term)</td>
<td>2021</td>
<td>No</td>
</tr>
<tr>
<td>Goetsch, Kathleen M.</td>
<td>2018 (2nd term)</td>
<td>2021</td>
<td>No</td>
</tr>
<tr>
<td>Hentkowski, Angela M.</td>
<td>2018 (1st term)</td>
<td>2021</td>
<td>Yes</td>
</tr>
<tr>
<td>Lynwood, Katie</td>
<td>2018 (2nd term)</td>
<td>2021</td>
<td>No</td>
</tr>
<tr>
<td>Mysliwiec, Melisa M. W.</td>
<td>2018 (1st term)</td>
<td>2021</td>
<td>Yes</td>
</tr>
<tr>
<td>Nusholtz, Neal</td>
<td>2018 (1st term)</td>
<td>2021</td>
<td>Yes</td>
</tr>
<tr>
<td>Labe, Robert C.</td>
<td>2019 (2nd term)</td>
<td>2022</td>
<td>No</td>
</tr>
<tr>
<td>Mayoras, Andrew W.</td>
<td>2019 (1st term)</td>
<td>2022</td>
<td>Yes</td>
</tr>
<tr>
<td>Mills, Richard C.</td>
<td>2019 (2nd term)</td>
<td>2022</td>
<td>No</td>
</tr>
<tr>
<td>Piwowarski, Nathan R.</td>
<td>2019 (2nd term)</td>
<td>2022</td>
<td>No</td>
</tr>
<tr>
<td>Syed, Nazneen Hasan</td>
<td>2019 (2nd term)</td>
<td>2022</td>
<td>No</td>
</tr>
<tr>
<td>Silver, Kenneth</td>
<td>2019 (1st term)</td>
<td>2022</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Ex Officio Members of the Council

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Brian V. Howe; Shaheen I. Imami; Stephen W. Jones; Robert B. Joslyn; James A. Kendall; Kenneth E. Konop; Nancy L. Little; James H. LoPrete; Richard C. Lowe; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack; Marlaine C. Teahan, Marguerite Munson Lentz
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, March 13, 2020
East Lansing, Michigan
9:00 – 10:15 AM

1. Christine Savage – Marital and Premarital Agreement Committee – 40
   minutes
   See attached:
   • Memorandum from the committee (Exhibit 1)
   • Proposed redline version of the Uniform Premarital and Marital Agreements
     Act (Exhibit 2)

2. Nathan Piwowarski and Christine Savage – Legislative Development and
   Drafting Committee – 35 minutes
   Re: Uniform Power of Attorney Act
   See attached memorandum (Exhibit 3)
EXHIBIT 1
The Premarital and Marital Agreement Committee ("Committee") has focused our efforts on a review of the Uniform Premarital and Marital Agreements Act ("Act"). This review has included an examination of the current law in Michigan relating to premarital and marital agreements, along with the review of the provisions of the Act during the CSP meetings. Attached is a copy of the Act marked with the revisions from the most recent CSP meeting.

At this point the Committee is requesting input from CSP on its interest in having the Committee pursue the advancement of the Act to the Michigan legislature.

Following is a brief summary of the Act:

Section 1: Title

"Uniform Premarital and Marital Agreements Act"

Section 2: Definitions

Section 2 of the Act is defined terms. To stay consistent with the uniformity of the Act, only minor revisions were made which are marked for terms that are also defined under EPIC. No substantive revisions were made to the defined terms.

Section 3: Scope

Section 3 outlines the scope of the Act. The Act applies to agreements signed after the effective date. It does not apply to agreements which require court approval to become effective or agreements between spouses who intend to obtain a marital dissolution or court-decreed separation.

Section 4: Governing Law
Section 4 describes the validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement and how it is determined by the law of jurisdiction designated in the agreement, given that it is not contrary to public policy or Michigan Law.

Section 5: Principles of Law and Equity

Section 5 makes clear that common law contract doctrines and principles of equity are continually applied where this act does not displace them.

Section 6: Formation Requirements

Section 6 states that the agreement must be in a record, typically written record, and signed by both parties. This Section also affirmatively provides that a premarital or marital agreement is enforceable without consideration.

Section 7: When Agreement Effective

Section 7 sets forth the effective date of the premarital and marital agreements. A premarital agreement is effective on marriage. A premarital agreement is effective on the signing of the agreement by both parties. The effective date does not deprive parties from agreeing that certain provisions within an agreement will not go into or out of effect until a later time.

Section 8: Void Marriage

Section 8 provides that if a marriage is void, the agreement is enforceable to the extent necessary to avoid inequitable result. This section is intended to apply primarily to cases where a marriage is void due to the pre-existing marriage of one of the partners. Situations where one partner seeking a civil annulment relating to some claims of misrepresentation or mutual mistake would usually be better left to the main enforcement provisions of Sections 9 and 10.

Section 9: Enforcement

Pursuant to Section 9 a premarital or marital agreement would be unenforceable if a party against whom enforcement is sought proves any of the following:

1. The party's consent to the agreement was involuntary or the result of duress;

   Note in the marked version, fraud and mistake were inserted consistent with Michigan case law.

2. The party did not have access to independent legal representation;
3. Unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights, or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or

4. Before signing the agreement, the party did not receive adequate financial disclosure.

Section 9 also details the requirements to meet the standards for enforceability:

1. **Independent Legal Representation.** A party has access to independent legal representation if (a) before signing a premarital or marital agreement, the party has a reasonable time to (i) decide whether to retain a lawyer to provide independent legal representation, and (ii) locate a lawyer to provide independent legal representation, obtain a lawyer's advice, and consider the advice provided; and (b) the other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

2. **Waiver.** A notice of waiver of rights under Section 9 requires language, conspicuously displayed, substantially similar to examples in the Act, as applicable to the premarital agreement or marital agreement.

3. **Adequate Financial Disclosure.** A party has adequate financial disclosure if the party: (a) receives a reasonably accurate description and good-faith estimate of the value of the property, liabilities, and income of the party, (b) expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided, or (c) has adequate knowledge or reasonable basis for having adequate knowledge of the description an estimate of the property, liabilities and income.

Note Section 9 also provides the following:

1. **Public Assistance.** If the premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to avoid that eligibility.

2. **Unconscionability or Hardship.** A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole (a) the term is unconscionable at the time of signing, or (b) enforcement of the term results in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.

Note that the marked changes modified to state that the material change was reasonably foreseeable at the time the agreement was signed. This modification was made to be consistent with Michigan case law.
Section 10: Unenforceable Terms

Section 10 discusses specific incidents in which a premarital or marital agreement is not enforceable. A term in a premarital agreement or marital agreement is not enforceable to the extent that it:

1. Adversely affects a child’s right to support;
2. Limits or restricts a remedy available to a victim of domestic violence;
3. Purports to modify the grounds for a court-decreed separation or marital dissolution; or
4. Penalizes a party for initiating a legal proceeding leading to a court-decreed separation or marital dissolution.

Section 11: Limitation of Action

Section 11 provides that a claim for relief under a premarital agreement or marital agreement is tolled during the marriage, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

Section 12: Uniformity of Applications and Construction

Section 12 provides that consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 13: Relation to Electronic Signatures in Global and National Commerce Act

Section 13 modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede Section 101 (C) of that act, or authorize electronic delivery of any of the notices described under that act.

Section 14: Repeals; Conforming Amendments

As Michigan did not adopt the prior uniform act, the Uniform Premarital Agreement Act, there will be no act to repeal.

Section 15: Effective Date

The effective date will be stated in the Act.
UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

Drafted by the
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FIRST YEAR
NASHVILLE, TENNESSEE
JULY 13 - JULY 19, 2012

WITH PREFATORY NOTE AND COMMENTS

COPYRIGHT © 2012
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 2, 2013
UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

SECTION 1. SHORT TITLE. This act may be known and cited as the "Uniform Premarital and Marital Agreements Act."

SECTION 2. DEFINITIONS. In this act:

(1) "Amendment" means a modification or revocation of a premarital agreement or marital agreement.

(2) "Marital agreement" means an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.

(3) "Marital dissolution" means the ending of a marriage by court decree. The term includes a divorce, dissolution, and annulment.

(4) "Marital right or obligation" means any of the following rights or obligations arising between spouses because of their marital status:

   (A) spousal support;

   (B) a right to property, including characterization, management, and ownership;

   (C) responsibility for a liability;

   (D) a right to property and responsibility for liabilities at separation, marital dissolution, or death of a spouse; or

   (E) award and allocation of attorney's fees and costs.
"Premarital agreement" means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.

"Property" means anything that may be the subject of ownership and includes both personal and real property, tangible or intangible, legal or equitable, or any interest therein.

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

"Sign" means with present intent to authenticate or adopt a record:

A) to execute or adopt a tangible symbol; or

B) to attach to or logically associate with the record an electronic symbol, sound, or process.

"State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

SECTION 3. SCOPE.

(a) This Act applies to a premarital agreement or marital agreement signed on or after the effective date of this Act.

(b) This Act does not affect any right, obligation, or liability arising under a premarital agreement or marital agreement signed before the effective date of this Act.

(c) This Act does not apply to:
1 (1) an agreement between spouses which affirms, modifies, or waives a
2 marital right or obligation and requires court approval to become effective; or
3 (2) an agreement between spouses who intend to obtain a marital
dissolution or court-decreed separation which resolves their marital rights or
obligations and is signed when a proceeding for marital dissolution or court-decreed
separation is anticipated or pending.
4
5 (d) This fact does not affect adversely the rights of a bona fide purchaser for
value to the extent that this fact applies to a waiver of a marital right or obligation in a
transfer or conveyance of property by a spouse to a third party.

SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation,
and construction of a premarital agreement or marital agreement are determined:
(1) by the law of the jurisdiction designated in the agreement if the jurisdiction
has a significant relationship to the agreement or either party and the designated law is
not contrary to a fundamental public policy of this state; or
(2) absent an effective designation described in paragraph (1), by the law of
this state, including the choice-of-law rules of this state.

SECTION 5. PRINCIPLES OF LAW AND EQUITY. Unless
displaced by a provision of this fact, principles of law and equity supplement
this fact.

SECTION 6. FORMATION REQUIREMENTS. A premarital agreement or
marital agreement must be in a record and signed by both parties. The agreement is
enforceable without consideration.

SECTION 7. WHEN AGREEMENT EFFECTIVE. A premarital agreement
is effective on marriage. A marital agreement is effective on signing by both parties.
SECTION 8. VOID MARRIAGE. If a marriage is determined to be void, a premarital agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable result.

SECTION 9. ENFORCEMENT.

(a) A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves any of the following:

1. The party’s consent to the agreement was involuntary or the result of fraud, duress, or mistake;
2. The party did not have access to independent legal representation under subsection (b);
3. Unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
4. Before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

(b) A party has access to independent legal representation if:

1. Before signing a premarital or marital agreement, the party has a reasonable time to:
   (A) Decide whether to retain a lawyer to provide independent legal representation; and
   (B) Locate a lawyer to provide independent legal representation, obtain the lawyer’s advice, and consider the advice provided; and
2. The other party is represented by a lawyer and the party has the
financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

(c) A notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following, as applicable to the premarital agreement or marital agreement:

(1) "If you sign this agreement, you may be:
(A) Giving up your right to be supported by the person you are marrying or to whom you are married.
(B) Giving up your right to ownership or control of money and property.
(C) Agreeing to pay bills and debts of the person you are marrying or to whom you are married.
(D) Giving up your right to money and property if your marriage ends or the person to whom you are married dies.
(E) Giving up your right to have your legal fees paid."

(d) A party has adequate financial disclosure under this section if the following applies:

(1) The party receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;
(2) The party expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or
(3) The party has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in paragraph (1).
(e) If a premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to avoid that eligibility.

(f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole, either of the following apply:

1. The term was unconscionable at the time the agreement was signed; or
2. Enforcement of the term may be unconscionable for a party at the time of enforcement because of a material change in circumstances arising after the agreement was signed that was not reasonably foreseeable at the time the agreement was signed.

(g) The court shall decide a question of unconscionability or substantial hardship under subsection (f) as a matter of law.

SECTION 10. UNENFORCEABLE TERMS.

(a) In this section, "custodial responsibility" means physical or legal custody, parenting time, access, visitation, or other custodial right or duty with respect to a child.

(b) A term in a premarital agreement or marital agreement is not enforceable to the extent that it:

1. adversely affects a child's right to support;
2. limits or restricts a remedy available to a victim of domestic violence
under law of this state other than this act; 

(3) Purports to modify the grounds for a court-decree separation or 
marital dissolution available under law of this state other than this act; or 

(4) Penalizes a party for initiating a legal proceeding leading to a court-decree separation or marital dissolution.

(c) A term in a premarital agreement or marital agreement which defines the rights or 
duties of the parties regarding custodial responsibility is not binding on the court.

SECTION 11. LIMITATION OF ACTION. A statute of limitations applicable to 
an action asserting a claim for relief under a premarital agreement or marital agreement is 
tolled during the marriage of the parties to the agreement, but equitable defenses limiting 
the time for enforcement, including laches and estoppel, are available to either party.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. 

In applying and construing this uniform act, consideration must be given to the need to 
promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL 
AND NATIONAL COMMERCE ACT. This act modifies, limits, or supersedes the 
Electronic Signatures in Global and National Commerce Act. 15 U.S.C. Section 7001 et 
seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) 
of that act. 15 U.S.C. Section 7003(b).

SECTION 14. REPEALS; CONFORMING AMENDMENTS. 

(a) [Uniform Premarital Agreement Act] is repealed. 
(b) Uniform Probate Code Section 213 (Waiver of Right to Elect and of Other Rights] is repealed.
SECTION 15. EFFECTIVE DATE. This act takes effect ...
EXHIBIT 3
Memo

To: Probate Council
From: Legislative Drafting Committee
Date: March 13, 2020
Subject: Uniform Power of Attorney Act

The Legislative Drafting Committee ("Committee") has reviewed the Uniform Power of Attorney Act ("UPOAA"). The purposes of this memorandum are (i) to provide the Committee on Special Projects ("CSP") with a brief summary of the UPOAA, and (ii) to determine if CSP has interest in the Committee beginning the process of developing a legislative proposal based on the UPOAA. The Committee intends to work in conjunction with the Power of Attorney Subcommittee of the Elder Abuse Task Force ("POA Subcommittee") to incorporate provisions to address past concerns raised with the UPOAA by the Michigan Bankers Association ("MBA").

As discussed in our last Committee meeting, there may be non-uniform provisions that can be incorporated into the UPOAA to make the proposal agreeable to the MBA which would include: (i) provisions to protect financial institutions that reject powers of attorney based on legitimate issues with such powers of attorney, and (ii) create consequences for those financial institutions that arbitrarily reject powers of attorney.

It is the belief of our Committee that the current timing suggests that the Probate Council should consider developing a legislative proposal based on the UPOAA as this matter is currently being addressed by the POA Subcommittee. The Committee acknowledges that a workable proposal will require collaboration with the POA Subcommittee and negotiations with the MBA. In an effort to avoid piecemeal confirmation of the UPOAA, our Committee is proposing that the Probate Council become actively involved with the development of the proposed legislation.

Below is a brief summary of the UPOAA. If CSP determines there is interest in pursuing this matter and the Probate Council supports the Committee moving forward with the proposed legislation, the Committee will provide a more comprehensive summary and points for discussion.

The UPOAA was approved by the National Conference of Commissioners on Uniform State Law in 2006. A summary of the UPOAA is as follows:
Article I General Provisions

Article I addresses substance with several sections addressing a number of default provisions as to the creation and use of the power of attorney. While most of the Article I provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article I serve as safeguards for the protection of the principal, agent, and third parties. The default provisions established in Article I are incorporated in Article III's optional Statutory Form.

Article I includes a definitional section applicable to most, but not all powers of attorney's, durability, execution requirements, validity of photocopies and those electronically submitted, portability, guardianship, effectiveness, termination, successor agents, compensation, implied acceptance by agent, agent duties, and the resignation requirements imposed on the agent.

Article I also includes the UPOAA provisions dealing with the agent's liability for breaching any fiduciary or authorize duty. As to the agent's liability, Article I holds the agent liable for breach, unless exonerated by the principal.

Article II Authority

Article II addresses areas of authority for agents by specifically defining the scope of the power given to the agent. Article II identifies agent powers that require a specific grant of authority. The authority warrants specific grant includes powers to impact the principal's property. These property matters involve the grant of authority where there is the greatest risk of abuse by the agent.

Additionally, because these powers by specific grant address authority that could sharply reduce the principal's power or change the principal's estate plan, the UPOAA imposes further limitations on any agent who is not an ancestor, spouse, or descendent of the principal. Non-relative agents are prohibited from exercising the property powers in favor of themselves or someone to whom they have a legal obligation of support.

Article II also provides for the general grant of authority with respect to the incidental subject matter of the power of attorney. Sections 204 through 216 of the UPOAA describe in detail the general authority granted. The general authority granted may be incorporated by reference.
Article III  Statutory Forms

Article III includes two optional forms: the Statutory Form and the agent's certification. The Statutory Form begins with a warning to the principal labeled "Important Information". This section identifies the risks associated with exercising a power of attorney. One of those risks is the agent's ability to make property decisions for the principal immediately, regardless of whether the principal can act for himself or herself.

The Statutory Form has a filled-in-the-blank format for the principal to first designate an agent and a successor agent. Next is a section dealing with the general grant of authority, allowing the principal to identify subject matter to be included in the agent's general authority and providing the principal with an option to select an all inclusive general grant of authority instead. The subject matters are encompassed in the principal's general grant of authority and cover a range of property types. Each property type is listed; however, the Statutory Form does not describe the kinds of actions the agents can take with respect to that property.

The third section identifies property-sensitive topics, which require an express grant of authority. The Statutory Form allows the principal to grant the agent express authority and the power to engage in the estate planning endeavors on behalf of the principal. These property-sensitive topics impose significant risk of loss; therefore, stricter rules apply to agents who are not the ancestor, spouse, or descendent of the principal. The principal is both warned and required to expressly authorize the agent to "take action that could significantly reduce the principal's property or change how the principal's property is distributed at the principal's death".

Next is a section further limiting the agent, who is not a close relative of the principal, from using property for the agent's benefit. The Statutory Form has a section for special instructions, is effective immediately, provides an opportunity for the principal to identify a guardian using a fill-in-the-blank format, and provides a statement authorizing reliance by a third party, followed by a signature with an optional acknowledgment. Also included in the Statutory Form is a section entitled, "Important Information for Agent," which describes the agent's duties, termination of authority, and potential for liability.

Article IV  Miscellaneous Provisions

Article IV contains miscellaneous provisions authorizing retroactive application to preexisting powers of attorney. Section 401 emphasizes the need to "promote uniformity of the law" with respect to the power of attorney.
Council Materials
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN
March 13, 2020
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 (Mark Kellogg)—Attachment 1
   B. Treasurer’s Report (James Spica) —Attachment 2
   C. Chair’s Report
   D. Committee on Special Projects (Katie Lynwood)
   E. Legislative Analysis & Monitoring Committee (Dan Hilker)
   F. Legislative Development and Drafting Committee (Nathan Piwowarski)—Attachment 3

VI. Other Committees Presenting Oral Reports
   A. Guardianship, Conservatorship & End-of-Life Committee (Kathleen Goetsch)—Attachment 5

VII. Other Committees Presenting Written Reports Only
   A. Tax Committee - March 2020 Tax Nugget (Mark DeLuca) —Attachment 4

VIII. Other Business

IX. Adjournment

Next Probate Council Meeting: Friday, April 17, 2020, at 9:00 am
Meeting of the Council of the
Probate and Estate Planning Section of
the State Bar of Michigan

Friday, February 7, 2020 @ 9:00 a.m.
University Club of MSU

Minutes

I. Call to Order

The Chair of the Council, Christopher A. Ballard, called the meeting to order at 9 a.m.

II. Introduction of Guests

A. Meeting attendees introduced themselves.

B. The following officers and members of the Council were present:

   Christopher A. Ballard, Chair
   David P. Lucas, Chairperson Elect
   Mark E. Kellogg, Secretary
   James P. Spica, Treasurer
   James F. Anderton
   Michael G. Lichterman
   Raj A. Malviya
   Kurt A. Olson
   Christine M. Savage
   Angela M. Hentkowski
   Katie Lynwood
   Neal Nusholtz
   Raj A. Malviya
   Richard Mills
   Nathan R. Piwowarski
   Ken Silver

C. The following officers and members of Council were present and attended via remote access:
   Hon. Michael Jaconette and Andrew W. Mayoras.

   The Chair noted that a quorum was present, in person.

C. The following liaisons to the Council were present:

   Neal Nusholtz (Tax Section).

D. Others present:

   Douglas G. Chalgian
III. Excused Absences

The following officers and members of the Council were absent with excuse:


IV. Lobbyist Report—Public Affairs Associates

Rebecca (Becky) Bechler of Public Policy Associates was present at the meeting.

V. Monthly Reports:

A. Minutes of Prior Council Meeting (Mark Kellogg)—ATTACHMENT 1

Minutes of Prior Council Meeting (submitted by Mark E. Kellogg): it was moved and seconded to approve the Minutes of January 10, 2020, meeting of the Council, as included in the meeting agenda materials and presented at the meeting. The minutes were approved by a vote of the Council.

B. Treasurer’s Report (James Spica)—ATTACHMENT 2
1. Financial Update

2. Proposed Budget

The proposed budget included a new item regarding clerical expenses which contemplates using the services of an administrative assistance to assist the Secretary of the Council and the Chair of the Committee on Special Projects with their ongoing duties during the fiscal year. It was also discussed that the Probate and Estate Planning Section should consider raising the Section

The Treasurer's Report and Proposed Budget was approved by a vote of the Council.

C. Chair’s Report (Christopher A. Ballard)

D. Committee on Special Projects (Katie Lynwood)

1. Nathan Piwowarski discussed the proposed corrections to the 2019 Omnibus bill. There were corrections/oversights identified by the Legislative Drafting Bureau.

2. Andrew Mayoras discussed Draft 2 of the proposed legislation regarding the Attorney Drafter/ As Beneficiary legislation. The committee discussed various aspects of the legislation. Proposed revisions included the following:

   Add the following: "A will trust or other will substitute that purports to convey property for less than fair market value may constitute a substantial gift under this Section." And delete Section 11(b)(ii).

The Council took a vote on taking a public policy position in support of the proposed legislation: Passed affirmative 15; negative 0; and abstention 0.

E. Legislative Analysis & Monitoring Committee (Dan Hilker)

F. Legislative Development and Drafting Committee (Nathan Piwowarski)

VI. Other Committees Presenting Oral Reports
A. Amicus Committee (Andy Mayoras)

B. Tax Nugget, February 2020 (J.V. Anderton)—ATTACHMENT 3

C. Petition to Compel JP Morgan Chase Bank to Comply with MCL 700.7914 (COT) and Order (Patricia Ouellette)—ATTACHMENT 4

VII. Other Committees Presenting Written Reports Only

A. Vehicle TOD Proposal (Georgette David and Katie Lynwood)—ATTACHMENT 5

VIII. Other Business

No other business came before the Council.

IX. Adjournment

Seeing no other matters or business to be brought before the meeting of the Council, the Chair declared the meeting adjourned at 11:50 a.m.

Respectfully submitted,

Mark E. Kellogg, Secretary

Next Probate Council Meeting: Friday, March 13, 2020, at 9 a.m.
## Carry-Over Fund Balance from 2018-2019

| Fund Bal-Probate/Estate Plan | $184,807.31 |

### TREASURER'S MONTHLY ACTIVITY REPORT

#### Carry-Over Fund Balance from 2018-2019

| Fund Bal-Probate/Estate Plan | $184,807.31 |

#### YTD Revenue

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1-7-99-775-1050 Probate/Estate Planning Dues</td>
<td>$3,745.00</td>
<td>$110,425.00</td>
<td>$110,000.00</td>
</tr>
<tr>
<td>1-7-99-775-1055 Probate/Estate Stud/Affil Dues</td>
<td>$70.00</td>
<td>$630.00</td>
<td>$800.00</td>
</tr>
<tr>
<td>1-7-99-775-1330 Subscription to Newsletter</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
</tr>
<tr>
<td>1-7-99-775-1470 Publishing Agreement Account</td>
<td>$-</td>
<td>$-</td>
<td>$200.00</td>
</tr>
<tr>
<td>1-7-99-775-1755 Pamphlet Sales Revenue</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
</tr>
<tr>
<td>1-7-99-775-1935 Miscellaneous Revenue</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
</tr>
<tr>
<td><strong>Total Revenue</strong></td>
<td><strong>$3,815.00</strong></td>
<td><strong>$111,055.00</strong></td>
<td><strong>$111,000.00</strong></td>
</tr>
</tbody>
</table>

#### Cumulative Expenses

<table>
<thead>
<tr>
<th>Description</th>
<th>January 2020</th>
<th>Cumulative Expenses</th>
<th>Budget (2019-2020)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-9-99-775-1127 Multi-Section Lobbying Group</td>
<td>$2,500.00</td>
<td>$10,000.00</td>
<td>$30,000.00</td>
</tr>
<tr>
<td>1-9-99-775-1145 ListServ</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
</tr>
<tr>
<td>1-9-99-775-1276 Meetings</td>
<td>$2,166.00</td>
<td>$9,783.20</td>
<td>$18,000.00</td>
</tr>
<tr>
<td>1-9-99-775-1283 Seminars</td>
<td>$-</td>
<td>$-</td>
<td>$20,000.00</td>
</tr>
<tr>
<td>1-9-99-775-1297 Annual Meeting Expenses</td>
<td>$1,000.00</td>
<td>$1,000.00</td>
<td>$1,000.00</td>
</tr>
<tr>
<td>1-9-99-775-1493 Travel</td>
<td>$948.04</td>
<td>$3,529.38</td>
<td>$12,000.00</td>
</tr>
<tr>
<td>1-9-99-775-1528 Telephone</td>
<td>$-</td>
<td>$-</td>
<td>$100.00</td>
</tr>
<tr>
<td>1-9-99-775-1549 Books &amp; Subscriptions</td>
<td>$-</td>
<td>$-</td>
<td>$750.00</td>
</tr>
<tr>
<td>1-9-99-775-1822 Litigation-Amicus Curiae Brief</td>
<td>$-</td>
<td>$8,502.00</td>
<td>$20,000.00</td>
</tr>
<tr>
<td>1-9-99-775-1833 Newsletter</td>
<td>$100.00</td>
<td>$200.00</td>
<td>$12,300.00</td>
</tr>
<tr>
<td>1-9-99-775-1861 Printing</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
</tr>
<tr>
<td>1-9-99-775-1868 Postage</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
</tr>
<tr>
<td>1-9-99-775-1987 Miscellaneous</td>
<td>$-</td>
<td>$-</td>
<td>$2,500.00</td>
</tr>
<tr>
<td>1-9-99-775-XXXX Clerical Expenses</td>
<td>$-</td>
<td>$-</td>
<td>$10,000.00</td>
</tr>
<tr>
<td><strong>Total Expenses</strong></td>
<td><strong>$4,714.04</strong></td>
<td><strong>$32,014.58</strong></td>
<td><strong>$126,650.00</strong></td>
</tr>
</tbody>
</table>

#### Net Income

<table>
<thead>
<tr>
<th>Description</th>
<th>January 2020</th>
<th>Cumulative Expenses</th>
<th>Budget (2019-2020)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Income</td>
<td>$(899.04)</td>
<td>$79,040.42</td>
<td>$(15,650.00)</td>
</tr>
</tbody>
</table>

**General Fund plus Net Income (Running Total)**

<table>
<thead>
<tr>
<th>Description</th>
<th>January 2020</th>
<th>Cumulative Expenses</th>
<th>Budget (2019-2020)</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Fund plus Net Income</td>
<td>$263,910.73</td>
<td>$263,910.73</td>
<td>$169,220.31</td>
</tr>
</tbody>
</table>

### Notes:

Incorrectly Allocated $1,000 to Annual Meeting Expenses in October, corrected in January.

#### Hearts and Flowers Fund

<table>
<thead>
<tr>
<th>Description</th>
<th>January 2020</th>
<th>Revenue</th>
<th>Withdrawals</th>
<th>Total Fund</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning Deposit Fund Balance</td>
<td>$772.81</td>
<td>$772.81</td>
<td></td>
<td>$772.81</td>
</tr>
</tbody>
</table>

#### Amicus Reserve

<table>
<thead>
<tr>
<th>Description</th>
<th>January 2020</th>
<th>Revenue</th>
<th>Withdrawals</th>
<th>Ending Fund Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning Fund Balance</td>
<td>$19,167.25</td>
<td>$</td>
<td>$</td>
<td>$19,167.25</td>
</tr>
</tbody>
</table>
To: Probate and Estate Planning Council

From: Legislation Development and Drafting Committee

Re: March 2020 Committee Report

Our Committee offers the following updates:

• **Omnibus.** We have reviewed and submitted feedback regarding draft #3 of the legislation. It feels like we are living Zeno’s paradox of the tortoise and Achilles. But the legislation nonetheless should be introduced “soon.”

• **TODs for vehicles.** We have received positive, helpful feedback from the Department of State. We aim to have public-policy-position-ready legislation before the CSP and Council by June of this year.

• **Delaware Tax Trap/MCL 554.92-.93.** Fortunately, we have a bill—SB 721 (Lucido). Unfortunately, we didn’t see the blueback before the bill was introduced, and it contains an older version of our proposal. We need the help of our lobbyists in ensuring that LSB and Sen. Lucido’s office are coordinating a substitute that corrects this error.

• **Entireties trusts.** A meeting with the MBA is still desirable, and still has not been set.

• **Uniform Power of Attorney Act.** Our committee recommends reopening the door to this legislation. Chris Savage has prepared an excellent summary memo, which will be considered by the Committee on Special Projects this month.

• **Qualified Dispositions in Trust/Voidable Transfers technical fix.** A blueback has been requested, but we haven’t seen a draft. Again, Zeno’s paradox.

• **Conservators as PRs/MCL 700.5426 and 700.3203.** There is no update on this project for the month.
MEMORANDUM

TO: SBM Probate and Estate Planning Council
FROM: Mark J. DeLuca, on behalf of the Tax Committee
RE: March 2020 Tax Nugget

This month’s Tax Nugget is a summary of Seely v. Commissioner of Internal Revenue, T. C. Memo 2020-6 (filed January 13, 2020). As we are in the thick of tax filing season, this case is a good reminder to tax practitioners that when filing a tax return or other document with the IRS, it is well worth the additional cost to send the documents to the IRS via certified mail, registered mail, or a private delivery service authorized by the IRS (e.g., UPS, Fed Ex, etc.).

Seely v. Commissioner involves an attorney that sent his clients’ Tax Court petition to the court via regular mail through the United States Postal Service (USPS). The attorney alleged that he mailed the petition four days before it was due to be filed with the Tax Court. However, the Tax Court did not receive the petition until 21 days after the due date. Moreover, unfortunately for the attorney, when the envelope enclosing the petition arrived at the Tax Court, the envelope seemingly had never been postmarked and had no other markings from USPS to determine when it was placed in the mail. Because the petition was received after the due date, with no postmark, the IRS argued that the petition should be dismissed by the court.

IRC Sec. 7502 provides a version of what common law refers to as the “mailbox rule.” Pursuant to IRC Sec. 7502(a), a document delivered to the IRS or Tax Court by regular U.S. mail is generally timely filed if the “the postmark date falls within the prescribed period or on or before the prescribed date [i.e., the due date]”. IRC Sec. 7502 and the regulations thereunder contain separate rules for documents sent via registered mail, certified mail, or an authorized private delivery service.

In Seely v. Commissioner, the court was faced with the question of what to do when the envelope containing the petition is received by the Tax Court, but has no postmark or any other marking from USPS. IRC Sec. 7502 and the regulations thereunder do not directly address envelopes completing lacking a postmark. However, the court held that its caselaw provides that if a postmark is illegible, then: (i) the burden is on the taxpayer to prove when the envelope was mailed; and (ii) the taxpayer is permitted to use extrinsic evidence to meet the burden of proof. If the taxpayer is unable to present “convincing evidence” to meet the burden, then the date the document is received by the Tax Court is treated as the default filing date.

1 Baldwin v. United States, 921 F.3d 836 (9th Cir. 2019) previously held that Treas. Reg. Sec. 301.7502(e)(2) precludes the introduction of extrinsic evidence to prove timely mailing (at least in some cases). The taxpayers in Baldwin have filed a Cert Petition with the U. S. Supreme Court seeking review of the 9th Circuit decision. The court in Seely distinguished Baldwin based on the fact that the tax return at issue in Baldwin was never actually received by the IRS and taxpayers wanted to use extrinsic evidence to prove delivery, as well as timely mailing. Thus, because the petition was actually received by the Tax Court in Seely, the court held that Treas. Reg. Sec. 301.7502(e)(2) does not preclude the introduction of extrinsic evidence to prove timely mailing.
The court in *Seely* held that if the envelope lacks a postmark, then the postmark should be deemed illegible and the taxpayer may introduce extrinsic evidence. Petitioners in *Seely* submitted a sworn statement from their attorney alleging that he deposited the petition with USPS four days before the due date of the petition. Interestingly, the IRS admitted that it normally takes 8 – 15 business days for a document to be delivered to a government agency or office in the District of Columbia. Thus, by the IRS’s own admission, it can take as many as 15 business days for a document to be received by the Tax Court when sent by regular U.S. mail from anywhere in the country.

Based upon the sworn statement from the Petitioners’ attorney, and the information received from the IRS and USPS regarding the timeline for mail to get to the Tax Court, the court sided with the Petitioners and held that it is more likely than not that the petition was timely filed.
MEMORANDUM

To: Probate Council
From: Guardianship, Conservatorship & End-of-Life Committee
Date: 3/9/2020
Re: SIB 0798 – Guardian duties/restrictions

A copy of Senate Bill 0798 is attached. Senator Lucido is a Co-Sponsor of this bill. It was introduced on 2/19/2020 and referred to the Committee on Judiciary and Public Safety. It is identical to that which was proposed in the AG’s Elder Abuse Task Force, with the exception that Subsection 5 was added to the proposed Senate Bill.

Blacks Law defines Restrict as “to restrain within bounds; to limit – to confine.

I am also attaching conversation with Josh Ard, who is a member of the Guardianship Committee regarding this proposal.

I have reviewed applicable EPIC statutes and the Uniform Guardianship and Protective Proceedings Act. Neither EPIC nor UGPPA contain any affirmative statement that an individual subject to guardianship retains their 1st Amendment Right to Freedom of Association. Even MCL 700.5306 as amended and effective 3/19/2020 (a copy is also attached), does not make specific reference to Freedom of Association.

The Guardianship Committee seeks guidance from Council on whether it is appropriate to take a public position on this bill.
SENATE BILL NO. 798

February 19, 2020, Introduced by Senators MACDONALD, WOJNO, RUNESTAD, LUCIDO and BULLOCK and referred to the Committee on Judiciary and Public Safety.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending section 5314 (MCL 700.5314), as amended by 2018 PA 594.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 5314. (1) If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. 

Subject to subsection (2), to the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the
guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within 3 months after the guardian's appointment and not less than once within 3 months after each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property.
(c) The power to give the consent or approval that is necessary to enable the ward to receive medical, mental health, or other professional care, counsel, treatment, or service. However, a guardian does not have and shall not exercise the power to give the consent to or approval for inpatient hospitalization unless the court expressly grants the power in its order. If the ward objects or actively refuses mental health treatment, the guardian or any other interested person must follow the procedures provided in chapter 4 of the mental health code, 1974 PA 258, MCL 330.1400 to 330.1490, to petition the court for an order to provide involuntary mental health treatment. The power of a guardian to execute a do-not-resuscitate order under subdivision (d), execute a nonopioid directive form under subdivision (f), or execute a physician orders for scope of treatment form under subdivision (g) does not affect or limit the power of a guardian to consent to a physician's order to withhold resuscitative measures in a hospital. As used in this subdivision, "involuntary mental health treatment" means that term as defined in section 400 of the mental health code, 1974 PA 258, MCL 330.1400.

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

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

(ii) Consults directly with the ward's attending physician as to the specific medical indications that warrant the do-not-
resuscitate order.

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

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

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

(f) The power to execute, reaffirm, and revoke a nonopioid directive form on behalf of a ward.

(g) The power to execute, reaffirm, and revoke a physician orders for scope of treatment form on behalf of a ward. However, a guardian shall not execute a physician orders for scope of treatment form unless the guardian does all of the following:

(i) Not more than 14 days before executing the physician orders for scope of treatment form, visits the ward and, if meaningful communication is possible, consults with the ward about executing the physician orders for scope of treatment form.

(ii) Consults directly with the ward's attending physician as to the specific medical indications that warrant the physician orders for scope of treatment form.

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:

(i) Visit the ward and, if meaningful communication is
possible, consult with the ward about reaffirming the physician
orders for scope of treatment form.

(ii) Consult directly with the ward's attending physician as to
specific medical indications that may warrant reaffirming the
physician orders for scope of treatment form.

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

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

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

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

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

(ii) Improvement or deterioration in the ward's mental,
physical, and social condition that occurred during the past year.
The ward's present living arrangement and changes in his or her living arrangement that occurred during the past year.

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

Medical treatment, including mental health treatment, received by the ward.

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

Whether the guardian has executed, reaffirmed, or revoked a nonopioid directive form on behalf of the ward during the past year.

Whether the guardian has executed, reaffirmed, or revoked a physician orders for scope of treatment form on behalf of the ward during the past year.

Services received by the ward.

A list of the guardian's visits with, and activities on behalf of, the ward.

A recommendation as to the need for continued guardianship.

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.

A guardian of a legally incapacitated individual shall not restrict the ability of the legally incapacitated individual to
communicate, visit, or interact with a person, unless any of the following apply:

(a) The ward expressed in a valid power of attorney, patient advocate designation, or any other writing or communication that the ward does not wish to communicate, visit, or interact with the person.

(b) The court, through a specific order, finds by clear and convincing evidence that the restrictions are necessary because interaction with the person poses a risk of physical, psychological, or financial harm to the ward.

(c) A personal protection order or other court order outside of a guardianship is in effect that limits contact between the ward and the person.

(d) Subject to subsection (3), both of the following apply:

(i) The guardian has good cause to believe restriction is necessary because interaction with the person poses a risk of physical, psychological, or financial harm to the ward.

(ii) Within 7 days after the guardian restricts the ward's ability to communicate, visit, or interact with the person, the guardian sends the person, court, and health facility or agency, or licensed adult foster care facility, where the ward resides written notice, on a form created by the state court administrative office, specifically identifying each reason for the restrictions and why less restrictive options were not reasonably available.

(3) Failure of the guardian to provide the form as specified in subsection (2)(d) lifts the restriction and may subject the guardian to removal under section 5310.

(4) An individual who has been restricted from interacting with a ward may petition for the restriction to be removed. The
court shall not order the restriction to remain in place unless it is shown by clear and convincing evidence that both of the following apply:

(a) The restriction is necessary because interaction with the individual poses a risk of physical, psychological, or financial harm to the ward.

(b) A less restrictive option is not reasonably available.

(5) As used in this section:

(a) "Adult foster care facility" means that term as defined in section 3 of the adult foster care facility licensing act, 1979 PA 218, MCL 400.703.

(b) "Health facility or agency" means that term as defined in section 20106 of the public health code, 1978 PA 368, MCL 333.20106.

(c) "Personal protection order" means a personal protection order issued under section 2950 or 2950a of the revised judicature act of 1961, 1961 PA 236, MCL 600.2950 and 600.2950a.
2020 SIB 0798

Good Afternoon Committee Members!! Its been awhile since there has been any need for communication ...

1. 2020 SIB 0798

Good Afternoon Committee Members!!

Its been awhile since there has been any need for communication on this committee. But perhaps here we go again -- with the introduced SB 798 -- this proposal is essentially the same that came out of the Elder Abuse Task Force -- the only difference is that SB 798 defines AFC Home, Health Facility and PPO.

Please review and comment -- the next PEPC meeting is in about 2 weeks -- 3/13/2020 -- I would like the committee to recommend that council take a position against on this proposal. I think it is unnecessary in light of the amendment to 700.5306.

Let me know your thoughts
They both address the same problem, but the approaches are strikingly different.

Under our existing law, there is no right to visitation unless the court finds by clear and convincing evidence that the ward either wants it or it's in the ward's best interest.

In the Senate Bill, the default is a right to visitation. Various things have to be proven to stop visitation.

I no longer have minor children, but think about it.
"Nobody gets to associate with you unless I either find it in your interest or you can convince me by clear and convincing evidence that you really want it."

Parents generally let free association be the default. They only object to certain people.

Another thing is that Senate Bill starts to do something that is necessary, although I don't think it does it well.

We shouldn't privatize enforcement of restrictions and privatize the list of malefactors.
If J. Ard should not be allowed to visit K. Goetsch, then I think
   • This information should be entered into some version of the LIEN system so the guardian could call on the police to help and doesn't have to personally show up and remove that awful J. Ard from Ms. Goetsch's presence. This would also give some authority to nursing homes and other assisted living facilities to keep the bad dude out.
The courts should know that there is something bad about J. Ard and he shouldn't be made a fiduciary in other matters.

I have suggested a way of doing things differently from ordinary PPO's. In particular, it makes sense for the order to be entered immediately if the guardian makes a requisite required statement under oath. Notice should be given to the ward, the banned person, and the probate court. If anybody objects, then there should be a swift hearing to dispose of the matter.

I don't support the senate bill as written, but we shouldn't assume that our law is all we need.

Josh Ard

3. RE: 2020 SIB 0798

Josh you make some good points. My concern is less about the absolute prohibition against someone visiting with the ward—as opposed to reasonable restrictions. Which the proposed legislation uses only the term "restriction".

As guardian of an individual who suffers from asthma or other breathing problem, is it unreasonable to say—you may not smoke around the individual—or when there are family members who are antagonistic with each other—to say—daughter A—you visit Monday, Wednesday & Friday—Daughter B you visit Tuesday Thursday and Saturday? Please do not come drunk to the visit? Or—if son A is going to spend the night at mom's house—do not parade around the home care workers in your "tighty-whities" And yes that last one is a real life scenario.

These are all issues I have had to deal with over the years. And each one has made its way into the court—which we have successfully supported the so-called "restrictions".

A guardian is appointed for a purpose—a guardian should not have to come to court each time there needs to be a reasonable restriction.

I fear we are giving more power to abusers than we are to those charged with protecting our compromised adults.

Maybe some solution may be a positive statement that a guardian must safeguard a ward's right to associate and maintain contact with their friends and family, unless such contact is deemed harmful.
to the person. Then the guardian is in a position that they do need to articulate reasonable restrictions.

Kathy Goetsch

4. RE: 2020 SIB 0798

You make great points, too, Kathy.

What I proposed before is a system where
- the guardian can immediately make reasonable restrictions
- proper notice has to be sent out about the restrictions
  - to the ward
  - to those who are restricted
  - the court
- the restrictions remain unless there is a hearing where the restrictions lose
- if somebody really is banned semi-permanently (e.g., not just when drunk) then that's entered in a LIEN system to get law enforcement to help and courts to know about it

I certainly agree that the senate bill doesn't fit these characteristics.
I know courts will say "Geez, this is more work" but that's life.

Josh
**ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)**  
*Act 386 of 1998*

***** 700.5306.amended THIS AMENDED SECTION IS EFFECTIVE MARCH 19, 2020 *****

700.5306.amended Court appointment of guardian of incapacitated person; findings; appointment of limited guardian; effect of patient advocate designation; supervised access.

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

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

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

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

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

(6) If the court finds by clear and convincing evidence that the individual is incapacitated, that the person that has the care and custody of the incapacitated individual denied another person access to the incapacitated individual, and that the incapacitated individual desires contact with the other person or that contact with the other person is in the incapacitated individual's best interest, the court may appoint a limited guardian to supervise access with the other person.


Popular name: EPIC