PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for

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

Saturday, March 18, 2017
9:00 am
University Club
3435 Forest Road
Lansing, Michigan 48910
Probate and Estate Planning Section of the State Bar of Michigan

Notice of Meetings

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

And

Meeting of the Council of the Probate and Estate Planning Section

March 18, 2017
9:00 a.m.
University Club
3435 Forest Road
Lansing, Michigan 48910

The above stated meetings of the Section will be held at the University Club, 3435 Forest Road, Lansing, Michigan 48910, on Saturday, March 18, 2017. The Section’s Committee on Special Projects (CSP) meeting will begin at 9:00 am, followed immediately by the meeting of the Council of the Section. If time allows and at the discretion of the Chair, we will work further on CSP materials after the Council of the Section meeting concludes.

Christopher Ballard, Secretary
Varnum LLP
300 N. 5th Ave Ste 230
Ann Arbor, Michigan 48104
Phone: (734) 372-2912
Fax: (734) 372-2940
Email: caballard@varnumlaw.com
Schedule and Location of Future Meetings

Probate and Estate Planning Section

Of the

State Bar of Michigan

Unless otherwise noted, CSP meetings are held at 9:00 a.m., immediately followed by the Council meeting for the Section at approximately 10:15 a.m., at the University Club, 3435 Forest Road, Lansing, Michigan 48910.

Meeting Schedule for 2016-2017

March 18, 2017
April 22, 2017
June 24, 2017

September 9, 2017 (Annual Section Meeting)
CALL FOR MATERIALS

Council Meetings of the Probate and Estate Planning Section

Schedule of Dates for Materials for Committee on Special Projects

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

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

April 13, 2017
June 15, 2017
August 31, 2017 (for September meeting)

Schedule of Dates for Materials for Council Meeting

All materials are due on or before 5:00 p.m. of the Friday falling 8 days before the next Council meeting. Council materials are to be sent to Chris Ballard, Secretary (caballard@varnumlaw.com).

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

April 14, 2017
June 16, 2017
September 1, 2017
## Officers for 2016-2017 Term

<table>
<thead>
<tr>
<th>Officer</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson</td>
<td>James B. Steward</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>Marlaine C. Teahan</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>Marguerite Munson Lentz</td>
</tr>
<tr>
<td>Secretary</td>
<td>Christopher A. Ballard</td>
</tr>
<tr>
<td>Treasurer</td>
<td>David P. Lucas</td>
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## Council Members for 2016-2017 Term

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<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>Bearup, George F.</td>
<td>2014 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2017</td>
<td>No</td>
</tr>
<tr>
<td>Jaconette, Hon Michael L.</td>
<td>2014 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Kellogg, Mark E.</td>
<td>2014 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
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<tr>
<td>Lichterman, Michael G.</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; partial term)</td>
<td>2017</td>
<td>Yes (2 terms)</td>
</tr>
<tr>
<td>Malviya, Raj A.</td>
<td>2014 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Welber, Nancy H.</td>
<td>2014 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2017</td>
<td>No</td>
</tr>
<tr>
<td>Caldwell, Christopher J.</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Clark-Kreuer, Rhonda M.</td>
<td>2015 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2018</td>
<td>No</td>
</tr>
<tr>
<td>Goetsch, Kathleen M.</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Lynwood, Katie</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Mysliwiec, Melisa M.W.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; partial term)</td>
<td>2018</td>
<td>Yes (2 terms)</td>
</tr>
<tr>
<td>Skidmore, David L.J.M.</td>
<td>2015 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2018</td>
<td>No</td>
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<tr>
<td>Labe, Robert C.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Mills, Richard C.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; full term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
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<tr>
<td>New, Lorraine F.</td>
<td>2016 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2019</td>
<td>No</td>
</tr>
<tr>
<td>Piwowarski, Nathan R.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Syed, Nazneen H.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Vernon, Geoffrey R.</td>
<td>2016 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2019</td>
<td>No</td>
</tr>
</tbody>
</table>
Ex Officio Members

John E. Bos
Robert D. Brower, Jr.
Douglas G. Chalgian
George W. Gregory
Henry M. Grix
Mark K. Harder
Hon. Philip E. Harter
Dirk C. Hoffius
Brian V. Howe
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. Morrisey
Patricia Gormely Prince
Douglas J. Rasmussen
Harold G. Schuitmaker
John A. Scott
Thomas F. Sweeney
Fredric A. Sytsma
Lauren M. Underwood
W. Michael Van Haren
Susan S. Westerman
Everett R. Zack
Michael W. Irish Award

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

**Recipients**

1995  Joe C. Foster, Jr.
1996  John H. Martin
1997  Harold A. Draper
1998  Douglas J. Rasmussen
1999  James A. Kendall
2000  NO AWARD PRESENTED
2001  John E. Bos
2002  Everett R. Zack
2003  NO AWARD PRESENTED
2004  Brian V. Howe
2005  NO AWARD PRESENTED
2006  Hon. Phillip E. Harter
2007  George Cooney (April 3, 2007)
2008  Susan A. Westerman
2009  Russell M. Paquette (posthumously)
2010  Fredric A. Sytsma
2011  John A. Scott
2012  NO AWARD PRESENTED
2013  Michael J. McClory
2014  Sebastian V. Grassi, Jr.
2015  NO AWARD PRESENTED
2016  Douglas A. Mielock

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

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

Who: As of November 2015, there have been five recipients:

- John E. Bos (2007)
- Everett R. Zack (2009)
- John H. Martin (2011)
- John A. Scott (2013)
- Phillip E. Harter (2015)

When: This award is not necessarily given every year. So far we’ve given awards in 2007, 2009, 2011, 2013, and 2015.

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

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

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

Guidelines for Selection:

- Significant CLE contributions to probate and estate planning over a substantial period of time.
- Outstanding quality of contributions.
- A wide range of contributions, e.g. multiple contributions for the following: speaker, author, editor, advisory board member, curriculum advisor, creating case study scenarios, preparing Top Tips, How-To Kits or other online resources, etc.
- Generous mentorship and assistance to colleagues with their probate and estate planning career development as well as activities and active involvement with the Probate & Estate Planning Section of the State Bar of Michigan.
Amicus Curiae Committee
Mission: To review requests made to the Section to file, and to identify cases in which the Section should file, amicus briefs in pending appeals and to engage and oversee the work of legal counsel retained by the Section to prepare and file its amicus briefs

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

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

Marlaine C. Teahan

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

Nancy H. Welber, Chair
Christopher A. Ballard
Robert M. O’Reilly
Lawrence W. Waggoner
Edward Goldman
James P. Spica

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

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

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

Christopher A. Ballard, Chair
Marguerite Munson Lentz,
David P. Lucas

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

Nancy H. Welber, Chair
Christopher A. Ballard
David P. Lucas
John Roy Castillo
Charitable and Exempt Organization Committee
Mission: To educate the Section about charitable giving and exempt organizations and to make recommendations to the Section concerning Federal and State legislative developments and initiatives in the fields of charitable giving and exempt organizations

Christopher J. Caldwell, Chair
Christopher A. Ballard
Michael W. Bartnik
William R. Bloomfield
Robin D. Ferriby
Richard C. Mills

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

Melisa M. W. Mysliwiec, Chair
Kathleen M. Goetsch
Katie Lynwood
Michael J. McClory
Neal Nusholtz
Jessica M. Schilling
Rebecca A. Schnelz, (Liaison to Solutions on Self-help Task Force)
Nancy H. Welber
Nicholas Vontroba

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

Geoffrey R. Vernon, Chair

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

Neal Nusholtz, Chair
George W. Gregory
Lorraine F. New
Nicholas A. Reister
Rebecca K. Wrock

Divided and Directed Trusteeships ad Hoc Committee
Mission: To review the forthcoming Uniform Directed Trust Act and other legislative proposals concerning the division of fiduciary labor and responsibility among non trustee directors, co-trustees, and divided trusteeships and, if advisable, to recommend changes to Michigan law in this area

James P. Spica, Chair
Probate & Estate Planning Section Committees 2016-2017

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

Michael G. Lichterman, Chair
William J. Ard
Amy N. Morrissey
Jeanne Murphy (Liaison to ICLE)
Neal Nusholtz
Michael L. Rutkowski

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

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

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

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

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

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

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

Ryan P. Bourjaily, Chair
Probate & Estate Planning Section Committees 2016-2017

Christopher A. Ballard
Georgette E. David
Mark E. Kellogg
Daniel S. Hilker
Michele C. Marquardt
Jonathon Nahhat

Legislation Development & Drafting Committee
*Mission: To review, revise, communicate and recommend Michigan’s trusts and estates law with the goal of achieving and maintaining leadership in promulgating probate laws in changing times. May work alone or in conjunction with other substantive standing or ad hoc committees.*

Nathan Piwowarski, Chair
Howard H. Collens
Georgette David
Henry P. Lee
Marguerite Munson Lentz
Michael G. Lichterman
Sueann Mitchell
Kurt A. Olson
James P. Spica
Robert P. Tiplady, II
Geoffrey R. Vernon

Ad Hoc Legislation Drafting Committee
*Mission: Draft proposal for forfeiture of gifts to lawyer who drafted the instrument.*

Sueann Mitchell, Chair
George W. Gregory
David P. Lucas
Kurt A. Olsen

Litigation, Proceedings, and Forms Committee
*Mission: To consider and recommend to the Council action with respect to contested and uncontested proceedings, the Michigan Court Rules, and published court forms, including the interpretation, use, and amendment of them*

David L.J.M. Skidmore, Chair
James F. (“JV”) Anderton
Constance L. Brigman (Liaison to SCAO for Guardianship, Conservatorship, and Protective Proceedings Workgroup)
Rhonda M. Clark-Kreuer
Phillip E. Harter
Michael D. Holmes
Shaheen I. Imami
Hon. Michael L. Jaconette
Hon. David M. Murkowski
Rebecca A. Schnelz (Liaison to SCAO for Mental Health/Commitment Workgroup)

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

Nicholas A. Reister, Chair
Daniel S. Hilker, Vice Chair
David Borst
Ryan Bourjaily
Christopher J. Caldwell
Nicholas R. Dekker
Daniel A. Kosmowski
Raj A. Malviya
Robert O’Reilly
Theresa Rose

Nominating Committee
*Mission: To annually nominate candidates to stand for election as the officers of the Section and members of the Council*
Probate & Estate Planning Section Committees 2016-2017

Thomas F. Sweeney, Chair

Amy N. Morrissey
Shaheen I. Imami

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

Marlaine C. Teahan, Chair

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

Marguerite Munson Lentz,
Chair

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

Mark E. Kellogg, Chair
Jeffrey S. Ammon
William J. Ard

David S. Fry
J. David Kerr
Michael G. Lichterman

Lorraine F. New, Chair
Christopher J Caldwell
Robert B. Labe
Raj A. Malviya
Nazneen H. Syed

Melisa M. W. Mysliwiec
James T. Ramer
James B. Steward

State Bar and Section Journals Committee
Mission: To oversee the publication of the Section’s Journal and periodic theme issues of the State Bar

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

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

03.13.2017
## Probate & Estate Planning Section
### Biennial Plan of Work
**10/1/2014 - 9/30/2016**

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<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>- Prop tax uncapping exempt (HB5552)</td>
<td></td>
<td>- Supreme Court Task Force Report</td>
<td></td>
<td>- &quot;Who Should I Trust?&quot; Program</td>
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<td></td>
<td>- Fiduciary Access to Digital Assets (HB5366-5370)</td>
<td></td>
<td>- Bylaw Update</td>
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<td>- &quot;Who Should I Trust?&quot; Program</td>
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<td></td>
<td>- PR access to online accts (SB 293)</td>
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<td>- 55th Annual P&amp;EP Institute</td>
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<td></td>
<td>- Hearings minors &lt; 18 (SB 144 &amp; 177)</td>
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<td></td>
<td>- Funeral Representative (HB 5162/SB 731)</td>
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<tr>
<td>Priority Items</td>
<td>- Domestic Asset Protection Trusts</td>
<td>- SCAO Meetings*</td>
<td></td>
<td>- Communications with members*</td>
<td>- Opportunities with ICLE</td>
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<tr>
<td></td>
<td>- ILIT Trustee Liability Protection</td>
<td></td>
<td></td>
<td>- Social media &amp; website*</td>
<td>- Digital Journal</td>
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<tr>
<td></td>
<td>- Artificial Reproductive Technology</td>
<td></td>
<td></td>
<td>- Brochures*</td>
<td></td>
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<td></td>
<td>- Charitable Trust</td>
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<td>- Annual Institute/ICLE seminars*</td>
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<td></td>
<td>- Probate Appeals</td>
<td></td>
<td></td>
<td>- Section Journal*</td>
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<td>Secondary Priority</td>
<td>- EPIC/MTC Updates</td>
<td></td>
<td>- Inventory Lawyer</td>
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<td>Priority To Be Determined</td>
<td>- Directed Investment Trusts</td>
<td></td>
<td>- Opportunities with ICLE</td>
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<td>- TBE Trusts</td>
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<td>- Digital Journal</td>
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<td>- ADR Revision</td>
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<td></td>
<td>- Property tax on trust property</td>
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<td></td>
<td>- Uniform Real Property TOD Act</td>
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</table>

**Priority To Be Determined**
- Dignified Death (Family Consent) Act
- Pooled income trust exclusion
- Neglect Legislation
- Foreign Guardians
- Inheritance Tax
- Estate Recovery
- PRE after death & nursing home

*ongoing

- Budget Reporting
- Action on SC recommendations
- Probate Court Opinion Bank
- Mentor program

- Action on SC recommendations
- Probate Court Opinion Bank
- Mentor program
CSP MATERIALS
AGENDA FOR
COMMITTEE ON SPECIAL PROJECTS

March 18, 2017

1. Legislation Development and Drafting Committee
   Discussion and vote on proposal to amend MCL § 700.7913 and MCL § 565.432 - certificate of trust statutes

2. Legislation Development and Drafting Committee
   Discussion and vote on proposal to amend MCL § 700.7302 (with an ancillary amendment of § 700.1106) - virtual representation

3. Legislation Development and Drafting Committee
   Discussion and vote on proposed tenancy by the entirety trust legislation.

4. Legislation Development and Drafting Committee
   Discussion regarding COLA adjustment figures
A bill to amend 1991 PA 133, entitled "Recording Trust Agreement or Certificate of Trust Existence and Authority," by amending section 1, section 2, section 3.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sect. 1. An instrument conveying, encumbering, or otherwise affecting an interest in real property, executed pursuant to an express trust, may be accompanied either by a copy of the trust agreement or by a certificate of trust existence and authority, as described in sections 2 and 3. THE OPERATIVE TRUST INSTRUMENT OR TRUST INSTRUMENTS, OR A CERTIFICATE OF TRUST THAT COMPLIES IN ALL RESPECTS WITH MCL 700.7913 AND CONTAINS THE LEGAL DESCRIPTION OF THE AFFECTED REAL PROPERTY.

Sec. 2. A certificate of trust existence and authority shall contain all of the following information:

(a) The title of the trust.

(b) The date of the trust agreement and any amendments to the trust agreement.

(c) The name of the settlor or grantor and the settlor's or grantor's address.

(d) The names and addresses of all of the trustees and successor trustees.

(e) The legal description of the affected real property.

(f) Verbatim reproductions of provisions of the trust agreement, and any amendments to the trust agreement, regarding all of the following:

(i) The powers of the trustee or trustees relating to real property or any interest in real property and restrictions on the powers of the trustee or trustees relating to real property or any interest in real property.

(ii) The governing law.

(iii) Amendment of the trust relating to the trust provisions described in subdivision (a) to (f)(ii).
(g) Certification that the trust agreement remains in full force and effect.

(h) A list of names and addresses of all persons who, at the time the certificate of trust is executed, are trustees of the trust.

Section 3. A certificate of trust existence and authority shall be executed by the settlor or grantor; an attorney for the settlor, grantor, or trustee; or an officer of a banking institution or an attorney if then acting as a trustee. The certificate shall be in the form of an affidavit.
Draft 5 (3/10/2017): All recommended additions in caps and bold; all recommended deletions in strikethrough. This draft does not attempt to track version-to-version changes.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending section 7913 (MCL 700.7913), as amended by 2000 PA 177
THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 7913. (1) Instead of furnishing a copy of the trust instrument to a person other than a trust beneficiary, the trustee may furnish to the person a certificate of trust WHICH SHALL CONTAIN containing all of the following information:
(a) The name of the trust, and the date of the trust, AND THE DATES OF ALL OPERATIVE TRUST INSTRUMENTS instrument and any amendments.
(b) The name and address of the currently acting trustee OR ALL CURRENT TRUSTEES OF THE TRUST.
(c) The powers of the trustee relating to the purposes for which the certificate OF TRUST is being offered.
(d) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.
(e) The authority of cotrustees to sign THE TRUST or otherwise authenticate ON BEHALF OF THE TRUST and whether less than ALL THE COTRUSTEES are required in order to exercise power of the trustee.

(2) A certificate of trust may be signed or otherwise authenticated by the settlor, any trustee, or any attorney for the settlor or the trustee. The certificate shall be in the form of an affidavit.

(3) A certificate of trust shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certificate of trust to be incorrect.

(4) A certificate of trust need not contain the dispositive terms of the trust INSTRUMENT.

(5) A recipient of a certificate of trust may require the trustee to furnish copies of those excerpts from the TRUST INSTRUMENTS original trust instrument and later amendments TO THE TRUST INSTRUMENT that designate the trustee and confer upon the trustee the power to act in the pending transaction.
(6) A person who acts in reliance upon a certificate of trust without knowledge that representations 
contained in the certificate are incorrect is not liable to any person for so acting and may 
assume without inquiry the existence of THE TRUST AND THE OTHER the facts contained in the certificate 
OF TRUST.

(7) A person who is good faith enters into a transaction in reliance upon a certificate OF TRUST may 
enforce the transaction against the trust property as if the representations contained in the certificate OF TRUST 
were correct.

(8) A person WHO MAKES [making] a demand for the trust instrument in addition to a certificate of 
trust or excerpts OF THE TRUST INSTRUMENT is liable for damages, costs, expenses, and legal fees if the 
court determines that the person WHO MADE THE DEMAND did was not ACT acting pursuant 
to a legal requirement TO in demand demanding the trust instrument.

(9) This section does not limit the right of a person to obtain a copy of the trust instrument in a 
judicial proceeding THAT CONCERNS concerning the trust.
MEMORANDUM

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

From: James P. Spica

Re: Proposal to Amend MCL § 700.7302 (with an ancillary amendment of § 700.1106)

Date: January 28, 2017

In its current form, Michigan Trust Code (MTC) section 7302\(^1\) neither means what it says nor says what it is said to mean: it does not mean, though it says, that a trustee with a discretionary distribution power (which is a power of appointment\(^2\)) can satisfy her reporting obligations simply by giving reports to herself;\(^3\) and it does not say, though “Reporter’s Commentary” says it means, that “the extent of a powerholder’s ability to represent and bind those subject to the power is limited by the scope and extent of the power of appointment.”\(^4\) The following proposed amendments are designed to make section 7302 mean what it says and say what the Reporter’s Commentary says it means. They are also designed to make section 7302 and EPIC generally more instructive regarding the law of powers of appointment.

700.1106 Definitions; M to P

Sec. 1106. As used in this act:

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

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

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

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

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

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

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\(^1\) MICH. COMP. LAWS § 700.7302.
\(^2\) See, e.g., id., § 556.115a (2012) (Powers of Appointment Act trust-decanting power); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. g (2011); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 cmt. d (1986).
\(^3\) Cf. MICH. COMP. LAWS §§ 700.7814 (trustee’s duty to report), 700.7301 (effect of representation).
\(^4\) ESTATES AND PROTECTED INDIVIDUALS CODE WITH REPORTERS’ COMMENTARY 505 (2015).
(vi) A licensed professional counselor licensed under part 181 of the public health code, 1978 PA 368, MCL 333.18101 to 333.18117.
(b) "Michigan prudent investor rule" means the fiduciary investment and management rule prescribed by part 5 of this article.
(c) "Minor" means an individual who is less than 18 years of age.
(d) "Minor ward" means a minor for whom a guardian is appointed solely because of minority.
(e) "Money" means legal tender or a note, draft, certificate of deposit, stock, bond, check, or credit card.
(f) "Mortgage" means a conveyance, agreement, or arrangement in which property is encumbered or used as security.
(g) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his or her death.
(h) "Organization" means a corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity.
(i) "Parent" includes, but is not limited to, an individual entitled to take, or who would be entitled to take, as a parent under this act by intestate succession from a child who dies without a will and whose relationship is in question. Parent does not include an individual who is only a stepparent, foster parent, or grandparent.
(j) "Partial guardian" means that term as defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.
(k) "Patient advocate" means an individual designated to exercise powers concerning another individual's care, custody, and medical or mental health treatment or authorized to make an anatomical gift on behalf of another individual, or both, as provided in section 5506.
(l) "Patient advocate designation" means the written document executed and with the effect as described in sections 5506 to 5515.
(m) "Payor" means a trustee, insurer, business entity, employer, government, governmental subdivision or agency, or other person authorized or obligated by law or a governing instrument to make payments.
(n) "Person" means an individual or an organization.
(o) "Personal representative" includes, but is not limited to, an executor, administrator, successor personal representative, and special personal representative, and any other person, other than a trustee of a trust subject to article VII, who performs substantially the same function under the law governing that person's status.
(p) "Petition" means a written request to the court for an order after notice.
(q) "Plenary guardian" means that term as defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.
(r) "Power of appointment" means that term as defined in section 2 of the powers of appointment act, 1967 PA 224, MCL 556.111 to 556.133.\(^5\)

\(^5\) See Mich. Comp. Laws § 556.112(e). The purpose of this ancillary proposed amendment of Estates and Protected Individuals Code (EPIC) section 1106 is merely to instruct; it does not change the effect of existing law. This is because neither the MTC nor EPIC currently defines the term ‘power of appointment.’ See § 700.1106, 700.7103 (2012). Cf. id. §700.7103(f) (defining ‘power of withdrawal’ by reference to a “general power of appointment”). And therefore the definition of ‘power of appointment’ in the Michigan Powers of Appointment Act of 1967 is bound to be read in pari materia with any EPIC provision that uses that term without defining it. See, e.g., Rupert Cross, Statutory Interpretation 150-51 (John Bell & George Engle eds., 3rd ed. 2005).
(FS) "Proceeding" includes an application and a petition, and may be an action at law or a suit in equity. A proceeding may be denominated a civil action under court rules.

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

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

(UV) "Property" means anything that may be the subject of ownership, and includes both real and personal property or an interest in real or personal property.

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

(WX) "Protective proceeding" means a proceeding under the provisions of part 4 of article V.

700.7302 Representation; holder of power of revocation or amendment or power of appointment

Sec. 7302. (1) To the extent there is no conflict of interest between the holder of a power of appointment and the person represented with respect to a particular question or dispute, the holder of a power of revocation or amendment or a presently exercisable or testamentary general or special power of appointment, including one in the form of a power of amendment or revocation, may represent and bind a person whose interest, as a

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6 The deleted language is superfluous since the 2012 “decanting” amendments to the Powers of Appointment Act, which broadened that Act’s definition of ‘power of appointment.’ See S.B. 980, 96th Leg., Reg. Sess. § 2(c) (Mich. 2012); Mich. Comp. Laws § 556.112(c) (2012).

7 This absence-of-conflict requirement is included in section 7302’s Uniform Trust Code (UTC) counterpart, UTC section 302: To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.


8 See supra note 6.

9 The reference in the existing section 7302 is to “a presently exercisable or testamentary general or special power of appointment.” Mich. Comp. Laws § 700.7303. That leaves out only one form of dispositive power (classified according to time for exercise), viz., a nontestamentary power (general or special) subject to a condition precedent. See, e.g., id. § 556.112(l) (Powers of Appointment Act definition of ‘presently exercisable’); John A. Borrón Jr. et al., The Law Of Future Interests § 874 (3d ed. 2003). Because the proposal makes the treatment of nontestamentary powers subject to a condition precedent explicit, in a new subsection (2)(b), thus covering the lot, the language in subsection (1) can refer simply to “powers of appointment.”

10 The added language this note tags will bring section 7302 in line with EPIC section 1209, from which the added language is taken. See Mich. Comp. Laws § 700.1209. (I leave it to the Committee to decide whether a conforming amendment should be made to EPIC section 1403. See id. § 700.1403(b)(i).)
permissible appointee, taker in default, or otherwise, is subject to the power. For the purpose, however, of granting consent or approval to modification or termination of a trust or to deviation from its terms, including consent or approval to a settlement agreement described in section 7111, only the holder of a presently exercisable or testamentary general power of appointment may represent and bind such a person as provided in this section.\(^{12}\)

(2) For purposes of this section:

(a) There is no conflict of interest between the holder of a nonfiduciary power of appointment and a person whose interest is subject to the power to the extent the subject interest is liable to be extinguished\(^{13}\) by an exercise of the power. Thus, for example,\(^ {14}\) if person \(A\) currently has a right to receive income from property \(P\) for life subject to a nonfiduciary testamentary power in person \(B\) to appoint the income of \(P\) away from \(A\), then there is no conflict of interest that would prevent \(B\) from currently representing \(A\) with respect to \(A\)’s right to receive income from the property after \(B\)’s death (if \(A\) survives \(B\)); but there may be such a conflict with respect to \(A\)’s right to receive income from \(P\) during \(B\)’s life.

(b) If a power of appointment is subject to a condition precedent other than the death of the holder of a testamentary power, no interest is subject to the power until the condition precedent is satisfied. Thus, for example,\(^ {15}\) if person \(A\) currently has a right to receive income from property \(P\) for life, and person \(B\) is granted a testamentary power to appoint the income of \(P\) away from \(A\) if, but only if, \(B\) graduates from college, then \(A\)’s right to receive income from \(P\) after \(B\)’s death (if \(A\) survives \(B\)) is not subject to \(B\)’s power until \(B\) graduates from college; but if \(B\) does graduate from college, then \(A\)’s right to receive income from \(P\) after \(B\)’s death (if \(A\) survives \(B\)) will become subject to \(B\)’s power on \(B\)’s graduation, even though \(B\) can only exercise the power by will.

(c) “Nonfiduciary” means, with respect to a power of appointment, that the power is not held in a fiduciary capacity.\(^ {16}\)

\(^{11}\) The added language here will bring section 7302 in line with EPIC sections 1209 and 1403, from which the added language is taken. See id. §§ 700.1209, 700.1403(b)(i). The amended language provides a basis in the section itself for the reading quoted supra in the text accompanying note 4.

\(^{12}\) This added language will avoid prejudicing the question whether representation for purposes of granting consent or approval to modification or termination of a trust or to deviation from the trust’s terms might be available in a given case under MTC section 7303 when it is not available under section 7302, as when, for example, a trustee has a presently exercisable special power of appointment by way of a discretionary distribution power. See id. § 700.7303(d) (representation of beneficiaries by trustee without regard to any fiduciary power of appointment).

\(^{13}\) In the case of a taker in default, a more technical term for ‘extinguished’ here would be ‘defeated’ or ‘divested.’ See, e.g., HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 61 (Jill E. Martin ed., 13th ed. 1989) (equitable interests of takers in default of exercise of power of appointment vested “subject to defeasance on [the power’s] exercise”); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 13 (1979) (same “subject to total divestment upon [the power’s] being exercised”). A more natural term would be ‘defeated’ or ‘destroyed.’ See, e.g., MAUDSLEY, supra, (“[a]n interest may be vested although it is subject to destruction on the happening of a future event”).

\(^{14}\) I have had success in the past in getting the Michigan Legislative Service Bureau to allow an example in a statute. See Mich. Comp. Laws § 556.115a(3)(c) (definition of ‘presently exercisable’ general power of withdrawal for purposes of Powers of Appointment Act trust-decanting provision).

\(^{15}\) See supra note 14.

\(^{16}\) This definition of ‘nonfiduciary’ is identical to the one in section 2(c) of the Personal Property Trust Perpetuities Act (PPTPA) except that it refers to donees or holders generally, while the PPTPA definition refers only to power holders who are trustees. See id. § 556.112(c). Thus, whereas a power of appointment held in a fiduciary capacity by an attorney-in-fact is a “nonfiduciary” power for purposes of PPTPA, it is a fiduciary power for purposes of section 7302 as amended by the proposal. (The reason for the relative breadth of the PPTPA definition
of ‘nonfiduciary’ has to do with the legislative history of the so-called “Delaware tax trap” and the purpose of PPTPA’s anti-Delaware-tax-trap provision. See James P. Spica, Means to an End: Electively Forcing Vesting to Suit Tax Rules Against Perpetuities, 40 ACTEC L.J. 347, 380 (2014).
ARTICLE VII: MICHIGAN TRUST CODE
PART 5: CREDITOR’S CLAIMS: SPENDTHRIFT, SUPPORT, AND DISCRETIONARY TRUSTS
700.7509 TENANCY BY THE ENTIRETY PROPERTY

(1) As used in this section:

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

(b) “Proceeds” means:

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

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

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

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

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

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

(2) Any property conveyed by the spouses to a trustee of one or more trusts, and the proceeds of that property, shall have the same immunity from the claims of each spouse’s separate creditors as would exist if the property or its proceeds were owned by the spouses as tenants by the entirety, so long as all of the following apply:

(a) The spouses remain married.

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

(c) The trust or trusts are revocable by either spouse or both spouses, acting together.
(d) Each spouse is a distributee or permissible distributee of the trust or trusts.

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

(3) Upon the death of the first spouse:

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

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

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

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

(5) Except as provided in subsection (6), immunity from the claims of separate creditors under subsections (2) and (3) shall be waived if both of the following are true:

(a) A trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property held in trust that is immune from the claims of separate creditors.

(b) The separate creditors claiming that the immunity provided by this section was waived by the spouses detrimentally relied upon the failure of the trustee to disclose (as provided in subsection (5)(a) above) in extending credit to the spouse.
Immunity is not waived under subsection (5) if the identity of the property that is
immune from the claims of separate creditors and evidence of such immunity is
otherwise reasonably disclosed by any of the following:

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

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

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

(d) A certificate of trust existence and authority under MCL 565.431 et. seq.
or a certificate of trust under MCL 700.7913.

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

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

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

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

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

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

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

(12) This section may not be construed to affect existing state law with respect to tenancies by the entirety. This section applies only to tenancy by the entirety property conveyed to a trustee on or after ________ ____, 2017.
(1) As used in this section, "proceeds" means:

(a) Property acquired by a trustee upon the sale, lease, license, exchange, or other disposition of property held by a trustee.

(b) Interest, dividends, rents, and other property collected by a trustee on, or distributed on account of, property held by a trustee.

(c) Rights arising out of property held by a trustee.

(d) Claims and resulting damage awards and settlement proceeds arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, property held by a trustee.

(e) Insurance proceeds or benefits payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, property held by a trustee.

(f) Property held by a trustee that is otherwise traceable to property originally conveyed to a trustee or the property proceeds described in subsections (1)(a) to (1)(e).

(2) Any property conveyed by a settlor or a settlor's spouse or both to a trustee of one or more trusts, and the proceeds of that property, shall have the same immunity from the claims of each spouse's separate creditors in the same manner as property owned as tenants by the entirety, so long as all of the following apply:

(a) The spouses remain married.

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

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

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

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

(3) Upon the death of the first spouse:

(a) All property held in trust that, under subsection (2), was immune from the claims of the deceased spouse's separate creditors immediately prior to his or her death shall continue to have immunity from the claims of the decedent's separate creditors as if both spouses were still alive.
(b) To the extent that the surviving spouse remains a distributee or permissible distributee of the trust or trusts and has the power, exercisable in his or her individual capacity, to vest individually in the surviving spouse title to the property that, under subsection (2), was immune from the claims of the deceased spouse’s separate creditors, the property shall be subject to the claims of the separate creditors of the surviving spouse.

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

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

(5) Upon the revocation of a trust described in subsection (2), all of the property held by the trustee of the trust at the time of the revocation shall be deemed to be held by both spouses as tenancy by the entirety.

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

(7) No transfer to a trust described in subsection (2) shall affect or change any marital property rights of either spouse to the transferred property or interest therein immediately prior to such transfer in the event of dissolution of marriage of the spouses, unless both spouses expressly agree otherwise in writing. Upon entry of a judgment of divorce or annulment between the spouses, the immunity from the claims of separate creditors under subsection (2) shall terminate.

(8) This section applies only to property conveyed to a trustee on or after _________ ____, 2017.
All,

We’ve been productive! Many thanks in particular to George, Jim, Rob, Rick, and Ken for their exceptional contributions.

I’ve attached the items that we are referring to CSP for consideration at the 2/18 meeting. I ask that each “project owner” briefly look over his file attachment to confirm that it is the most recent version of our work product.

In addition to the attached materials, we will be seeking at least some limited feedback from CSP as to the following adjustments:

- 3605 sets a threshold for who can demand that the PR get bonded. Current amount: $2,500. Recommended amount: $4,000.
- Two provisions affect deposits made to the county treasurer, to hold for missing distributees:
  - 3916 allows the trustee or PR to force the lapse of very small gifts to the residue so that they do not have to be deposited with the treasurer. The current threshold for this is $250. Recommended amount: $1,000.
  - 3917 governs the service charge the treasurer can impose on funds held for missing distributees. Currently, the treasurer typically may take 1% unless the amount paid out to a single individual exceeds $1,000.00, in which case the treasurer shall take $10.00 plus 1/2 of 1% of the excess of the amount over $1,000.00. Recommended change for this threshold is to $1,500.
- 3918 allows small amounts to be distributed for the benefit of disabled persons without appointing a conservator. The current threshold is $5,000. Recommended amount: $25,000.
- 5102 allows small amounts to be distributed for the benefit of minors without appointing a conservator. The current threshold is $5,000. Recommended amount: $25,000.
- 3981 allows certain organizations that tend to end up with a decedent’s wallet and wearing apparel (nursing homes, hospitals, police agencies, morgues, etc.) to release some cash and the wearing apparel to family members if furnished with a sworn statement. The Committee intends to expand this to include cash and personal property of up to $750 in value.
- 3982 governs the small estate procedure (petitions and orders of assignment). Current amount: $22,000. Recommended amount: $100,000. Additionally, the Committee will draft a proposal to easily use this procedure to clean up missed assets that should transfer into a living trust by way of a pour-over will.
- 3983 authorizes a decedent’s successor to collect up to $22,000 in personalty by sworn statement. Recommended amount: $50,000. The Committee is exploring the use of this procedure for real property (this is currently done in Arizona).
- 257.236 provides for the SOS’s administrative transfer of vehicles worth a cumulative value of $60,000 or less to the owner’s successors. Recommended amount: $100,000.
- 324.80312 provides for the SOS’s administrative transfer of watercraft worth a cumulative value of $100,000 or less to the owner’s successors. Recommended amount: $200,000.
Additionally, we will recommend to Jim Steward that we establish a joint committee with the Family Law Section to explore a comprehensive update of our statutes concerning marital agreements. This is in part inspired by the COA’s recent *Allard* decision, but probably has been a long time coming, anyway.

Cheers,

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END OF CSP MATERIALS
I. Call to Order

II. Excused Absences

III. Introduction of Guests

IV. Minutes of February 18, 2017, Meeting of the Council
   See Attachment 1

V. Treasurer's Report – David P. Lucas
   See Attachment 2

VI. Chairperson's Report – James B. Steward
   See Attachment 3

VII. Report of the Committee on Special Projects – Geoffrey R. Vernon

VIII. Report of Standing Committees

A. Internal Governance
   1. Budget – Christopher A. Ballard
   2. Bylaws – Nancy H. Welber
   3. Awards – Amy N. Morrissey
   4. Planning – Marlaine C. Teahan
   5. Nominating – Thomas F. Sweeney
   6. Annual Meeting – Marlaine C. Teahan

B. Legislation and Lobbying
   1. Legislative Analysis and Monitoring Committee – Ryan P. Bourjaily
2. Legislation Development & Drafting Committee – Nathan Piwowarski
3. Ad-Hoc Legislation Drafting Committee – Sueann Mitchell
4. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon
5. Assisted Reproductive Technology Ad Hoc Committee – Nancy H. Welber
6. Divided and Directed Trusteeship Committee – James P. Spica

See Attachment 4

C. Education and Advocacy Services for Section Members
1. Amicus Curiae – David L. Skidmore

See Attachment 5
2. Probate Institute – Marguerite Munson Lentz
3. State Bar and Section Journals – Richard C. Mills
4. Citizens Outreach – Melisa M.W. Mysliwiec
5. Electronic Communications – Michael G. Lichterman
6. Membership – Nicholas A. Reister

D. Ethics and Professional Standards
1. Ethics & Unauthorized Practice of Law – Katie Lynwood

E. Administration of Justice

F. Areas of Practice
1. Real Estate – Mark E. Kellogg
2. Tax Committee – Lorraine F. New

See Attachment 6
3. Charitable and Exempt Organization – Christopher J. Caldwell
4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

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

See Attachment 7

X. Other Business
XI. Hot Topics
XII. Adjournment
Attachment 1
I. Call to Order

The Chair of the Section, James Steward, called the meeting to order at 10:28 am.

II. Attendance

A. The following officers and members of Council were in attendance:

James B. Steward
Marlaine C. Teahan
Marguerite Munson Lentz
Christopher A. Ballard
David P. Lucas
George F. Bearup
Christopher J. Caldwell
Rhonda M. Clark-Kreuer
Kathleen M. Goetsch
Hon. Michael L. Jaconette
Mark E. Kellogg
Michael G. Lichterman
Katie Lynwood
Raj A. Malviya
Richard C. Mills
Melisa M.W. Mysliwiec
Lorraine F. New
Nathan R. Piwowarski
David L.J.M. Skidmore
Geoffrey R. Vernon
Nancy H. Welber

A total of 21 council members and officers were present, representing a quorum.

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

Robert C. Labe
Nazneen H. Syed
C. The following officers and members of Council were absent without excuse:

None.

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

George W. Gregory
Kenneth E. Konop
Nancy L. Little
Thomas Sweeney

E. Others in attendance:

Aaron Bartell
Susan Chalgian
Mark DeLuca
Daniel Hilker
Mallory Kallabat
Jeff Kirkey, ICLE
Joann Kline
Neal Nusholtz
Kurt A. Olson
Scott Robbins
Mike Shelton
James P. Spica, liaison to the Uniform Law Commission
Amy Rombyer Tripp, liaison to the Elder Law Section
Paul Vaidya

III. Minutes of the January 14, 2017, Meeting of the Council

The minutes of the January 14, 2017, Meeting of the Council were attached to the combined Agenda for this meeting posted on the Section’s web page prior to the meeting. Mr. Ballard moved that the minutes be approved. The motion was seconded. The motion was approved on a voice vote with no nays and no abstentions.

IV. Treasurer’s Report – David P. Lucas

Mr. Lucas’s Treasurer’s Report was attached to the combined Agenda. He reported that section membership is down by approximately 50 people, which will result in section revenue falling below the budgeted amount.

V. Chairperson’s Report – James Steward

- Mr. Steward’s report was included as part of the materials
- The section has historically sponsored a bike tour held at the probate institute.

Mr. Steward made a motion that the section sponsor the tour again this year, with the sponsorship amount to be paid out of the hearts and flowers fund. The motion was seconded. The motion was approved on a voice vote by all Council members.
present, except for George Bearup, who abstained.

- The Section received a request from the ADR section to act as cosponsor for a seminar entitled "Representing Clients in Mediation." There would be no cost to the Section. Mr. Steward made a motion to approve the cosponsorship. The motion was seconded. The motion was approved unanimously on a voice vote, with no nays and no abstentions.
- Mr. Steward will be forming a new ad hoc committee on divided and directed trusteeships, of which Jim Spica will be chair.
- Jim Spica has been appointed as the Section's liaison to the Uniform Law Commission.
- The section is following the Maki v. Coen case, which deals with whether a lawyer for a fiduciary may be sued by the wards/beneficiaries, or whether only the fiduciary has standing. A published opinion was recently issued by the Michigan Court of appeals, finding in favor of the lawyer.

VI. Report of the Committee on Special Projects – Geoffrey R. Vernon

Mr. Vernon presented the report of the committee.

The committee discussed a possible change to EPIC relating to the ability of a holder of a power of appointment to represent permissible appointees, takers in default, etc. The matter will be deferred to a future meeting in order to give those attending the CSP meeting more time to digest the complexities of the proposal before voting on a recommendation to Council.

The committee discussed a possible change to the Uniform Fraudulent Transfers Act (MCL 566.31 et seq) to take into account the provisions of the Qualified Dispositions in Trust Act. The committee presented technical amendments to the UFTA. The committee made a motion to support the proposed amendments, giving the committee the authority to make nonsubstantive amendments, as needed, and to make changes to the draft language which would make the changes retroactive to the effective date of revisions made to the UFTA in 2016. The motion passed, with 21 votes in favor, none against, and no abstentions.

The committee presented a proposed amendment to MCL 700.7103(n), relating to the definition of trust protector. The committee made a motion to submit the proposed language to the Legislative Services Bureau, with the committee having the ability to make nonsubstantive changes, as needed. The motion passed, with 21 votes in favor, none against, and no abstentions.

The committee presented proposed amendments to the certificate of trust provisions of EPIC (MCL 700.7913). The committee also proposes changes to the real estate certificate of trust statute to eliminate the current real estate certificate of trust and instead refer to the certificate of trust provisions in EPIC. Following discussion, the committee will make revisions to the proposed language and will present the revised version at a future date.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – Christopher A. Ballard – no report.
2. **Bylaws – Nancy H. Welber**

Ms. Welber presented a proposal that was signed by three members of the section to delete section 8.4 of the bylaws, which requires that any printing done by the section be done under the supervision of the State Bar. Ms. Welber made a motion to approve the amendment and present it to the section membership with a recommendation that the section membership adopt the amendment. The motion was seconded. The motion passed, with 21 votes in favor, none against, and no abstentions.

Ms. Welber will arrange to have the proposed amendment provided to the members of the section at least 30 days prior to the membership meeting at which the amendment will be presented for a vote.

3. **Awards – Amy N. Morrissey—no report.**

4. **Planning – Marlaine C. Teahan—no report.**

5. **Nominating – Thomas W. Sweeney**

Mr. Sweeney outlined the procedure for nominations and solicited input to the committee. Recommendations are due by the end of April, and the committee will meet in May to produce a slate of candidates.

6. **Annual Meeting – Marlaine C. Teahan**

Ms. Teahan reported that the section's annual meeting will be September 9, in Lansing.

**B. Legislation and Lobbying**

1. **Legislative Analysis and Monitoring Committee**

Mr. Hilker made the report on behalf of the committee. He discussed two bills that are currently working their way through the legislature.

SB 39 would make changes to the funeral representative provisions in EPIC, clarifying the surviving spouse sections. The committee has decided to let the legislation proceed as drafted, without further comment from the section.

SB 49 deals with compensation for guardians and conservators. Under the current language of EPIC, a court may not approve compensation to a guardian or conservator from a third party, a fiduciary can only receive compensation from the estate of the ward. The bill would modify MCL 700.5106 to permit compensation from other sources. The committee had some concerns with the language, as drafted, which permits third party compensation without any oversight. The committee recommends a change that would permit third party compensation, but would still require that all compensation be subject to the review of the court. The guardianship and conservatorship committee will take these concerns into account and present proposed language that could be submitted as an amendment to the bill.
2. Legislation Development & Drafting Committee – Nathan R. Piwowarski

Mr. Piwowarski reported that the committee is meeting regularly. They are currently focusing on three areas: the exempt property allowance (the Jajuga fix), COLA related work, and long-arm jurisdiction in guardianship and conservatorship cases.

Mr. Vernon discussed a recent Court of Appeals case (Allard v Allard), which could eliminate the ability of premarital agreements to address spousal support in the case of a divorce. The Family Law Section submitted an amicus brief in the Court of Appeals case. The committee will look at the ramifications of the case and possible solutions, including looking at whether Michigan should adopt the Uniform Premarital Agreements Act.

3. Ad-Hoc Legislative Drafting Committee

There was no formal report, but the Council conducted a general discussion on the status of the Mardigian case. The case was recently argued in the Michigan Supreme Court. The committee is waiting on the result before taking any action.


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

Ms. Welber reported that she had met with Right to Life to discuss the draft legislation. They are generally supportive of the draft. The section's lobbyist is trying to find a sponsor for the legislation, and feels that there is a very good chance of passage.

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L.J.M. Skidmore

Mr. Skidmore reported that there was a request for an amicus brief for the In re Vansach case, which deals with Medicaid reimbursement. The Elder Law and Disability Rights Section has filed a motion to submit an amicus brief. The committee, following an initial review, recommended that the Probate and Estate Planning Section not file an amicus brief in this matter. Mr. Steward provided some additional detail in the case. Ms. Chalgian reported that there is another case working its way through the courts that might have better facts. Mr. Stewart asked the committee to conduct a further review and return to the Council with a recommendation.

2. Probate Institute – Marguerite Munson Lentz

Ms. Lentz reported that registration for the institute is open. Registrations are up so far this year. In addition to the institute, there will be an add-on seminar that deals with the income tax aspects of estate planning.
Ms. Little presented the report. The latest issue of the *Journal* was just published. She would like to solicit articles on powers of appointment and assisted reproductive technology.


Mr. Lucas reported that the State Bar will provide us with names of new section members. The committee plans to contact new members to invite them to section activities and council meetings.

**D. Ethics and Professional Standards**

1. Ethics & Unauthorized Practice of Law– Katie Lynwood—

Ms. Lynwood reported that the State Bar is working on a seminar that will be presented at multiple locations throughout the state on October 11 entitled "Who Should You Trust?"

**E. Administration of Justice**


Ms. Teahan reported on the status of the changes to the probate court appeals rules. The State Bar is considering the materials that the section submitted. The comment period will close in three weeks. Oral argument on the proposal will probably be in May.

**F. Areas of Practice**

1. Real Estate – Mark E. Kellogg

Mr. Kellogg reported that the committee will be looking at preparing new legislation on property tax uncapping. They are working with the legislature to find a possible sponsor.

2. Tax Committee – Lorraine F. New

Ms. New presented a tax nugget with three items.

(i) Closing letters no longer being automatically generated following the filing of estate tax returns. The IRS has indicated that the taxpayer can rely on a transcript report instead.

(ii) The IRS is still working on 2704 regulations. Gift tax returns probably need to disclose that the value of the gifts reported on the return doesn't comply with the proposed regulations. AICPA has some good language to use to satisfy the disclosure requirements.

(iii) The IRS issued Notice 2017-15. Under the notice, same sex spouses may be able to file retroactively for tax credits that were previously taken away from them. On any filing, make sure
to include a notation that it is being made pursuant to the Notice.

Mr. Malviya gave a brief summary of the proposed tax plans coming from the Trump administration, and will present additional information on the plans at the next meeting.

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

Ms. Clark-Kreuer reported on SB 270 that passed last year without getting input from the State Bar. The bill was backed by AARP. The committee would like to propose a technical correction to the new law. They will come back to the council with a formal recommendation.

VIII. Other Reports

A. Liaisons
3. Elder Law and Disability Rights Section Liaison – Amy Rombyer Tripp—no report.
4. Family Law Section Liaison – Patricia M. Ouellette—no report.
5. ICLE Liaison – Jeanne Murphy—no report.
10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz—no report.
13. Taxation Section Liaison – George W. Gregory

Mr. Gregory reported that there is an upcoming seminar on May 25. In addition, the section is
looking for articles for their journal.

IX. **Other Business**

Mr. Konop reported that the Oakland County Bar solicited help in drafting patient advocates and wills on behalf of first responders. The request for help solicited drafting help from both lawyers and non-lawyers. More information will be presented to the Ethics & Unauthorized Practice of Law committee, which will determine whether the section should follow up.

X. **Hot Topics**

XI. **Adjournment**

The meeting was adjourned by Chairperson James Steward at 11:57 am.
Attachment 2
1. **Financial statements.** Included with this report is the spreadsheet that I maintain, for the period October 1, 2016 through March 7, 2017; this spreadsheet is maintained on a cash basis (as of the date income is mailed to the State Bar and payments are ordered from the State Bar, not necessarily the payment date). The included spreadsheet is not much changed from the spreadsheet provided for the last meeting, since I have been away from my office for some time, and I have not authorized many payments since the last report.

Also attached is the State Bar’s report for the five-month period ended February 28, 2017. As indicated above, I have not been able to update my spreadsheet for the State Bar activity reported on the State Bar report (mostly income items).

2. **Hearts and Flowers Fund.** The Council’s Hearts and Flowers Fund is used, for example, to pay for plants sent in remembrance of deaths of individuals who have some relationship to the Council. The amount in the Fund is carried over from year to year.

Thank you so much to the many of you who have contributed to the Hearts and Flowers Fund. For Council members who have not contributed to the Fund this year, please consider making an annual contribution of $35.00.

As of the date that this Report was prepared, the Fund had a balance of $823.21.

3. **Individuals who are entitled to Section expense reimbursement.** Council Officer, Council Members, Council Ex Officio Members, and Council Liaisons might be entitled to reimbursement for expenses incurred on behalf of the Council. Reimbursable expenses include mileage expenses for attendance at regularly-scheduled meetings of the Council.

4. **Section Expense Reimbursement Form.** Council members must use the State Bar’s Section Expense Reimbursement Form to request reimbursement. The form and instructions are available at www.michbar.org/file/generalinfo/pdfs/sectexp.pdf. A copy of the Form is also included with this report. Please carefully complete the Form before submitting it; Forms not fully completed cannot be processed.

5. **Submitting expense reimbursement requests.** Council members may submit a completed Section Expense Reimbursement Form to me, in person, by email ([dlucas@vcflaw.com](mailto:dlucas@vcflaw.com)), by fax, or by mail. All of my contact information follows. Generally, other than mileage reimbursement, the State Bar requires that I attach paid receipts to the Form when I submit the Form, requesting reimbursement, so please attach a copy of your paid receipt to your Form when you submit the completed Form to me. So far, the State Bar has not required proof of mileage for mileage reimbursement.

6. **Mileage reimbursement rate.** The IRS business mileage reimbursement rate for 2017 is $0.535 per mile. If you are eligible for reimbursement for your mileage for Probate Council business for 2017 mileage, then you must use this rate, reported on the Section Expense Reimbursement Form.

7. **Timely submission of reimbursement requests.** While the State Bar is somewhat flexible, the State Bar’s policy is to reject any expense reimbursement requests for expenses more than 30 days old. Please submit expense reimbursement requests as soon as possible.
8. **Section expenses.** If you have any question about whether an expense is reimbursable by the Section, please contact me or any other officer. If there is any question about whether an expense is reimbursable, please don’t incur the expense until a Section officer confirms that it is reimbursable. Council and Section members are not authorized to sign any agreement on behalf of the Council or the State Bar.

David P. Lucas  
Treasurer, Probate and Estate Planning Section

**Treasurer contact information:**
David P. Lucas  
Vandervoort, Christ & Fisher P.C.  
70 Michigan Avenue W., Suite 450  
Battle Creek, Michigan 49017  
voice: 269-965-7000  
fax: 269-965-0646  
email: dlucas@vcflaw.com
<table>
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<th>Revenue Subcategories</th>
<th>State Bar Account No.</th>
<th>Vendors</th>
<th>FY to Date Actual</th>
<th>Budget 2016-2017</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
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<tr>
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<td>$650.00</td>
<td>(325.00)</td>
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<td>$103,785.80</td>
<td>$115,650.00</td>
<td>(11,864.20)</td>
<td>89.74%</td>
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**Disbursements**

| Journal (1)                         | ICLE                  |                             | $12,225.00        | (8,225.00)      | 32.72%   |
| E-blast                             |                       |                             | $ -               |                 |          |
| ICLE (formatting)                   |                       |                             | $4,000.00         |                 |          |
| Chairperson's Dinner (2)            |                       |                             | $10,000.00        | 2,378.47        | 123.78%  |
| Plaques                             | 1-9-99-775-1297       |                             | $ -               |                 |          |
| Gavel                               | 1-9-99-775-1276       | Prime Time Awards, Inc.     | $ -               |                 |          |
| Chair's Dinner--food                | 1-9-99-775-1276       |                             | $ -               |                 |          |
| Chair's Dinner-venue                | 1-9-99-775-1276       |                             | $12,378.47        |                 |          |
| Travel                              |                       | per separate travel schedule | $10,336.44        | $18,500.00      | (8,163.56) | 55.87%                  |
| Lobbying                            | 1-9-99-775-1127       | Public Affairs Associates, Inc. | $12,500.00        | $30,000.00      | (17,500.00) | 41.67%                  |
| Meetings (3)                        | 1-9-99-775-1276       | per separate meetings schedule | $14,000.00        | (7,210.80)      | 48.49%   |
| Mtg with Chair's Dinner             | 1-9-99-775-1276       |                             | $ -               |                 |          |
| Monthly (venue)                     | 1-9-99-775-1276       | University Club of MSU      | $6,789.20         |                 |          |
| Officers conference (including travel) | 1-9-99-775-1276    |                             | $ -               |                 |          |

**Long-range Planning**

| Membership Activities               |                       |                             | $2,500.00         | (2,500.00)      | 0.00%    |
| Postage                             | 1-9-99-775-1868       |                             | $ -               |                 |          |
| Reception                           | 1-9-99-775-1276       |                             | $ -               |                 |          |
| Printing                            | 1-9-99-775-1861       |                             | $ -               |                 |          |
| Young Lawyers Summit                | 1-9-99-775-1283       |                             | $ -               |                 |          |
| Probate banner                      | 1-9-99-775-1283       |                             | $ -               |                 |          |
| E-blasts                            | 1-9-99-775-1283       |                             | $ -               |                 |          |
| Table Throw                         | 1-9-99-775-1283       |                             | $ -               |                 |          |

**Total Disbursements**

| Publishing and Copyright            |                       |                             | $1,000.00         | (1,000.00)      | 0.0%     |
| Printing                            | 1-9-99-775-1861       |                             | $ -               |                 |          |
| Pamphlets                           | 1-9-99-775-1798       |                             | $ -               |                 |          |
| Copyright                           | 1-9-99-775-1935       |                             | $ -               |                 |          |
| Other                               |                       |                             | $325.00           | (325.00)        | 0.0%     |
| Copying                             | 1-9-99-775-1826       |                             | $ -               |                 |          |
| Postage                             | 1-9-99-775-1868       |                             | $ -               |                 |          |
| Young Lawyer's Conference           | 1-9-99-775-1276       |                             | $ -               |                 |          |

| **Total Disbursements**             |                       |                             | $60,079.11        | $115,650.00     | (55,570.89) | 51.95%                  |

**Net Increase (Decrease)**

|                       |                       |                             | $43,706.69        | $ -             | $43,706.69 | 100.00%                 |

Probate and Estate Planning Section
Treasurer's Report

03/18/2017
## Probate and Estate Planning Section

### Treasurer's Report

For the Five Months Ending February 28, 2017

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**Net Income**

(10,970.86) 61,464.69 55,764.17

Beginning Fund Balance:

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<td><strong>Total Beginning Fund Balance</strong></td>
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<td><strong>228,702.77</strong></td>
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**Ending Fund Balance**

285,656.43 284,466.94
Staple receipts to back of form as required. For electronic transmittal, scan and PDF receipts and send with form by e-mail. Policies and procedures on reverse side.

**Section Expense Reimbursement Form**

306 Townsend St., Lansing MI 48933-2012, (800) 968-1442

<table>
<thead>
<tr>
<th>Date</th>
<th>Description &amp; Purpose (Note start and end point for mileage)</th>
<th>Mileage Rate</th>
<th>Mileage</th>
<th>Lodging/Other Travel</th>
<th>Meals (Self + attach list of guests)</th>
<th>Miscellaneous (i.e. copying, phone, etc.)</th>
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<td>$ 0.00</td>
</tr>
</tbody>
</table>

GrandTotal $ 0.00

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

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

Probate and Estate Planning Section
Treasurer's Report

Page 5

Print 03/18/2017
Section Expense Reimbursement Policies and Procedures

General Policies
1. Requests for reimbursement of individual expenses should be submitted as soon as practical after being incurred, but not to exceed 45 days. However, at the end of the fiscal year, any remaining expense reimbursement requests for the fiscal year just ended must be submitted by the 3rd workday in October. The State Bar reserves the right to deny a reimbursement request that is untimely or where the State Bar’s ability to verify an expense has been compromised due to any delay. Expense reimbursement forms, along with instructions for completing and transmitting expense reimbursement forms, are found on the State Bar of Michigan website at: http://michbar.org/programs/forms

2. All out of pocket expenses must be itemized. Each reimbursed expense must be clearly described and the business purpose indicated.

3. Reimbursement in all instances is limited to reasonable and necessary expenses.

4. Detailed receipts are recommended for all expenses but required for expenses over $25.

5. An itemized receipt is required before reimbursement will be made for any meal. The reimbursement request must identify whether the meal is a breakfast, lunch or dinner. If the receipt covers more than one person, the reimbursement request must identify the names of all those in attendance for whom reimbursement is claimed, and the business purpose of the meal. If the receipt includes charges for guests for whom reimbursement is not claimed, the guests need not be identified by name, but their presence and number should be noted. Reimbursed meals while traveling (except group meals) are taxable if no overnight stay is required.

For subsidized sections (Young Lawyers Section, Master Lawyer Section, and Judicial Section) the presumptive limits on meal reimbursement are the per diem amounts published on the State of Michigan Department of Technology, Management and Budget’s website at http://www.michigan.gov/dmb/0,5552,7-150-9141_13132---00.html

6. Spouse expenses are not reimbursable.

7. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursed mileage for traveling on State Bar business is limited to actual distance traveled for business purposes.

8. Receipts for lodging expenses must be supported by a copy of the itemized bill showing per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid. Barring special circumstances such as the need for handicap accessibility accommodations, for conference attendance, the reimbursement will be limited to the least expensive available standard room conference hotel rate.

9. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.

A. Tickets should be at the best rate available for as direct a path as possible. The use of travel websites such as Travelocity, Priceline and Hotwire are recommended to identify the most economical airfare alternatives.

B. Reimbursement of airfare will be limited to the cost of coach class tickets available for the trip at the time the tickets are purchased. The additional cost of business class or first class airfare will not be reimbursed.

C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.

D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

10. Reimbursement for car, bus, or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

11. Outside speakers must be advised in advance of the need for receipts and the above requirements.

12. Bills for copying done by a firm should be approved in advance and include the numbers of copies made, the cost per page and general purpose (committee or section meeting notice, seminar materials, etc.).

13. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

14. The State Bar of Michigan is exempt from sales tax. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

15. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of ... you will receive a refund, please notify the finance department staff at the time you submit your request for payment.

16. Gift cards (Visa, AMEX) that are reimbursed are taxable for any amount, and tangible gifts (other than recognition items such as plaques, gavels, etc.) and gift certificates (for restaurants, department stores, etc.) purchased and reimbursed are considered taxable if greater than $100.

Specific Policies
1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.

4. Payments to vendors for $5,000 or greater are not reimbursable. Payments to vendors for $5,000 or greater should be paid directly by the State Bar.
Attachment 3
CHAIR REPORT
for
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
March 18, 2017

I. Membership Committee Chair.

Joseph J. Viviano has taken a position at a firm in Chicago which means he is relocating to the Chicago area, and therefore has resigned as the Chair of the Membership Committee. He has thanked us for the opportunity to serve, and we wish him well with this new career change.

After consultation with Raj Malviya, I have appointed Nicholas A. Reister as the new Chair of that committee, and Daniel S. Hilker as Vice Chair.

When Joe advised me of his resignation, he also mentioned that the Membership Committee’s planning is well underway for the Probate Institute, and that Nicholas Reister is making arrangements for the social event, similar to what they have done previously. That event will which be held at the Grand Traverse Hotel again (instead of off-site). The cost of last year’s social event was $1,821.00, of which the Probate Council paid $1,500 and Smith Haughey paid $321.00. As part of Joe’s report, he is requesting $2,000 to pay the total cost of the social event this year. Since this chair position change has just occurred, I am including this information in the Chair’s report, just in case neither Joe nor Nick were able to get the Membership Committee report into Chris for this month’s agenda

I believe that this year’s budgeted amounts for this Committee already includes sufficient funds for this expenditure, but Council should still officially approve it as requested. Therefore, Council needs to discuss and vote on this expenditure request.

II. The George A. Cooney Society.

The description of the George A. Cooney Society Award is included with the meeting materials.

As stated in that description, this award is given jointly by the Institute of Continuing Legal Education and the Probate & Estate Planning Section to a Michigan estate planning attorney for outstanding contributions to continuing legal education in Michigan. ICLE's has nominated George W. Gregory for the George A Cooney Society Award. See ICLE’s nomination description and background attached as Chair Report Attachment A.
Council should discuss and decide whether to concur.

III. ICLE's “Experts in Estate Planning” series Sponsorship Funding Request.

For the past three years, we have supported ICLE's Experts in Estate Planning series starting with Natalie Choate (2014), Susan Bart (2015) and Kim Kamin (2016) by contributing $4,000 in each of those years to help pay speaker honoraria and travel expenses. ICLE is requesting a one-time increase for 2017 to $6,000 to bring Natalie Choate back to Michigan. As explained by Jeff Kirkey, Education Director of the Institute of Continuing Legal Education:

“With all of the potential tax changes under the new administration it feels like the perfect time to bring back the retirement assets guru. Natalie does not come cheap and we will not have the Financial and Estate Planning Council of Metro Detroit serving as a co-sponsor this time. In 2014 the FEPCMD paid for half of Natalie's $12,300 honorarium/travel. It's a much costlier endeavor for ICLE this time around as we will pay for the entirety of her honorarium and travel. Would the Section consider upping its support this year? We [ICLE] will once again offer in-person plus webcast options so Section members statewide can take advantage of Natalie's wisdom. Of course, Section members receive a discount on the registration fee.”

Council needs to discuss this request and decide whether to approve.

Jim Steward,
Chair
CHAIR REPORT

ATTACHMENT A
February 24, 2017

James B. Steward  
Chairperson, Probate & Estate Planning Section, State Bar of Michigan  
Steward & Sheridan PLC  
205 S Main St  
Ishpeming, MI 49849

Dear Jim and members of the Council:

I would like to recommend that the Probate & Estate Planning Section and ICLE induct George Gregory into the George A. Cooney Society.

As you know, the George A. Cooney Society was created after George's passing to recognize outstanding contributions to continuing legal education. So far, John Bos, Ev Zack, John Martin, John Scott and Phil Harter have been inducted into the Society.

George Gregory’s accomplishments in CLE are sustained and prolific. As you can see from the attached list of George’s ICLE contributions, throughout his legal career George has been a mainstay of ICLE programs in probate and estate planning, most notably the Annual Drafting Estate Planning Documents seminar and the Annual Probate & Estate Planning Institute. He’s also become a regular in the ICLE studio. His ICLE speaking engagements began decades ago and number more than 68 seminars (the list shows seminars beginning in 1987 because that’s as far back as ICLE’s database goes). George has an uncanny knack for explaining the intersection of probate and estate planning with tax, family business dynamics, and litigation. George consistently does an exceptional job. George brings keen intellect, practical common sense, thoughtful judgment and a fine sense of humor to all of his talks.

George is a long-time contributor to the ICLE FormBank, sharing many of his well-crafted forms with his fellow attorneys. George regularly shares great speaker and topic ideas that ICLE should consider. He routinely sends reports to ICLE planners after each Heckerling and Notre Dame conference with his highlights.

George Gregory’s contributions don’t end there. He has served on ICLE’s Probate & Estate Planning Advisory Board for many years trekking to Ann Arbor at least once each year to share his unique perspectives on practice. George is a former chairperson of the Probate and Estate Planning Section and has written numerous articles for the Section’s journal and sits on the Probate Section’s EPIC Q&A Panel. He is also a past chairperson of the Taxation Section. Mr. Gregory exemplifies the highest traditions of the bar. He gives generously to the bar in support of education; he volunteers his time to the profession; and he does it all with zest, energy and a sense of humor. I believe he is truly deserving of this honor.
Sincerely,

Jeff Kirkey  
Education Director  
Institute of Continuing Legal Education
The George A. Cooney Society

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

**Who:** As of February 2017, there have been five recipients: John Bos, Everett Zack and John Martin, John Scott and Phil Harter. ICLE intends to nominate George Gregory in 2017.

**When:** This award is not necessarily given every year. So far we’ve given awards in 2007, 2009, 2011, 2013 and 2015.

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

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

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

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

The George A. Cooney Society

Member 2017

George W. Gregory

In recognition of your outstanding contributions to continuing legal education

ICLE
Probate & Estate Planning Section of the State Bar of Michigan
George W. Gregory

George W. Gregory PLLC  
2855 Coolidge Hwy Ste 103  
Troy MI 48084  
(248) 647-5700 Fax:  (248) 646-7082  
Web site:  http://www.ggregoryonline.com  
E-mail:  ggregory@ggregoryonline.com  

Short Biographical Paragraph

George W. Gregory is a CPA, but practices law in Troy, specializing in tax law, estate planning, business law, and probate. He is active in the Taxation Section and the Probate and Estate Planning Section of the State Bar of Michigan where he has chaired many committees and projects. He is also the only lawyer to have held all of the officer positions in both sections. He has presented materials for various professional groups including ICLE, the Michigan Association of Certified Public Accountants, and many Estate Planning Councils and has written about tax related topics in a variety of publications including the "Michigan Bar Journal," "Michigan CPA," "Michigan Probate and Estate Planning Journal," and "Michigan Tax Lawyer." Mr. Gregory has been a fellow of the American College of Trust and Estate Counsel since 1998 and has an AV Martindale Hubble rating. He has been listed in every issue of "The Best Lawyers in America" since 2000 and every issue of "Michigan Super Lawyers" since 2006.

Areas of Practice and Specialties

Probate and Estate Planning  
Tax planning  
Business planning  

Professional Organizations and Distinctions

State Bar of Michigan Sections

Taxation  
Chairperson, 1997-98; Vice Chair, 1996-97; Secretary-Treasurer 1995-96; Council Member 1992-95  
Chair, Summer Tax Conference 1993-94; Chair, Tax Section Directory, 1994-95; Chair, MI Inheritance Tax Reform Com, 1992-93;  
Chairperson, 1992-93 After Hours Tax Series; Chair, Estate and Trust Com, 1991-2  

Probate and Estate Planning  
Chairperson, 2011-2012  

Business Law  
American Institute of CPAs  
MI Assoc of CPAs  
American College of Trusts and Estate Counsel  
Fellow  

Former Internal Revenue Agent of the IRS primarily auditing business tax returns for income tax liabilities.

ICLE Probate & Estate Planning Advisory Board  

Teaching and Lecturing

Taught income tax courses for Revenue Agents, Tax Auditors, Taxpayer Service Representatives and Estate and Gift Tax Attorneys, 1973-80  
Lecturer and Asst Prof, Wayne State U School of Business Administration, 1981-87  
Session chairperson, moderator, presenter or discussant at various presentations given by MI Association of Certified Public Accountants, Taxation Section of the State Bar of MI, Detroit Bar Association, Greater Detroit Association of Life

"Use of Trusts - GRITs, GRATs, GRUTs and When They Apply," part of the Income and Estate Tax Conference, sponsored by the MACPA, at the MSU Management Education Center, Troy, MI, May 4, 2001
"Basics of Estate Planning," presented to the Small Practitioners Conference of the Michigan Association of CPAs, September 20, 2000 at the Lansing Center, Lansing, Michigan

**Professional Degree**

MBA; JD, cum laude Wayne State University 1980

The Amended Michigan Inheritance Tax Act: Coping With the Changes and Special Problems 9/11/1992 Speaker

Drafting Estate Planning Documents II 1/14/1993 Speaker

The New Michigan Estate Tax: Practice and Procedure 10/8/1993 Speaker

Drafting Estate Planning Documents III 1/13/1994 Speaker

Estate Planning for the Marital Deduction 9/16/1994 Speaker

Drafting Estate Planning Documents, 4th Annual 1/6/1995 Speaker


5th Annual Drafting Estate Planning Documents Seminar 1/11/1996 Speaker

Sixth Annual Drafting Estate Planning Documents Seminar 1/16/1997 Speaker


The Taxpayer Relief Act of 1997: Business and Estate Planning After the 1997 Tax Act 10/13/1997 Speaker

AHTLS: Handling Estate Tax Cases 11/13/1997 Speaker

Using Trusts in Estate Planning 12/18/1997 Speaker

7th Annual Estate Planning Documents Seminar 1/16/1998 Speaker

38th Annual Probate and Estate Planning Seminar 6/12/1998 Speaker


8th Annual Drafting Estate Planning Documents Seminar 1/14/1999 Speaker

Planning and Drafting with Michigan LLCs 9/23/1999 Speaker

After Hours Tax: Estate and Gift Tax - Hot Topics and IRS Activities 11/2/1999 Speaker

9th Annual Drafting Estate Planning Documents Seminar 1/6/2000 Speaker

40th Annual Probate & Estate Planning Seminar 5/18/2000 Panelist


10th Annual Drafting Estate Planning Documents Seminar 1/18/2001 Speaker

Estate and Tax Planning After the 2001 Tax Act 9/6/2001 Speaker

Using Trusts in Estate Planning After Tax Reform 2001 10/12/2001 Speaker

11th Annual Drafting Estate Planning Documents Seminar 1/31/2002 Moderator

12th Annual Drafting Estate Planning Documents Seminar 1/30/2003 Moderator

43rd Annual Probate and Estate Planning Institute 5/15/2003 Speaker
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<td>After Hours Tax Series: Hot Topics in Estate and Gift Tax</td>
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<td>16th Annual Drafting Estate Planning Documents Seminar</td>
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<td>49th Annual Probate &amp; Estate Planning Institute</td>
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<td>6th Annual Solo &amp; Small Firm Institute</td>
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<td>19th Annual Drafting Estate Planning Documents</td>
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<td>Estate Planning in Times of Estate Tax Uncertainty: Your Two Hour</td>
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<td>After Hours Tax Law Series: Hot Topics in Estate &amp; Gift Tax</td>
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<td>21st Annual Drafting Estate Planning Documents</td>
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<td>After Hours Tax Law Series: Hot Topics in Estate &amp; Gift Tax</td>
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<td>52nd Annual Probate &amp; Estate Planning Institute</td>
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<td>Probate &amp; Estate Planning Institute, 54th Annual</td>
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<td>Drafting Estate Planning Documents, 24th Annual</td>
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<td>Probate &amp; Estate Planning Institute, 55th Annual</td>
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<td>Drafting Estate Planning Documents, 25th Annual</td>
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<td>Elder Law Institute, 2nd Annual</td>
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<td>Drafting Estate Planning Documents, 26th Annual</td>
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<td>Tax Law Series: Estate Planning Tax Considerations for 2017</td>
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ICLE Books Written
Probate Section - EPIC Panel
Reviewer

ICLE Online Products

Other Publications

"Bounty Hunting Comes to Oakland County", Laches, April 1997; republished in Summons, July 1997.
"An Analysis of How Courts Use Generally Accepted Accounting Principles," 1987 Midwest Regional Meeting of the American Accounting Assoc
Attachment 4
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Divided and Directed Trusteeships ad Hoc Committee Chair’s Report
Date: March 10, 2017

I am providing the Council this written report because on the date of March 2017 Council meeting (March 18, 2017), I shall be in Bethesda, Maryland attending (what is scheduled to be) the final face-to-face drafting session of the Directed Trust Drafting Committee of the Uniform Law Commission (ULC). The draft of the [Uniform] Directed Trust Act that issues from that ULC meeting will be one half of the basic reading assignment for members of the Council’s new Divided and Directed Trusteeships ad Hoc Committee (DDTC). The current draft of the [Uniform] Directed Trust Act can be seen (on the ULC website) at:


The other half of the DDTC’s basic reading will be the statutory proposal set out in James P. Spica, Onus Fiduciæ Est Omnis Divisa in Partes Tres: A Statutory Proposal for Partitioning Trusteeship, 49 REAL PROP. TR. & EST. L.J. 349 (2014), which can be seen (on the Dickinson Wright PLLC website) at:


To date, those who have offered or consented to become members of the DDTC are:

Judith M. Grace (of Greenleaf Trust)
Raj A. Malviya
Gabrielle M. McKee (of Dickinson Wright PLLC)
Richard C. Mills
Marlaine C. Teahan
Robert P. Tiplady
Geoffrey R. Vernon
Nancy H. Welber

I ask that Jim Steward, as Chair of the Section, appoint all of these people members of the DDTC. And I ask that anyone else who might like to be appointed contact either me (313.223.3090) or Gabrielle McKee (248.433.7672).
We shall have an organizational meeting—likely a teleconference—sometime in April.

JPS
DETROIT 40411-1 1416471v1
Attachment 5
MEMORANDUM

TO: James B. Steward, Chair
Probate & Estate Planning Section Council

FROM: David L.J.M. Skidmore

DATE: March 6, 2017

RE: Application for Amicus Brief: In Re Joseph Vansach, Jr.

Introduction

The Council has received an Application for Amicus Brief from Don L. Rosenberg regarding In Re Joseph Vansach, Jr. The Application defines the issues in the Vansach appeal as follows: “Whether the Probate Court has the authority to issue a protective order over the estate of an individual receiving Medicaid, whether the Probate Court can allocate income among spouses, and whether Michigan DHHS must comply with Probate Court orders.” (Exhibit A, Application for Amicus Brief.)

At the Council meeting on February 18, 2017, I reported the Amicus Committee’s recommendation that the Council not file an amicus brief in this matter, for the reasons (1) that the members of the Amicus Committee were not in agreement on a position to take in an amicus brief, and (2) that the Elder Law Section had already petitioned for leave to file an amicus brief. After discussion, you referred the matter back to committee and requested a written report prior to the next Council meeting on March 18, 2017. You asked that the Amicus Committee involve Amy Tripp, Hon. Michael Jacomette, and Rhonda Clark-Kreur in its further deliberations.

On the recommendation of Amy Tripp, I spoke to attorney David L. Shaltz who is representing a party to a similar appeal pending before the Michigan Court of Appeals. Mr. Shaltz submitted a memorandum providing input for the Amicus Committee’s consideration. (Exhibit B, Shaltz Memorandum.) You also submitted a memorandum providing input for the Amicus Committee’s consideration. (Exhibit C, Steward Memorandum.)

Analysis

The Vansach appeal concerns an “Order for Protective Order for Income Support Order for the Benefit of Community Spouse” entered by the St. Clair County Probate Court, in a conservatorship proceeding for Joseph Vansach, Jr., a Protected Individual, on August 24, 2016. (Exhibit D, Protective Order.)

Under the Protective Order, the Probate Court ruled that all of the Protected Individual’s income was assigned to the Protected Individual’s spouse as a Support Order for the remainder of the Protected Individual’s life: “IT IS HEREBY ORDERED that JOSEPH VANSACH, JR.’s
monthly income and all subsequent increases are assigned to RAMONA FENNER-VANSACH, as an on-going Support Order for the remainder of JOSEPH VANSACH, JR.’s life.”

In making this Protective Order, the Probate Court held that it possessed exclusive jurisdiction to enter the Order: “[T]his court pursuant to the Estates and Protected Individual Code MCL 700.5402 gives the probate court exclusive jurisdiction to determine how a protected individual’s estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual’s dependents or other claimants.”

The Probate Court made its Protective Order, notwithstanding the fact that the Michigan Department of Health and Human Services had previously made an administrative determination regarding (1) the amount of the income of Mr. Vansach (a Medicaid recipient) to which Mrs. Vansach (the community spouse of a Medicaid recipient) was entitled, and (2) the amount of Mr. Vansach’s income required to be applied to the cost of his care: “Petitioner has established to the satisfaction of the Court that RAMONA FENNER-VANSACH is entitled to a deviation from the allocation of resources and income set forth in 42 U.S.C. § 1396r-5.”

The Appellant in Vansach is the Michigan Department of Health and Human Services (herein, the “State”). The State filed its Brief on Appeal on December 1, 2016. (Exhibit E, State’s Brief on Appeal.)

The Appellee is Ramona Fener-Vansach (herein, the “Community Spouse”). The Community Spouse filed her Brief on Appeal on January 26, 2017. (Exhibit F, Community Spouse’s Brief on Appeal.)

In its Brief, the State identified three issues on appeal. Throughout the Brief, the State articulated each issue in various terms.

First Issue:

The State identified and described the first issue in various terms. “Courts lack subject-matter jurisdiction when Medicaid recipients who are dissatisfied with a Michigan Department of Health and Human Services’ determination of benefits fail to exhaust their administrative remedies and instead seek a remedy in the courts. The Vansachs were dissatisfied with the Department’s determination of Ramona Vansach’s community-spouse income allowance and Joseph Vansach’s patient-pay amount but did not avail themselves of the available administrative remedies. Did the probate court lack jurisdiction over these claims?” (State’s Brief on Appeal at xi.) “The first [issue] is whether an individual who has received a Medicaid determination from the Department must exhaust all administrative remedies provided by the agency and in law, rather than evade the administrative process by asking the probate court to interfere in the agency’s determination[.]” (Id at 2.) “The trial court lacked jurisdiction to alter the Department’s Medicaid determination of the community-spouse income allowance.” (Id at 3.)

The State’s position on the first issue is erroneous. It is true that the State has authority to make income allocation determinations regarding Medicaid recipients and community spouses. However, the Probate Court possesses primary and exclusive subject matter jurisdiction over protective proceedings and protective orders, including the assets regarding which a protective
order may be issued. MCL 700.1302(c). There may be an overlap of the State’s authority and the Probate Court’s jurisdiction, where both entities are concerned with the income of an individual who is both a Medicaid recipient and a protected individual. But that does not mean that a Probate Court’s ruling in a protective proceeding is a usurpation of the State’s authority, because the Probate Court’s jurisdiction derives from an independent statutory grant of authority, not Medicaid law. A Probate Court’s ruling in a protective proceeding is governed by the provisions of Article V of EPIC, not by Medicaid law. Consequently, the Probate Court’s ruling in a protective proceeding does not represent a redetermination of the State’s Medicaid income allocation determination. Therefore, the exhaustion of administrative remedies doctrine does not apply, because the Probate Court is not engaging in judicial review of the State’s administrative decision.

In fact, federal law – 42 USC 1396r-5 – expressly provides that the State is required to honor the support order of a state court that affects the income of a Medicaid recipient: “If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.” This federal statute implicitly recognizes that a state court may possess jurisdiction to enter a support order derived from legal authority other than Medicaid law, and such a support order is not characterized as a “redetermination” of the Medicaid income allocation determination. The State’s argument that this statute only applies to state court orders entered prior to the date of the Medicaid income allocation determination is not apparent from the terms of the statute, and the State has cited no case law supporting such construction of the statute.

The Amicus Committee recommends that the Probate Council seek leave to file an amicus brief regarding the first issue to clarify and defend the probate court’s independent and exclusive jurisdiction over protective proceedings and protective orders, including those concerning a protected individual who is also a Medicaid recipient.

**Second Issue:**

The State identified and described the second issue in various terms. “Probate courts may issue protective orders if the criteria under MCL 700.5401(3) are established by clear and convincing evidence. Joseph Vansach already had a conservator, and there was no lack of access to his income and no indication his income was being wasted or dissipated. Did the probate court err in concluding that the prerequisites for issuance of a protective order were satisfied?” (State’s Brief on Appeal at xi.) “The second [issue] is whether the Estates and Protected Individual’s [sic] Code (EPIC) permits a protective order when the petitioner has no need for it except to change a Medicaid determination in order to keep more assets or income than Medicaid policy would otherwise permit[.]” (Id at 2.) “Ramona and Joseph Vansach do not meet the prerequisites for the order under the Estates and Protected Individuals Code (EPIC), and the order itself exceeds the authority granted to the court.” (Id at 17.)

Protective proceedings are governed by Article V, Part 4, of EPIC, MCL 700.5401 et seq. “Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.” MCL 700.5401(1).
“The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following: (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance[; and] (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.” MCL 700.5401(3).

“The individual to be protected, a person who is interested in the individual's estate, affairs, or welfare, including a parent, guardian, or custodian, or a person who would be adversely affected by lack of effective management of the individual's property and business affairs may petition for a conservator's appointment or for another appropriate protective order.” MCL 700.5404(1).

As to the law, the State’s construction of the protective order statutes is tortured, defective, incomplete, and erroneous. In particular, the State completely ignores the portion of MCL 700.5401(3)(b) providing that a protective order may be entered based on a showing that “money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.” As to the application of the law to the facts of the case, there were no facts or circumstances present that precluded entry of a protective order by the probate court, based on the factual record as described in both parties’ Briefs.

The Amicus Committee recommends that the Probate Council seek leave to file an amicus brief regarding the second issue to clarify the protective order provisions of EPIC and to confirm that entry of a protective order was legally and factually proper in this case.

**Third Issue:**

The State identified and described the third issue in various terms. “The Supremacy Clause of the United States Constitution mandates that all state judges must follow federal law and not read a conflict into state law, and the requirements of 42 US 1396a(4) and 42 USC 1396r-5 are federal law. Did the probate court err in issuing an order under MCL 700.5807 that is in conflict with and obstructs the intent of this federal law?” (State’s Brief on Appeal at xi.) “The third [issue] is whether probate courts may use a general law, intended to assist individuals who are unable to manage their own financial matters, to evade clear and precise federal law mandating the amount of income and assets that a community spouse may retain and still qualify the institutionalized spouse for Medicaid care at public expense.” (Id at 2.) “The probate court’s powers to make permissive orders for protected persons in EPIC do not override federal and state laws that specifically grant sole authority to the Department for Medicaid determinations.” (Id at 29.)

Regarding the third issue, the State appears to be asking the Michigan Court of Appeals to disregard clear and unambiguous provisions of EPIC based on extensive discussion of public policy considerations identified by the State.
The Amicus Committee recommends that the Probate Council seek leave to file an amicus brief regarding the third issue to clarify that public policy considerations identified by the State cannot override clear and unambiguous provisions of EPIC (which represent the most clear statement of Michigan public policy on these matters).

Counsel Recommendation:

If the Council decides to seek leave to file an amicus brief in this matter, the Amicus Committee recommends that the Council retain Fraser Trebilcock (by Marlaine Teahan) or John A. Scott, P.C. (by Greg Kish) to represent the Council.

DLS

DLS/sra

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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 24, 2017

Name Don L. Rosenberg P Number P31188

Firm Name Barron, Rosenberg, Mayoras & Mayoras

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City Troy State MI Zip Code 48098

Phone Number 248-641-7070 Fax Number 248-641-7073

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Attach Additional Sheets as Required

Name of Case In re: Joseph Vansach, Jr.

Parties Involved Ramona Vansach (spouse of Joseph), and the Michigan Department of Health and Human Services

Current Status Pending appeal

Deadlines Plaintiff-Appellee reply brief due Feb. 2, 2017

Issue(s) Presented Please see attached reply brief for full details

Whether the Probate Court has the authority to issue a protective order over the estate of an individual receiving Medicaid, whether the Probate Court can allocate income among spouses, and whether Michigan DHHS must comply with Probate Court orders.
Michigan Statute(s) or Court Rule(s) at Issue  MCL 600.308, MCL 700.1105, MCL 700.1302

MCL 700.5401, MCL 700.5402, MCL 700.5407, MCL 700.5415

Common Law Issues/Cases at Issue  Please see attached brief for full list of cases

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section?  The resolution of this matter is likely to have a significant impact on the area of Probate, estate planning, those with disabilities, guardians and conservatorships, and elder law practices. Furthermore, the ability of the any attorney seeking to protect income and assets for a client is at risk in this case, and all cases which may come after it.

Do you believe that a decision in this case will substantially impact this Section’s attorneys and their clients? If so, how?  Yes, an adverse ruling would severely limit a significant number of attorneys belonging to this section from assisting their clients in implementing strategies to protect assets, and ensure that their loved ones receive the best quality of case, in the least restrictive setting, and at the least cost to them and their families.
February 27, 2017

To:        David Skidmore & Amy Tripp
From:      David L. Shultz
Re:        Potential Issues for a Probate and Estate Planning Section Amicus Brief in Joseph Vansach, Jr. v MI Dep’l of Health and Human Services, Court of Appeals No. 334732

I am now representing a client in the Court of Appeals in a matter similar to Don Rosenberg’s case, Joseph Vansach, Jr. v MI Dep’t of Health and Human Services, Court of Appeals No. 334732. In my case the Department of Attorney General’s due date for its initial brief is March 28, 2017. In the AG’s docketing statement for my case, the Vansach case is listed as presenting similar issues for adjudication.

I have reviewed the probate court pleadings and transcript as well as the briefs filed by the AG and Don in Vansach. This memo describes the issues in Vansach that may be of particular concern to the Probate and Estate Planning Section. They involve challenges to the probate court’s jurisdiction to issue protective orders. I recommend that in its evaluation of whether to participate in this case, the Section’s Litigation Committee press the attorneys in Vansach for a clear assessment of the issues that could benefit most from supplemental coverage and how the Probate and Estate Planning Section can add real value to the appeal by its participation. Vansach is not my case and I may not have the best understanding of all the nuances underlying this appeal.

Background

Joseph Vansach, Jr. is 90 years old. He resides in a skilled nursing facility in Port Huron, Michigan. He suffers from dementia. The St. Clair County Probate Court appointed William F. Schieman III as his Conservator in 2013. His total monthly income is $4,184.02. Joseph has been a Medicaid recipient since November 2014. His monthly Patient Pay Amount to the nursing home where he resides was $3,372.00. $812.00 of his income was retained by his...
spouse as her Medicaid Community Spouse Income Allowance.

Ramona Fenner-Vansach is Joseph’s spouse. She is 87 years old. She has been married to Joseph for 12 years.

In May 2016 Ramona petitioned the St. Clair County Probate Court for a protective order to assign all of Joseph’s income to her. She submitted an exhibit showing her monthly living expenses of $3,796 and debts totaling $730. The exhibit showed her monthly “take home” income as $1,978 which included $1,166 Social Security and $812 from the Medicaid Community Spouse Income Allowance. She claimed a monthly shortfall between her income and her living expenses of $2,538 per month.

On August 24, 2016 St. Clair County Probate Judge John D. Tomlinson granted the protective order that is attached to this memo. The Michigan Department of Attorney General was noticed as an interested party and appeared at the hearing to argue against the petition.

In September 2016 the Department of Attorney General appealed the protective order to the Michigan Court of Appeals. The parties have filed their briefs. On February 8, 2016 the Elder Law and Disability Rights Section of the State Bar of Michigan filed a motion to file an amicus curiae brief. An answer was due on 2/22/17. As of 2/24/2017 there was no entry on the appellate docket sheet showing an answer was filed.

Issues Raised by the AG on Appeal

For the most part the AG has attacked the protective order as an unlawful intrusion on the DHHS’s exclusive authority to make Medicaid determinations. The AG argues that once Mr. Vansach qualified for Medicaid in 2014 and his patient pay amount was set, it was unlawful for the probate court to alter that determination by issuing a protective order that has the effect of decreasing the patient pay amount. This argument is framed by the AG’s repeated misstatement of the governing federal law and its attempt to inject legal theories, e.g., exhaustion of administrative remedies, that have no bearing on the facts at hand. The brief filed by the Appellee addresses those arguments well. I expect the amicus brief filed by the ELDRS will do so also.

The AG’s brief does make other arguments that seek to restrict the scope of the probate court’s jurisdiction to issue protective orders. These arguments are not dependent on the facts of this particular case and their nexus to the Medicaid program.

ISSUE 1: The docketing statement filed by the AG with the Court of Appeals sets forth the following issue:
“Joseph Vansach already had a conservator and the request for an order did not satisfy the standards of MCL 700.5401-5408 to justify a protective order.”

In its briefs the AG argues that because Joseph Vansach already had a Conservator “who can make financial transactions that Joseph would be able to make if not under a disability, including transferring income and assets” he is “unable to establish necessary ‘cause’ and meet the necessary prerequisites for a protective order” set forth in MCL 700.5401(1). Further, the AG argues that even though a conservatorship was in place, the petitioner nonetheless failed to present evidence showing that Joseph was unable to manage his property and business affairs due to mental disabilities or that his property or business affairs were somehow in disarray or had need of a protective order. Finally the AG suggests that even if the prerequisites for a protective order are present, MCL 700.5407(2)(c) limits the court’s powers to those the person himself could exercise if not under a disability. Stated another way, protective orders are not available to persons who have Conservators if the relief sought is the establishment of an order of support for a spouse.

[NOTE: The transcript of the probate court proceeding shows that the petitioner did not sponsor testimony to support its petition. She relied on the contents of her petition that is part of the court’s “record” of the proceeding. The transcript also shows that during the hearing the AG declined the court’s invitation for an evidentiary hearing on the reasonableness of the petitioner’s request for an order of support.]

The AG’s argument ignores the fact that absent the petition, the Conservator lacks the ability to provide the relief requested in the petition, i.e., payment of Joseph’s money to his spouse, a person entitled to his support. Without such an order, the Conservator cannot pay money to the spouse if doing so will put Joseph at risk of being evicted from the nursing home for nonpayment. The AG’s argument also does not recognize that if Joseph was not under a mental disability, he could petition the court for such an order himself under MCL 700.5404(1). Perhaps the bigger problem with the AG’s position is that it wholly ignores the EPIC statutory provision that explicitly provides the Court’s jurisdiction to issue a protective order when money is needed for “those entitled to the individual’s support, and that protection is necessary to obtain or provide money.” MCL 5401(3)(b). This power is reiterated in MCL 700.5407(2)(c) in which EPIC recognizes that protective orders are appropriate to provide for the benefit of the individual’s immediate family.

ISSUE 2: Is the court’s exclusive subject matter jurisdiction to enter a protective order circumscribed by federal Medicaid law?

Federal Medicaid law provides three options for setting the community spouse income allowance that is used to calculate a nursing home resident’s Medicaid patient pay amount.
One option uses a formula in DHHS policy to calculate the allowance. Another option uses an "exceptional circumstances causing financial duress" standard that requires a person to request an administrative hearing to make that showing. The third option is using the amount of spousal support in a court order. Each of these options are separate and independent from one another. There is nothing in the federal law that specifies that a court order is dependent on and must conform to the policy governing the other two options. Federal law recognizes the authority of state courts to issue orders of support. When such an order exists, federal law directs state Medicaid agencies to honor those orders.

The AG's advocacy in the Vansach case is wholly predicated on public policy arguments that complain that the Petitioner gets a more generous result by securing a court order of spousal support than by using either of the two other options for setting the community spouse income allowance. Because the DHHS administers those two other options the AG suggests that the use of the court order option unlawfully interferes with the agency's authority to make Medicaid determinations.

This issue presents an opportunity to remind the court that (1) the Michigan legislature is the body that defines the probate court's jurisdiction, (2) nothing in EPIC or the federal Medicaid law circumscribes the probate court's jurisdiction to issue protective orders in the way the AG proposes, and (3) as recently as January 2017 the Court of Appeals in Estate of Tyler Jacob Maki v Victor Coen, COA No. 328704, restated the principle that when it comes to public policy questions the Court cannot substitute its own policy decisions for those made by the Legislature. When such questions are presented, they are properly directed toward the Legislature.

I hope these comments are helpful. In my opinion, the Litigation Committee should coordinate with the attorneys in the Vansach case, including the attorney(s) who will be writing the amicus brief for the ELDRS section, to make ensure that the issues that could benefit most from additional advocacy are identified and that the overall presentation of the case to the Court of Appeals is enhanced.
STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF ST. CLAIR

IN RE: JOSEPH VANSACH, JR.,
a protected individual

Case No: 13-11-023802-CA
Hon. John D. Tomlinson

DON L. ROSENBERG (P31188)
KIMBERLY CRANK BROWNING (P75909)
SCOTT M. ROBBINS (P74881)
BARRON, ROSENBERG,
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ORDER FOR PROTECTIVE ORDER FOR INCOME SUPPORT ORDER FOR THE BENEFIT OF COMMUNITY SPOUSE

AT A SESSION OF SAID COURT, IN THE CITY OF PORT HURON, COUNTY OF ST. CLAIR, STATE OF MICHIGAN, ON THE 24TH DAY OF AUGUST, 2016.

Present: Honorable JOHN D. TOMLINSON P-45917
St. Clair County Probate Court

WHEREAS, on August 24, 2016, a hearing was held on a Petition for Protective Order for Income Support Order for the Benefit of the Community Spouse.

WHEREAS, upon hearing arguments of counsel, all interested parties having received notice and the Court being otherwise fully advised in the premises

WHEREAS, this court pursuant to the Estates and Protected Individual Code MCL 700.5402 gives the probate court exclusive jurisdiction to determine how a protected individual’s estate that is subject to the laws of the this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual’s dependents or other claimants.

WHEREAS, the Court finds that RAMONA FENNER-VANSACH is a spouse in need of support from her husband, JOSEPH VANSACH, JR., a Protected Person. Petitioner has established to the satisfaction of the Court that RAMONA FENNER-VANSACH is entitled to a deviation from the allocation of resources and income set forth in 42 U.S.C. § 1396r-5.

IT IS HEREBY ORDERED that JOSEPH VANSACH, JR.’s monthly income and all subsequent increases are assigned to RAMONA FENNER-VANSACH, as an on-going Support Order for the remainder of JOSEPH VANSACH, JR.’s life.
IT IS FURTHER ORDERED that this Order shall be effective retroactively to June 2, 2016.

IT IS SO ORDERED.

Dated: AUGUST 24, 2016

St. Clair County Probate Court Judge

A TRUE COPY
Probate Register
Memo to Amicus Curiae Committee.
From: Jim Steward
3/6/2017

Re: Joseph Vansach case request for Amicus Briefing.

I. Department of Health & Human Services claim as stated in part I of its brief:

"The trial court lacked jurisdiction to alter the Department’s Medicaid determination of the community-spouse income allowance."

The first "question" as stated in the Department’s “Statement of Questions Presented” reads as follows:

Courts lack subject-matter jurisdiction when Medicaid recipients who are dissatisfied with a Michigan Department of Health and Human Services’ determination of benefits fail to exhaust their administrative remedies and instead seek a remedy in the courts. The Vansachs were dissatisfied with the Department’s determination of Ramona Vansach’s community-spouse income allowance and Joseph Vansach’s patientpay amount but did not avail themselves of the available administrative remedies. Did the probate court lack jurisdiction over these claims? [emphasis added]

In Contrast, the Appellee’s counter-statement of the first issue is as follows:

Does the Probate Court have exclusive subject matter jurisdiction to enter a protective order under MCL 700.1302(c) and MCL 700.5402, in connection with a protected individual, even though the protected individual is receiving Medicaid benefits?

The State Administrative Agency (the Appellant) asserts that the probate court does not have jurisdiction to rule on a person’s petition for a protective order because there may be an effect on a person’s Medicaid benefits calculation and (apparently) there is (or may be) an administrative procedure that the person could use instead. However, the State Administrative Agency states this claim as a failure to exhaust administrative remedies. Under the procedural posture of this case, that is a false assertion because there was no administrative proceeding pending which dealt with a request for an increase in the Medicaid spouse allowance. The State Administrative agency is actually claiming that because there may have been the possibility of asking the Agency to make a similar ruling (although not identical, because the jurisdiction of the administrative agency is actually different than the jurisdiction of the court), that the court does not have jurisdiction. The State Administrative agency is also claiming that because the court order could have an effect on what the Agency does, that the court lacks jurisdiction to enter any order as requested by the petitioner. Obviously, there is no such limitation stated in EPIC:
700.1302 Exclusive subject matter jurisdiction.
Sec. 1302. The court has exclusive legal and equitable jurisdiction of all of the following:
* * * *
(c) Except as otherwise provided in section 1021 of the revised judicature act of 1961, 1961 PA 236, MCL 600.1021, a proceeding that concerns a guardianship, conservatorship, or protective proceeding.

700.5401 Protective proceedings.
Sec. 5401. (1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.
(2) The court may appoint a conservator or make another protective order in relation to a minor's estate and affairs if the court determines that the minor owns money or property that requires management or protection that cannot otherwise be provided, has or may have business affairs that may be jeopardized or prevented by minority, or needs money for support and education and that protection is necessary or desirable to obtain or provide money.
(3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.
(4) The court may appoint a conservator in relation to the estate and affairs of an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment.

Sec. 5402. After the service of notice in a proceeding seeking a conservator's appointment or other protective order and until the proceeding's termination, the court in which the petition is filed has the following jurisdiction:
(a) Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated.
(b) Exclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants.
(c) Concurrent jurisdiction to determine the validity of a claim against the protected individual or the protected individual's estate, and questions of title concerning estate property.

Whether or not a court order will affect what the Agency does regarding a particular person depends on the statutes under which the Agency operates – perhaps it will or perhaps it won't. As observed by the Appellee here, "Such an order for spousal support does not become a Medicaid determination simply because it impacts a subsequent Department determination."

And, as noted by Judge Mack in the decision he issued in the case of In the Matter of Edward J. Tylutki (Wayne County Probate Court, copy attached):

"Nothing in EPIC divests this Court of its exclusive jurisdiction to enter protective orders for the benefit of protected individuals or their dependents. The Probate Court's jurisdiction cannot be proscribed by the Department's policy manual or an internal memo. In all of this, the Department overlooks the fact that it, and not the Probate Court, makes the decision on Medicaid eligibility. This Court, by granting Tylutki's petition, does not order the Department to do anything. The Department has chosen to modify how it evaluates Medicaid applications. Whether that is consistent with the law is not for this Court to determine at this time."

[In the Matter of Edward J. Tylutki, opinion and order, pp 9-10].

As also held by Judge Nebel In the Matter of: Wayne E. Scherer (Schoolcraft County Probate Court, copy attached):

DHS suggests that the request for a protective order must fail because this Court lacks jurisdiction. They contend that the DHS is solely responsible for the Administration of the Social Security Act in Michigan. However, nothing in the Social Security Act or in EPIC divests this Court of its exclusive jurisdiction to enter protective orders for the benefit of protected individuals or their dependents when Medicaid benefits are being considered. Although DHS may be solely responsible for the Administration of the Social Security Act in Michigan, that does not limit Probate Court jurisdiction related to protected individuals or their dependents. The Probate Court's jurisdiction cannot be proscribed by DHS policy. It should be noted that it is DHS, not the Probate Court, that makes the decision on Medicaid eligibility. This Court, by granting a protective order, does not order DHS to do anything. DHS has modified how it treats a SBO trust and how it evaluates Medicaid applications. The merits of that process is not anything that this Court will comment on. Simply put, this Court has determined that it has anything that this Court will comment on. Simply put, this Court has determined that it has jurisdiction to consider the merits of a protected order request, it has discretion to issue protective orders following such a request, and it remains up to DHS to consider Medicaid eligibility in whatever manner they chose to consider that eligibility.

[In the Matter of: Wayne E. Scherer, opinion and order, p 5]
As mentioned above, as part of the Agency’s claim of the probate court’s lack of jurisdiction, it asserts that the petitioner’s sole remedy is an administrative hearing. However, under Michigan’s administrative procedure’s act, the petitioner could not file a request for an administrative hearing, because there was no ongoing administrative proceeding pertaining to a request for increase in spousal allowance and no administrative determination had been made regarding such a request. What the State Administrative Agency is really doing is trying to preclude the Petitioner from using the probate court’s protective order procedures and limit the Petitioner to only the administrative option when no statute contains such a limitation. The reason for this tact is obvious: the Agency does not want an unbiased tribunal to hear the matter.

My concern is that if the Court of Appeals was to issue an opinion upholding the Agency’s claims, then the probate court’s jurisdiction would be severely curtailed, with effects extending far beyond just this case. Basically, the probate court could never issue any orders without first trying to figure out if doing so might somehow affect a State Administrative Agency. We must remember that if the court does not have jurisdiction of the case, then any orders entered are in essence void and of no effect.

**Thorough briefing to the court of appeals is needed when issues such as these are raised to help assure that the Court of Appeals can understand probate court matters and properly interpret EPIC.**

II. The Appellant next argues that the Probate Court lacked the authority to issue a protective order where a conservator is in place.

The second question presented, as stated by the State Administrative Agency, is as follows:

*Probate courts may issue protective orders if the criteria under MCL 700.5401(3) are established by clear and convincing evidence. Joseph Vansach already had a conservator, and there was no lack of access to his income and no indication his income was being wasted or dissipated. Did the probate court err in concluding that the prerequisites for issuance of a protective order were satisfied?*

Again, in contrast, the second issue as stated by the Appellant reads as follows:

*Does the Probate Court have the authority to issue a protective order allocating support from a protected individual’s estate to that protected individual’s spouse?*

In this part of its brief, the State Administrative Agency is arguing that the probate court does not have the authority to issue a protective order, because Mr. Vansach previously had a conservator appointed.

Although my primary concern is the attack on the probate court’s jurisdiction and the potential for the court of appeals to “get it wrong” without thorough briefing, I am also quite concerned that the
appeals court could misinterpret EPIC regarding this second claim as well. I agree with the analysis by the Appellee:

First, the appointment of a conservator does not, by its terms, automatically prohibit a subsequent protective order. MCL 700.5415(1) states that when a conservator is appointed, an interested person, “may file a petition in the appointing court for an order to do any of the following: ... (e) Grant other appropriate relief.” This language clearly permits subsequent protective orders to be issued and disposes of the allegation that a conservator’s appointment prohibits it.

Second, a showing that “property will be wasted or dissipated” is not the only way to establish MCL 700.5401(3)(b). The text of the statute is as follows:

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual’s support, care, and welfare or for those entitled to the individual’s support, and that protection is necessary to obtain or provide money. (emphasis added).

[Appellee’s Reply Brief, page 17]

The appointment of a conservator does not necessarily provide money for “support, care and welfare” of a protected person’s family, but more importantly, EPIC does not prevent the issuance of a protective order after a conservator has been appointed. And again, I believe (based on past court of appeals decisions) that the court of appeals needs all the help it can get in the form of thorough briefing to make correct decisions regarding probate court matters.

Summary:

In light of the potential for severe restrictions on the jurisdiction of our probate courts, or ability of our probate courts to issue needed protective orders, I urge the Committee to thoroughly discuss the issues raised by this case. The Committee may still decide that an amicus brief by the Section is not warranted, but please provide the Council with the overall rationale for your recommendation in relation to the issues presented by the case.

Jim Steward
Wayne County Probate Court
OFFICE OF JUDGE MILTON L. MACK, JR.
CHIEF JUDGE OF PROBATE
Phone: (313) 224-5672
Fax: (313) 224-8099

DATE: APR 21 2015

TO: Attorney John B. Payne

FAX No: _1-313-583-3100

From: Tyjuana Palmer

No. of Pages: 11 (including this page)

REMARKS: copy of Judges Opinion
RE: matter of Edward J. Tylutki
STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

In the Matter of Case No. 2015-804523-PO
EDWARD J. TYLUTKI, A Protected Individual

OPINION:

The matter before the Court arises from Rose Tylutki's Petition for a Protective Order seeking increased spousal support to provide financial protection for her, as a dependent community spouse. This Petition specifically seeks relief as follows: (1) that this Court award/determine "Countable Assets" under Medicaid totaling $180,636.45 for her spousal support; (2) that the principal of the "Solely for the Benefit Trust" for Rose Tylutki, dated June 5, 2014, shall not be deemed available to the Protected Person from the date it was executed and funded; and (3) the Petitioner be awarded monthly spousal support in the amount of $4,041.04 from the parties' combined income.

The Department of Human Services (DHS), represented by the Michigan Attorney General, has objected to the Petition arguing that a Medicaid application is currently pending and therefore, DHS has exclusive jurisdiction until the administrative proceedings are complete. DHS also argues that the Court should not act now because the Department may only use pre-existing court-ordered support when it determines Medicaid eligibility.

A hearing was held on March 24, 2015, and the Court took this matter under advisement to render an Opinion.
STATEMENT OF FACTS

Rose Tylutki and Edward Tylutki are parties to a long-term marriage. Both of them worked and presently receive social security and pension income totaling $4,041.04 per month. Edward Tylutki receives $2,300.47 per month while Rose receives $1,740.57. They currently have "countable assets" for Medicaid eligibility purposes of $180,636.45. These assets include bank accounts and a $10,000 life insurance policy.

Edward Tylutki is eighty-five (85) years of age and is currently residing in a nursing home facility, Imperial Health Care Center, located in Dearborn Heights Michigan. He suffers from memory loss and is unable to ambulate without assistance. According to the Guardian ad Litem, he is incapacitated and in need of full time care. As such, Edward Tylutki, the alleged protected individual, is "institutionalized" for purposes of the Medicare Catastrophic Coverage Act of 1988 and is an "institutionalized spouse", as defined in 40 USC 1396r-5. The Petitioner is a "community spouse" under the same statute.

Rose Tylutki is seventy-nine (79) years of age and has a life expectancy of an additional 10.04 years. Pursuant to Medicaid rules, as a "community spouse", the Petitioner can receive one-half (1/2) of the couple's countable assets up to the limit of $117,240.00 in 2014. Mr. and Mrs. Tylutki, however, have countable assets of about $180,000.00 and therefore the Petitioner would currently be entitled to only $90,000. This amount can be increased pursuant to a Court Order if the community spouse can establish exceptional circumstances resulting in significant financial distress. The instant petition is a protective order requesting, in part, increased spousal support to provide for financial protection for the Petitioner, a dependent community spouse.
Prior to submitting a Medicaid application for her husband, the Petitioner, as the "community spouse", through counsel, executed an "Irrevocable Solely for the Benefit of Trust" ("SBOT") for Rose Tylutki, dated June 5, 2014, and funded it with funds in excess of $75,000.00. The Trust was drafted in compliance with the requirements of Michigan Bridges Eligibility Manual (BEM) Items 401 and 405, dealing with SBOT agreements, effective July 1, 2014.

On June 27, 2014, Petitioner through her co-counsel, Paul M. Lubienski, filed an application for Medicaid with more than one hundred pages of documentation. DHS sent a Verification Checklist on August 19, 2014, allegedly requesting the same information previously provided. That information was due by August 29, 2014. On September 8, 2014, the application for Medicaid was denied due to failure to verify assets.

On October 23, 2014, the Petitioner requested an administrative hearing and also filed a second application for Medicaid. In December, 2014, an administrative hearing was allegedly held; however, Petitioner's counsel claims he did not receive notice of the hearing and did not appear. The request for an administrative hearing was denied. Subsequently, the Petitioner requested reconsideration of this denial which was also dismissed.

On February 17, 2015, an appeal was filed with the Wayne County Circuit Court and is pending before Circuit Judge Daphne Means Curtis. According to counsel, the sole issue on appeal is DHS's refusal to conduct an administrative hearing in this matter or give Petitioner and her counsel proper notice of the hearing before the Administrative Law Judge.

On January 30, 2015, Rose Tylutki filed the instant petition for a protective order. The Petitioner argues that this Court has exclusive jurisdiction to decide this petition
pursuant to the Estates and Protected Individuals Code ("EPIC").

On March 20, 2015, the Michigan Attorney General, on behalf of DHS objected to the Petition, arguing that this Court, at present, lacks subject matter jurisdiction because the Petitioner has failed to properly exhaust her administrative remedies. In this regard, the Respondent asserts that, under the guise of seeking a protective order, the Petitioner is asking this Court to inappropriately intervene in a pending administrative review of a Medicaid eligibility determination. The Attorney General contends the Petitioner is attempting to circumvent the completion of the review of Medicaid eligibility which is the subject of an administrative appeal currently pending before the Wayne County Circuit Court.

ISSUES AND CONCLUSIONS OF LAW

The specific issue before this Court is whether it has subject matter jurisdiction to grant the relief sought in this Petition for Protective Order. The Probate Court has broad jurisdiction over conservatorships and protective proceedings. MCL 700.5401(3) specifically provides that the Probate Court may appoint a conservator or make a protective order as follows:

(3) The court may appoint a conservator or make another protective order in relation to an individual’s estate and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual’s support, care, and welfare or for those entitled to the individual’s support, and that protection is necessary to obtain or provide money.
Jurisdiction over protective proceedings is more particularly described in MCL 700.5402 as follows:

After the service of notice in a proceeding seeking a conservator's appointment or other protective order and until the proceeding's termination, the court in which the petition is filed has the following jurisdiction:

(a) **Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated.**

(b) **Exclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants.** (emphasis added)

Additionally, MCL 700.5407(2)(c) further provides as follows:

(c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to an individual for a reason other than minority, the court, for the benefit of the individual and members of the individual's immediate family, has all the powers over the estate and business affairs that the individual could exercise if present and not under disability, except the power to make a will. **Those powers include, but are not limited to, all of the following:**

(i) To make gifts.
(ii) To convey or release a contingent or expectant interest in property including marital property rights and a right of survivorship incident to joint tenancy or tenancy by the entirety.
(iii) To exercise or release a power held by the protected individual as personal representative, custodian for a minor, conservator, or donee of a power of appointment.
(iv) To enter into a contract.
(v) To create a revocable or irrevocable trust of estate property that may extend beyond the disability or life of the protected individual.
(vi) To exercise an option of the protected individual to purchase securities or other property.
(vii) To exercise a right to elect an option and change a beneficiary under an insurance or annuity policy and to surrender the policy for its cash value.
(viii) To exercise a right to an elective share in the estate of the individual's deceased spouse.
(ix) To renounce or disclaim an interest by testate or intestate succession or by inter vivos transfer. (emphasis added)
It is clear that the Probate Court has exclusive jurisdiction and broad discretion in the area of protective proceedings or protective orders under EPIC. The question before the court is whether Medicaid issues somehow impair the jurisdiction of the court to act under EPIC.

Medicaid is a joint federal-state program providing assistance to the needy. Federal law requires each state to designate a single State agency to administer the Medicaid program and to conduct hearings for contested cases. 42 USC 1396a(a)(5).

In Michigan, the Legislature has determined that DHS is the single State agency to make determinations and to hold fair hearings in contested matters. Pursuant to MCL 400.6, DHS maintains the authority to develop regulations and to implement the goals and principles of the assistance program created under the Social Welfare Act, including all the standards and policies related to applications and recipients that are necessary or desirable to administer this program. In order to accomplish these duties the Director of the Department of Human Services is to promulgate rules to conduct hearings pursuant to the Administrative Procedures Act (APA). See MCL 24 201 to MCL 24 328; MCL 400.9.

The APA permits judicial review only when a person has exhausted the administrative remedies available within an agency and is dissatisfied with the final decision by an agency. Generally a person must exhaust those remedies before seeking judicial review. See MCL 24.301; Int'l Bus. Machines Corp. v. State, Dep't of Treasury, Revenue Div., 75 Mich. App. 604, 608-610; 255 N.W.2d 702, 704 (1977).

Furthermore, if statutory language establishes the intent to endow a state agency with exclusive jurisdiction, the courts must decline to exercise jurisdiction until all

Futility will not be presumed. Courts are to generally assume that the administrative process will properly correct alleged errors. *Huron Valley Schools v. Secretary of State*, 266 Mich. App. 638, 649, 702 N.W.2d 862 (2005); *L & L Wine & Liquor Corp. v. Liquor Control Comm’n*, 274 Mich. App. 354, 358, 733 N.W.2d 107, (2007). While in this case, pursuit of the administrative process is likely futile in light of the Department’s new policy in its memorandum dated August 20, 2014, from Terrance M. Bauer, Director, Field Operations Administration, it is not necessary for the Court to address that issue. It is also not necessary to address the Department’s authority or to review the Department’s decision since this Court is not reviewing the Department’s decision. That matter will be addressed by the Circuit Court.

The Department claims there are two ways in which the Petitioner can properly request to alter or increase the community spouse’s spousal support. One, after the Department has made a determination of the community spouse income allowance, upon a request for hearing, the Administrative Law Judge may adjust the Medicaid recipient’s income to divert more to the community spouse, if it is found there are exceptional
circumstances resulting in significant financial distress. See 42 USC. § 1396r-5(e)(2)(B); BAM 600, pg. 30.

Second, when a support order is already in place, the Attorney General claims that "the Department may base its determination on court-ordered support that is in an amount greater than the community spouse allowance calculated under Department policy" relying upon 42 USC § 1396r-5(d)(5), which provides as follows:

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

42 USC. § 1396r-5 (West) [emphasis added]

While the Department uses the word may, the statute uses the word shall. The statute controls. The Department argues that at the time they determined Mr. Tylutki’s eligibility for Medicaid, there was no Court order and thus no basis for this Court to reinterpret or impose its own determination of Medicaid eligibility. Instead, it is argued that under these facts the Petitioner can only seek such a redetermination from DHS.

In adopting the Medicare Catastrophic Coverage Act of 1988 (MCCA), Congress sought to protect community spouses from "pauperization" while preventing financially secure couples from obtaining Medicaid assistance. Wisconsin Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473, 480, 122 S. Ct. 962, 967, 151 L. Ed. 2d 935 (2002). The Court finds that the Department reads the statute too narrowly. The law clearly contemplates that a court order that follows an initial determination shall be honored. The statute expressly provides that "After an institutionalized spouse is determined or redetermined to be eligible" the monthly income allowance for the community spouse
shall not be less than the amount ordered by the court. See 42 USC 1396r-5. Congress amended the act in 1989 to add the words “or redetermined” after the word “determined” to make it clear that court orders for support must be honored, not only at application, but also at any redetermination of eligibility. In this case, there has been a determination. If a court subsequently orders support, that would be an order in existence at the time of redetermination. Redeterminations occur when there is a change in circumstances and at regular annual reviews. To accept the Department’s interpretation of the statute, the Court would be required to ignore the 1989 amendment.

Further, as far as protective orders that affect the transfer of assets for the support of the community spouse, the statute provides as follows:

"An institutionalized spouse may, without regard to section 1396(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3)." 42 USC 1396r5(d)(6)(f)(1).

The law clearly contemplates and authorizes the consideration of court-ordered transfers that occur after an initial determination. The language as soon after the date of the initial determination of eligibility contradicts the Department’s position that a protective order must be issued before a person applies for Medicaid.

Nothing in EPIC divests this Court of its exclusive jurisdiction to enter protective orders for the benefit of protected individuals or their dependents. The Probate Court’s jurisdiction cannot be proscribed by the Department’s policy manual or an internal memo. In all of this, the Department overlooks the fact that it, and not the Probate Court,
makes the decision on Medicaid eligibility. This Court, by granting Tylutki’s petition, does not order the Department to do anything. The Department has chosen to modify how it evaluates Medicaid applications. Whether that is consistent with the law is not for this Court to determine at this time.

The Department correctly states that the Court must determine a basis for issuing a protective order under MCL 700.5407(2)(c). That provision authorizes the Court to act for the benefit of the individual and members of the individual’s immediate family. The statute does not require that the Court should consider the impact of its order on other people or governmental bodies. This Court’s jurisdiction to act does not fade away because it might result in undesirable consequences for other parties. It may be that the Department will ignore this Court’s order or it may be that it may accept the order now or later. That decision will not be reviewed by this Court at this time.

The Department concludes by claiming that the Tylutki’s are seeking this protective order without a bona fide showing that the protected person needed relief. The Department ignores the fact that the law permits the Court to enter orders to protect the protected person’s immediate family. In this case, the protected person clearly expressed to the guardian ad litem that he wanted the Court to grant this petition in order to protect his wife upon his demise. The Department does not challenge the merits of the petition, only the timing.

The Court will grant the petition as prayed. An order may be presented.

APR 21 2015
Date

JUDGE MILTON L. MACK, JR.
Hon. Milton L. Mack, Jr.
Judge of Probate
STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF SCHOOLCRAFT

IN THE MATTER OF:

WAYNE E. SCHERER,                     File No. 15-6487-PO
An Incapacitated Individual.             HON.CHARLES C. NEBEL

MEMORANDUM OF DECISION AND ORDER

FACTS AND BACKGROUND

At issue in this case are the polar opposite positions of the Michigan Department of Human Services (DHS) suggesting that Mr. Scherer does not qualify for Medicaid benefits based upon a lack of financial need, AND the position of Mr. Scherer’s wife who contends that he should qualify for those benefits after the Court grants a protective order awarding her the entire estate of Mr. Scherer. This matter has been argued and briefed by capable counsel on each side of this issue. The bulk of the relevant facts are not contested. It is agreed that the Scherer estate is worth approximately $357,000, exclusive of whatever value may be attributed to the Scherer home or car. Of that sum Mrs. Scherer would be entitled to a Community Spouse Resource Allowance ("CSRA") of $117,240 which is agreed to be exempt from consideration for Medicaid purposes. Since Mr. Scherer would not be eligible for Medicaid benefits until his estate is worth $2,000 or less, the significance of the remaining $240,000 is what is in controversy in this case.

A hearing was held on February 17, 2015, and the parties were each given time to supplement the record with additional briefs and rebuttal pleadings. The Court has taken this
matter under advisement and has researched the issue in an attempt to determine whether or not there is any clear authority and whether there is any consensus at the trial court level as to how this matter should be resolved. Sadly, at this point, there appears to be no clear authority or any statewide consensus on this issue. It is likely that the Michigan Court of Appeals and/or the Michigan Supreme Court will address this issue at some point in the near future.

DHS claims that the Scherers have failed to exhaust administrative remedies and that this Court does not have jurisdiction to entertain the request for a protective order. Several probate courts throughout the State of Michigan have agreed that a protective order is unavailable under these circumstances. They include Ottawa, Marquette, Chippewa and Kent counties. The Scherers' rely on language from the Estates and Protected Individuals Code ("EPIC") to support their position that a protective order is available under these circumstances. If and when it can be determined that there is jurisdiction over a particular protected individual, it would appear that the issuance and the extent of a protective order is within the discretion of the trial court. This approach has been approved in various counties throughout the State of Michigan, including Wayne and Midland counties.

Mr. Scherer is 85 years old, suffers from Alzheimer's Dementia and has a life expectancy of approximately 5.5 years. Mrs. Scherer is 82 years old with a life expectancy of a little more than eight years. Mr. Scherer is receiving residential care at the Schoolcraft County Medical Facility at a cost of more than $7,000 a month.

It is clear to this Court that the Scherers are requesting a protective order in an attempt to qualify for Medicaid benefits after an unsuccessful attempt to qualify for those benefits through the use of a solely for the benefit trust ("SBO"). Historically, the assets within a SBO trust would not have counted against the value of an estate for Medicaid purposes. Had those assets
within the Scherer SBO trust been excluded from the evaluation, Mr. Scherer would have qualified for Medicaid benefits. Because those assets were counted, he did not. There was approximately $250,000 in the Scherer SBO trust as the time Mr. Scherer initially attempted to secure Medicaid eligibility.

It is also clear that this Court cannot establish or review the merits of a Medicaid determination. DHS argues that is effectively what is being requested by Mrs. Scherer, as granting the relief requested would bind the administrative agency into a determination of eligibility.

Not surprisingly, the two adult children of Mr. and Mrs. Scherer, Joseph Scherer and Gary Scherer, have filed waivers consenting to a resolution as requested by their mother.

ISSUES AND CONCLUSIONS OF LAW

The specific issue before this Court is whether it has subject matter jurisdiction to grant the relief sought in this Petition for Protective Order. The Probate Court has broad jurisdiction over conservatorships and protective proceedings. MCL 700.5401(3) specifically provides that the Probate Court may appoint a conservator or make a protective order as follows:

(3) The court may appoint a conservator or make another protective order in relation to an individual’s estate and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual’s support, care, and welfare or for those entitled to the individual’s support, and that protection is necessary to obtain or provide money.

Jurisdiction over protective proceedings is more particularly described in MCL 700.5402 as follows:
After the service of notice in a proceeding seeking a conservator's appointment or other protective order and until the proceeding's termination, the court in which the petition is filed has the following jurisdiction:

(a) **Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated.**

(b) **Exclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants.** (emphasis added)

Additionally, MCL 700.5407(2)(c) further provides as follows:

(c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to an individual for a reason other than minority, the court, for the benefit of the individual and members of the individual's immediate family, has all the powers over the estate and business affairs that the individual could exercise if present and not under disability, except the power to make a will. *Those powers include, but are not limited to, all of the following:*

(i) To make gifts.

(ii) To convey or release a contingent or expectant interest in property including marital property rights and a right of survivorship incident to joint tenancy or tenancy by the entirety.

(iii) To exercise or release a power held by the protected individual as personal representative, custodian for a minor, conservator, or donee of a power of appointment.

(iv) To enter into a contract.

(v) To create a revocable or irrevocable trust of estate property that may extend beyond the disability or life of the protected individual.

(vi) To exercise an option of the protected individual to purchase securities or other property.

(vii) To exercise a right to elect an option and change a beneficiary under an insurance or annuity policy and to surrender the policy for its cash value.

(viii) To exercise a right to an elective share in the estate of the individual’s deceased spouse.

(ix) To renounce or disclaim an interest by testate or intestate succession or by inter vivos transfer. (emphasis added)

Clearly, EPIC provides a Probate Court with exclusive jurisdiction and broad discretion in the area of protective proceedings or protective orders. In the instant case, that would give this Court jurisdiction to look into Mr. Scherer's situation and the discretion to rule on the merits.
of the protective order request. The remaining question before the Court is whether Medicaid issues somehow limit the jurisdiction of the Court to act under EPIC.

DHS suggests that the request for a protective order must fail because this Court lacks jurisdiction. They contend that the DHS is solely responsible for the Administration of the Social Security Act in Michigan. However, nothing in the Social Security Act or in EPIC divests this Court of its exclusive jurisdiction to enter protective orders for the benefit of protected individuals or their dependents when Medicaid benefits are being considered. Although DHS may be solely responsible for the Administration of the Social Security Act in Michigan, that does not limit Probate Court jurisdiction related to protected individuals or their dependents. The Probate Court's jurisdiction cannot be proscribed by DHS policy. It should be noted that it is DHS, and not the Probate Court, that makes the decision on Medicaid eligibility. This Court, by granting a protective order, does not order DHS to do anything. DHS has modified how it treats a SBO trust and how it evaluates Medicaid applications. The merits of that process is not anything that this Court will comment on. Simply put, this Court has determined that it has jurisdiction to consider the merits of a protected order request, it has discretion to issue protective orders following such a request, and it remains up to DHS to consider Medicaid eligibility in whatever manner they chose to consider that eligibility.

This Court elects to follow the rationale of the Probate Courts that have found that there is jurisdiction consistent with EPIC to address the wellbeing of incapacitated adults like Mr. Scherer. In light of that ruling the Court need not comment on any requirement related to exhaustion of remedies as a condition precedent to jurisdiction. With the determination of subject matter jurisdiction, it would appear that the extent of any relief granted by this Court would be discretionary in nature.
DHS correctly identifies that the Court must determine a basis for issuing a protective order under MCL 700.5407(2)(c). That provision authorizes the Court to act for the benefit of the individual AND members of the individual's immediate family. The statute does not require that the Court should temper its consideration of a protected individual's needs or the needs of his family by considering the impact of its order on other people or governmental bodies. This Court's jurisdiction to act and its obligation to a protected individual does not disappear because it might result in undesirable consequences for third parties. It may be that DHS will ignore this Court's order in declining Medicaid eligibility or it may be that it may grant Medicaid eligibility based upon a review of the Scherer finances post protective order. Again, that is a Medicaid decision for DHS and not this Court.

In this case there is no real question as to whether or not Mr. Scherer is an individual who is unable to effectively manage his affairs due to mental difficulties resulting from the effects of Alzheimer's Dementia. His mental impairments have rendered Mr. Scherer unable to perform the day to day activities relating to his care and unable to manage his affairs effectively. This mental impairment is severe and lifelong. Mr. Scherer is receiving appropriate and competent residential care at the Schoolcraft County Medical Care Facility where he will likely be for the remainder of his life.

Similarly, it is clear to the Court that Mr. Scherer has substantial value of property that will be dissipated without proper management. Furthermore, the Court believes that the value of this property is necessary to provide for Mr. Scherer's support, care and welfare, as well as, for the support, care and welfare of Mrs. Scherer, his spouse, someone who is entitled to Mr. Scherer's support. Protection of the substantial value of Mr. Scherer's property is necessary to obtain or provide funds for him individually and for his dependent spouse.
The Court is convinced that those assets that had been transferred into the SBO trust as of July 31, 2014 are reasonably necessary to provide for the support, care and welfare of both Mr. Scherer and his dependent spouse.

Based upon all of the facts and circumstances involved in this matter, the Court determines that Mrs. Scherer is awarded 100% of the assets that had been transferred into the SBO trust as of July 31, 2014, as her separate and distinct property. Whatever effect, if any, this ruling may have as to any Medicaid eligibility is left to the Department of Human Services to determine. Additionally, the Court deems it appropriate to terminate the spousal rights of Mr. Scherer for any rights he may have to claim an elective share or any allowances in the estate of Mrs. Scherer. Finally, Mrs. Scherer is granted the ability to pay appropriate fees associated with these legal proceedings.

Dated: May 22, 2015

Hon. Charles C. Nebel
Schoolcraft County Probate Judge
STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF ST. CLAIR

IN RE: JOSEPH VANSACH, JR.,
a protected individual

Case No: 13-11-023802-CA
Hon. John D. Tomlinson

DON L. ROSENBERG (P31188)
KIMBERLY CRANK BROWNING (P75909)
SCOTT M. ROBBINS (P74881)
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ORDER FOR PROTECTIVE ORDER FOR INCOME SUPPORT ORDER FOR THE BENEFIT
OF COMMUNITY SPOUSE

AT A SESSION OF SAID COURT, IN THE CITY OF
PORT HURON, COUNTY OF ST. CLAIR, STATE OF
MICHIGAN, ON THE 24TH DAY OF AUGUST, 2016.

Present: Honorable JOHN D. TOMLINSON P-45917
St. Clair County Probate Court

WHEREAS, on August 24, 2016, a hearing was held on a Petition for Protective Order for
Income Support Order for the Benefit of the Community Spouse.

WHEREAS, upon hearing arguments of counsel, all interested parties having received
notice and the Court being otherwise fully advised in the premises

WHEREAS, this court pursuant to the Estates and Protected Individual Code MCL 700.5402
gives the probate court exclusive jurisdiction to determine how a protected individual's estate that
is subject to the laws of the this state is managed, expended, or distributed to or for the use of the
protected individual or any of the protected individual's dependents or other claimants.

WHEREAS, the Court finds that RAMONA FENNER-VANSACH is a spouse in need of
support from her husband, JOSEPH VANSACH, JR., a Protected Person. Petitioner has
established to the satisfaction of the Court that RAMONA FENNER-VANSACH is entitled to a
deviation from the allocation of resources and income set forth in 42 U.S.C. § 1396r-5.

IT IS HEREBY ORDERED that JOSEPH VANSACH, JR.'s monthly income and all
subsequent increases are assigned to RAMONA FENNER-VANSACH, as an on-going Support
Order for the remainder of JOSEPH VANSACH, JR.'s life.
IT IS FURTHER ORDERED that this Order shall be effective retroactively to June 2, 2016.

IT IS SO ORDERED.

Dated: AUGUST 24, 2016

St. Clair County Probate Court Judge

A TRUE COPY
Probate Register
STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOSEPH VANSACH, JR.,
Plaintiff-Appellee,
v
MICHIGAN DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
Defendant-Appellant.

Court of Appeals No. 334732
St. Clair Circuit Court No.
2013-023802-CA

The appeal involves a ruling
that a provision of the
Constitution, a statute, rule or
regulation, or other state
governmental action is invalid.

BRIEF OF APPELLANT MICHIGAN DEPARTMENT OF HEALTH AND
HUMAN SERVICES

ORAL ARGUMENT REQUESTED

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
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STATEMENT OF JURISDICTION

Defendant-Appellant, the Department of Health and Human Services, appeals the St. Clair County Probate Court's Decision and Order in the Matter of Joseph Vansach, Jr. Pursuant to MCR 5.801, this Court has jurisdiction of an appeal by right filed by an aggrieved party from a final order of a probate court if such an appeal is provided by statute. MCL 600.861 provides that a final order affecting the rights or interests of any interested person in an estate is appealable by right to this Court. See also MCL 600.308(1)(b). The Department is paying Medicaid benefits for Mr. Vansach and is an interested person pursuant to MCR 5.125(C)(24). MCR 5.801(B)(2)(j), (o), and (u), provide the Department an appeal to this Court from a probate court order transferring assets of an estate, determining rights or interests in property, or directing the making or repayment of distributions.
STATEMENT OF QUESTIONS PRESENTED

1. Courts lack subject-matter jurisdiction when Medicaid recipients who are dissatisfied with a Michigan Department of Health and Human Services' determination of benefits fail to exhaust their administrative remedies and instead seek a remedy in the courts. The Vansachs were dissatisfied with the Department's determination of Ramona Vansach's community-spouse income allowance and Joseph Vansach's patient-pay amount but did not avail themselves of the available administrative remedies. Did the probate court lack jurisdiction over these claims?

   Appellant's answer: Yes.
   Appellee's answer: No.
   Lower court's answer: No.

2. Probate courts may issue protective orders if the criteria under MCL 700.5401(3) are established by clear and convincing evidence. Joseph Vansach already had a conservator, and there was no lack of access to his income and no indication his income was being wasted or dissipated. Did the probate court err in concluding that the prerequisites for issuance of a protective order were satisfied?

   Appellant's answer: Yes.
   Appellee's answer: No.
   Trial court's answer: No.

3. The Supremacy Clause of the United States Constitution mandates that all state judges must follow federal law and not read a conflict into state law, and the requirements of 42 USC 1396a(5) and 42 USC 1396r-5 are federal law. Did the probate court err in issuing an order under MCL 700.5807 that is in conflict with and obstructs the intent of this federal law?

   Appellant's answer: Yes.
   Appellee's answer: No.
   Lower court's answer: Did not answer.
CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

United States Constitutional Provision

US Const, art VI, cl 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Michigan Constitutional Provisions

Const 1963, art VI, § 13

The circuit court shall have original jurisdiction in ... appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law;

Const. 1963, art VI, § 28

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law.

Federal Statutes

42 USC 1396a(a)(5) provides:

[T]he determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan . . . .

42 USC 1396r-5(d) Protecting income for community spouse, provides:

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

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(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least \( \frac{1}{5} \) of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

In subparagraph (C), the term “family member” only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the “community spouse monthly income allowance” for a community spouse is an amount by which—

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds—

(i) the applicable percent (described in subparagraph (B)) of \( \frac{1}{12} \) of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).
A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the “applicable percent” described in this paragraph, effective as of-

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(ii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term “excess shelter allowance” means, for a community spouse, the amount by which the sum of-

(A) the spouse’s expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse’s principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse’s actual utility expenses, exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community
spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(6) Application of “income first” rule to revision of community spouse resource allowance

For purposes of this subsection and subsections (c) and (e) of this section, a State must consider that all income of the institutionalized spouse that could be made available to a community spouse, in accordance with the calculation of the community spouse monthly income allowance under this subsection, has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse.

42 USC 1396r-5 (e)(2)(A) provides:

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of—

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse.

42 USC 1396r-5 (e)(2)(B) provides:

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances
resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

**Federal Regulations**

42 CFR 431.10(a)-(b) provides:

(a) *Basis and purpose.* This section implements section 1902(a)(5) of the Act, which provides for designation of a single State agency for the Medicaid program.

(b) *Designation and certification.* A State plan must—

1. Specify a single State agency established or designated to administer or supervise the administration of the plan; and

2. Include a certification by the State Attorney General, citing the legal authority for the single State agency ....

42 CFR 431.10(d) provides:

(d) *Agreement with Federal or State agencies.* The plan must provide for written agreements between the Medicaid agency and the Exchange or any other State or local agency that has been delegated authority under paragraph (c)(1)(i) of this section to determine Medicaid eligibility and for written agreements between the agency and the Exchange or Exchange appeals entity that has been delegated authority to conduct Medicaid fair hearings under paragraph (c)(1)(ii) of this section[.]

42 CR 431.10(e)(3) provides:

*Authority of the single State agency.* The Medicaid agency may not delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters.
Michigan State Statutes

MCL 24.301 provides:

When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law.

MCL 24.303(1) provides:

[A] petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county.

MCL 400.6(3) provides:

The . . . agency may develop policies to establish income and asset limits, types of income and assets to be considered for eligibility, and payment standards for assistance programs administered under this act. Policies developed under this subsection are effective and binding on all those affected by the assistance programs.

MCL 400.105(1) provides in part:

The [department] shall establish a program for medical assistance for the medically indigent under title XIX. The director of the [department] shall administer the program established by the [department] and shall be responsible for determining eligibility under this act.

MCL 700.5401 provides in pertinent part:

(3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

MCL 700.5402 provides in pertinent part:

After the service of notice in a proceeding seeking a conservator's appointment or other protective order and until the proceeding's termination, the court in which the petition is filed has the following jurisdiction:

(b) Exclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants.

MCL 700.5407 provides in pertinent part:

(c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to an individual for a reason other than minority, the court, for the benefit of the individual and members of the individual's immediate family, has all the powers over the estate and business affairs that the individual could exercise if present and not under disability, except the power to make a will.
INTRODUCTION

Medicaid Assistance for Long-term Care is intended for the truly needy who would otherwise go without medical care. That has always been its purpose. Congress carefully crafted the exacting "impoverishment provisions" of the Medicare Catastrophic Coverage Act of 1988 (MCCA) to provide for the "minimal monthly maintenance needs" of community spouses and keep them above published poverty levels when their nursing home spouses became Medicaid recipients. Balancing the need with scarce public funds, federal law provides the precise calculations for limits on the community spouse's resource and income allowances and the strict standard for increases in those allowances following a Department hearing. Each additional dollar allotted to a community spouse over these allowances is a dollar that is unavailable for someone in real need.

Joseph Vansach receives Medicaid benefits to help pay for his nursing home care. At the time he originally applied for these benefits (two years ago), his community spouse, Ramona, used probate court orders to shield over $500,000.00 in excess of the CMS published limits for eligibility. Because of those court orders he became eligible for Medicaid beginning November 1, 2014. He has been receiving benefits for over two years. After the most recent yearly redetermination, Ramona decided that she was now dissatisfied with the amount of her community spouse income allowance. But rather than seek a hearing from the Department, as law and policy requires, she simply returned to the probate court asking for another order awarding her the couple's entire income for her own use. The Medicaid Long-term Care system is not designed to accommodate and cannot afford such abuse.
This case raises three important issues. The first is whether an individual who has received a Medicaid determination from the Department must exhaust all administrative remedies provided by the agency and in law, rather than evade the administrative process by asking the probate court to interfere in the agency’s determination;

The second, is whether the Estates and Protected Individual’s Code (EPIC) permits a protective order when the petitioner has no need for it except to change a Medicaid determination in order to keep more assets or income than Medicaid policy would otherwise permit;

The third is whether probate courts may use a general law, intended to assist individuals who are unable to manage their own financial matters, to evade clear and precise federal law mandating the amount of income and assets that a community spouse may retain and still qualify the institutionalized spouse for Medicaid care at public expense. Federal law is clear and cannot be ignored by courts in order to distribute benefits that those laws do not intend.

When probate courts make orders that allow only certain individuals to keep income and assets in excess of the amounts that Congress provided in its statutory instructions, it introduces inequity and bias in the program, contrary to the stated objectives of fairness and consistency. 42 CFR 435.901. It also imposes a public burden that Congress did not provide for.
STATEMENT OF FACTS AND PROCEEDINGS

Joseph Vansach has had a conservator to manage his financial affairs since October 13, 2013. (Case summary, St. Clair County Probate Court, ¶ 12.) With the conservator's support, Joseph and Ramona Vansach sought help from the probate court to do Medicaid planning prior to submitting an application in 2014 seeking Medicaid benefits to pay for Joseph's nursing home expenses. After at least two court orders and several hearings related to family squabbles over his assets, (Tr, 8-24-2016, p 10, ¶¶ 2-7, Exh e-mail, Case Summary, multiple entries), the probate court ultimately permitted the couple to retain more than $500,000.00 in excess of the CMS1 published limits that a couple may have and still qualify for Medicaid Long-term Care benefits, (id.; Tr, 8-24-2016, p 4, ¶¶ 9-15); (Dep't Probate Ct Br, p 5 and Exh A, CMS Guidelines.2) (Exhibit A). Joseph then had no assets left to contribute to his own care or to relieve the taxpayers. He was determined asset-eligible for Long-term Care benefits, and the Department determined how much he would contribute from his personal income as his Patient Pay Amount.

The rules for the community spouse income allowance are based on federal law and the CMS Guidelines. (Exh A.) 42 USC 1396r-5(d). Ramona Vansach, as

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1 The Centers for Medicare and Medicaid Services (CMS) is the agency in the US Dept of Health and Human Services that administers the Medicaid program in all 50 states. CMS publishes the SSI and Spousal Impoverishment Guidelines that state the upper and lower limits for assets and income to qualify for the program. These are included again for convenience as Exhibit A.

2 CMS publishes the SSI and Spousal Impoverishment Guidelines that state the upper and lower limits for assets and income to qualify for the program.
Joseph Vansach’s Community Spouse, presented her actual shelter expenses, and her allowance was determined according to the explicit instructions of 42 USC 1396r-5 and the standards in the CMS Guidelines. These standards are in effect for all Medicaid applications, not only in Michigan, but in every other state as well. This is in line with Congress’ stated intent for consistency. 42 CFR 435.901.

In keeping with departmental policy, Ramona Vansach is permitted to keep her personal income of $1,145.00 and currently receives an additional $1,028.00 from Joseph Vansach’s income to bring her income to $2,173.00 per month. Based on the expenses she presented, at the most recent redetermination of eligibility, this was the amount calculated to be necessary to meet her minimum monthly maintenance needs (MMMN). From his personal monthly income of $4,475.00, Joseph deducts his health-insurance premiums, guardianship fees, a personal-care allowance, and of course, the allowance to Ramona. Joseph Vansach then pays $3,339.00 as his Patient Pay Amount for his own care. Joseph Vansach began receiving Medicaid Long-term Care benefits in November 2014.

On June 2, 2016, Ramona Vansach filed a petition for a protective order, asking the court to “increase the community spouse income allowance.” (Pet 6-1-2016, p 3.) The court, with no explanation of her need, and no review based on 42 USC 1396r-5(e)’s federally mandated standard for such increases, granted all of the couple’s combined income to her and placed the entire burden of Joseph’s care on the taxpayers. (Order, August 24, 2016.)
ARGUMENT

I. The trial court lacked jurisdiction to alter the Department’s Medicaid determination of the community-spouse income allowance.

It is well established law in Michigan that when statutory language establishes the legislature’s intent to give a state agency the authority to make certain determinations, courts must decline to exercise jurisdiction until all administrative proceedings are complete. 


The Legislature gave the Department the authority to make Medicaid determinations, and 42 USC 1396r-5(e) provides the remedy for individuals dissatisfied with those determinations: a fair hearing. But Joseph and Ramona Vansach, dissatisfied with the Department’s Medicaid determination of her Community Spouse Income allowance, did not avail themselves of that fair-hearing process. Instead, they sought an order to alter the Department determination from the probate court, although that court has no authority to review Medicaid determinations.

A. Issue Preservation

The Department preserved this issue by raising it in its Brief in Response to Protective Order, filed on June 2, 2016, and during oral argument before the

**B. Standard of Review**


**C. Analysis**

The Medicaid program is a well-developed, highly structured, and intricate program intended to fairly distribute taxpayer supported medical care to individuals who cannot provide it for themselves. The Department has sole authority to make Medicaid determinations. Applicants seeking additional benefits must proceed through the administrative hearing process.

1. **Under federal and State law, the Department is the single state agency authorized to make Medicaid determinations.**

Medicaid, enacted in 1965 as Title XIX of the Social Security Act, 42 USC § 1396 *et seq*, is a cooperative federal-state endeavor designed to provide health care to needy individuals. *Atkins v Rivera*, 477 US 154 (1986); 42 USC § 1396p. The Medicaid program was established to provide "federal assistance to States that
choose to reimburse certain costs of medical treatment for needy persons." *Harris v McRae*, 448 US 297, 301; 100 S Ct 2671; 65 L Ed 2d 784 (1980). The program is needs-based, and Congress and CMS have placed stringent restrictions on financial eligibility. *Cook v Dep't of Social Servs*, 225 Mich App 318, 320 (1997). The program was never intended as a socialized nursing home program available to all elderly individuals, which is why applicants must demonstrate their financial need and accept the terms of assistance. MCL 400.6(2). *Id.* "The Medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving Medicaid benefits from the states." *Ronney v Dep't of Social Servs*, 210 Mich App 312, 319 (1995), citing *Forsythe v Rowe*, 226 Conn 818, 828 (1993). Each applicant bears the burden of demonstrating entitlement to public assistance. *Lavine v Milne*, 424 US 577, 584-585 (1976).

As a condition of participating in the Medicaid program and receiving federal funding, states must conform to all federal law and regulation. 42 USC 1396c; 42 CFR §§ 430.30-48. Each state is required to designate a single state agency to administer the Medicaid program and to conduct hearings for contested cases related to Medicaid in that agency. 42 USC § 1396a(3) and (5); 42 CFR 431.10; 42 CFR 431.200. 42 USC 1396a(3) and 42 USC 1396r-5(e) specifically provide for a fair hearing by the Department:

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of -- (i) the community spouse monthly income allowance. [42 USC 1396r-5(e)(2); See also 42 CFR 431.200-223.]
Congress further specified the standard to be used in the fair hearing for any increase in the community spouse "minimum monthly needs allowance:"

If either such spouse establishes that the community spouse needs income above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary. 42 USC 1396r-5(e)(2)(B) (emphasis provided).

There is no ambiguity in this language, and thus, no invitation to evade federal policy by seeking an alternative tribunal or a more liberal standard to override the Department determination of the Community Spouse Allowance.

Pursuant to 42 USC 1396a(a)(3) and (5), the Legislature appointed the Department as the single state agency to make Medicaid determinations of eligibility and benefits and to hold fair hearings for contested matters. MCL 400.6; MCL 400.105; MCL 24.303(1); 42 CFR 430.10; 42 CFR 431.10; 42 CFR 431.200. The Department's policies are found in the Michigan State Medicaid Plan, which was approved by CMS3 because it is in accord with all federal law and regulation. 42 USC 1396a; 42 CFR 430.10. The policies developed pursuant to MCL 400.6 "to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds ... are effective and binding on all those affected by the programs." § 6(3) and (4).

This includes Joseph and Ramona Vansach. By seeking and accepting

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3 The Centers for Medicare and Medicaid Services (CMS) in the US Dept of Health and Human Services oversees the Medicaid program in all 50 states.
Medicaid benefits, they were bound by all of its policies and requirements. MCL 400.6. Congress intended that Medicaid programs would be administered in all states consistent with the goals of the program. 42 USC 1396a(17); 42 CFR 431.200; 42 CFR 435.901. Thus, all determinations—including here in Michigan—must comply with all federal law and regulations and in accord with the CMS published guidelines for minimum and maximum permitted spousal income and assets. (Exh A.) Congress “sought to combat the rapidly increasing costs of Medicaid by enacting statutory provisions to ensure that persons who could pay for their own care” would do so. Mackey v Dep’t of Human Servs, 289 Mich App 688, 695 (2010).

2. Congress crafted law specifically designed to qualify individuals for Medicaid Long-term Care benefits without impoverishing the spouse who remains at home, and no increases may be granted without a showing of “exceptional circumstances resulting in financial duress.”

Until 1988, the assets of both spouses were considered available for the care of the nursing home spouse. All of the couple’s assets had to be spent down to $3,000.00, which often left the community spouse destitute in order to qualify the institutionalized spouse for Medicaid assistance. The US Supreme Court noted that elderly couples were resorting to divorce to reserve an equitable portion of the couple’s assets and income for the community spouse. Schweiker v Gray Panthers, 453 US 34, 42 (1981). In the Medicare Catastrophic Coverage Act (MCCA), Congress specifically addressed the issues of how much of the couple’s income and
assets the community spouse could retain and still permit the nursing home spouse to qualify for Medicaid long-term care benefits. Congress' solution was to divide the marital assets using a floor and ceiling so that the community spouse will not be impoverished, but nevertheless will not be able to keep an amount in excess of what Congress felt was appropriate for beneficiaries of public benefits. *Wisconsin v Blumer*, 534 US 473, 480 (2002).

The MCCA provisions, called the "impoverishment provisions," are codified at 42 USC 1396r-5. These provisions provide for an equal distribution of the assets unless it is below the minimum standard, in which case the community spouse retains all assets. (Exh A.) 42 USC 1396r-5. Assets over the prescribed upper limits must be spent down for allowable expenses and the institutionalized individual's care before benefits are available. 42 USC 1395r-5. (Exh A.)

The stated intent of the provisions was twofold: "to protect community spouses from pauperization while preventing financially secure couples from obtaining Medicaid assistance." *Blumer*, 534 US at 480, citing H.R. Rep. No. 100-105, pt. 2, p 65 (1987) (bill seeks to "end th[e] pauperization" of the community spouse "by assuring that the community spouse has a sufficient-but not excessive-amount of income and resources available").

To assure that couples had "sufficient-but not excessive" income and assets, "Congress installed a set of intricate and interlocking requirements with which states must comply in allocating a couple's income and resources." *Id.* The guidelines for the program published by CMS state the maximum allowable income
and assets for those who qualify for Medicaid. (Exh A.) Any increase over the amount calculated by the Department can be granted only after a showing of "exceptional circumstances resulting in significant financial duress." 42 USC 1396r-5(e)(2)(B). The allowances are not generous, but Medicaid is, after all, a means-tested program, and the limited resources must be carefully allocated to ensure care for as many needy individuals as possible at a cost that the public can afford. Indeed, Congress was very clear that the intent was to provide only for essentials, the stated "minimum monthly maintenance needs" and not to preserve a desired lifestyle for the community spouse. 42 USC 1396r-5(d)(3). This needs allowance is based on a multiple of the poverty level, and Congress mandated a cap. 42 USC 1396r-5(d)(3)(C). Congress knew that the program would be paid for by taxpayers who often do not themselves enjoy high levels of income and assets.

3. When statutory language establishes the legislature's intent to give a state agency exclusive jurisdiction, the courts must decline to exercise jurisdiction until all administrative proceedings are complete.

Statutory language establishes the clear intent to give the Department the sole authority to make Medicaid determinations. The judicial branch may not exercise that authority except as expressly provided in Michigan's constitution. Const 1963, art III, § 2. In Michigan, under both federal and state law, the Department is the single state agency authorized to make Medicaid determinations of eligibility and benefits. 42 USC 1396a(a); 42 CFR 431.10; MCL 400.6; MCL 400.105. The Department develops policies, including income and asset limits for
Medicaid, and these policies "are effective and binding on all those affected by the assistance programs." MCL 400.6. Medicaid recipients like Joseph and Ramona Vansach, who request and accept benefits, must abide by the rules and regulations of the Medicaid program—including the single remedy of a fair hearing within the Department if they are dissatisfied with the Department determination of eligibility or the amount of benefits such as the determination of the community spouse resource allowance. MCL 400.6; 42 USC 1396r-5(e). Judicial review is permissible only "[w]hen a person has exhausted all administrative remedies available within an agency." MCL 24.301; Const 1963, art VI, § 28; MCL 400.37. *Bonneville v Mich Corrections Org, Serv Employees Int'l Union, Local 526M, AFL-CIO, 190 Mich App 473, 476 (1991)*.

The Social Welfare Act vests the director of the Department with the powers and duties "to hold and decide hearings." MCL 400.9. To accomplish these duties, the director is instructed to promulgate rules for the conduct of hearings within the Department pursuant to the Administrative Procedures Act (APA). MCL 400.9 (APA, MCL 24.201-24.328). Hearings for the Department are held by the Michigan Administrative Hearings System (MAHS), the independent agency that holds hearings for Michigan's agencies and is authorized to hold fair hearings for the Department. MCL 400.105; MCL 24.301; Executive Order No. 2015-4. BAM 600 provides the policies for the Administrative Law Judges who preside over these hearings, including the standard required by 42 USC 1396r-5 for an increase in the community spouse's income allowance and the resulting decrease in the Medicaid
recipient’s Patient Pay Amount. 42 USC 1396(r-5)(e)(2) (exceptional circumstances resulting in significant financial duress). BAM 600, p 39.

The APA permits judicial review only “[w]hen a person has exhausted all administrative remedies available within an agency” and is dissatisfied with the final decision by the agency. MCL 24.301. The APA explicitly requires that this be the remedy sought and that the agency in question must either have denied the request or failed to act upon it expeditiously before an appeal can be made to the circuit court. No law, regulation, or policy provides for probate-court review of Medicaid determinations, and any review of a final administrative determination must be filed in the circuit court. MCL 24.303; MCL 400.37.

Therefore, the probate court lacked jurisdiction to entertain what effectively amounted to the Vansach’s request for an increase in the Medicaid allowances calculated by the Department. See Citizens for Common Sense in Gov’t v Attorney Gen, 243 Mich App at 52 (“[C]ourts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency.”), citing Judges of the 74th Judicial Dist v Bay Co., 385 Mich 710, 727 (1971); 42 USC 1396(a)(3); MCL 400.9. Instead of availing themselves of the fair hearing process, the Vansachs petitioned the probate court to issue an order assigning all of Joseph Vansach’s income to Ramona for her personal use, for the purpose of overruling the Department determination of benefits. (Petition, p 6, ¶¶ 1-3.)

As explained in Section II, Joseph Vansach already has a conservator who can make any transactions that the statute, MCL 700.5401-5408, anticipates—
including management of an individual's property, estate, and affairs. See §
5401(3) & (4). So there could be *no* purpose for the Vansachs to request the probate
court orders other than to interfere with and alter the Department's determination
process and result. The probate court's order effectively changed the Department's
Medicaid determination of the patient-pay amount and community spouse income
allowance. (8-24-2016 Tr, p 19.) But only the Department can make or review
Medicaid determinations; therefore, the probate court lacked subject-matter
jurisdiction because Joseph and Ramona Vansach failed to exhaust their
administrative remedies.

*In re Harper*, 302 Mich App 349 (2013), describes a similar case where, as
here, the Department was granted exclusive authority to make the applicable
determinations, and, as here, the claimant also resorted to a trial court rather than
exhausting the administrative remedies available from the Department. *Harper*
held that where there is a comprehensive statutory scheme over the matter at issue
and exclusive jurisdiction for the Department, the applicant is required to exhaust
all administrative remedies, and the courts cannot not use general laws to "subvert
the statutory scheme." *In re Harper*, 302 Mich App at 256. And the EPIC
provisions of MCL 700.5401-5408 are general rules only to assist individuals who
need access to the accounts of a disabled individual.

As in *Harper*, here there is a "comprehensive statutory scheme" that dictates
that the Department is the sole determiner of Medicaid benefit levels and spousal
allowances, and therefore must calculate those levels under the exacting
specifications of law and policy. 42 USC 1396a; 42 USC 1396r-5. As with the
Harper Claimant, Ramona Vansach inappropriately sought to evade the federally
mandated limits of the Medicaid program by requesting a protective order in the
probate court. And like the Harper Claimant, Ramona must exhaust her
administrative remedies before a court that has jurisdiction. Id.; MCL 400.37.

4. Federal law does not authorize parallel proceedings.

Although federal law provides that the Department will respect existing
court orders of spousal support, 42 USC 1396r-5 does not authorize a court to
conduct parallel or subsequent proceedings. Section 1396r-5(d)(5) provides:

If a court has entered an order against an institutionalized spouse for
monthly income for the support of the community spouse, the community
spouse monthly income allowance for the spouse shall be not less than the
amount of the monthly income so ordered. (Emphasis added.)

The plain language of § 1396r-5(d)(5) contemplates only court orders that
were in effect before the application was submitted. The fact that court orders,
which for other Medicaid determinations have no impact, are recognized related to
the community spouse is in keeping with the history of the MCCA, because
Congress understood that before it established the impoverishment provisions,
certain elderly couples had sought divorces or domestic relations orders of spousal
support to establish an equitable division of property and income to avoid
destitution. Gray Panthers, 453 US at 42. But the language of § 1396r-5(d) does
not grant a separate avenue for the courts to determine an alternate community
spouse income allowance. Indeed, it does not even suggest that in addition to or in
contravention of the complex and exhaustive plan to keep the community spouse from falling below the poverty level, courts would be free to interfere and provide a completely different result for the community spouse. There is a deferential standard, and even an authorized reviewing court may not "substitute its judgment for that of the agency." VanZandt v State Employees Ret Sys, 266 Mich App 578, 584; 701 NW2d 214 (2005). Nor does a reviewing court have equitable jurisdiction over an administrative decision. Huron Behavioral Health v Dep't of Cnty Health, 293 Mich App 491, 497-98 (2011).

Permitting probate courts to use the general provisions for conservators to transfer assets and make financial transactions to thwart the intention of the Congressional plan has negative consequences. First, it creates inequities with respect to Title XIX funds and encourages forum shopping to evade federal standards. The Medicaid program was intended to be uniform and consistent in all states, 42 CFR 435.901, but in some Michigan counties where probate judges grant these types of protective orders for the sole purpose of increasing the Medicaid allowances, individuals will receive very different levels of benefits from other individuals with similar financial circumstances.

Second and just as importantly, it forces the taxpayers to take on the burden of providing care to individuals who could afford to contribute to their own care, creating state financial difficulties in programs that were only intended to be funded for those who had actual need. Seeking court intervention to preserve higher income and assets than the program intends, "frustrates the purpose of the
act" by allowing "individuals otherwise ineligible for Medicaid benefits" to "mak[e] themselves eligible," and at the same time, preserve assets for their heirs. *Ronney*, 210 Mich App at 319.

II. Ramona and Joseph Vansach do not meet the prerequisites for the order under the Estates and Protected Individuals Code (EPIC), and the order itself exceeds the authority granted to the court.

A. Issue Preservation

The Department preserved this issue by raising it in its Brief in Response to Protective Order, filed on June 2, 2016, and during oral argument before the probate court on August 24, 2016. *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989).

B. Standard of Review


"An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature." *Fulton v William Beaumont Hosp*, 253 Mich App 70, 76 (2002); *People v Wager*, 460 Mich 118, 123 n 7 (1999). Courts must "respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility." *People v McIntire*, 461 Mich 147, 153 (1999). *McIntire* at 153. Adherence to these principles will limit the chances "that a court will impermissibly substitute its own policy
preferences.” *Id.*; see also *Cady v Detroit*, 289 Mich 499, 509 (1939) (“Courts cannot substitute their opinions for that of the legislative body on questions of policy.”).

C. Analysis

Again, Joseph Vansach already has a conservator who can make any financial transaction that Joseph would be able to make if not under a disability, including transferring income and assets. He is thus unable to establish necessary “cause,” MCL 700.5401(1); or meet the prerequisites for a protective order. See MCL 700.5401(3)(a) and (b). The court order was requested and granted to increase Ramona Vansach’s Community Spouse Income Allowance and decrease Joseph Vansach’s Patient Pay Amount, both of which are Medicaid determinations that are not within the court’s authority for such orders under MCL 5407(2).

1. Before a conservator may be appointed or a protective order can be made, the standards of MCL 700.5401 must be met.

The court’s “exclusive jurisdiction” granted by MCL 700.5402 is “to determine how the protected individual’s estate that is subject to the laws of this state is managed, expended, or distributed …” when the court has established “cause.” MCL 700.5401(1). And the “laws of this state” include those of the Social Welfare Act (SWA) that bind all those affected by Medicaid. MCL 400.6(2).

This Court has been clear: before a conservatorship (and therefore, a protective order, which has the same standards) can be made, the prerequisites of MCL 700.5401(3) “must be established by clear and convincing evidence.” *In re*
Conservatorship of Shirley Bittner, 312 Mich App 227, 237 (2015). “The clear and convincing evidence standard is the most demanding standard applied in civil cases.” *Id.*, citing *In re Martin*, 450 Mich 204, 227 (1995). Under MCL 700.5401(1) the court “may appoint a conservator or make another protective order, if the court determines that both of the following criteria are satisfied” (emphasis added):

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual’s support, care, and welfare, or for those entitled to the individual’s support and that protection is necessary to obtain or provide money. [MCL 700.5401(3).]

The Vansachs do not meet either criteria, and certainly not by clear and convincing evidence. In fact, no evidence was produced that Joseph Vansach was “unable to manage property and business affairs” due to mental disabilities, even though he has had a court-appointed conservator for several years, apparently without complaint or difficulty. (Petition, p 1, ¶ 2; 8-24-2016 Tr, p 1.) And no evidence was produced showing that his property and business affairs were somehow in disarray or had need of a protective order or additional conservator. Because the conservator, who is already in place, can execute all necessary financial, business, and property transactions that Joseph Vansach could perform for himself if not under a disability, Joseph and Ramona Vansach cannot establish either prong of the requirements. MCL 700.5401(1) and (3).
In *In re Conservatorship of Shirley Bittner*, this Court concluded that it was not appropriate to appoint a conservator (a process that has the same standards as issuance of a protective order) for Shirley because her financial affairs were in good order and well controlled with the assistance of a willing and capable attorney-in-fact under a properly functioning power of attorney. *Bittner*, 312 Mich App at 240-241. Here, as in *Bittner*, "this record demonstrates that the necessary prerequisites for a conservatorship (or protective order) have not been fulfilled." *Id.* at 241.

In fact, the Vansach conservatorship makes an even stronger case to deny an order. A conservatorship is far more comprehensive than most powers of attorney, and thus, is more comprehensive than the power of attorney in place in *Bittner*. As such, it more specifically negates the ability to demonstrate a need under § 5401(3). In any case, the Vansachs never indicated that there was any difficulty with the way that Joseph Vansach's estate was "managed, expended or distributed," other than that they wanted the total burden of his care placed on the taxpayers so that Ramona would have a higher income. They were not asking for a change in the way transactions were made. They were asking for a change in the Medicaid determination of the amount of Joseph's income that Ramona could keep and a concomitant change in the amount that the Department had determined (under policy directives) to be the correct amount for Joseph to contribute to his own care as his Patient Pay Amount. (Vansach Petition, p 6.) These are determinations that can be made only by the single state agency appointed by the Legislature, pursuant to the federally approved policy in the State Medicaid Plan, to comply with all
federal law and regulations. 42 USC 1396a. And the probate court is not that single agency, and therefore its determination—coerced by the protective order—would not be compliant with federal law. 42 USC 1396r-5.

Other than a list of her desired expenses (Vansach Petition, Exh B), no evidence was presented that additional money was needed for Ramona Vansach's support, especially since Ramona had used a court order several years before for Joseph's initial application to bypass the Medicaid limits to shield more than $500,000.00 of excess assets that she could use to defray her expenses. (8-24-2016 Tr, p 4, ¶¶ 9-14; p 13, ¶¶ 6-7.)

And, nobody has expressed a concern that Joseph Vansach or his conservator will squander or misuse the assets. His income, which is the basis of this dispute, is divided among Ramona, his own personal needs allowance, his health insurance premiums, and his contribution toward the cost of his own care in the nursing home. This cannot be construed as being “wasted or dissipated” and does not demonstrate a lack of proper management. See MCL 700.5401(b). Nor can Ramona Vansach demonstrate that she has any need for the requested protective order because complete access and control over all of Joseph Vansach’s assets and income is already available through the court-appointed conservator, who has been acting in this capacity for several years. What she actually seeks is a higher income than Medicaid can provide for her without a demonstration of “exceptional circumstances resulting in significant financial distress.” 42 USC 1396r-5(e)(2)(B).
Before issuing a protective order, it must be established by clear and convincing evidence that the prerequisites of both MCL 700.5401(3)(a) and (b) are met. Bittner, 312 Mich App at 237. In this case, as in Bitter, there has been no “evidence suggesting waste or dissipation of assets,” no “indication that ... money or property was mishandled,” and “[n]o facts presented to the probate court [that] even hinted at fiscal mismanagement.” Bittner, 312 Mich App 240–241. And thus, as in Bittner “this record demonstrates that the necessary prerequisites for a conservatorship have not been fulfilled.” Id. This order was inappropriately issued contrary to law. MCL 700.5401(3).

2. The powers a probate court may grant under a conservatorship or protective order are limited to those the individual could exercise if present and not under a disability.

MCL 700.5407 describes the powers granted to the probate court for the appointment of a conservator or for a protective order under this section:

After hearing and upon determining that a basis for an appointment or other protective order exists with respect to an individual for a reason other than minority, the court, for the benefit of the individual and members of the individual's immediate family, has all the powers over the estate and business affairs that the individual could exercise if present and not under disability, except the power to make a will. [MCL 700.5407(c).]

Thus, after establishing the prerequisites of MCL 5401(3)(a) and (b) as the “basis” for the protective order, the court still has only the powers that the individual himself could exercise, if not under disability. MCL 700.5407(2)(c).
EPIC, MCL 700.5401-5408, neither intends nor permits the court to usurp the authority of agency determinations to, for example, shield assets from: tax liabilities, statutory fees, creditor liability, or in this case, public assistance benefit assessments. For example, while the court may approve property deeds, it does not control whether the tax evaluation is uncapped on transfer. Similarly, although the court may order transfers of assets and income, it is still bound by laws relating to IRA's, capital gains, and assignments of federal benefits such as Social Security payments. In the same way, the court may assist individuals in moving or transferring assets or income, but may not dictate the results when they conflict with decisions that are within the control of another agency.

3. Only the Department can make determinations of community spousal allowance, and the probate court cannot give Vansach or his conservator more powers than he would otherwise possess if not under a disability.

Medicaid determinations of community spouse allowances are clearly and unambiguously within the control of the Department alone. 42 USC 1396a; MCL 400.109. Joseph Vansach would not have the power to make or change Medicaid determinations, and neither would his conservator. Thus, applying these limitations here, the probate court also has no power to do it for him by making a Medicaid determination for Vansach through a protective order. § 5407(2)(c). A court may not use permissive orders to assist individuals to evade federally mandated requirements for Medicaid, 42 USC 1396r-5, which are effective and binding on them as recipients of Medicaid benefits. MCL 400.6(3). Accordingly, the
August 24, 2016, order was not a permissible order under MCL 700.5407 and should fail for this reason alone.

By stating that the order would have no purpose unless the Department was compelled to honor it in its determination of benefits, the probate court revealed its intent to bind the Department to a determination that it would not otherwise make pursuant to policy. (8-24-2016 Tr, p 19, ¶¶ 8-9; p 28, ¶¶ 10-24.) And the probate court clarified that it was making an order to require a third party to do something. (8-24-2016 Tr, p 28, ¶¶ 15-24.) That third party was the Department in its agency of making Medicaid determinations of eligibility and benefits. So although the court agreed in theory that once the Department had made its determination it could not alter it, it still looked for a loophole to require the Department to increase Ramona Vansach’s community spouse allowance. (8-24-2016 Tr, p 19, ¶¶ 23-25, p 20.)

The probate courts do have authority to issue protective orders for the purposes and situations that EPIC anticipates, and these orders have the same standards and conditions as conservatorships. But the scenario here is not one that EPIC contemplates. Even though Joseph was disabled, there was no need for the probate court to act because he already had a conservator who effectively managed his financial affairs, and that is the extent of the court’s authority. MCL 700.5401-5408. MCL 700.5407, Permissible court orders, provides:

(1) The court shall exercise the authority conferred in this part ... and shall make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure. [MCL 700.5407(1).]
And again, the actions the court may take in these orders are limited to those that an individual could do for himself if not under a disability. MCL 700.5407(2)(c). In fact, the court has less power than an individual because it cannot make a will for him. MCL 700.5407(2)(c). And since no individual has the ability or authority to make or change a Medicaid determination, the trial court using MCL 700.5401-5408 cannot, by the clear terms of the statute, use these provisions to do it for him.

Protection of the type envisioned by MCL 700.5401(3)(b)—the sort “necessary to obtain or provide money”—does not suggest an interference with the lawfully assigned authority of another agency. Indeed, the language of MCL 700.5402 grant of jurisdiction given to the probate court is for an “estate that is subject to the laws of this state.” “Subject to the laws of this state” includes MCL 400.6, which grants the Department sole authority to develop “policies to establish income and asset limits, types of income and assets to be considered for eligibility, and payment standards for assistance programs administered under this act.” MCL 400.6(3). MCL 400.6(3) also states that “[p]olicies developed under this subsection are effective and binding on all those affected by the assistance programs.” This clearly and unambiguously includes Joseph and Ramona Vansach.

Joseph Vansach did not need a protective order for financial matters, which the probate court must find before granting such orders. See MCL 700.5401(3)(a) and (b); Bittner, 312 Mich App at 237. Although the probate court order was not a domestic relations order, it was styled as a court order of spousal support to force the Department to change its Medicaid determination by increasing the community
spouse income allowance. Yet the court did not use the standards for either a domestic relations order of spousal support or the standard mandated by 42 USC 1396r-5(e)(2)(B) for an increase in the spousal allowance. (8-24-2016 Tr, pp 32–33.) Instead, the probate court stated: “My order is applicable to your determination. Your determination is not applicable to my order.” (8-24-2016 Tr, p 33, ¶¶ 1-3.)

The probate court admitted that it had heard no evidence that Ramona Vansach had problems with financial transactions or that she actually needed a higher income. (8-24-2016 Tr, p 33, ¶¶ 4-13.) The probate court was also advised that any increase given to Ramona Vansach would cause an increase in the Medicaid payments and raise the burden on taxpayers. (8-24-2016 Tr, p 31.) But it nevertheless entered an order granting “Mrs. Vansach 100 percent of Mr. Vansach’s income for purposes of making sure that her needs are being met,” with no actual examination or review of her needs or income. (8-24-2016 Tr, p 33, ¶¶ 19-24.)

4. Allowing courts to impose results that do not comport with established Medicaid law and policy introduces inequity and bias that is contrary both to EPIC and to Medicaid’s objectives of fairness and consistency.

Allowing a probate court to issue an order that forces the Department to grant benefits to Ramona and Joseph Vansach for which they would not otherwise qualify under policy, creates problematic and unintended inequities.

To begin, it creates an inequity under EPIC. Probate courts may make protective orders for individuals who have mental deficiencies or mental illness, MCL 700.5401(3)(a), but may only provide conservators for those who have physical
disabilities but are mentally competent. MCL 700.5401(4). This means that the court cannot make the type of order issued by this court for the Vansachs to assist other disabled applicants to increase their Medicaid benefits if they are physically disabled but mentally competent. This is because under the statute, although the court “may appoint a conservator or make another protective order” on the finding that the individual is unable to manage his affairs for reasons related to mental incompetence, the court may only

appoint a conservator in relation to the estate and affairs of an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment. [MCL 700.5401(4).]

This Court in *Ronney* discussed the same sort of inequity, noting that

[this] would produce a reading of the [law] in which a competent person would be treated less favorably than an incompetent person solely because of his disability. Specifically, petitioner's reading of the statute would lead to a circumstance where, unlike the competent, the incompetent could retain their assets and still qualify for Medicaid, allowing the legally incompetent the advantage of using the Medicaid program as an estate-planning tool. [*Ronney*, 210 Mich App 312, 320 (1995).]

There is nothing in Michigan law to suggest that our legislature intended to benefit one group of individuals with a taxpayer subsidy of Title XIX funds while not extending the same benefit to other community spouses in the same financial condition, but who are still able to make determinations for themselves. “It would be anomalous to construe the statute to allow a medicaid applicant to accomplish through a conservator [or an order with the same powers] ... what the law prevents

Nor is there anything in federal law to suggest that Congress intended this sort of inequity. To the contrary, Medicaid’s focus is on consistency and fairness.

Congress purposefully required that each state must “provide for the establishment or designation of a single State agency to administer or to supervise the administration” of its Medicaid program, 42 USC § 1396a(a)(5) and

other State or local agencies ... must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency. 42 CFR 431.10.

“[T]he single state agency requirement reflects two important values: an efficiency rationale and an accountability rationale.” *KC ex rel Africa H v Shipman*, 716 F3d 107, 112 (CA 4 2013). It reflects Congress’ objective of consistency in the program across all 50 states. 42 CFR 435.901. “The [single state agency] requirement thereby avoids the disarray that would result if multiple state or even local entities were free to render conflicting determinations about the rights and obligations of beneficiaries and providers.” *Id*.

Here, permitting these orders made under a general EPIC provision to overrule a comprehensive system for Medicaid determinations as dictated by federal law introduces bias and unfairness in a program developed for consistency across all applicants from all parts of the country. The U.S. Supreme Court has been clear: A court is not free to ignore an agency’s regulations to provide its own interpretation.
Batterton v Francis, 432 US 416, 425 (1977); American Telephone and Telegraph v United States, 299 US 232, 236 (1936) ("This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.").

Orders like the one issued for Joseph and Ramona Vansach interfere with the complex and interrelated structure of federal and state law that comprise the Medicaid program. Individuals applying for Medicaid benefits should be treated equally and should be able to rely on the Department’s written policy and should not be encouraged to forum shop to seek a more advantageous result. By granting Ramona and Joseph Vansach benefits not available to other community spouses in the same financial position, it creates inequities in the Medicaid program that are neither permitted nor intended by Congress. Therefore, the probate court order must be reversed and Joseph and Ramona Vansach must pursue any increases in benefits through the Department’s fair hearings process.

III. The probate court’s powers to make permissive orders for protected persons in EPIC do not override federal and state laws that specifically grant sole authority to the Department for Medicaid determinations.

The court has no power beyond that conferred by statute. State v Heinitz Estate, 352 Mich 313, 317; 89 NW2d 476 (1958). The question of jurisdiction does not depend on the truth or falsity of the charge, but rather upon its nature. Altman v Nelson, 197 Mich App 467, 472–473 (1992) (citations omitted). Regardless of the artfulness of the pleading, the essence of the order that Joseph and Ramona
Vansach requested is for an increase in her community spouse income allowance and a reduction of his Patient Pay Amount — again, Medicaid determinations that no court has the authority to make. 42 USC 1396a; MCL 400.105.

The authority and jurisdiction of the court related to orders for protected individuals does not abrogate or excuse application of federal or state laws where both Congress and the Legislature have made it clear that the Department has been given sole authority to make the rules and policies for eligibility for the public benefits they administer. In re Harper, 302 Mich App at 355-356.

As a condition of receiving federal funding for its Medicaid program, federal law mandates the use of a single state agency to administer the program and make all Medicaid determinations of eligibility and benefits pursuant to a State Medicaid Plan that has been approved by CMS to be in accord with all federal law and regulation. 42 USC 1396a. Failure to comply with these requirements can mean the loss of federal funding for the state Medicaid program. 42 USC 1396c. This promotes Congress objectives of consistency and fairness. 42 CFR 435.901.

In the MCCA, 42 USC 1396r-5, Congress deliberately developed a framework that describes in exacting detail how the income and assets allowances for the community spouse will be calculated. See § 1396r-5(b) (Rules for treatment of income); § 1396r-5(d) (Protecting income for the community spouse); and 1396r-5(e) (fair hearings). And each year CMS calculates and publishes the SSI and Community Spouse Impoverishment Standards that list the limits for income and assets for all applicants for Medicaid Long-term Care throughout the entire United
States. It is reasonable to assume that Congress and the CMS expect that these rules and guidelines will be followed. But a conflict can occur when a state law is interpreted to override Congressional intent. That would be an "implied conflict preemption," which occurs if a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."


Here, the probate court's holding (based on its interpretation of 42 USC 1396r-5(d)(5)) that the authority in MCL 700.5401-5408 overrides the spousal impoverishment provisions of 42 USC 1396r-5, stands as an obstacle to the goals Congress intended with the Medicaid program. Federal law provides that after eligibility has been determined, the Department uses court orders of spousal support entered "against an institutionalized spouse for monthly income for support of the community spouse" to determine the community spouse income allowance, but only if it is more favorable to the community spouse. 42 USC 1396r-5(d). This provision is not surprising since Congress enacted the spousal impoverishment provisions partially to discourage older couples from divorcing to qualify for Medicaid and many already had these orders. See _Gray Panthers_, 453 US at 42. But if Congress had intended to invite all local courts to change the Medicaid
determinations at will, it certainly would have made that clear and would not have wasted time on the precise directions and calculations.

Even where the court appears to have powers for certain matters under a statute, any conflict between two statutes “is resolved by the basic rule of statutory construction requiring that, when two statutory provisions conflict and one is specific while the other is only generally applicable, the specific provision controls. Id. at 358; In re Brown, 229 Mich App 496, 500 (1998). In this case, the comprehensive interrelated statutory policies for the spousal allowance based on federal law, federal regulation, state law, and policy, must prevail. 42 USC 1396p; 42 USC 1382b(c); BEM 402.

This concept is clearly explained in In re Harper, 302 Mich App 349 (2013). In Harper, a mother had been placed on the central registry when the court took jurisdiction over her child. Rather than request expunction through the Department as required by statute, she sought remedy from the circuit court, contending that the trial court had authority to enter such an order pursuant to MCL 712A.6, which allows the court to issue certain orders for the benefit of juveniles. This Court disagreed, holding that because “the Legislature created a comprehensive statutory scheme” for the process of expunctions and had indicated that the Department was to be responsible for such determinations, “[a]llowing the [mother] to evade the [Department’s] role in this process would subvert the statutory scheme” and “in turn would ignore the Legislature’s intent.” In re Harper, 302 Mich App at 356; see also Klapp v United Ins Group Agency, 468 Mich 459, 468
(2003). The *Harper* court concluded the comprehensive statute assigning the
responsibility for expunction determinations to the Department controls over a
general statute permitting the court to make orders for the well-being of

This is analogous to the situation in the instant case. Joseph and Ramona
Vansach asked the court to make an order for her general welfare under MCL
700.5401, 5402, and 5407, which is in conflict with the Department’s authority to
make Medicaid determinations pursuant to a complex plan with intricate and
interlocking federal law and regulation and State law and policy. 42 USC 1396a; 42
USC 1396b; 1396c; 42 CFR 435.7000 et seq; 42 CFR 436.632; MCL 400.6; MCL
400.9; BEM 402. In fact, the statutory basis here is even more comprehensive than
in *In re Harper* because Medicaid determinations are grounded in extensive and
comprehensive federal law and regulations. See 42 USC 1396p; 42 USC 1382b(c);
*Westside Mothers*, 289 F3d 852, 859-860 (CA 6, 2004)(Medicaid laws are supreme
law and “the supremacy clause requires conflicting local law to yield.”)

Courts are bound to take notice of the limits of their authority, and a court
should recognize its lack of jurisdiction and act accordingly by staying proceedings,
disposing the action, or otherwise disposing thereof, at any stage of the proceeding.

Section 1396r-5 does not permit probate courts to invade the authority of
the Department and effectively change the determination of Medicaid allowances.
Although some states permit court orders to effect the determination, those states
require the court to use the “exceptional circumstances” standard of 42 USC 1396r-5(e)(2) for any increases in allowances. Other states have resolved the issue by holding that probate courts must not interfere with Medicaid determinations. See, e.g., Alford v Mississippi Div of Medicaid, 30 So 3d 1212, 1221 (Miss, 2010) (holding that the statutory language “if a court has entered an order” is insufficient to confer upon the courts parallel jurisdiction to increase the [MMNA] and [community spouse resource allowance]; Arkansas Dep’t of Health and Human Servs v Smith, 262 SW3d 167 (Ark, 2007) (One who wishes to apply for Medicaid must go through the process established by Congress and the State and cannot do an “end run” around that process by seeking a preemptive court order of spousal support.); Amos v Estate of Amos, 267 SW3d 761, 762 (Mo Ct App 2008) (Uniformity of result is critical. None of these objectives is furthered by conferring parallel jurisdiction on a probate court, and the Act's mere reference to an “amount transferred under a court order,” without further explanation, is insufficient to do so.).

Although not binding on this Court, these cases “may be ‘instructive’ and used as a guide.” Wells Fargo Bank, NA v Null, 304 Mich App 508, 533 (2014). It is plain that Congress clearly intended that the exacting instructions laid out in 42 USC 1396r-5, related to the spousal income allowance, be followed absent a showing of exceptional circumstances resulting in significant financial duress. § 1396r-5(d)(2). Courts using the general provisions of MCL 700.5407 and characterizing them as court orders of spousal support to subvert the clearly delineated process create conflict with 42 USC §§ 1396a and 1396r-5 and obstruct the purpose of
Congress for consistency and fairness in the administration of the Medicaid program for all applicants and recipients. 42 CFR 435.901; 42 CFR 430.10.

The trial court inappropriately used the general terms of MCL 700.5401-5408, intended to assist individuals who lacked financial access or needed transfers, and characterized an order as a court order of spousal support solely for the purpose of evading the federally mandated financial limits for Medicaid.
CONCLUSION AND RELIEF REQUESTED

Both federal and state law confer exclusive jurisdiction on the Michigan Department of Health and Human Services as the sole agency authorized to make Medicaid determinations of eligibility and benefits. And the Medicaid scheme sets forth a fair hearing process as an administrative remedy for individuals dissatisfied with the Department’s determination. Accordingly, the probate court here had no authority to issue a protective order that (1) allowed the Vansachs to circumvent these established administrative remedies, and (2) essentially changed Department Medicaid determination by allowing for a larger spousal allowance than Medicaid policy allows for Long-term Care applicants across the country. Not only was that action contrary to law, but it also creates systemic inequality for all other Medicaid applicants and will cost taxpayers millions of dollars that are best spent assisting those truly in need.

WHEREFORE, the Department of Health and Human Services requests that this Honorable Court reverse the protective order issued solely to compel the Department to grant more Medicaid benefits than Joseph and Ramona were entitled to under law and policy.
Respectfully submitted,

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Dated: December 1, 2016
STATE OF MICHIGAN
IN THE COURT OF APPEALS

In Re: JOSEPH VANSACH, JR.,

Plaintiff-Appellee

v

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Defendant-Appellant

_________________________/

BRIEF OF APPELLEE, RAMONA FENNER-VANSACH

ORAL ARGUMENT REQUESTED

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Dated: January 26, 2017

Court of Appeals No. 334732
St. Clair Circuit Court No.
2013-023,802-CA

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellee, Ramona Fenner-Vansach, accepts that this court possesses proper jurisdiction to hear this case pursuant to MCR 5.801. However, the jurisdictional authorities relied on by the Department are not entirely correct. That is, MCL 600.861 was repealed, and MCL 600.308(1)(b) does not exist.

Notwithstanding the foregoing, appellee does not contest the basis for jurisdiction of this appeal or that the appeal was filed timely pursuant to MCR 5.801(b)(3) and MCL 600.308(1).
COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the Probate Court have exclusive subject matter jurisdiction to enter a protective order under MCL 700.1302(c) and MCL 700.5402, in connection with a protected individual, even though the protected individual is receiving Medicaid benefits?

Appellant’s Answer: No.

Appellee’s Answer: Yes.

Lower Court’s Answer: Yes.

2. Does the Probate Court have the authority to issue a protective order allocating support from a protected individual’s estate to that protected individual’s spouse?

Appellant’s Answer: No.

Appellee’s Answer: Yes.

Lower Court’s Answer: Yes.

3. Do Federal and State laws require that the Department of Health and Human Services comply with Probate Court protective orders?

Appellant’s Answer: No.

Appellee’s Answer: Yes.

Lower Court’s Answer: Yes.
COUNTER STATEMENT OF FACTS AND PROCEEDINGS

The matter on Appeal concerns the issuance of a 2016 protective order against the conservator estate of Joseph Vansach, Jr. ("Joseph") for the benefit of his spouse, Ramona Fenner-Vansach ("Ramona" or "Appellee"), and nothing more.\(^1\) Indeed, on August 24, 2016, the St. Clair County Probate Court issued "Order for Protective Order for Income Support Order for the Benefit of Community Spouse," (the "Income Order"). While only this 2016 Protective Order forms the backdrop of the probate proceedings and this Appeal, the entire probate proceeding history is relevant.

The probate proceedings were commenced on October 16, 2013, when an independent conservator, attorney William F. Schieman (the "Conservator"), was appointed to manage the financial affairs of Joseph. Case summary, St. Clair Probate Court, ¶ 12. On October 10, 2014, the Conservator petitioned the Probate Court for an initial protective order. Id at ¶ 41. That petition (the "Resource Petition") sought inter alia the authority to: allow planning to qualify for Medicaid benefits, increase the community spouse's resource allowance\(^2\), terminate spousal rights, and to permit payment of fees. All interested parties, including the Department of Health and Human Services, formerly known as the Department of Human Services (the "Department" or "Appellant") were given proper notice. Id at ¶ 43-44. No objections to the Resource Petition were ever made. Notably, the Department did not appear at the hearing.

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\(^1\) Throughout Appellant's brief the Department referred to Joseph as the Appellee. The characterization of Joseph as Appellee is disingenuous at best. In this case, Joseph's spouse filed a petition for protective order in the conservatorship estate, which is the subject of this Appeal. Joseph's spouse is the Appellee.

\(^2\) The increase in the community spouse resource allowance was a request for Ramona to keep all of her assets, including those that exceeded the minimum resource allowance approved by the Department.
On November 11, 2014, the St. Clair County Probate Court granted the Resource Petition and an order (the “Resource Order”) was entered accordingly. *Id* at ¶ 46. The Resource Order allowed, *inter alia*, the payment of Joseph’s existing debts, authority to qualify Joseph for Medicaid assistance, an increase in Ramona’s community spouse resource allowance to 100% of the couple’s assets, and a termination of Joseph’s elective share in Ramona’s estate should she predecease him.³ To date, no Motion for Reconsideration or Appeal was taken by anyone. Therefore, it is undeniable that the Resource Order is final.⁴

On November 25, 2014, Joseph applied for Medicaid benefits. The Medicaid application sought an effective date of November 1, 2014. Joseph’s Medicaid application was approved on December 15, 2014. Joseph’s Medicaid determination is not at issue before this court.

On June 2, 2016, Ramona, and not Joseph, filed “Petition for Protective Order for Income Support Order for the Benefit of the Community Spouse” (the “Income Petition”) against the conservatorship estate of Joseph in St. Clair County Probate Court. Despite the Department’s assertions in its Brief, Ramona did not request that the Probate Court review or change the Department’s Medicaid determination. Rather, Ramona requested a protective order in which Joseph’s monthly income and all subsequent increases in excess of the Medicaid personal needs allowance be assigned to Ramona.⁵ *see* Income Petition, p 6.

All interested parties, including the Department were given proper notice. Case summary, St. Clair Probate Court, ¶¶ 76-77. Only the Department objected. *Id* at ¶ 81. On August 18, 2016, the Department filed a written objection. In the objection, while the

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³ That petition and its subsequent order are not before the court in the pending appeal.
⁴ The Department’s attempt to re-argue the facts underlying the Resource Petition in this Appeal is glaring, nevertheless, that Order stands.
⁵ Where the first protective order addressed assets, this protective order dealt with Joseph’s income.
Department asserted issues connected to the (former) Resource Order, the focus of the Department’s objection was that the Probate Court did not have authority to make, alter, or review the Department’s Medicaid determinations.⁶

The hearing was scheduled for August 24, 2016. Id at ¶ 75. At the hearing, the Department readily acknowledged that the Probate court had authority to enter a protective order under the facts of this case.

The Court: How do you reconcile that with the, the fact that I can make an order. I can make an order, like you already referenced in divorces, spousal support, child support, I can do that. I can divide assets. I can divide property. I can do all kinds of stuff. Why can’t I do that in this instance if there is a stream of income that’s meant to support more than one person, why don’t I get to divide that as a part of a protective order.

Ms. Brown: You can, of course, divide it. You can allow them to make the transaction.
Tr. 8-24-2016, p 15, ¶¶ 12-24

Furthermore, on the record, the Department continued its position that the Probate Court’s authority to issue a protective order would be binding on the Department’s future determinations regarding Medicaid in this case:

Ms. Brown: The point is at redetermination --

The Court: Right.

Ms. Brown: -- if someone is found re-eligible --

The Court: Uh-hum.

Ms. Brown: -- and at that time if they are redetermining the community spouse income allowance the department will take into consideration a court order.

The Court: That was entered after the initial determinations?

Ms. Brown: That’s correct. Tr. 8-24-2016, p 19, ¶¶ 4-14

⁶ It is significant that the Appellee has never disputed the Department’s authority in this case.
Importantly, the Probate Court recognized that it had no authority to review or modify the Department’s Medicaid decisions. Tr. 8-24-2016, p 22, ¶¶ 16-17. Rather, the Probate Court concluded it was following the law: “What I am doing is I am making an order that the Department by their own rules and regulations is then, what’s the word I’m looking for, constrained to follow.” Tr. 8-24-2016, p 16, ¶¶ 13-15.

Ultimately, the Department waived its right to future hearings on this issue. When asked specifically if the Department wanted an evidentiary hearing on the reasonableness of Ramona’s support request, the Department declined. “Your Honor, I am not going to ask for an evidentiary hearing…” Tr. 8-24-2016, p 33 ¶¶ 16-17.

On August 24, 2016, the Probate Court issued the Income Order, which in part awarded the following:

**IT IS HEREBY ORDERED** that JOSEPH VANSACH, JR.’s monthly income and all subsequent increases are assigned to RAMONA FENNER-VANSACH, as an on-going Support Order for the remainder of JOSEPH VANSACH, JR.’s life. Income Order, p 1.

On September 15, 2016, the Department timely filed its Claim of Appeal. Case summary, St. Clair Probate Court, ¶ 85. It must be stressed that the Departments appeal includes facts which are not a part of this Court record and not in evidence.\(^7\) Appellant asserts that the probate court lacked the jurisdiction and the authority to issue the protective order in this case.

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\(^7\) By way of example only and not limitation, the Department alleges that the Vansachs were dissatisfied with the Department’s determination of Ramona’s community-spouse income allowance and Joseph’s patient-pay amount — this is not a fact in evidence, and not part of the record. Any and all facts not in evidence should not be considered by this court.
ARGUMENT

I. The Probate Court has exclusive subject matter jurisdiction to enter a protective order under MCL 700.1302(c) and MCL 700.5402 in connection with a protected individual even though the protected individual is receiving Medicaid benefits.

A. Standard of Review


A statutory provision must be read in the context of the entire act, and “every word or phrase of a statute should be accorded its plain and ordinary meaning.” *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, “no further judicial construction is required or permitted, and the statute must be enforced as written.” *Puhutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000)). Only when the statutory language is ambiguous may a court consider evidence outside the words of the statute to determine the Legislature’s intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). “An ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning.” *Papas v Gaming Control Board*, 257 Mich App 647, 658; 669 NW2d 326 (2003).
B. The Probate Court has exclusive jurisdiction to issue protective orders.

This Court has long recognized that the Probate Court has exclusive subject matter jurisdiction to adjudicate specific matters, including protective proceedings. In re Lager Estate, 286 Mich App 158, 162; 779 NW2d 310 (2009). "In general, subject-matter jurisdiction has been defined as a court's power to hear and determine a cause or matter." Id. (quotation marks and citation omitted). In other words, "[a] court has subject-matter jurisdiction to hear a case if the law has given the court the power to grant the rights requested by the parties." Cipri v Bellingham Frozen Foods, Inc, 213 Mich App 32, 39; 539 NW2d 526 (1995). "If a court lacks subject-matter jurisdiction, its acts and proceedings are invalid." City of Riverview v Sibley Limestone, 270 Mich App 627, 636; 716 NW2d 615 (2006).

It is notable that the jurisdiction of Probate Courts and Circuit Courts are distinguishable. "In Michigan, the circuit courts are courts of general jurisdiction and are vested with original jurisdiction to hear and determine all civil claims unless the constitution or statutes provide otherwise." Trost v Buckstop Lure Co, Inc, 249 Mich App 580, 587; 644 NW2d 54 (2002) (quotation marks and citation omitted). Probate Courts, on the other hand, are courts of limited jurisdiction determined by statute. In re Lager Estate, 286 Mich App at 162.

In the pending appeal, the Probate Court’s exclusive jurisdiction to issue protective orders is well-settled, and is set forth in MCL 700.1302 which provides, in part that:

The court has exclusive legal and equitable jurisdiction of the following:
[A] proceeding that concerns a guardianship, conservatorship, or protective proceeding.

In this case, the probate court found that it had the authority to issue a protective order under both MCL 700.1302(c) and MCL 700.5402.
Consistent with the lower court's interpretation of MCL 700.1302(c), this case falls within the exclusive jurisdiction of the probate court.

Despite the Probate Court’s clear and exclusive jurisdiction to hear and decide protective orders, the Appellant has inappropriately framed this case as a Medicaid case. Appellant’s choice of label, however, does not deprive the probate court of jurisdiction which was provided to it by statute.

As our Courts have repeatedly recognized, "[i]n determining jurisdiction, this Court will look beyond a party’s choice of labels to the true nature of the claim." *Michigan’s Adventure, Inc v Dalton Tp*, 287 Mich App 151, 155; 782 NW2d 806, 808 (2010), quoting *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). "[W]e determine the gravamen of a party's claim by reviewing the entire claim, and a party cannot avoid dismissal of a cause of action by artful pleading." *Attorney Gen v Merck Sharp & Dohme Corp*, 292 Mich App 1, 9-10; 807 NW2d 343 (2011). Indeed, this Court has routinely found that subject matter jurisdiction is the deciding body’s authority to try a case of the kind or character pending before it, regardless of the particular facts of the case. *MJC/Lotus Group v Twp of Brownstown*, 293 Mich App 1, 7; 809 NW2d 605 (2011). As the Court recognized in *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992):

**Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending.** The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. **Jurisdiction always depends on the allegations and never upon the facts.** When a party appears before a judicial tribunal and alleges that it has been denied a certain right, and the law has given the tribunal the power to enforce that right if the adversary has been notified, the tribunal must proceed to determine the truth or falsity of the allegations. The truth of the allegations does not constitute jurisdiction. (emphasis added). (citations omitted).
It is therefore, unquestionably clear upon the filing of a request for a protective proceeding determination, the Probate Court had full authority to hear the case, notwithstanding its impact on Medicaid benefits.

In addition to the foregoing, the Probate Court’s exclusive authority over the determination of the need for protection and its supervision is provided in MCL 700.5402, which states in part that:

[T]he court in which the petition is filed has the following jurisdiction:

(a) Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated.

(b) Exclusive jurisdiction to determine how the protected individual’s estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual’s dependents or other claimants.

(emphasis added)

Given the clear and unambiguous language of MCL 700.1302(c) and MCL 700.5402, there is no question that the probate court had the exclusive jurisdiction to issue a protective order in this case.

That the Probate Court had the authority to issue such a protective order was even admitted on the record by the Department. Tr. 8-24-2016, p 15 ¶¶ 12-24.

In the case at bar, whether by unintended consequences, or by a deliberate plan, the fact that Medicaid benefits were impacted is not determinative of the Probate Court’s jurisdiction. As this court has routinely acknowledged, the fact of jurisdiction is determined on the “commencement” and not at the “conclusion.” Altman, supra. And, since the determining issue of jurisdiction are the allegations, it is not relevant that the facts of this particular protective order created a result that the Department did not like, especially where it was undisputed on the
record that the Probate Court had the exclusive jurisdiction to issue the protective order from the outset.

C. **The Probate Court was not making a Medicaid determination but a separate protective order for spousal support.**

The Department goes to great lengths to attempt to show this Court that the Probate Court made a Medicaid determination, and therefore lacked jurisdiction to issue a protective order in this case. In support of its argument, the Department claims that the Department is “the single agency to administer the Medicaid plan” under Federal law. Appellee does not dispute Appellant’s position on this conclusion – in fact, the Appellee so stipulates that the Department is the single agency that administers the Medicaid program. This is not a situation where the Probate Court was sought to undo a Medicaid Determination. Appellee agrees that the Probate Court would lack such authority. The law is clear that if the Legislature has expressed an intent to make an administrative tribunal’s jurisdiction *exclusive*, then the court cannot exercise jurisdiction over those same areas. *Citizens, Com Sense in G v Attorney Gen*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

However, Appellant grossly misinterprets the scope of Federal law by asserting that if a separate and distinct lawful determination is made by a separate and distinct entity (i.e. the Probate Court) which has a causal effect on the Department’s determination (i.e. a change in the community spousal monthly income allowance) it must be deemed a Medicaid determination and is therefore invalid. In fact, the Department’s policy manual (BEM 225, BEM 105, BEM 546) mandates that Medicaid determinations be made so that the determinations of other authorities are included and recognized.
By way of example only, and not by way of limitation, BEM 225 states that in order “to be eligible for full [Medicaid] coverage a person must be a U.S. citizen or an alien admitted to the U.S. under a specific immigration status.” Clearly, this does not mean that the Department has the authority to naturalize persons as citizens or qualify aliens. The Department’s BEM 225 acknowledges that U.S. Citizenship and Immigration Services (USCIS) is the entity to make citizenship and legal alien determinations. The Department acknowledges in its own manual that it must accept the citizenship or alien status when making its Medicaid determinations. Although it has an impact on the Department’s Medicaid determination, it does not mean that USCIS is making a Medicaid determination.

Similarly, BEM 105 instructs that to receive Medicaid, a person must be “aged (65 or older), blind, disabled…” The Department’s policy, in BEM 260, acknowledges that the Social Security Administration’s (SSA) determination for disability or blindness is final for Medicaid benefits. This is a direct acknowledgment that the Department’s Medicaid determinations are based on the SSA disability and blindness determination. It does not, however, mean that the SSA is making a Medicaid determination.

Moreover, BEM 546 establishes the nursing home patient’s private pay amount for long term care. That amount is influenced by a variety of factors, including a patient’s receipt of Veterans benefits. Because it has an impact on the Department’s determination of the patient’s private pay amount, it does not mean that the Veterans Benefits Administration (VBA) is making a Medicaid determination when it rules on a Veteran’s benefit eligibility.

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8 The Michigan Department of Health and Human Services establishes its Medicaid program rules and regulations in the Bridges Eligibility Manual (BEM) and the Bridges Administrative Manual (BAM).
The above examples of citizenship, disability, blindness, and Veterans benefits reinforce the notion that while the Department has the exclusive authority to make Medicaid determinations, other decisions still may be made which impact a Medicaid determination. These other decisions do not, by their impact, deprive the Department of its authority. However the clearest example of the principle that Medicaid determinations be made so that the determinations of other authorities are recognized is set forth in the Department’s manual which requires that if there is a court order that sets an amount of support, the order shall govern. BEM 546 states as follows:

**Exception:** Use court-ordered support as the community spouse income allowance if: The L/H patient was ordered by the court to pay support to the community spouse, and [i]the court-ordered amount is greater than the result of step five.⁹

The directives of BEM 546 acknowledges that the role of the [Probate] Court is to determine spousal need, and the only Medicaid determination the Department may make in response is to follow the order. Such an order for spousal support does not become a Medicaid determination simply because it impacts a subsequent Department determination. The applicable Federal Medicaid law and the Department policy endorse this remedy. To side otherwise would empower the Department to operate in areas allocated exclusively to USCIS, SSA, and VBA. As the Probate Court recognized, “I’m doing my job, they’re doing their job. My job impacts their job, but I’m not taking their job.” Tr. 8-24-2016, p 30, ¶ 6-8.

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⁹ The “L/H Patient” is the nursing home patient pursuant to the Bridges Policy Glossary.
D. An administrative hearing is not necessary because the Appellee is not seeking to overturn the Department’s Medicaid determination.

In addition to the foregoing, Appellant argues that at this point in time, the Vansachs’ sole remedy is an administrative hearing. However, an administrative hearing is only necessary when a Medicaid claimant seeks to overturn a Medicaid determination by the Department. 42 U.S. Code § 1396r-5(e)(2)(A). In this case, Appellee is not objecting to the Department’s determination. Appellee requested spousal support, so that the Department would take into account the court ordered support, as it is legally obligated to do, and the Department would make the proper Medicaid determination, as it is required to do per 42 U.S. Code § 1396r-5(d)(1) and § 1396r-5(d)(5).

Notwithstanding the foregoing, even if Appellee was seeking to overturn the Medicaid determination, which Appellee is not, pursuing an administrative hearing in this case would be futile, and the judicially-created exception to the exhaustion rule as described in the Manor House case would apply, Manor House v Warren, 204 Mich App 603, 605; 516 NW2d 530 (1994). To invoke the futility exception, “it must be ‘clear that an appeal to the administrative board would be an exercise in futility and nothing more than a formal step on the way to the courthouse.’ Id. (citation omitted)” L & L Wine, 274 Mich App at 358 (quoting Manor House, 204 Mich App at 605). The Michigan Supreme Court supports this position, stating that “the law will not require a citizen to undertake a vain and useless act. The law does not require useless expenditures of effort.” Trojan v Taylor Tp, 352 Mich 636, 639; 91 NW2d 9 (1958).

Federal law, 42 U.S. Code § 1396r-5(e)(2)(B) and the Department’s manuals (BAM 600 and BEM 546) permit increases in the community spouse monthly income allowance where exceptional circumstances would result in significant financial duress. However, the Department
states that exceptional circumstances may *NEVER* include day-to-day living expenses. BAM 600, p 39. Instead, the only definition of exceptional circumstances provided is “the need for the community spouse to pay for supportive and medical services at home to avoid being institutionalized.” *Id* at 40.

In the petition filed by Ramona, she set forth all of her actual expenses as the spouse living in the community. All of those expenses, the very types of normal expenses that Ramona needs to avoid financial distress and impoverishment, were explicitly excluded from the list of “exceptional circumstances.” The list of “exceptional circumstances” denied consideration by the Department’s policy is long. BAM 600, p 39-40. It does not allow exceptions for the community spouse’s clothing, medical bills, food, heat, utilities, taxes, transportation and other necessities of life. The Department’s limits on where exceptional circumstances exist are so strict that no administrative hearing in this case would ever be expected to result in an adjustment of the community spouse monthly income allowance, and an administrative appeal would have been futile.

It is notable that the Appellant’s brief failed to mention that its policy for administrative hearings prohibits the administrative law judge from increasing the community spouse monthly income allowance for the exact types of living needs listed in the petition for protective order. This is further evidence that a request for an administrative hearing would have been an utterly futile act.\(^\text{10}\) Therefore, even if an administrative hearing was required, this case would qualify

\(^{10}\) Even if Appellee were to accept the argument that the next course of action would have been an Appeal to the Department and seek further administrative remedies, doing so would have been a further drain on the Vansachs’ resources: both in time and money; not to mention a drain on the resources of the Department.
under the futility exception to the requirement of administrative remedy exhaustion. *Manor House*, 204 Mich App at 605.

Neither Congress, through the Medicaid Catastrophic Care Act (the "MCCA"), nor the Department's own Medicaid policies require a Medicaid recipient to exhaust the administrative hearing process as a precondition for the Department to consider a court order in determining the community spouse monthly income allowance. This is because court orders are presented in the Federal law's definition of the community spouse monthly income allowance, and as a result, they are an independent alternative to two other methods for determining an income allowance. Court orders are determined under a different standard by different personnel.

Appellant offers *Bonneville v MCO, SEIU*, 190 Mich App 473; 476 NW2d 411 (1991), as support for the claim that the Vansachs were required to exhaust administrative remedies. *Bonneville* is inapplicable to the facts at bar. Under the facts in *Bonneville*, claimants were entitled to only "an administrative procedure for the processing of complaints of unfair labor practice." *Id* at 476. In contrast, under Medicaid law, there are several methods to establish the community spouse monthly income allowance, including Protective Orders issued under MCL 700.5401 et seq.

Regardless, the Department had every opportunity to probe the propriety of expenses and budget presented to the Probate Court. The Probate Court also offered the Department the right to an evidentiary hearing on the Department's objections. On the record, the Department expressly waived its right to a hearing. It is well settled law that issues and arguments raised for the first time on appeal are not subject to review. *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 332 (1992), citing *Bloemsma v Auto Club Ins Ass'n*, 190 Mich App 686, 692; 476 NW2d 487(1991). Given the Probate Court's exclusive jurisdiction to issue a
protective order, the Department’s failure to preserve its right to a hearing on the reasonableness of the support is fatal.

II. The Probate Court has authority to issue a protective order allocating support from a protected individual’s estate to that protected individual’s spouse.

A. Standard of Review

As already stated, issues of statutory construction are reviewed de novo, of which the primary rule is to give effect to the intent of the legislature. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002). The Court must begin by first “examining the plain language of the statute,” *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011), in the context of the entire act and “every word or phrase of a statute should be accorded its plain and ordinary meaning.” *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, “no further judicial construction is required or permitted, and the statute must be enforced as written.” *Puhutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000)).

B. The prerequisites of MCL 700.5401(3) were clearly established.

The Appellant next argues that the Probate Court lacked the authority to issue a protective order where a conservator is in place. Appellant’s position is without merit. It is undisputed that in order to issue a protective order, MCL 700.5401(3) requires a showing that both: a) “the individual is unable to manage property... for reasons such as mental illness, mental deficiency, physical illness or disability” and b) that “money is needed for... those entitled to the individual’s support, and that protection is necessary to obtain or provide money.” Both subparagraphs (a) and (b) were clearly and convincingly established on this record.
The Probate Court found that:

I don’t think there’s any doubt that I have the ability to enter Protective Orders. I don’t think that’s really a dispute here. Tr. 8-24-2016, p 28, ¶¶ 7-9

*   *   *

Sometimes a conservator can manage people’s assets or take control of things, but they may not be able to get a third party to do something, make a payment on a land contract, something like that. And they can ask me for assistance in that. I see that very similar to the circumstances that we have here. And so I think I can make a Protective Order even if there’s a conservatorship in place, really even if there’s a Power of Attorney, even if there’s no authority I can do that, and I don’t think that that really precludes that. Tr. 8-24-2016, p 28, ¶¶ 15-24

The Probate Court then concluded that Ramona was entitled to spousal support in the form of the Income Order:

And so I think that legally I’m permitted to make the order that is requested of me. Obviously I think to establish entitlement to the order there’s been a prima facie showing with the budget and the other things that have been referred to. Tr. 8-24-2016, p 30, ¶¶ 15-20

The Probate Court’s order specifically found in part that:

RAMONA FENNER-VANSACH is a spouse in need of support from her husband, JOSEPH VANSACH, JR., a Protected Person.
Income Order, p 1.

The Court’s authority was found in MCL 700.5401(3)(a), which requires that “for reasons such as mental illness, mental deficiency, physical illness or disability,” an individual is “unable to manage property and business affairs effectively.” Joseph has a court appointed conservator and he suffers from dementia, a disease that has rendered him unable to perform his activities of daily living. He was found to be a legally incapacitated individual, specifically defined by MCL 700.1105(a) as “an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability…” and the exact showing required by MCL
700.5401(3)(a). Appellant has offered no evidence to contradict the prior court orders determining incapacity and the overwhelming proof of Joseph's inability to manage his affairs. No challenge was made on this record regarding Joseph's incapacity, and as a result, MCL 700.5401(3)(a) is not in dispute.

Rather, Appellant raises challenges to MCL 700.5401(3)(b) by incorrectly taking the position that the protective order was not properly issued; claiming that the appointment of a conservator automatically prohibits protective orders issued later in time, i.e. it would be impossible for an individual's property and business affairs to be at risk of waste or dissipation if he had a conservator. Appellant's arguments are without merit and unsupported by the clear provisions of MCL 700.5415 and MCL 700.5401(3)(b).

First, the appointment of a conservator does not, by its terms, automatically prohibit a subsequent protective order. MCL 700.5415(1) states that when a conservator is appointed, an interested person, "may file a petition in the appointing court for an order to do any of the following: ... (e) Grant other appropriate relief." This language clearly permits subsequent protective orders to be issued and disposes of the allegation that a conservator's appointment prohibits it.

Second, a showing that "property will be wasted or dissipated" is not the only way to establish MCL 700.5401(3)(b). The text of the statute is as follows:

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. (emphasis added).

The second half of the paragraph (b) provides the statutory language upon which the Probate Court appropriately found that Ramona "is a spouse in need of support from her
husband, JOSEPH VANSACH, JR., a Protected Person.” It is self-evident that a wife is entitled to support from her husband. 11 In light of the foregoing, the appointment of a conservator for Joseph did not prevent the Probate Court from properly issuing the Income Order.

This assertion of financial need was not challenged by the Department. In fact, the Department affirmatively declined an opportunity to determine the necessity for an order of spousal support. The Trial Court plainly stated, “Well, I’ll just, I’ll cut through it, do you want an evidentiary hearing on that or no?” to which Appellant replied, “Your Honor, I am not going to ask for an evidentiary hearing.” Tr. 8-24-2016, p 33, ¶¶ 14-17. The Appellant is now attempting to impermissibly introduce a factual argument which the Appellant abandoned by never preserving it on the record (Appellant’s brief, p 21). In re Forfeiture, supra at 84; Bloemsma, supra at 692.

Appellant analogizes this case to In re Conservatorship of Shirley Bittner, 312 Mich App 227 (2015), however the two could not be more dissimilar. In Bittner, this Court reversed an order appointing a conservator because there was no showing that the prerequisites of MCL 700.5401(3) were met. There, a strong factual basis established that 74-year-old woman was experiencing a slight decline in mental acuity and intermittent problems with the ability to effectively manage her finances, but that she retained testamentary capacity; was alert, verbal and oriented fully to person, place and time; and could make informed decisions. In addition, a completely different portion of MCL 700.5401(3)(b) was at issue because the individual’s spouse passed away two years prior. This case is distinguishable because Joseph Vansach, Jr.’s inability to manage his affairs is without question. He exhibits zero qualities of an individual

11 This well-established concept of spousal support is seeded throughout common law and statutory law, including but not limited to the laws of: divorce, Social Security, Medicaid, and probate/estate administration.
with capacity. Unlike *Bittner*, the Probate Court in the instant case found that Joseph’s wife is entitled to his support, and protection is necessary to obtain and provide money. The Vansachs provided a compelling budget; the Department simply waived an opportunity to contest it. Tr. 8-24-2016, p 33, ¶¶ 14-17

C. An individual not under disability is permitted to allocate income to his spouse, therefore the Probate Court may do the same, as it did here.

After establishing the prerequisites for the issuance of a protective order, the Court, “for the benefit of the individual and members of the individual’s immediate family, has all of the powers over the estate and business affairs that the individual could exercise if present and not under disability.” MCL 700.5407(c). It is axiomatic that allocation of income between spouses is within an individual’s authority; a spouse is fully permitted to allocate his entire income to his spouse and so it follows logically that a Probate Court may allocate income similarly.

Appellee’s point is that an individual (not under disability) would be permitted to allocate his income to his spouse. The protective order, which makes the same allocation, only has a different end result because Congress has expressly stated that Medicaid determinations shall take court orders into account. 42 U.S. Code § 1396r-5(d)(5). Appellant argues that the allocation of income should be prohibited because it has the effect of usurping the authority of an agency to make a determination. This reasoning is completely unsupported given the clear directives of MCL 700.5401 *et seq.* The Probate Court made this point very clear by stating, “I’m doing my job, [the Department is] doing their job. My job impacts their job, but I’m not taking their job.” Tr. 8-24-2016, p 30, ¶¶ 6-8.
D. Ramona was permitted to make a request for spousal support.

As a married couple, it is unquestioned that Joseph and Ramona are entitled to rely on their joint resources, assets and income, for their livelihood. As alleged in Appellee’s Income Petition, Ramona was experiencing a significant monthly deficit because Joseph’s income, essentially the lion’s share of their income, was unavailable to Ramona pursuant to 42 U.S. Code § 1396r-5(d)(3)’s calculation. To obtain relief, Ramona sought the assistance of a Probate Court protective order – an order which Federal law specifically requires the Department to consider when making its Medicaid determinations.

As an individual entitled to Joseph’s support, Ramona petitioned the court for a spousal order of support, pursuant to its powers under MCL 700.5401, MCL 700.5402, and MCL 700.5407. Both requirements of § 5401(3) were established, clearly and convincingly. The Trial Court had exclusive jurisdiction under § 5402 to make its order permitted by § 5407(c).

Ramona’s request for the Court’s assistance was of its “exclusive jurisdiction to determine how the protected individual’s estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual’s dependents.” MCL 700.5402. It was never a request to make a direct Medicaid determination.

Federal law does not prohibit petitions for a protective orders and Michigan State law recognizes and permits them. MCL 700.5401(1). The Trial Court was acting within its exclusive jurisdiction to issue a protective order. And an order for spousal support does not transform into a Medicaid determination simply because the Department must take it into consideration when making its own determination.
III. Federal and State laws require that the Department honor Probate Court protective orders.

A. Standard of Review

Issues of statutory construction are reviewed de novo where the primary rule is to give effect to the intent of the legislature. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002). The Court must begin by first “examining the plain language of the statute,” *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011), in the context of the entire act and “every word or phrase of a statute should be accorded its plain and ordinary meaning.” *Krohn v Home-Owners Ins Co.*, 490 Mich. 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, “no further judicial construction is required or permitted, and the statute must be enforced as written.” *Puhutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000)).

B. Federal law provides different methods to determine the community spouse monthly income allowance.

As a part of the Medicaid Catastrophic Care Act of 1988, Congress enacted a comprehensive scheme that sets forth rules to determine how much of a nursing home spouse’s income may be diverted to the community spouse for her support. Specifically, Congress discusses the treatment of income in 42 U.S. Code § 1396r-5.

42 U.S. Code § 1396r-5(d) sets forth a complex set of rules designed to allocate income for the community spouse and to properly determine the amount of such an allocation. 42 U.S. Code § 1396r-5(d)(1) instructs as follows:
(1) **ALLOWANCES TO BE OFFSET FROM THE INCOME OF INSTITUTIONALIZED SPOUSE** After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse’s income that is to be applied to the costs of care in the institution, there shall be deducted from the spouse’s monthly income the following amounts in the following order:

§ 1396r-5(d)(1) provides the following four amounts: (d)(1)(A): a personal needs allowance; (d)(1)(B): a community spouse monthly income allowance; (d)(1)(C): a family allowance; and (d)(1)(D): medical and remedial care expenses. Paragraph (d)(1)(B), describing the community spouse monthly income allowance, is applicable to the case at bar.

The statutory language of 42 U.S. Code § 1396r-5(d)(1)(B) describes three separate and independent alternatives available to Medicaid applicants for establishing a community spouse monthly income allowance: a formula found in § 1396r-5(d)(3); an administrative hearing provided by § 1396r-5(e)(2); or a court order under § 1396r-5(d)(5). Given the law of statutory construction, it must be assumed that Congress intended for three alternatives, otherwise it never would have included all three in the language of the statute. A spouse of an individual receiving benefits should not be precluded from using any of those alternatives provided by Congress. To do so would be unfair, and inconsistent with Congressional objectives of fairness.

The law does not require that a claimant seek one alternative in priority to any other, and the Vansachs choice for pursuing 42 U.S. Code § 1396r-5(d)(5) was permitted. In fact, the plain reading of the statute and standard outline format actually show that Congressional intent was for 42 U.S. Code § 1396r-5(d)(5) to be superior to the other methods for determining the community spouse monthly income allowance. It requires the Department to end its process and make a determination consistent with a court order for spousal support when one has been issued.
Again, 42 U.S. Code § 1396r-5(d)(1) provides four amounts to be deducted from an institutionalized spouse’s monthly payment to the institution. One of those amounts is subsection (d)(1)(B) which states as follows:

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse. (emphasis added).

The statute’s reference to “paragraph (2)” is a reference to 42 U.S. Code § 1396r-5(d)(2), which states as follows:

(2) COMMUNITY SPOUSE MONTHLY INCOME ALLOWANCE DEFINED In this section (except as provided in paragraph (5)), the ‘community spouse monthly income allowance’ for a community spouse is an amount by which —.\textsuperscript{12} (emphasis added).

The statute’s reference to “paragraph (5)” is a reference to 42 U.S. Code § 1396r-5(d)(5), which states as follows:

(5) COURT ORDERED SUPPORT
If a court has entered an order against an institutionalized spouse for monthly income of the community spouse, the community spouse monthly income allowance for the spouse shall not be less than the amount of the monthly income so ordered. (emphasis added).

The definition of the community spouse monthly income allowance contains the exception for court ordered support. It states that the amount is determined “except as provided in paragraph (5).” Therefore, before calculating an amount under § 1396r-5(d)(3), or holding an administrative hearing under § 1396r-5(e)(2), the Department must first ascertain whether a Court Order for support had been issued, and if so, set the community spouse monthly income

\textsuperscript{12} If an exception described in “paragraph (5)” does not exist, the statutory definition of the Community spouse monthly income allowance next references the equation formula (found in 42 U.S. Code § 1396r-5(d)(3)) and that the equation formula is subject to an administrative hearing adjustment found in statute 42 U.S. Code § 1396r-5(e)(2).
allowance at an amount not less than the order. It cannot be overlooked that the Court Order exception is stated before 1) any instructions are given in order to calculate an amount, or 2) any reference to an administrative hearing is made. This spawns zero ambiguity, so outside evidence to determine the Legislature’s intent is not permitted. *Sun Valley Foods Co* supra at 236.

Congress drafted § 1396r-5(d)(5) with clear and unambiguous language. As a result, “the statute must be enforced as written.” *Puhutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). The statute makes no differentiation among types of courts or orders, so a Probate Court’s protective order must be included. Therefore, the Department must follow the Probate Court issuance of the Income Order for spousal support dated August 24, 2016.

The Appellant attempts to misinterpret the statute and mislead this Court by alleging that a Probate Court must use a different standard – that of an administrative hearing to appeal a Department determination – when deciding whether to issue a protective order that would impact a Medicaid determination. “Every word or phrase of a statute should be accorded its plain and ordinary meaning.” *Krohn, supra* at 156. A plain reading of 42 U.S. Code § 1396r-5(d)(5) does not suggest that a Probate Court, when issuing a spousal support order, must apply the same standards as an administrative hearing. The Probate Court identifies Appellant’s logic as completely backwards:

The Court: My order is applicable to your determination. Your determination’s not applicable to my order. Tr. 8-24-2016, p 33, ¶¶ 1-3.

The statute is clear and unambiguous; therefore Congressional intent must be derived from the plain meaning of its statute. *Puhutski supra*, 465 Mich at 683.

Appellant alleges that a court order for support has no impact in this matter because Joseph had already been approved for Medicaid benefits. Appellee acknowledges that 42 U.S. Code § 1396r-5(d) refers to orders that a court “has entered,” however it only means that
Ramona's community spouse monthly income allowance should be changed subsequent to the Probate Court issuing its Income Order. It cannot be interpreted that once an individual becomes eligible for benefits, future adjustments are precluded. 42 U.S. Code § 1396r-5(d) is very explicit that at each determination or redetermination, the community spouse monthly income allowance shall be adjusted when necessary.

To further support this interpretation, it is important to consider the 1989 amendment to 42 U.S. Code § 1396r-5(d). In 1989, Congress passed P.L. 101-239, which amended the statute to insert the words "or redetermined" after the word "determined" in subsection 42 U.S. Code § 1396r-5(d)(1). This change was titled "CLARIFICATION OF APPLICATION OF INCOME RULES TO REDETERMINATIONS," and this unmistakably illustrates Congressional intent that a Court order for support is applicable to the Department at its redetermination process, and not only applicable in circumstances where the order was obtained prior to an individual first becoming eligible for Medicaid benefits. A redetermination of eligibility occurs after the approval of a Medicaid application when a client reports a change in circumstances\(^\text{13}\). The Department's position that a protective order must be issued before a person applies for Medicaid is contradicted by the amendment and Federal law governing the Medicaid program.

42 U.S. Code § 1396r-5(d)(5), the Court ordered support exception, is governed directly by this 1989 update as a sub-statute of 42 U.S. Code § 1396r-5(d)(1). (d)(1) leads to (d)(1)(B), which leads to (d)(2), and then to "paragraph (5)" more formally known as 42 U.S. Code § 1396r-5(d)(5). Therefore even though its numbered paragraph is on the same level in the

\(^{13}\) One example of a change in circumstances is the receipt of a court order for support. In addition to a change in circumstance, redeterminations are also conducted at regular annual reviews.
statutory outline, the Court ordered support exception applies to determinations and redeterminations.

Appellant also alleges that because the Probate Court’s order for spousal support results in a different end-point than its more commonly used methods for calculating a community spouse monthly income allowance it must be an unavailable remedy. Appellant brief 12/1/2016, p 26. It is preposterous to even suggest that even though multiple alternatives exist, one is unavailable because it would result differently from the others. There would be no purpose for Congress to create different methods to only arrive at the exact same result. And it is impossible to read the text of the statute that way.

C. Congressional intent is expressed through a statute’s plain and ordinary meaning.

Appellant continues to impermissibly suggest that congressional intent is what it wishes it to be. However, unless more than one common and accepted meaning exists in a particular statute’s language, it is unambiguous. Papas, supra at 658. The language of 42 U.S. Code § 1396r-5, as used in this particular context (let alone any context), only has one meaning, and is therefore unambiguous. Where “the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning plainly expressed and further judicial interpretation is not permitted.” Papas, supra 257 Mich App 647 at 658. Congress made its goals clear when it drafted 42 U.S. Code § 1396r-5.

Notwithstanding the clear and unambiguous statutory language, Appellant still insists on discussing outside evidence of Congressional intent – an action which is not permitted. Puhotski, supra at 683. There is no ambiguity in the plain meaning of its terms – Federal law clearly states that a court’s order for spousal protection shall be determinative. 42 U.S. Code §
1396r-5(d)(5). Therefore, the Department must be bound to follow its instructions without the reading of any outside evidence.

Appellant further urges this Court to question whether Congress intended a protective order to impact the Department’s determination. Papas, supra at 658, prohibits this. “[A]n ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review.” Id. Therefore, the only conclusion that may be drawn is that Congress intended court orders for support to be binding on the Department’s Medicaid determinations. The United States Supreme Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Connecticut Nat Bank v Germain, 503 US 249, 253-254; 112 S Ct 1146; 117 L Ed 2d 391; 60 USLW 4222 (1992).

D. Agency policy requires that the Department honor the Income Order.

Federal statute 42 U.S. Code § 1396a makes the Federal Medicaid program applicable to every state in the United States. All State programs, must design their Medicaid programs in light of those Federal statutory guideposts. Michigan is no exception and the Department manual is explicit. It specifically provides an exception to the computation when a court order for support is higher. Despite being Agency policy, the Department does not mention the BEM to this Court for obvious reasons. Policy language is unequivocal, and it appropriately summarizes that the Department must make their determinations in light of court orders for support. Instead, as Appellant has done here, the Department has opted to ignore their State (and Federal) obligations.

BEM 546 guides the Department through the process to properly allocate the income of the institutionalized individual. It provides a five-part calculation to determine the amount that is
to be protected for the community spouse. This calculation also includes an alternative method for calculating the amount by way of court orders. It states as follows: “Use court-ordered support as the community spouse income allowance if: The L/H patient was ordered by the court to pay support to the community spouse, and the court-ordered amount is greater than the result of step five” (emphasis added). The Department recognizes its obligation to follow Court orders for spousal support. It even specifically drafted its policy manual with the word “use” in place of more discretionary language such as “may use.”

Appellant completely disposes of this alternative and refuses to honor the State or Federal laws that specifically include court orders when determining a community spousal monthly income allowance. Instead, the Department insists that the only available alternative to the mathematical calculation of the community spouse monthly income allowance is the futile method of an administrative hearing. It is inexplicable why the Department ignores its own agency manual in BEM 546 or the language 42 U.S. Code § 1396r-5(d)(5). The Department’s action attacks the fairness and consistency of a nationwide program which it allegedly seeks to uphold.
CONCLUSION AND RELIEF REQUESTED

The Probate Court had proper authority to hear a request for support and issue its Income Order which must be honored by the Department. Too many of the Department’s arguments are not based on governing law. Instead, the Department relies on public policy and political considerations that are the sole domain of the legislature.

Michigan statutes provide the Probate Court with exclusive subject matter jurisdiction to rule on requests for protective orders, despite an individual receiving Medicaid benefits. The law is clear that a Court’s jurisdiction to hear a case is based upon its power over a class of cases. Jurisdiction depends on a case’s nature, not the truth or falsity of the charge. This case was a petition for a protective order rightfully before the Probate Court. It was not a request for a Medicaid determination.

The Vansachs never disputed the Department’s exclusive authority to make Medicaid determinations. In fact, no request had ever been made for the Probate Court to overturn the Department’s determination. Instead, Ramona requested income support from Joseph, a spouse upon whom she was financially dependent. The pre-requisites for the issuance of an order were met with clear and convincing evidence, and the Appellant declined its right to conduct an evidentiary hearing on the necessity of the income increase. As such, the order was appropriately issued.

It is in error to assert that an administrative hearing is the Vansachs’ only permissible option. There is no prerequisite in Federal law or Department policy that conditions the use of the Probate Court’s Income Order on Ramona first requesting an administrative hearing to seek a higher community spouse monthly income allowance.
The Vansachs neither circumvented administrative remedies, nor changed the Department’s Medicaid determination by obtaining a protective order, and Federal law requires that the Department honor the protective order. Federal law is clear and unambiguous; Court orders for spousal support determine the community spouse monthly income allowance, and the Department is legally required to make its Medicaid determinations in light of such orders. Ignoring the protective order and refusing to appropriately adjust Ramona’s community spouse monthly resource allowance would go against Congressional intent, something that the Department is not permitted to do under Federal law and the Department’s own policy.

WHEREFORE, Appellee, Ramona Fenner-Vansach, respectfully requests that this Honorable Court affirm the Probate Court’s protective order for spousal support.

Respectfully submitted,

/s/ Don L. Rosenberg
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Dated: January 26, 2017
Attachment 6
As expected, the first month of this year has been an active period for the introduction of transfer tax legislation. As of this writing, four House Bills and one Senate Bill have been introduced that propose to repeal one or more of the various types of transfer taxes. Some also affirmatively retain basis step up under §1014 of the Code, while the others make no mention of repeal of the basis step up or address any type of carryover basis regime. Importantly, none of the bills protect QTIP Trusts from the loss of a step up in basis at the surviving spouse’s death. As it relates to the international planning arena, most of the new bills make no mention of how existing QDOTs will be taxed if the estate tax is repealed. Since QDOTs are taxed differently than standard marital trusts, (there is a QDOT tax that is assessed on all principal distributions to the spousal beneficiary, with some exceptions) we need to know how the QDOT tax will be treated if the federal estate tax is repealed.

Additionally, as mentioned above, if the federal gift tax is repealed, this opens the door for planning (and potential abuse) in the income tax arena. Without the gift tax, taxpayers in high income brackets could shift income tax cost to a taxpayer in a lower tax bracket. The donee taxpayer could then sell the assets, recognize less taxable gain, and transfer the assets back to the donor taxpayer. This would allow for a heavily manipulated transfer system within family units influenced by income shifting, with no check and balance system in place. Also, it is important to consider the potential abuse of leveraged entities and effect on valuation. For example, with no federal gift tax in place, a partnership could be created, leveraged so all equity is extracted and transferred to family free of gift tax, leaving a worthless entity that would not be subject to federal estate tax or a deemed capital gain tax at death.

Finally, just a plug on the effects of a “no gift tax regime” in the international planning arena. Consider gifts to nonresident aliens, who do not pay income tax on certain types of U.S. source income. Getting rid of the gift tax would allow U.S. persons to gift assets to nonresident family members, who will not recognize income on exempt U.S. source assets or alternatively, could simply convert the asset to a non-U.S. situs asset so no U.S. source income would be generated. There are also many rules that apply to nonresidents that would be indirectly affected by a federal estate tax repeal.

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1 QTIP Trust are included in the beneficiary spouse’s gross estate under IRC §2044, which is the prerequisite for it to receive a stepped-up basis under IRC §1014(b)(10).
2 IRC §2056A(b)(1).
3 In general, non-resident aliens are not subject to U.S. income taxation on interest on bank deposits, portfolio interests and capital gains (excluding real estate). IRC §§887(i); (h) and (a)(2).
4 For example, see IRC §877A addressing expatriation, IRC §2801 addressing the inheritance tax imposed on property received from covered expatriates and IRC §897 addressing the nonresidents subject to capital gains on the disposition of U.S. real property under FIRPTA.
The key takeaways from the House and Senate bills introduced this year to date, along with President Trump and the House Republicans' tax proposals, are summarized in the following chart, with appropriate citations so practitioners can track each bill.5

**Proposed Legislation Chart**

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<th>Proposed Legislation</th>
<th>Trump Plan6</th>
<th>Better Way7</th>
<th>HR.308</th>
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6 Available at https://assets.donaldjtrump.com/trump-tax-reform.pdf
8 H.R. 30 Farmers Against Crippling Taxes, 115th Congress (2017-2018). Introduced in House (01/03/17). https://www.congress.gov/bill/115th-congress/house-bill/30?q=%7B%22search%22%3A%22A%5B%22H.R.+30%22%5D%7D&r=1
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Uniform Law Commission Liaison Report
Date: March 10, 2017

ULC Directed Trust Drafting Committee
Robert H. Sitkoff, Chair
Turney P. Berry, Vice-Chair
John D. Morley, Reporter
James P. Spica, ABA Advisor

I am providing the Council this written report because on the date of March 2017 Council meeting (March 18, 2017), I shall be in Bethesda, Maryland attending (what is scheduled to be) the final face-to-face drafting session of the Directed Trust Drafting Committee of the Uniform Law Commission (ULC). If all goes as planned, the draft of the [Uniform] Directed Trust Act that results from March 17-18 meeting will be reviewed in May by the ULC’s Joint Editorial Board for Uniform Trusts and Estates Acts, and the Committee will read its proposed final draft at the Annual Meeting of the Uniform Law Commission in July and ask the plenary session to approve the Act for promulgation to the states. So, we should have a Uniform Directed Trust Act to conjure with sometime this summer.

Revised Uniform Principal and Income Act Drafting Committee
Turney P. Berry, Chair
David J. Clark, Vice-Chair
Ronald D. Aucutt, Reporter
William P. LaPiana, ABA Advisor

On March 24 and 25, I shall be in Washington, D.C. attending the third face-to-face drafting session of the ULC Revised Uniform Principal and Income Act Drafting Committee. After that meeting, this ULC Committee will be roughly midway through its deliberations. The Committee’s charge is as follows:

The drafting committee will undertake a number of revisions to bring the UPAIA up to date and to add a unitrust provision. Modern trust law requires a trustee to invest for the best total return and simultaneously to treat income and remainder beneficiaries impartially. In order to fulfill these duties, a trustee should be able to make adjustments between income and principal...
or to make a unitrust election. The drafting committee will address many other issues, including (1) the treatment of money that a trust receives in partial liquidation of an entity in which the trust owns an interest and (2) the allocation of capital gains to income for income tax purposes.

A New Drafting Committee on Electronic Wills

In January, the ULC Executive Committee authorized the appointment of a new Drafting Committee on Electronic Wills “to draft a uniform act or model law addressing the formation, validity and recognition of electronic wills. The committee may seek expansion of its charge to address end-of-life planning documents such as advance medical directives or powers of attorney for health care of finance.” The Committee has not yet been appointed; appointment (by the ULC President) is expected later this month.

JPS
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