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 24, 2018
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 24, 2018
9:00 a.m.
University Club
3435 Forest Road
Lansing, Michigan 48910

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

David P. Lucas, Secretary

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

**Meeting Schedule for 2017-2018**

April 21, 2018
June 16, 2018
September 8, 2018 (Annual Section Meeting)

**Meeting Schedule for 2018 - 2019**

October 13, 2018
November 17, 2018
December 15, 2018
January 26, 2019
February 16, 2019
March 16, 2019
April 13, 2019
June 15, 2019
September 21, 2019 (Annual Section Meeting)
CALL FOR MATERIALS

Council Meetings of the Probate and Estate Planning Section

*Due dates for Materials for Committee on Special Projects*

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

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

April 12, 2018
June 7, 2018
August 30, 2018 (for September meeting)

*Due dates for Materials for Council Meeting*

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

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

April 13, 2018
June 8, 2018
August 31, 2018
### Officers of the Council for 2017-2018 Term

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

### Council Members for 2017-2018 Term

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

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Brian V. Howe; Shaheen I. Imami; Stephen W. Jones; Robert B. Joslyn; James A. Kendall; Kenneth E. Konop; Nancy L. Little; James H. LoPrete; Richard C. Lowe; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack
### Probate & Estate Planning Section
#### Biennial Plan of Work
#### 10/1/2016 - 9/30/2018

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<th>Council Organization &amp; Internal Procedures</th>
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<th>Education &amp; Service to the Public &amp; Members</th>
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<td>- Prop tax uncapping exempt.</td>
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<td>- Promotion of &quot;Who Should I Trust?&quot; Program* (or similar)</td>
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<td>- Tenants by Entirety Property bill</td>
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<td>- 57th Annual P&amp;E Institute</td>
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<td>- ILIT trustee exoneration bill</td>
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<td>- Jajuga legislation override</td>
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<tr>
<td><strong>Priority Items</strong></td>
<td>- Assisted Reproductive Technology</td>
<td>- Probate Appeals Rules</td>
<td>- SC AO Meetings*</td>
<td>- who does the attorney for the fiduciary represent?</td>
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<td>- EPIC/MTC Updates</td>
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<td>- Communications with members*</td>
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<td>- Guardian/Conservator Jurisdiction</td>
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<td>- Social events for Section members</td>
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<td>- Tenants by Entirety Property in Trust bill</td>
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<td>- Liaise with local bar associations</td>
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<tr>
<td><strong>Secondary Priority</strong></td>
<td>- Charitable Trust statute update</td>
<td>- Review Ch. 5 of MCR for potential updates (incl. attorney representation, but not fiduciary exception)</td>
<td>- Amend bylaws to better coordinate transition of new officers/members</td>
<td>- Brochures*</td>
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<td>- Expand Personal Residence Exemption</td>
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<td>- Annual Institute/ICLE seminars*</td>
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<td>- attorney for the fiduciary (Perry v Cotton issue)</td>
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<td>- Section Journal*</td>
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<td>- Michigan Community Property Trust Act</td>
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<td>- Opportunities with ICLE</td>
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<td>- EPIC changes to reflect UPC updates</td>
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<td>- Mentor program</td>
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<td>- Dignified Death (Family Consent) Act</td>
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<td>- Outreach to COA to stay apprised of pending appeals &amp; need for involvement</td>
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<td>- Directed/Separate Trustee Proposals</td>
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<td>- Estate Recovery</td>
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<td>- Further brochure updating</td>
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*ongoing
CSP Materials
PROBATE & ESTATE PLANNING COUNCIL
COMMITTEE ON SPECIAL PROJECTS MEETING

AGENDA

MARCH 24, 2018

(9:00 - 10:00 AM)

Legislation Development & Drafting Committee (9:00 - 10:00 am)

1. Discussion of revisions to certificate of trust existence and authority legislation.

2. Update on TBE legislation (SB 905) and LSB revisions to Legislation Development & Drafting Committee language.
Draft 8 (3/16/2018): All recommended additions in caps and bold; all recommended deletions in strikethrough. This draft does not attempt to track version-to-version changes. Changes from prior version are red.

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, section 4, and section 5.

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.

Sec. 4. [Maintain with stylistic changes]

The trust agreement or certificate of trust existence and authority, and any amendments to or revocations of the trust agreement or the certificate of trust existence and authority, may be recorded in the office of the register of deeds of each county where the lands that are the subject of or affected by the trust agreement are located.

Sec. 5. [Maintain with stylistic changes]

A purchaser or other party relying upon the information contained in a recorded certificate of trust existence and authority shall be afforded the same protection as is provided to a subsequent purchaser in good faith under section 29 of chapter 65 of the Revised Statutes of 1846, being section 565.29 of the Michigan Compiled Laws, and shall not be required to further examine the trust agreement, unless an instrument amending or revoking the trust agreement or certificate of trust existence and authority is recorded in the same office in which the trust agreement or certificate of trust existence and authority was recorded.
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. THE AUTHORITY OF THE SETTLOR TO REVOKE THE TRUST.

(e) The authority of cotrustees to sign ON BEHALF OF 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 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 facts contained in the certificate.

(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 were correct.

(8) A person who makes 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 did not act pursuant to a legal requirement to demand 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.
Thank you for being willing to keep MLTA updated on the legislation as it moves forward.

Also, one of the MLTA Legislative Steering Committee members reached out to me today and asked me to pose the following questions to you and your colleagues regarding repealing the two recording sections in the statute:

This repeals section 565.434 & 436 – which deals with recording a COT:

565.434 Trust agreement or certificate of trust existence and authority; recording.
The trust agreement or certificate of trust existence and authority, and any amendments to or revocations of the trust agreement or the certificate of trust existence and authority, may be recorded in the office of the register of deeds of each county where the lands that are the subject of or affected by the trust agreement are located.

565.436 Indexing of certificate of trust existence and authority.
The certificate of trust existence and authority, in addition to being indexed in any other manner required by law, shall be indexed in the records of the office of the register of deeds under the title of the trust.

1. Why does the Probate and Estate Planning Section want to repeal these sections?
2. Are there concerns that the Register of Deeds may not record the COT and/or change how it is indexed?

I apologize for these late developing questions, but any information you can share will be greatly appreciated.

Thank you.

-Cami
Hello again, Mr. Piwowarski.

Earlier this morning, the MLTA Legislative Steering Committee reviewed HBs 5398 and 5362. They had considerable discussion and decided to take a neutral position on the legislation.

Thank you again for reaching out to the association. They appreciate that you kept them in mind when seeking feedback on the proposal.

-Cami

Good afternoon, Mr. Piwowarski.

Thank you for contacting MLTA regarding HBs 5398 and 5362. We appreciate the information that you shared in your message and the request for the association’s thoughts on the proposal.

I have forwarded your e-mail on to MLTA’s Legislative Steering Committee for further review. Once they have had the opportunity to review it and the legislation, we’ll be back in touch.

Thank you again for your outreach.

-Cami
Dear Ms. Lay,

The State Bar’s Probate and Estate Planning Section is working to simplify our certificate of trust statutes. Representative Lucido has been kind enough to sponsor our proposals:


The Section has tasked Katie Lynwood (copied on this message) and I with working with other stakeholders—including the Michigan Land Title Association—to shepherd these proposals through the legislative process.

We have worked through some feedback from the Michigan Bankers’ Association. In particular, the MBA has offered helpful perspective regarding the need for disclosing a trust’s revocability for many home loans to be salable on the secondary market.

We would greatly appreciate your thoughts regarding the proposals. My assistant, Lindsey Hall (copied on this message), would gladly help you identify some times that you, members of the MLTA, Ms. Lynwood, and I could speak.

We look forward to working with you.

Cordially,

Nathan Piwowarski
McCurdy Wotila & Porteous, PC
120 West Harris Street
Cadillac, Michigan 49601
direct phone line: (231) 577-5246
general office line: (231) 775-1391
fax: (231) 577-1488
email: nathan@mwplegal.com
www.mwplegal.com

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Debbie Mitin
Director of Trust Services | Michigan Bankers Association
507 S. Grand Ave. | Lansing, MI 48933
(Office): 517-485-3600 | (Direct) 517-342-9072
www.mibankers.com

Save the Date: April 18-20, Traverse City, MI

From: Vicki DenBoer [mailto:vickid@wmcb.com]
Sent: Monday, February 12, 2018 9:31 AM
To: Deborah Mitin <dmitin@MIBANKERS.COM>; 'William Franks' <Wfranks@Mercbank.com>; 'William Collins'
<william.collins@chemicalbankmi.com>
Cc: Patricia Herndon <pherndon@MIBANKERS.COM>
Subject: RE: HB 5398, 5362: revocability

Thank you for the willingness to listen. I have attached three different examples of trust requirements for secondary market loans.
Fannie Mae: The first two paragraphs outline the revocability requirements
Freddie Mac: It is under number 6 on page 4.
US Bank: This is an example of an investor that we sell loans to that also have the requirement.

Thanks,

Vicki DenBoer
SVP-Retail Loan Manager
NMLS# 638592
West Michigan Community Bank
5367 School Avenue | Hudsonville, MI 49426
Below is the email I received from Nathan Piwowarski regarding our discussion last week. Please let me know you thoughts on his recommendations for changes to the bill. Also Vicki is it possible to share the Fannie guidelines with Nathan that you referenced at our phone call? Thanks.

Debbie Mitin
Director of Trust Services | Michigan Bankers Association
507 S. Grand Ave. | Lansing, MI 48933
(Office): 517-485-3600 | (Direct) 517-342-9072
www.mibankers.com

Save the Date: April 18-20, Traverse City, MI
Thank you again for your group’s time and helpful feedback. Based on our discussions, we quite likely will change course concerning the repeal of sections 4 and 6 of the real estate cert act. That may not have happened without your efforts.

Our drafting committee discussed—at great length!—the revocability disclosure currently found at MCL 700.7913(1)(d). We found your concerns well-taken. We just want to make sure that the disclosure doesn’t create unnecessary mischief: these days, there are many trust instruments conferring powers of appointment (which allow for decanting) and trust protectors (who can do all manner of interesting things affecting a trustee’s authority). Some of the things an appointment holder or trust protector might do could easily be thought of as a power of revocation—even though these reserved powers would not make the trust revocable in the statutory and common law senses.

We are considering maintaining MCL 700.7913(1)(d), but having it read, “Whether the settlor holds the power to revoke the trust.” We are thinking that this would prevent misunderstandings about all of these “revocation-like” powers, and perhaps still satisfy buyers on the secondary market.

Would you mind taking a straw poll with your colleagues to see whether they’d be comfortable with this? Also, would you mind sharing the Fannie guidelines that were referred to during our call?

Thanks again!

Nathan Piwowarski
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Cadillac, Michigan 49601
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Selling Guide
Published December 19, 2017

B2-2-05: Inter Vivos Revocable Trusts (10/31/2017)

This topic contains information on inter vivos revocable trusts, including:
Overview
Inter Vivos Revocable Trust as Eligible Mortgagor
Lender Requirements
Trust and Trustee Requirements
Eligible Property and Occupancy Types
Underwriting Considerations
Title and Title Insurance Requirements
Loan Delivery Data

Overview

Except as expressly provided elsewhere in the Selling Guide, Fannie Mae only accepts individuals as credit-qualitying borrowers. In addition, Fannie Mae normally deems property in which no borrower has an ownership interest as ineligible collateral. However, to accommodate the use of inter vivos trusts as an estate planning tool, Fannie Mae provides an exception for property held by inter vivos revocable trusts created by credit-qualitying borrowers.

Inter Vivos Revocable Trust as Eligible Mortgagor

An inter vivos revocable trust is a trust that
• an individual creates during his or her lifetime;
• becomes effective during its creator's lifetime; and
• can be changed or cancelled by its creator at any time, for any reason, during that individual's lifetime.

Fannie Mae will accept an inter vivos revocable trust that has an ownership interest in the security property as an eligible mortgagor (a party to the security instrument) for all transaction types, provided it complies with the requirements in this topic.

Note: A trust must meet Fannie Mae’s revocability and other eligibility requirements at the time the loan is delivered. Trust eligibility is not affected if the trust documents contain a provision that the trust will, in the future, become irrevocable upon the death of one of the settlors. However, such a change in the trust structure after delivery of the mortgage loan may affect the eligibility of the trust as a mortgagor in a subsequent loan transaction.

Lender Requirements

A lender delivering a loan that has an inter vivos revocable trust as mortgagor is responsible for:
• determining that both the trust and the mortgage satisfy Fannie Mae eligibility criteria and documentation requirements;
• determining under the laws of the states in which it does business that it can originate mortgages to validly create inter vivos revocable trusts that meet the terms and conditions specified by Fannie Mae; and
• completing a review of the mortgage documentation, applicable state law, and the trust documents to ensure that title insurers provide full title insurance coverage without exceptions for the trust or the trustees for inter vivos revocable trusts in that state. (See Title and Title Insurance Requirements below for additional information.)

Legal document requirements are described in B8-6-02, Inter Vivos Revocable Trust Mortgage Documentation and Signature Requirements. Also see B-2-05, Signature Requirements for Mortgages to Inter Vivos Revocable Trusts, for signature requirements under different inter vivos revocable trust scenarios.

Trust and Trustee Requirements

The inter vivos revocable trust must be established by one or more natural persons, solely or jointly. The primary beneficiary of the trust must be the individual(s) establishing the trust. If the trust is established jointly, there may be more than one primary beneficiary as long as the income or assets of at least one of the individuals establishing the trust will be used to qualify for the mortgage.

The trustee(s) must include either:
• the individual establishing the trust (or at least one of the individuals, if there are two or more); or
• an institutional trustee that customarily performs trust functions and is authorized to act as trustee under the laws of the applicable state.

The trustee(s) must have the power to mortgage the security property for the purpose of securing a loan to the individual (or individuals) who are the borrower(s) under the mortgage or deed of trust note.

Note: In the event the originally named trustee is unable or unwilling to serve, and the trust instrument has a mechanism for appointment of a successor trustee, the trust can properly act through the successor trustee.
Eligible Property and Occupancy Types

All property and occupancy types are eligible. For properties that are the borrower’s principal residence, at least one individual establishing the trust must occupy the security property and sign the loan documents.

Underwriting Considerations

The loan must be underwritten with at least one individual establishing the trust as borrower. Additional individuals, including other individuals establishing the trust, may also be considered co-borrowers if those individuals’ credit will be used to qualify for the loan.

Title and Title Insurance Requirements

The lender must retain in the individual loan file a copy of any trust documents that the title insurance company required in making its determination on the title insurance coverage.

The following requirements apply to title and title insurance:

- Title held in the trust does not in any way diminish Fannie Mae’s rights as a creditor, including the right to have full title to the property vested in Fannie Mae should foreclosure proceedings have to be initiated to cure a default under the terms of the mortgage.
- The title insurance policy ensures full title protection to Fannie Mae.
- The title insurance policy states that title to the security property is vested in the trustee(s) of the inter vivos revocable trust.
- The title insurance policy does not list any exceptions with respect to the trustee(s) holding title to the security property or to the trust.
- Title to the security property is vested solely in the trustee(s) of the inter vivos revocable trust, jointly in the trustee(s) of the inter vivos revocable trust and in the name(s) of the individual borrower(s), or in the trustee(s) of more than one inter vivos revocable trust.

Loan Delivery Data

Only the information related to the individual(s) establishing the inter vivos revocable trust whose credit is used to qualify for the loan should be provided at the time of loan delivery, such as the borrower name and Social Security number. The name of the inter vivos revocable trust cannot be included within the loan delivery data.

A loan that has an inter vivos revocable trust as a mortgagee must be delivered with Special Feature Code 168 (in addition to any other special feature codes that may also be applicable to the transaction).

Related Announcements

The table below provides references to the Announcements that have been issued that are related to this topic.

<table>
<thead>
<tr>
<th>Announcement</th>
<th>Issue Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Announcement SEL-2017-09</td>
<td>October 31, 2017</td>
</tr>
<tr>
<td>Announcement SEL-2019-01</td>
<td>January 17, 2019</td>
</tr>
</tbody>
</table>
5103.5: Living Trust (11/09/16)

The Seller warrants and represents that the Living Trust meets Freddie Mac's revocability and all other eligibility requirements as of the Delivery Date and the Funding Date.

A Living Trust is an eligible Borrower for a Home Mortgage if it meets all of the following conditions:

1. **Special underwriting requirement**
   
The Mortgage applicants must include an Underwritten Settlor (or at least one Underwritten Settlor if there is more than one Settlor)

2. **Trust requirements**
   
   - The Settlor (or each Settlor, if there is more than one) is the primary beneficiary of the trust
   
   - The trustee(s) must be the Settlor (or at least one Settlor if there is more than one), or a Settlor and one or more co-trustees. A financial institution customarily engaged in trust functions in the applicable jurisdiction may serve as a co-trustee.
   
   - The trustee(s) must be specifically authorized to:
     - Borrow money for the benefit of an Underwritten Settlor
     - Purchase, construct or encumber realty to secure a loan to an Underwritten Settlor

3. **Property type, occupancy and ownership requirements**

   - The Mortgage is secured by:
     - A 1- to 4-unit Primary Residence occupied by an Underwritten Settlor, or
     - A second home occupied for some portion of the year by an Underwritten Settlor, or
     - A 1- to 4-unit Investment Property
   
   - If a Living Trust is a Borrower, then:
     - The occupancy of the property/Mortgaged Premises by an Underwritten Settlor of that Living Trust will be considered to be occupancy by the Borrower of the property/Mortgaged Premises
     - The Underwritten Settlor is an individual who is deemed to be the owner of the property/Mortgaged Premises
4. Title and title insurance

   • Title

   The title to the property is vested in the trustee(s) on behalf of the trust (or in such other manner as is customary in the jurisdiction for Living Trusts)

   • The title insurance policy

     - States that title to the Mortgaged Premises is vested in the trustee(s) on behalf of the Living Trust (or in such other manner as is customary in the jurisdiction for Living Trusts)

     - Does not list any exceptions arising from the trust ownership of the property

   • The Seller must verify that:

     - Title vested in the trustee(s) on behalf of the trust (or in such other manner as is customary in the jurisdiction for Living Trusts) does not lessen in any way Freddie Mac's interest in the Mortgage, such as Freddie Mac's ability to obtain clear and marketable title to the Mortgaged Premises in the event of a foreclosure of the Mortgage

     - The title insurance policy provides full title insurance protection to Freddie Mac

5. Signatures required; forms of signature

Set forth below are the required forms of signatures (Note) and required forms of signatures and acknowledgment (Security Instrument). If the Seller elects to use the Note with signature addendum to the Note ("Signature Addendum") alternative:

(i) The form of Signature Addendum, and its use, must comply with all applicable laws.

(ii) The use of the Signature Addendum must result in a properly signed and legally enforceable Note.

(iii) The Signature Addendum must not impair Freddie Mac's status as a "holder in due course" or any of Freddie Mac's rights under the Purchase Documents.

(iv) The Seller indemnifies Freddie Mac from any loss or damage Freddie Mac may incur as a result of the use of the Signature Addendum.

<table>
<thead>
<tr>
<th>Loan documents</th>
<th>Required forms of signatures</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>(See Exhibit 9A, Note Signature Forms for Living Trusts)</em></td>
</tr>
<tr>
<td>Note</td>
<td>• Each Underwritten Settlor individually; and</td>
</tr>
<tr>
<td></td>
<td>• One or more trustees on behalf of the trust, indicating the complete legal name of the trust, using the form prescribed in Exhibit 9A. An Underwritten Settlor executing the Note both individually and as a trustee must use one of the methods prescribed in Exhibit 9A.</td>
</tr>
</tbody>
</table>

| Note with Signature Addendum alternative | • May be used if there is not enough space on the Note for the signatures of the trustee(s). The Note must clearly reference the existence of the Signature Addendum. |
- Each Underwritten Settlor (regardless of whether the Underwritten Settlor also is signing as a trustee) must sign individually in the Borrower's signature lines on the Note itself; only the signature(s) of the trustee(s) may be included on the Signature Addendum

| Signature Addendum requirements | The Signature Addendum must:  
  • Be permanently affixed to the Note  
  • Clearly identify the Note by referencing the following:  
    - Name(s) of the Borrower(s)  
    - Note Date  
    - Property address  
    - Original Principal Balance of the Note |

| SECURITY INSTRUMENT | Required forms of signatures and acknowledgment  
(See Exhibit 9B, Security Instrument Signature and Acknowledgement Forms for Living Trusts) |
|---------------------|-------------------------------------------------------------------------------------------------------------------------------|
| Loan documents      | • Executed by the trustee(s) on behalf of the trust, indicating the complete legal name of the trust, using the form prescribed in Exhibit 9B  
  • Acknowledged by each Underwritten Settlor on the Security Instrument in the form prescribed by Exhibit 9B |
| Security Instrument | • The Security Instrument is executed by the trustee(s) on behalf of the trust, indicating the complete legal name of the trust  
  • The Seller may use a rider to the Security Instrument that meets all of the requirements in Exhibit 9B including that the rider:  
    - Is signed by the trustee(s) of the Living Trust; and  
    - Is acknowledged by each Underwritten Settlor of the Living Trust |
| Security Instrument with Rider as alternative form of Underwritten Settlor acknowledgment |                                                                                                                                 |

Note:
The Seller may exclude any institutional trustee and any individual trustee who is not an Underwritten Settlor from personal liability under the Note and the Security Instrument provided that:

- The Seller verifies that such exclusion applies specifically to that trustee, and the Seller excludes only that trustee from liability; and
• Such exclusion does not impair the exercise of any rights and remedies under the
  Note and/or the Security Instrument

6. **Seller review**

The Seller must review:

• Either (a) the trust agreement for the Living Trust or, (b) an abstract, certification
  or other summary of the trust agreement if and to the extent the laws of the
  applicable jurisdiction require or permit a third-party dealing with a trustee to rely
  on such abstract, certification or other summary. Based on such review, the Seller
  must determine that:
    • The Settlor (or each Settlor, if there is more than one) has retained the power
      to revoke or amend the trust
    • There is specific authorization for the trustee(s) to borrow money and to
      purchase, construct, or encumber realty as more fully described in Section
      5103.5(2) above
    • There is no unusual risk or impairment of lenders' rights (such as distributions
      required to be made in specified amounts from other than net income)
    • The beneficiary need not grant written consent for the trust to borrow money
      or, if such consent is required, it has been granted in writing for purposes of the
      Mortgage
    • If the trust agreement requires more than one trustee to borrow money or to
      purchase, construct or encumber realty, that the requisite number of trustees
      have signed the loan documents
  • The deed conveying the Mortgaged Premises to the trustee or trust to verify that
    title is vested in the trustee(s) on behalf of the Living Trust (or is vested in such
    other manner as is customary in the jurisdiction for Living Trusts)

7. **The Mortgage file**

• In addition to other requirements in the Purchase Documents, when the Borrower
  is a Living Trust, the Mortgage file also must contain either:
    • A complete copy of the trust agreement
    • An abstract, certification or other summary of the trust agreement if and to the
      extent the laws of the applicable jurisdiction require or permit a third-party
      dealing with a trustee to rely on such abstract, certification or other summary

8. **Delivery requirements**

See Section 6302.9 for special delivery requirements when the Borrower is a Living
Trust.
9. **Freddie Mac resources**

The following are useful Freddie Mac resources related to this section:

<table>
<thead>
<tr>
<th>Document Custodian Procedures Handbook, Chapter 3, Document Delivery and Processing Procedures, Borrower’s Signature</th>
</tr>
</thead>
</table>

The ULDD information regarding non-individual Borrowers in the following user guides:
- Selling Mortgages to Freddie Mac for Cash
- Selling Mortgages to Freddie Mac – Guarantor and MultiLender

<table>
<thead>
<tr>
<th>Related Guide Bulletins</th>
<th>Issue Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulletin 2016-20</td>
<td>November 9, 2016</td>
</tr>
</tbody>
</table>
U.S. Bank Home Mortgage – Correspondent Clients
Certificate of Trust Changes

Effective immediately for any new loans or loans in the pipeline, U.S. Bank Home Mortgage is amending our requirements when closing in a revocable trust to allow for a simplified trust certificate when the loan is underwritten by U.S. Bank Home Mortgage.

There is a Certification of Revocable Trust Form that will be utilized for 43 states exclusively. There are seven states in which a trust certificate cannot be used (CO, CT, HI, LA, NY, OK, RI). For those states, please follow our current policy using an attorney’s opinion requiring a full copy of the trust. Instructions for trusts in California have been deleted from Underwriting/Credit Policy guidelines, and the new documentation requirements have been updated.

Published in our Seller Guide folder 1100: Exhibits & Forms > 1110: Underwriting are the following:
- **Certification of Revocable Trust Form** (1117.1.1)
- **Certification of Revocable Trust Key** — available to assist in the completion and review of the trust certificate. (1117.1.2)
- **Trust Lending Tool** — a list of states for which a Certificate of Trust can be utilized, clarification on who needs to sign, and whether signatures have to be notarized. (1117.3)

**Delegated Correspondents** are encouraged to use our Certification of Revocable Trust form, however you may use your own form as long as it contains the same information.

Please refer to these Underwriting/Credit Policy sections in the Seller Guide for complete guidelines:
711.3 FHA – Eligible Borrowers
712.5 VA – Eligible Borrowers
713.5 Agency – Eligible Borrowers
714.1.4 Portfolio – Borrower & Occupancy

Notes:
- Irrevocable trusts are not acceptable for any product.
- Fannie Mae products must have an SCC Code of 168.

Please contact your Client Support Group or Account Executive for assistance with any questions you may have.

Thank you for your partnership!
SENATE BILL No. 905

March 15, 2018, Introduced by Senator JONES and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," (MCL 700.1101 to 700.8206) by adding section 7509.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SEC. 7509. (1) ANY PROPERTY CONVEYED BY A SETTLOR OR A SETTLOR'S SPOUSE, OR BOTH, TO A TRUSTEE OF 1 OR MORE TRUSTS, AND THE PROCEEDS OF THAT PROPERTY, HAVE THE SAME IMMUNITY FROM THE CLAIMS OF EACH SPOUSE'S SEPARATE CREDITORS IN THE SAME MANNER AS IF THE PROPERTY OR ITS PROCEEDS WERE OWNED BY THE SPOUSES AS TENANTS BY THE ENTIRETY, WHILE 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 APPLIES TO THE PROPERTY OR
ITS PROCEEDS.

(2) ON THE DEATH OF THE FIRST SPOUSE, ALL OF THE FOLLOWING APPLY:

(A) ALL PROPERTY HELD IN TRUST THAT, UNDER SUBSECTION (1), WAS
IMMUNE FROM THE CLAIMS OF THE DECEASED SPOUSE'S SEPARATE CREDITORS
IMMEDIATELY BEFORE HIS OR HER DEATH CONTINUES TO HAVE IMMUNITY FROM
THE CLAIMS OF THE DECEDED SPOUSE'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 (1), WAS IMMUNE FROM THE CLAIMS OF THE
DECEASED SPOUSE'S SEPARATE CREDITORS, THE PROPERTY IS 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 (1), WAS IMMUNE FROM CLAIMS OF EACH SPOUSE'S
SEPARATE CREDITORS, THE PROPERTY CONTINUES TO HAVE IMMUNITY FROM
THE CLAIMS OF THE SEPARATE CREDITORS OF THE SURVIVING SPOUSE.

(3) THE IMMUNITY FROM THE CLAIMS OF SEPARATE CREDITORS UNDER
SUBSECTIONS (1) AND (2) 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.

(4) ON THE REVOCATION OF A TRUST DESCRIBED IN SUBSECTION (1),
ALL OF THE PROPERTY HELD BY THE TRUSTEE OF THE TRUST AT THE TIME OF
THE REVOCATION IS CONSIDERED TO BE HELD BY BOTH SPOUSES AS TENANTS
BY THE ENTIRETY.

(5) IN A DISPUTE RELATING TO THE IMMUNITY OF TRUST PROPERTY
FROM THE CLAIM OF EITHER SPOUSE'S SEPARATE CREDITOR UNDER THIS
SECTION, THE CREDITOR HAS THE BURDEN OF PROVING, BY CLEAR AND
CONVINCING EVIDENCE, THAT THE TRUST PROPERTY IS NOT IMMUNE FROM THE
CREDITOR'S CLAIMS.

(6) A TRANSFER TO A TRUST DESCRIBED IN SUBSECTION (1) DOES NOT
AFFECT OR CHANGE ANY MARITAL PROPERTY RIGHTS OF EITHER SPOUSE TO
THE TRANSFERRED PROPERTY OR INTEREST IN THE TRANSFERRED PROPERTY
IMMEDIATELY BEFORE THE TRANSFER IN THE EVENT OF DISSOLUTION OF
MARRIAGE OF THE SPOUSES, UNLESS BOTH SPOUSES EXPRESSLY AGREE
OTHERWISE IN WRITING. ON ENTRY OF A JUDGMENT OF DIVORCE OR
ANNULMENT BETWEEN THE SPOUSES, THE IMMUNITY FROM THE CLAIMS OF
SEPARATE CREDITORS UNDER SUBSECTION (1) TERMINATES.

(7) THIS SECTION APPLIES ONLY TO PROPERTY CONVEYED TO A
TRUSTEE AFTER DECEMBER 31, 2018, OR HELD BY A TRUSTEE ACTING
PURSUANT TO A TRUST INSTRUMENT DATED AFTER DECEMBER 31, 2018.

(8) AS USED IN THIS SECTION, "PROCEEDS" MEANS:

(A) PROPERTY ACQUIRED BY A TRUSTEE ON 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 SUBDIVISIONS (A) TO (E).
ARTICLE VII: MICHIGAN TRUST CODE
PART 5: CREDITOR'S CLAIMS: SPENDTHRIFT, SUPPORT, AND DISCRETIONARY TRUSTS
700.7509 TENANCY BY ENTIRETY TRUSTS

(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 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 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 tenants 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, or held by a trustee acting pursuant to a trust instrument dated on or after ________________ , ____, 2017.
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

March 24, 2018
Lansing, Michigan

Agenda
10:15-12:00

1. Call to Order
2. Introduction of Guests
3. Excused Absences
4. Minutes of February 17, 2018 Meeting of the Council
   Attachment 1
5. Chair's Report – Marlaine C. Teahan (5 minutes)
   Attachment 2
6. Committee Reports
   A. Committee on Special Projects – Geoff Vernon (5 minutes)
      Council vote requested to take a Public Policy Position to approve the
      Certificate of Trust legislation updates. See CSP materials for specific
      proposed language.
   B. Premarital Agreement Committee – Chris Savage (20 minutes)
      Attachment 3
      The Committee would like to discuss the Uniform Premarital and Marital
      Agreements Act with Council prior to proceeding with revisions to the
      Act. We will discuss Allard and revising the Act in a manner that will be
      acceptable to other stakeholders.
   C. Outreach Committee – Kathy Goetsch (5 minutes)
      Attachment 4
      Discussion regarding printed pamphlets
D. Tax Committee – Lorraine F. New (10 minutes)

Attachment 5


E. Electronic Communications Committee – Mike Lichterman (5 minutes)

Oral report of Committee regarding SBM Connect.

F. Guardianship, Conservatorship, and End of Life Committee – Rhonda Clark (15 minutes)

Oral report on various legislative issues.

G. Membership Committee – Nick Reister (5 minutes)

Oral report on committee initiatives.

7. Written Reports Without Oral Presentation

- Court Rules, Forms & Proceedings Committee Attachment 6
- Divided and Directed Trusteeship Committee Attachment 7
- Uniform Law Commission Liaison Report Attachment 8
- Uniform Fiduciary Income and Principal Act Ad Hoc Committee Attachment 9

8. Other Business

9. Adjournment

Next CSP/Council meeting is Saturday, April 21, 2018, 9 a.m. – 12 p.m.
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION OF
THE STATE BAR OF MICHIGAN

February 17, 2018
Lansing, Michigan

Minutes

1. Call to Order: The Chair of the Section, Marlaine C. Teahan, called the meeting to order at 10:32 am.

2. Introduction of Guests and attendance.
   a. meeting attendees introduced themselves
   b. The following officers and members of the Council were present:

Marlaine C. Teahan, Chair
David P. Lucas, Secretary
David L.J.M. Skidmore, Treasurer
Christopher J. Caldwell
Kathleen M. Goetsch
Nazneen Hasan
Angela M. Hentkowski
Michael L. Jaconette
Mark E. Kellogg
Robert B. Labe
Katie Lynwood
Richard C. Mills
Melisa M.W. Mysliwiec
Lorraine F. New
Kurt A. Olson
Christine M. Savage
Geoffrey R. Vernon
A total of 17 Council officers and members were present, constituting a quorum

3. Absences
   a. The following members of the Council were absent with excuse:

Marguerite Munson Lentz
Christopher A. Ballard

(2018 - 02 - a) (February 17, 2018)
The following officers and members of the Council were absent without excuse: none

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

The following liaisons to the Council were present:
Daniel W. Borst
Susan Chalgian
Patricia M. Ouellette

Others present:
Aaron Bartell
Ryan Bourjaily
Georgette David
Dan Hilker
Andy Mayoras
Scott Robbins
Jim Ryan, Public Affairs Associates
Nick Ryan
Mike Shelton
Paul Vaidya

Minutes of January 20, 2018 Meeting of the Council: it was moved and seconded to approve the Minutes of the January 20, 2018 meeting of the Council, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

Chair’s Report – Marlaine C. Teahan: The Chair reviewed the Chair’s Report which was included with the meeting agenda materials, including (i) that the Chair, on behalf of the Section, has submitted a letter to the Legislature, describing the Section’s opposition to SB 713, in its current form; and (ii) that Candace Crowley, of the State Bar has requested lawyers to volunteer for the Bar’s Modest Means Workgroup, and the Chair encouraged Section members to so volunteer.

(2018 - 02 - a) (February 17, 2018)
Mike McClory reported on a project to convert archived Court records to digital format, and then destroy paper records; Mr. McClory stated that this project is different from the E-file project. Mr. McClory stated that one of the issues is whether Courts will be required to destroy archived documents, or authorized to destroy archived documents.

George Gregory reported on the status of divided and directed trusteeship legislation and community property trust legislation.

Dan Hilker reported that HB 4410 (the Jajuga fix) has passed the House.

The Chair continued the review of the Chair’s report, including a description of a meeting with several hospital lobbyists regarding HB 5075 and HB 5065, as described in the Chair’s Report.

The Chair announced that the Visitation of Competent Adults Ad Hoc Committee has reviewed the proposed legislation, provided a report, and is now disbanded.

The Chair announced the formation of the Uniform Fiduciary Income and Principal Act (UFIPA) Ad Hoc Committee, and charged the Committee with reviewing the Uniform Law Commission’s UFIPA draft, which is scheduled for action by the Commission in July, 2018. The Chair appointed Jim Spica as Chair of the Ad Hoc Committee, and asked for volunteers to serve on the Ad Hoc Committee.

6. Committee Reports

a. Committee on Special Projects (CSP) - Geoff Vernon: Mr. Vernon reported that the CSP is seeking a sponsor for the EPIC Omnibus legislation, and that the CSP proposed the addition of a definition of “Charitable trust” to MCL 700.7103(c) as follows: “Charitable trust means a trust or portion of a trust created for a charitable purpose described in section 7405(1) that is a material purpose of the trust.” After discussion of this definition at CSP, the CSP Chair will direct the definition back to the Legislation Development Committee for further review.

b. Court Rules, Forms, & Proceedings Committee - Melisa Mysliwiec: Ms. Mysliwiec referred to the Committee’s report which is included in the meeting agenda materials, including (i) the public administrator bills are now Public Acts (PA 13 and 14 of 2018); (ii) the Committee’s work regarding Automatic Mediation legislation; (iii) HB 4752 (removing the sunset on the deduction of liens from the value of real estate for estate inventory purposes) has been passed, but is not yet signed by the Governor; and (iv) the Committee will approach SCAO and try to change their position, that liens do not reduce the value of an estate for purposes of determining eligibility for proceedings under MCL 700.3982.

(2018 - 02 - a) (February 17, 2018)
c. Guardianship, Conservatorship, and End of Life Committee - Rhonda Clark: The Chair suspended the agenda order and heard a report by the Committee during the meeting of the Committee on Special Projects. Ms. Clark reported on various legislative issues, including (i) SB 713, including a possible future request that the Council take a position on constitutional and other grounds to supplement the Section’s Public Policy Position; (ii) SB 784, regarding do-not-resuscitate orders for minors. The Council discussed SB 784, including the issue of notification of minors age 14 or more at the time that the guardian is granted such authority, the interaction with POST legislation, and whether parents have the authority to sign a DNR order without Court action. The Chair requested that the Committee continue to consider SB 784, with a view to proposing a public policy position on SB 784.

d. Real Estate Committee - Mark Kellogg: Mr. Kellogg reported on HB 4905, regarding the eligibility for the real estate tax personal residence exemption, when the owner of the real estate is in a nursing facility, and the Council discussed the legislation. The Committee’s motion is:

   The Probate and Estate Planning Section supports the Substitute for House Bill No. 4905, with the deletion of the phrase “is not leased and” from section 7cc(5)(d) of such proposed legislation.

   The Chair stated that since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded the vote of 17 in favor of the motion, 0 opposed to the motion, 0 abstain, and 6 not voting. The Chair declared the motion approved.

e. Electronic Communications Committee - Mike Lichterman: The Chair stated that Mr. Lichterman’s report is included in the meeting agenda materials.

f. Tax Committee - Lorraine New: Angela Hentkowski reported on a Tax Nugget and suggested alerts regarding the Tax Cuts and Jobs Act that are included in the meeting agenda materials.

g. Membership Committee - Nick Reister: Angela Hentkowski reported on behalf of the Committee, including (i) social events at the Acme Estate Planning Institute; (ii) informed the Council that volunteers were needed for the Section’s table at the Institute; and (iii) the Committee is working on Section regional gatherings.

7. Written Reports Without Oral Presentation - The Chair noted the several reports that were included with the agenda materials.

(2018 - 02 - a) (February 17, 2018)
8. Other Business

a. Amicus Curiae Committee: David Skidmore presented materials regarding In the Matter of Dorothy Redd, Legally Incapacitated individual, Michigan Court of Appeals No. 335152, stating that the Appellant in that matter has requested that the Council seek leave to submit an amicus curiae brief in support of the Appellant’s Application for Leave to Appeal to the Michigan Supreme Court. The Committee’s motion is:

   The Probate and Estate Planning Section declines the request that the Section seek leave to submit an amicus curiae brief in support of the Appellant’s Application for Leave to Appeal in In the Matter of Dorothy Redd, Legally Incapacitated individual, Michigan Court of Appeals No. 335152.

   The Chair stated that since the Committee’s motion does not seek a public policy position of the Section, the vote of the Council could be taken as a voice vote. Following discussion, the Chair called the question, and, on voice vote (with no nays and no abstentions), the Chair declared the motion approved.

b. Mr. McClory reported on the status of the e-filing project, including that (i) the Supreme Court has issued a stay on the Court Rules proposals; and (ii) how pro se litigants would be required to file. The Chair stated to the Council that it was important for the Section to be involved in the development of the e-filing rules and asked Mr. McClory to follow up with the Chair of the e-filing Workgroup to be sure we are able to send a Council member to participate in the Workgroup.

   There was no other business offered or requested.

9. Adjournment: seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 11:46 am.

Respectfully submitted,
David P. Lucas, Secretary
1. **Correspondence.** The SBM wrote, asking if we need space at the 2018 annual meeting in Grand Rapids. I responded that we do not need space. The organizer of the March 16, 2018, ELDRS 16th Annual Spring Conference requested permission to send an e-blast to our Section members with conference information; permission granted.

2. **Modest Means SBM Workgroup.** As reported in my February Chair’s Report, the SBM was seeking a Section member to join the SBM’s Modest Means Workgroup. Many thanks to Georgette David for volunteering. As the work develops, Georgette will keep Council up-to-date.

3. **HB 5075 and HB 5076 Workgroup.** On February 28, 2018, Ray Harris, of our Guardianship, Conservatorship, and End of Life Committee, and I met with Rep. Noble and Rep. Cole regarding our concerns on HB 5075 and HB 5076. There were almost 30 people in attendance, including Judge Jaconette and the MPJA lobbyist, Becky Bechler and Jim Ryan from Public Affairs Associates, representatives from the ELDRS Section with their lobbyist, Right to Life, several lobbyists from hospital associations, a medical ethicist, legislative aides, and others. The discussions were very helpful in explaining some of the problematic issues contained in HB 5075 and HB 5076. We expect more dialogue on these bills.

4. **EPIC Q&A Panel.** After much deliberation and input by many, the Officers recommend that the Section will no longer solicit new questions for the EPIC Q&A Panel to answer. The existing questions and answers will be archived on the ICLE website and in ICLE's Probate Sourcebook. A vote of the Council will be taken to formalize the Officers' recommendation.

5. **Ad Hoc Committees.** In February, the Visitation of Competent Adults Ad Hoc Committee completed its work and was terminated. Many thanks to Geoff Vernon and Susan Chalgian for spearheading this effort.

In February, Jim Spica was named Chair of the Uniform Fiduciary Income and Principal Act (UFIPA) Ad Hoc Committee. The mission of this ad hoc committee is to review the Uniform Law Commission's UFIPA draft and final version, scheduled to be voted upon at the Commission's Annual Meeting in July, 2018. Beginning work on UFIPA this year will position Council well in analyzing and responding to the uniform law in a timely fashion.

Since the last meeting, I appointed committee members, see below. Anyone else interested in serving on the UFIPA Ad Hoc Committee should contact Jim Spica atjspica@dickinson-wright.com, or 313-223-3090, or Gabrielle McKee at 248-433-7672.

6. **Bill Hound Reports.** For an interactive summary of the bills being watched by our Legislative Monitoring Committee, look in our Section's Connect Library.
7. **Welcome to the Following New Committee Members:**

- **Amicus Curiae:** Ryan Bourjaily
- **Court Rules, Forms, & Proceedings:** Warren Krueger
- **Guardianship, Conservatorship and End of Life:** Warren Krueger
- **UFIPA Ad Hoc Committee:**
  - Anthony J. Belloli (Plante Moran Trust)
  - Marguerite Munson Lentz
  - Raj A. Malviya
  - Gabrielle M. McKee
  - Richard C. Mills
  - Robert P. Tiplady
  - Geoffrey R. Vernon

8. **We took a Public Policy Position in February on the following:**

The Section took a formal public policy position on HB 4905, as follows:

> The Probate and Estate Planning Section supports the Substitute for House Bill No. 4905, with the deletion of the phrase “is not leased and” from section 7cc(5)(d) of such proposed legislation.

The position and all amendments can be found online at the SBM Probate and Estate Planning Section Public Policy Position page: [https://www.michbar.org/sections/probateppe](https://www.michbar.org/sections/probateppe)

9. **New Ideas, Comments, Questions.** Please email or call me at mteahan@fraserlawfirm.com with your thoughts and ideas for the following:

- projects our Section should tackle – legislative or otherwise;
- new ways to benefit our Section Members;
- new social events for our Section Members, guests, and those interested in joining our Section;
- anything you would like to discuss; and
- your questions -- If I can't answer your question, I will find someone who can.

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

11. **Upcoming Seminars ICLE/SBM –** [www.icle.org](http://www.icle.org)

- Apr. 10 - Medicaid and Health Care Planning Update 2018, Plymouth (Live)
- May 16 - Income Tax Planning for Family LPs, LLCs, and Disregarded Entities (Probate Institute add-on seminar), Acme (Live)
• May 17-19 - Probate & Estate Planning Institute, 58th Annual, Acme (Live) – registration is open!

• June 14-15 - Probate & Estate Planning Institute, 58th Annual, Plymouth (Live) -- registration is open and note that the Plymouth location of the Institute will be held on Thursday and Friday this year – due to popular demand.
A BRIEF ANALYSIS OF MICHIGAN LAW
IN THE AFTERMATH OF THE ALLARD DECISION
AND THE UNIFORM MARITAL AGREEMENT ACT

This presentation is intended to explore the possible application of the Uniform Marital Agreement Act to existing Michigan Law. As of this writing, and to this author’s knowledge the Uniform Act is not being considered by either the House or the Senate of Michigan. There is a House Bill which has passed the House and has been introduced in the Senate, HB 4751 which its author intends to serve as a “fix” to the Allard III Court of Appeals decision. It was proposed by Representative Kesto. HB 4751 is addressed later in this presentation.

The body of Michigan Law interpreting Marital Property agreements, including Pre-Nuptial Agreements is drawn from MCL 552.28 which very simply states:

RIGHTS AND LIABILITY OF MARRIED WOMEN (EXCERPT)
Act 216 of 1981

557.28 Contract relating to property made in contemplation of marriage.
Sec. 8. A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place.

Additionally pursuant to the Michigan Statute of Frauds, MCL 566.132, a Pre-Nuptial Agreement must be in writing and signed by the parties to the contract:

566.132 Agreements, contracts, or promises required to be in writing and signed; enforcement; “financial institution” defined.
Sec. 2. (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
(a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.
(b) ***
(c) An agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.

The Author thanks and acknowledges the contribution of Christine Savage, member of Probate Council and Chair of the Allard workgroup for her analysis of relevant case law interpreting pre-nuptial agreements in Michigan.
Therefore, a written Pre-Nuptial Agreement, signed by the parties to the marriage will remain in full force and effect once the marriage takes place. The enforceability of a Pre-Nuptial Agreement requires full and fair disclosure of assets. In Re Estate of Benker 416 Mich 681, 331 NW2d 193 (1982). The Benker case involved the enforceability of a pre-nuptial agreement, in which each party to the agreement waived all statutory inheritance rights in the other’s estate. The agreement provided no written disclosures of the assets of either party. Upon the death of Mr. Benker, his widow challenged the pre-nuptial based on lack of proper disclosure. The Supreme Court upheld the trial court’s setting aside of the Benker pre-nuptial agreement based on the lack of full and fair disclosure. The Benker Court found that public policy supports the enforcement of pre-nuptial agreements where inheritance rights are involved. However, to be enforceable the agreement must:

1. It must be fair, equitable and reasonable in view of the surrounding facts and circumstances.
2. It must be entered into voluntarily by both parties.
3. There must be full and frank disclosure by the parties.
4. The parties must understand his or her rights, as well as the extent of the waiver of their rights.

The Benker court went on to find that the party who is challenging the enforceability of the pre-nuptial agreement bears the burden of proving that it should be set aside. Failure to fully and fairly disclose raises a rebuttable presumption that the agreement should be set-aside. Benker at 699.

The presumption of non-disclosure was properly invoked in this case on the basis of all the facts discussed earlier. We must now address the nature of this presumption and its effect. The presumption of non-disclosure is a rebuttable one. Once the presumption is proper, it is incumbent upon the opposite party to introduce evidence to rebut the presumption.
...We hold: (1) that the burden of proof of breach of fair disclosure falls upon the party charging it, and (2) that under the facts of this case the required proof by the party charging breach of fair disclosure was supported by a rebuttable presumption of non-disclosure. We further find that there were not sufficient facts to rebut this presumption of non-disclosure of assets. Therefore, we hold that the probate court properly held the antenuptial agreement to be invalid.

*Id.* at 699 – 700.

So now that the Supreme Court has formally validated MCL 552.28 and determined that pre-nuptial agreements are enforceable as a matter of public policy. Agreements that incorporate the principles outlined above will be enforced – or will they? The question of enforceability in the context of a divorce action was addressed by the Court of Appeals in the case of *Rinvelt v Rinvelt* 190 MA 372, 475 NW2d 478 (1991). In *Rinvelt* the Court found that a pre-nuptial agreement should be enforced in a divorce proceeding.

The question now before us is whether we should extend these principles to antenuptial agreements that contemplate divorce rather than simply the death of one of the parties. To our knowledge, no Michigan case has specifically held that antenuptial agreements are enforceable in the context of a divorce. We now hold that they are. *Id.* at 379

Further:

Prenuptial agreements, on the other hand, provide such people with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny. Moreover, allowing couples to think through the financial aspects of their marriage beforehand can only foster strength and permanency in that relationship. In this day and age, judicial recognition of prenuptial agreements most likely “encourages rather than discourages marriage.” Citations Omitted, *Id.* at 381

Therefore, the *Rinvelt* Court stated that a pre-marital agreement may be enforced in a divorce proceeding so long as the following factors are properly addressed:
1. Was the agreement obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact?
2. Was the agreement unconscionable when executed?
3. Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

If any one of the factors is present, then the pre-nuptial agreement will not be enforced.

Rinvelt at 381.

Rinvelt introduced the concept that a “change of circumstances” may affect the enforceability of a pre-nuptial agreement. So what about a natural change of circumstances over a period of years? This issue was addressed in Reed v Reed 265 MA 131 (2005). In Reed the court considered whether the length of the marriage and the growth of separate assets could be a change of circumstances. In making its analysis, it determined that a foreseeable change in circumstances did not justify setting aside the terms and conditions of a pre-nuptial agreement.

The Reed Court found the length of marriage is foreseeable. Further that fact that a party's separate assets could grow at different rates and that one party's assets might grow significantly more than the others ("captains of their own financial ships") is a foreseeable event.

So there we have it! Michigan statutorily acknowledges the enforceability of pre-nuptial agreements and so long as there is full and fair disclosure, the agreement is free of fraud, duress, mistake or misrepresentation and the agreement was not unconscionable when signed, the agreement will be enforced, even if there has been a change in circumstances due to length of the marriage and change in value of assets during the marriage right? Wrong! Enter Allard v Allard (On Remand) 318 MA 583, 899 NW2d 420 (2017). The Allard decision on remand set both the estate planning attorneys and the domestic relations attorneys into a flutter to say the least.

The 2017 Allard decision seems to upset the principles of enforceability of pre-nuptial agreements. Determining that since courts in divorce matters exercised equitable powers, the
parties to a pre-marital agreement could not contractually waive their equitable rights. The Allard Court considered the dissolution of a 16 year marriage with minor children. Prior to the marriage, the parties entered into a pre-nuptial agreement, wherein, each party was to retain all rights to their individual property, including all growth of the property, in the event of a divorce. When Mr. Allard filed for divorce after 16 years, his separate assets were valued at approximately $900,000.00 and Mrs. Allard’s separate assets were valued at $90,000.00. The execution of the marital agreement complied with the conditions set out in the Benker and Rinvelt cases. Apparently the extreme growth of Mr. Allard’s estate (though supplemented by gifts and transfers from his parents) was apparently foreseeable as addressed by the Reed court.

In what appears to be an attempt to overcome an unjust result, the 2017 Allard decision determined that the parties to a pre-nuptial agreement cannot by written contract waive the equitable jurisdiction of the court. In particular, the parties cannot contractually waive the ability of the court to apply the equitable principles expressed in MCL 552.23 and 552.401. Specifically, the parties to a pre-nuptial are unable to waive any right to the court’s ability to invade separate property of a spouse, when a court finds that the separate property of the other spouse is insufficient to support that spouse and the minor children. MCL 552.23 states in part:

Sec. 23. (1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

The facts of the Allard case certainly make a case the application of MCL 552.23. It could clearly be argued that give the overall facts and circumstances of the case, an award to Mrs. Allard of $90,000.00 in property was insufficient for the suitable support of her and the children,
particularly in light of the fact that Mr. Allard would receive $900,000.00. However, what is not so clear from the facts is whether or not Mrs. Allard actually contributed to acquisition, improvement or accumulation of the property as contemplated in MCL 552.401 which states:

Sec. 1. The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party. (Emphasis Added)

It does not appear from the facts that Mrs. Allard made any contribution to the acquisition, improvement or accumulation of Mr. Allard’s separate estate. Nevertheless, The Allard Court on remand found:

This matter returns to us on remand from our Supreme Court. Allard v Allard, 499 Mich 932(2016) (Allard II). We have been instructed to consider two issues on remand:“(1) whether parties may waive the trial court’s discretion under MCL 552.23(1) and MCL 552.401 through an antenuptial agreement,” and “(2) if so, whether the parties validly waived MCL 552.23(1) and MCL 552.401 in this case.” Id. We conclude that parties cannot, by antenuptial agreement, deprive a trial court of its equitable discretion under MCL 552.23(1) and MCL 552.401.

And there we have it – nothing like creating uncertainty in a world that craves certainty.

Those of us who engage in the world of estate planning like to create certainty for our clients. We want them to rest assured that once they place their signature on a document, the terms will be enforced, especially, if the client is trying to protect their children and heirs of a prior marriage from the potential side-effects of a subsequent marriage. It is clear that MCL 552.23 and 552.401 are applicable only in the event of a divorce proceeding. Nevertheless, Allard (on Remand) introduces uncertainty to the enforcement of pre-nuptials. What about the situation where a man or woman after a long term marriage ends in death, and shortly thereafter
remarries a much younger person with little or no apparent separate estate of their own. Add to
that the person from the long term marriage, after the death of their spouse uses some of their
deceased spouse estate to purchase a stock similar to Apple in its beginning years. The new
stock is disclosed in the pre-nuptial agreement at its then very low per-share value. When the
subsequent marriage ends in divorce 10 years later that stock as increased in value by more than
100 times. Arguably, the “younger” spouse should not be able to successfully set-aside the pre-
nuptial agreement. But Allard (on Remand) appears to open that door. It may be argued that
Allard only applies to those cases where there are children and child support as factors, one can
only guess what may happened in a situation where one spouse purchases an “Apple” type of
stock with their separate assets.

Will further legislation serve as a fix to Allard? Maybe or more likely maybe not. Let’s
take a look at HB 4751 which has passed the Michigan House and is being considered by the
Michigan Senate. The text of HB 4751 as passed by the House appears below.

**HB-4751, As Passed House, October 26, 2017**

**SUBSTITUTE FOR**

**HOUSE BILL NO. 4751**

A bill to amend 1981 PA 216, entitled
"An act to provide for the rights and liabilities of married women
with respect to certain real and personal property; to abrogate the
common law disabilities of married women with respect to certain
contracts; to prescribe the payment and satisfaction of judgments
rendered upon certain written contracts; and to repeal certain acts
and parts of acts," by amending section 8 (MCL 557.28).

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**
Sec. 8. (1) A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place.

(2) A CONTRACT DESCRIBED IN SUBSECTION (1) IS UNENFORCEABLE IF A PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT PROVES EITHER OF THE FOLLOWING:

(A) THE PARTIES' CONSENT TO THE CONTRACT WAS THE RESULT OF FRAUD, DURESS, OR MISTAKE.
(B) BEFORE SIGNING THE CONTRACT, THE PARTY DID NOT RECEIVE ADEQUATE FINANCIAL DISCLOSURE, INCLUDING DISCLOSURE OF ASSETS IN A DOMESTIC ASSET PROTECTION TRUST. A PARTY HAS ADEQUATE FINANCIAL DISCLOSURE UNDER THIS SUBDIVISION IF 1 OF THE FOLLOWING APPLIES:
(i) THE PARTY RECEIVES A REASONABLY ACCURATE DESCRIPTION AND GOOD-FAITH ESTIMATE OF VALUE OF THE PROPERTY, LIABILITIES, AND INCOME OF THE OTHER PARTY.
(ii) THE PARTY EXPRESSLY WAIVES THE RIGHT TO FINANCIAL DISCLOSURE BEYOND THE DISCLOSURE PROVIDED.
(iii) THE PARTY HAS ADEQUATE KNOWLEDGE OR A REASONABLE BASIS FOR HAVING ADEQUATE KNOWLEDGE OF THE INFORMATION DESCRIBED IN SUBPARAGRAPH (i)
(3) A COURT MAY REFUSE TO ENFORCE A TERM OF THE CONTRACT OR THE ENTIRE CONTRACT IF, IN THE CONTEXT OF THE CONTRACT TAKEN AS A WHOLE, EITHER OF THE FOLLOWING APPLIES:
(A) THE TERM WAS UNCONSCIONABLE AT THE TIME THE CONTRACT WAS SIGNED.
(B) ENFORCEMENT OF THE TERM MAY BE UNCONSCIONABLE FOR A PARTY AT THE TIME OF ENFORCEMENT BECAUSE OF A MATERIAL CHANGE IN CIRCUMSTANCES ARISING AFTER THE CONTRACT WAS SIGNED THAT WAS NOT REASONABLY FORESEEABLE AT THE TIME THE CONTRACT WAS SIGNED.
(4) THE COURT SHALL DECIDE THE QUESTION OF UNCONSCIONABILITY UNDER SUBSECTION (3) AS A MATTER OF LAW.
(5) THIS SECTION APPLIES TO CONTRACTS RELATING TO PROPERTY MADE BETWEEN PERSONS IN CONTEMPLATION OF MARRIAGE MADE BEFORE AND AFTER THE EFFECTIVE DATE OF THE 2017 AMENDATORY ACT THAT AMENDED THIS SECTION.

This amendatory act takes effect 90 days after the date it is enacted into law.

It appears to have been introduced in the Senate, but to-date no further action has been taken.

The Senate substitute bill is attached at the end of these materials as Exhibit 1. There does not appear to be any difference between the two bills.
This proposal does not appear to make any substantial changes in Michigan law – either the compilation of case-law or statutory law on this subject. While it appears to restrict the ability of a court in a divorce proceeding to set aside a pre-nuptial agreement to those reasons enumerated, it does not address the application of MCL 552.23 and 552.401. It does not usurp the Equitable Powers of the court in making a property division in a divorce action. The Equitable Powers granted to the court in 552.23 and .401 would still be available to the court.

Attached to the end of these materials is the full text of the Uniform Premarital and Marital Agreements Act. It is Exhibit 2. The attachment contains the analysis and commentary of the committee. The salient parts of the Uniform Act are further addressed below.

The Uniform Act applies to both pre-marital and post-marital agreements. See Section 2 of the Uniform Act which includes a.) amendments to an agreement (subsection 1) ; b.) agreements entered into after the marriage (subsection 2) and c: pre-marital agreements (subsection 5). Subsection 2 of Section 2 would appear to codify the enforceability of a post-nuptial agreement, even if the parties are still residing together. The codification of a post-nuptial agreement would be an improvement over the status of Michigan law which calls into question the enforceability of a post-nuptial agreement entered into while parties are living together and negotiating an amicable divorce settlement.

Section 10 of the Uniform Act specifies what matters cannot be addressed or defined in a martial agreement. Specifically, a marital agreement cannot “adversely affect childrens’ rights to support. Nor can an agreement restrict the rights of a party who is the victim of domestic violence. It would appear that section 10 codifies that portion of Allard that nullified the pre-nuptial agreement because the agreement would otherwise affect the support of the children.
The Uniform Act would appear to limit Allard to those situations where there are minor children whose support would be otherwise affected by the marital agreement.

Section 9 of the Uniform Act which is titled “Enforcement” defines those acts, inclusions or circumstances which would permit a court to deny enforcement of a marital agreement. On close examination, it appears to expand those circumstances already defined in Michigan statutory and case law. Section 9 expands reasons to deny enforceability to specifically include four other factors besides duress and failure to fully disclose. The lack or failure of independent counsel – and the definition of what is the lack of or failure to have the ability to have independent counsel is codified in the Uniform Act. While the right to independent counsel may be assumed as a condition required to support enforceability in Benker, supra and Rinvelt, supra it is not specified. The lack of independent counsel has certainly been considered by trial courts in determining the enforceability of a pre-marital agreement. It has not been otherwise codified in Michigan law.

Similarly, while Benker, supra addresses the concept of a knowing waiver of rights, there is no definition as to what that means. The Uniform Act defines the language that must be included in a waiver of rights. While the exact language of the Uniform Act may not be required, a waiver which does not substantially comply with the acts waiver requirements may very jeopardize enforceability of the agreement. Failure to have the appropriate acknowledgement of waiver of rights will result in non-enforceability of the marital agreement under the terms of the Uniform Act.

Section 9 (e) of the Uniform Act provides if a party to a marital agreement would require some state assistance upon separation or divorce, that party may ask the court to disregard that part of a marital agreement that waives or modifies spousal support. Therefore, even if, a marital
agreement contains language substantially complying with the Staple v Staple language, a court can disregard the language if one of the party’s would qualify for state assistance. This provision could certainly be a trap for the unwary. It may open the door for interpretation of and setting aside a pre or post marital agreement years after the entry of a judgment of divorce.

Finally, Section 9 of the Uniform Act introduces the concept of “undue hardship”. Specifically Subsection (f)(2) gives discretionary authority to the court to find the agreement unenforceable if it would result in “undue hardship because of a change in circumstances”. This section arguably codifies and perhaps expands the principles set forth in Allard III. It appears to expand the principle to those situations where there are no children to consider for support. Therefore, had the Allard’s had no children Mrs. Allard likely would have received the same result under the Uniform Act.

Section 11 of the Uniform Act introduces the concept of “equitable defenses limiting the time for enforcement” see page 19 of the Uniform Act. To date no Michigan cases have challenged a pre-nuptial agreement on the basis that it is just “too old”. Section 11 appears to allow just such a challenge. Specifically Section 11 states:

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

Had this section been a part of Michigan statutory law when the first Allard case was decided by the Court of Appeals, there may have been a different outcome. The court could have determined that because of laches and/or estoppel Mr. Allard was precluded from enforcing the pre-nuptial contract. His behavior of routinely accepting gifts from his parents and expanding his business to multiple businesses during the term of the marriage may have estopped him from enforcement of the original terms of the pre-nuptial agreement.
The principles of Equity and Law are made a part of the Uniform Act. Section 5 of the Uniform Act states: “PRINCIPLES OF LAW AND EQUITY. Unless displaced by a provision of this [act], principles of law and equity supplement this [act].” Uniform Martial Agreements Act, p. 8. The commentary that follows clearly indicates that rather than upending settled case and statutory law, this act is intended to incorporate the established law of the jurisdiction adopting the uniform act.

In the event that HB 4751 is adopted by the Michigan Senate and the Governor signs it into law, Michigan will have some statutorily codified law regarding the enforceability of pre-marital agreements. Is HB 4751 better than what we have now? Is HB 4751 better than the Uniform Martial Agreement Act? The author will let the reader make their own decision. It appears the Uniform Marital Agreement is far more defined and answers many more questions that may arise in enforcement of marital agreements, than does HB 4751.

In any event, if HB 4751 becomes law, there will undoubtedly be ample opportunity for trial counsel and appellate counsel to explore and define its application. If all or parts of the Uniform Marital Agreement Act were to become law in Michigan, the effect would likely affect the contents of and the execution of a Michigan Pre-Nuptial and Post-Nuptial Agreement.
UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 2, 2013
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The Uniform Law Commission (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 121st year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

Prefatory Note

The purpose of this act is to bring clarity and consistency across a range of agreements between spouses and those who are about to become spouses. The focus is on agreements that purport to modify or waive rights that would otherwise arise at the time of the dissolution of the marriage or the death of one of the spouses.

Forty years ago, state courts generally refused to enforce premarital agreements that altered the parties’ right at divorce, on the basis that such agreements were attempts to alter the terms of a status (marriage) or because they had the effect of encouraging divorce (at least for the party who would have to pay less in alimony or give up less in the division of property). Over the course of the 1970s and 1980s, nearly every state changed its law, and currently every state allows at least some divorce-focused premarital agreements to be enforced, though the standards for regulating those agreements vary greatly from state to state. The law relating to premarital agreements affecting the parties’ rights at the death of a spouse had historically been less hostile than the treatment of such agreements affecting the right of the parties at divorce. The ability of a wife to waive her dower rights goes back to the 16th century English Statute of Uses. 27 Hen. VIII, c. 10, § 6 (1535). Other countries have also moved towards greater legal recognition of premarital agreements and marital agreements, though there remains a great diversity of approaches internationally. See Jens M. Scherpe (ed.), Marital Agreements and Private Autonomy in Comparative Perspective (Hart Publishing, 2012); see also Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds.), The Future of Family Property in Europe (Intersentia, 2011).

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by 26 jurisdictions, with roughly half of those jurisdictions making significant amendments, either at the time of enactment or at a later date. See Amberlynn Curry, Comment, “The Uniform Premarital Agreement Act and Its Variations throughout the States,” 23 Journal of the American Academy of Matrimonial Lawyers 355 (2010). Over the years, commentators have offered a variety of criticisms of that Act, many arguing that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties. E.g., Barbara Ann Atwood, “Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act,” 19 Journal of Legislation 127 (1993); Gail Frommer Brod, “Premarital Agreements and Gender Justice,” 9 Yale Journal of Law & Feminism 229 (1994); J. Thomas Oldham, “With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades,” 19 Duke Journal of Gender and the Law 83 (2011).

Whatever its faults, the Uniform Premarital Agreement Act has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage.

The situation regarding marital agreements has been far less settled and consistent. Some states have neither case law nor legislation, while the remaining states have created a wide range of approaches. Additionally, other legal standards relating to the waiver of rights at the death of the other spouse, by either premarital agreements or marital agreements, seem to impose somewhat different requirements. See, e.g., Uniform Probate Code, Section 2-213; Restatement
(Third) of Property, Section 9.4 (2003); Model Marital Property Act, Section 10 (1983); and Internal Revenue Code, Sections 401 and 417 (stating when a surviving spouse’s waiver of rights to a qualified plan would be valid).

The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other. Because a significant minority of states authorizes some form of fairness review based on the parties’ circumstances at the time the agreement is to be enforced, a bracketed provision in Section 9(f) offers the option of refusing enforcement based on a finding of substantial hardship at the time of enforcement. And because a few states put the burden of proof on the party seeking enforcement of marital (and, more rarely, premarital) agreements, a Legislative Note after Section 9 suggests alternative language to reflect that burden of proof.

This act chooses to treat premarital agreements and marital agreements under the same set of principles and requirements. A number of states currently treat premarital agreements and marital agreements under different legal standards, with higher burdens on those who wish to enforce marital agreements. See, e.g., Sean Hannon Williams, “Postnuptial Agreements,” 2007 Wisconsin Law Review 827, 838-845; Brian H. Bix, “The ALI Principles and Agreements: Seeking a Balance Between Status and Contract,” in Reconceiving the Family: Critical Reflections on the American Law Institute’s Principles of the Law of Family Dissolution (Robin Fretwell Wilson, ed., Cambridge University Press, 2006), pp. 372-391, at pp. 382-387; Barbara A. Atwood, “Marital Contracts and the Meaning of Marriage,” 54 Arizona Law Review 11 (2012). However, this act follows the American Law Institute, in its Principles of the Law of Family Dissolution (2002), in treating the two types of agreements under the same set of standards. While this act, like the American Law Institute’s Principles before it, recognizes that different sorts of risks may predominate in the different transaction types – risks of unfairness based on bounded rationality and changed circumstances for premarital agreements, and risks of duress and undue influence for marital agreements (Principles of the Law of Family Dissolution, Section 7.01, comment e, at pp. 953-954) – this act shares the American Law Institute’s view that the resources available through this act and common law principles are sufficient to deal with the likely problems related to either type of transaction.
UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

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

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

(A) spousal support;

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

(C) responsibility for a liability;

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

(E) award and allocation of attorney’s fees and costs.

(5) “Premarital agreement” means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at
separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.

(6) "Property" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.

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

(8) "Sign" means with present intent to authenticate or adopt a record:
   
   (A) to execute or adopt a tangible symbol; or
   
   (B) to attach to or logically associate with the record an electronic symbol, sound, or process.

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

Legislative Note: If your state recognizes nonmarital relationships, such as civil unions and domestic partnerships, consider whether these definitions need to be amended.

Comment

The definition of "amendment" includes "amendments" of agreements, narrowly understood, and also revocations.

The definitions of "premarital agreement" and "marital agreement" are part of the effort to clarify that this act is not intended to cover cohabitation agreements, separation agreements, or conventional day-to-day commercial transactions between spouses. Marital agreements and separation agreements (sometimes called "marital settlement agreements") are usually distinguished based on whether the couple at the time of the agreement intends for their marriage to continue, on the one hand, or whether a court-decree separation, permanent physical separation or dissolution of the marriage is imminent or planned, on the other. To avoid deception of the other party or the court regarding intentions, one jurisdiction refuses to enforce a marital agreement if it is quickly followed by an action for legal separation or dissolution of the marriage. See Minnesota Statutes § 519.11, subd. 1a(d)(marital agreement presumed to be
unenforceable if separation or dissolution sought within two years; in such a case, enforcement is allowed only if the spouse seeking enforcement proves that the agreement was fair and equitable).

While most premarital agreements and marital agreements will be stand-alone documents, a fragment of a writing that deals primarily with other topics could also constitute a premarital agreement or marital agreement for the purpose of this act.

With premarital agreements, the nature and timing of the agreement (between parties who are about to marry) reduces the danger that the act’s language will accidentally include types of transactions that are not thought of as premarital agreements and should not be treated as premarital agreements (but see the discussion of Mahr agreements, below). There is a greater concern with marital agreements, since (a) spouses enter many otherwise enforceable financial transactions, most of which are not problematic and should not be made subject to special procedural or substantive constraints; and (b) there are significant questions about how to deal with agreements whose primary intention may not be to waive one spouse’s rights at dissolution of the marriage or the other spouse’s death, but where the agreement nonetheless has that effect. In the terms of another uniform act, the purpose of the definition of “marital agreement” is to exclude from coverage “acts and events that have significance apart from their effect” upon rights at dissolution of the marriage or at the death of one of the spouses. See Uniform Probate Code, Section 2-512 (“Events of Independent Significance”). Such transactions might include the creation of joint and several liability through real estate mortgages, motor vehicle financing agreements, joint lines of credit, overdraft protection, loan guaranties, joint income tax returns, creation of joint property ownership with a right of survivorship, joint property with payment-on-death provisions or transfer-on-death provisions, durable power of attorney or medical power of attorney, buy-sell agreements, agreements regarding the valuation of property, the placing of marital property into an irrevocable trust for a child, etc.

The shorter definition of “premarital agreement” used by the Uniform Premarital Agreement Act (in its Section 1(1): “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage”) had the disadvantage of encompassing agreements that were entered by couples about to marry but that were not intended to affect the parties’ existing legal rights and obligations upon divorce or death, e.g., Islamic marriage contracts, with their deferred Mahr payment provisions. See Nathan B. Oman, “Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization,” 45 Wake Forest Law Review 579 (2010); Brian H. Bix, “Mahr Agreements: Contracting in the Shadow of Family Law (and Religious Law) – A Comment on Oman,” 1 Wake Forest Law Review Online 61 (2011), available at http://wakeforestlawreview.com/.

The definition of “property” is adapted from the Uniform Trust Code, Section 103(12).

This act does not define “separation agreement,” leaving this to the understanding, rules, and practices of the states, noting that the practices do vary from state to state (e.g., that in many states separation agreements require judicial approval while in other states they can be valid without judicial approval).
A premarital agreement or marital agreement may include terms not in violation of public policy of this state, including terms relating to: (1) rights of either or both spouses to interests in a trust, inheritance, devise, gift, and expectancy created by a third party; (2) appointment of fiduciary, guardian, conservator, personal representative, or agent for person or property; (3) a tax matter; (4) the method for resolving a dispute arising under the agreement; (5) choice of law governing validity, enforceability, interpretation, and construction of the agreement; or (6) formalities required to amend the agreement in addition to those required by this act.

SECTION 3. SCOPE.

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

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

(c) This [act] does not apply to:

(1) an agreement between spouses which affirms, modifies, or waives a marital right or obligation and requires court approval to become effective; or

(2) an agreement between spouses who intend to obtain a marital dissolution or court-decreed separation which resolves their marital rights or obligations and is signed when a proceeding for marital dissolution or court-decreed separation is anticipated or pending.

(d) This [act] does not affect adversely the rights of a bona fide purchaser for value to the extent that this [act] applies to a waiver of a marital right or obligation in a transfer or conveyance of property by a spouse to a third party.

Comment

This section distinguishes marital agreements, which are subject to this act, both from agreements that parties might enter at a time when they intend to obtain a divorce or legal separation or to live permanently apart, and also from the conventional transfers of property in which state law requires one or both spouses waive rights that would otherwise accrue at the death of the other spouse.

Subsection (c) is meant to exclude “separation agreements” and “marital settlement agreements” from the scope of the act. These tend to have their own established standards for
enforcement. The reference to “a waiver of a marital right or obligation” in Subsection (d) would include the release of dower, curtesy, or homestead rights that often accompanies the conveyance of real property. In general, the enforceability of agreements in Subsections (b), (c) and (d) is left to other law in the state.

This section is not meant to restrict third-party beneficiary standing where it would otherwise apply.

SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:

(1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or

(2) absent an effective designation described in paragraph (1), by the law of this state, including the choice-of-law rules of this state.

Comment

This section is adapted from the Uniform Trust Code, Section 107. It is consistent with Uniform Premarital Agreement Act, Section 3(a)(7), but is broader in scope. The section reflects traditional conflict of laws and choice of law principles relating to the enforcement of contracts. See Restatement (Second) of Conflict of Laws, Sections 186-188 (1971). Section 187(2)(a) of that Restatement expressly states that the parties’ choice of law is not to be enforced if “the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice.” Section 187(2)(b) of the same Restatement holds that the parties’ choice of law is not to be enforced if “application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.” The limitation of choice of law provisions to jurisdictions having some connection with the parties or the transaction tracks a similar restriction in the Uniform Commercial Code, which restricts choice of law provisions to states with a reasonable relation to the transaction (this was Section 1-105 under the UCC before the 2001 revisions; and Section 1-301 in the (2001) Revised UCC Article 1).

“Significant relation” and “fundamental public policy” are to be understood under existing state principles relating to conflict of laws, and “contrary to … fundamental public policy” means something more than that the law of the other jurisdiction differs from that of the forum state. See, e.g., International Hotels Corporation v. Golden, 15 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); Capital One Bank v. Fort, 255 P.3d 508, 510-513 (Or. App. 2011) (court refused to apply law under choice of law provision because
contrary to "fundamental public policy" of forum state); Russell J. Weintraub, *Commentary on the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010).

For examples of choice of law and conflict of law principles operating in this area, see, e.g., *Bradley v. Bradley*, 164 P.3d 537, 540-544 (Wyo. 2007) (premarital agreement had choice of law provision selecting Minnesota law; amendment to agreement held invalid because it did not comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91, 95-96 (Vt. 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*, 628 S.E.2d 546, 553-556 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it during short stay in the Virgin Islands before their wedding there; the agreement was held to be covered by Virgin Islands law because there was no clear party intention that Virginia law apply and because Virgin Island law was not contrary to the forum state’s public policy); cf. *Davis v. Miller*, 7 P.3d 1223, 1229-1230 (Kan. 2000) (parties can use choice of law provision to choose the state version of the Uniform Premarital Agreement Act to apply to a marital agreement, even though that Act would otherwise not apply).

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

**Comment**

This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of the *Uniform Commercial Code*, and incorporates the case-law that has developed to interpret and apply those provisions. Because this act contains broad, amorphous defenses to enforcement like "voluntariness" and "unconscionability" (Section 9), there is a significant risk that parties, and even some courts, might assume that other conventional doctrinal contract law defenses are not available because preempted. This section is intended to make clear that common law contract doctrines and principles of equity continue to apply where this act does not displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital agreements and marital agreements based on legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, waiver, etc. For example, a premarital agreement presented to one of the parties for the first time hours before a marriage (where financial commitments have been made and guests have arrived from far away) clearly raises issues of duress, and might be voidable on that ground. Cf. In re *Marriage of Balcof*, 141 Cal.App.4th 1509, 1519-1527, 47 Cal.Rptr.3d 183, 190-196 (2006) (marital agreement held unenforceable on the basis of undue influence and duress); *Bakos v. Bakos*, 950 So.2d 1257, 1259 (Fla. App. 2007) (affirming trial court conclusion that premarital agreement was voidable for undue influence).

The application of doctrines like duress varies greatly from jurisdiction to jurisdiction: e.g., on whether duress can be shown even in the absence of an illegal act, e.g. *Farm Credit Services of Michigan's Heartland v. Weldon*, 591 N.W.2d 438, 447 (Mich. App. 1998) (illegal act required for claim of duress under Michigan law), and whether the standard of duress should be applied differently in the context of domestic agreements compared to commercial agreements. This act is not intended to change state law and principles relating to these matters.
Rules of construction, including rules of severability of provisions, are also to be taken from state rules and principles. \textit{Cf.} \textit{Rivera v. Rivera}, 243 P.3d 1148, 1155 (N.M. App. 2010), \textit{cert. denied}, 243 P.3d 1146 (N.M. 2010) (premarital agreement that improperly waived the right to alimony and that contained no severability clause deemed invalid in its entirety); \textit{Sanford v. Sanford}, 694 N.W.2d 283, 291-294 (S.D. 2005) (applying state principles of severability to conclude that invalid alimony waiver in premarital agreement severable from valid provisions relating to property division); \textit{Bratton v. Bratton}, 136 S.W.3d 595, 602 (Tenn. 2004) (property division provision in marital agreement not severable from provision waiving alimony). Additionally, state rules and principles will govern the ability of parties to include elevated formalities for the revocation or amendment of their agreements.

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

\textbf{Comment}

This section is adapted from \textit{Uniform Premarital Agreement Act}, Section 2. Almost all jurisdictions currently require premarital agreements to be in writing. A small number of courts have indicated that an oral premarital agreement might be enforced based on partial performance, \textit{e.g.}, \textit{In re Marriage of Benson}, 7 Cal. Rptr. 3d 905 (App. 2003), \textit{rev’d}, 36 Cal.4th 1096, 116 P.3d 1152 (Cal. 2005) (ultimately holding that the partial performance exception to statute of frauds did not apply to transmutation agreement), and at least one jurisdiction has held that a premarital agreement could be amended or rescinded by actions alone. \textit{Marriage of Baxter}, 911 P.2d 343, 345-346 (Or. App. 1996), review denied, 918 P.2d 847 (Or. 1996). One court, in an unpublished opinion, enforced an oral agreement that a written premarital agreement would become void upon the birth of a child to the couple. \textit{Ehlert v. Ehlert}, No. 354292, 1997 WL 53346 (Conn. Super. 1997). While this act affirms the traditional rule that formation, amendment, and revocation of premarital agreements and marital agreements need to be done through signed written documents, states may obviously construe their own equitable doctrines (application through Section 5) to warrant enforcement or modification without a writing in exceptional cases.

It is the consensus view of jurisdictions and commentators that premarital agreements are or should be enforceable without (additional) consideration (the agreement to marry or the act of marrying is often treated as sufficient consideration). Additionally, most modern approaches to premarital agreements have by-passed the consideration requirement entirely: \textit{e.g.}, \textit{Uniform Premarital Agreement Act}, Section 2; American Law Institute, \textit{Principles of the Law of Family Dissolution}, Section 7.01(4) (2002); \textit{Restatement (Third) of Property}, Section 9.4(a) (2003).

In some states, courts have raised concerns relating to the consideration for marital agreements. The view of this act is that marital agreements, otherwise valid, should not be made unenforceable on the basis of lack of consideration. As the American Law Institute wrote on the distinction (not requiring additional consideration for enforcing premarital agreements, but
requiring it for marital agreements). “This distinction is not persuasive in the context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the marriage at any time.” *Principles of the Law of Family Dissolution*, Section 7.01, Comment c, at 947-948 (2002). The consideration doctrine is sometimes used as an indirect way to ensure minimal fairness in the agreement, and the seriousness of the parties. See, e.g., Lon L. Fuller, “Consideration and Form,” 41 *Columbia Law Review* 799 (1941). Those concerns for marital agreements are met in this act directly by other provisions. On the conclusion that consideration should not be required for marital agreements, see also *Restatement (Third) of Property*, Section 9.4(a) (2003), and *Model Marital Property Act*, Section 10 (1983).

**SECTION 7. WHEN AGREEMENT EFFECTIVE.** A premarital agreement is effective on marriage. A marital agreement is effective on signing by both parties.

**Comment**

This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The effective date of an agreement (premarital agreement at marriage, marital agreement at signing) does not foreclose the parties from agreeing that certain provisions within the agreement will not go into force until a later time, or will go out of force at that later time. For example, a premarital agreement may grant a spouse additional rights should the marriage last a specified number of years.

Parties sometimes enter agreements that are part cohabitation agreement and part premarital agreement. This act deals only with the provisions triggered by marriage, without undermining whatever enforceability the cohabitation agreement has during the period of cohabitation.

**SECTION 8. VOID MARRIAGE.** If a marriage is determined to be void, a premarital agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable result.

**Comment**

This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example, if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but, unknown to Joan, John was still legally married to Martha, the marriage between John and Joan would be void, and whether their premarital agreement should be enforced would be left to the discretion of the court, taking into account whether enforcement in whole or in part would be required to avoid an inequitable result.

This section is intended to apply primarily to cases where a marriage is void due to the pre-existing marriage of one of the partners. Situations where one partner is seeking a civil annulment (see Section 2(3)) relating to some claims of misrepresentation or mutual mistake
would usually be better left to the main enforcement provisions of Sections 9 and 10.

SECTION 9. ENFORCEMENT.

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

(1) the party’s consent to the agreement was involuntary or the result of duress;

(2) the party did not have access to independent legal representation under subsection (b);

(3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or

(4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

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

(1) before signing a premarital or marital agreement, the party has a reasonable time to:

(A) decide whether to retain a lawyer to provide independent legal representation; and

(B) locate a lawyer to provide independent legal representation, obtain the lawyer’s advice, and consider the advice provided; and

(2) the other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.
(c) A notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following, as applicable to the premarital agreement or marital agreement:

"If you sign this agreement, you may be:

Giving up your right to be supported by the person you are marrying or to whom you are married.

Giving up your right to ownership or control of money and property.

Agreeing to pay bills and debts of the person you are marrying or to whom you are married.

Giving up your right to money and property if your marriage ends or the person to whom you are married dies.

Giving up your right to have your legal fees paid."

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

(1) receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;

(2) expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or

(3) has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in paragraph (1).

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

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

[(1)] the term was unconscionable at the time of signing; or

(2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.

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

Legislative Note: Section 9(a) places the burden of proof on the party challenging a premarital agreement or a marital agreement. Amendments are required if your state wants to (1) differentiate between the two categories of agreements and place the burden of proof on a party seeking to enforce a marital agreement, or (2) place the burden of proof on a party seeking to enforce either a premarital agreement or marital agreement.

If your state wants to permit review for “substantial hardship” caused by a premarital agreement or marital agreement at the time of enforcement, Section 9(f), including the bracketed language, should be enacted.

Comment

This section is adapted from Uniform Premarital Agreement Act, Section 6. While this section gives a number of defenses to the enforcement of premarital agreements and marital agreements, other defenses grounded in the principles of law and equity also are available. See Section 5.

The use of the phrase “involuntary or the result of duress” in Subsection (a)(1) is not meant to change the law. There is significant and quite divergent caselaw that has developed under the “voluntariness” standard of the Uniform Premarital Agreement Act and related law – e.g., compare Marriage of Bernard, 204 P.3d 907, 910-913 (Wash. 2009) (finding agreement “involuntary” when significantly revised version of premarital agreement was presented three days before the wedding) and Peters-Riemers v. Riemers, 644 N.W.2d 197, 205-207 (N.D. 2002) (agreement presented three days before wedding found to be “involuntary”; court also emphasized absence of independent counsel and adequate financial disclosure) with Brown v. Brown, No. 2050748, 19 So.3d 920 (Table) (Ala. App. 2007) (agreement presented day before wedding; court held assent to be “voluntary”), aff’d sub. nom Ex parte Brown, 26 So.3d 1222, 1225-1228 (Ala. 2009) and Binek v. Binek, 673 N.W.2d 594, 597-598 (N.D. 2004) (agreement sufficiently “voluntary” to be enforceable despite being presented two days before the wedding); see also Mamot v. Mamot, 813 N.W.2d 440, 447 (Neb. 2012) (summarizing five-factor test many
courts use to evaluate “voluntariness” under the UPAA); see generally Judith T. Younger, “Lovers’ Contracts in the Courts: Forsaking the Minimal Decencies,” 13 William & Mary Journal of Women and the Law 349, 359-400 (2007) (summarizing the divergent interpretations of “voluntary” and related concepts under the UPAA); Oldham, “With All My Worldly Goods,” supra, at 88-99 (same). This act is not intended either to endorse or override any of those decisions. One factor that courts should certainly consider: the presence of domestic violence would be of obvious relevance to any conclusion about whether a party’s consent to an agreement was “involuntary or the result of duress.”

The requirement of “access to independent counsel” in Subsections (a)(2) and (b) represents the view that representation by independent counsel is crucial for a party waiving important legal rights. The act stops short of requiring representation for an agreement to be enforceable, cf. California Family Code § 1612(c) (restrictions on spousal support allowed only if the party waiving rights consulted with independent counsel); California Probate Code § 143(a) (waiver of rights at death of other spouse unenforceable unless the party waiving was represented by independent counsel); Ware v. Ware, 687 S.E.2d 382, 387-391 (W. Va. 2009) (access to independent counsel required, and presumption of validity for premarital agreement available only where party challenging the agreement actually consulted with independent counsel). When a party has an obligation to make funds available for the other party to retain a lawyer, under Subsection (b)(2), this refers to the cost of a lawyer competent in this area of law, not necessarily the funds needed to retain as good or as many lawyers as the first party may have.

The notice of waiver of rights of Subsections (a)(3) and (c) is adapted from the Restatement (Third) of Property, Section 9.4(c)(3) (2003), and it is also similar in purpose to California Family Code §1615(c)(3). It creates a safe harbor when dealing with unrepresented parties by use of the applicable designated warning language of Subsection (c), or language substantially similar, but also allows enforcement where there has been an explanation in plain language of the rights and duties being modified or waived by the agreement.

The requirement of reasonable financial disclosure of Subsection (a)(4) and (d) pertains only to assets of which the party knows or reasonably should know. There will be occasions where the valuation of an asset can only be approximate, or may be entirely unknown, and this can and should be noted as part of a reasonable disclosure. Disclosure will qualify as “reasonably accurate” even if a value is approximate or difficult to determine, and even if there are minor inaccuracies. As the Connecticut Supreme Court stated, after reviewing cases from many jurisdictions on the comparable standard of “fair and reasonable disclosure,” “[t]he overwhelming majority of jurisdictions that apply this standard do not require financial disclosure to be exact or precise. ... [The standard] requires each contracting party to provide the other with a general approximation of their income, assets and liabilities....” Friezo v. Friezo, 914 A.2d 533, 549, 550 (Conn. 2007). Under Subsection (d)(1), an estimate of value of property, liabilities, and income made in good faith would satisfy this act even if it were later found to be inaccurate.

Some commentators have urged that a waiver of the right of financial disclosure (or the right of financial disclosure beyond what has already been disclosed) be valid only if the waiver were signed after receiving legal advice. The argument is that it is too easy to persuade an
unrepresented party to sign or initial a waiver provision, and that the party waiving that right would then likely be ignorant of the magnitude of what was being given up. Even when notified in the abstract of the rights being given up, it would make a great deal of difference if the party thinks that what was being given up was a claim to a portion of $80,000, when in fact what was being given up was a claim to a portion of $80,000,000. However, this act follows the current consensus among the states in not requiring legal representation for a waiver. One reason for not requiring legal advice is that this might effectively require legal representation for all premarital agreements and marital agreements. Under a requirement of legal representation, parties entering agreements might reasonably worry that even if there were significant disclosure, it would always be open to the other party at the time of enforcement to challenge the agreement on the basis that the disclosure was not sufficient, and that any waiver of disclosure beyond the amount given was invalid because of a lack of legal representation. In general, there was a concern that a requirement of legal representation would create an invitation to strategic behavior and unnecessary litigation.

“Conspicuously displayed” in Subsection (c) follows the language and standard of Uniform Commercial Code § 1-201(10), and incorporates the case-law regarding what counts as “conspicuous.”

Reference in Subsection (d)(3) to “adequate knowledge” includes at least approximate knowledge of the value of the property, liabilities, and income in question.

Subsection (e) as adapted from the Uniform Premarital Agreement Act, Section 6(b). Other jurisdictions have in the past chosen even more significant protections for vulnerable parties. See, e.g., N.M. Stat. § 40-3A-4(B) (premarital agreement may not affect spouse’s right to support); Matter of Estate of Spurgeon, 572 N.W.2d 595, 599 (Iowa 1998) (widow’s spousal allowance could be awarded, even in the face of express provision in premarital agreement waiving that right); In re Estate of Thompson, No. 11-0940, 812 N.W.2d 726 (Table), 2012 WL 469985 (Iowa App. 2012) (same); Hall v. Hall, 4 So.3d 254, 256-257 (La. App. 2009), writ denied, 9 So.3d 166 (La. 2009) (waiver of interim support in premarital agreement unenforceable as contrary to public policy). This act attempts to give vulnerable parties significant procedural and substantive protections (protections far beyond what was given in the original Uniform Premarital Agreement Act), while maintaining an appropriate balance between such protection and freedom of contract.

The reference in Subsection (f) to the unconscionability of (or substantial hardship caused by) a term is meant to allow a court to strike particular provisions of the agreement while enforcing the remainder of the agreement – consistent with the normal principles of severability in that state (see Section 5 and its commentary). However, this language is not meant to prevent a court from concluding that the agreement was unconscionable as a whole, and to refuse enforcement to the entire agreement.

Subsection (f) includes a bracketed provision for states that wish to include a “second look,” considering the fairness of enforcing an agreement relative to the time of enforcement. The suggested standard is one of whether “enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement
was signed.” This language broadly reflects the standard applied in a number of states. E.g., Connecticut Code § 46b-36g(2) (whether premarital agreement was “unconscionable . . . when enforcement is sought”); New Jersey Statutes § 37:2-38(b) (whether premarital agreements was “unconscionable at the time enforcement is sought”); North Dakota Code § 14-03.1-07 ("enforcement of a premarital agreement would be clearly unconscionable"); Ansin v. Craven-Ansin, 929 N.E.2d 955, 964 (Mass. 2010) (“the terms of the [marital] agreement are fair and reasonable ... at the time of divorce”); Bedrick v. Bedrick, 17 A.3d 17, 27 (Conn. 2011) (“the terms of the [marital] agreement are . . . not unconscionable at the time of dissolution”). However, it should be noted that even in such “second look” states, case law invalidating premarital agreements and marital agreements at the time of enforcement almost universally concerns rights at divorce. There is little case law invalidating waivers of rights arising at the death of the other spouse grounded on the unfairness at the time of enforcement.

Among the states that allow challenges based on the circumstances at the time of enforcement, the terminology and the application vary greatly from state to state. Courts characterize the inquiry differently, referring variously to “fairness,” “hardship,” “undue burden,” “substantial injustice” (the term used by the American Law Institute’s Principles of the Law of Family Dissolution § 7.05 (2002)), or just “unconscionability” at the time of enforcement. In determining whether to enforce the agreement or not under this sort of review, courts generally look to a variety of factors, including the duration of the marriage, the purpose of the agreement, the current income and earning capacity of the parties, the parties’ current obligations to children of the marriage and children from prior marriages, the age and health of the parties, the parties’ standard of living during the marriage, each party’s financial and homemaking contributions during the marriage, and the disparity between what the parties would receive under the agreement and what they would likely have received under state law in the absence of an agreement. See Brett R. Turner & Laura W. Morgan, Attacking and Defending Marital Agreements (2nd ed., ABA Section of Family Law, 2012), p. 417. The American Law Institute argued that courts generally were (and should be) more receptive to claims when the marriage had lasted a long time, children had been born to or adopted by the couple, or there had been “a change of circumstances that has a substantial impact on the parties ... [and that] the parties probably did not anticipate either the change, or its impact” at the time the agreement was signed. American Law Institute, Principles of the Law of Family Dissolution § 7.05(2) (2002). One court listed the type of circumstances under which enforcement might be refused as including: “an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a spouse by way of responsibility to children of the parties; marked changes in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse.” Gross v. Gross, 464 N.E.2d 500, 509-510 n.11 (Ohio 1984).

Subsection (g) characterizes questions of unconscionability (or substantial hardship) as questions of law for the court. This follows the treatment of unconscionability in conventional commercial contracts. See UCC § 2-302(1) & Comment 3; Restatement (Second) of Contracts § 208, comment f (1981). This subsection is not intended to establish or modify the standards of review under which such conclusions are considered on appeal under state law.
Waiver or modification of claims relating to a spouse's pension is subject to the constraints of applicable state and federal law, including ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq.). See, e.g., Robins v. Geisel, 666 F.Supp.2d 463, 467-468 (D. N.J. 2009) (wife's premarital agreement waiving her right to any of her husband's separate property did not qualify as a waiver of her spousal rights as beneficiary under ERISA); Strong v. Dubin, 901 N.Y.S.2d 214, 217-220 (N.Y. App. Div. 2010) (waiver in premarital agreement conforms with ERISA waiver requirement and is enforceable).

In contrast to the approach of the act, some jurisdictions put the burden of proof on the party seeking enforcement of an agreement. See, e.g., Randolph v. Randolph, 937 S.W.2d 815, 820-821 (Tenn. 1996) (party seeking to enforce premarital agreement had burden of showing, in general, that other party entered agreement "knowledgeably": in particular, that a full and fair disclosure of assets was given or that it was not necessary due to the other party's independent knowledge); Stancil v. Stancil, No. E2011-00099-COA-R3-CV, 2012 WL 112600 (Tenn. Ct. App., Jan. 13, 2012) (same); In re Estate of Cassidy, 356 S.W.3d 339, 345 (Mo. App. 2011) (parties seeking to enforce waivers of rights at the death of the other spouse have the burden of proving that procedural and substantive requirements were met). The Legislative Note directs a state to amend Subsection (a) appropriately if the state wants to place the burden of proof on the party seeking enforcement of a marital agreement, a premarital agreement, or both. In those jurisdictions, Subsection (a) should provide that the agreement is unenforceable unless the party seeking to enforce the agreement proves each of the required elements.

Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital agreements as compared to premarital agreements. See, e.g., Ansin v. Craven-Ansin, 929 N.E.2d 955, 961-964 (Mass. 2010); Bedrick v. Bedrick, 17 A.3d 17, 23-25 (Conn. 2011). Those jurisdictions view agreements in the midst of marriage as being especially at risk of coercion (the analogue of a "hold up" in a commercial arrangement) or overreaching. Additionally, these conclusions are sometimes based on the view that parties already married are in a fiduciary relationship in a way that parties about to marry, and considering a premarital agreement, are not. Linda J. Ravdin, Premarital Agreements: Drafting and Negotiation (American Bar Association, 2011), pp. 16-18. Also, some jurisdictions have distinguished "reconciliation agreements" entered during marriage with other marital agreements, giving more favorable treatment to reconciliation agreements. See, e.g., Bratton v. Bratton, 136 S.W.3d 595, 599-600 (Tenn. 2004) (summarizing the prior law in Tennessee under which reconciliation agreements were enforceable but other marital agreements were void). Many other jurisdictions and The American Law Institute (in its Principles of the Law of Family Dissolution, Section 7.01(3) & Comment b (2002)) treat marital agreements under the same standards as premarital agreements. This is the approach adopted by this act.

SECTION 10. UNENFORCEABLE TERMS.

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

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

(1) adversely affects a child’s right to support;

(2) limits or restricts a remedy available to a victim of domestic violence under law of this state other than this [act];

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

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

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

Legislative Note: A state may vary the terminology of “custodial responsibility” to reflect the terminology used in the law of this state other than this act.

Comment

This section lists provisions that are not binding on a court (this contrasts with the agreements mentioned in Section 3, where the point was to distinguish agreements whose regulation fell outside this act). They include some provisions (e.g., regarding the parents’ preferences regarding custodial responsibility) that, even though not binding on a court, a court might consider by way of guidance.

There is a long-standing consensus that premarital agreements may not bind a court on matters relating to children: agreements cannot determine custody or visitation, and cannot limit the amount of child support (though an agreed increase of child support may be enforceable). E.g., In re Marriage of Best, 901 N.E.2d 967, 970 (Ill. App. 2009) (“Premarital agreements limiting child support are … improper”), appeal denied, 910 N.E.2d 1126 (Ill. 2009); cf. Pursley v. Pursley, 144 S.W.3d 820, 823-826 (Ky. 2004) (agreement by parties in a separation agreement to child support well in excess of guideline amounts is enforceable; it is not unconscionable or contrary to public policy). The basic point is that parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the best interests of minor children. Subsection (b)(1) applies also to step-children, to whatever extent the state imposes child-support obligation on step-parents.

There is a general consensus in the caselaw that courts will not enforce premarital agreement provisions relating to topics beyond the parties’ financial obligations inter se. And
while some courts have refused to enforce provisions in premarital agreements and marital agreements that regulate (or attach financial penalties to) conduct during the marriage, e.g., Diosdado v. Diosdado, 118 Cal. Rptr.2d 494, 496-497 (Cal. App. 2002) (refusing to enforce provision in agreement imposing financial penalty for infidelity); In re Marriage of Mehren & Dargan, 118 Cal.App.4th 1167, 13 Cal.Rptr.3d 522 (Cal. App. 2004) (refusing to enforce provision that penalized husband’s drug use by transfer of property); see also Brett R. Turner and Laura W. Morgan, Attacking and Defending Marital Agreements 379 (2nd ed., ABA Section on Family Law, 2012) (“It has been generally held that antenuptial agreements attempting to set the terms of behavior during the marriage are not enforceable” (footnote omitted)), this act does not expressly deal with such provisions, in part because a few courts have chosen to enforce premarital agreements relating to one type of marital conduct: parties’ cooperating in obtaining religious divorces or agreeing to appear before a religious arbitration board. E.g., Avitzur v. Avitzur, 446 N.E.2d 136, 138-139 (N.Y. 1983) (holding enforceable religious premarital agreement term requiring parties to appear before religious tribunal and accept its decision regarding a religious divorce). Also, while there appear to be scattered cases in the distinctly different context of separation agreements where a court has enforced the parties’ agreement to avoid fault grounds for divorce, e.g., Massar v. Massar, 652 A.2d 219, 221-223 (N.J. App. Div. 1994); cf. Eason v. Eason, 682 S.E.2d 804, 806-808 (S.C. 2009) (agreement not to use adultery as defense to alimony claim enforceable); see generally Linda J. Ravdin, Premarital Agreements: Drafting and Negotiation (ABA, 2011), p. 111 (“In some fault states, courts may enforce a provision [in a premarital agreement] that waives fault”), there appears to be no case law enforcing an agreement to avoid no-fault grounds. This act follows the position of the American Law Institute (Principles of the Law of Family Dissolution, Section 7.08(1) (2002)), that agreements affecting divorce courts in any way should not be enforceable.

It is common to include escalator clauses and sunset provision in premarital agreements and marital agreements, making parties’ property rights vary with the length of the marriage. Cf. Peterson v. Sykes-Peterson, 37 A.3d 173, 177-178 (Conn. App. 2012), cert. denied, 42 A.3d 390 (Conn. 2012) (rejecting argument that sunset provision in premarital agreement is unenforceable because contrary to public policy). Subsection (b)(4), which makes provisions unenforceable that penalize one party’s initiating an action that leads to the dissolution of a marriage, does not cover such escalator clauses. Additionally, nothing in this provision is intended to affect the rights of parties who enter valid covenant marriages in states that make that alternative form of marriage available.

Section 10 does not purport to list all the types of provisions that are unenforceable. Other provisions which are contrary to public policy would also be unenforceable. See Section 5.

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

This Section is adapted from Uniform Premarital Agreement Act, Section 8. As the
Comment to that Section stated: “In order to avoid the potentially disruptive effect of
compelling litigation between the spouses in order to escape the running of an applicable statute
of limitations, Section 8 tolls any applicable statute during the marriage of the parties ....
However, a party is not completely free to sit on his or her rights because the section does
preserve certain equitable defenses.”

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In
applying and construing this uniform act, consideration must be given to the need to promote
uniformity of the law with respect to its subject matter among states that enact it.

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

[SECTION 14. REPEALS; CONFORMING AMENDMENTS.

(a) [Uniform Premarital Agreement Act] is repealed.

(b) [Uniform Probate Code Section 2-213 (Waiver of Right to Elect and of Other Rights)]
is repealed.

(c) [.. . .]

SECTION 15. EFFECTIVE DATE. This [act] takes effect ....
To: Probate and Estate Planning Council  
From: Kathleen Goetsch  
Date: 3/15/2018  
Re: Outreach Committee Chair’s Report

I am happy to report that we have sold substantially all of the pamphlets which council paid for printing in 2016. Pamphlets were sold at the 2016 Annual Probate and Estate Planning Institute - at Grand Traverse and in Plymouth.

Pamphlets were also sold in September 2016 (by Connie Brigman) and November 2016 (by Jim Steward).

Melisa Mysliwiec sold pamphlets in December 2016 and March 2017.

Remaining are to be sold are the following:

- 2 packets (50 pamphlets to a packet) of DPOA pamphlets
- 1 packet (50 pamphlets to a packet) of PAD pamphlets
- 17 packets (50 pamphlets to a packet) of Estate Administration pamphlets.

Price for each packet is:

- $17.50 for DPOA
- $17.50 for PAD
- $18.55 for Estate Administration

These pamphlet packets are now contained in 2 banker boxes (still in my trunk).
We should decide what to do with these remaining packets. If we choose to attempt to sell the remaining packets at the Annual Institute -- we need to do some planning now as to the logistics.

We might simply make an announcement at the beginning of each morning session -- perhaps to contact me via phone, text or e-mail and I will make arrangements to deliver them to the purchaser.

I think this might be better than trying to set up a table to sell the remaining pamphlets.

An alternative is to “give” them away as some type of reward for attending.

It does appear that we have substantially recouped our investment/printing costs of the 15,000 pamphlets we had printed in April/May 2016. I hope to have a report of our revenues at the March PEPC meeting.
Representative Steven Johnson (R), Pamela Hornberger (R), Lana Theis (R), Peter Lucido (R), Martin Howrylak (R), and Gary Glenn (R) introduced HB 5443 on January 24, 2018. The new bill would repeal the Michigan estate tax act, 1899 PA 188, MCL 205.201 to 205.256.

Prior to the Economic Growth and Tax Relief Reconciliation Act (“EGTRRA”) in 2005, federal estate tax allowed deductions for estate taxes assessed and paid to states. Before October 1, 1993, Michigan applied an inheritance tax regime using a seemingly complicated set of rules under the first half of the Michigan estate tax act, MCL 205.201 through 205.222. See MCL 205.223. For estates of persons dying after September 30, 1993, Michigan began taxing estates based on the amount of credit the decedent’s estate could get from the federal government for inheritance or estate taxes paid to the state. See MCL 205.223 – 205.256. This greatly simplified the process of calculating the taxes owed. The Michigan estate tax act was known as a “pick up tax” or “sponge tax” because it soaked up whatever federal credit was allowed.

After EGTRRA, in 2005, the federal government got rid of the credit allowed for estate and inheritance taxes paid to the states. EGTRRA effectively repealed the estate and inheritance tax laws for Michigan, and other states that were applying a pick up tax or sponge tax with no other manner for computing the estate tax.

This new bill, HB 5443, was read and referred to the Committee on Tax Policy, and is still there.

Arguably the bill does very little, and may largely be a symbolic move for political points. However, it could also be a move to try and allay fears that the old system of an inheritance tax will be reinstated to help fund state projects or programs that may be expected to lose federal funding assistance in the future.
January 24, 2018, Introduced by Reps. Johnson, Hornberger, Theis, Lucido, Howrylak and Glenn and referred to the Committee on Tax Policy.

A bill to repeal 1899 PA 188, entitled

"Michigan estate tax act,"

(MCL 205.201 to 205.256).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Enacting section 1. The Michigan estate tax act, 1899 PA 188,

2 MCL 205.201 to 205.256, is repealed.
To:             Probate and Estate Planning Council Members  
From:           Melisa M. W. Mysliwiec  
RE:             Updates  
Date:           March 14, 2018  

1. ADM File No. 2002-37 – E-Filing and Electronic Records Court Rule Amendments  

Mike McClory attempted to make contact with Mary Rousch at SCAO in an effort to get someone from Council at the table at the upcoming work groups at the Supreme Court related to the E-Filing and Electronic Records Court Rule Amendments. There were work group meetings scheduled for March 5 and 12. These particular meetings were scheduled to last all day and designed for court personnel only. Topics to be discussed included payment, review queues, and system requirements.

Mike then had a discussion with Judge Mack on the issue. The conclusion is that the Probate and Estate Planning Section does not have to be involved in the workgroup for quite some time as discussions that would impact probate court users are a ways off. As a summary, Mary Rousch has been working 24/7 on implementing e-filing for the Wayne County Circuit Court, and it is not going well. Judge Mack indicated that no additional courts will be brought online for e-filing until the Wayne County Circuit Court is up and operational. He also verified that the March 5 and 12 meetings were meant to deal with internal operational issues for courts, not issues which would affect probate practitioners. Judge Mack conducts monthly leadership meetings on the e-filing project and agreed to raise the Probate and Estate Planning Section's participation as an issue at their March meeting, but Council participation will not be necessary in the near future due to the slower than anticipated pace of e-filing implementation. When we have more information relative to this project, we will provide an update.

2. State Court Administrative Office ADR Summit:

We have been invited to send a representative to an ADR Summit convened by the State Court Administrative Office, to be held on May 11, 2018 at the Michigan Hall of Justice in Lansing beginning at 9:30 a.m., and concluding at approximately 3:30 p.m. Someone from our committee will attend.

There are two primary purposes for convening the ADR Summit. First, SCAO would like to identify changes in ADR practices and attitudes in the seven years since its office conducted its first comprehensive study of mediation and case evaluation in 2011. The original study can be found here: http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20Michigan%20Circuit%20Courts.pdf

Consultants are returning to three of the earlier studied courts to assess current ADR practices and their impact on the courts’ dockets, and have again surveyed judges and
lawyers about their experiences with and attitudes toward case evaluation and mediation. The consultants’ report will be provided to attendees in advance of the meeting, and their key findings will be presented at the meeting.

Second, SCAO will be inviting attendees to provide recommendations to the State Court Administrator and Michigan Supreme Court for guiding the further development of ADR processes in the trial courts.

Respectfully submitted,

[Signature]

Melisa M. W. Mysliwiec
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 (DDTC) Chair’s Report

Date: March 16, 2018

I am happy to report that I received the Legislative Service Bureau’s first draft of the DDTC legislative proposal (which the Council approved on November 11, 2017 and which Representative Klint Kesto agreed to sponsor on December 13, 2017) on March 1, 2018 and that the few substantive changes wrought by the LSB drafter appear to have been inadvertent. I returned the first draft to the LSB with changes and extensive comments on March 7, and we are now awaiting a second and (I hope) final draft.

The DDTC has also received and responded to comments on the proposal from the Trust Counsel Committee of the Michigan Bankers Association. A copy of those comments and DDTC’s responses to them is attached as an appendix to this report.

JPS
DETROIT 40411-1 1416471v6
Appendix to March 16, 2018 DDTC Chair’s Report

MEMORANDUM

To: Michigan Bankers Association - Trust Counsel Committee

From: James P. Spica, Chair, Divided and Directed Trusteeships ad Hoc Committee of the Council of the Probate and Estate Planning Section of the State Bar of Michigan

Re: Questions & Comments on the 9/28/17 Legislative Proposal from the State Bar of Michigan Probate Council ad Hoc Committee on Directed and Divided Trusteeships

Date: February 26, 2018 / February 5, 2018

Please see the comments (in red) below.

The Michigan Bankers Association Trust Counsel Committee has reviewed the Legislative Proposal dated September 28, 2017 from the. Below is a summary of the comments and questions from the MBA Trust Counsel Committee on the legislative proposal to amend the Estates and Protected Individuals Code (“EPIC”), 1998 PA 386.

700.7703a Directed Trusteeship

The Trust Counsel Committee expressed concern about the ambiguity of subsection (4)(b)(i), which permits a trust director to “exercise any further power appropriate to the exercise or nonexercise of [a] power of direction.” This broad language appears to give a trust director carte blanche authority extending beyond powers granted by the terms of the trust. This poses a potential challenge to the trustee’s authority, and places a burden on financial institutions and other third parties who may receive instructions from a trust director seeking to exercise such “further power.”

The first thing to be noted here is that subsection (4)(b)(i) is Uniform Law Commission (ULC) language—it comes, that is, from the Uniform Directed Trust Act (UDTA) and is not an innovation of the Probate Council’s Divided and Directed Trusteeships ad Hoc Committee (Council Committee). See UNIF. DIRECTED TRUST ACT § 6(b)(1) (UNIF. LAW COMM’N 2017). In importing the UDTA into the Michigan Trust Code (MTC), the Council Committee adopted a procedural bias in favor of ULC language: unless language found in the UDTA was either inconsistent with a policy decision we had taken or very likely to be mischievous, we adopted it. The rationale for that procedural bias, of course, is that the access to authority that is a signal advantage of enacting a uniform law depends on uniformity. See Council Committee Proposal (CP) § 7703a(19) (UNIF. DIRECTED TRUST ACT § 17); Robert S. Summers, Statutory Interpretation in the United States, in INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 427–28 (D. Neil MacCormick & Robert S. Summers eds., 1991) (decisions of foreign courts interpreting pertinent uniform and model acts among materials courts should consider).

It has also to be emphasized that subsection (4)(b)(i)’s force is only as a rule of construction: it applies only if the terms of the trust do not indicate a contrary intention. See CP § 7703a(4)(b) (UNIF. DIRECTED TRUST ACT § 6(b)). Thus any settlor who thinks she can delineate a given power of direction by an exclusive list of express powers is welcome to try. The legislative hunch on which subsection (4)(b)(i) is based is that such an attempt will regularly succeed only in making the relevant provision of the trust...
instrument unreadable. And the plausibility of that hunch is suggested by even a cursory list of relevant ancillary powers, e.g., the power to incur reasonable costs and direct their payment, the power to make reports or accountings to trust beneficiaries, the power to direct a trustee to execute a certificate of trust, the power to employ professionals to assist or advise the director in the exercise or nonexercise of the director’s express power(s), the power to prosecute, defend, or join an action relating to a trust, etc.

Subsection (4)(b)(i) is an invitation for the settlor to rely on common sense rather than an exclusive enumeration of express powers. But that invitation can hardly be construed as carte blanche. The provision’s operation as a rule of construction directs the relevant inquiry to the settlor’s likely intent, the adjectives ‘further’ and ‘appropriate’ tether the inquiry to the director’s express power(s) under the terms of the trust, and the provision’s obvious similarity to Uniform Trust Code (UTC) section 815 suggests that in this context, appropriateness should be judged in relation to the purpose for which the power was granted and the function(s) being carried out by the director. See Mich. Comp. Laws § 700.7816(1)(b)(ii) (Unif. Trust Code § 815(a)(2)(B) (Unif. Law Comm’n 2010).

One important function of subsection (4)(b)(i), by the way, is to deal with Schwartz v. Wellin, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014), in which the court held that a trust protector lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil Procedure because the protector was neither a real party in interest nor a party that could otherwise pursue a claim under the Rule. Rule 17(a)(1) allows a party to participate in litigation even if the party is not a real party in interest if the party is “authorized by statute.” According to the ULC Comment to the UDTA:

Subsection [(4)](b)(1) supplies the requisite statutory authorization if participating in a lawsuit would be “appropriate” to a director’s exercise or nonexercise of a power granted by the terms of the trust[]. It would normally be “appropriate,” for example, for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director’s exercise of a power of direction. The requisite statutory authorization might also come from subsection (a) if the terms of the trust expressly confer a power of litigation on a director.

Unif. Directed Trust Act § 6 cmt. If the Council Committee had chosen to eschew the UDTA’s general analogy (in the provision that shows up in the CP as subsection (4)(b)(ii)) to UTC section 815, it would have had to provide some other express authorization to meet the case of Schwartz v. Wellin, thus further depreciating the virtue of uniformity described above.

In relation to subsection (4)(b)(ii), which addresses trust directors with joint powers, the Trust Counsel Committee questioned how impasse would be resolved if there are two trust directors with joint powers who disagree. Similarly, how would conflicts between trustees and trust directors be resolved (e.g., disagreements regarding investment decisions)? The latter question also impacts the shared liability provision of subsection (6)(a).

Like subsection (4)(b)(i), subsection (4)(b)(ii) comes from the UDTA and is merely a rule of construction. See Unif. Directed Trust Act § 6(b)(2). The UDTA sensibly does not attempt to solve problems of fiduciary coordination that are completely general in the sense that they may arise regardless of whether a power of direction is granted. The problem of possible deadlock among trust directors with joint powers or between directed trustees and trust directors is no different from the problem of possible deadlock among cotrustees. Subsection (4)(b)(ii) simply imports the prevailing default rule for cotrustees. See Mich. Comp. Laws § 700.7703(1) (Unif. Trust Code § 703(a)); Restatement (Third) of Trusts § 39 (2003). If trust directors with joint powers are deadlocked and the terms of the trust provide no trump, the court is fairly instructed by the subsection’s analogy to cotrustees to “direct exercise of the [joint] power or take other action to break the deadlock.” Restatement (Third) of Trusts § 39 cmt. e (2003) (apropos of cotrustees). And a trust director that holds a power of direction
jointly with a trustee or another trust director would be subject to the fiduciary duty of a cotrustee respecting that power. See CP § 7703a(6)(a) (UNIF. DIRECTED TRUST ACT § 8(a)(1)(B)).

Subsection (8) appears to be conditioned on the premise that a directed trustee does not share duty with a trust director. The Trust Counsel Committee supports this provision but suggests clarification as to whether it also applies to situations where the trustee shares authority with the trust director.

The assumption of subsection (8) is only that shared responsibility will affect what amounts to compliance with a power of direction. To the extent a trust director has a power over the trust that allows her (on the best interpretation of what the settlor intended) to tell the trustee what to do, subsection (8) requires the trustee to follow the director’s instructions. But subsection (8) has nothing to say about the discharge of the trustee’s separate fiduciary duties qua trustee. If the settlor has arranged things, for example, so that a trust director and the trustee have to agree on whether or not to make certain distributions to a trust beneficiary, subsection (8) requires the trustee to acknowledge the trust director’s veto if exercised, but if the trust director is in favor of a given distribution that falls under the joint-agreement provision, then the trustee is still liable, regardless of subsection (8), to a claim by an affected beneficiary that she (the trustee) abused her discretion, qua trustee, in deciding to veto (or not to veto) the distribution in question.

For another example, assume the settlor has arranged things so that a trust director, D, has a power to direct the trustee, T, to make certain distributions to a trust beneficiary at the beneficiary’s request, but the settlor has also given T discretion to make the same distributions and has not given D a veto over exercises of T’s discretion in the matter. In that case, subsection (8) protects T in case D directs a requested distribution of the relevant kind, but if D demurs to a distribution request from the beneficiary, T is still liable, regardless of subsection (8), to a claim by an affected beneficiary that T abused her discretion in deciding to make (or not to make) the requested distribution.

Thus, the effects of shared responsibility automatically inform the directed trustee’s duty “to comply” with a trust director’s exercise or nonexercise of the director’s power by adjusting the meaning of ‘to comply’ in the circumstances. As the examples above are meant to suggest, the point is self-clarifying once one gets down to the facts of a situation that implicates it.

700.7703b Divided Trusteeship

The Trust Counsel Committee raised questions about the distinction between hiring an agent such as an investment advisor to perform certain discretionary functions of the trustee under MCL 700.7817(v) and the use of a “separate investment trustee” under proposed MCL 700.7703b. For example, if a registered investment advisor (RIA) firm is designated to act as an investment advisor in the trust document, does this elevate the RIA to “trustee” status even though the RIA does not hold trust powers under state law?

It is difficult to see how CP section 7703b could possibly increase the risk of accidental trustees, given that the “separate trustees” referred to in section 7703b are evidently all trustees. See, e.g., CP § 7703b(3)(a), (6). Trustees are the legal owners of assets to which trust beneficiaries hold “equitable title,” and under an express trust, the sine qua non of potential liability for breach of trust is the trustee’s acceptance. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. a (2007); F. W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 55 (A. H. Chaytor & W. J. Whittaker eds., 1929) (photo. reprint 1984). I do not know whether RIAs ever take legal title to trust assets, but presumably the agency agreements they currently use are not liable to be construed as acceptances of trust—presumably RIAs currently manage to enter into agency relations with trustees without inadvertently becoming cotrustees. Whatever they do now to avoid becoming accidental cotrustees will also prevent their becoming accidental separate trustees.
Several Trust Counsel Committee members commented that the divided trustee provisions are unclear as to how differences are to be resolved. A suggestion was made to add a provision clarifying that the “separate resultant trustee” would have authority to resolve any disputes among the separate trustees and to direct other separate trustees to perform administrative functions related to their sphere of duty but not expressly assigned in the trust document.

Like the UDTA, the CP’s divided trusteeships proposal, section 7703b, does not attempt to solve problems of fiduciary coordination that are completely general in the sense that they may arise regardless of whether a separate trustees provision is created. The problem of a possible impasse between separate trustees is no different from the problem of a possible impasse between cotrustees. On the other hand, the settlor of a trust having a separate trustees provision is completely free under the CP to give a separate resultant trustee a power of the kind suggested: under the CP, section 7703b merely provides interested settlors a safe harbor and a how-to manual for segregating trustee functions so as to limit one trustee’s potential liability for another’s misconduct; the CP adds nothing to MTC section 7105(2) that would prevent a settlor from giving a separate trustee a power to trump certain decisions of other separate trustees operating under the same separate trustees provision. See CP § 7105.

It is, however, unlikely that a comprehending settlor would want to do that. On the contrary, a settlor who has a sensible motivation for setting up a divided trusteeship—viz., the wish to provide each of several trustees involved in the administration of a given res complete protection from liability for breaches of trust committed (in respect of that res) by any of the others—will scrupulously avoid anything that might suggest to a court that any of the separate trustees has “overall responsibility for seeing that the terms of the trust are honored.” UNIF. TRUST CODE § 808 cmt.

One can easily imagine, for instance, a situation in which a separate distributions trustee, SDT, objects that a decision by the trust’s separate investment trustee, SIT, to sell a particular asset, impairs SDT’s ability to fulfill the settlor’s intent as expressed in the relevant discretionary trust provision, and SIT will not relent. Does SDT have to petition the probate court to instruct SIT or vice versa? A petition may be what the settlor would prefer in that case, but, in any case, the problem is not peculiar to separate trustees. Exactly the same situation can arise, for instance, if SDT and SIT are the only serving authorized cotrustees. The risk of a fiduciary impasse is too obvious, and the means of avoiding it too various, for the proposal to offer . . . a preferred solution. One expects trust protectors with bivalent powers to direct separate trustees will often be deployed in this context, but the alternatives are legion. The only alternative that settlors aiming at separate trusteeships can be expected consistently to eschew is the anointment of a separate trustee as primus inter pares, for that is evidently retrograde to the proposal’s tendency to isolate the respective functions of separate trustees.

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 16, 2018

UFIPA

A new (and I think much improved) draft of the Uniform Fiduciary Income and Principal Act issued from the ULC Drafting Committee’s most recent face-to-face meeting (February 16-17 in Philadelphia). That draft will be posted on the ULC website after it has been vetted by the ULC Style Committee later this month.

Electronic Wills

At last, midway through its scheduled term for deliberations, the ULC’s Electronic Wills Drafting Committee has posted a first discussion draft (dated February 18, 2018). The draft can be viewed at:

http://www.uniformlaws.org/shared/docs/electronic%20wills/2018mar_E-
Wills_Mtg%20Draft.pdf

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MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Uniform Fiduciary Income and Principal Act ad Hoc Committee Chair’s Report
Date: March 16, 2018

The penultimate draft of the Uniform Fiduciary Income and Principal Act (UFIPA), which will be submitted for approval at the Uniform Law Commission’s Annual Meeting this coming July, will be the initial reading assignment for members of the Council’s new UFIPA ad Hoc Committee. That draft will be available after the current draft of the Uniform Act—which has not been posted on the ULC website, but which I can provide on request—is vetted by the ULC Style Committee later this month.

To date, those who have offered or consented to become members of the Council’s UFIPA Committee are:

Anthony J. Belloli (of Plante Moran Trust)
Marguerite Munson Lentz
Raj A. Malviya
Gabrielle M. McKee
Richard C. Mills
Robert P. Tiplady
Geoffrey R. Vernon

I ask that Marlaine Teahan, as Chair of the Section, appoint all of these people members of the Committee. 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.