Agendas & Attachments for

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

Saturday, April 11, 2015
9:00 a.m.
University Club
Lansing, Michigan
Probate and Estate Planning Section of the State Bar of Michigan

Notice of Meetings

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

Meeting of the Council of the Probate and Estate Planning Section

April 11, 2015
9:00 a.m.
University Club
3435 Forest Road
Lansing, Michigan 48910

The above stated meetings of the Section will be held at the MSU University Club, 3435 Forest Road, Lansing, Michigan, Saturday, April 11, 2015. The Section's Committee on Special Projects (CSP) meeting will begin at 9:00 a.m., followed immediately by the meeting of the Council of the Section. If time allows and at the discretion of the Chair, we will work further on CSP materials after the Council of the Section meeting concludes.

Marlaine C. Teahan
Secretary

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

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

The following is a list of the remaining meetings for 2014-15:

June 13, 2015
September 12, 2015 (Annual Section Meeting)

Tentative meeting schedule for 2015-16:

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

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

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

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

Schedule of due dates for materials – by 5 p.m.
June 4, 2015
September 3, 2015 (Annual Section Meeting)
**STATE BAR OF MICHIGAN**  
**PROBATE AND ESTATE PLANNING SECTION COUNCIL**

**Officers for 2014-2015 Term**

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

**Council Members for 2014-2015 Terms**

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

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

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

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

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

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

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

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

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

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

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

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

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

**Guidelines for Selection:**

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

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

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

Shaheen I. Imami

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

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

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

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

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

Shaheen I. Imami, Chair

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

Christopher A. Ballard, Chair

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

George W. Gregory, Chair
Mark K. Harder
Thomas F. Sweeney
Legislation Committee
Mission: In cooperation with the Section’s lobbyist, to bring to the attention of the Council recent developments in the Michigan legislature and to further achievement of the Section’s legislative priorities, as well as to study legislation and recommend a course of action on legislation not otherwise assigned to a substantive committee of the Section

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Michele C. Marquardt, Chair
(Liaison to SCAO for Estates & Trusts Workgroup)
James F. ("JV") Anderton
Constance L. Brigman (Liaison to SCAO for Guardianship, Conservatorship, and Protective Proceedings Workgroup)
Rhonda M. Clark-Kreuer
Phillip E. Harter
Michael D. Holmes
Shaheen I. Imami
Hon. Michael L. Jaconette
Hon. David M. Murkowski
Rebecca A. Schnelz (Liaison to SCAO for Mental Health/Commitment Workgroup)
David L. Skidmore
Updating Michigan Law Committee
Mission: To review, revise, communicate and recommend Michigan's trusts and estates law with the goal of achieving and maintaining leadership in promulgating probate laws in changing times
Geoffrey R. Vernon, Chair
Robert P. Tiplady, II, Vice Chair
Susan M. Allan
Howard H. Collens
Georgette E. David
Shawn P. Eyestone
Mark K. Harder
Raymond A. Harris
Shaheen I. Imami
Robert B. Labe
Henry P. Lee
Marguerite Munson Lentz
Michael G. Lichterman
Raj A. Malviya
Sueann T. Mitchell
Nathan R. Piwowarski
James P. Spica

Artificial Reproductive Technology Ad Hoc Committee
Mission: To review the 2008 Uniform Probate Code Amendments for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction
Nancy H. Welber, Chair
Christopher A. Ballard
Keven DuComb
Robert M. O'Reilly
Lawrence W. Waggoner

Insurance Ad Hoc Committee
Mission: To recommend new legislation related to insurability and the administration of irrevocable life insurance trusts
Geoffrey R. Vernon, Chair
Stephen L. Elkins
Mark K. Harder
James P. Spica
Joseph D. Weiler, Jr.

Membership Committee
Mission: To strengthen relations with Section members, encourage new membership, and promote awareness of and participation in Section activities
Raj A. Malviya, Chair
Christopher J. Caldwell
Nicholas R. Dekker

Real Estate Committee
Mission: To recommend new legislation related to real estate matters of interest and concern to the Section and its members
George F. Bearup, Chair
Jeffrey S. Ammon
William J. Ard
Stephen J. Dunn
David S. Fry
Mark E. Kellogg
J. David Kerr
Michael G. Lichterman
David P. Lucas
Katie Lynwood
Douglas A. Mielock
Melisa M. W. Mysliwiec
James T. Ramer
James B. Steward
Transfer Tax Committee  
*Mission: To monitor developments concerning Federal and State transfer taxes and to recommend appropriate actions by the Section in response to developments or needs*

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

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

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

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

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

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

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

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

Lorraine F. New, Chair  
Christopher A. Ballard  
Michael W. Bartnik  
William R. Bloomfield  
Robin D. Ferriby  
Richard C. Mills

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

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

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

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

Patricia M. Ouellette

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

Jeanne Murphy

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

William J. Ard

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

J. David Kerr

Alternative Dispute Resolution Section Liaison

Hon. Milton L. Mack, Jr.

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

John R. Dresser

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

Amy Rombyer Tripp
Michigan Bankers Association Liaison
Mission: The liaison to the Michigan Bankers Association is responsible for developing and maintaining bilateral communication between the Section and the Michigan Bankers Association in matters of mutual interest and concern

Susan M. Allan

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

Rebecca A. Schnelz

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

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

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

Rebecca A. Schnelz

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

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

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

Richard J. Siriani

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

George W. Gregory
<table>
<thead>
<tr>
<th></th>
<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Fiduciary Access to Digital Assets (HB 5366-5370)</td>
<td></td>
<td>- Bylaw Update</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- PR access to online accts (SB 293)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Hearings minors &lt; 18 (SB 144 &amp; 177)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Funeral Representative (HB 5162/SB 731)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Priority Items</strong></td>
<td>- Domestic Asset Protection Trusts</td>
<td>- SCAO Meetings*</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- ILIT Trustee Liability Protection</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Artificial Reproductive Technology</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Charitable Trust</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Probate Appeals</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Secondary Priority</strong></td>
<td>- EPIC/MTC Updates</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Directed Investment Trusts</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- TBE Trusts</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- ADR Revision</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Property tax on trust property</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Uniform Real Property TOD Act</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Priority To Be Determined</strong></td>
<td>- Dignified Death (Family Consent) Act</td>
<td></td>
<td>- Budget Reporting</td>
<td>- Probate Court Opinion Bank</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Pooled income trust exclusion</td>
<td></td>
<td>- Action on SC recommendations</td>
<td>- Mentor program</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Neglect Legislation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Foreign Guardians</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Inheritance Tax</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Estate Recovery</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- PRE after death &amp; nursing home</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*ongoing
Probate and Estate Planning Council
Committee on Special Projects Agenda

April 11, 2015

9:00 a.m.

1. Artificial Reproductive Technology ("ART") Committee – Nancy Welber
   Proposed amendments to EPIC (Exhibit A-1)
   Discussion will focus on sections 2-115, 2-116, 2-120, 2-121, 2-705
   Consent Form to be added to the Michigan Health Code pp.80-81
   New Subsections to be added to MCL 700.3715 and 700.7821 pp. 77-78
   Recommended Repeal of the Michigan Surrogate Parenting Act, pp. 83-84

2. Updating Michigan Law Committee – Geoffrey Vernon
   Proposed tenancy by the entireties statutes
   Please see the current CSP materials for the following:
   MCL 557.151, new version (Feb Exhibit B-1)
   MCL 700.7509, new version (Feb Exhibit B-2)
   Please see the January CSP Materials for copies of the following:
   MCL 554.44, 554.45 (Jan Exhibit B-1)
   MCL 557.151 (current) (Jan Exhibit B-2)
   MCL 557.151 (replacement), previous version (Jan Exhibit B-3)
   MCL 557.101, 557.102, 565.48, 565.49 (Jan Exhibit B-4)
   MCL 600.2807 (Jan Exhibit B-5)
   MCL 600.6023a (Jan Exhibit B-6)
   MCL 700.2801, 700.2806, 700.2114, 700.2519 (Jan Exhibit B-7)
   MCL 700.7509, previous version (Jan Exhibit B-8)
   Please see the December CSP Materials for copies of the following:
   ACTEC Chart Summarizing the state law (Dec Exhibit B-6)
   Sample State Statutes (Dec Exhibit B-7)

3. Community Property Trusts Committee – Neal Nusholtz
   Proposed tenancy by the entireties statutes (Exhibit C-1)
EXHIBIT A-1
PROPOSED AMENDMENTS TO EPIC, BASED ON UNIFORM PROBATE CODE 2008 & LATER REVISIONS

Table of Contents

ARTICLE I
GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

PART 2. DEFINITIONS

Section 1-201. General Definitions.

ARTICLE II
INTESTACY, WILLS, AND DONATIVE TRANSFERS

PART 1. INTESTATE SUCCESSION

Subpart 1. General Rules

Section 2-103  Share of Heirs Other than Surviving Spouse
2-104.  Requirement of Survival by 120 Hours; Individual in Gestation.
2-108.  [Reserved.]
2-114.  Parent Barred from Inheriting in Certain Circumstances.

Subpart 2. Parent-Child Relationship

2-115.  Definitions.
2-117.  No Distinction Based on Marital Status; Child Born or Conceived During Marriage.
2-118.  Adoptee and Adoptee’s Adoptive Parent or Parents.
2-119.  Adoptee and Adoptee’s Genetic Parents.
2-120.  Child Conceived by Assisted Reproduction Other Than Child Born to Gestational Carrier.
2-121.  Child Born to Gestational Carrier.
2-122.  Equitable Adoption.
PART 5. WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

Section
2-502. Execution; Witnessed or Notarized Wills; Holographic Wills.
2-504. Self-proved Will.

PART 7. RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

Section
2-705. Class Gifts Construed to Accord with Intestate Succession; Exceptions.

PART 8. GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

Section
2-805. Reformation to Correct Mistakes.
2-806. Modification to Achieve Transferor’s Tax Objectives.

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

PART 4. FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

Section
3-406. Formal Testacy Proceedings; Contested Cases.

ARTICLE VIII

EFFECTIVE DATE AND REPEALER

Section

Add new subsection to MCL 700.3715 and to 700.7821 regarding posthumous conception.
UNIFORM PROBATE CODE

__________

ARTICLE I

GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

PART 2. DEFINITIONS

AMEND MCL 700.1107 TO READ. SECTION 1-201. GENERAL DEFINITIONS—RECORD THROUGH TRUSTEE. AS USED IN THIS ACT Subject to additional definitions contained in the subsequent [articles] that are applicable to specific [articles.] [parts.] or sections and unless the context otherwise requires, in this [code]:

(a 41) “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.

(f 45) “Sign” means, with present intent to authenticate or adopt a record other than a will:

(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.
The Uniform Probate Code was originally promulgated in 1969.

1990 Revisions. In 1990, Article II underwent significant revision. The 1990 revisions were the culmination of a systematic study of the Code conducted by the Joint Editorial Board for the Uniform Probate Code (now named the Joint Editorial Board for Uniform Trust and Estate Acts) and a special Drafting Committee to Revise Article II. The 1990 revisions concentrated on Article II, which is the article that covers the substantive law of intestate succession; spouse’s elective share; omitted spouse and children; probate exemptions and allowances; execution and revocation of wills; will contracts; rules of construction; disclaimers; the effect of homicide and divorce on succession rights; and the rule against perpetuities and honorary trusts.

Themes of the 1990 Revisions. In the twenty or so years between the original promulgation of the Code and 1990, several developments occurred that prompted the systematic round of review. Four themes were sounded: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and (4) the acceptance of a partnership or marital-sharing theory of marriage.

The 1990 revisions responded to these themes. The multiple-marriage society and the partnership/marital-sharing theory were reflected in the revised elective-share provisions of Part 2. As the General Comment to Part 2 explained, the revised elective share granted the surviving spouse a right of election that implemented the partnership/marital-sharing theory of marriage.

The children-of-previous-marriages and stepchildren phenomena were reflected most prominently in the revised rules on the spouse’s share in intestacy.

The proliferation of will substitutes and other inter-vivos transfers was recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison. One aspect of this tendency was reflected in the restructuring of the rules of construction. Rules of construction are rules that supply presumptive meaning to dispositive and similar provisions of governing instruments. See Restatement (Third) of Property: Wills and Other Donative Transfers § 11.3 (2003). Part 6 of the pre-1990 Code contained several rules of construction that applied only to wills. Some of those rules of construction appropriately applied only to wills; provisions relating to lapse, testamentary exercise of a power of appointment, and ademption of a devise by satisfaction exemplify such rules of construction. Other rules of construction, however, properly apply to all governing instruments, not just wills; the provision relating to inclusion of adopted persons in class gift language exemplifies this type of rule of construction. The 1990 revisions divided pre-1990 Part 6 into two parts – Part 6, containing rules of construction for wills only; and Part 7, containing rules of construction for wills and
other governing instruments. A few new rules of construction were also added.

In addition to separating the rules of construction into two parts, and adding new rules of construction, the revocation-upon-divorce provision (Section 2-804) was substantially revised so that divorce not only revokes testamentary devises, but also nonprobate beneficiary designations, in favor of the former spouse. Another feature of the 1990 revisions was a new section (Section 2-503) that brought the execution formalities for wills more into line with those for nonprobate transfers.

**2008 Revisions.** In 2008, another round of revisions was adopted. The principal features of the 2008 revisions are summarized as follows:

**Inflation Adjustments.** Between 1990 and 2008, the Consumer Price Index rose by somewhat more than 50 percent. The 2008 revisions raised the dollar amounts by 50 percent in Article II Sections 2-102, 2-102A, 2-201, 2-402, 2-403, and 2-405, and added a new cost of living adjustment section — Section 1-109.

**Intestacy.** Part 1 on intestacy was divided into two subparts: Subpart 1 on general rules of intestacy and subpart 2 on parent-child relationships. For details, see the General Comment to Part 1.

**Execution of Wills.** Section 2-502 was amended to allow notarized wills as an alternative to wills that are attested by two witnesses. That amendment necessitated minor revisions to Section 2-504 on self-proved wills and to Section 3-406 on the effect of notarized wills in contested cases.

**Class Gifts.** Section 2-705 on class gifts was revised in a variety of ways, as explained in the revised Comment to that section.

**Reformation and Modification.** New Sections 2-805 and 2-806 brought the reformation and modification sections now contained in the Uniform Trust Code into the Uniform Probate Code.

**Historical Note.** This Prefatory Note was revised in 2008.

**UPC Legislative Note:** References to spouse or marriage appear throughout Article II. States that recognize civil unions, domestic partnerships, or similar relationships between unmarried individuals should add appropriate language wherever such references or similar references appear.

States that do not recognize such relationships between unmarried individuals, or marriages between same-sex partners, are urged to consider whether to recognize the spousal-type rights that partners acquired under the law of another jurisdiction in which the relationship was formed but who die domiciled in this state. Doing so would not be the equivalent of recognizing such relationships in this state but simply allowing those who move to and die in this state to retain the rights they previously acquired elsewhere. See Christine A. Hammerle, Note,
PART 1. INTESTATE SUCCESSION

UPC GENERAL COMMENT

The pre-1990 Code’s basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 and 2008 revisions were intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy and family relationships.

1990 Revisions. The principal features of the 1990 revisions were:

1. So-called negative wills were authorized, under which the decedent who dies intestate, in whole or in part, can by will disinherit a particular heir.

2. A surviving spouse was granted the whole of the intestate estate, if the decedent left no surviving descendants and no parents or if the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has no descendants who are not descendants of the decedent. The surviving spouse receives the first $200,000 plus three-fourths of the balance if the decedent left no surviving descendants but a surviving parent. The surviving spouse receives the first $150,000 plus one-half of the balance of the intestate estate, if the decedent’s surviving descendants are also descendants of the surviving spouse but the surviving spouse has one or more other descendants. The surviving spouse receives the first $100,000 plus one-half of the balance of the intestate estate, if the decedent has one or more surviving descendants who are not descendants of the surviving spouse. (To adjust for inflation, these dollar figures and other dollar figures in Article II were increased by fifty percent in 2008.)

3. A system of representation called per capita at each generation was adopted as a means of more faithfully carrying out the underlying premise of the pre-1990 UPC system of representation. Under the per-capita-at-each-generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares.

4. Although only a modest revision of the section dealing with the status of adopted children and children born of unmarried parents was then made, the question was under continuing review and it was anticipated that further revisions would be forthcoming in the future.

5. The section on advancements was revised so that it applies to partially intestate estates as well as to wholly intestate estates.

2008 Revisions. As noted in Item 4 above, it was recognized in 1990 that further revisions on matters of status were needed. The 2008 revisions fulfilled that need. Specifically, the 2008 revisions contained the following principal features:

Part 1 Divided into Two Subparts. Part 1 was divided into two subparts: Subpart 1 on general rules of intestacy and Subpart 2 on parent-child relationships.
Subpart 1: General Rules of Intestacy. Subpart 1 contains Sections 2-101 (unchanged), 2-102 (dollar figures adjusted for inflation), 2-103 (restyled and amended to grant intestacy rights to certain stepchildren as a last resort before the intestate estate escheats to the state), 2-104 (amended to clarify the requirement of survival by 120 hours as it applies to heirs who are born before the intestate’s death and those who are in gestation at the intestate’s death), 2-105 (unchanged), 2-106 (unchanged), 2-107 (unchanged), 2-108 (deleted and matter dealing with heirs in gestation at the intestate’s death relocated to 2-104), 2-109 (unchanged), 2-110 (unchanged), 2-111 (unchanged), 2-112 (unchanged), 2-113 (unchanged), and 2-114 (deleted and replaced with a new section addressing situations in which a parent is barred from inheriting).

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

Historical Note. This General Comment was revised in 2008.
Add Subpart 1. General Rules

**AMEND MCL 700.2103 TO READ. SECTION 2-103—SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.**

(a) Any part of the intestate estate not passing to a decedent’s surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

1. to the decedent’s descendants by representation;
2. if there is no surviving descendant, to the decedent’s parents equally if both survive, or to the surviving parent if only one survives;
3. if there is no surviving descendant or parent, to the descendants of the decedent’s parents or either of them by representation;
4. if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:
   - (A) half to the decedent’s paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent’s paternal grandparents or either of them if both are deceased, the descendants taking by representation; and
   - (B) half to the decedent’s maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the
descendants of the decedent’s maternal grandparents or either of them if both are deceased, the descendants taking by representation;

(5) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent’s relatives on the side with one or more surviving members in the manner described in paragraph (4).

(b) If there is no taker under subsection (a), but the decedent has:

(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse’s descendants by representation; or

(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.

**UPC Comment**

This section provides for inheritance by descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

**1990 Revisions.** The 1990 revisions were stylistic and clarifying, not substantive. The pre-1990 version of this section contained the phrase “if they are all of the same degree of kinship to the decedent they take equally (etc.).” That language was removed. It was unnecessary and confusing because the system of representation in Section 2-106 gives equal shares if the decedent’s descendants are all of the same degree of kinship to the decedent.

The word “descendants” replaced the word “issue” in this section and throughout the 1990 revisions of Article II. The term issue is a term of art having a biological connotation.
Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.

2008 Revisions. In addition to making a few stylistic changes, which were not intended to change meaning, the 2008 revisions divided this section into two subsections. New subsection (b) grants inheritance rights to descendants of the intestate’s deceased spouse(s) who are not also descendants of the intestate. The term deceased spouse refers to an individual to whom the intestate was married at the individual’s death.

Historical Note. This Comment was revised in 2008.
AMEND MCL 700.2104 TO READ AND REPEAL MCL 700.2108.

SECTION 2-104.—REQUIREMENT OF SURVIVAL BY 120 HOURS;
INDIVIDUAL IN GESTATION.

(a) [Requirement of Survival by 120 Hours; Individual in Gestation.]

For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (b), the following rules apply:

(1) An individual born before a decedent’s death who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before a decedent’s death survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period.

(2) An individual in gestation at a decedent’s death is deemed to be living at the decedent’s death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent’s death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

(b) [Section Inapplicable If Estate Would Pass to State.] This section does not apply if its application would cause the estate to pass to the state under Section 2-105.

UPC Comment
This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. See Halbach & Waggoner, The UPC’s New Survivorship and Antilapse Provisions, 55 Alb. L. Rev. 1091, 1094-1099 (1992). The 120 hour period will not delay the administration of a decedent’s estate because Sections 3-302 and 3-307 prevent informal issuance of letters for a period of five days from death. Subsection (b) prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives for any period.

In the case of a surviving spouse who survives the 120-hour period, the 120-hour requirement of survivorship does not disqualify the spouse’s intestate share for the federal estate-tax marital deduction. See Int. Rev. Code § 2056(b)(3).

2008 Revisions. In 2008, this section was reorganized, revised, and combined with former Section 2-108. What was contained in former Section 2-104 now appears as subsections (a)(1) and (b). What was contained in former Section 2-108 now appears as subsection (a)(2). Subsections (a)(1) and (a)(2) now distinguish between an individual who was born before the decedent’s death and an individual who was in gestation at the decedent’s death. With respect to an individual who was born before the decedent’s death, it must be established by clear and convincing evidence that the individual survived the decedent by 120 hours. For a comparable provision applicable to wills and other governing instruments, see Section 2-702. With respect to an individual who was in gestation at the decedent’s death, it must be established by clear and convincing evidence that the individual lived for 120 hours after birth. For a comparable provision applicable to wills and other governing instruments, see Section 2-705(g).

Historical Note. This Comment was revised in 2008.
**AMEND MCL 700.2108 TO READ, SECTION 2-108.** [RESERVED.]

*Legislative Note:* Section 2-108 is reserved for possible future use. The 2008 amendments moved the content of this section to Section 2-104(a)(2).

**MCL 700.2108 Afterborn heirs.**

An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.
AMEND MCL 700.2114 TO READ PARENT BARRED FROM INHERITING IN CERTAIN CIRCUMSTANCES.

MOVED FROM MCL 700. 2114(4) AND (3)

(1) Inheritance from or through a child by either genetic parent or his or her kindred is precluded unless that genetic parent has openly treated the child as his or hers, and has not refused to support the child.

(2) The permanent termination of parental rights of a minor child by an order of a court of competent jurisdiction; by a release for purposes of adoption given by the parent, but not a guardian, to the family independence agency or a licensed child placement agency, or before a probate or juvenile court; or by any other process recognized by the law governing the parent-child status at the time of termination, excepting termination by emancipation or death, ends kinship between the parent whose rights are so terminated and the child for purposes of intestate succession by that parent from or through that child.

EPIC Committee Comment

The EPIC Committee did not adopt the 2008 UPC section on this topic. The 2008 UPC reads as follows:

UPC 2-114. PARENT BARRED FROM INHERITING IN CERTAIN CIRCUMSTANCES.

(a) A parent is barred from inheriting from or through a child of the parent if:

(1) the parent’s parental rights were terminated and the parent-child relationship was not judicially reestablished; or

(2) the child died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated under law of this state other than this [code] on the basis of
nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

(b) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

2008 UPC Comment

2008 Revisions. In 2008, this section replaced former section 2-114(c), which provided: “(c) inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.”

Subsection (a)(1) recognizes that a parent whose parental rights have been terminated is no longer legally a parent.

Subsection (a)(2) addresses a situation in which a parent’s parental rights were not actually terminated. Nevertheless, a parent can still be barred from inheriting from or through a child if the child died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated under law of this state other than this [code], but only if those parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

ADD SUBPART 2. PARENT-CHILD RELATIONSHIP

ADD AS MCL 700.2115. SECTION 2-115. DEFINITIONS. In this [subpart]:

(1) “Adoptee” means an individual who is adopted.

(2) “Assisted reproduction” means a method of causing pregnancy other than sexual intercourse.

(3) “Divorce” includes an annulment, dissolution, and declaration of invalidity of a marriage.

(4) “Functioned as a parent of the child” means behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household.

(5) “Genetic father” means the man whose sperm fertilized the egg of a child’s genetic mother. If the father-child relationship is established under the presumption of paternity under MCL 700.2117 [insert applicable state law], the term means only the man for whom that relationship is established.

(6) “Genetic mother” means the woman whose egg was fertilized by the sperm of a child’s genetic father.
(7) “Genetic parent” means a child’s genetic father or genetic mother.

(8) “Incapacity” means the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

(9) “Relative” means a grandparent or a descendant of a grandparent.

**UPC Legislative Note:** States that have enacted the Uniform Parentage Act (2000, as amended) should replace “applicable state law” in paragraph (5) with “Section 201(b)(1), (2), or (3) of the Uniform Parentage Act (2000), as amended”. Two of the principal features of Articles 1 through 6 of the Uniform Parentage Act (2000, as amended) are (i) the presumption of paternity and the procedure under which that presumption can be disproved by adjudication and (ii) the acknowledgment of paternity and the procedure under which that acknowledgment can be rescinded or challenged. States that have not enacted similar provisions should consider whether such provisions should be added as part of Section 2-115(5). States that have not enacted the Uniform Parentage Act (2000, as amended) should also make sure that applicable state law authorizes parentage to be established after the death of the alleged parent, as provided in the Uniform Parentage Act § 509 (2000, as amended), which provides: “For good cause shown, the court may order genetic testing of a deceased individual.”

**UPC Comment**

**Scope.** This section sets forth definitions that apply for purposes of the intestacy rules contained in Subpart 2 (Parent-Child Relationship).

**Definition of “Adoptee”.** The term “adoptee” is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

**Definition of “Assisted Reproduction”.** The definition of “assisted reproduction” is copied from the Uniform Parentage Act § 102. Current methods of assisted reproduction include intrauterine insemination (previously and sometimes currently called artificial insemination), donation of eggs, donation of embryos, in-vitro fertilization and transfer of embryos, and intracytoplasmic sperm injection.

**Definition of “Functioned as a Parent of the Child”.** The term “functioned as a parent of the child” is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers. The Reporter’s Note No. 4 to § 14.5 of the Restatement lists the following parental functions:

_Custodial responsibility_ refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

_Decisionmaking responsibility_ refers to authority for making significant life decisions on behalf of the child, including decisions about the child’s education, spiritual guidance, and health
Caretaking functions are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

(a) satisfying the nutritional needs of the child, managing the child’s bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child’s personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child’s physical safety, and providing transportation;

(b) directing the child’s various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child’s needs for behavioral control and self-restraint;

(d) arranging for the child’s education, including remedial or special services appropriate to the child’s needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

Parenting functions are tasks that serve the needs of the child or the child’s residential family. Parenting functions include caretaking functions, as defined [above], and all of the following additional functions:

(a) providing economic support;

(b) participating in decision making regarding the child’s welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting
the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child’s welfare and development.

Ideally, a parent would perform all of the above functions throughout the child’s minority. In cases falling short of the ideal, the trier of fact must balance both time and conduct. The question is, did the individual perform sufficient parenting functions over a sufficient period of time to justify concluding that the individual functioned as a parent of the child. Clearly, insubstantial conduct, such as an occasional gift or social contact, would be insufficient. Moreover, merely obeying a child support order would not, by itself, satisfy the requirement. Involuntarily providing support is inconsistent with functioning as a parent of the child.

The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned as a parent of the child inherits from the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individual whom the child claims functioned as his or her parent.

**Definition of “Genetic Father”**. The term “genetic father” means the man whose sperm fertilized the egg of a child’s genetic mother. If the father-child relationship is established under the presumption of paternity recognized by the law of this state, the term means only the man for whom that relationship is established. As stated in the Legislative Note, a state that has enacted the Uniform Parentage Act (2000/2002) should insert a reference to Section 201(b)(1), (2), or (3) of that Act.

**Definition of “Relative”**. The term “relative” does not include any relative no matter how remote but is limited to a grandparent or a descendant of a grandparent, as determined under this Subpart 2.
ADD AS MCL 700.2116. SECTION 2-116—EFFECT OF PARENT-CHILD RELATIONSHIP. Except as otherwise provided in Section 2-119(b) through (e), if a parent-child relationship exists or is established under this [subpart], the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

UPC Comment

Scope. This section provides that if a parent-child relationship exists or is established under any section in Subpart 2, the consequence is that the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession by, from, or through the parent and the child. The exceptions in Section 2-119(b) through (e) refer to cases in which a parent-child relationship exists but only for the purpose of the right of an adoptee or a descendant of an adoptee to inherit from or through one or both genetic parents.
AMEND MCL 700.2114 TO READ AS FOLLOWS AND RENUMBER IT AS MCL 700.2117. SECTION 2-117. — NO DISTINCTION BASED ON MARITAL STATUS; CHILD BORN OR CONCEIVED DURING MARRIAGE.

Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.

Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121:

(1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her genetic parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:

(a) If a child is born or conceived during a marriage, both spouses are presumed to be the genetic parents of the child for purposes of intestate succession. The presumption is rebuttable only by clear and convincing evidence. If two individuals participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their genetic child for purposes of intestate succession.

(b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child’s genetic father for purposes of intestate succession if any of the following occur:

(i) The man joins with the child's mother and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.
(ii) The man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child's birth.

(iii) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.

(iv) The man is determined to be the child's father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(v) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(vi) The man is determined to be the father in an action under the revocation of paternity act.

(c) A child who is not conceived or born during a marriage is an individual born in wedlock if the child's parents marry after the conception or birth of the child.

(§ 2) Only the individual presumed to be the genetic parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent.

**UPC Comment**

**Scope.** This section, adopted in 2008, provides the general rule that a parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status. Exceptions to this general rule are contained in Sections 2-114 (Parent Barred from Inheriting in Certain Circumstances), 2-119 (Adoptee and Adoptee’s Genetic Parents), 2-120 (Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier), and 2-121 (Child Born to Gestational Carrier).

This section replaces former Section 2-114(a), which provided: “(a) Except as provided
in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].”

**Defined Terms.** Genetic parent is defined in Section 2-115 as the child’s genetic father or genetic mother. Genetic mother is defined as the woman whose egg was fertilized by the sperm of a child’s genetic father. Genetic father is defined as the man whose sperm fertilized the egg of a child’s genetic mother.
ADD AS MCL 700.2118. SECTION 2-118. ADOPTEE AND ADOPTEE’S ADOPTIVE PARENT OR PARENTS.

(a) Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents. A parent-child relationship exists between an adoptee and the adoptee’s adoptive parent or parents.

(b) Individual in Process of Being Adopted by Married Couple; Stepchild in Process of Being Adopted by Stepparent. For purposes of subsection (a):

(1) an individual who is in the process of being adopted by a married couple when one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent’s surviving spouse; and

(2) a child of a genetic parent who is in the process of being adopted by a genetic parent’s spouse when the spouse dies is treated as adopted by the deceased spouse if the genetic parent survives the deceased spouse by 120 hours.

(c) Child of Assisted Reproduction or Gestational Child in Process of Being Adopted. If, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent’s spouse when that spouse dies, the child is treated as adopted by the
deceased spouse for the purpose of subsection (b)(2).

**UPC Comment**

**2008 Revisions.** In 2008, this section and Section 2-119 replaced former Section 2-114(b), which provided: “(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent”. The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Subsection (a) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Section 2-119(a) and (b)(1) covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (b)(2) and (c), which are explained below.

**Data on Adoptions.** Official data on adoptions are not regularly collected. Partial data are sometimes available from the Children’s Bureau of the U.S. Department of Health and Human Services, the U.S. Census Bureau, and the Evan B. Donaldson Adoption Institute.

For an historical treatment of adoption, from ancient Greece, through the Middle Ages, 19th- and 20th-century America, to open adoption and international adoption, see Debora L. Spar, The Baby Business ch. 6 (2006) and sources cited therein.

**Defined Term.** *Adoptee* is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor but includes an individual who is adopted as an adult.

**Subsection (a): Parent-Child Relationship Between Adoptee and Adoptive Parent or Parents.** Subsection (a) states the general rule that adoption creates a parent-child relationship between the adoptee and the adoptee’s adoptive parent or parents.

**Subsection (b)(1): Individual in Process of Being Adopted by Married Couple.** If the spouse who subsequently died had filed a legal proceeding to adopt the individual before the spouse died, the individual is “in the process of being adopted” by the deceased spouse when the spouse died. However, the phrase “in the process of being adopted” is not intended to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

**Subsection (b)(2): Stepchild in Process of Being Adopted by Stepparent.** If the stepparent who subsequently died had filed a legal proceeding to adopt the stepchild before the stepparent died, the stepchild is “in the process of being adopted” by the deceased stepparent when the stepparent died. However, the phrase “in the process of being adopted” is not intended
to be limited to that situation, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

**Subsection (c): Child of Assisted Reproduction or Gestational Child in Process of Being Adopted.** Subsection (c) provides that if, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent’s spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). An example would be a situation in which an unmarried mother or father is the parent of a child of assisted reproduction or a gestational child, and subsequently marries an individual who then begins the process of adopting the child but who dies before the adoption becomes final. In such a case, subsection (c) provides that the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2). The phrase “in the process of being adopted” carries the same meaning under subsection (c) as it does under subsection (b)(2).
Section 2-119. Adoptee and Adoptee's Genetic Parents.

(a) [Parent-Child Relationship Between Adoptee and Genetic Parents.] Except as otherwise provided in subsections (b) through (e), a parent-child relationship does not exist between an adoptee and the adoptee’s genetic parents.

(b) [Stepchild Adopted by Stepparent.] A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

   (1) the genetic parent whose spouse adopted the individual; and
   (2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(c) [Individual Adopted by Relative of Genetic Parent.] A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

(d) [Individual Adopted after Death of Both Genetic Parents.] A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic
parent.

(e) [Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted.] If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents under Section 2-120 or between a gestational child and a parent or parents under Section 2-121, the child is adopted by another or others, the child’s parent or parents under Section 2-120 or 2-121 are treated as the child’s genetic parent or parents for the purpose of this section.

UPC Comment

2008 Revisions. In 2008, this section and Section 2-118 replaced former Section 2-114(b), which provided: “(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.” The 2008 revisions divided the coverage of former Section 2-114(b) into two sections. Section 2-118(a) covered that part of former Section 2-114(b) that provided that an adopted individual is the child of his or her adopting parent or parents. Subsections (a) and (b) of this section covered that part of former Section 2-114(b) that provided that an adopted individual is not the child of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

The 2008 revisions also added subsections (c), (d), and (e), which are explained below.

Defined Terms. Section 2-119 uses terms that are defined in Section 2-115.

Adoptee is defined in Section 2-115 as an individual who is adopted. The term is not limited to an individual who is adopted as a minor, but includes an individual who is adopted as an adult.

Genetic parent is defined in Section 2-115 as the child’s genetic father or genetic mother. Genetic mother is defined as the woman whose egg was fertilized by the sperm of a child’s genetic father. Genetic father is defined as the man whose sperm fertilized the egg of a child’s genetic mother.
Relative is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

Subsection (a): Parent-Child Relationship Between Adoptee and Adoptee’s Genetic Parents. Subsection (a) states the general rule that a parent-child relationship does not exist between an adopted child and the child’s genetic parents. This rule recognizes that an adoption severs the parent-child relationship between the adopted child and the child’s genetic parents. The adoption gives the adopted child a replacement family, sometimes referred to in the case law as “a fresh start”. For further elaboration of this theory, see Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5(2)(A) & cmts. d & e (1999). Subsection (a) also states, however, that there are exceptions to this general rule in subsections (b) through (d).

Subsection (b): Stepchild Adopted by Stepparent. Subsection (b) continues the so-called “stepparent exception” contained in the Code since its original promulgation in 1969. When a stepparent adopts his or her stepchild, Section 2-118 provides that the adoption creates a parent-child relationship between the child and his or her adoptive stepparent. Section 2-119(b)(1) provides that a parent-child relationship continues to exist between the child and the child’s genetic parent whose spouse adopted the child. Section 2-119(b)(2) provides that a parent-child relationship also continues to exist between an adopted stepchild and his or her other genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that genetic parent, but not for purposes of inheritance by the other genetic parent and his or her relatives from or through the adopted stepchild.

Example 1 — Post-Widowhood Remarriage. A and B were married and had two children, X and Y. A died, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B’s children and under Section 2-118(a) as C’s children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A’s children for purposes of inheritance from and through A but not for purposes of inheritance from or through X or Y. Thus, if A’s father, G, died intestate, survived by X and Y and by G’s daughter (A’s sister), S, G’s heirs would be S, X, and Y. S would take half and X and Y would take one-fourth each.

Example 2 — Post-Divorce Remarriage. A and B were married and had two children, X and Y. A and B got divorced, and B married C. C adopted X and Y. Under subsection (b)(1), X and Y are treated as B’s children and under Section 2-118(a) as C’s children for all purposes of inheritance. Under subsection (b)(2), X and Y are treated as A’s children for purposes of inheritance from and through A. On the other hand, neither A nor any of A’s relatives can inherit from or through X or Y.

Subsection (c): Individual Adopted by Relative of a Genetic Parent. Under subsection (c), a child who is adopted by a maternal or a paternal relative of either genetic parent, or by the spouse or surviving spouse of such a relative, remains a child of both genetic parents.

Example 3. F and M, a married couple with a four-year old child, X, were badly injured in an automobile accident. F subsequently died. M, who was in a vegetative state and on life support, was unable to care for X. Thereafter, M’s sister, A, and A’s husband, B, adopted X. F’s father, PFG, a widower, then died intestate. Under subsection (c), X is treated as PFG’s grandchild (F’s child).
**Subsection (d): Individual Adopted After Death of Both Genetic Parents.** Usually, a post-death adoption does not remove a child from contact with the genetic families. When someone with ties to the genetic family or families adopts a child after the deaths of the child’s genetic parents, even if the adoptive parent is not a relative of either genetic parent or a spouse or surviving spouse of such a relative, the child continues to be in a parent-child relationship with both genetic parents. Once a child has taken root in a family, an adoption after the death of both genetic parents is likely to be by someone chosen or approved of by the genetic family, such as a person named as guardian of the child in a deceased parent’s will. In such a case, the child does not become estranged from the genetic family. Such an adoption does not “remove” the child from the families of both genetic parents. Such a child continues to be a child of both genetic parents, as well as a child of the adoptive parents.

*Example 4.* F and M, a married couple with a four-year-old child, X, were involved in an automobile accident that killed F and M. Neither M’s parents nor F’s father (F’s mother had died before the accident) nor any other relative was in a position to take custody of X. X was adopted by F and M’s close friends, A and B, a married couple approximately of the same ages as F and M. F’s father, PGF, a widower, then died intestate. Under subsection (d), X is treated as PGF’s grandchild (F’s child). The result would be the same if F’s or M’s will appointed A and B as the guardians of the person of X, and A and B subsequently successfully petitioned to adopt X.

**Subsection (e): Child of Assisted Reproduction or Gestational Child Who Is Subsequently Adopted.** Subsection (e) puts a child of assisted reproduction and a gestational child on the same footing as a genetic child for purposes of this section. The results in Examples 1 through 4 would have been the same had the child in question been a child of assisted reproduction or a gestational child.
ADD AS MCL 700.2120. SECTION 2-120. CHILD CONCEIVED BY ASSISTED REPRODUCTION OTHER THAN CHILD BORN TO GESTATIONAL CARRIER.

(a) [Definitions.] In this section:

(1) “Birth mother” means a woman, other than a gestational carrier under Section 2-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child’s genetic mother.

(2) “Child of assisted reproduction” means a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

(3) “Third-party donor” means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(A) a husband who provides sperm, or a wife who provides eggs, that are used for assisted reproduction by the wife;

(B) the birth mother of a child of assisted reproduction; or

(C) an individual who has been determined under subsection (e) or (f) to have a parent-child relationship with a child of assisted reproduction.

(b) [Third-Party Donor.] A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.
(c) [Parent-Child Relationship with Birth Mother.] A parent-child relationship exists between a child of assisted reproduction and the child’s birth mother.

(d) [Parent-Child Relationship with Husband Whose Sperm Were Used During His Lifetime by His Wife for Assisted Reproduction.] Except as otherwise provided in subsections (i) and (j), a parent-child relationship exists between a child of assisted reproduction and the husband of the child’s birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

(e) [Birth Certificate: Presumptive Effect.] A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that individual.

(f) [Parent-Child Relationship with Another.] Except as otherwise provided in subsections (g), (i), and (j), and unless a parent-child relationship is established under subsection (d) or (e), a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the
individual:

(1) before or after the child’s birth, signed a record that, considering all the facts and circumstances, evidences the individual’s consent; or

(2) in the absence of a signed record under paragraph (1):

(A) functioned as a parent of the child no later than two years after the child’s birth;

(B) intended to function as a parent of the child no later than two years after the child’s birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.

(g) [Record Signed More than Two Years after the Birth of the Child: Effect.] For the purpose of subsection (f)(1), neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached [18] years of age.

(h) [Presumption: Birth Mother Is Married or Surviving Spouse.] For the purpose of subsection (f)(2), the following rules apply:

(1) If the birth mother is married and no divorce proceeding is
pending, in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B).

(2) If the birth mother is a surviving spouse and at her deceased spouse’s death no divorce proceeding was pending, and, if before death or incapacity, the deceased spouse deposited the sperm or eggs that were used to conceive the child, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

(i) [Divorce Before Placement of Eggs, Sperm, or Embryos.] If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother’s former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse’s child.

(j) [Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos.] If, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies subsection (f).

(k) [When Posthumously Conceived Child Treated as in Gestation.] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual’s death, the child is treated as in gestation at the
individual’s death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual’s death; or

(2) born not later than 45 months after the individual’s death.

**UPC Legislative Note:** States are encouraged to enact a provision requiring genetic depositories to provide a consent form that would satisfy subsection (f)(1). See Cal. Health & Safety Code § 1644.7 and .8 for a possible model for such a consent form.

**UPC Comment**

**Data on Children of Assisted Reproduction.** The Center for Disease Control (CDC) of the U.S. Department of Health and Human Services collects data on children of assisted reproduction (ART). See Center for Disease Control, 2004 Assisted Reproductive Technology Success Rates (Dec. 2006) (2004 CDC Report), available at http://www.cdc.gov/ART/ART2004. The data, however, is of limited use because the definition of ART used in the CDC Report excludes intrauterine (artificial) insemination (2004 CDC Report at 3), which is probably the most common form of assisted reproductive procedures. The CDC estimates that in 2004 ART procedures (excluding intrauterine insemination) accounted for slightly more than one percent of total U.S. births. 2004 CDC Report at 13. According to the Report: “The number of infants born who were conceived using ART increased steadily between 1996 and 2004. In 2004, 49,458 infants were born, which was more than double the 20,840 born in 1996.” 2004 CDC Report at 57. “The average age of women using ART services in 2004 was 36. The largest group of women using ART services were women younger than 35, representing 41% of all ART cycles carried out in 2004. Twenty-one percent of ART cycles were carried out among women aged 35-37, 19% among women aged 38-40, 9% among women aged 41-42, and 9% among women older than 42.” 2004 CDC Report at 15. Updates of the 2004 CDC Report are to be posted at http://www.cdc.gov/ART/ART2004.

**AMA Ethics Policy on Posthumous Conception.** The ethics policies of the American Medical Association concerning artificial insemination by a known donor state that “[i]f semen is frozen and the donor dies before it is used, the frozen semen should not be used or donated for purposes other than those originally intended by the donor. If the donor left no instructions, it is reasonable to allow the remaining partner to use the semen for intrauterine insemination but not to donate it to someone else. However, the donor should be advised of such a policy at the time of donation and be given an opportunity to override it.” Am. Med. Assn. Council on Ethical & Judicial Affairs, Code of Medical Ethics: Current Opinions E-2.04 (Issued June 1993; updated December 2004).

**Subsection (a): Definitions.** Subsection (a) defines the following terms:

*Birth mother* is defined as the woman (other than a gestational carrier under Section 2-121) who gave birth to a child of assisted reproduction.
Child of assisted reproduction is defined as a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.

Third-party donor. The definition of third-party donor is based on the definition of “donor” in the Uniform Parentage Act § 102.

Other Defined Terms. In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

Assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic father is defined in Section 2-115 as the man whose sperm fertilized the egg of a child’s genetic mother.

Genetic mother is defined as the woman whose egg was fertilized by the sperm of the child’s genetic father.

Incapacity is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

Subsection (b): Third-Party Donor. Subsection (b) is consistent with the Uniform Parentage Act § 702. Under subsection (b), a third-party donor does not have a parent-child relationship with a child of assisted reproduction, despite the donor’s genetic relationship with the child.

Subsection (c): Parent-Child Relationship With Birth Mother. Subsection (c) is in accord with Uniform Parentage Act Section 201 in providing that a parent-child relationship exists between a child of assisted reproduction and the child’s birth mother. The child’s birth mother, defined in subsection (a) as the woman (other than a gestational carrier) who gave birth to the child, made the decision to undergo the procedure with intent to become pregnant and give birth to the child. Therefore, in order for a parent-child relationship to exist between her and the child, no proof that she consented to the procedure with intent to be treated as the parent of the child is necessary.

Subsection (d): Parent-Child Relationship with Husband Whose Sperm Were Used
During His Lifetime By His Wife for Assisted Reproduction. The principal application of subsection (d) is in the case of the assisted reproduction procedure known as intrauterine insemination husband (IIH), or, in older terminology, artificial insemination husband (AIH). Subsection (d) provides that, except as otherwise provided in subsection (i), a parent-child relationship exists between a child of assisted reproduction and the husband of the child’s birth mother if the husband provided the sperm that were used during his lifetime by her for assisted reproduction and the husband is the genetic father of the child. The exception contained in subsection (i) relates to the withdrawal of consent in a record before the placement of eggs, sperm, or embryos. Note that subsection (d) only applies if the husband’s sperm were used during his lifetime by his wife to cause a pregnancy by assisted reproduction. Subsection (d) does not apply to posthumous conception.

Subsection (e): Birth Certificate: Presumptive Effect. A birth certificate will name the child’s birth mother as mother of the child. Under subsection (c), a parent-child relationship exists between a child of assisted reproduction and the child’s birth mother. Note that the term “birth mother” is a defined term in subsection (a) as not including a gestational carrier as defined in Section 2-121.

Subsection (e) applies to the individual, if any, who is identified on the birth certificate as the child’s other parent. Subsection (e) grants presumptive effect to a birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction. In the case of unmarried parents, federal law requires that states enact procedures under which “the name of the father shall be included on the record of birth,” but only if the father and mother have signed a voluntary acknowledgment of paternity or a court of an administrative agency of competent jurisdiction has issued an adjudication of paternity. See 42 U.S.C. § 666(a)(5)(D). This federal statute is included as an appendix to the Uniform Parentage Act.

The federal statute applies only to unmarried opposite-sex parents. Section 2-120(e)’s presumption, however, could apply to a same-sex couple if state law permits a woman who is not the birth mother to be listed on the child’s birth certificate as the child’s other parent. Even if state law does not permit that listing, the woman who is not the birth mother could be the child’s parent by adoption of the child (see Section 2-118) or under subsection (f) as a result of her consent to assisted reproduction by the birth mother “with intent to be treated as the other parent of the child,” or by satisfying the “function as a parent” test in subsection (f)(2).

Section 2-120 does not apply to same-sex couples that use a gestational carrier. For same-sex couples using a gestational carrier, the parent-child relationship can be established by adoption (see Section 2-118 and Section 2-121(b)), or it can be established under Section 2-121(d) if the couple enters into a gestational agreement with the gestational carrier under which the couple agrees to be the parents of the child born to the gestational carrier. It is irrelevant whether either intended parent is a genetic parent of the child. See Section 2-121(a)(4).

Subsection (f): Parent-Child Relationship with Another. In order for someone other than the birth mother to have a parent-child relationship with the child, there needs to be proof that the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. The other individual’s genetic material might or might not have
been used to create the pregnancy. Except as otherwise provided in this section, merely depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with the child.

Subsection (f)(1): Signed Record Evidencing Consent, Considering All the Facts and Circumstances, to Assisted Reproduction with Intent to Be Treated as the Other Parent of the Child. Subsection (f)(1) provides that a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction with intent to be treated as the other parent of the child is established if the individual signed a record, before or after the child’s birth, that considering all the facts and circumstances evidences the individual’s consent. Recognizing consent in a record not only signed before the child’s birth but also at any time after the child’s birth is consistent with the Uniform Parentage Act §§ 703 and 704.

As noted, the signed record need not explicitly express consent to the procedure with intent to be treated as the other parent of child, but only needs to evidence such consent considering all the facts and circumstances. An example of a signed record that would satisfy this requirement comes from In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, the New York Surrogate’s Court held that a child of posthumous conception was included in a class gift in a case in which the deceased father had signed a form that stated: “In the event of my death I agree that my spouse shall have the sole right to make decisions regarding the disposition of my semen samples. I authorize repro lab to release my specimens to my legal spouse [naming her].” Another form he signed stated: “I, [naming him], hereby certify that I am married or intimately involved with [naming her] and the cryopreserved specimens stored at repro lab will be used for future inseminations of my wife/intimate partner.” Although these forms do not explicitly say that the decedent consented to the procedure with intent to be treated as the other parent of the child, they do evidence such consent in light of all of the facts and circumstances and would therefore satisfy subsection (f)(1).

Subsection (f)(2): Absence of Signed Record Evidencing Consent. Ideally an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child will have signed a record that satisfies subsection (f)(1). If not, subsection (f)(2) recognizes that actions speak as loud as words. Under subsection (f)(2), consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual functioned as a parent of the child no later than two years after the child’s birth. Under subsection (f)(2)(B), the same result applies if the evidence establishes that the individual had that intent but death, incapacity, or other circumstances prevented the individual from carrying out that intent. Finally, under subsection (f)(2)(C), the same result applies if it can be established by clear and convincing evidence that the individual intended to be treated as a parent of a posthumously conceived child.

Subsection (g): Record Signed More than Two Years after the Birth of the Child: Effect. Subsection (g) is designed to prevent an individual who has never functioned as a parent of the child from signing a record in order to inherit from or through the child or in order to make it possible for a relative of the individual to inherit from or through the child. Thus, subsection (g) provides that, for purposes of subsection (f)(1), an individual who signed a record more than
two years after the birth of the child, or a relative of that individual, does not inherit from or through the child unless the individual functioned as a parent of the child before the child reached the age of 18.

Subsection (h): Presumption: Birth Mother is Married or Surviving Spouse. Under subsection (h), if the birth mother is married and no divorce proceeding is pending, then in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B) or if the birth mother is a surviving spouse and at her deceased spouse’s death no divorce proceeding was pending, then in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

Subsection (i): Divorce Before Placement of Eggs, Sperm, or Embryos. Subsection (i) is derived from the Uniform Parentage Act § 706(b).

Subsection (j): Withdrawal of Consent Before Placement of Eggs, Sperm, or Embryos. Subsection (j) is derived from Uniform Parentage Act Section 706(a). Subsection (j) provides that if, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies the requirements of subsection (f).

Subsection (k): When Posthumously Conceived Gestational Child Treated as in Gestation. Subsection (k) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual’s death, the child is treated as in gestation at the individual’s death for purposes of Section 2-104(a)(2) if the child is either (1) in utero no later than 36 months after the individual’s death or (2) born no later than 45 months after the individual’s death. Note also that Section 3-703 gives the decedent’s personal representative authority to take account of the possibility of posthumous conception in the timing of all or part of the distribution of the estate.

The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent’s death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.
ADD AS MCL 700.2121. SECTION 2-121. CHILD BORN TO GESTATIONAL CARRIER.

(a) [Definitions.] In this section:

(1) “Gestational agreement” means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (e).

(2) “Gestational carrier” means a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child’s genetic mother.

(3) “Gestational child” means a child born to a gestational carrier under a gestational agreement.

(4) “Intended parent” means an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

(b) [Court Order Adjudicating Parentage: Effect.] A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

(c) [Gestational Carrier.] A parent-child relationship between a gestational
child and the child’s gestational carrier does not exist unless the gestational carrier is:

(1) designated as a parent of the child in a court order described in subsection (b); or

(2) the child’s genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

(d) [Parent-Child Relationship with Intended Parent or Parents.] In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an intended parent who:

(1) functioned as a parent of the child no later than two years after the child’s birth; or

(2) died while the gestational carrier was pregnant if:

(A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child’s birth;

(B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child’s birth; or
(C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child’s birth.

(e) [Gestational Agreement after Death or Incapacity.] In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual’s death or incapacity to conceive a child under a gestational agreement entered into after the individual’s death or incapacity if the individual intended to be treated as the parent of the child. The individual’s intent may be shown by:

(1) a record signed by the individual which considering all the facts and circumstances evidences the individual’s intent; or

(2) other facts and circumstances establishing the individual’s intent by clear and convincing evidence.

(f) [Presumption: Gestational Agreement after Spouse’s Death or Incapacity.] Except as otherwise provided in subsection (g), and unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if:

(1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child;
(2) when the individual deposited the sperm or eggs, the individual
was married and no divorce proceeding was pending; and

(3) the individual’s spouse or surviving spouse functioned as a parent
of the child no later than two years after the child’s birth.

(g) [Subsection (f) Presumption Inapplicable.] The presumption under
subsection (f) does not apply if there is:

(1) a court order under subsection (b); or

(2) a signed record that satisfies subsection (e)(1).

(h) [When Posthumously Conceived Gestational Child Treated as in
Gestation.] If, under this section, an individual is a parent of a gestational child
who is conceived after the individual’s death, the child is treated as in gestation at
the individual’s death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual’s death; or

(2) born not later than 45 months after the individual’s death.

(i) [No Effect on Other Law.] This section does not affect law of this state
other than this [code] regarding the enforceability or validity of a gestational
agreement.

**UPC Comment**

Subsection (a): Definitions. Subsection (a) defines the following terms:

Gestational agreement. The definition of gestational agreement is based on the
Comment to Article 8 of the Uniform Parentage Act, which states that the term “gestational
carrier” “applies to both a woman who, through assisted reproduction, performs the gestational
function without being genetically related to a child, and a woman who is both the gestational and genetic mother. The key is that an agreement has been made that the child is to be raised by the intended parents.” The Comment also points out that “The [practice in which the woman is both the gestational and genetic mother] has elicited disfavor in the ART community, which has concluded that the gestational carrier’s genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.”

Gestational carrier is defined as a woman who is not an intended parent and who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child’s genetic mother.

Gestational child is defined as a child born to a gestational carrier under a gestational agreement.

Intended parent is defined as an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

Other Defined Terms. In addition to the terms defined in subsection (a), this section uses terms that are defined in Section 2-115.

Child of assisted reproduction is defined in Section 2-115 as a method of causing pregnancy other than sexual intercourse.

Divorce is defined in Section 2-115 as including an annulment, dissolution, and declaration of invalidity of a marriage.

Functioned as a parent of the child is defined in Section 2-115 as behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household. See also the Comment to Section 2-115 for additional explanation of the term.

Genetic mother is defined as the woman whose egg was fertilized by the sperm of the child’s genetic father.

Incapacity is defined in Section 2-115 as the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.

Relative is defined in Section 2-115 as a grandparent or a descendant of a grandparent.

Subsection (b): Court Order Adjudicating Parentage: Effect. A court order issued under Section 807 of the Uniform Parentage Act (UPA) would qualify as a court order adjudicating parentage for purposes of subsection (b). UPA Section 807 provides:
UPA Section 807. Parentage under Validated Gestational Agreement.

(a) Upon birth of a child to a gestational carrier, the intended parents shall file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

(1) confirming that the intended parents are the parents of the child;

(2) if necessary, ordering that the child be surrendered to the intended parents; and

(3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.

(b) If the parentage of a child born to a gestational carrier is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

(c) If the intended parents fail to file notice required under subsection (a), the gestational carrier or the appropriate state agency may file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

Subsection (c): Gestational Carrier. Under subsection (c), the only way that a parent-child relationship exists between a gestational child and the child’s gestational carrier is if she is (1) designated as a parent of the child in a court order described in subsection (b) or (2) the child’s genetic mother and a parent-child relationship does not exist under this section with an individual other than the gestational carrier.

Subsection (d): Parent-Child Relationship With Intended Parent or Parents. Subsection (d) only applies in the absence of a court order under subsection (b). If there is no such court order, subsection (b) provides that a parent-child relationship exists between a gestational child and an intended parent who functioned as a parent of the child no later than two years after the child’s birth. A parent-child also exists between a gestational child and an intended parent if the intended parent died while the gestational carrier was pregnant, but only if (A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child’s birth; (B) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child’s birth; or (C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child’s birth.

Subsection (e): Gestational Agreement After Death or Incapacity. Subsection (e) only applies in the absence of a court order under subsection (b). If there is no such court order, a parent-child relationship exists between a gestational child and an individual whose sperm or
eggs were used after the individual’s death or incapacity to conceive a child under a gestational agreement entered into after the individual’s death or incapacity if the individual intended to be treated as the parent of the child. The individual’s intent may be shown by a record signed by the individual which considering all the facts and circumstances evidences the individual’s intent or by other facts and circumstances establishing the individual’s intent by clear and convincing evidence.

Subsections (f) and (g): Presumption: Gestational Agreement After Spouse’s Death or Incapacity. Subsection (f) and (g) are connected. Subsection (f) provides that unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if (1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child, (2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and (3) the individual’s spouse or surviving spouse functioned as a parent of the child no later than two years after the child’s birth.

Subsection (g) provides, however, that the presumption under subsection (f) does not apply if there is a court order under subsection (b) or a signed record that satisfies subsection (e)(1).

Subsection (h): When Posthumously Conceived Gestational Child is Treated as in Gestation. Subsection (h) provides that if, under this section, an individual is a parent of a gestational child who is conceived after the individual’s death, the child is treated as in gestation at the individual’s death for purposes of Section 2-104(a)(2) if the child is either (1) in utero not later than 36 months after the individual’s death or (2) born not later than 45 months after the individual’s death. Note also that Section 3-703 gives the decedent’s personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate.

The 36-month period in subsection (g) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The three-year period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent’s death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a typical period of pregnancy.
**ADD AS MCL 700.2122. SECTION 2-122. EQUITABLE ADOPTION.**

This [subpart] does not affect the doctrine of equitable adoption.

**UPC Comment**

On the doctrine of equitable adoption, see Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5, cmt. k & Reporter’s Note No. 7 (1999).
PART 5. WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

UPC GENERAL COMMENT

Part 5 of Article II was retitled in 1990 to reflect the fact that it now includes the provisions on will contracts (pre-1990 Section 2-701) and on custody and deposit of wills (pre-1990 Sections 2-901 and 2-902).

Part 5 deals with capacity and formalities for execution and revocation of wills. The basic intent of the pre-1990 sections was to validate wills whenever possible. To that end, the minimum age for making wills was lowered to eighteen, formalities for a written and attested will were reduced, holographic wills written and signed by the testator were authorized, choice of law as to validity of execution was broadened, and revocation by operation of law was limited to divorce or annulment. In addition, the statute also provided for an optional method of execution with acknowledgment before a public officer (the self-proved will).

These measures have been retained, and the purpose of validating wills whenever possible has been strengthened by the addition of a new section, Section 2-503, which allows a will to be upheld despite a harmless error in its execution.
AMEND MCL 700.2502 TO READ. SECTION 2-502. EXECUTION; WITNESSED OR NOTARIZED WILLS; HOLOGRAPHIC WILLS.

(a) [Witnessed or Notarized Wills.] Except as otherwise provided in subsection (b) and in Sections 2-503, 2-506, and 2-513, a will must be:

(1) in writing;

(2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and

(3) either:

(A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgement of the will; or

(B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.

(b) [Holographic Wills.] A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator’s signature and the document’s material portions are in the testator’s handwriting.

(c) [Extrinsic Evidence.] Intent that a document constitute the testator’s will can be established by extrinsic evidence, including, for holographic wills, portions
of the document that are not in the testator’s handwriting.

**UPC Comment**

**Subsection (a): Witnessed or Notarized Wills.** Three formalities for execution of a witnessed or notarized will are imposed. Subsection (a)(1) requires the will to be in writing. Any reasonably permanent record is sufficient. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. i (1999).

Under subsection (a)(2), the testator must sign the will or some other individual must sign the testator’s name in the testator’s presence and by the testator’s direction. If the latter procedure is followed, and someone else signs the testator’s name, the so-called “conscious presence” test is codified, under which a signing is sufficient if it was done in the testator’s conscious presence, i.e., within the range of the testator’s senses such as hearing; the signing need not have occurred within the testator’s line of sight. For application of the “conscious-presence” test, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. n (1999); Cunningham v. Cunningham, 80 Minn. 180, 83 N.W. 58 (1900) (conscious-presence requirement held satisfied where “the signing was within the sound of the testator’s voice; he knew what was being done....”); Healy v. Bartless, 73 N.H. 110, 59 A. 617 (1904) (individuals are in the decedent’s conscious presence “whenever they are so near at hand that he is conscious of where they are and of what they are doing, through any of his senses, and where he can readily see them if he is so disposed.”); Demaris’ Estate, 166 Or. 36, 110 P.2d 571 (1941) (“[W]e do not believe that sight is the only test of presence. We are convinced that any of the senses that a testator possesses, which enable him to know whether another is near at hand and what he is doing, may be employed by him in determining whether [an individual is] in his [conscious] presence....”).

Signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a “signature”. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. j (1999). There is no requirement that the testator “publish” the document as his or her will, or that he or she request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or that his or her name was signed by another) or that the document is his or her will. An acknowledgment need not be expressly stated, but can be inferred from the testator’s conduct. Norton v. Georgia Railroad Bank & Tr. Co., 248 Ga. 847, 285 S.E.2d 910 (1982).

There is no requirement that the testator’s signature be at the end of the will; thus, if the testator writes his or her name in the body of the will and intends it to be his or her signature, the statute is satisfied. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmts. j & k (1999).

Subsection (a)(3) requires that the will either be (A) signed by at least two individuals, each of whom witnessed at least one of the following: (i) the signing of the will; (ii) the testator’s acknowledgment of the signature; or (iii) the testator’s acknowledgment of the will; or (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. Subparagraph (B) was added in 2008 in order to recognize the validity
of notarized wills.

Under subsection (a)(3)(A), the witnesses must sign as witnesses (see, e.g., Mossler v. Johnson, 565 S.W.2d 952 (Tex. Civ. App. 1978)), and must sign within a reasonable time after having witnessed the testator’s act of signing or acknowledgment. There is, however, no requirement that the witnesses sign before the testator’s death. In a particular case, the reasonable-time requirement could be satisfied even if the witnesses sign after the testator’s death.

Under subsection (a)(3)(B), a will, whether or not it is properly witnessed under subsection (a)(3)(A), can be acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments. Note that a signature guarantee is not an acknowledgment before a notary public or other person authorized by law to take acknowledgments. The signature guarantee program, which is regulated by federal law, is designed to facilitate transactions relating to securities. See 17 C.F.R. § 240.17Ad-15.

Allowing notarized wills as an optional method of execution addresses cases that have begun to emerge in which the supervising attorney, with the client and all witnesses present, circulates one or more estate-planning documents for signature, and fails to notice that the client or one of the witnesses has unintentionally neglected to sign one of the documents. See, e.g., Dalk v. Allen, 774 So.2d 787 (Fla. Dist. Ct. App. 2000); Sisson v. Park Street Baptist Church, 24 E.T.R.2d 18 (Ont. Gen. Div. 1998). This often, but not always, arises when the attorney prepares multiple estate-planning documents — a will, a durable power of attorney, a health-care power of attorney, and perhaps a revocable trust. It is common practice, and sometimes required by state law, that the documents other than the will be notarized. It would reduce confusion and chance for error if all of these documents could be executed with the same formality.

In addition, lay people (and, sad to say, some lawyers) think that a will is valid if notarized, which is not true under non-UPC law. See, e.g., Estate of Saueressig, 136 P.3d 201 (Cal. 2006). In re Estate of Hall, 51 P.3d 1134 (Mont. 2002), a notarized but otherwise unwitnessed will was upheld, but not under the pre-2008 version of Section 2-502, which did not authorize notarized wills. The will was upheld under the harmless-error rule of Section 2-503. There are also cases in which a testator went to his or her bank to get the will executed, and the bank’s notary notarized the document, mistakenly thinking that notarization made the will valid. Cf., e.g., Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985). Under non-UPC law, the will is usually held invalid in such cases, despite the lack of evidence raising any doubt that the will truly represented the decedent’s wishes.

Other uniform acts affecting property or person do not require either attesting witnesses or notarization. See, e.g., Uniform Trust Code Section 402(a)(2); Uniform Power of Attorney Act Section 105; Uniform Health-Care Decisions Act Section 2(f).

A will that does not meet the requirements of subsection (a) may be valid under subsection (b) as a holograph or under the harmless error rule of Section 2-503.

Subsection (b): Holographic Wills. This subsection authorizes holographic wills. On holographic wills, see Restatement (Third) of Property: Wills and Other Donative Transfers §
3.2 (1999). Subsection (b) enables a testator to write his or her own will in handwriting. There need be no witnesses. The only requirement is that the signature and the material portions of the document be in the testator’s handwriting.

By requiring only the “material portions of the document” to be in the testator’s handwriting (rather than requiring, as some existing statutes do, that the will be “entirely” in the decedent’s handwriting), a holograph may be valid even though immaterial parts such as date or introductory wording are printed, typed, or stamped.

A valid holograph can also be executed on a printed will form if the material portions of the document are handwritten. The fact, for example, that the will form contains printed language such as “I give, devise, and bequeath to ______” does not disqualify the document as a holographic will, as long as the testator fills out the remaining portion of the dispositive provision in his or her own hand.

Subsection (c): Extrinsic Evidence. Under subsection (c), testamentary intent can be shown by extrinsic evidence, including for holographic wills the printed, typed, or stamped portions of the form or document. Handwritten alterations, if signed, of a validly executed nonhandwritten will can operate as a holographic codicil to the will. If necessary, the handwritten codicil can derive meaning, and hence validity as a holographic codicil, from nonhandwritten portions of the document. See Restatement (Third) of Property: Wills and Other Donative Transfers § 3.2 cmt. g (1999). This position intentionally contradicts Estate of Foxley, 575 N.W.2d 150 (Neb. 1998), a decision condemned in Reporter’s Note No. 4 to the Restatement as a decision that “reached a manifestly unjust result”.


Historical Note. This Comment was revised in 2008.

The Michigan Notary Public Act (MCL 55.285) provides in relevant part:

MCL 55.285 Performance of notarial acts; scope; verification.
(1) A notary public may perform notarial acts that include, but are not limited to, the following:
(a) Taking acknowledgments.
(b) Administering oaths and affirmations.
(c) Witnessing or attesting to a signature.
(2) In taking an acknowledgment, the notary public shall determine, either from personal knowledge or from satisfactory evidence, that the person in the presence of the notary public and making the acknowledgment is the person whose signature is on the record.
(3) In taking a verification upon oath or affirmation, the notary public shall determine, either from personal knowledge or from satisfactory evidence, that the person in the presence of the notary public and making the verification is the person whose signature is on the record being verified.
**4.** In witnessing or attesting to a signature, the notary public shall determine, either from personal knowledge or from satisfactory evidence, that the signature is that of the person in the presence of the notary public and is the person named in the record.

**5.** In all matters where the notary public takes a verification upon oath or affirmation, or witnesses or attests to a signature, the notary public shall require that the person sign the record being verified, witnessed, or attested in the presence of the notary public.

**6.** A notary public has satisfactory evidence that a person is the person whose signature is on a record if that person is any of the following:

   (a) Personally known to the notary public.

   (b) Identified upon the oath or affirmation of a credible witness personally known by the notary public and who personally knows the person.

   (c) Identified on the basis of a current license, identification card, or record issued by a federal or state government that contains the person's photograph and signature.

AMEND MCL 700.2504 TO READ. SECTION 2-504 - SELF-PROVED

WILL.

700.2504 Self-proved will.

(1) A will that is executed with attesting witnesses may be simultaneously executed, attested, and made self-proved by acknowledgment of the will by the testator and 2 witnesses' sworn statements, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I, ________________________, the testator, sign my name to this document on __________, ______. I have taken an oath, administered by the officer whose signature and seal appear on this document, swearing that the statements in this document are true. I declare to that officer that this document is my will; that I sign it willingly or willingly direct another to sign for me; that I execute it as my voluntary act for the purposes expressed in this will; that I am 18 years of age or older and under no constraint or undue influence; and that I have sufficient mental capacity to make this will.

_________________________________
(Signature) Testator

We, ________________________ and ________________________, the witnesses, sign our names to this document and have taken an oath, administered by the officer whose signature and seal appear on this document, to swear that all of the following statements are true: the individual signing this document as the testator executes the document as his or her will, signs it willingly or willingly directs another to sign for him or her, and executes it as his or her voluntary act for the purposes expressed in this will; each of us, in the testator's presence, signs this will as witness to the testator's signing; and, to
the best of our knowledge, the testator is 18 years of age or older, is under no constraint or undue influence, and has sufficient mental capacity to make this will.

_________________________________
(Signature) Witness

_________________________________
(Signature) Witness

The State of ________________________________
County of ________________________________
Sworn to and signed in my presence by ____________, the testator, and sworn to and signed in my presence by ____________ and ____________, witnesses, on _________, ________.

month/day year

____________________________________
(SEAL) Signed

____________________________________
(official capacity of officer)

(2) An attested will may be made self-proved at any time after its execution by the acknowledgment of the will by the testator and the sworn statements of the witnesses to the will, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

The State of ________________________________
County of ________________________________
We, ____________, ____________, and ____________, the testator and the witnesses, respectively, whose names are signed to the attached will, sign this document and have taken an oath, administered by the officer whose signature and seal appear on this document, to swear that all of the following statements are true: the individual signing this document as the will's testator
executed the will as his or her will, signed it willingly or
willingly directed another to sign for him or her, and executed
it as his or her voluntary act for the purposes expressed in
the will; each witness, in the testator's presence, signed the
will as witness to the testator's signing; and, to the best of
the witnesses' knowledge, the testator, at the time of the
will's execution, was 18 years of age or older, was under no
constraint or undue influence, and had sufficient mental
capacity to make this will.

_________________________________
(Signature) Testator

_________________________________
(Signature) Witness

_________________________________
(Signature) Witness

Sworn to and signed in my presence by ____________, the
testator, and sworn to and signed in my presence by
____________ and ______________, witnesses, on
____________, __________.

month/day/year

____________________________________
(SEAL) Signed

____________________________________
(official capacity of officer)

(3) A codicil to a will that is executed with attesting witnesses may be
simultaneously executed and attested, and both the codicil and the original will
made self-proved, by acknowledgment of the codicil by the testator and by
witnesses' sworn statements, each made before an officer authorized to administer
oaths under the laws of the state in which execution occurs and evidenced by the
officer's certificate, under official seal, in substantially the following form:

I, ______________, the testator, sign my name to this
document on __________, ____. I have taken an oath,
administered by the officer whose signature and seal appear on
this document, swearing that the statements in this document are true. I declare to that officer that this document is a codicil to my will; that I sign it willingly or willingly direct another to sign for me; that I execute it as my voluntary act for the purposes expressed in this codicil; and that I am 18 years of age or older, and under no constraint or undue influence; and that I have sufficient mental capacity to make this codicil.

_________________________________
(Signature) Testator

We, _______________ and _______________, the witnesses, sign our names to this document and have taken an oath, administered by the officer whose signature and seal appear on this document, to swear that all of the following statements are true: the individual signing this document as the testator executes the document as a codicil to his or her will, signs it willingly or willingly directs another to sign for him or her, and executes it as his or her voluntary act for the purposes expressed in this codicil; each of us, in the testator's presence, signs this codicil as witness to the testator's signing; and, to the best of our knowledge, the testator is 18 years of age or older, is under no constraint or undue influence, and has sufficient mental capacity to make this codicil.

____________________
(Signature) Witness

____________________
(Signature) Witness

The State of ______________________________
County of ___________________________________

Sworn to and signed in my presence by __________, the testator, and sworn to and signed in my presence by _________________ and ________________, witnesses, on
(official capacity of officer)

(4) If necessary to prove the will's due execution, a signature affixed to a self-proving sworn statement attached to a will is considered a signature affixed to the will.

(5) Instead of the testator and witnesses each making a sworn statement before an officer authorized to administer oaths as prescribed in subsections (1) to (3), a will or codicil may be made self-proved by a written statement that is not a sworn statement. This statement shall state, or incorporate by reference to an attestation clause, the facts regarding the testator and the formalities observed at the signing of the will or codicil as prescribed in subsections (1) to (3). The testator and witnesses shall sign the statement, which must include its execution date and must begin with substantially the following language: "I certify (or declare) under penalty for perjury under the law of the state of Michigan that...".

**UPC Comment**

A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405, and 3-406 without the testimony of any attesting witness, but otherwise it is treated no differently from a will not self-proved. Thus, a self-proved will may be contested (except in regard to questions of proper execution), revoked, or amended by a codicil in exactly the same fashion as a will not self-proved. The procedural advantage of a self-proved will is limited to formal testacy proceedings because Section 3-303, which deals with informal probate, dispenses with the necessity of testimony of witnesses even though the instrument is not self-proved under this section.

Subsection (c) was added in 1990 to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit was held not to constitute a signature on the will, resulting in invalidity of the will in cases in which the testator or witnesses got confused and only signed on the self-proving affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash U. L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash. Ct. App. 1989).

**2008 Revision.** Section 2-502(a) was amended in 2008 to add an optional method of execution by having a will notarized rather than witnessed by two attesting witnesses. The amendment to Section 2-502 necessitated amending this section so that it only applies to a will
that is executed with attesting witnesses.

**Historical Note.** This Comment was revised in 2008.
PART 7. RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER
GOVERNING INSTRUMENTS

UPC GENERAL COMMENT

Part 7 contains rules of construction applicable to wills and other governing instruments, such as deeds, trusts, appointments, beneficiary designations, and so on. Like the rules of construction in Part 6 (which apply only to wills), the rules of construction in this part yield to a finding of a contrary intention.

Some of the sections in Part 7 are revisions of sections contained in Part 6 of the pre-1990 Code. Although these sections originally applied only to wills, their restricted scope was inappropriate.

Some of the sections in Part 7 are new, having been added to the Code as desirable means of carrying out common intention.

Application to Pre-Existing Governing Instruments. Under Section 8-101(b), for decedents dying after the effective date of enactment, the provisions of this Code apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature of the Code. The statement, titled “Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents,” can be found at 17 Am. C. Tr. & Est. Couns. Notes 184 (1991) or can be obtained from the Uniform Law Commission, www.uniformlaws.org.

Historical Note. This General Comment was revised in 1993. For the prior version, see 8 U.L.A. 137 (Supp. 1992).
AMEND MCL 700.2707 TO READ. SECTION 2-705. CLASS GIFTS

CONSTRUED TO ACCORD WITH INTESTATE SUCCESSION;

EXCEPTIONS.

(a) [Definitions.] In this section:

(1) “Adoptee” has the meaning set forth in Section 2-115.
(2) “Child of assisted reproduction” has the meaning set forth in Section 2-120.
(3) “Distribution date” means the date when an immediate or postponed class gift takes effect in possession or enjoyment.
(4) “Functioned as a parent of the adoptee” has the meaning set forth in Section 2-115, substituting “adoptee” for “child” in that definition.
(5) “Functioned as a parent of the child” has the meaning set forth in Section 2-115.
(6) “Genetic parent” has the meaning set forth in Section 2-115.
(7) “Gestational child” has the meaning set forth in Section 2-121.
(8) “Relative” has the meaning set forth in Section 2-115.

(b) [Terms of Relationship.] A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective
descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. For the purpose of determining whether a contrary intention exists under Section 2-701, a provision in a governing instrument that relates to the inclusion or exclusion in a class gift of a child born to parents who are not married to each other but does not specifically refer to a child of assisted reproduction or a gestational child does not apply to a child of assisted reproduction or a gestational child.

(c) [Relatives by Marriage.] Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or nephews, are construed to exclude relatives by marriage, unless:

1. when the governing instrument was executed, the class was then and foreseeably would be empty; or
2. the language or circumstances otherwise establish that relatives by marriage were intended to be included.

(d) [Half-Blood Relatives.] Terms of relationship in a governing instrument that do not differentiate relationships by the half blood from those by the whole blood, such as brothers, sisters, nieces, or nephews, are construed to include both types of relationships.

(e) [Transferor Not Genetic Parent.] In construing a dispositive provision
of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of that genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached [18] years of age.

(f) [Transferor Not Adoptive Parent.] In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

(1) the adoption took place before the adoptee reached [18] years of age;
(2) the adoptive parent was the adoptee’s stepparent or foster parent; or
(3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached [18] years of age.

(g) [Class-Closing Rules.] The following rules apply for purposes of the class-closing rules:

(1) A child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.
(2) If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent’s death,
the child is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent’s death or born not later than 45 months after the deceased parent’s death.

(3) An individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

**UPC Comment**

This section facilitates a modern construction of gifts that identify the recipient by reference to a relationship to someone; usually these gifts will be class gifts. The rules of construction contained in this section are substantially consistent with the rules of construction contained in the Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.5 through 14.9. These sections of the Restatement apply to the treatment for class-gift purposes of an adoptee, a nonmarital child, a child of assisted reproduction, a gestational child, and a relative by marriage.

The rules set forth in this section are rules of construction, which under Section 2-701 are controlling in the absence of a finding of a contrary intention. With two exceptions, Section 2-705 invokes the rules pertaining to intestate succession as rules of construction for interpreting terms of relationship in private instruments.

**Subsection (a): Definitions.** With one exception, the definitions in subsection (a) rely on definitions contained in intestacy sections. The one exception is the definition of “distribution date,” which is relevant to the class-closing rules contained in subsection (g). *Distribution date* is defined as the date when an immediate or postponed class gift takes effect in possession or enjoyment.

**Subsection (b): Terms of Relationship.** Subsection (b) provides that a class gift that uses a term of relationship to identify the takers includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of a child of assisted reproduction or a gestational child in a class is subject to the class-closing rules. See *Examples 11 through 15*.

The last sentence of subsection (b) was added by technical amendment in 2010. That sentence is necessary to prevent a provision in a governing instrument that relates to the inclusion or exclusion of a child born to parents who are not married to each other from applying to a child of assisted reproduction or a gestational child, unless the provision specifically refers
to such a child. Technically, for example, a posthumously conceived child born to a decedent’s surviving widow could be considered a nonmarital child. See, e.g., Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 266-67 (Mass. 2002) (“Because death ends a marriage,... posthumously conceived children are always nonmarital children.”). A provision in a will, trust, or other governing instrument that relates to the inclusion or exclusion of a nonmarital child, or to the inclusion or exclusion of a nonmarital child under specified circumstances, was not likely inserted with a child of assisted reproduction or a gestational child in mind. The last sentence of subsection (b) provides that, unless that type of provision specifically refers to a child of assisted reproduction or a gestational child, such a provision does not state a contrary intention under Section 2-701 to the rule of construction contained in subsection (b).

Subsection (b) also provides that, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession regarding parent-child relationships. The subsection (e) exception relates to situations in which the transferor is not the genetic parent of the child. The subsection (f) exception relates to situations in which the transferor is not the adoptive parent of the adoptee. Consequently, if the transferor is the genetic or adoptive parent of the child, neither exception applies, and the class gift or other term of relationship is construed in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of an adoptee or a child born to parents who are not married to each other in a class is subject to the class-closing rules. See Examples 9 and 10.

Subsection (c): Relatives by Marriage. Subsection (c) provides that terms of relationship that do not differentiate relationships by blood from those by marriage, such as “uncles”, “aunts”, “nieces”, or “nephews”, are construed to exclude relatives by marriage, unless (1) when the governing instrument was executed, the class was then and foreseeably would be empty or (2) the language or circumstances otherwise establish that relatives by marriage were intended to be included. The Restatement (Third) of Property: Wills and Other Donative Transfers § 14.9 adopts a similar rule of construction. As recognized in both subsection (c) and the Restatement, there are situations in which the circumstances would tend to include a relative by marriage. As provided in subsection (g), inclusion of a relative by marriage in a class is subject to the class-closing rules.

One situation in which the circumstances would tend to establish an intent to include a relative by marriage is the situation in which, looking at the facts existing when the governing instrument was executed, the class was then and foreseeably would be empty unless the transferor intended to include relatives by marriage.

Example 1. G’s will devised property in trust, directing the trustee to pay the income in equal shares “to G’s children who are living on each income payment date and on the death of G’s last surviving child, to distribute the trust property to G’s issue then living, such issue to take per stirpes, and if no issue of G is then living, to distribute the trust property to the X Charity.” When G executed her will, she was past the usual childbearing age, had no children of her own, and was married to a man who had four children by a previous marriage. These children had lived with G and her husband for many years, but G had never adopted them. Under these
circumstances, it is reasonable to conclude that when G referred to her “children” in her will she was referring to her stepchildren. Thus her stepchildren should be included in the presumptive meaning of the gift “to G’s children” and the issue of her stepchildren should be included in the presumptive meaning of the gift “to G’s issue.” If G, at the time she executed her will, had children of her own, in the absence of additional facts, G’s stepchildren should not be included in the presumptive meaning of the gift to “G’s children” or in the gift to “G’s issue.”

Example 2. G’s will devised property in trust, directing the trustee to pay the income to G’s wife W for life, and on her death, to distribute the trust property to “my grandchildren.” W had children by a prior marriage who were G’s stepchildren. G never had any children of his own and he never adopted his stepchildren. It is reasonable to conclude that under these circumstances G meant the children of his stepchildren when his will gave the future interest under the trust to G’s “grandchildren.”

Example 3. G’s will devised property in trust, directing the trustee to pay the income “to my daughter for life and on her death, to distribute the trust property to her children.” When G executed his will, his son had died, leaving surviving the son’s wife, G’s daughter-in-law, and two children. G had no daughter of his own. Under these circumstances, the conclusion is justified that G’s daughter-in-law is the “daughter” referred to in G’s will.

Another situation in which the circumstances would tend to establish an intent to include a relative by marriage is the case of reciprocal wills, as illustrated in Example 4, which is based on Martin v. Palmer, 1 S.W.3d 875 (Tex. Ct. App. 1999).

Example 4. G’s will devised her entire estate “to my husband if he survives me, but if not, to my nieces and nephews.” G’s husband H predeceased her. H’s will devised his entire estate “to my wife if she survives me, but if not, to my nieces and nephews.” Both G and H had nieces and nephews. In these circumstances, “my nieces and nephews” is construed to include G’s nieces and nephews by marriage. Were it otherwise, the combined estates of G and H would pass only to the nieces and nephews of the spouse who happened to survive.

Still another situation in which the circumstances would tend to establish an intent to include a relative by marriage is a case in which an ancestor participated in raising a relative by marriage other than a stepchild.

Example 5. G’s will devised property in trust, directing the trustee to pay the income in equal shares “to my nieces and nephews living on each income payment date until the death of the last survivor of my nieces and nephews, at which time the trust shall terminate and the trust property shall be distributed to the X Charity.” G’s wife W was deceased when G executed his will. W had one brother who predeceased her. G and W took the brother’s children, the wife’s nieces and nephews, into their home and raised them. G had one sister who predeceased him, and G and W were close to her children, G’s nieces and nephews. Under these circumstances, the conclusion is justified that the disposition “to my nieces and nephews” includes the children of W’s brother as well as the children of G’s sister.

The language of the disposition may also establish an intent to include relatives by marriage, as illustrated in Examples 6, 7, and 8.
Example 6. G’s will devised half of his estate to his wife W and half to “my children.” G had one child by a prior marriage, and W had two children by a prior marriage. G did not adopt his stepchildren. G’s relationship with his stepchildren was close, and he participated in raising them. The use of the plural “children” is a factor indicating that G intended to include his stepchildren in the class gift to his children.

Example 7. G’s will devised the residue of his estate to “my nieces and nephews named herein before.” G’s niece by marriage was referred to in two earlier provisions as “my niece.” The previous reference to her as “my niece” indicates that G intended to include her in the residuary devise.

Example 8. G’s will devised the residue of her estate “in twenty-five (25) separate equal shares, so that there shall be one (1) such share for each of my nieces and nephews who shall survive me, and one (1) such share for each of my nieces and nephews who shall not survive me but who shall have left a child or children surviving me.” G had 22 nieces and nephews by blood or adoption and three nieces and nephews by marriage. The reference to twenty-five nieces and nephews indicates that G intended to include her three nieces and nephews by marriage in the residuary devise.

Subsection (d): Half Blood Relatives. In providing that terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as “brothers”, “sisters”, “nieces”, or “nephews”, are construed to include both types of relationships, subsection (d) is consistent with the rules for intestate succession regarding parent-child relationships. See Section 2-107 and the phrase “or either of them” in Section 2-103(a)(3) and (4). As provided in subsection (g), inclusion of a half blood relative in a class is subject to the class-closing rules.

Subsection (e): Transferor Not Genetic Parent. The general theory of subsection (e) is that a transferor who is not the genetic parent of a child would want the child to be included in a class gift as a child of the genetic parent only if the genetic parent (or one or more of the specified relatives of the child’s genetic parent functioned as a parent of the child before the child reached the age of [18]). As provided in subsection (g), inclusion of a genetic child in a class is subject to the class-closing rules.

Example 9. G’s will created a trust, income to G’s son, A, for life, remainder in corpus to A’s descendants who survive A, by representation. A fathered a child, X; A and X’s mother, D, never married each other, and A never functioned as a parent of the child, nor did any of A’s relatives or spouses or surviving spouses of any of A’s relatives. D later married E; D and E raised X as a member of their household. Because neither A nor any of A’s specified relatives ever functioned as a parent of X, X would not be included as a member of the class of A’s descendants who take the corpus of G’s trust on A’s death.

If, however, A executed a will containing a devise to his children or designated his children as beneficiary of his life insurance policy, X would be included in the class. Under Section 2-117, X would be A’s child for purposes of intestate succession. Subsection (c) is
Subsection (f): Transferor Not Adoptive Parent. The general theory of subsection (f) is that a transferor who is not the adoptive parent of an adoptee would want the child to be included in a class gift as a child of the adoptive parent only if (1) the adoption took place before the adoptee reached the age of 18; (2) the adoptive parent was the adoptee’s stepparent or foster parent; or (3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of 18. As provided in subsection (g), inclusion of an adoptee in a class is subject to the class-closing rules.

Example 10. G’s will created a trust, income to G’s daughter, A, for life, remainder in corpus to A’s descendants who survive A, by representation. A and A’s husband adopted a 47-year old man, X. Because the adoption did not take place before X reached the age of 18, A was not X’s stepparent or foster parent, and A did not function as a parent of X before X reached the age of 18. X would not be included as a member of the class of A’s descendants who take the corpus of G’s trust on A’s death.

If, however, A executed a will containing a devise to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class. Under Section 2-118, X would be A’s child for purposes of intestate succession. Subsection (d) is inapplicable because the transferor, A, is an adoptive parent.

Subsection (g): Class-Closing Rules. In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must (1) qualify as a class member under subsection (b), (c), (d), (e), or (f) and (2) not be excluded by the class-closing rules. For an exposition of the class-closing rules, see Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1. Section 15.1 provides that, “unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution.”

Subsection (g)(1): Child in Utero. Subsection (g)(1) codifies the well-accepted rule that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

Subsection (g)(2): Children of Assisted Reproduction and Gestational Children; Class Gift in Which Distribution Date Arises At Deceased Parent’s Death. Subsection (g)(2) changes the class-closing rules in one respect. If a child of assisted reproduction (as defined in Section 2-120) or a gestational child (as defined in Section 2-121) is conceived posthumously, and if the distribution date arises at the deceased parent’s death, then the child is treated as living on the distribution date if the child lives 120 hours after birth and was either (1) in utero no later than 36 months after the deceased parent’s death or (2) born no later than 45 months after the deceased parent’s death.

The 36-month period in subsection (g)(2) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with
assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent’s death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a normal period of pregnancy.

Example 11. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G’s will devised “90 percent of my estate to my wife W and 10 percent of my estate to my children.” G also left frozen sperm at a sperm bank in case he should be killed in action. G consented to be treated as the parent of the child within the meaning of Section 2-120(f). G was killed in action. After G’s death, W decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (1) in utero within 36 months after G’s death or (2) born within 45 months after G’s death, and if the child lived 120 hours after birth, the child is treated as living at G’s death and is included in the class.

Example 12. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G’s will devised “90 percent of my estate to my husband H and 10 percent of my estate to my issue by representation.” G also left frozen embryos in case she should be killed in action. G consented to be the parent of the child within the meaning of Section 2-120(f). G was killed in action. After G’s death, H decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (1) in utero within 36 months after G’s death or (2) born within 45 months after G’s death, and if the child lived 120 hours after birth, the child is treated as living at G’s death and is included in the class.

Example 13. The will of G’s mother created a testamentary trust, directing the trustee to pay the income to G for life, then to distribute the trust principal to G’s children. When G’s mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of Section 2-120(f). After G’s death, G’s widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (1) in utero within 36 months after G’s death or (2) born within 45 months after G’s death, and if the child lived 120 hours after birth, the child is treated as living at G’s death and is included in the class under the rule of convenience.

Subsection (g)(2) Inapplicable Unless Child of Assisted Reproduction or Gestational Child is Conceived Posthumously and Distribution Date Arises At Deceased Parent’s Death. Subsection (g)(2) only applies if a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date arises at the deceased parent’s death.
Subsection (g)(2) does not apply if a child of assisted reproduction or a gestational child is not conceived posthumously. It also does not apply if the distribution date arises before or after the deceased parent’s death. In cases to which subsection (g)(2) does not apply, the ordinary class-closing rules apply. For purposes of the ordinary class-closing rules, subsection (g)(1) provides that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

This means, for example, that, with respect to a child of assisted reproduction or a gestational child, a class gift in which the distribution date arises after the deceased parent’s death is not limited to a child who is born before or in utero at the deceased parent’s death or, in the case of posthumous conception, either (1) in utero within 36 months after the deceased parent’s death or (2) born within 45 months after the deceased parent’s death. The ordinary class-closing rules would only exclude a child of assisted reproduction or a gestational child if the child was not yet born or in utero on the distribution date (or who was then in utero but who failed to live 120 hours after birth).

A case that reached the same result that would be reached under this section is In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father’s widow around three and five years after his death) were included in class gifts to the deceased father’s “issue” or “descendants”. The children would be included under this section because (1) the deceased father signed a record that would satisfy Section 2-120(f)(1), (2) the distribution dates arose after the deceased father’s death, and (3) the children were living on the distribution dates, thus satisfying subsection (g)(1).

Example 14. G created a revocable inter vivos trust shortly before his death. The trustee was directed to pay the income to G for life, then “to pay the income to my wife, W, for life, then to distribute the trust principal by representation to my descendants who survive W.” When G died, G and W had no children. Shortly before G’s death and after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of Section 2-120(f). After G’s death, W decided to become inseminated with G’s frozen sperm so that she could have his child. The child, X, was born five years after G’s death. W raised X. Upon W’s death many years later, X was a grown adult. X is entitled to receive the trust principal, because a parent-child relationship between G and X existed under Section 2-120(f) and X was living on the distribution date.

Example 15. The will of G’s mother created a testamentary trust, directing the trustee to pay the income to G for life, then “to pay the income by representation to G’s issue from time to time living, and at the death of G’s last surviving child, to distribute the trust principal by representation to G descendants who survive G’s last surviving child.” When G’s mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of Section 2-120(f). After G’s death, G’s widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (1) in utero within 36 months after G’s death or (2) born within 45 months after the G’s death, and if the child lived 120 hours after birth, the child is treated as living at G’s death and is included in the class-gift of income under the rule of convenience. If G’s widow later decides to use his frozen sperm to have another child
or children, those children would be included in the class-gift of income (assuming they live 120 hours after birth) even if they were not in utero within 36 months after G’s death or born within 45 months after the G’s death. The reason is that an income interest in class-gift form is treated as creating separate class gifts in which the distribution date is the time of payment of each subsequent income payment. See Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 cmt. p. Regarding the remainder interest in principal that takes effect in possession on the death of G’s last living child, the issue of the posthumously conceived children who are then living would take the trust principal.

**Subsection (g)(3).** For purposes of the class-closing rules, an individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted. An individual is “in the process of being adopted” if a legal proceeding to adopt the individual had been filed before the class closed. However, the phrase “in the process of being adopted” is not intended to be limited to the filing of a legal proceeding, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.


**Historical Note.** This Comment was revised in 1993, 2008, and 2010.
PART 8. GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

UPC GENERAL COMMENT

Part 8 contains five general provisions that cut across probate and nonprobate transfers. Part 8 previously contained a sixth provision, Section 2-801, which dealt with disclaimers. Section 2-801 was replaced in 2002 by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (Sections 2-1101 to 2-1117). To avoid renumbering the other sections in this part, Section 2-801 is reserved for possible future use.

Section 2-802 deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share.

Section 2-803 spells out the legal consequence of intentional and felonious killing on the right of the killer to take as heir under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Section 2-804 deals with the consequences of a divorce on the right of the former spouse (and relatives of the former spouse) to take under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Sections 2-805 and 2-806, added in 2008, bring the reformation provisions in the Uniform Trust Code into the UPC.

Application to Pre-Existing Governing Instruments. Under Section 8-101(b), for decedents dying after the effective date of enactment, the provisions of this Code apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature of the Code. The statement, titled “Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents”, can be found at 17 ACTEC Notes 184 (1991) or can be obtained from the Uniform Law Commission, www.uniformlaws.org.

Historical Note. This General Comment was revised in 1993, 2002, and 2008.

2002 Amendment Relating to Disclaimers. In 2002, the Code’s former disclaimer provision (Section 2-801) was replaced by the Uniform Disclaimer of Property Interests Act, which is incorporated into the Code as Part 11 of Article 2 (Sections 2-1101 to 2-1117). The statutory references in this Comment to former Section 2-801 have been replaced by appropriate references to Part 11. Updating these statutory references has not changed the substance of this Comment.
ADD AS MCL 700.2810 SECTION 2-805. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor’s intention if it is proved by clear and convincing evidence what the transferor’s intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

**UPC Comment**

Added in 2008, Section 2-805 is based on Section 415 of the Uniform Trust Code, which in turn was based on Section 12.1 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-805 is broader in scope than Section 415 of the Uniform Trust Code because Section 2-805 applies but is not limited to trusts.

Section 12.1, and hence Section 2-805, is explained and illustrated in the Comments to Section 12.1 of the Restatement and also, in the case of a trust, in the Comment to Section 415 of the Uniform Trust Code.

**2010 Amendment.** This section was revised by technical amendment in 2010. The amendment better conforms the language of the section to the language of the Restatement (Third) of Property provision on which the section is based.
ADD AS MCL 700.2811. SECTION 2-806. MODIFICATION TO

ACHIEVE TRANSFEROR’S TAX OBJECTIVES. To achieve the transferor’s tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor’s probable intention. The court may provide that the modification has retroactive effect.

UPC Comment

Added in 2008, Section 2-806 is based on Section 416 of the Uniform Trust Code, which in turn was based on Section 12.2 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-806 is broader in scope than Section 416 of the Uniform Trust Code because Section 2-806 applies but is not limited to trusts.

Section 12.2, and hence Section 2-806, is explained and illustrated in the Comments to Section 12.2 of the Restatement and also, in the case of a trust, in the Comment to Section 416 of the Uniform Trust Code.
ARTICLE III
PROBATE OF WILLS AND ADMINISTRATION

PART 4. FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

AMEND MCL 700.3406 TO READ: SECTION 3-406. FORMAL TESTACY PROCEEDINGS; CONTESTED CASES. In a contested case in which the proper execution of a will is at issue, the following rules apply:

(1) If the will is self-proved pursuant to Section 2-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit.

(2) If the will is notarized pursuant to Section 2-502(a)(3)(B), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

(3) If the will is witnessed pursuant to Section 2-502(a)(3)(A), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in
the clause occurred.

**UPC Comment**

**2008 Revisions.** This section, which applies in a contested case in which the proper execution of a will is at issue, was substantially revised and clarified in 2008.

**Self-Proved Wills:** Paragraph (1) provides that a will that is self-proved pursuant to Section 2-504 satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit. Paragraph (1) does not preclude evidence of undue influence, lack of testamentary capacity, revocation or any relevant evidence that the testator was unaware of the contents of the document.

**Notarized Wills:** Paragraph (2) provides that if the will is notarized pursuant to Section 2-502(a)(3)(B), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

**Witnessed Wills:** Paragraph (3) provides that if the will is witnessed pursuant to Section 2-502(a)(3)(A), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred. For further explanation of the effect of an attestation clause, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. q (1999).

**Historical Note.** This Comment was revised in 2008.
Add new subsection to MCL 700.3715.

(gg) In deciding how and when to distribute all or part of a decedent’s estate, the decedent’s personal representative may take into account whether:

(i) the personal representative has received notice or has knowledge of an intention to use genetic material to create a child after the decedent’s death; and

(ii) the posthumous birth of a child of assisted reproduction may have an effect on the distribution of the decedent’s estate.

COMMENT

This section is based on Cal. Prob. Code§ 249.5 and 249.6. In most cases when an intestate decedent is survived by a surviving spouse, the surviving spouse will inherit all or almost all of the decedent’s estate. Consequently, even when there is a posthumous conception by the surviving spouse, the child will not inherit any portion of the decedent’s estate even if the child is treated under 2-120 or 2-121 as the child of the deceased spouse.
Add new subsection to MCL 700.7821.

(4) In deciding how and when to distribute all or part of a trust estate, the trustee may take into account whether:

(a) the trustee has received notice or has knowledge of an intention to use genetic material to create a child after the trust distribution date; and

(b) the posthumous birth of a child of assisted reproduction may have an effect on the distribution of the trust estate.

COMMENT

This new subsection is a companion provision to MCL 700.3715(gg).
**UPC Legislative Note:** States that have previously enacted the Uniform Probate Code and are enacting an amendment or amendments to the Code are encouraged to include the following effective date provision in their enacting legislation. The purpose of this effective date provision, which is patterned after Section 8-101 of the original UPC, is to assure that the amendment or amendments will apply to instruments executed prior to the effective date, to court proceedings pending on the effective date, and to acts occurring prior to the effective date, to the same limited extent and in the same situations as the effective date provision of the original UPC.

Include the following in the Act adopting the above EPIC amendments:

**TIME OF TAKING EFFECT; PROVISIONS FOR TRANSITION.**

(a) This [act] takes effect on January 1, 20__.

(b) On the effective date of this [act]:

(1) the [act] applies to governing instruments executed by decedents dying thereafter;

(2) the [act] applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code;

(3) an act done before the effective date of this [act] in any proceeding and any accrued right is not impaired by this [act]. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date of this [act], the provisions shall remain in force with respect to that right; and

(4) any rule of construction or presumption provided in this [act] applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent.
§ __.____ Assisted reproduction; Form required to be provided to individual to establish parental intent for purposes of the Estates and Protected Individuals Code § 700.---; contents of form.

(1) Section 700.--- of the Estates and Protected Individuals Code provides that a birth mother who is not a gestational carrier is automatically the mother of the child. The form required by this section is intended to assist in determining whether any other individual is the other parent of the child. An individual need not be the donor of genetic material to be the other parent of the child.

(a) This section and the form required by this section only apply to cases of assisted reproduction in which the birth mother or prospective birth mother is not a gestational carrier or prospective gestational carrier as defined in MCL § 700.___.

(b) Any entity that receives or possesses human genetic material that may be used for conception must make available a form that can be used by an individual, other than the birth mother or prospective birth mother, to signify the individual’s consent to assisted reproduction by the birth mother or prospective birth mother with intent to be treated as the other parent of the child for purposes of Section
You may wish to consult with a lawyer before signing this form. This form is designed only to clarify your intent; signing this form is not mandatory.

IF THE TRANSFER OF EGGS, SPERM, OR EMBRYOS FOR PURPOSES OF ASSISTED REPRODUCTION BY (INSERT NAME OF BIRTH MOTHER OR PROSPECTIVE BIRTH MOTHER) OCCURS AFTER YOUR DEATH, DO YOU INTEND TO BE TREATED AS THE CHILD’S OTHER PARENT?

PLEASE SELECT ONLY ONE, THEN SIGN AND DATE BELOW:

_____ Yes
_____ No

Signed: ____________________________ Dated: ____________________________

• In case of a multiple birth, your response applies to all children born alive from the transfer that resulted in the birth.

• You can amend or revoke your consent at any time before the transfer of eggs, sperm, or embryos.

• Any future amendment or revocation you wish to make must be in a written document that you sign and date. A designation, amendment, or revocation may not be changed or revoked orally.
APPENDIX

The Committee recommends repeal of the Michigan Surrogate Parenting Act.

MICHIGAN SURROGATE PARENTING ACT

Act 199 of 1988

MCL 722.851 Short title.

This act shall be known and may be cited as the “surrogate parenting act”.

MCL 722.853 Definitions.

As used in this act:

(a) “Compensation” means a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother or surrogate carrier.

(b) “Developmental disability” means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974, being sections 330.1001 to 330.2106 of the Michigan Compiled Laws.

(c) “Mental illness” means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974.

(d) “Mentally retarded” means that term as defined in the mental health code, Act No. 258 of the Public Acts of 1974.

(e) “Participating party” means a biological mother, biological father, surrogate carrier, or the spouse of a biological mother, biological father, or surrogate carrier, if any.

(f) “Surrogate carrier” means the female in whom an embryo is implanted in a surrogate gestation procedure.

(g) “Surrogate gestation” means the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.

(h) “Surrogate mother” means a female who is naturally or artificially inseminated and who subsequently gestates a child conceived through the insemination pursuant to a surrogate parentage contract.

(i) “Surrogate parentage contract” means a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child.

MCL 722.855 Surrogate parentage contract as void and unenforceable.

A surrogate parentage contract is void and unenforceable as contrary to public policy.
MCL 722.857 Surrogate parentage contract prohibited; surrogate parentage contract as felony; penalty.

(1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability is the surrogate mother or surrogate carrier.

(2) A person other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability who enters into, induces, arranges, procures, or otherwise assists in the formation of a contract described in subsection (1) is guilty of a felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

MCL 722.859 Surrogate parentage contract for compensation prohibited; surrogate parentage contract for compensation as misdemeanor or felony; penalty.

(1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation.

(2) A participating party other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than $10,000.00 or imprisonment for not more than 1 year, or both.

(3) A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

MCL 722.861 Custody of child.

If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, “best interests of the child” means that term as defined in section 3 of the child custody act of 1970, Act No. 91 of the Public Acts of 1970, being section 722.23 of the Michigan Compiled Laws.
EXHIBIT B-1
Tenancy by Entireties in Real and Personal Property

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) As used in this section:

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

(b) "Proceeds" means:

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

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

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

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

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

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

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

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

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

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

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

Upon the death of the first spouse:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(12) This section may not be construed to affect existing state law with respect to tenancies by the entirety. This section applies only to tenancy by the entirety property conveyed to a trustee on or after _________ ____, 2014.
EXHIBIT C-1

(1) Definitions. As used in this section:

a. “Michigan Common Law Ownership by Married Spouses” is the ownership of marital property other than property owned by a Michigan Community Property Trust.
b. “Michigan Community Debt” is debt incurred by both married spouses during the Period of the Michigan Community Property Estate.
c. “Michigan Community Property” is that property held by a Michigan Community Property Trust that has been placed in said Trust during the Period of the Michigan Community Estate. On documents of ownership, where the full name of the trust as a Community Property Trust is not included, the trustee of a Michigan Community Property Trust should be titled as either a “Community Property Trustee” or as a “CP Trustee.”

Michigan Community Property includes:

a. property transferred to the Michigan Community Property Trust; or
b. property transferred to the Michigan Community Property Trustee; or

c. property or rights to property made payable to a Michigan Community Property Trust or titled either in the name of the Michigan Community Property Trust or in the name of the Michigan Community Property Trustee as Trustee for the Michigan Community Property Trust; and.

d. Income, earnings or appreciation associated with said property.

d. “Michigan Community Property Trust” (“CP Trust”). A Michigan Community Property Trust is a trust that bears the name “Community Property Trust” or “CP Trust” in its title and is subject to the provisions of 700.7510(2).

e. “Michigan Community Property Trustee” (or a CP Trustee) is a trustee or co-trustee of a Michigan Community Property Trust.
f. “Period of the Michigan Community Estate”. The Michigan Community Estate exists during the period of time that both married spouses are domiciled in the State of Michigan. The Michigan Community Estate commences the moment before property is transferred to a Michigan Community Property Trust for the first time and ends on the first of the following events:
   a. Both spouses are no longer domiciled in Michigan.
   b. Death of one spouse
   c. Divorce
   d. Annulment.

In regard to the rights and interests of a spouse in Michigan Community Property Trust property, the character of Michigan Community Property in a Michigan Community Property Trust shall continue to exist after the Period of the Michigan Community Estate has ended, although future contributions to a Michigan Property Trust after the Period of the Michigan Community Estate has ended will not qualify as Michigan Community Property and joint debts of married spouses after the Period of the Michigan Community Estate has ended will not qualify as Michigan Community Debt.

g. “Transmutation of Michigan Common law ownership into Michigan Community Property” by married spouses occurs when Michigan Common Law property held by married spouses is transferred to a Michigan Community Property Trust during the Period of the Michigan Community Property Estate.

(2) Michigan Community Property Trust. A trust qualifies as a Michigan Community Property Trust only if it:

a. Contains property placed in the Michigan Community Property Trust by married spouses during the Period of the Michigan Community Estate;
b. Expressly declares it is a Michigan Community Property Trust;
c. Has the phrase “Community Property Trust” or has the phrase “CP Trust” in its title;
d. has been executed by married spouses; and
e. Contains the following paragraph:

   THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND
YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE.

(3) Michigan Community Property Trust; Community Spousal Rights. Each married spouse will have the following rights in property placed in a Michigan Community Property Trust during the Period of the Michigan Community Estate:

a. Each spouse shall have a one half (1/2) interest in Michigan Community Trust Property during their lifetime and on death.

b. Each spouse may bequest or devise one half (1/2) of the property in a Michigan Community Property Trust both as expressed in the original trust document and in subsequent amendments separate from the trust document signed by the spouse amending their bequest or devise. Spouses may join together in making such devises. Valuations of property, when necessary to achieve a one half distribution on death, may be fairly made by the Michigan Community Property Trustee.

c. Expenses of a Michigan Community Property Trust shall be treated as one-half (1/2) belonging to each spouse.

d. Property of a Michigan Community Property Trust shall be distributed out of the Trust equally to both spouses. Property which cannot be divided shall be held as tenants in common upon distribution unless otherwise agreed by both spouses. Unless otherwise expressly agreed in the Michigan Community property Trust, or ordered by a court having jurisdiction over a Michigan Community property Trust, distributions by a Michigan Community Property Trustee from a Michigan Community Property Trust shall only occur by joint consent of the spouses either in the original Michigan Community Property Trust document or by other agreement or restatement of the Michigan Community Property Trust.

e. All rights in Michigan Community Property Trust Property are equal regardless of the source of funds used to buy such property, regardless of who transferred property into the trust, including by third parties, and
regardless of whose labor relates to its acquisition or its appreciation in value. Other than devises or bequests of a spouse’s one half interest, amendments to or revocation of a Michigan Community Property Trust require consent of both spouses. A third party gift to a Michigan Community Property Trust shall be considered to be a gift to the community of the marriage.

f. All property placed in a Michigan Community Property Trust during the Period of the Michigan Community Estate shall be considered community property subject to the provisions herein even after the Period of the Michigan Community Estate has ended.

g. Michigan Community Property is subject to joint control.

(1) Each spouse may authorize the other spouse to unilaterally manage the Michigan Community Property Trust as a sole Michigan Community Property Trustee by declaring so in a Michigan Community Property Trust or by separate document. Similarly, both spouses may authorize a third party to act as a Michigan Community Property Trustee. Unless both spouses agree otherwise, removal of Michigan Community Property Trustees and reappointment of Michigan Community Property Trustees must be made jointly by spouses during their joint lifetimes and singularly in the event of the death of one spouse. Spouses may revoke specific grants of authority to the Michigan Property Trustee at any time and may provide new grants of authority at any time, although spouses may otherwise agree that revocations of authority must be made jointly. Unless specifically provided in a Michigan Community Property Trust, neither spouse shall sell, convey, or encumber the real property in the Michigan Community Property Trust without the other spouse either: (1) joining as a Michigan Community Property Co-Trustee in the execution of the deed or other document by which the real estate is sold, conveyed, or encumbered, or (2) executing some other document authorizing a Michigan Community Property Trustee or Co-Trustees the execute documents selling, conveying or encumbering real estate.

(2) A Michigan Community Property Trustee or Co-Trustee shall not, sell, convey, or encumber the assets, including real estate or the
goodwill of a business held in the Michigan Community Property Trust where both spouses participate in its management unless there has been the consent of both spouses to do so: Where only one spouse participates in such management of a business, the Michigan Community Property Trustee may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.

h. Neither spouse may gift property of the Michigan Community Property Trust without the express consent of the other spouse provided in the Michigan Community Property Trust or by separate document.

i. Property transferred to a Michigan Community Property Trust during the Period of the Michigan Community Estate is treated for all purposes as if it were acquired by either or both spouses during their marriage on the date the property is transferred to the trust.

j. A spouse serving as a Michigan Community Property Trustee is liable to the other spouse for any loss or damage caused by fraud or bad faith in the management of the Michigan Community Property.

Judicial Proceedings

700.7212. Community Property Trust and Divorce. In the event of a court proceeding involving divorce or separation, the court with jurisdiction over the divorce or separation shall have exclusive jurisdiction over the Michigan Community Property Trust, property held by the Michigan Community Property Trust or property payable to the Michigan Community Property Trust. A spouse may file a petition for determination of abandonment by or disappearance of a spouse and that court will also have exclusive jurisdiction over the trust. A court having jurisdiction may enter an order allowing a co-trustee spouse to have exclusive management and control over part or all of a Michigan Community Property Trust. (a) The court may:

(1) impose any condition and restriction the court deems necessary to protect the rights of a spouse;
(2) require a bond conditioned on the faithful administration of the property; and
(3) require payment to an agent of the court of all or a portion of the proceeds of the sale of the property, to be disbursed in accordance with the court's further directions. The court has continuing jurisdiction over the court's order rendered under this subchapter.

(b) On the motion of either spouse, the court shall amend or vacate the original order after notice and hearing if:

(1) the spouse who disappeared reappears;
(2) the abandonment or permanent separation ends; or
(3) a spouse who was reported to be a prisoner of war or missing on public service returns.

(1) In the event of a divorce, the court having jurisdiction over said divorce shall treat each spouse’s one-half share in a Michigan Community Property Trust in the same manner as all other marital property and may cause distributions from the Trust to occur in accordance with its allocation of property of the spouses in a divorce. Further, in such divorce proceedings, the distributions from a Michigan Community Property Trust may be the subject of a property settlement agreement (in conjunction with the divorce) where the distributions from the Michigan Community Property Trust are allocated in any manner in which the spouses decide.

700.7510. Michigan Community Debt. Michigan Community Debt may be collected from the assets of a Michigan Community Property Trust without any claim of contribution or indemnification between spouses; and action for such payment may be brought directly against a Michigan Community Property Trust. In case of debt which is the debt of a single spouse or in the case of joint debt which has not been incurred during the Period of the Michigan Community Estate, the Michigan Community Property Trustee may either be joined in a suit against the spouse or spouses having such debt; or, in the alternative, an action against the Michigan Community Property Trust may be brought in a subsequent proceeding after a judgment has been obtained against that spouse individually or both spouse’s jointly.
1. In Michigan, a surviving spouse has a basis in entireties property of one half of the fair market value of the property plus one half of the original purchase price. In community property states, the surviving spouse has a basis in community property equal to the full fair market value of the property. This is because property held by a spouse in community property states is considered property acquired from a decedent.

1014 (b) Property acquired From a Decedent. (6) In the case of decedents dying after December 31, 1947, property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and following, relating to estate tax) or section 811 of the Internal Revenue Code of 1939;

2 Alaska and Tennessee are common law states but they have optional community property statutes. Alaska permits married couples to declare what property is community property in a community property agreement without having to place property into a trust. Tennessee only has a trust provision in its statute which allows community property treatment for property placed in a community property trust. The Committee has decided to stay away from issues that can come up with Community Property Agreements because prior tax law in the area of community property agreements indicates agreements might create problems.

In a 1944 Supreme Court case, Oklahoma created what the Supreme Court called “an optional community property law.” Commissioner v. Harmon, 323 U.S. 44 (1944). Under that statute, a husband and wife could make a written election to have their property treated as community property. The purpose of doing so (before the advent of joint tax return filing) was so that a husband and wife could split their income and each would report ½ of the total income to save on taxes. The husband and wife then filed two separate tax returns and split the income, even though the split income included the husband’s salary and income on property separately owned by the husband. The Supreme Court called that an impermissible assignment of income. It did not work to permit the husband not to report the income. The government still maintains that position in its Internal Revenue Manual 25.18.1.1.2 “Community Property Law”:

Alaska has also adopted a community property system, but it is optional. Spouses may create community property by entering into a community property agreement or by creating a community property trust. See Alaska Stat. §§ 34.77.020 - 34.77.995. The U.S. Supreme Court ruled that a similar statute allowing spouses to elect a community property system under
Oklahoma law would not be recognized for federal income tax reporting purposes. *Commissioner v. Harmon*, 323 U.S. 44 (1944). The Harmon decision should also apply to the Alaska system for income reporting purposes.

In Rev. Rul. 77-359, a taxpayer husband and wife agreed in the state of Washington that they would hold their property as community property. The ruling described a Washington case which it said had held that:

> a written agreement between husband and wife that each parcel of land wherever situated, both presently owned or thereafter to be acquired, should be deemed community property was a valid contract and operated to convert separate real property into community property. In reaching this conclusion, the court said that under the laws of Washington husband and wife were given the right to deal in every possible manner with their property, and that the husband and wife could change the status of separate property to community property.

The revenue ruling held that ownership of property must be changed for income to be split:

> To the extent that the agreement affects the income from separate property and not the separate property itself, the Service will not permit the spouses to split that income for Federal income tax purposes where they file separate income tax returns. See *Commissioner v. Harmon*, 323 U.S. 44 (1944)

3 Alaska has a complicated provisions for insurance. Tennessee does not. The Alaska statute addresses ownership issues where insurance is held by a community trust and paid for with separate property or vice versa. The Committee believes this is unnecessary. If insurance is paid into the community property trust during the period of the community estate, then it is community property. If it is paid out of the community property trust, it becomes equally owned by the spouses.

4 To achieve community property status when community property is optional, should require a public declaration of a community property trust since Michigan is a common law state where it cannot be assumed that property is held as community property. Alaska and Tennessee have no such provision.

5 The phrase “Community Estate” appears in the Internal Revenue Manual 25.18.1.2.4 (3-04-2011)

Termination of the Community Estate:

Michigan Community Property Trust Committee p.8
1. The community estate may be terminated in a number of ways including the following.
   - Death
   - Change of domicile
   - Divorce or legal separation
   - Physical separation (in a few states)

The practical implications of using a “Period of the Michigan Community Estate” allows a Community Property Trust to toggle on and off without having to terminate the trust. The Tennessee statute provides that on termination of the marriage other than death, the assets of the trust are distributed. The Alaska statute allows the married couple to agree on when the trust is distributed. Neither Tennessee nor Alaska require domicile of the spouses for there to be community property. Because domicile is a requirement in community property states for property to be treated as community property, the Committee believes Michigan should have a domicile requirement. A community property trust can, in essence, toggle on and off if married couples leave the state and not have to terminate the trust. Property in the trust will not lose its community property status if the couples leave the state, but any property put in the trust while not a resident of the state will not have community property status under Michigan law. Community estate also relates to Community Debt. See below.

6 The term character is drawn from the Internal Revenue Manual, which provides:

   25.18.1.2.7 (03-44-2011)
   Characterization of Property

1. After it is determined that community property laws apply (i.e., the taxpayers are married and domicile in a community property state), the next step is to determine the taxpayer’s rights and interest in the property under state law. This process is known as characterization. Characterization of property is a crucial and necessary component of every community property tax case.

2. Characterization is important = because it will determine the tax consequences. As it relates to separate tax returns filed by married individuals domiciled in a community property state, federal Income tax is assessed on 100% of a taxpayer’s separate property income, and 50% of the total community property income acquired by either spouse. In some cases, property may be partially community property and partially separate property, requiring an allocation. In addition, the reach of the tax lien depends, in part, on the character of the taxpayer’s property. As a result, the Service must characterize the taxpayer's property before it can correctly determine and collect tax.
Alaska and Tennessee allow a community property trust to include a resident trustee and non domiciled spouses. The Committee believes that domicile is a general requirement of being subject to the community property laws of a state. Neither the Alaska nor Tennessee statutes address how the trust or the trustee are identified on property.

This language is in the Alaska statute.

The proposed Michigan Statute differs from Alaska and Tennessee statutes which provide that spouses can agree on many terms in the trust, such as control or management, rights and obligations, or choice of law. The Committee believes it would be better to affirmatively state the rights and obligations which the spouses have and from which they can deviate so that the community property is an incident of living in the state. In Commissioner v. Harmon the Supreme Court noted a difference between consensual and legal community property:

“Under Lucas v. Earl an assignment of income to be earned or to accrue in the future, even though authorized by state law and irrevocable in character, is ineffective to render the income immune from taxation as that of the assignor. On the other hand, in those states which, by inheritance of Spanish law, have always had a legal community property system, which vests in each spouse one half of the community income as it accrues, each is entitled to return one half of the income as the basis of federal income tax. Communities are of two sorts,—consensual and legal. A consensual community arises out of contract. It does not significantly differ in origin or nature from such a status as was in question in Lucas v. Earl, where by contract future income of the spouses was to vest in them as joint tenants. In Poe v. Seaborn, supra, the court was not dealing with a consensual community but one made an incident of marriage by the inveterate policy of the State. In that case the court was faced with these facts: The legal community system of the States in question long antedated the Sixteenth Amendment and the first Revenue Act adopted thereunder. Under that system, as a result of State policy, and without any act on the part of either spouse, one half of the community income vested in each spouse as the income accrued and was, in law, to that extent, the income of the spouse.”

Commissioner v. Harmon, 323 U.S. 44 (1944)
End of CSP Materials
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN

April 11, 2015
Lansing, Michigan

AGENDA

I. Call to Order

II. Excused Absences

III. Introduction of Guests

IV. Minutes of the March 14, 2014 Meeting of the Council – Marlaine C. Teahan


V. Treasurer's Report – Marguerite Munson Lentz

See Attachment 2 including an April written report, Treasurer's financial report (January and February, 2015), and SBM reimbursement forms and instructions.

VI. Chairperson's Report – Amy N. Morrissey

See Attachment 3

• Public Policy Report re: ADM File No. 2014-09; and
• Public Policy Report re: MCL 700.1513.

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

VIII. Standing Committee Reports

A. Internal Governance

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

B. Legislation and Lobbying

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

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

2. Updating Michigan Law – Geoffrey R. Vernon
3. Community Property Trusts Ad Hoc Committee – Neal Nusholtz
4. Insurance Ad Hoc Committee – Geoffrey R. Vernon
5. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber
6. Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee – George F. Bearup

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L. Skidmore

See Attachment 5 – *In re John Markoul Living Trust*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2015, Docket No. 316892, and proposed letter that includes our Section's position relative to the case. [Note: This letter may instead take the form of an amicus brief depending on the vote of Council.]

2. Probate Institute – James B. Steward
3. State Bar and Section Journals – Richard C. Mills
4. Citizens Outreach – Constance L. Brigman

See Attachment 6 – Summary of Committee's April 1, 2015 meeting, proposed DPOA webpage layout, and Committee proposal regarding options for our Section's Brochures online.

5. Electronic Communications – William J. Ard
6. Membership – Raj A. Malviya

D. Ethics and Professional Standards

1. Ethics – David P. Lucas
2. Unauthorized Practice of Law & Multidisciplinary Practice – Patricia M. Ouellette
3. Specialization and Certification Ad Hoc Committee – James B. Steward

E. Administration of Justice

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

F. Areas of Practice

1. Real Estate – George F. Bearup
2. Transfer Tax Committee – Lorraine F. New
3. Charitable and Exempt Organization – Lorraine F. New
4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

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

IX. Other Business

X. Hot Topics

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

March 14, 2015 -- Lansing, Michigan

MINUTES

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

II. Attendance. Guests were introduced.

A total of 4 officers and 16 members of the Council were present, representing a quorum.

A. The following 4 officers of the Council were in attendance:

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

B. The following 16 members of the Council were in attendance:

Susan M. Allan
W. Josh Ard
Christopher A. Ballard
George F. Bearup
Constance L. Brigman
Rhonda M. Clark-Kreuer
Hon. Michael L. Jaconette
Mark E. Kellogg
David P. Lucas
Raj A. Malviya
Richard C. Mills
Lorraine F. New
David L.J.M. Skidmore
James P. Spica
Geoffrey R. Vernon
Nancy H. Welber

C. The following 1 officer and 2 members were absent with excuse:

Shaheen I. Imami, Chair Elect
Michele C. Marquardt
Patricia M. Ouellette

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

Robert D. Brower, Jr.
George W. Gregory
Phillip E. Harter
Michael J. McClory

E. The following guests were in attendance:

J.V. Anderton
Lynn Chard
Kathleen Goetsch
Steve Jones
Robert B. Labe
Michael G. Lichterman
Robert O'Reilly
Nathan R. Piwowarski
Nicholas A. Reister
Jessica M. Schilling
Nazneen H. Syed
Erin Tepastte
III. Minutes – Marlaine C. Teahan. The Minutes of the February 14, 2015 Council meeting were approved as submitted, by general consent.

IV. Treasurer's Report – Marguerite Munson Lentz. A written Treasurer's report and financial spreadsheet for January, 2015 was included in the Agenda. The Treasurer’s Report and financial report were approved as submitted, by general consent.

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

- The State Bar of Michigan announced on March 5, 2015 the formation of the Task Force to Tackle Challenges of 21st Century Legal Practice. The announcement is at http://www.michbar.org/news/releases/archives15/3_5_15_21CPTF.cfm. State Bar of Michigan President Thomas C. Rombach has appointed distinguished legal leaders to a new 21st Century Practice Task Force to recommend how the State Bar can best serve the public and support lawyers' professional development in a rapidly changing legal marketplace. The task force will also look at the potential for modernizing Michigan's attorney regulation in response to those changes. SBM Past Presidents Bruce Courtade, of Grand Rapids, and Julie Fershtman, of Farmington Hills, will co-chair the task force. Other members of the task force include Michigan Supreme Court Justice Mary Beth Kelly, Speaker of the Michigan House of Representatives Kevin Cotter, the deans of all five Michigan law schools, former American Bar Association President Robert Hirshon, and former Judge James Redford, Governor Snyder's legal counsel.

- Each attorney should have received a survey from the SBM which is part of the Task Force to Tackle Challenges. Ms. Morrissey encouraged completion of the survey.

- In response to an email received last month from Lisa Dedden Cooper of AARP, Ms. Morrissey met with Ms. Cooper to listen to the organization's position on the UAGPPJA. Uniformity is their primary goal as 40 have adopted some form of UAGPPJA and 2 more have proposed legislation related to UAGPPJA. Ms. Morrissey has asked for data as to how many such cases have arisen in Michigan and if the uniform law is working well in other states. Ms. Morrissey anticipates we will see additional legislation on this in the future and asked Ms. Cooper to keep us informed so that we may weigh in on the issues. Jim Steward added further information on the rarity of this occurrence and Constance Brigman reported on how such changes will require significant changes to our court rules and forms.

- The Hon. Milton L. Mack, Jr. will be our new ADR Section Liaison. We are happy to have Judge Mack as part of our Council and look forward to his contributions.

- Kirkey asked for support for ICLE’s Solo and Small Firm Institute. We have a presence at the annual State Bar meeting. Institute is cosponsored with the SBM. ICLE has asked for a $2,500 support. We would be listed as a sponsoring section along with other sections, including the Business Law, Law Practice Management, and Solo and Small Firm Sections. This was discussed in detail with input by many. Ms. Morrissey asked Council to consider this over the next month in anticipation of taking a vote next month.

- Ms. Morrissey reported that the University Club apologized for the noise at our last Council meeting; the U Club very graciously reduced our bill accordingly.
• Josh Ard was at the SBM's Standing Committee on Professional Ethics meeting last week. One change approved – credit unions can now offer IOLTA accounts. The Supreme Court may approve various changes to the Michigan Rules of Professional Conduct to more closely parallel Michigan's rules to the national rules. Ms. Morrissey referred these possible rule changes to the Ethics committee. Specifically, the Committee will look at MRPC 1.14 regarding a client under a disability.

• George Gregory stated that there may be some significant changes to the Michigan income tax law. Mr. Gregory will give our lobbyist a heads up on how these changes might impact Council's work to update Michigan law and request that she keep us informed of any proposed legislation.

• Ms. Morrissey reported on Bernstein v. Seyburn, decided February 20, 2014, unpublished, No. 313894 Oakland Circuit Court, and how that opinion may impact the statute of repose. Issue referred to amicus committee.

VI. Report of the Committee on Special Projects – Christopher A. Ballard
The Committee on Special Projects (CSP) gave a report on the following items discussed at CSP:

• Artificial Reproductive Technology Committee report, Professor Lawrence W. Waggoner reviewed issues relative to MCL 700.2114 and the possible expansion of the section in accord with the Uniform Probate Code (as revised in 2008 and 2010). It is anticipated that a complete package of materials will be presented next month.

• Insurance Committee report – CSP recommended to Council that it approve the proposed legislation for MCL 700.1513; upon a vote of Council the proposed statute was approved for submission to Becky Bechler for drafting. A public policy report will be submitted to the State Bar of Michigan. 20 were present and eligible for the vote with these results: 17 Aye, 3 Nay, 0 Abstain.

VII. Standing Committee Reports
A. Internal Governance
5. Nominating – George W. Gregory. Still accepting suggestions for nominations. The Nominating Committee consists of Mark Harder, George Gregory and Tom Sweeney. Those interested in serving as an officer or member of Probate Council should convey that interest to the Nominating Committee. In addition, individuals can be recommended to the Nominating Committee by others. The Committee has received some nominations for members and officers.

B. Education and Advocacy Services for Section Members
2. Probate Institute – James B. Steward reported that, compared to last year, we are ahead of the number of registrants for the Annual Institute. Work is ongoing for the Speakers' Dinner.

3. State Bar and Section Journals – Richard C. Mills reported that the Journal is on track to be published soon. Melisa M.W. Mysliwiec is looking for an application developer for the Section Journal.

4. Citizens Outreach – Constance L. Brigman reported on the temporary brochures. An update to the status on the Citizens Outreach Committee brochures was given. The Committee will be moving forward as follows, as approved by Council upon no objection from any member of Council:

1. Connie Brigman, as Chair of the Committee, will personally edit the brochures then submit them to SBM. Council will next see the temporary brochures after they are posted.

2. The Committee will ask the SBM to contact us in October and April each year for an update on what to do with the brochures. It was suggested that an addition be made to the biennial plan that the brochures should be reviewed regularly.

3. The Committee will clarify to the SBM that the “temporary” brochures will not be printed and sold by the SBM; and

4. The Committee will work with the SBM to have the “temporary” brochures posted on the public side of the webpage so that anyone will be able to download, edit and print them. We will clarify with the SBM that our Section has copyrighted the brochures and that will be clear on the pdfs.


6. Membership – Raj A. Malviya referred Council to his written report. Three Committee initiatives are the main focus this year, including hosting a vendor table at the May and June Annual Institutes, hosting a social gathering at the Traverse City office of Smith Haughey Rice & Roegge, and conducting meetings at Michigan law schools with 3Ls to explain benefits of Section membership and to encourage students to consider a future career in trusts and estates. Discussion was held on the Committee's funding request relative to the three initiatives presented. A concern about the timing of the social gathering at SHR&R was discussed; these issues will be resolved between Mr. Steward and Mr. Malviya so that both events can take place with the full support of Council. Mr. Malviya made a motion for $4,000 to fund the initiatives, support from Meg Lentz. Motion carries with general consent of Council; George Bearup abstained from voting.

C. Legislation and Lobbying

1. Legislation – William J. Ard. PAA report is in the Agenda, outlining the legislation we are currently watching. Mr. Gregory reminded Council that the SBM wants each Section to regularly report our public policy positions for each legislative term.

Nancy Welber brought up certain problem areas with the recent legislation relative to property tax uncapping, specifically the problem of uncapping when using a pourover will to convey property to a trust; there is currently
no exemption for such conveyance. Mr. Bearup indicated that this issue, and the issue regarding lady bird deeds, has already been presented to legislative aid for review and possible amendment.

2. Updating Michigan Law – Geoffrey R. Vernon. The Committee expects to give a full report at next month’s CSP committee meeting.

3. Community Property Trusts Ad Hoc Committee – Neal Nusholtz reported that the Committee hopes to have a draft in 3 weeks or so. Mr. Nusholtz discussed the possibility of a PLR on this issue; the current debate is on whether a Michigan resident can have choice of law provision to articulate how marital property will be treated.

4. Insurance Ad Hoc Committee – Geoffrey R. Vernon. No further report other than that given at CSP.

5. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber. No further report other than that given at CSP.

D. Ethics and Professional Standards


3. Specialization and Certification Ad Hoc Committee – James B. Steward. No report; Ms. Morrissey indicates this topic may be taken off the Agenda.

E. Administration of Justice

1. Court Rules, Procedures and Forms – Michele C. Marquardt. J.V. Anderton reported for the committee and discussed the Supreme Court's ADM 2014-09 and its proposed modification to MCR 7.215. The Council consensus is that we would prefer having as many published opinions as possible. A motion was made by Ms. Morrissey, with support from Ms. Lentz, to oppose ADM 2014-09 to the extent it changes MCR 7.215(C), for the reasons outlined in Justice Markman’s dissent. With 19 Council members present and eligible to vote, the vote was 19 Aye, 0 Nay, 0 Abstain. A public policy report will be submitted to the State Bar of Michigan.

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

F. Areas of Practice


G. Liaisons


3. Elder Law and Disability Rights Section Liaison – Amy R. Tripp reported that there is a very early draft of the ABLE Act version of Michigan law that is not yet ready for review. More information may be provided if it becomes available in future months.


5. ICLE Liaison – Jeanne Murphy.  Lynn Chard reported that the Probate Institute registrations are going well. Ms. Chard reminded Council members of the special session being given by attorney Lou Harrison.


10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz.  No report.


13. Taxation Section Liaison – George W. Gregory.  Mr. Gregory's written report is attached as Attachment A.

VIII. Other Business.  None.

IX. Hot Topics.  None.

X. Adjournment – 12:05 p.m.
Report to the Probate & Estate Planning Section

Dated: Thursday, March 12, 2015

From: George W. Gregory, Liaison of the Taxation Section

For: The meeting of Saturday, March 14, 2015

(1) The Taxation Section had a meeting on March 12, 2015. The Taxation Section is having its annual conference. There are a number of parts of the conference that I think would be of interest to the members of the Probate & Estate Planning Section. I invite you to review the materials at the ICLE website.

(2) According to a presentation made to the Taxation Section, it is the plan of the State Bar to do away with list-serves. No date has been selected for this yet.

(3) The Young Tax Lawyers Committee of the Taxation Section decided to have social events at breweries. The next meeting is on April 2, 2015, at the Detroit Brew Company. There is information available about it on the Taxation Section website.

(4) The Inaugural Taxation Section Lifetime Achievement Award will probably take place in May, 2015. Nominations are open. You can send them to Marjorie Gell by regular or e-mail. She is the Chair of the Taxation Section and the Chair of the Committee. The deadline for nominations is April 1, 2015.

(5) There will be a “Meet the Players” conference on June 18, 2015 in Grand Rapids, Michigan. It is sponsored by the Taxation Section. The EMICPA and the Michigan Women’s Tax Association is primarily a social event (legislators will be there). More information to come.
STATE BAR OF MICHIGAN

PROBATE AND ESTATE PLANNING SECTION


March 19, 2015 – March 23, 2015 at Noon

<table>
<thead>
<tr>
<th>Officers:</th>
<th>Vote: Support, Oppose, Abstain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amy N. Morrissey, Chair</td>
<td>support</td>
</tr>
<tr>
<td>Shaheen I. Imami, Chair-Elect</td>
<td>support</td>
</tr>
<tr>
<td>James B. Steward, Vice Chair</td>
<td>support</td>
</tr>
<tr>
<td>Marlaine C. Teahan, Secretary</td>
<td>support</td>
</tr>
<tr>
<td>Marguerite Munson Lentz, Treasurer</td>
<td>support</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Council Members</th>
<th>Vote: Support, Oppose, Abstain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Susan M. Allan</td>
<td>support</td>
</tr>
<tr>
<td>W. Josh Ard</td>
<td>support</td>
</tr>
<tr>
<td>Christopher A. Ballard</td>
<td>support</td>
</tr>
<tr>
<td>George F. Bearup</td>
<td>support</td>
</tr>
<tr>
<td>Constance L. Brigman</td>
<td>support</td>
</tr>
<tr>
<td>Rhonda M. Clark-Kreuer</td>
<td>support</td>
</tr>
<tr>
<td>Hon. Michael L. Jaconette</td>
<td>abstain</td>
</tr>
<tr>
<td>Mark E. Kellogg</td>
<td>support</td>
</tr>
<tr>
<td>David P. Lucas</td>
<td>support</td>
</tr>
<tr>
<td>Raj A. Malviya</td>
<td>support</td>
</tr>
<tr>
<td>Michele C. Marquardt</td>
<td>support</td>
</tr>
<tr>
<td>Richard C. Mills</td>
<td>support</td>
</tr>
<tr>
<td>Lorraine F. New</td>
<td>support</td>
</tr>
<tr>
<td>Patricia M. Ouellette</td>
<td>support</td>
</tr>
<tr>
<td>David L.J.M. Skidmore</td>
<td>support</td>
</tr>
<tr>
<td>James P. Spica</td>
<td>support</td>
</tr>
<tr>
<td>Geoffrey R. Vernon</td>
<td>support</td>
</tr>
<tr>
<td>Nancy H. Welber</td>
<td>support</td>
</tr>
</tbody>
</table>
PROBATE AND ESTATE PLANNING COUNCIL  
Treasurer’s Report  
April 11, 2015

**Income/Expense Reports**

Attached is the income/expense report for February 2015.

**Mileage Reimbursement Rate Effective 1/1/2015**

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

**Expense Reimbursement Requests**

- Email forms to [mlentz@bodmanlaw.com](mailto:mlentz@bodmanlaw.com) or provide paper copies in person or by mail.

Marguerite Munson Lentz, Treasurer  
Probate and Estate Planning Section

Treasurer Contact Information:

**Marguerite Munson Lentz**  
BODMAN PLC  
6th Floor at Ford Field  
1901 St. Antoine Street  
Detroit, Michigan 48226  
office: 313-393-7589  
fax: 313-393-7579  
email: [mlentz@bodmanlaw.com](mailto:mlentz@bodmanlaw.com)
### Probate Council
#### Treasurer's Report
#### Feb-15

**Beginning Fiscal Year**

<table>
<thead>
<tr>
<th></th>
<th>2014-2015</th>
<th>FY to Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Fund</td>
<td>$188,741.33</td>
<td>$245,905.16</td>
</tr>
<tr>
<td>Amicus Fund (reserve)</td>
<td>$35,423.50</td>
<td>$35,423.50</td>
</tr>
<tr>
<td><strong>Total fund</strong></td>
<td><strong>$224,164.83</strong></td>
<td><strong>$281,328.66</strong></td>
</tr>
</tbody>
</table>

#### Revenue

<table>
<thead>
<tr>
<th>Subcategories</th>
<th>Jan-15</th>
<th>Feb-15</th>
<th>FY to Date</th>
<th>Budget 2014-2015</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Membership Dues</td>
<td>$3,220.00</td>
<td>$1,295.00</td>
<td>$114,940.00</td>
<td>$115,000.00</td>
<td>(60.00)</td>
<td>99.95%</td>
</tr>
<tr>
<td>Publishing Agreements</td>
<td>$325.00</td>
<td>$650.00</td>
<td>(325.00)</td>
<td>(325.00)</td>
<td>50.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Other</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>$3,220.00</td>
<td>$1,295.00</td>
<td>$115,265.00</td>
<td>$115,650.00</td>
<td>(385.00)</td>
<td>99.67%</td>
</tr>
</tbody>
</table>

#### Disbursements

<table>
<thead>
<tr>
<th>Journal (1)</th>
<th>$12,225.00</th>
<th>(8,400.00)</th>
<th>31.29%</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>E-blast</td>
<td>$75.00</td>
<td>$3,750.00</td>
<td>7,000.00</td>
<td>67.51%</td>
<td>100.96%</td>
<td></td>
</tr>
<tr>
<td>Chairperson's Dinner (2)</td>
<td>$132.50</td>
<td>$103.76</td>
<td>$6,196.25</td>
<td>633.00</td>
<td>100.96%</td>
<td></td>
</tr>
<tr>
<td>Plaques</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Gavel</td>
<td>$-</td>
<td>$-</td>
<td>$633.00</td>
<td>633.00</td>
<td>100.96%</td>
<td></td>
</tr>
<tr>
<td>Chair's Dinner--food</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Chair's Dinner--venue</td>
<td>$333.00</td>
<td>$633.00</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td>$3,138.80</td>
<td>$566.28</td>
<td>$6,770.16</td>
<td>$18,500.00</td>
<td>(11,729.84)</td>
<td>36.60%</td>
</tr>
<tr>
<td>Lobbying</td>
<td>$5,000.00</td>
<td>$2,500.00</td>
<td>$15,000.00</td>
<td>$30,000.00</td>
<td>(15,000.00)</td>
<td>50.00%</td>
</tr>
<tr>
<td>Meetings (3)</td>
<td>$15,000.00</td>
<td>(10,426.12)</td>
<td>30.49%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mtg with Chair's Dinner</td>
<td>766.38</td>
<td>$966.38</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Monthly</td>
<td>2,080.20</td>
<td>1,527.30</td>
<td>$3,607.50</td>
<td>3,607.50</td>
<td>100.00%</td>
<td></td>
</tr>
<tr>
<td>Officers conference (including travel)</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Long-range Planning</td>
<td>$-</td>
<td>$1,000.00</td>
<td>(1,000.00)</td>
<td>0.00%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Support for Annual Institute</td>
<td>$5,000.00</td>
<td>$5,000.00</td>
<td>$14,000.00</td>
<td>-</td>
<td>100.00%</td>
<td></td>
</tr>
<tr>
<td>Contribution to institute</td>
<td>$5,000.00</td>
<td>$5,000.00</td>
<td>$14,000.00</td>
<td>-</td>
<td>100.00%</td>
<td></td>
</tr>
<tr>
<td>Speaker's Dinner</td>
<td>$9,000.00</td>
<td>$9,000.00</td>
<td>$18,000.00</td>
<td>-</td>
<td>100.00%</td>
<td></td>
</tr>
<tr>
<td>Amicus Briefs</td>
<td>$-</td>
<td>$10,000.00</td>
<td>(10,000.00)</td>
<td>0.00%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Seminars</td>
<td>$4,000.00</td>
<td>$4,000.00</td>
<td>$8,000.00</td>
<td>-</td>
<td>100.00%</td>
<td></td>
</tr>
<tr>
<td>Electronics communications (4)</td>
<td>$2,825.00</td>
<td>(2,499.16)</td>
<td>11.53%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>List serve</td>
<td>$300.00</td>
<td>$300.00</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>E-blast</td>
<td>$300.00</td>
<td>$300.00</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Telephone</td>
<td>$25.84</td>
<td>$25.84</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Other (5)</td>
<td>$1,100.00</td>
<td>(961.22)</td>
<td>12.6%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Copying</td>
<td>$138.78</td>
<td>$138.78</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Postage</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Young Lawyer's Conference</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>Membership Activities (6)</td>
<td>400.00</td>
<td>$4,000.00</td>
<td>(3,600.00)</td>
<td>(63,548.83)</td>
<td>46.89%</td>
<td></td>
</tr>
<tr>
<td><strong>Total Disbursements</strong></td>
<td><strong>$28,950.43</strong></td>
<td><strong>$5,413.74</strong></td>
<td><strong>$56,101.17</strong></td>
<td><strong>$119,650.00</strong></td>
<td>(63,548.83)</td>
<td><strong>46.89%</strong></td>
</tr>
</tbody>
</table>

#### Net Increase (Decrease)

|                     | $59,163.83 | (4,000.00) |

### Footnotes

1. Includes e-blast for the Journal
2. Includes plaques for outgoing Chair and Council Members
3. Includes October meeting in connection with Chair's Dinner and SBM Leadership Conference expenses for incoming Chair and Chair Elect
4. Includes ListServ, telephone, e-blast & other electronic communications
5. Includes copying costs and $750 for Young Lawyers' Conference
6. New budget item approved at March probate council meeting.

### Hearts and Flowers

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning Balance</td>
<td>$1,889.31</td>
</tr>
<tr>
<td>Zingerman's Bread for Brian Howe (wife died)</td>
<td>$91.00</td>
</tr>
<tr>
<td>Plant for Michele Manquandt (father died)</td>
<td>$74.68</td>
</tr>
<tr>
<td><strong>Balance</strong></td>
<td><strong>$1,723.63</strong></td>
</tr>
</tbody>
</table>
### Section
### Expense Reimbursement Form

Select a Section

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

<table>
<thead>
<tr>
<th>Date</th>
<th>Description &amp; Purpose (Note start &amp; end point for mileage.)</th>
<th>Mileage</th>
<th>Lodging/Other Travel</th>
<th>Meals (Self + attach list of guests)</th>
<th>Miscellaneous (i.e. copying, phone, etc.)</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>0.575</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>$0.00</td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0.575</td>
<td></td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0.575</td>
<td></td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0.575</td>
<td></td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0.575</td>
<td></td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0.575</td>
<td></td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0.575</td>
<td></td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
</tbody>
</table>

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

Date | Title | Signature
--- | --- | ---

Grand Total | $0.00

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

Reset Form

Print Form
Instructions for Section Expense Reimbursement Form

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

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

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

If you have any questions about this form, please contact Alpa Patel at (517) 346-6362 or apatel@mail.michbar.org.
Attachment 3
The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 3,769.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 19. The number who voted opposed to this position was 0.
Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Marlaine C. Teahan

E-Mail:
mteahan@fraserlawfirm.com

Proposed Court Rule or Administrative Order Number:
2014-09 - Proposed Amendment of MCR 7.215

The proposed amendments of MCR 7.215(A)-(C) were submitted by the Court of Appeals. Proposed MCR 7.215(A) would clarify the term “unpublished” as used in the rule. The proposed amendment of MCR 7.215(B) would provide more specific guidance for Court of Appeals judges regarding when an opinion should be published. Finally, in response to what the Court of Appeals describes as an increased reliance by parties on unpublished opinions, the proposed revision of MCR 7.215(C) would explicitly note that citation of unpublished opinions is disfavored unless an unpublished decision directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal.

Date position was adopted:
March 14, 2015

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
19 Voted for position
0 Voted against position
0 Abstained from vote
4 Did not vote (absent)

Position:
Oppose

Explanation of the position, including any recommended amendments:
The Section opposes amendment of MCR 7.215(C), as proposed in ADM 2014-09, and agrees with Justice Markman's dissent on this proposed rule change.
The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
Respectfully submits the following position on:

* MCL 700.1513

* 

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 3,775.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 17. The number who voted opposed to this position was 3.
Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Marlaine C. Teahan

E-Mail:
mteahan@fraserlawfirm.com

Regarding:
Proposed new legislation: MCL 700.1513

Date position was adopted:
March 14, 2015

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
17 Voted for position
3 Voted against position
0 Abstained from vote
3 Did not vote (absent)

Position:
Support

Explanation of the position, including any recommended amendments:
The Section is proposing new legislation that, under certain circumstances, would provide exculpation of trustees of life insurance trusts from liability related to the administration of life insurance policies held in the trust.
700.1513 Duties of a trustee with respect to the acquisition, retention, and ownership of life insurance policies

Sec. 1513 (1) As used in this Section, the term “irrevocable life insurance trust” (hereinafter referred to as an "ILIT") means a trust that:

(a) Is not revocable within the meaning of MCL 700.7103(h).
(b) The settlor(s) created with the intent that the trustee(s) acquire, by purchase or gift, one or more life insurance policies as a trust asset.
(c) Was not created solely to accomplish one or more of the charitable purposes set forth in MCL 700.7405(1).

(2) It is presumed that the settlor(s) intended to create an ILIT to acquire or receive one or more life insurance policies if either of the following apply:

(a) The trustee(s) acquire(s), by purchase or gift, a life insurance policy within 6 months of its creation.
(b) For the entire period prior to the acquisition of the life insurance policy the only trust assets are cash, cash equivalents, or a life insurance policy.

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

(a) Determine whether the trustee or ILIT beneficiaries have an insurable interest in the insured in accordance with the provisions of MCL 700.7114.
(b) Determine whether any life insurance policy is or remains a proper trust investment.
(c) Investigate the financial strength or changes in the financial strength of the life insurance company issuing or maintaining the policy.
(d) Inquire about changes in the health or financial condition of the insured.
(e) Diversify the investment in the policy relative to any other life insurance policies or any other trust assets.
(f) Pay policy premiums unless there is sufficient cash or other readily marketable assets held by the trust that were designated for this purpose by the settlor or a third party.
(g) Exercise or not exercise any option available under the policy regardless of whether the exercise or nonexercise results in the lapse or termination of the policy.

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

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

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

(7) Except as otherwise provided in the terms of the ILIT, this section applies to an ILIT established before, on, or after [the effective date of this section] and to a life insurance policy acquired, retained, or owned by a trustee before, on, or after such date.
Below are bills that PAA has identified for Council of Probate Section of State Bar of MI

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

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

**H 4133**  
**Title:** Second Parent Adoption  
**Author:** Irwin  
**Introduction:** 2/3/2015  
**Location:** House Families, Children and Seniors Committee  
**Summary:** Provides for second parent adoption.  
**Status:** 02/03/2015 INTRODUCED.  
02/03/2015 To HOUSE Committee on FAMILIES, CHILDREN, AND SENIORS.

**H 4370**  
**Title:** Homestead Property Tax Credit  
**Author:** Hughes  
**Introduction:** 3/24/2015  
**Location:** House Tax Policy Committee  
**Summary:** Eliminates limitations and restrictions on deduction of certain retirement or pension benefits and restores treatment of senior citizens and the homestead property tax credit.  
**Status:** 03/24/2015 INTRODUCED.  
03/24/2015 To HOUSE Committee on TAX POLICY.
**H 4374** Title: Same Sex Marriage  
Author: Irwin  
Introduction: 3/24/2015  
Location: House Families, Children and Seniors Committee  
Summary: Removes prohibition on same-sex marriage.  
Status: 03/24/2015 INTRODUCED.  
03/24/2015 To HOUSE Committee on FAMILIES, CHILDREN, AND SENIORS.

**H 4375** Title: Same Sex Marriage  
Author: Zemke  
Introduction: 3/24/2015  
Location: House Families, Children and Seniors Committee  
Summary: Removes prohibition of same-sex marriage from foreign marriage act.  
Status: 03/24/2015 INTRODUCED.  
03/24/2015 To HOUSE Committee on FAMILIES, CHILDREN, AND SENIORS.

**H 4376** Title: Same Sex Couples  
Author: Wittenberg  
Introduction: 3/24/2015  
Location: House Families, Children and Seniors Committee  
Summary: Allows issuance of marriage license to same-sex couples without publicity.  
Status: 03/24/2015 INTRODUCED.  
03/24/2015 To HOUSE Committee on FAMILIES, CHILDREN, AND SENIORS.

**HJR L** Title: Same Sex Marriage Resolution  
Author: Moss  
Introduction: 3/24/2015  
Location: House Families, Children and Seniors Committee  
Summary: Reduces cap on amount of venture capital voucher certificates.  
Status: 03/24/2015 INTRODUCED.  
03/24/2015 To HOUSE Committee on FAMILIES, CHILDREN, AND SENIORS.

**S 24** Title: Homestead Exemption  
Author: Nofs  
Introduction: 1/21/2015  
Last Amend: 3/18/2015  
Location: House Tax Policy Committee  
Summary: Continues principal residence homestead exemption upon death of a homeowner under certain circumstances.  
Status: 01/21/2015 INTRODUCED.
01/21/2015 To SENATE Committee on FINANCE.
03/05/2015 From SENATE Committee on FINANCE: Recommended as substituted (S-1).
03/05/2015 In SENATE. To second reading.
03/18/2015 In SENATE. Read second time and committee substitute adopted. (S-1) To third reading.
03/19/2015 In SENATE. Read third time. Passed SENATE. *****To HOUSE.
03/19/2015 To HOUSE Committee on TAX POLICY.

**S 49**
Title: Crimes Against Elder Adults
Author: Smith V
Introduction: 1/28/2015
Location: Senate Second Reading - Committee Reports
Summary: Increases penalties for certain crimes against a person over 65 years of age.
Status: 01/28/2015 INTRODUCED.
01/28/2015 To SENATE Committee on JUDICIARY.
02/12/2015 From SENATE Committee on JUDICIARY: Recommended as substituted. (S-1)
02/12/2015 In SENATE. To second reading.

**S 50**
Title: Elder Abuse
Author: Smith V
Introduction: 1/28/2015
Location: Senate Second Reading - Committee Reports
Summary: Provides for sentencing guidelines for elder adult abuse.
Status: 01/28/2015 INTRODUCED.
01/28/2015 To SENATE Committee on JUDICIARY.
02/12/2015 From SENATE Committee on JUDICIARY: Recommended as substituted. (S-1)
02/12/2015 In SENATE. To second reading.

**S 73**
Title: Obtaining Property
Author: Schmidt W
Introduction: 2/3/2015
Location: Senate Judiciary Committee
Summary: Prohibits obtaining services or property by fraud or deception and provides penalties.
Status: 02/03/2015 INTRODUCED.
02/03/2015 To SENATE Committee on JUDICIARY.

**S 74**
Title: Obtaining Services
Author: Schmidt W
Introduction: 2/3/2015
Enacted: 1/10/2015
Last Amend: 12/4/2014
Location: Senate Judiciary Committee
Summary: Enacts sentencing guidelines for obtaining services or property by fraud or deception.
Status: 02/03/2015 INTRODUCED.
02/03/2015 To SENATE Committee on JUDICIARY.

S 227
Title: Same Sex Marriage
Author: Hertel
Introduction: 3/24/2015
Location: Senate Judiciary Committee
Summary: Removes prohibition on same-sex marriage from family law.
Status: 03/24/2015 INTRODUCED.
03/24/2015 To SENATE Committee on JUDICIARY.

S 228
Title: Marriage Licenses
Author: Knezek
Introduction: 3/24/2015
Location: Senate Judiciary Committee
Summary: Allows issuance of marriage license to same-sex couple without publicity.
Status: 03/24/2015 INTRODUCED.
03/24/2015 To SENATE Committee on JUDICIARY.

S 229
Title: Same Sex Marriage
Author: Smith V
Introduction: 3/24/2015
Location: Senate Judiciary Committee
Summary: Removes prohibition on same-sex marriage from foreign marriage act.
Status: 03/24/2015 INTRODUCED.
03/24/2015 To SENATE Committee on JUDICIARY.

SJR 1
Title: Same Sex Marriage
Author: Warren
Introduction: 3/24/2015
Location: Senate Judiciary Committee
Summary: Repeals constitutional prohibition of same-sex marriage and civil unions; Repeals section 25 of article I of the state constitution of 1963 to allow the recognition of marriage or similar unions of two people.
Status: 03/24/2015 INTRODUCED.
03/24/2015 To SENATE Committee on JUDICIARY.
PER CURIAM.

Petitioner appeals by right in this case involving the construction of a trust. Petitioner is decedent’s daughter and respondent is decedent’s surviving spouse. The intervening parties are three of decedent’s stepchildren. We affirm.

On April 7, 1981, decedent created a living, revocable trust, which became irrevocable upon his death on March 12, 2012. Upon decedent’s death, the trust was divided into two separate trusts, designated as the Marital Trust and the Family Trust. Article 8 of the trust instrument governs the manner in which funds are to be allocated between the two separate trusts:
a. Creation of the Marital Trust

The Marital Trust shall consist of a dollar amount equal to fifty (50%) percent of the value of my gross estate as defined for Federal Estate Tax purposes, less all allowable federal estate deductions other than the marital deduction.

The Marital Trust shall be reduced by the value, for Federal Estate Tax purposes, of any interest in property which qualifies for the marital deduction and which passes or has passed from me to my spouse other than under this Article.

The marital deduction amount determined under this Paragraph a. shall be a pecuniary amount and not a fractional share.

***

c. Creation of the Family Trust.

The Family Trust shall consist of the balance of the trust property.

On September 17, 2008, decedent amended Article 8 of the trust instrument to provide as follows:

The Marital Trust shall consist of my primary residence (subject to any mortgages thereon) at the time of my death, plus a dollar amount equal to fifty (50%) percent of the values of the balance of my gross estate as defined for Federal Estate Tax purposes, less all allowable federal estate deductions other than the marital deduction.

The Marital Trust shall be reduced by the value, for Federal Estate Tax purposes, of any interest in property which qualifies for the marital deduction and which passes or has passed from me to my spouse other than under this Article.

The marital deduction amount determined under this Paragraph a. shall be a pecuniary amount and not a fractional share.

At the time of decedent’s death, he and respondent owned a home as tenants by the entireties. When decedent died, respondent became the sole owner of the home by right of survivorship. Nearly one year later, the acting trustee filed a petition for clarification, asserting that “[b]y not changing the title and funding of the Trust with the Residence, the value of the Residence becomes an issue.” Accordingly, petitioner asked the court for clarification on the following points:

B. Determining whether the value of the Residence is to be included in the creation of the Marital Trust;

C. Determining whether the value of the Residence reduces the value of the Marital Trust and, if so, by how much[.]
The probate court found that the marital home was never included in the trust and never “passed” to respondent because it was owned by respondent before and after decedent’s death. As a result, it found that the value of the Marital Trust should not be reduced by the value of the marital home. Petitioner disagreed and requested an evidentiary hearing on the issue. The probate court denied petitioner’s request, explaining that its ruling was made as a matter of law and that no factual dispute existed between the parties. Petitioner also argued that respondent was not entitled to her exempt property allowance because she failed to file a claim with the estate within four months of decedent’s death. Again, the probate court disagreed.


When interpreting the meaning of a trust, the probate court must ascertain and give effect to the intent of the settlor. *In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008). In doing so, the court must look to the words of the trust document itself. *Id.* Only if the language is ambiguous may the probate court look outside the trust language and consider the circumstances surrounding its creation. *Id.*

The relevant language of Article 8 of the trust is unambiguous. It provides that “[t]he Marital Trust shall be reduced by the value, for Federal Estate Tax purposes, of any interest in property which qualifies for the marital deduction and which passes or has passed from me to my spouse . . . .” The value of the marital home is not to be deducted from the Marital Trust because it did not “pass” from decedent to respondent. Again, decedent and respondent owned their home as tenants by the entireties. In *Tkachik v Mandeville*, 487 Mich 38, 46; 790 NW2d 260 (2010), our Supreme Court explained that a tenancy by the entireties “is a type of concurrent ownership in real property that is unique to married persons.” A defining trait of such a tenancy is “that one tenant by the entirety has no interest separable from that of the other.” *Id.* (citation omitted). In addition, “both spouses have a right of survivorship, meaning that, in the event that one spouse dies, the remaining spouse automatically owns the entire property.” *Id.* at 46-47. As a result, “entireties properties are not part of a decedent spouse’s estate, and the law of descent and distribution does not apply to property passing to the survivor.” *Id.* at 47 (emphasis added).

Because decedent and respondent owned their home as tenants by the entireties, respondent was a full owner of the property before and after her husband’s death. When decedent died, respondent became the sole owner automatically, not because the property “passed” as part of the estate. The property never was part of the estate. Furthermore, because the language of the trust instrument was clear and unambiguous, the probate court did not err by denying petitioner’s request for an evidentiary hearing. See *Kostin*, 278 Mich App at 53.

Nor did the probate court err by ruling that respondent was entitled to her exempt property allowance. Petitioner cites MCL 700.7605(1) and MCL 700.7606(1) for the proposition
that respondent was required to submit a formal claim for her exempt property allowance within four months of decedent’s death. MCL 700.7605(1) states:

   The property of a trust over which the settlor has the right without regard to the settlor’s mental capacity, at his or her death, either alone or in conjunction with another person, to revoke the trust and reinvest principal in himself or herself is subject to all of the following, but only to the extent that the settlor’s property subject to probate administration is insufficient to satisfy the following expenses, claims, and allowances:

   (a) The administration expenses of the settlor’s estate.

   (b) An enforceable and timely presented claim of a creditor of the settlor, including a claim for the settlor’s funeral and burial expenses.

   (c) Homestead, family, and exempt property allowances.

MCL 700.7606(1) states in relevant part:

   If a personal representative is not appointed for the settlor’s estate within 4 months after the date of the publication of notice to creditors, a trust described in section 7605(1) is not liable for payment of homestead, family, or exempt property allowances. . . .

First, neither of these statutory provisions applies to the trust in this case. As stated in MCL 700.7605(1), this portion of the Michigan Trust Code applies only to trusts that remain revocable at death. The trust in this case became irrevocable upon death. Second, the probate court correctly construed the language regarding exempt property. Article 8, § 1 of the trust instrument provides in pertinent part:

   The provisions made herein and in my Will for my spouse shall be in lieu of my spouse’s marital rights and all other rights in my estate except for exempt property and, in the event my spouse validly elects to take against my Will, then the trust property shall be administered and distributed in the manner provided herein as though my spouse had predeceased me. [Emphasis added.]

The language is clear that exempt property, such as a property allowance, is not subject to Article 8, § 1.

   Affirmed. As the prevailing party, respondent Georgia Markoul may tax her costs pursuant to MCR 7.219.

   /s/ Mark J. Cavanagh
   /s/ Kathleen Jansen
   /s/ Amy Ronayne Krause
March 18, 2015

Mr. Jerome W. Zimmer, Jr., Chief Clerk
Michigan Court of Appeals
P.O. Box 30022
Lansing, Michigan 48909-7522


Dear Mr. Zimmer:

This letter is being sent as a policy position statement of the Probate and Estate Planning Section of the Michigan State Bar (the “Section”). The Section believes that the Court of Appeals should take action to correct a serious mistake of law reflected in its opinion rendered in In re John Markoul Living Trust, No. 316892. Specifically, the Section believes that the Court of Appeals misconstrued Section 7605(1) of the Michigan Trust Code, MCL 700.7605(1), by holding that the statute does not apply to revocable trusts that become irrevocable upon the death of the settlor.

Section 7605(1) of the Michigan Trust Code, MCL 700.7605(1), provides as follows:

The property of a trust over which the settlor has the right without regard to the settlor’s mental capacity, at his or her death, either alone or in conjunction with another person, to revoke the trust and vest principal in himself or herself is subject to all of the following, but only to the extent that the settlor’s property subject to probate administration is insufficient to satisfy the following expenses, claims, and allowances:

(a) The administration expenses of the settlor’s estate.

(b) An enforceable and timely presented claim of a creditor of the settlor, including a claim for the settlor’s funeral and burial expenses.

(c) Homestead, family, and exempt property allowances.

The Reporter’s Comment to Section 7605(1) describes the purpose of the statute (which was effective April 1, 2010) and its relationship to prior Michigan law. “Under Michigan law, assets in a revocable trust have long been subject to claims of the settlor’s creditors, both during lifetime and at death. See MCL 556.128, .131. This section does not alter those provisions.” J. Martin and M. Harder, Estates and Protected Individuals Code with Reporters’ Commentary Section 700.7605, Reporter’s Comment (ICLE 2014). “Subsection 7605(1)
provides that the assets of a revocable trust are liable for the payment of administration expenses; claims against the settlor; and homestead, family, and exempt property allowance. However, that liability exists only to the extent that the probate estate is insufficient to satisfy those items.” *Id.* “If, at death, the settlor of a trust held a power of revocation over the trust, the assets of that trust (except as provided in subsections (2), (3), and (4)) are exposed to debts, expenses, and allowances.” *Id.*

In the *Markoul Trust* decision, the Court of Appeals ruled that Section 7605(1) of the MTC did not apply to the case in issue because the settlor of the trust was deceased, and because the settlor’s trust became irrevocable at his death. “[N]either of these statutory provisions applies to the trust in this case. As stated in MCL 700.7605(1), this portion of the Michigan Trust Code applies only to trusts that remain revocable at death. The trust in this case became irrevocable upon death.”

As the Court of Appeals recognized, it is true that the settlor of a trust cannot revoke the trust after he or she dies, and consequently a revocable trust becomes irrevocable upon the death of the settlor. However, the Court of Appeals seemed to suggest that some revocable trusts continue to be revocable after the death of the settlor, and that Section 7605(1) of the MTC only applies to such trusts: “The trust in this case became irrevocable upon death” and so Section 7605(1) did not apply “to the trust in this case.”

The notion that some single-settlor revocable trusts continue to be revocable after the death of the settlor was erroneous. Every single-settlor revocable trust becomes irrevocable at the death of the settlor who created the trust. Under Michigan trust law, there is no type of single-settlor revocable trust that continues to be revocable after the death of the settlor who possessed the power of revocation. Therefore, under the Court of Appeals’ construction of Section 7605(1), the statute would never be capable of being invoked for a single-settlor revocable trust, because every such revocable trust becomes irrevocable upon the settlor’s death. (Some joint, multi-settlor trusts may still be revocable so long as one or more of the co-settlors is living, but there is nothing in the terms or history of Section 7605(1) to suggest that it was intended to apply only to joint, multi-settlor trusts.)

By its terms, Section 7605(1) applies to “a trust over which the settlor ha[d] the right ... at his or her death ... to revoke the trust and revest principal in himself or herself[.]” Hence, the statutory standard is: At the settlor’s death, and but for the settlor’s death, did the settlor have the right to revoke the trust? If yes, then Section 7605(1) applies. If no (for those trusts that are irrevocable during the lifetime of the settlor), then Section 7605(1) does not apply.

The Section is very concerned about the potential that the *Markoul Trust* decision could disrupt longstanding law and practice. The liability of a deceased settlor’s trust -- that was revocable immediately prior to the settlor’s death -- for the debts listed in Section 7605(1) is a
fundamental principle of estate and trust law in Michigan. In practice, revocable trusts are regularly held liable for the Section 7605(1) debts, likely in hundreds of instances in Michigan over the course of a year.

Moreover, the principle behind Section 7605(1) is that a decedent should not be permitted to avoid his or her debts by titling assets in the name of a revocable trust. The Court of Appeals’ decision seems to reflect that a debtor could do just that -- avoid liability for his or her debts by leaving assets titled in the name of a revocable trust, which would be contrary to long-established Michigan law.

The Section respectfully requests that the Court of Appeals act to correct this situation, given the potential for confusion and disruption to practice. The Section voted to send this letter after ascertaining that the non-prevailing party in the Markoul Trust case was not pursuing an appeal to the Michigan Supreme Court, and hence that there was no opportunity for the Section to file an amicus brief. Thank you.

Very truly yours,

Amy N. Morrissey
Chair, SBM Probate & Estate Planning Council

DLS/sjb
094000.094261 #12535620-1
Citizens Outreach Committee Conference Call April 1 @ 11:30 AM

On the call:
1. Connie Brigman, chairperson
2. Becky Schnelz X
3. Neal Nusholtz X
4. Nick Vontroba X
5. Melisa Mylswieic X
6. Nancy Welber X
7. Kathleen Goetsch X
8. Katie Lynwood
9. Jessica Schilling
10. Mike McClory

Unavailable:
8. Katie Lynwood
9. Jessica Schilling
10. Mike McClory

Report:

I sent the temporary brochures to Mike Eidelbes. But I have not received a response. None of our brochures are currently on the SBM website.

1. **FIRST ITEM FOR VOTE:** Do we currently want to concentrate on:
   Paper brochures, printed brochures or try to do both simultaneously with two separate work groups? The entire committee wants to work on web brochures only. Neal supports having paper brochures for members to put in their offices with the section’s emblem on it. Connie agrees that they are professional, but the committee’s mission statement is to reach the public at large. Nancy agrees we should address paper brochures later. Neal agreed. We are in agreement that the two kinds of brochures have different content and that one brochure does not serve both audiences.

2. **SECOND ITEM FOR VOTE:** Should we recommend to the Council that we develop a web publishing arrangement? The purpose is to give notice to others that the materials posted are not to be posted on any other server without our permission. All agreed that we need to address this issue with the SBM and see something in writing. Nick asked if the temporary brochures are yet posted since this issue pertains to them as well.

3. **Action item:** **KATHLEEN:** Call Mr. Betz at 517-230-0110 to MAKE SURE that our 2004 pdfs being taken off his website here and anywhere else that he is publishing them on his server: https://www.msu.edu/user/betz/estateplanning/

Non-action items that we didn't have time to cover on the call.

BECKY, we don't have feedback on how many SBM PEP section members use the brochures for seminars. We only know that non-members are using them. (See Mr. Betz information)

ACM requires authors to assign publication rights to ACM as a condition of publishing the work. ACM relies on either an assignment of copyright with permanent rights reserved to the author, or an equivalent grant of a license. ACM treats the rights granted as the basic means of obtaining certain exclusive publication rights; to create and deliver the Digital Library; to further disseminate works by acting as a single source for blanket republication requests, such as aggregated collections or translations, and the delivery of the material to the requesting party; to protect works from plagiarism and any other unauthorized uses; and to sustain and develop its publishing program by selling subscriptions or charging for access to its collections.

ACM requires that authors have the authority to grant rights by copyright or license agreements, or that they obtain the necessary authorization to execute the grant of rights. Such grant applies to any medium used by ACM for publication. Both the ACM Copyright Transfer and the ACM Publishing License Agreement leave important rights with the original owner.

Authors should incorporate the appropriate ACM copyright or License notice and ACM citation of the publication into copies they personally maintain on non-ACM servers.

The author’s grant of rights applies only to the work as a whole, and not to any embedded objects owned by third parties. An author who embeds an object, such as an art image that is copyrighted by a third party, must obtain that party’s permission to include the object, with the understanding that the entire work may be distributed as a unit in any medium. The requirement to obtain third-party permission does not apply if the author embeds only a link to the copyright holder's object.

Authors who wish to embed a component of another ACM-copyrighted or licensed work, e.g., an excerpt, a table, or a figure, must obtain an explicit permission (there is no fee) from ACM.

2.2 Publication Notices

The proper publication notice should be displayed on the first page or initial screen of a display of works published by ACM, whether those works are published in print or in a digital medium. Other than government works, one of three standard notices are assigned to a work depending on the type of paper and author choices. A non-
exclusive permission to publish license is used for certain types of work, typically newsletter articles or very short pieces that may be developed later into regular articles. The non-exclusive permission to publish license is also available for authors who choose to pay an upfront free access fee. The three notices are:

- "Copyright {YEAR} ACM"
- "Copyright {YEAR} held by Owner/Author. Publication Rights Licensed to ACM"
- "Copyright {YEAR} held by Owner/Author"

The Publication Notice is typically preceded or followed by the following Permissions Statement that informs readers of free uses they may make without requesting permission and directing them to the appropriate place to request permission for other types of re-use:

- Permission to make digital or hard copies of part or all of this work for personal or classroom use is granted without fee provided that copies are not made or distributed for profit or commercial advantage and that copies bear this notice and the full citation on the first page. Copyrights for components of this work owned by others than ACM must be honored. Abstracting with credit is permitted. To copy otherwise, to republish, to post on servers, or to redistribute to lists, requires prior specific permission and/or a fee. Request permissions from permissions@acm.org or Publications Dept., ACM, Inc., fax +1 (212) 869-0481.

For nonexclusive licenses, the penultimate sentence of the Permissions Statement is deleted and the last sentence is altered as follows:

- To copy otherwise, to republish, to post on servers, or to redistribute to lists, contact the Owner/Author.
Publications

- Durable Power of Attorney — Frequently Asked Questions
- Patient Advocate Designations — Frequently Asked Questions
- Acting for Adults Who Are Disabled — Frequently Asked Questions
- Probate Administration — Frequently Asked Questions
Durable Power of Attorney — Frequently Asked Questions

- What is a durable power of attorney?
- What powers and duties might exist under a power of attorney?
- When is a durable power of attorney effective?
- Who is my agent in a durable power of attorney?
- What are the advantages and problems associated with a durable power of attorney?
- How can I get a durable power of attorney?
What is a Durable Power of Attorney?

A durable power of attorney is a written power of attorney. It contains the words “this power of attorney shall not be affected by my incapacity” or “this power of attorney shall become effective upon my incapacity” or similar words. In it, you, as principal, name another individual as your agent or attorney-in-fact to act for you to handle your affairs. You must sign the durable power of attorney before you become incapacitated. Otherwise, it will not be valid.

Authority

You can choose to give broad authority to your agent. For example, you can give the power to do anything you could do. Alternatively, you can choose to give narrow authority to your agent. For example, you can give the power to sell a piece of real estate. Many powers and duties might exist under a durable power of attorney.

Acknowledgment

You sign your power of attorney—your signature must be notarized or properly witnessed—and your agent uses the document to show he or she has authority to act on your behalf. The agent must acknowledge his or her responsibilities and duties. Michigan law requires certain statements be within the acknowledgment, and the agent must sign the document containing the acknowledgment.

Real Estate

If the power of attorney satisfies the register of deeds requirements, it can be recorded. If recorded, your agent may use the power of attorney in connection with a real estate transaction.
What Powers and Duties Might Exist under a Durable Power of Attorney?

You probably want your agent to have authority to do anything that you could do. Many durable powers of attorney are very broad, meaning they give the agent a lot of authority to act on your behalf. Specifically, a power of attorney might authorize your agent to do any or all of the following on your behalf:

- Pay for support and care
- Borrow money
- Conduct banking transactions
- Deal with property
- Handle legal claims
- Gain entry to safety deposit boxes
- Deal with insurance and retirement benefits
- Prepare and file tax returns
- Exercise stockholder rights
- Contract for services
- Make gifts
- Collect Social Security and other benefits
- Exercise rights of the settlor or grantor of a trust

If you want to authorize someone to make your medical decisions or decisions to withdraw life-sustaining treatment when you are no longer able to do so, you should designate someone to act as your patient advocate.

Your agent’s duties may include:

- signing checks
- making deposits
- paying bills
- contracting for medical or other professional services
- selling property
- obtaining insurance
- doing all the things you do in managing your day-to-day affairs
When is a Durable Power of Attorney Effective?

A durable power of attorney is a written power of attorney that can become effective upon execution or spring into effect upon incapacity. Either way, the durable power of attorney stays effective when the person is incapacitated. It contains the words “this power of attorney shall not be affected by my incapacity” or “this power of attorney shall become effective upon my incapacity” or similar words. You must sign the durable power of attorney before you become incapacitated. Otherwise, it will not be valid.

Effective Upon Execution
You may make a durable power of attorney that is effective immediately. You may give your agent broad authority. Such authority should only be given to someone you trust. The durable power of attorney can require your agent to follow your instructions.

Springing into Effectiveness
You can make a durable power of attorney that becomes effective only if you become disabled. The document would include the following language: “This power of attorney shall become effective upon my incapacity.” If you include this, you should explain how you will be determined to be incapacitated. For example, you might require two licensed physicians certify in writing that you are unable to make decisions. It will be helpful when your agent or others determine when it is time for your agent to act on your behalf.

The Durable Power of Attorney May be Revoked
As long as you are competent, you can revoke your durable power of attorney. The revocation should be in writing and it should be delivered to the agent and third parties with whom the agent is dealing (for example, your bank). A conservator appointed by the probate court can revoke the durable power of attorney.

The Durable Power of Attorney Terminates at Death
The durable power of attorney terminates at the time of your death unless there is uncertainty as to whether you are dead or alive. Understand, however, that a third party is entitled to rely on a power of attorney that has been terminated or revoked until the third party has actual notice of the termination.
Who is my Agent in a Durable Power of Attorney?

You may name any adult as your Agent—for example, a spouse, adult child, relative, or friend—or a bank. Whomever you select as your agent, you should trust and have confidence in them and they should be willing to act for you. Remember, your agent may have broad powers and duties, including making important financial and personal decisions for you.

You can name more than one agent. If you do name more than one agent, you should specify whether your or not the agents can act independently. If you name two agents to act jointly, a deadlock may develop if they cannot agree. Rather than naming two people to act jointly, you could name one agent with an alternate to act if the first agent cannot or will not act.

Agent Obligations

Your agent has a duty to follow your instructions and act in your best interests. The agent must acknowledge his or her responsibilities and duties. Michigan law requires certain statements be within the acknowledgment, and the agent must sign the document containing the acknowledgment. The agent should keep accurate records of assets and accounts. If your agent improperly manages your affairs, he or she is legally responsible to compensate you.

Abuse of Authority

If your agent abuses the authority, you can revoke the durable power of attorney if you have capacity. If you do not have capacity, you cannot revoke it. Anyone interested in your welfare can ask the probate court to intervene and appoint a conservator to handle your affairs. The conservator can require the agent to account for your assets and income; they can even suspend or revoke the durable power of attorney. In addition, you or your conservator can sue your agent for damages caused by the agent’s abuse of authority.
What are the Advantages and Problems associated with a Durable Power of Attorney?

Advantages of a Durable Power of Attorney
Some of the advantages of a durable power of attorney include:

- You select your agent instead of the probate court selecting your agent.
- It can give you and your family some peace of mind knowing you have appointed someone who will handle your affairs.
- It can save the stress, time, and expense of a court proceeding.

Problems with a Durable Power of Attorney
There is no guarantee it will be accepted or recognized by third parties. For example, if the purpose of the durable power of attorney is dealing with governmental agencies such as the Social Security Administration, the Veterans Administration, or the Internal Revenue Service, you must either use the agency’s special power of attorney form or make sure the durable power of attorney provided to the agency contains the special wording required by each agency’s particular form.

Another problem occurs if your agent quits, dies, or becomes unable to act as your agent. In such an event, if you haven’t named an alternate agent, there will be no one to act on your behalf. In order for a durable power of attorney to be beneficial, you have to give the agent broad authority. Therefore, your agent should be someone you trust and have confidence in handling your affairs.
How can I get a Durable Power of Attorney?

You should consult a knowledgeable lawyer who can prepare a durable power of attorney to meet your needs and advise you on how it is used. Everyone should consider the advantages of having a durable power of attorney. It’s an important part of estate planning.
Patient Advocate Designations — Frequently Asked Questions

This information is being completed by another task group.
Acting for Adults Who Are Disabled — Frequently Asked Questions

This information is being completed by another task group.
Probate Administration — Frequently Asked Questions

This information is being completed by another task group.
Proposal for Committee on Special Projects meeting on April 11, 2015

The Citizens Outreach Committee asks for a recommendation to the State Bar of Michigan Probate and Estate Planning Council as follows:

1. Direction to the Citizens Outreach Committee to explore third party vendors who could host a webpage for the State Bar of Michigan Probate and Estate Planning Council for the publication of the brochures that the committee developed on the following topics:
   a. Guardianships
   b. Conservatorships
   c. Durable Powers of Attorney
   d. Patient Advocate Designations
   e. Probate of a Decedent’s Estate

2. Direction to the Citizens Outreach Committee to explore a mutually acceptable publication agreement with the State Bar of Michigan regarding the temporary brochures currently submitted for publication on the State Bar of Michigan’s webpage and for the materials previously posted.

BACKGROUND

1. A. We hope to publish the brochures in a way that reaches the intended audience – the general public. However:
   * Members see them as a member benefit/potential marketing materials.
   * State Bar of Michigan sees them as materials needed for a “For the Public,” Publications Page on the SBM website.

1. B. Difficulties with the State Bar of Michigan proposal for web publication of brochures.
   The State Bar of Michigan webmaster has offered two web formats for our materials. Neither format is a good fit if we hope to be accessible to the general public.
   a. The webmaster offered to publish our materials using Flipbook.
      i. Flipbook requires up-to-date Adobe Flashplayer.
         Professional webpages should never require Flashplayer.
         “(This is what Flash sites look like to people without Flash or who are looking at Flash on an iPhone or iPad.)”
ii. What about just using a pdf? Only small pdfs will load at an acceptable speed. And, “if you don’t write-protect your document, then someone can upload the whole file to their site and change it however they want (including editing out your links.)” See, http://www.lunametrics.com/blog/2013/01/10/seo-pdfs/. As of 4-1-15 there were outdated pdfs of our brochures on an MSU Extension website that none of us knew were there.

b. The SBM webmaster offered to publish our materials in HTML – one page per topic. Understandably, she is swamped with the SBM website changeover.

i. The offer is to put all of the content on one page and put anchors at the top of the page. Each anchor acts as a direct link to that section of text. No scrolling required. If the reader wants the whole article, there will still be a lot of scrolling. Only some will hang in there to scroll through more than 400 words. “…Having to scroll 10 or 11 times down a page to sort through information does not seem to deter people who are involved in the field of web development. I think years of staring at endless streams of code makes them feel at home in these situations. The average audience, however, finds such an abundance of information - presented in a chunk on one screen - daunting. The reader, forced to scroll through paragraph after paragraph until it all blurs together, is no longer absorbing the information at all. They are hypnotically watching the text go by.”
http://becircle.com/three_scrolls_and_youre_out.

Web navigation should be for the reader’s needs and not for yours.
ii. Shortened topics are acceptable if we can have many pages (see the DPOA mockup in Exhibit A), but that option was not offered. A web article for the general public ought not be longer than two pages, double-spaced in 12-point font. Here is what Amicus suggests: “Everyone coming to your site is not looking for the same information. And while the search engines have become really great at leading clients to pages directly related to their search inquiry, they are not perfect by any stretch. ... Less really can be more when it comes to captivating a site visitor. Generally, we’d recommend no more than 4 short paragraphs... See more at:

http://amicuscreative.com/corporate/2012/07/31/Attorney-Website-Design/Can-you-ever-have-too-much-content-on-a-web-page-_bl4819.htm#sthash.5dRSJbd0.dpuf.

1. C. Why a third party vendor should be explored for web brochures.
   a. We need a highly accessible web page for readers of differing skills and abilities. The Michigan Supreme Court’s website ranks in the top ten nationally. Borrowing from some of the criteria used to judge them:
      i. User interface
         1. Navigates easily (3 clicks or less to find what you are looking for, easily identifiable links and search options)
         2. Pages download quickly and all links work.
         3. Includes graphics and video
         4. Readable text - contrast, font size and type
         5. Helpful reference materials and links
         6. Site search feature
         7. Self help module
8. Mobile friendly website

ii. **Accessible.** To be functionally accessible consider: *severe or moderate visual impairment, colorblindness, deafness or hard of hearing, motor disabilities and cognitive disabilities.*

See, [http://uiaccess.com/understanding.html](http://uiaccess.com/understanding.html). ¹

1. Screen reader capable. Users with severe visual impairments typically use screen readers, programs that navigate the web browser's rendering of the code of a web page and read aloud the content. Screen readers identify not only text but alternate text for images. They facilitate full interaction with web page content and objects. And they allow users to skip between chunks of content by link, heading, form element, and content block, among other means. Invalid or lax coding practices, minimal logical structure and semantics, and inappropriate or missing textual descriptions for images or links make navigation and understanding of web content difficult or impossible for screen reader reliant users. Some usages of JavaScript and plug-ins can be inaccessible to screen readers, as well.

2. Use HTML. According to Smashing Magazine, 64% of smartphone users expect a webpage to load in 4 seconds or less, but the average website loads in 9 seconds. “The best way to hit that magic 4-second mark is to minimize the processing load on smartphones....”

3. Flexible font and color settings. Users with moderate to severe visual impairments (“low-vision”) typically

¹ “The Web is providing unprecedented access to information and interaction for people with disabilities. It provides opportunities to participate in society in ways
enlarge the screen fonts, either by using the browser's zoom or text scaling facilities or by using screen magnification programs. These users may also set their operating system to a “high-contrast” mode or use custom style sheets to increase the contrast between foreground and background.

   Motor disabilities make it difficult to point and click.
   Limited motor acuity makes it difficult to scroll.
   Users with limited upper-body mobility may use speech recognition for input or other input devices which mimic keyboard input, or they may rely solely on the keyboard for all input. All navigation should be operable via the keyboard alone with minimal complexity.

5. Translation capabilities

6. Text captions for video. Users who are deaf or hard of hearing may rely on transcripts of audio content, captioned video, and alternatives to auditory cuing.

7. Zoom feature.

8. Readable and easy to comprehend content.
   Cognitive disabilities include conditions affecting reading and verbal comprehension, learning disabilities, attention and distractibility disorders, conditions affecting memory and processing of large amounts of information, and problems comprehending information presented mathematically or graphically. Look for clarity in presentation and logical and spatial organization, correct grammar and spelling, reduced verbal complexity.
iii. **Interactive capabilities.**

1. **Call to action button.** In marketing, a call to action function on a webpage is a banner or button that asks the reader if they want to find out more. If the reader responds in the affirmative, the website directs the web traffic to a second website. At the second website, the reader hopefully has been converted into a customer. The success of the webpage is often measured by how often readers click on the call to action button. For instance, our webpage’s call to action button would direct the reader to the SBM Member Directory where he or she could search for an attorney. Some people call this type of marketing permission marketing, because the reader will first give permission then get the sales pitch.

2. Links for court websites.

3. Links for subscription services.

---

b. **Looking at the bigger picture,** creating our own webpage for the brochures is the best way to provide online guidance to the public. We should at least explore that option with a third party vendor. When we gave our web brochures to the SBM, we might as well have given them to the cable company because this arrangement is far too disconnected.

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

ii. We have no idea which web brochures are reaching the intended audience. Web analytics show the website owner which landing pages are effective. (Google analytics) We don't own the SBM webpage.

iii. We have no information about the web visitors that we are getting. Are they return visitors? Did they come to us from google? Or did they come through the member login area? Did they download any documents? What happened to our work? Logfile analysis of the web server produces important marketing data such as the number of unique visitors to a site. Again, we don’t have access to the server so we don’t know what effect our work is having.

iv. We have no input on the site mapping for the brochures. The webmaster’s goal is to put all original content that matches popular search terms (keywords)\(^2\) on the host website. Original content is unique content not found elsewhere on the web. According to the experts, unique content is the highest priority to gain website credibility in the eyes of the google search engine.

v. We ought to SEO the brochures, but the SBM is not doing that. Only the website owner can employ search engine

---

\(^2\) A keyword, in the context of search engine optimization, is a particular word or phrase that describes the contents of a Web page. Keywords are shortcuts that sum up an entire page – they are placed in a Web page’s metadata to help search engines match the page to a search query. The role of keywords was once very central to the function of search engines. People began abusing the keyword metadata by including keywords that had little to do with the webpage’s content, thus keywords in search engine optimization lost some appeal. Keywords are still an important factor, but they are not the only factor in SEO. The importance of the keyword is that it is a word that someone might type into a search engine.
optimization (SEO) for the webpage.\(^3\) SEO helps a webpage appear on the first page in a google search results page. According to google, a great time to hire an SEO advisor is when you’re considering a site redesign, or planning to launch a new site. If we hope to reach the general public, then we need to be on the first page of a google results page.

2. A. We need to clarify our publication arrangement with the SBM. It is not clear who should respond when a third party publishes our brochures on their website.

2. B. We can explore with the SBM whether it makes sense to have a written agreement that includes language that prohibits publication on a third party’s server without our prior permission.

\(^3\) See 95 SEO tips. [http://webdesign.about.com/od/seo/tp/seo_tips_and_tricks.htm](http://webdesign.about.com/od/seo/tp/seo_tips_and_tricks.htm).