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 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., Orr 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. 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, 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, 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
________________, ____________.

month/day year

04/16/2016    CSP meeting
(SEAL) Signed

(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. 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
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 inapplicable because the transferor, A, is the genetic parent.

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 arranged for the
embryos to be implanted in the uterus of a gestational carrier. 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.

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 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 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 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. 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. 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 (gg) 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:

(i) may take into account whether:

(a) 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

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

(ii) shall not be liable for making a distribution of all or part of a decedent’s estate if the personal representative made a distribution before receiving notice or acquiring knowledge of an intention to use genetic material to create a child after the decedent’s death.

**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 (gg) to MCL § 700.3715.

700.3715 Transactions authorized for personal representatives
Sec. 3715 Except as restricted or otherwise provided by the will or by an order in a formal proceeding, and subject to the priorities stated in section 3902, a personal representative, acting reasonably for the benefit of interested persons, may properly do any of the following:
   (a) Retain property . . .
   (gg) If 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, take into account whether the posthumous birth of a child of assisted reproduction may have an effect on the distribution of the decedent’s estate.

COMMENT

Subsection (gg) 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 MCL §§ 700.2120 or 700.2121 as the child of the deceased spouse.
Add new title and add subsection (2) to MCL § 700.3908 and redesignate current § 700.3908 as § 700.3908(1).

700.3908 Proposed distribution; Distribution affecting interests of posthumously conceived child
Sec. 3908

(1) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of a distributee to object to the proposed distribution on the basis of the kind or value of property the distributee is to receive, if not waived earlier in writing, terminates if the distributee fails to object in a writing received by the personal representative within 28 days after mailing or delivery of the proposal.

(2) The personal representative shall not be liable for making a distribution of all or part of a decedent’s estate that affects the interests of a posthumously conceived child of assisted reproduction if the personal representative made the distribution before receiving notice or acquiring knowledge of an intention to use genetic material to create a child after the decedent’s death.
Amend MCL § 700.3957 by adding a 4-year limitations period for a posthumously conceived child of the decedent:

700.3957 Limitations on actions and proceedings against distributees

Sec. 3957. (1) Except as provided in subsections (2) and (3), and unless previously adjudicated in a formal testacy proceeding or in a proceeding settling a personal representative's accounts, or otherwise barred, a claimant's claim to recover from a distributee who is liable to pay the claim and the right of an heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or its value from a distributee are forever barred at the later of 3 years after the decedent's death or 1 year after the time of the property's distribution. However, all claims of the decedent's creditors are barred in accordance with the time periods specified in section 3803.

(2) Except as provided in subsection (3), in the case of a posthumously conceived child of assisted reproduction, the child’s right as an heir or devisee, or that of a successor personal representative acting in the child’s behalf, to recover property improperly distributed or its value from a distributee is forever barred at the later of 4 years after the decedent's death or 1 year after the time of the property's distribution.

(3) This section does not bar an action to recover property or value received as a result of fraud.
MCL § 700.7104 is moved to MCL § 700.1109, and its scope has been expanded so that subsection (2) is not limited to trusts.

700.7104 Notice or knowledge of fact [Reserved]

See 71104.

(1) Subject to subsection (2), a person has knowledge of a fact if one or more of the following apply:

(a) The person has actual knowledge of it.

(b) The person has received a notice or notification of it.

(c) From all the facts and circumstances known to the person at the time in question, the person has reason to know it.

(2) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust or from the time the information would have been brought to the employee’s attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual’s regular duties or the individual knows a matter involving the trust would be materially affected by the information.

COMMENT

This section has been moved to MCL § 700.1109 and has been modified so that subsection (2) is not limited to trusts. By moving this section, the definition of “notice or knowledge of fact” applies to the entire Estates and Protected Individuals Code and not just to the Michigan Trust Code.
Add new subsection (oo) to MCL § 700.7817.

700.7817 Specific powers of trustee
Sec. 7817. Without limiting the authority conferred by section 7816, a trustee has all of the following powers:
   (a) To take possession . . .
   (oo) After the trustee receives notice or has knowledge of an intention to use genetic material to create a child, to take into account whether the posthumous birth of a child of assisted reproduction may have an effect on the distribution of the trust estate.

COMMENT

Subsection (oo) is a companion provision to MCL § 700. 3715(gg).
Add new subsection (4) to MCL § 700.7821.

700.7821 Distribution upon termination; any distribution affecting posthumously conceived child

Sec. 7821  (1) Upon termination or partial termination of a trust, the trustee may send to the trust beneficiaries a proposal for distribution. The right of any trust beneficiary to object to the proposed distribution terminates if the trust beneficiary does not notify the trustee of an objection within 28 days after the proposal was sent, but only if the proposal informed the trust beneficiary of the right to object and of the time allowed for objection.

(2) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, taxes, and expenses, including attorney fees and other expenses incidental to the allowance of the trustee's accounts.

(3) A release by a trust beneficiary of a trustee from liability for breach of trust is invalid to the extent either of the following applies:
   (a) The release was induced by improper conduct of the trustee.
   (b) The trust beneficiary, at the time of the release, did not know of the material facts relating to the breach.

(4) The trustee shall not be liable for making a distribution of all or part of the trust estate that affects the interests of a posthumously conceived child of assisted reproduction if the trustee made the distribution before receiving notice or acquiring knowledge of an intention to use genetic material to create a child.

COMMENT

Subsection (4) is a companion provision to MCL § 700.3908(2).
**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.
Proposed Addition to Michigan Health Code

MICHIGAN HEALTH CODE

§ Assisted reproduction; Form required to be provided to individual to establish parental intent for purposes of the Estates and Protected Individuals Code § 700.2120; contents of form.

(1) Section 2120 of the Estates and Protected Individuals Code, MCL § 700.2120, provides that a birth mother is the mother of the child born to her. The form required by this section is intended to assist in determining whether, in the case of posthumous conception, 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.

(2) This section and the form required by this section only apply to cases of assisted reproduction in which the prospective mother will be a birth mother as defined in MCL § 700.2120; it does not apply to cases of assisted reproduction in which the prospective mother will be a gestational carrier as defined in MCL § 700.2121.

(3) Any entity that, on or after the effective date of this section, receives human genetic material that may be used for conception must make available a declaration of intent form that can be used by an individual other than the prospective birth mother to signify the individual’s consent to assisted reproduction by the prospective birth mother with intent to be treated as the other parent of the child for purposes of MCL § 700.2120. The execution of the form is not mandatory, and the form is not the exclusive means of establishing an individual’s intent. Although the form is not protected health information, the entity shall incorporate the form into the individual’s medical records and should provide a copy of the signed form to the individual and the prospective birth mother. The entity shall also incorporate any signed revocation of the form into the individual’s medical records, if the revocation document is delivered to the entity. The form shall include advisements in substantially the following form:
DECLARATION OF INTENT TO BE PARENT OF CHILD

You may wish to consult with a lawyer before signing this form. This form is designed to declare 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 PROSPECTIVE BIRTH MOTHER) OCCURS AFTER YOUR DEATH, AND SHE GIVES BIRTH TO A CHILD, SHE IS THE CHILD’S PARENT. DO YOU INTEND TO BE TREATED AS THE CHILD’S OTHER PARENT?

PLEASE CHECK “YES” OR “NO” AND THEN SIGN AND DATE BELOW:

_____ Yes  _____ No

Signed: __________________________  Date:____________________

If you check “Yes” above:

• In case of multiple births, this form applies to all children born alive from the transfer or transfers that resulted in the births.

• This form is a legal document. Although it will become part of your medical records, it is not protected health information.

• The possibility of a child of yours being born after your death might delay the distribution of your estate or of a trust benefitting your children.

• You can change your mind by revoking this form. Any revocation must be in a written document that you sign and date. An oral revocation will not be effective. If you decide to revoke the form, you should deliver the document revoking the form to the entity so that it will become part of your medical records. You should also notify the prospective birth mother of your decision to revoke.
APPENDIX

The Committee recommends repeal of the Michigan Surrogate Parenting Act., as provided in SB 811, GESTATIONAL SURROGATE PARENTAGE 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.
MEMORANDUM

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

From: James P. Spica

Re: Undisclosed Trusts Proposal

Date: April 9, 2018

I. Undisclosed Trusts

The premise of this proposal is that Michigan law already countenances undisclosed trusts (which are sometimes confusingly referred to as “secret trusts” in the United States)1 as a special case of the “purpose trusts”2 currently permitted by Estates and Protected Individuals Code (EPIC) section 2722.3 That is because anyone who wishes to support the pursuit of a certain noncharitable endeavor without directly motivating the endeavor for certain potential adherents can articulate a purpose within the contemplation of EPIC section 2722(1) to which the concealment of means is integral.

Suppose, for example, that I am a highly distinguished concert violinist of a family that includes (a) a long line of highly distinguished concert violinists who have all espoused the use of a particular style of bow (A Line) and (b) a great many inveterate music-haters (B Class) whose parents, prospecting for genetically transmitted talent, subjected their unpromising offspring to arduous and thoroughly unprofitable courses of musical instruction. I would very much like to see the cult of the relevant bow flourish and the A Line continue, but I am very much loath to augment the B Class. So, I create a trust to support the future musical education of young and as yet unborn violinists who eventually display talent and in whom the cult of the relevant bow can be inculcated (through the trustees’ exertions), but to protect those innocent of talent within my own family from stray parental enthusiasm, I enjoin the trustee to pursue the trust’s purpose “for as long as possible (and to the greatest extent permitted by law)” without disclosing the existence of the trust, the source or extent of the trust fund, the trust’s purpose, or the considerations that inform the trustees’ dispositive discretions.

The bow-cult concert violinist is just one interpretation of the relevant model, viz., the settlor who wants to support a noncharitable endeavor she regards as a “calling” without stimulating disingenuous or misguided attempts to heed “the call.” One can easily imagine analogous stories involving draft-horse farming, heritage livestock breeding, artisan

---

1 Technically the term ‘secret trust’ refers to a testamentary trust that is not disclosed (or the terms of which are not specified) in the will that transfers the res to the trustee. See, e.g., J. E. PENNER, THE LAW OF TRUSTS ¶ 6.48 (8th ed. 2012); SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 93-94 (3d ed. 2011); HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 147-55 (Jill E. Martin ed., 13th ed. 1989).


3 MICH. COMP. LAWS § 700.2722(1).
passementerie manufacture, etc. In each case, (it is submitted) the resultant trust is one that can be performed by the trustee for up to twenty-one years under EPIC section 2722(1) \(^{4}\) (up to twenty-five years under the Committee’s proposal to substitute UTC sections 408 and 409 \(^{5}\) for section 2722). So, for the limited period permitted by section 2722 (or by Michigan Trust Code sections 7409 if the Committee’s prior proposal, which has been approved by Council, becomes law), Michigan law permits undisclosed trusts \(^{6}\) when concealment of means is an integral part of the settlor’s pet project provided the settlor does not designate any “definite or definitely ascertainable beneficiary.” \(^{7}\)

But, of course, a trust of the kind we have imagined can be drafted such that a particular person can become entitled to a trust distribution or distributions. It may be, for example, that the trustee (in our hypothetical above) is instructed by the terms of the trust to engineer an anonymous, bow-style-referential gift to any devotee of the relevant bow who becomes a finalist in a certain international violin competition. In that case, if such a devotee becomes such a finalist during the trust’s continuance, she will have an equitable “right” \(^{8}\) in the trust property of which she is permitted by section 2722 to remain ignorant. \(^{9}\) If the trustee arranges the payment, the beneficiary’s ignorance does no harm, but if the trustee is derelict or obdurate, the beneficiary cannot defend her interest for want of information. \(^{10}\)

This latter point emphasizes that section 2722 permits trusts whose terms cannot be enforced (for lack of notice) by people who would otherwise be, in certain circumstances at least, indistinguishable from ordinary trust beneficiaries. Yet that is the salient objection to nondisclosure of noncharitable trusts: “‘If the beneficiaries have no rights enforceable against the trustees, there are no trusts’ . . . [and] the beneficiaries cannot enforce [their] right[s] without information.” \(^{11}\) But why should a jurisdiction that allows a settlor to thwart these precepts (if only temporarily) for the benefit of a purpose prevent her from thwarting them (for the same duration) for the benefit—as she sees it—of particular persons? Shall we say the policy of our law is laissez faire (in the relevant interval) provided the settlor means to confer benefits only on persons whose identities are indifferent to her; but that when she aims to confer benefits on particular persons, our respect for her intent is so great that we feel constrained (even in that narrow interval) to ignore what she thinks best for the persons in question?

It is true that the purpose trust is an anomaly. \(^{12}\) But at the level of policy, sanctioned anomalies are not self-limiting: if we are prepared to permit something anomalous by way of a purpose trust, it makes sense for us to ask whether we really have a rationale for limiting that permission to cases in which, from the settlor’s point of view, the persons benefited have only instrumental value (pun intended!) and are not ends in themselves. The proposal below eschews the need for such a rationale: it treats concealment of means itself as a permissible noncharitable trust purpose within the period permitted for the continuance of a purpose trust and it allows the

\(^{4}\) See id.
\(^{6}\) See MICH. COMP. LAWS § 700.2722(3)(e).
\(^{7}\) Id. § 700.2722(1) (UNIF. TRUST CODE § 409(1)).
\(^{8}\) EPIC section 2722 purports to make purpose trusts “enforceable” regardless of whether the terms of the “trust” designate someone to enforce it. See id. § 700.2722(3)(d) (UNIF. TRUST CODE § 409(2)).
\(^{9}\) See supra note 6.
\(^{10}\) In that case, it would fall to a person described in id. § 700.2722(3)(d) (UNIF. TRUST CODE § 409(2)), if there is one, to protect the beneficiary’s interest.
\(^{11}\) PENNER, supra note 1, ¶ 10.60 (quoting Armitage v. Nurse, [1998] Ch. 241 at 253 (Eng.)).
\(^{12}\) See id. at ¶ 9.30. See generally Matthews, supra note 2.
settlor to confer, within that period, what she conceives as the benefit of concealment on definite or definitely ascertainable beneficiaries.

A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by adding new section 7409a.13

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700. 7409a Undisclosed trust

Sec. 7409a. (1) If the terms of a trust created for a noncharitable purpose are embodied in a trust instrument that clearly express the settlor’s intent that 1 or more items of prime disclosure information should be withheld, generally or in specified circumstances, from 1 or more of the trust beneficiaries:

(a) During the nondisclosure period:

(i) To the extent necessary to effectuate the settlor’s expressed intent, the trustee does not have the duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee.

(ii) The trustee may administer the trust in accordance with the settlor’s expressed intent regarding nondisclosure of primary disclosure information to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any reporting obligations imposed on the trustee by law other than this [estates and protected individuals] code.

(iii) If the trust instrument grants a nondisclosure correlative right, the trustee has a duty to administer the trust in accordance with the settlor’s expressed intent regarding nondisclosure of primary disclosure information, but only to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any reporting obligations imposed on the trustee by law other than this [estates and protected individuals] code.

(iv) Any purported appointment or distribution of assets of the instant trust to another undisclosed trust is ineffective to the extent it could cause the appointed or distributed assets to be administered continuously under the authority of this section for a period ending after the date on which the instant trust’s maximum nondisclosure period ends.

(b) In no case shall either the trustee nor any nondisclosure correlative right holder be liable to any trust beneficiary on account of the trustee’s failure to follow the terms of the trust enjoining nondisclosure of prime disclosure information during the trust’s nondisclosure period. The trustee’s duty (if any) to follow the terms of the trust enjoining nondisclosure of prime disclosure information during the trust’s nondisclosure period is owed solely to the holders (if any) of nondisclosure correlative rights, and the sole remedy of a nondisclosure correlative right holder for the trustee’s breach of that duty is removal.

(2) If the trust instrument grants either a nondisclosure correlative right or a protection power:

13 The proposal would be supported by amendments providing cross references to the new section in Mich. Comp. Laws §§ 700. 7105(2), .7110(2).
(a) Upon the reasonable request of a nondisclosure correlative right holder or protection power holder at any time during the trust’s nondisclosure period, the trustee shall promptly furnish to the right or power holder a copy of the terms of the trust that describe or affect the holder’s right or power.

(b) Within 63 days after accepting trusteeship of an undisclosed trust, the trustee shall notify all nondisclosure correlative right holders and protection power holders of the acceptance, of the court in which the trust is registered, if it is registered, and of the trustee’s name, address, and telephone number.

(c) Within 63 days after the date the trustee acquires knowledge of the creation of an undisclosed trust of which the trustee is trustee or the date the trustee acquires knowledge that a formerly revocable trust of which the trustee is trustee has, by becoming irrevocable, whether by the death of the settlor or otherwise, become an undisclosed trust, the trustee shall notify all nondisclosure correlative right holders and protection power holders of the trust's existence, of the identity of the settlor or settlors, of the court in which the trust is registered, if it is registered, and of the right to request a copy of the terms of the trust that describe or affect the right or power holders’ rights or powers.

(3) On the date on which the nondisclosure period ends, the trust ceases to be an undisclosed trust within the meaning of this section and to the extent terms of the trust are inconsistent with the duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee, those terms cease to be effective.

(4) To the extent the trustee has not already provided notice of the trust required under section 7814(2) by the end of the trust’s nondisclosure period, the trustee is deemed for that purpose to have accepted the trust and to have acquired knowledge of the trust’s creation on the date on which the nondisclosure period ends, and the identities of the qualified trust beneficiaries are determined for that purpose as of the time immediately preceding the end of the nondisclosure period.

(5) As used in this section:

(a) “Maximum nondisclosure period” means a period of 25 years from the later of the first date on which property becomes subject to the terms of the trust or the date on which the trust ceases to be revocable by the settlor.

(b) “Nondisclosure period” means the shorter of the trust’s maximum nondisclosure period or the period from the beginning of the maximum nondisclosure period to the trust’s termination.

(c) “Nondisclosure correlative right” means a right granted by the terms of a trust that allows the right holder to remove a trustee of the trust for the trustee’s failure during the trust’s nondisclosure period to follow, to the extent practicable, the terms of the trust enjoining nondisclosure of prime disclosure information.

(d) “Prime disclosure information” concerning a trust means the fact of the trust’s existence, the identity of the trustee, the terms of the trust, or the nature or extent of the trust property.

14 See supra notes 4-5 and accompanying text.

15 This is to analogize the period during which the vesting of future interests in the assets of a trust can be postponed by the exercise of a power of appointment: that period begins when the trust in question can no longer be revoked by the settlor, not when the trust instrument begins to govern a res. See Mich. Comp. Laws § 556.125. See generally John C. Gray, The Rule Against Perpetuities § 524.1 (4th ed. 1942); Ronald H. Maudsley, The Modern Law of Perpetuities 38 (1979).
(e) “Protection power” means a power granted by the terms of a trust that allows the power holder to direct the trustee of the trust for the benefit of the trust beneficiaries during the trust’s nondisclosure period. A protection power may authorize the power holder to represent the trust beneficiaries in the sense described in section 7301(1).

(f) “Undisclosed trust” means a trust administered pursuant to this section during the nondisclosure period.
Council meeting materials
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

April 21, 2018
Lansing, Michigan

Agenda
10:15-12:00

1. Call to Order
2. Introduction of Guests
3. Excused Absences
4. Geoffrey R. Vernon Tribute
5. Election of Council Member

Relevant Section Bylaws:

SECTION 3.6 VACANCY. The Council may appoint any lawyer member of the Section who is an active member of the State Bar of Michigan as an officer or Council member to act until the next election in the event of death, disability, removal or resignation of any officer or Council member, or on a temporary basis.

6. Minutes of March 24, 2018 Meeting of the Council

Attachment 1

7. Chair's Report – Marlaine C. Teahan

Attachment 2

8. Treasurer's Report – David Skidmore

Attachment 3

9. Committee Reports

A. Committee on Special Projects

MTC Notice Fix. Public Policy Position to vote on following definition to be added to EPIC Omnibus Bill:

7103(c) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1) if that charitable purpose is a material purpose of the trust.
B. Legislative Development and Drafting Committee – Katie Lynwood

Report on HB 4410 (Jajuga Fix Legislation), Testimony April 17, 2018 at the Senate Judiciary Committee.

C. ART Update – Nancy Welber

Vote needed to give Committee Chair the authority to make non-substantive changes to legislative proposal.

D. Tax Committee – Mark DeLuca

Tax Nugget, Attachment 4

E. Electronic Communications Committee – Mike Lichterman

Oral report of Committee regarding SBM Connect.

F. Guardianship, Conservatorship, and End of Life Committee – Rhonda Clark

Oral report on various legislative issues.

G. Membership Committee – Nick Reister

Oral report on committee initiatives and update for May/June Probate Institutes.

H. Amicus Committee – David Skidmore

Update on various cases on which we have filed amicus curiae briefs.

10. Liaison Reports

A. ADR Section – John A. Hohman

B. Taxation Section – George W. Gregory

Attachment 5

11. Written Reports Without Oral Presentation

- Divided and Directed Trusteeship Committee Attachment 6
- Uniform Fiduciary Income and Principal Act Ad Hoc Committee Attachment 7
- Public Affairs Associates, list of current bills being tracked Attachment 8

12. Other Business

13. Adjournment

Next CSP/Council meeting is Saturday, June 16, 2018, 9 a.m. – 12 p.m.
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION OF
THE STATE BAR OF MICHIGAN

March 24, 2018
Lansing, Michigan

Minutes

1. Call to Order: The Chair of the Section, Marlaine C. Teahan, called the meeting to order at 10:22 am.

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

      Marlaine C. Teahan, Chair
      Marguerite Munson Lentz, Chair Elect
      Christopher A. Ballard, Vice Chair
      David P. Lucas, Secretary
      Rhonda M. Clark-Kreuer
      Kathleen M. Goetsch
      Nazneen Hasan
      Angela M. Hentkowski
      Michael G. Lichterman
      Katie Lynwood
      Raj A. Malviya
      Richard C. Mills
      Lorraine F. New
      Kurt A. Olson
      Nathan R. Piwowarski
      Christine M. Savage
      A total of 16 Council officers and members were present, constituting a quorum

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

      David L.J.M. Skidmore
      Christopher J. Caldwell
Michael L. Jaconette
Mark E. Kellogg
Robert B. Labe
Melisa M.W. Mysliwiec
Geoffrey R. Vernon

b. The following officers and members of the Council were absent without excuse:
none

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

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

e. Others present:
Aaron Bartell
Becky Bechler
Kim Browning
Georgette David
Mark DeLuca
Dan Hilker
Jim Hughesian
David Kerr
Ron Kneiser
Adam C. Lowen
Andy Mayoras
Gabrielle McKee
Neal Nusholtz
Scott Robbins
Mike Shelton
Ken Silver

4. Minutes of February 17, 2018: Meeting of the Council: it was moved and seconded to approve the Minutes of the February 17, 2018 meeting of the Council, as included in the meeting agenda
materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

5. Chair’s Report – Marlaine C. Teahan:
   a. The Chair requested that Mike McClory report on the bicycle ride event scheduled at the annual Probate Institute. Mr. McClory reported that the Cherry Capital Bicycle Club would host the event, and Ms. Teahan announced that the Council’s Hearts and Flowers Fund would contribute $200 to the Club to defray the cost of the event; Ms. Teahan will request that the Treasurer pay that amount from the Hearts and Flowers Fund.
   b. The Chair reviewed the Treasurer’s Report, which was included with the meeting materials. The Chair encouraged the timely submission of requests for reimbursement.
   c. The Chair reviewed the Chair’s Report which was included with the meeting agenda materials, including (i) the Modest Means SMB Workgroup, and the Chair requested that Georgette David describe the activity of the Workgroup; Ms. David discussed the activity of the Workgroup, asked for comments on the program—there was discussion regarding the program which Ms. David will take back to the Workgroup; (ii) legislative activity regarding HB 5075 and 5076, and noted that the Section has taken a public policy position on those Bills; Ms. Teahan reported on a productive Workgroup meeting, held by the bills’ sponsors, and requested that the Guardianship, Conservatorship, and End of Life Committee prepare a letter for her signature to send to the sponsors regarding these bills; (iii) the EPIC Q&A Panel, the Council officers are recommending that the Panel not take new questions and that the existing questions and answers would be available for use on the ICLE website; the Chair requested questions and comments about the discontinuance of the Panel; after a voice vote, the officers' recommendation was approved by the Council; the Chair and the Council expressed many thanks to Phil Harter for his many years of chairing the Panel; (iv) the Uniform Fiduciary Principal and Income Act Ad Hoc Committee, which Jim Spica will chair; the Chair requested that comments and questions be submitted to Mr. Spica or Gabrielle McKee; (v) the Chair has appointed John A. Hohman as the Section’s Liaison to the ADR Section; Judge Hohman (ret.) currently serves on the ADR Section’s Council and served for several years as a Monroe County Probate Judge and then as the State Court Administrator for SCAO; (vi) the Chair will be appointing an ad hoc committee to address the issue of electronic wills.

6. Committee Reports
   a. Committee on Special Projects (CSP) - Nathan Piwowarski: Mr. Piwowarski reported that the CSP discussed Draft 8 of a bill to amend 1991 PA 133, entitled “Recording Trust
Agreement or Certificate of Trust Existence and Authority, which Draft was included with the meeting materials. The Committee’s motion is:

The Probate and Estate Planning Section supports Draft 8 of a bill to amend 1991 PA 133, entitled “Recording Trust Agreement or Certificate of Trust Existence and Authority (with certain typographical changes); and empowers the Chair of the Section’s Legislative Development & Drafting Committee to consent to non-substantive modifications to the Draft.

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

Mr. Piwowarski also reported on the status of the EPIC Omnibus proposed legislation, and highlighted (i) the Committee’s discussion on SB 905; (ii) that Rep. Elder will sponsor such legislation; (iii) the Committee’s discussions regarding the definition of “record” and “signed”; (iv) the Committee’s discussions regarding an attorney-in-fact’s ability to establish a trust for the principal; (v) small estates; and (vi) who is a “qualified trust beneficiary” under the Michigan Trust Code.

b. Premarital Agreements Committee - Christine Savage: Ms. Savage reported that the Committee has reviewed the Uniform Premarital and Marital Agreements Act and HB 4751, which were included with the meeting materials, Ms. Savage also noted that A Brief Analysis of Michigan Law in the Aftermath of the Allard Decision and the Uniform Premarital and Marital Agreement Act was included with the meeting materials. Ms. Savage led a discussion regarding premarital agreements. Following discussion, the Chair requested that the Committee present its recommendations for Michigan's response to the UPMAA during the Committee on Special Projects at the Council’s June, 2018 meeting.

c. Outreach Committee - Kathleen M. Goetsch: Ms. Goetsch discussed the report of the Committee which was included with the meeting materials. Following discussion, and on recommendation of the Committee, the Chair stated that the remaining pamphlets could be taken to the annual ICLE Probate Institute for distribution without charge; without objection from the Council, the Chair asked the Committee to develop a plan for free distribution, and execute such plan.
d. Tax Committee - Mike Shelton: Mr. Shelton gave the report of the Committee, including HB 5443, repealing the Michigan Estate Tax. Following discussion, the Chair stated that the Council would take a “wait and see” approach to the legislation.

e. Electronic Communications Committee - Mike Lichterman: Mr. Lichterman reported that Section members were notified in February and in March that the listserv was being terminated, and that Section communications would be moving to SBM Connect. Mr. Lichterman reported that, in response to his invitation to Section members for questions and comments, he had received very few comments, most of which related to how to use SBM Connect. Two issues have yet to be resolved: (i) how can the listserv archive be moved to SBM Connect; and (ii) how to allow communication for Section members who have not authorized the State Bar to make their email addresses public; the Committee is working on these issues, as well as further publicizing the move to SBM Connect, and education for members on how to use SBM Connect. At the May Probate Institute in Acme Mr. Lichterman will provide an educational presentation on how to use SBM Connect. Ms. Teahan will provide the same presentation at the June Probate Institute in Plymouth.

f. Guardianship, Conservatorship, and End of Life Committee - Rhonda Clark-Kreuer: Ms. Clark-Kreuer updated the Council on the status of SB 713 (regarding visitation of vulnerable adults). The Committee continues to address this matter, and Ms. Clark-Kreuer referred to materials authored by Josh Ard which were posted to SBM Connect. The Chair stated that the Section has taken a public policy position on SB 713, and that the Section’s public policy position should be highlighted to the Elder Law Section and the Michigan Probate Judges Association.

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

8. Other Business

a. The Chair described the upcoming ADR Summit, and reported that Andy Mayoras will attend on behalf of the Section.

b. Mr. McClory reported on the status of the e-filing project, including that (i) there will be one portal for all e-filing; (ii) e-filing will be introduced in groups of counties; and (iii) the input of the various e-filing user groups (such as probate practitioners) will be sought, but the project is not ready to solicit such input yet.

Probate and Estate Planning Council
Meeting minutes
Page 5
(2018 - 03 - a) (March 24, 2018)
There was no other business offered or requested.

9. Adjournment: seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 11:50 am.

Respectfully submitted,
David P. Lucas, Secretary
1. **Potential Speaker.** Attorney Howard S. Krooks will be in Michigan from October 16 to 18, 2018. He has offered to speak for our Section on a variety of topics. I will provide more details at the Council meeting.

2. **ICLE Contract.** The Section contract with ICLE is up for renewal on May 31, 2018. We are waiting for a revised contract from ICLE. Once obtained, it will be provided to the officers, then State Bar of Michigan, for review and approval. After approvals are obtained, we will seek Council approval by an email vote, or at our June meeting.

3. **ADR Summit.** Our Section was invited to send a representative to attend the May 11, 2018 ADR Summit. Andrew W. Mayoras has been selected to attend. We look forward to a report on the Summit from Andy at our June meeting.

4. **ADR Liaison.** John A. Holman, Jr., of Ann Arbor, has agreed to serve as our Liaison to the ADR Section. John is a retired Probate Judge, the former State Court Administrator, and is currently on the Council of the ADR Section of the State Bar of Michigan. John will address the Council on ADR in Probate Court.

5. **Ethics and advertising.** Our Ethics committee analyzed ADM File 2016-27 relative to a proposed rule change (MRPC 7.2) dealing with attorney advertising. The Representative Assembly sought input from Sections wanting to comment. The Ethics Committee recommended that we take no position.
   

6. **Ad Hoc Committees.** In March, Douglas A. Mielock was named Chair of the Ad Hoc Committee on Electronic Wills. The mission of the Ad Hoc Committee is to study the draft proposal on electronic wills of the Uniform Law Commission, determine problems and pitfalls of the formation, validity and recognition of electronic wills, and be prepared to respond to both the Uniform Law Commission’s proposal and any legislation introduced in Michigan. Kim Browning has joined this Committee. Jim Spica will serve as both an ex officio member of this Committee and as a Special Advisor to the Chair. Additional committee members are needed. Please contact Doug Mielock at 517-371-8203, dmIELock@fosterswift.com, or Marlaine Teahan 517-377-0869, mteahan@fraserlawfirm.com, to join.

7. **Welcome to the Following New Committee Members:**
   - Guardianship, Conservatorship and End of Life: Kathleen Goetsch
   - UFIPA Ad Hoc Committee: Joe Viviano
   - Tax Committee: Mike Shelton
8. **We took a Public Policy Position in March on the following:**
The Probate and Estate Planning Section supports Draft 8 of a bill to amend 1991 PA 133, entitled “Recording Trust Agreement or Certificate of Trust Existence and Authority (with certain typographical changes); and empowers the Chair of the Section’s Legislative Development & Drafting Committee to consent to non-substantive modifications to the Draft.

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

9. **HB 5075 and HB 5076 Workgroup.** On February 28, 2018, Ray Harris, of our Guardianship, Conservatorship, and End of Life Committee, and I met with Rep. Noble and Rep. Cole regarding our concerns on HB 5075 and HB 5076. We expect more dialogue on these bills. The Guardianship, Conservatorship, and End of Life Committee is preparing a letter for the Chair to provide a summary of our position.

10. **Amicus update.** In re Joseph Vansach, Jr. (334732) amicus brief filed by Section on May 11, 2017; oral argument May 8, 2018 District D Item #7, Panel PDO, JPH, KFK court of appeals; consolidated with In re Jerome R. Bockes (336267)

11. **Bill Hound Reports.** For an interactive summary of the bills being watched by our Legislative Monitoring Committee, using Bill Hound, look in our Section’s Connect Library.

12. **New Ideas, Comments, Questions.** Please email or call me at mteahan@fraserlawfirm.com with your thoughts and ideas for the following:
   - projects our Section should tackle – legislative or otherwise;
   - new ways to benefit our Section Members;
   - new social events for our Section Members, guests, and those interested in joining our Section;
   - anything you would like to discuss; and
   - your questions -- If I can't answer your question, I will find someone who can.

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

- May 16 - Income Tax Planning for Family LPS, LLCs, and Disregarded Entities (Probate Institute add-on seminar), Acme (Live)

- May 17-19 - Probate & Estate Planning Institute, 58th Annual, Acme (Live) – registration is open!

- May 24 – The 31st Annual Tax Conference, Plymouth

- June 14-15 - Probate & Estate Planning Institute, 58th Annual, Plymouth (Live) -- registration is open and note that the Plymouth location of the Institute will be held on Thursday and Friday this year – due to popular demand.
**Membership by Member Type:**

<table>
<thead>
<tr>
<th>Membership Type</th>
<th>Current</th>
<th>End of Last FY</th>
<th>Annual Increase (Decrease)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney, Active (ATA Only)</td>
<td>3,370</td>
<td>3,425</td>
<td>(55)</td>
</tr>
<tr>
<td>Attorney (All others)</td>
<td>19</td>
<td>17</td>
<td>2</td>
</tr>
<tr>
<td>Affiliate (LASST and LADM)</td>
<td>25</td>
<td>26</td>
<td>(1)</td>
</tr>
<tr>
<td>Law Student (LS)</td>
<td>44</td>
<td>68</td>
<td>(24)</td>
</tr>
<tr>
<td>Non Members (NON)</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,460</strong></td>
<td><strong>3,538</strong></td>
<td><strong>(78)</strong></td>
</tr>
</tbody>
</table>

**Membership by Dues Type:**

<table>
<thead>
<tr>
<th>Dues Type</th>
<th>Current</th>
<th>End of Last FY</th>
<th>Annual Increase (Decrease)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid</td>
<td>3,265</td>
<td>3,263</td>
<td>2</td>
</tr>
<tr>
<td>Free</td>
<td>194</td>
<td>273</td>
<td>(79)</td>
</tr>
<tr>
<td>Unpaid</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

*Membership numbers fluctuate during certain months due to the following reasons:

|------|------|------|------|------|------|------|-----|------|------|------|------|

** Add paid plus discounted dues type to equal revenue from Section Dues (-1050) and Law Student/ Affil Dues (-1055).
### State Bar of Michigan

#### Probate and Estate Planning Section

For the Six Months Ending March 31, 2018

<table>
<thead>
<tr>
<th>Description</th>
<th>March 2018</th>
<th>March 2018</th>
<th>March 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenue:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1-7-99-775-1050 Probate/Estate Planning Dues</td>
<td>245.00</td>
<td>113,435.00</td>
<td>112,875.00</td>
</tr>
<tr>
<td>1-7-99-775-1055 Probate/Estate Stud/Affil Dues</td>
<td>840.00</td>
<td>910.00</td>
<td></td>
</tr>
<tr>
<td>1-7-99-775-1330 Subscription to Newsletter</td>
<td>35.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1-7-99-775-1470 Publishing Agreement Account</td>
<td></td>
<td>325.00</td>
<td></td>
</tr>
<tr>
<td>1-7-99-775-1755 Pamphlet Sales Revenue</td>
<td></td>
<td>1,902.35</td>
<td></td>
</tr>
<tr>
<td><strong>Total Revenue</strong></td>
<td>245.00</td>
<td>114,310.00</td>
<td>116,012.35</td>
</tr>
<tr>
<td><strong>Expenses:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1-9-99-775-1127 Multi-Section Lobbying Group</td>
<td>2,500.00</td>
<td>15,000.00</td>
<td>17,500.00</td>
</tr>
<tr>
<td>1-9-99-775-1145 ListServ</td>
<td>75.00</td>
<td>375.00</td>
<td>450.00</td>
</tr>
<tr>
<td>1-9-99-775-1276 Meetings</td>
<td>12,475.42</td>
<td>23,902.22</td>
<td></td>
</tr>
<tr>
<td>1-9-99-775-1283 Seminars</td>
<td>15,000.00</td>
<td>21,000.00</td>
<td>18,000.00</td>
</tr>
<tr>
<td>1-9-99-775-1493 Travel</td>
<td>646.15</td>
<td>6,964.88</td>
<td>11,633.98</td>
</tr>
<tr>
<td>1-9-99-775-1528 Telephone</td>
<td>94.03</td>
<td>662.61</td>
<td>499.36</td>
</tr>
<tr>
<td>1-9-99-775-1549 Books &amp; Subscriptions</td>
<td>750.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1-9-99-775-1822 Litigation-Amicus Curiae Brief</td>
<td>13,138.74</td>
<td>56,081.25</td>
<td></td>
</tr>
<tr>
<td>1-9-99-775-1833 Newsletter</td>
<td>4,075.00</td>
<td>4,075.00</td>
<td></td>
</tr>
<tr>
<td>1-9-99-775-1861 Printing</td>
<td></td>
<td>38.70</td>
<td></td>
</tr>
<tr>
<td>1-9-99-775-1868 Postage</td>
<td></td>
<td>1.36</td>
<td></td>
</tr>
<tr>
<td>1-9-99-775-1987 Miscellaneous</td>
<td>1,109.50</td>
<td>1,109.50</td>
<td></td>
</tr>
<tr>
<td><strong>Total Expenses</strong></td>
<td>32,563.42</td>
<td>118,493.66</td>
<td>76,100.62</td>
</tr>
<tr>
<td><strong>Net Income</strong></td>
<td>(32,318.42)</td>
<td>(4,183.66)</td>
<td>39,911.73</td>
</tr>
<tr>
<td><strong>Beginning Fund Balance:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1-5-00-775-0001 Fund Bal-Probate/Estate Plan</td>
<td>222,338.06</td>
<td></td>
<td>224,191.74</td>
</tr>
<tr>
<td><strong>Total Beginning Fund Balance</strong></td>
<td>222,338.06</td>
<td></td>
<td>224,191.74</td>
</tr>
<tr>
<td><strong>Ending Fund Balance</strong></td>
<td>218,154.40</td>
<td></td>
<td>264,103.47</td>
</tr>
</tbody>
</table>
Revenue Procedure 2018-18

On March 5, 2018 the IRS issued Rev. Proc. 2018-18 to reflect the statutory changes from P. L. 115-97 (known as the Tax Cuts and Jobs Act), including inflation-adjusted amounts. The figures provided in Rev. Proc. 2018-18 apply to tax years beginning in 2018 and transactions occurring during the 2018 calendar year. Below is a summary of the some of the key provisions affecting (i) estate, gift, and generation-skipping transfer tax; and (ii) income taxation of estates and trusts.

I. Estate, Gift, and Generation-Skipping Transfer Tax

- For decedents dying in 2018 (and gifts made during 2018), the basic exclusion amount for purposes of federal estate and gift tax is $11,180,000.

- For generation-skipping transfers made during 2018, the GST tax exemption amount is also $11,180,000.

- The §2503(b) annual gift tax exclusion for qualifying gifts made in 2018 is $15,000 per donee.

- Under §2523(i)(2), the annual gift tax exclusion for qualifying gifts made to a non-citizen spouse in 2018 is $152,000.

- Under §6039F, a donee receiving gifts from certain foreign persons may be required to report the gifts using IRS Form 3520 if the aggregate value of the gifts received in 2018 exceeds $16,076.

- If an estate elects to use the §2032A special valuation method for qualified property, 2032A(a)(2) limits the aggregate decrease in fair market value to a maximum of $1,140,000.

II. Income Taxation of Estates and Trusts

2018 Estate and Trust Income Tax Tables:

<table>
<thead>
<tr>
<th>If Taxable Income is:</th>
<th>The Tax is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not over $2,550</td>
<td>10% of taxable income</td>
</tr>
<tr>
<td>Over $2,550 but not over $9,150</td>
<td>$255, plus 24% of the excess over $2,550</td>
</tr>
<tr>
<td>Over $9,150 but not over $12,500</td>
<td>$1,839, plus 35% of the excess over $9,150</td>
</tr>
<tr>
<td>Over $12,500</td>
<td>$3,011.50, plus 37% of the excess over $12,500</td>
</tr>
</tbody>
</table>

- The alternative minimum tax (AMT) exemption amount for estates and trusts under §55(d)(1)(D) is $24,600. The AMT exemption for estates and trusts under §55(d) begins to phase-out when alternative minimum taxable income reaches $500,000 and completely phases-out when alternative minimum taxable income reaches $598,400.
Taxation Section Liaison  
Report to the Probate & Estate Planning Section  
April 2018

Ryan Peruski is working on the Fall 2018 Fundamentals Program.

Other upcoming events on IRC 280E Planning & Considerations (with medical cannabis) at Honigman in Detroit on April 19th; Employee Benefits Networking Event at the Knickerbocker in Grand Rapids on April 28th; and the Annual Tax Conference at the Inn at St John’s in Plymouth on May 24th (see attached).

As of March 15, 2018 there were 27 people registered for the Annual Tax Conference.

Nick Monterosso chair of the Estates & Trusts Committee is moving to Florida.

The Taxation Section has landing pages for all of its Committees, including Estate & Trusts, for Section members who sign up for it.

The Internal Revenue Service in Detroit will move from 500 Woodward Avenue to 985 Michigan Avenue in 2019.

George W. Gregory, Liaison
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Divided and Directed Trusteeships ad Hoc Committee (DDTC) Chair’s Report
Date: April 13, 2018

I returned the Legislative Service Bureau’s second draft of the DDTC legislative proposal to the LSB (with changes and comments) on April 4, 2018. We are now awaiting a third and (I hope) final draft. (We are close.)

JPS
DETROIT 40411-1 1416471v7
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Uniform Fiduciary Income and Principal Act ad Hoc Committee Chair’s Report
Date: April 13, 2018

The committee roster has been updated.

Anthony J. Belloli (of Plante Moran Trust)
George W. Gregory
Marguerite Munson Lentz
Raj A. Malviya
Gabrielle M. McKee
Richard C. Mills
James P. Spica (Chair)
Robert P. Tiplady
Joseph J. Viviano

[Geoffrey R. Vernon, requiescat in pace]
PROBATE

HB 4021 - PROBATE, Guardians and Conservators, Allow guardianship petitions probate judges to schedule certain hearings before minor turns 18 years of age. (Kosowski, Robert (D), 01/12/17)
(Status: 01/18/2017 - bill electronically reproduced 01/12/2017)

HB 4040 - VEHICLES, Registration, Exempt senior citizens from vehicle registration fees increases. (Camilleri, Darrin (D), 01/12/17)
(Status: 01/18/2017 - bill electronically reproduced 01/12/2017)

HB 4043 - LAW ENFORCEMENT, Communications, Establish missing senior and vulnerable adult plan. (Farrington, Diana (R), 01/18/17)
(Status: 01/24/2017 - bill electronically reproduced 01/18/2017)

HB 4171 PA 155 - PROBATE, Guardians and Conservators, Authorize a guardian to sign physician orders for scope of treatment form. (Cox, Laura (R), 02/07/17)
(Status: 11/09/2017 - assigned PA 155'17 with immediate effect)

HB 4297 - CRIMINAL PROCEDURE, Evidence, Create presumption that certain documents affecting real property are forged or counterfeit. (Love, Leslie (D), 03/02/17)
(Status: 03/07/2017 - bill electronically reproduced 03/02/2017)

HB 4312 - OCCUPATIONS, Attorneys, Modify eligibility requirements for attorney licensed in another state to practice law in Michigan. (LaFave, Beau (R), 03/07/17)
(Status: 06/15/2017 - substitute H-1 adopted and amended)

HB 4410 - PROBATE, Wills and Estates, Allow exempt property decedent to exclude adult child by written instrument. (Lucido, Peter J. (R), 03/23/17)
(Status: 02/15/2018 - REFERRED TO COMMITTEE ON JUDICIARY)

Senate Committee Hearing: 04/17/2018 Judiciary (HB 4410 on Agenda) - (Click for More Info)

HB 4469 - SENIOR CITIZENS, Other, Provide for eligibility for participation in senior farmers' market nutrition program (SFMNP) and create a rotating distribution process (Guerra, Vanessa (D), 03/30/17)
(Status: 04/19/2017 - bill electronically reproduced 03/30/2017)

HB 4532 PA 54 - PROPERTY, Recording, Modify marital status in instruments conveying or mortgaging real estate. (Whiteford, Mary (R), 04/26/17)
(Status: 06/20/2017 - assigned PA 54'2017 with immediate effect)

HB 4588 - OCCUPATIONS, Securities, Require financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults and posting of information. (Brinks, Winnie (D), 05/04/17)
(Status: 05/09/2017 - bill electronically reproduced 05/04/2017)

HB 4589 - OCCUPATIONS, Securities, Require financial advisors to report suspected cases of financial abuse of elderly or other
HB 4684 - PROBATE, Guardians and Conservators, Allow limited guardianship to supervise access to incapacitated individuals relative. (Lucido, Peter J. (R), 05/31/17)
(Status: 06/06/2017 - bill electronically reproduced 05/31/2017)

HB 4686 - HOUSING, Affordable, Authorize local units to impose rent limitation for senior citizens and individuals with disabilities and provide for tax exemptions and specific tax. (Chang, Stephanie (D), 05/31/17)
(Status: 06/06/2017 - bill electronically reproduced 05/31/2017)

HB 4686 - HOUSING, Affordable, Authorize local units to impose rent limitation for senior citizens and individuals with disabilities and provide for tax exemptions and specific tax. (Chang, Stephanie (D), 05/31/17)
(Status: 06/06/2017 - bill electronically reproduced 05/31/2017)

HB 4686 - HOUSING, Affordable, Authorize local units to impose rent limitation for senior citizens and individuals with disabilities and provide for tax exemptions and specific tax. (Chang, Stephanie (D), 05/31/17)
(Status: 06/06/2017 - bill electronically reproduced 05/31/2017)

HB 4821 - PROBATE, Wills and Estates, Require appointment of the state or county public administrator as personal representative of a decedent's estate in a formal proceeding and modify powers and duties of public administrators acting as personal representatives. (Runestad, Jim (R), 07/12/17)
(Status: 02/06/2018 - assigned PA 13'18 with immediate effect)

HB 4822 - PROBATE, Wills and Estates, Require appointment of the state or county public administrator as personal representative of a decedent's estate in a formal proceeding and modify powers and duties of public administrators acting as personal representatives. (Ellison, Jim (D), 07/12/17)
(Status: 02/06/2018 - assigned PA 14'18 with immediate effect)

HB 4885 - CRIMES, Embezzlement, Increase penalties for stealing, embezzling, or converting personal or real property from a vulnerable adult. (Lucido, Peter J. (R), 08/16/17)
(Status: 09/06/2017 - bill electronically reproduced 08/16/2017)

HB 4886 - CRIMINAL PROCEDURE, Sentencing Guidelines, Increase penalties for embezzlement from vulnerable adult.
(Lucido, Peter J. (R), 08/16/17)
(Status: 09/06/2017 - bill electronically reproduced 08/16/2017)

HB 4887 - OCCUPATIONS, Pawnbrokers, Establish hold process for pawned goods. (Lucido, Peter J. (R), 08/16/17)
(Status: 03/08/2018 - REFERRED TO COMMITTEE ON COMMERCE)

HB 4905 - PROPERTY TAX, Principal Residence Exemption, Modify principal residence exemption for individual residing in nursing home or assisted living facility (Lucido, Peter J. (R), 09/07/17)
(Status: 04/12/2018 - PLACED ON ORDER OF THIRD READING)

HB 4931 - CIVIL PROCEDURE, Civil Actions, Create financial exploitation liability act (Kosowski, Robert L. (D), 09/13/17)
(Status: 09/14/2017 - bill electronically reproduced 09/13/2017)

HB 4959 - FAMILY LAW, Marriage and Divorce, Require prenuptial and postnuptial agreements to be enforceable. (Hoitenga, Michele (R), 09/14/17)
(Status: 09/19/2017 - bill electronically reproduced 09/14/2017)

HB 4994 - SENIOR CITIZENS, Crimes, Provide for public relations campaign to prevent elder abuse. (Kosowski, Robert L. (D), 09/20/17)
(Status: 09/26/2017 - bill electronically reproduced 09/20/2017)
HB 4995 - SENIOR CITIZENS, Crimes, Require neglect and mistreatment of senior citizens the department of health and human services to collect and analyze data. (Kosowski, Robert L. (D), 09/20/17)
(Status: 09/20/2017 - introduced by Representative Robert Kosowski)

HB 4996 - PROBATE, Guardians and Conservators, Expand notification requirement of guardians. (Kosowski, Robert L. (D), 09/20/17)
(Status: 09/26/2017 - bill electronically reproduced 09/20/2017)

HB 5037 - PROBATE, Guardians and Conservators, Provide for power of guardian to implant a tracking device with a ward. (Lucido, Peter J. (R), 09/27/17)
(Status: 09/28/2017 - bill electronically reproduced 09/27/2017)

HB 5073 - CIVIL PROCEDURE, Alternate Dispute resolution, Revise procedures for mediation and case evaluation of civil actions. (Kesto, Klint (R), 10/10/17)
(Status: 10/17/2017 - reported with recommendation for referral to Committee on Law and Justice)

HB 5075 - PROBATE, Patient Advocates, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patient's best interest. (Cole, Triston (R), 10/10/17)
(Status: 10/11/2017 - bill electronically reproduced 10/10/2017)

HB 5076 - HEALTH, Other, Establish procedure to require physician and hospital to obtain the consent of certain persons to withhold or withdraw a life-sustaining treatment. (Noble, Jeff (R), 10/10/17)
(Status: 10/11/2017 - bill electronically reproduced 10/10/2017)

HB 5152 - HEALTH, Patient Directives, Create non-opioid directive form. (Singh, Sam (D), 10/19/17)
(Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

HB 5153 - PROBATE, Guardians and Conservators, Allow a guardian to execute a non-opioid directive form. (Canfield, Edward (R), 10/19/17)
(Status: 04/10/2018 - REFERRED TO COMMITTEE ON HEALTH POLICY)

HB 5323 - CRIMINAL PROCEDURE, Pretrial Procedure, Modify process for expunction and destruction of DNA samples and identification profiles. (Lucido, Peter J. (R), 12/06/17)
(Status: 12/12/2017 - bill electronically reproduced 12/06/2017)

HB 5362 - PROBATE, Trusts, Modify information required in a certificate of trust. (Lucido, Peter J. (R), 12/13/17)
(Status: 12/28/2017 - bill electronically reproduced 12/13/2017)

HB 5398 - PROBATE, Trusts, Allow use of a certificate of trust under the estates and protected individuals code for a trust that affects real property. (Lucido, Peter J. (R), 01/11/18)
(Status: 01/16/2018 - bill electronically reproduced 01/11/2018)

HB 5443 - TAXATION, Estates, Repeal Michigan estate tax act. (Johnson, Steven (R), 01/24/18)
(Status: 01/25/2018 - bill electronically reproduced 01/24/2018)

HB 5456 - PA 100 - CIVIL PROCEDURE, Civil Actions, Enact asbestos bankruptcy trust claims transparency act. (Wentworth, Jason (R), 01/30/18)
(Status: 04/10/2018 - assigned PA 100’18 with immediate effect)

HB 5546 - PROPERTY TAX, Assessments, Allow transfer of ownership from a general or limited partnership to certain individuals to be exempt from uncapping taxes after transfer. (Inman, Larry (R), 02/13/18)
(Status: 02/14/2018 - bill electronically reproduced 02/13/2018)
SB 0039 - PROBATE, Other, Revise exceptions to definition of surviving spouse in relation to a funeral representative. (Jones, Rick (R), 01/18/17) (Status: 04/18/2017 - ASSIGNED PA 0020'17 WITH IMMEDIATE EFFECT)

SB 0049 - PROBATE, Guardians and Conservators, Modify provision related to compensation for professional guardian or professional conservator. (Booher, Darwin (R), 01/18/17) (Status: 10/31/2017 - ASSIGNED PA 0136'17 WITH IMMEDIATE EFFECT)

SB 0071 - VEHICLES, Registration, Exempt vehicle registration fees senior citizens from increases. (Ananich, Jim (D), 01/31/17) (Status: 01/31/2017 - INTRODUCED BY SENATOR JIM ANANICH)

SB 0284 - PROPERTY, Recording, Remove requirement statement of marital status in instruments conveying or mortgaging real estate. (Jones, Rick (R), 03/29/17) (Status: 04/26/2017 - referred to Committee on Financial Services)

SB 0345 - OCCUPATIONS, Securities, Require certain record keeping and posting of information for financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults (Jones, Rick (R), 05/02/17) (Status: 05/02/2017 - INTRODUCED BY SENATOR STEVEN BIEDA)

SB 0346 - OCCUPATIONS, Securities, Require financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults (Ananich, Jim (D), 05/02/17) (Status: 02/01/2018 - HOUSE SUBSTITUTE H-2 CONCURRED IN)

SB 0378 - SENIOR CITIZENS, Housing, Amend home for the aged definition and create an exemption from licensing. (Knollenberg, Marty (R), 05/16/17) (Status: 11/28/2017 - ASSIGNED PA 167'17 WITH IMMEDIATE EFFECT)

SB 0525 - COURTS, Reorganization, Modify reorganization of courts and number of judgeships (Jones, Rick (R), 09/06/17) (Status: 09/07/2017 - INTRODUCED BY SENATOR TONYA SCHUITMAKER)

SB 0579 - HEALTH, Other, Establish procedure to withhold or withdraw a life-sustaining treatment to require physician and hospital to obtain the consent of certain persons. (Proos, John (R), 09/28/17) (Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS)

SB 0597 - PROBATE, Patient Advocates, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patient's best interest (Proos, John (R), 09/28/17) (Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS)

SB 0644 - TORTS, Liability, Enact insurance agents liability act. (Jones, Rick (R), 11/01/17) (Status: 11/01/2017 - INTRODUCED BY SENATOR RICK JONES)

SB 0713 - PROBATE, Guardians and Conservators, Provide for visitation procedures for isolated adults. (Marleau, Jim (R), 12/06/17) (Status: 02/15/2018 - REPORTED FAVORABLY WITH SUBSTITUTE S-1)

SB 0731 - PROPERTY, Recording, Change requirement that an instrument be filed to recorded. (Zorn, Dale (R), 12/13/17) (Status: 02/14/2018 - referred to Committee on Local Government)

SB 0732 - PROPERTY, Recording, Modify recording waiver of mortgage priority. (Zorn, Dale (R), 12/13/17) (Status: 02/14/2018 - referred to Committee on Local Government)
SB 0733 - LAND USE, Other, Modify certified survey map requirements. (Zorn, Dale (R), 12/13/17)
(Status: 02/14/2018 - referred to Committee on Local Government)

SB 0734 - PROPERTY, Recording, Require trust to be recorded separately under conveyance of a trust. (Conyers, Ian (D), 12/13/17)
(Status: 02/14/2018 - referred to Committee on Local Government)

SB 0735 - PROPERTY, Recording, Require death certificate for joint tenant to be recorded separately from deed. (Knezek, David (D), 12/13/17)
(Status: 02/14/2018 - referred to Committee on Local Government)

SB 0736 - PROPERTY, Recording, Remove recording requirements from exception for wills. (Hertel Jr., Curtis (D), 12/13/17)
(Status: 02/14/2018 - referred to Committee on Local Government)

SB 0737 - PROPERTY, Recording, Require recording with register of deeds an English translation document to be included. (Hertel Jr., Curtis (D), 12/13/17)
(Status: 02/14/2018 - referred to Committee on Local Government)

SB 0738 - PROPERTY, Recording, Provide certificates of correction for recording fee. (Proos, John (R), 12/13/17)
(Status: 02/14/2018 - referred to Committee on Local Government)

SB 0739 - PROPERTY, Condemnation, Repeal prima facie evidence of ownership in fourth class cities. (Proos, John (R), 12/13/17)
(Status: 02/14/2018 - referred to Committee on Local Government)

SB 0784 - HEALTH, Emergency Response, Allow a parent or guardian to execute do-not-resuscitate order on behalf of a minor child. (Warren, Rebekah (D), 01/25/18)
(Status: 02/22/2018 - REPORTED FAVORABLY WITH SUBSTITUTE S-2)

SB 0785 - EDUCATION, School Districts, Establish filing, storage, and notice rules regarding do-not-resuscitate orders and revocations of do-not-resuscitate orders. (Jones, Rick (R), 01/25/18)
(Status: 01/25/2018 - INTRODUCED BY SENATOR RICK JONES)

SB 0786 - PROBATE, Guardians and Conservators, Authorize a guardian of a minor to execute a do-not-resuscitate order. (Warren, Rebekah (D), 01/25/18)
(Status: 02/22/2018 - REPORTED FAVORABLY WITH SUBSTITUTE S-1)

SB 0827 - EDUCATION, School Districts, Create filing, storage and notice rules regarding do-not-resuscitate orders and comfort or care plans and limitation liability for providing a comfort or care measure. (Jones, Rick (R), 02/15/18)
(Status: 02/22/2018 - REPORTED FAVORABLY WITH SUBSTITUTE S-1)

SB 0905 - PROBATE, Trusts, Allow trust property treated as property held as tenants by the entirety under certain circumstances. (Jones, Rick (R), 03/15/18)
(Status: 03/15/2018 - INTRODUCED BY SENATOR RICK JONES)