SBM
State Bar of Michigan

# PROBATE & ESTATE PLANNING SECTION

## Agendas and Attachments for:

## Meeting of the Committee on Special Projects (CSP);

## Meeting of the Council of the Probate and Estate Planning Section

Friday, June 14, 2019
9:00 a.m.
University Club of MSU
3435 Forest Road
Lansing, Michigan 48910

**Probate and Estate Planning Section of the**
**State Bar of Michigan**

Meeting of the Section's Committee on Special Projects and
Meeting of the Council of the Probate and Estate Planning Section

June 14, 2019
9:00 a.m.

University Club of MSU
3435 Forest Road
Lansing, Michigan 48910

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

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STATE BAR OF MICHIGAN
PROBATE AND ESTATE PLANNING SECTION COUNCIL
**Council and CSP Meeting Schedule for 2018-2019**
Friday, June 14, 2019, University Club, Lansing, Michigan**
Friday, September 20, 2019, University Club, Lansing, Michigan**

**University Club, 3435 Forest Road, Lansing, Michigan 48909
Each meeting starts with the Committee on Special Projects at 9:00am, followed by the meeting of the Council of the Probate & Estate Planning Section.

**Call for materials**

***Due dates for Materials for Committee on Special Projects***

All materials are due on or before 5:00 p.m. of the date falling 9 days before the next CSP meeting. CSP materials are to be sent to Katie Lynwood, Chair of CSP (klynwood@bllhlaw.com)

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

Wednesday, June 5, 2019 (for Friday, June 14, 2019 meeting)
Wednesday, September 11, 2019 (for Friday, September 20, 2019 meeting)

***Due dates for Materials for Council Meeting***

All materials are due on or before 5:00 p.m. of the date falling 8 days before the next Council meeting. Council materials are to be sent to David Skidmore (dskidmore@wnj.com).

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

Thursday, June 6, 2019 (for Friday, June 14, 2019 meeting)
Thursday, September 12, 2019 (for Friday, September 20, 2019 meeting)

## Officers of the Council for 2018-2019 Term

| Office | Officer |
|---|---|
| Chairperson | Marguerite Munson Lentz |
| Chairperson Elect | Christopher A. Ballard |
| Vice Chairperson | David P. Lucas |
| Secretary | David L.J.M. Skidmore |
| Treasurer | Mark E. Kellogg |

## Council Members for 2018-2019 Term

| Council Member | Year Elected to Current Term (partial, first or second full term) | Current Term Expires | Eligible after Current Term? |
|---|---|---|---|
| Anderton, James F. | 2018 (1st term) | 2020 | Yes (2 terms) |
| Jaconette, Hon. Michael L. | 2017 (2nd term) | 2020 | No |
| Lichterman, Michael G. | 2017 (1st term) | 2020 | Yes |
| Malviya, Raj A. | 2017 (2nd term) | 2020 | No |
| Olson, Kurt A. | 2017 (1st term) | 2020 | Yes |
| Savage, Christine M. | 2017 (1st term) | 2020 | Yes |
| | | | |
| Caldwell, Christopher J. | 2018 (2nd term) | 2021 | No |
| Goetsch, Kathleen M. | 2018 (2nd term) | 2021 | No |
| Hentkowski, Angela M. | 2018 (1st term) | 2021 | Yes |
| Lynwood, Katie | 2018 (2nd term) | 2021 | No |
| Mysliwiec, Melisa M. W. | 2018 (1st term) | 2021 | Yes |
| Nusholtz, Neal | 2018 (1st term) | 2021 | Yes |
| | | | |
| Labe, Robert C. | 2016 (1st term) | 2019 | Yes (1 term) |
| Mayoras, Andrew W. | 2018 (to fill Geoff Vernon's seat) | 2019 | Yes (2 terms) |
| Mills, Richard C. | 2016 (1st full term) | 2019 | Yes (1 term) |
| New, Lorraine F. | 2016 (2nd term) | 2019 | No |
| Piwowarski, Nathan R. | 2016 (1st term) | 2019 | Yes (1 term) |
| Syed, Nazneen H. | 2016 (1st term) | 2019 | Yes (1 term) |

**Ex Officio Members of the Council**

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

## Probate and Estate Planning Section
## 2018-2019 Plan of Work

| | Section Initiatives | Respond to Others' Initiatives | Outreach to Section or Community |
|---|---|---|---|
| **Fall 2018 priority** | Obtain passage of:<br>$ Omnibus EPIC<br>$ ART, SB 1056, 1057, 1058<br>$ Certificate of Trust, HB 5362, 5398<br>$ Modify Voidable Transfers Act to fix glitch<br>$ Divided and Directed Trustees act, HB 6129, 6130, 6131<br>$ Uncapping bill, SB 540, HB 5546 | $ Respond if needed to HB 4751, 4969<br>$ Respond re HB 4684, 4996 (visitation of isolated adults) | $ State Bar Journal theme issue (Nov. 2018)<br>$ Consider initiatives for involving younger lawyers, increasing diversity.<br>$ Promote "Who Should I Trust" in October 2018?<br>$ Update information regarding members, committees, etc. on web site |
| **Spring 2019 priority** | $ Lawyer drafter/beneficiary<br>$ TBE Trusts<br>$ Community Property Trusts<br>$ Premarital property act<br>$ Undisclosed trusts | | $ Annual Probate Institute (May/June 2019) |
| **Ongoing** | $ SCAO meetings<br>$ Review of forms and court rules for changes needed by legislative changes | $ State Bar 21st Century Task Force<br>$ Modest Means Work Group<br>$ E-filing in courts | $ Social events for members<br>$ Joint event with other bars like the taxation section or business law section?<br>$ Review brochures on web site. Need to be updated? |
| **Secondary priority** | $ Review Uniform Fiduciary Income and Principal Act<br>$ No liability for trustee of ILIT (SB 644 stalled) | | |
| **Future projects** | $ Legislative fix for who does attorney represent when attorney represents fiduciary<br>$ Update supervision of charitable trusts act?<br>$ Revise nonprofit corporation act so charity can clearly act as trustee<br>$ Statutory authority for private trust companies. | $ Electronic Wills | |

(2019-06-14)

# CSP Materials

**MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN**

**AGENDA**

Friday, June 14, 2019

East Lansing, Michigan

9:00 – 10:15 AM

1. **Christine Savage – Marital and Premarital Agreement Committee – 25 minutes**

   See attached:

   - Memo from the committee re: Allard (Exhibit 1)
   - Memo from the committee re: proposed statute (Exhibit 2)
   - Proposed redline version of the Uniform Premarital and Marital Agreements Act (Exhibit 3)

2. **Andy Mayoras – Drafter/beneficiary Ad Hoc Committee – 25 minutes**

   See attached draft of proposed statute (Exhibit 4)

3. **Jim Spica – Legislative Development and Drafting Committee – 15 minutes**

   Re: Delaware Tax Trap Trigger / MCL 554.92 - .93.
   See attached Memo from Jim Spica (Exhibit 5)

4. **Georgette David and Katie Lynwood – Legislative Development and Drafting Committee – 10 minutes**

   Re: Vehicle Transfer on Death
   See attached:

   - Memo from Georgette David and Katie Lynwood (Exhibit 6)
   - Spreadsheet of Motor Vehicles TOD and State Statutes (Exhibit 7)

# EXHIBIT 1

# Memo

To: Probate Council

From: Premarital and Marital Agreement Committee

Date: April 12, 2019

Subject: Uniform Premarital and Marital Agreements Act

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The Premarital and Marital Agreement Committee ("Committee") has reviewed the Uniform Premarital and Marital Agreements Act ("Act"). This review has included an examination of the current law in Michigan relating to premarital and marital agreements, along with the review of the provisions of the Act during the CSP meetings.

The Committee expects that the current state of the law in Michigan relating to premarital and marital agreements as a result of Allard, will be a primary point of discussion when making revisions, if any, to the Act. In anticipation of potential revisions to address Allard, the Committee thought it would be efficient to have the Allard discussion prior to proceeding with revisions to or introduction of the Act. This will enable Council to take a position relating to Allard and provide the Committee with direction as to how to proceed with the Act.

A summary of the Allard caselaw is as follows:

FACTS: The parties signed a premarital agreement two days before their wedding. Approximately 10 days before their wedding, Husband gave Wife a draft of a premarital agreement. Husband and Wife discussed that Husband's father had insisted on a premarital agreement prior to leaving Husband an inheritance. Husband expressed to Wife that his father was adamant that if she did not sign a premarital agreement there would be no wedding. Wife then signed the premarital agreement. Wife did not consult with her own attorney. Wife claimed that she wanted to write "signed under duress" on the document but was not permitted to do so by Husband's attorney.

The applicable provisions of the premarital agreement are as follows:

> 4 Each party shall during his or her lifetime keep and retain sole ownership, control, and enjoyment of all real, personal, intangible, or mixed property now owned, free and clear of any claim by the other party. However, provided that nothing herein contained shall be construed to prohibit the parties

from at any time creating interests in real estate as tenants by the entireties or in personal property as joint tenants with rights of survivorship and to the extent that said interest is created, it shall, in the event of divorce, be divided equally between the parties. At the death of the first of the parties hereto, any property held by the parties as such tenants by the entireties or joint tenants with rights of survivorship shall pass to the surviving party.

5. In the event that the marriage . . . terminate[s] as a result of divorce, then, in full satisfaction, settlement, and discharge of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce (including any right to payment of legal fees incident to a divorce), under the present or future statutes and laws of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released), the parties agree that all property acquired after the marriage between the parties shall be divided between the parties with each party receiving 50 percent of the said property. However, notwithstanding the above, the following property acquired after the marriage will remain the sole and separate property of the party acquiring the property and/or named on the property:

a. As provided in paragraphs Two and Three of this antenuptial agreement, any increase in the value of any property, rents, profits, or dividends arising from property previously owned by either party shall remain the sole and separate property of that party.

b. Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property [***6] in his or her individual capacity or name.

8. Each party shall, without compensation, join as grantor in any and all conveyances of property made by the other party or by his or her heirs, devises, or personal representatives, thereby relinquishing all claim to the property so conveyed, including without limitation any dower or homestead rights, and each party shall further, upon the other's request, take any and all steps and execute, acknowledge, and deliver to the other party any and all further instruments necessary or expedient to effectuate the purpose and intent of this agreement.

10. Each party acknowledges that the other party has advised him or her of the other party's means, resources, income, and the nature and extent of the other party's properties and holdings (including, but not limited to, the financial

information set forth in exhibit A attached hereto and incorporated herein by reference) and that there is a likelihood for substantial appreciation of those assets subsequent to the marriage of the parties.

Included with the agreement was Husband's disclosure statement, which indicated that he already had approximately $400,000 in net worth.

During the course of the marriage, Husband and Wife held a joint checking account. There were no other joint assets. Wife worked at two different advertising agencies during the first years of the marriage. At the end of her employment, she earned approximately $30,000 per year. After Wife became pregnant with their second child, Wife stopped working and did not seek further employment.

Husband received numerous cash gift from his parents during the marriage, often totaling $20,000 per year. Husband also received loans from his father during the marriage, and claims that he used those funds to acquire some of the real estate he purchased during the marriage. Husband also formed 6 single member LLC's during the marriage.

Husband used at least some of the LLCs as a vehicle to purchase and convey numerous real estate holdings. In addition, the marital home, which husband owned before the marriage, was conveyed to one of the LLCs. Husband asserted in the trial court that Wife never incurred any liability as a result of the obligations arising from these multiple transactions, and that, as required by the premarital agreement, Wife signed warranty deeds when properties were sold to release any dower rights she might have acquired. However, despite contending that Wife willfully released her dower rights in accordance with the terms of the premarital agreement, Husband also asserted that Wife never gained any ownership interest in any of the properties.

After 16 years of marriage, Husband filed for divorce. Husband argued that the premarital agreement governed and was dispositive of all issues except for custody, parenting time and child support. Wife argued that the premarital agreement was void because the terms of the agreement were unconscionable, Wife did not have the benefit of independent counsel, and also because the premarital agreement was signed under duress on the day of the wedding rehearsal. Wife also contended that a change of circumstances supported the setting aside of the premarital agreement, asserting that she was abused by Husband during the marriage and that Husband never intended to create a marital partnership.

1. Allard v Allard, Trial Court.

a. The Trial Court held as follows: (i) Wife could not establish that the premarital agreement was signed under duress because there was no evidence of any illegal action, (ii) the agreement was not unconscionable because its terms did not shock the conscience of the court, and (iii) there was no change of circumstances that would make enforcement of the premarital agreement unfair and unreasonable. The Trial Court noted that the length of marriage and the growth of assets are not unforeseeable and therefore cannot qualify as a change of circumstances.

b. The Trial Court awarded Husband the six LLCs, the stock he owned, and all Bank accounts presently titled in his name were titled in the name of his single member LLCs. The Trial Court awarded Wife the stock she owned an IRA account, and all bank accounts that were in her name. The value of the assets awarded to Husband was in excess of $900,000, the assets awarded to Wife were valued at approximately $95,000.

c. The Trial Court rejected Wife's argument to invade the separate property holding that allowing invasion would violate the parties right to "freely contract".

2. Allard v Allard, 308 Mich App 536 (2014) (Allard I).

a. The Court of Appeals relied on Reed v Reed when it held that premarital agreements "may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of a material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that the enforcement would be unfair and unreasonable". The Court of Appeals further reasoned based on Woodington v Shokoohi that "to determine if a prenuptial agreement is unenforceable because of a change in circumstances, the focus is on whether the changed circumstances were reasonably foreseeable either before or during the signing of the prenuptial agreement".

b. The Court of Appeals disregarded Wife's argument of abuse as a change in circumstances as the parties agreed in the premarital agreement that fault would not be a factor in these determinations. Therefore, to invalidate the agreement on the basis of one party's fault would contravene the clear and unambiguous language of the premarital agreement. The Court of Appeals determined that even if the abuse was unforeseeable, it

did not void the agreement on the basis of change of circumstance because change of circumstances must relate to the issues addressed in the agreement. The types of change of circumstance would have to relate to the issues addressed in the agreement, which were spousal support and division of assets.

c. The Court of Appeals held that under the plain and unambiguous language of the premarital agreement, the LLCs created by plaintiff during the course of the marriage were not acquired in Husband's individual capacity or name; that under the plain and unambiguous language of the premarital agreement, the income of the parties is to be treated as marital income and not property.. The Court of Appeals remanded for determination regarding the extent to which income earned by Husband and derived from the LLCs should be treated as marital income, and whether that marital income was used to purchase assets titled in the LLCs.

d. The Court of Appeals held that the invasion statutes do not permit a party to invade the separate property of the other party, contrary to the terms of a premarital agreement.

3. Allard v Allard, 499 Mich 932 (2016) (Allard II)

a. The Supreme Court reasoned that the parties premarital agreement rendered much of the property at issue part of the Husband's separate estate. If the premarital agreement did nothing more than divide the property between the marital state and the parties separate estates, the trial court could exercise its discretion to invade the Husband's separate estate. However, the property settlement in the premarital agreement was to be "in full satisfaction, settlement, and discharged of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce . . . ., Under the present or future statutes and laws of common law of the State of Michigan or any other jurisdiction "all of which are hereby waived and released)". The Supreme Court held that the Court of Appeals did not address whether the statement waived the defendant's ability to seek invasion of the Husband's separate estate.

b. The Supreme Court vacated the Court of Appeals decision relating to the invasion of separate property. It remanded back to the Court of Appeals to consider whether the party may waive the Trial Court's statutory discretion to invade separate property.

4. Allard v Allard, January 31, 2017 (Allard III)

a. On remand the Court of Appeals found that the invasion of separate property is allowed despite a premarital agreement which states that a party is not permitted to invade separate property. The Court held that a husband and wife could not, by their prenuptial agreement, deprive the trial court of its equitable discretion to award the wife spousal support or to effectuate an equitable property settlement by "invading" the husband's separate assets.

b. The Court reasoned that the trial court must have "equitable discretion" to invade separate assets of a party even though a premarital agreement may state otherwise. The Court of Appeals held that any agreement which prohibits the invasion of separate property is "void as against both statute and the public policy codified by the Legislature". The Court held that the parties to a divorce cannot, through a premarital agreement, compel a court of equity to order a property settlement that is inequitable. Although parties have a fundamental right to contract as they see fit, they have no right to do so in direct contravention of this state's law and public policy.

# EXHIBIT 2

# Memo

To: Probate Council

From: Premarital and Marital Agreement Committee

Date: January 25, 2019

Subject: Uniform Premarital and Marital Agreements Act

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The Premarital and Marital Agreement Committee ("Committee") has focused our efforts on a review of the Uniform Premarital and Marital Agreements Act ("Act"). This review has included an examination of the current law in Michigan relating to premarital and marital agreements, along with the review of the provisions of the Act during the CSP meetings. Attached is a copy of the Act marked with the revisions from the most recent CSP meeting.

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

Following is a brief summary of the Act:

**Section 1: Title**

"Uniform Premarital and Marital Agreements Act"

**Section 2: Definitions**

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

**Section 3: Scope**

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

**Section 4: Governing Law**

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

**Section 5: Principles of Law and Equity**

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

**Section 6: Formation Requirements**

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

**Section 7: When Agreement Effective**

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

**Section 8: Void Marriage**

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

**Section 9: Enforcement**

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

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

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

2. The party did not have access to independent legal representation;

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

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

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

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

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

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

Note Section 9 also provides the following:

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

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

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

**Section 10: Unenforceable Terms**

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

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

**Section 11: Limitation of Action**

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

**Section 12: Uniformity of Applications and Construction**

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

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

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

**Section 14: Repeals; Conforming Amendments**

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

**Section 15: Effective Date**

The effective date will be stated in the Act.

# EXHIBIT 3

# UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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

*WITH PREFATORY NOTE AND COMMENTS*



January 2, 2013

# UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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# UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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

**SECTION 2. DEFINITIONS.** In this ~~[act]~~act:

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

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

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

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

(A) spousal support;

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

(C) responsibility for a liability;

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

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

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

(6) "Property" means anything that may be the subject of ~~ownershi~~ownership and includes both ~~p. whether~~ real ~~or~~and personal property, tangible or intangible, legal or equitable, or any interest therein.

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

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

(A) to execute or adopt a tangible symbol; or

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

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

**SECTION 3. SCOPE.**

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

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

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

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

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

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

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

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

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

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

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

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

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

**SECTION 9. ENFORCEMENT.**

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

(1) ~~the~~ The ~~party's~~ parties' consent to the agreement was involuntary or the result of fraud, duress, or mistake;

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

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

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

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

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

(A) ~~d~~Decide whether to retain a lawyer to provide independent legal representation; and

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

(2) ~~t~~The other party is represented by a lawyer and the party has the

financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

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

(1) "If you sign this agreement, you may be:

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

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

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

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

(E) Giving up your right to have your legal fees paid."

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

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

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

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

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

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

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

(2) eEnforcement of the term may be unconscionable for a party at the time of enforcement because of [would result in substantial hardship for a party because of] a material change in circumstances arising after the agreement was signed] that was not reasonably foreseeable at the time the agreement was signed.

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

**SECTION 10. UNENFORCEABLE TERMS.**

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

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

(1) [adversely] Adversely affects a child's right to support;

(2) [L]Limits or restricts a remedy available to a victim of domestic violence

under law of this state other than this ~~[act]~~act;

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

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

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

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

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

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

**[SECTION 14. REPEALS; CONFORMING AMENDMENTS.**

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

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

~~(c) [. . .]~~

**SECTION 15. EFFECTIVE DATE.** This ~~[act]~~act takes effect ...

# EXHIBIT 4

700.____ Gifts to drafting lawyers and other disqualified persons.

(1) Any part of a written instrument which, directly or indirectly, makes a substantial gift to a lawyer who drafted the instrument, or a person or entity related to the lawyer, is void, unless the lawyer or other recipient of the gift is related to the person making the gift.

(2) This section is not applicable to a provision in a written instrument appointing a lawyer, or a person or entity related to the lawyer, as a fiduciary. Reasonable fiduciary fees that may be received by a lawyer, or a person or entity related to the lawyer, who acts as a fiduciary are not considered to be gifts under this section.

(3) A provision in a written instrument purporting to waive the application of this section is unenforceable.

(4) If property distributed in kind, or a security interest in property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this section, the purchaser or lender takes title free of any claims arising under this section and incurs no personal liability by reason of this section, whether or not the gift is void under this section. Additionally, this section does not directly or indirectly impose liability on a financial institution or other third-party who honors or relies on a written instrument that contains or effectuates a gift that is void under this section, unless such third-party has actual knowledge that a gift is void under this section. A fiduciary acting with respect to an instrument, such as trustee or personal representative, is not considered to be a third-party for purposes of this provision.

(5) If a part of a written instrument is invalid by reason of this section, the invalid part is severable and will not affect any other part of the written instrument which can be given effect, including a term that makes an alternate or substitute gift. In the case of a power of

appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person or entity related to the lawyer. If the invalid part cannot be severed, then the entire instrument shall be deemed to have no effect and the immediately prior valid instrument, if any, shall be revived.

(6) For purposes of this section:

(a) The phrase "lawyer who drafted the instrument" refers to an individual who: (i) is or was licensed to practice law in this state or any other, prior to or at the time of the instrument was prepared and/or executed, and (ii) directly or indirectly prepared or supervised the preparation and/or execution of the written instrument. A lawyer is deemed to have prepared, or supervised the execution of, the written instrument if the preparation, or supervision of the execution, of the written instrument was performed by an employee, subordinate, partner, co-owner, or another person or lawyer employed by the same firm or company as the lawyer.

(b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the preparation or execution of the written instrument or solicited the gift, the person is:

1. A spouse of the individual;
2. A lineal ascendant or descendant of the individual and/or the individual's spouse;
3. A sibling of the individual;
4. A spouse of a person described in subparagraph 2. or subparagraph 3.

Additionally, an entity is "related" to a lawyer if the lawyer owns a 50% or greater interest in the entity or otherwise controls the entity.

(c) The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, a check, a form or other document that adds a person as a joint owner or beneficiary of an account at a financial institution, or a beneficiary designation under a life insurance contract or any other contractual arrangement that creates an ownership interest or permits the naming of a beneficiary.

(d) The term "gift" includes an inter vivos gift, a testamentary transfer of real or personal property or any interest therein, and the power to make such a transfer regardless of whether the gift is outright or in trust; regardless of when the transfer is to take effect; and regardless of whether the power is held in a fiduciary or nonfiduciary capacity. Further, a transaction which conveys property for substantially less than fair market value is considered to be a gift for purposes of this section.

(e) A gift is considered "substantial" if the value of the gift exceeds $5,000.00.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or in equity. A gift or instrument that is not rendered void under this section can still be challenged under other legal grounds.

(8) This section applies only to written instruments executed on or after October 1, 2019.

# EXHIBIT 5

M E M O R A N D U M

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

**From:** James P. Spica

**Re:** Proposal to Amend MCL §§ 554.92–.93

**Date:** February 20, 2019

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## I. Purpose of the Proposal

The proposal is to make the anti-Delaware-tax-trap provision of the Personal Property Trust Perpetuities Act (PPTPA) elective. This will allow the donee[1] of a qualifying special power of appointment[2] over personal property held in trust to spring the so-called "Delaware tax trap" without having to create a presently exercisable general power of appointment over the property in question.

## II. The Delaware Tax Trap

"Delaware tax trap" (Trap) is the colloquial name for Internal Revenue Code (Code) section 2041(a)(3) and its gift tax counterpart, Code section 2514(d). The Trap provides that assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) federal transfer tax base (gift tax base or gross estate depending on whether the triggering exercise is effectively testamentary) to the extent *H* exercises the power by creating another power over the assets in question (second power) that "under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[3] Thus, the Trap assumes that applicable local law limits the period during which the vesting of future interests can be postponed or the power of alienation suspended and that, under that law, when one power of appointment, $p_1$, is exercised so as to grant a second power of appointment, $p_2$, the date of the creation of $p_1$ may or may not be

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[1] The "donee" of a power of appointment is the person to whom the power is granted or by whom it is retained—i.e., the *holder* of the power. *See* Mich. Comp. Laws § 556.112(e); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.2(b) (Am. Law Inst. 2011).

[2] A "special power" is a power of appointment whose permissible appointees do not include the donee of the power, her estate, her creditors, or the creditors of her estate. *See* Mich. Comp. Laws § 556.112(i). In other words, a "special power" is a power of appointment that is *not* a "general power." *See id.* § 556.112(h) (defining "general power" as power of appointment whose permissible appointees include donee, her estate, her creditors, or the creditors of her estate); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.3 (Am. Law Inst. 2011). The sense in which a "*qualifying* special power of appointment" *qualifies* is described *infra* in Part VIII apropos of proposed new PPTPA section 2(2)(a).

[3] I.R.C. § 2041(a)(3) (providing estate tax version of Trap); *see id.* § 2514(d) (providing gift tax version).

determinative of the remotest date on which interests granted by exercise of $p_2$ must vest (if at all, to be valid) or assets appointed by exercise of $p_2$ must become transferable within the meaning of an applicable rule against suspension of absolute ownership or the power of alienation. If the date of $p_1$'s creation is determinative, the Trap is not sprung. But if the date of $p_1$'s creation is irrelevant, the Trap is sprung, and the assets subject to $p_2$ are included in the transfer tax base of the donee of $p_1$ upon the granting of $p_2$.

Historically, the Trap was a legislative response to the peculiarity of Delaware law that allows the exercise of a testamentary general or special power of appointment to restart any applicable perpetuities testing or wait-and-see period; for Delaware is peculiar in applying the common law principle that the period determining the remotest date on which interests granted by exercise of a presently exercisable general power of appointment must vest (if at all, to be valid) is measured from the time the power is exercised (rather than from the time of the power's creation or deemed creation) to the exercise of *any* power of appointment, including a testamentary general or special power.[4] Before the enactment of the federal generation-skipping transfer (GST) tax, that peculiarity of Delaware law posed a serious threat to the integrity of the federal transfer tax base as a measure of wealth, a threat that the Trap was designed to neutralize:

> In at least one State a succession of powers of appointment, general *or limited*, may be created and exercised *over an indefinite period* without violating the rule against perpetuities. In the absence of some special provision in the [Code], property could be handed down from generation to generation without ever being subject to estate tax.[5]

### III. Application to Powers Subject to Michigan Law

Now, the Trap refers to postponement of vesting, on the one hand, and suspension of absolute ownership or the power of alienation, on the other,[6] in the disjunctive, but the disjunction has been interpreted as a reference to the particular vesting or alienation requirements actually imposed by local law.[7] Michigan has not had a rule against suspension of absolute ownership or

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[4] *See* 25 Del. Code Ann. tit. 25, § 501. As to the uniqueness of Delaware's rule on this point among common law jurisdictions, see, e.g., John C. Gray, The Rule Against Perpetuities § 514 n.1 (Roland Gray ed., 4th ed. 1942).

[5] S. Rep. No. 82-382, at 1 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1530, 1535 (emphasis added).

[6] Postponement of vesting is the conceptual province of all forms of rule against perpetuities, whereas suspension of absolute ownership or the power of alienation is the province of a conceptually distinct group of rules. *See, e.g.*, Gray, *supra* note 4, § 119; Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, 28 Est. Plan. 68, 70–71 (2001). Vesting is irrelevant to rules against the suspension of absolute ownership or the power of alienation, under which a suspension occurs when there is no person or group of persons living who can convey absolute ownership of the property in question, as when trust principal is directed to someone yet unknown or unborn. *See* Ira Mark Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 Alb. L. Rev. 261, 267–69 (1981). These rules are violated when such a suspension may last longer than a specified period that is often similar to the common law perpetuities testing period of a life in being plus twenty-one years (plus gestation). *See, e.g.*, Bloom, *supra*, at 268.

[7] *See* Estate of Murphy v. Comm'r, 71 T.C. 671 (1979), acq. 1979-2 C.B. 2.

the power of alienation since 1949,[8] after which the common law rule against perpetuities (RAP) applied with respect to both real and personal property until the enactment, in 1988, of the Uniform Statutory Rule Against Perpetuities (USRAP),[9] which PPTPA overlies.[10] That makes remoteness of vesting the relevant concern in Michigan for application of the Trap, which means that we can ignore the Trap's abstract concern with a rule against suspension of absolute ownership or the power of alienation: for our purposes, the Trap might simply provide that assets subject to a special power of appointment[11] (first power) are included in the power holder's (*H*'s) transfer tax base to the extent *H* exercises the power by granting another power over the assets in question (second power) that, under Michigan law, can be validly exercised so as to postpone the vesting of future interests in the assets for a period ascertainable without regard to the date of creation of the first power.[12]

## IV. The Relation-Back Principle

Under Michigan law, in the case of any power of appointment other than a presently exercisable general power, the remotest date (if any) on which interests granted by exercise of the power must vest (if at all, to be valid) is reckoned from the time the power was *created*; in the case of a presently exercisable general power, the remotest such date (if any) is reckoned from the time the power is exercised.[13] This is a particular implication of a more general account of special and testamentary general powers of appointment that is sometimes called the "relation back theory,"[14] but it is a particular implication that is often singled out for mention when the general theory is described, as when we read: "Where an appointment is made under a special power, the appointment is read back into the instrument creating the power (as if the donee were filling in blanks in the donor's instrument) *and the period of perpetuities is computed from the date the power was created.*"[15] As a general account of the meaning and effect of special and testamentary general powers, the relation-back theory is open to criticism;[16] but the particular implication of the theory pertaining to perpetuities[17] was thoroughly entrenched in the common law.[18]

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[8] *See* 1949 Pub. Acts 38 (codified at Mich. Comp. Laws § 554.51).

[9] *See* Mich. Comp. Laws § 554.53.

[10] *See id.* §§ 554.92(f), 554.93(3).

[11] Assets subject to a general power of appointment are included in the power holder's federal transfer tax base in any case—i.e., without regard to the Trap. *See* I.R.C. §§ 2041(a)(1)–(2), 2514(a)–(b). Thus, the Trap is not *a trap* for the donee of a general power of appointment.

[12] *Cf. id.* § 2041(a)(3) (regarding estate tax version of Trap); *cf. also id.* § 2514(d) (regarding gift tax version).

[13] *See* Mich. Comp. Laws § 556.124(1).

[14] *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.4 cmt. f (Am. Law Inst. 2011).

[15] Ronald H. Maudsley, The Modern Law of Perpetuities 62 (1979) (quoting W. Barton Leach) (emphasis added). *See also, e.g.*, Restatement (Second) of Conflict of Laws § 274 cmt. b (Am. Law Inst. 1971).

[16] *See, e.g.*, John A. Borron, Jr. et al., The Law of Future Interests §§ 913, 1274 at 274–75 (3d ed. 2004).

[17] I.e., the principle described *supra* in the text accompanying note 13.

[18] *See, e.g.*, Gray, *supra* note 4, §§ 474.2, at 467, 514-15; Borron, *supra* note 16, § 1274.

If we suppose a finite perpetuities-limitation period, like either the common law testing period (of a life in being plus twenty-one years plus gestation)[19] or the so-called "wait-and-see period" specified in the USRAP,[20] it is easy to see how, in the case of a special power of appointment, the relation-back principle meets the policy concern that motivated the Trap:[21] the terminus of a finite period measured from the date that the "first power" contemplated by the Trap came into existence (or from an *earlier* date on which that power is *deemed* to have come into existence under the relation-back principle) is bound to fall earlier (on the timeline) than the terminus of the same period measured from a date *later than* the date on which the first power came into existence, as when, for example, the period is measured—as it is in Michigan when a presently exercisable general power is exercised[22] (and in Delaware in any case)[23]—from the date on which the "second power" is *exercised*. Moving a finite period along the timeline is like laying down a ruler—the point at which one end is placed rigidly determines the point at which the other end falls.

## V. The Threat of Infinity

But what if the ruler is infinitely long? In that case, the point at which we place the nearer end does *not* determine where the further end falls—because there is no further end! PPTPA creates an infinitely long ruler: apart from its anti-Trap provision, and excepting certain personal property previously held in trusts that were irrevocable on September 25, 1985, PPTPA makes the USRAP and all other RAP-like rules inapplicable with respect to personal property held in any trust that was revocable on or created after May 28, 2008.[24] So, if PPTPA did not make an anti-Trap exception, given that Michigan does not have rule against suspension of absolute ownership or the power of alienation,[25] any "second power" over personal property subject to a trust of the right vintage that might be created by the exercise of a "first power" within the meaning of the Trap could postpone vesting for a period *without end.*

If there is any sense in which the further end (to continue the ruler metaphor) of an endless period is "ascertainable," what is ascertained must be merely that *there is no the further end*, and that is a realization to which the position of the period's nearer end (if it has one) is evidently irrelevant—the end of a period that has a beginning but no end cannot be drawn nearer by moving the period's origin to an earlier place on the timeline. Thus, under PPTPA, but for the effect of the anti-Trap provision, the period during which the exercise of any "second power" contemplated by the Trap could postpone the vesting of future interests would be "ascertainable," if at all, "without regard to the date of creation of the first power" (or any other event), and the Trap would, therefore, include the assets subject to the second power in the

[19] *See, e.g.*, Gray, *supra* note 4, § 201, at 191 (famously formulating the RAP); *see also id.* §§ 220-21 (regarding periods of gestation).

[20] *See* Mich. Comp. Laws § 554.72(1)(b). As to the difference in general between the common law testing period a "wait-and-see period," see, e.g., Maudsley, *supra* note 15, at 80-81; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 571–73 (1986).

[21] I.e., the policy concern expressed in the legislative history quoted *supra* text accompanying note 5.

[22] *See supra* note 13.

[23] *See supra* notes 4–5 and accompanying text.

[24] *See* Mich. Comp. Laws §§ 554.93(1)–(2), 554.94.

[25] *See supra* notes 8–9 and accompanying text.

transfer tax base of the holder of the first power upon the exercise of the first power to grant the second.[26]

## VI. *Status Quo*

That is why PPTPA makes an anti-Trap exception, in section 3(3), for the case in which a nonfiduciary[27] special power of appointment over personal property held in trust is exercised to create, a "second power."[28] In that case, the period during which the vesting of a future interest in the property may be postponed by the exercise of the second power is determined under a modified USRAP (having a 360-year wait-and-see period) *by reference to the date on which the first power was created.*[29] By requiring interests created by exercise of the second power to vest—and powers of appointment created by an exercise of the second power to be irrevocably exercised or otherwise to terminate—within a finite testing period under the USRAP, PPTPA section 3(3) prevents the value of assets subject to the second power from being included by the Trap in the transfer tax base of the donee of the first power when she exercises the first power to create the second (in case the instrument that creates the second power, by exercising the first, does not itself avert the Trap by placing limitations on exercise of the second power).[30]

Now, the anti-Trap provision (PPTPA section 3(3)) does not apply when a "first power" is exercised to create a presently exercisable general power of appointment: section 2(e) excludes presently exercisable general powers from the extension of the term "second power" as defined for purposes of PPTPA.[31] That makes Trap springing elective to the extent the donee of a special power of appointment is able[32] and willing to create a presently exercisable general power over the trust assets in question.[33] And there are situations in which it can be advantageous to spring

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[26] *See* I.R.C. §§ 2041(a)(3), 2514(d). *See also* James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 Real Prop. Tr. & Est. L.J. 673, 682 (2009).

[27] Powers that are to be exercised only in a fiduciary capacity are not treated as powers of appointment under the federal transfer taxes. *See, e.g.*, Treas. Reg. § 20.2041-1(b)(1) (dispositive powers exercisable only in fiduciary capacity not treated as powers of appointment under I.R.C. § 2041).

[28] *See* Mich. Comp. Laws § 554.92(b), (e).

[29] *See id.* § 554.93(3), 554.75(2).

[30] *See* Spica, *supra* note 26, at 683.

[31] *See* Mich. Comp. Laws § 554.92(e).

[32] Unless the instrument granting a power of appointment manifests a contrary intent, a power of appointment can ordinarily be exercised to grant further powers of appointment in permissible appointees. *See, e.g.*, Restatement (Third) of Prop.: Wills & Other Donative Transfers § 19.14 (Am. Law Inst. 2011); *see also id.* § 17.1 (defining "power of appointment" circularly to include power to "designate recipients of . . . powers of appointment over the appointive property"); Unif. Powers of Appointment Act § 102(13) (Unif. Law Comm'n 2013) (defining "power of appointment" circularly to include power to "designate a recipient of . . . another power of appointment"). On the other hand, the donor a power of appointment can definitely rule out particular uses of the power, including the creation of further powers; for an exercise of a power must comply "with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power." Mich. Comp. Laws § 556.115(2); *see also* Hannan v. Slush, 5 F.2d 718, 722 (E.D. Mich. 1925); Restatement (Second) of Property: Donative Transfers §12.1 (Am. Law Inst. 1986).

[33] *See* James P. Spica, *Means to an End: Electively Forcing Vesting to Suit Tax Rules Against Perpetuities*, 40 ACTEC L.J. 347, 379-80 (2014).

the Trap, as when, for example, a special power holder's death would otherwise be a "taxable termination" within the meaning of the federal GST tax and the attributable GST tax would be more than the attributable estate tax under the Trap.[34] Trap springing can also be advantageous when the effective exclusion amount available to the holder (*H*) of a testamentary special power of appointment is ample enough to cover appreciated assets subject to the power: in that case, an exercise of the power to grant another power so as to spring the Trap, will be without transfer tax effect, thanks to the effective exclusion of the unified credit, but the appointed assets will have been acquired by *H*'s appointees "from a decedent" within the meaning of Code section 1014 and, hence, qualify for the so-called "step up" in basis.[35] In situations like these, the power holder can spring the Trap under PPTPA in its current form, but only by exercising her power so as to grant a presently exercisable general power of appointment.[36]

## VII. The Problem

Sometimes in the context of GST-tax planning, creation of a presently exercisable general power of appointment does not seem extravagant: if there is a lot of wealth involved, strategic placement of a presently exercisable general power will often yield transfer tax benefits in addition to attracting the federal estate or gift tax when GST tax would otherwise be payable.[37] But with recent increases in the effective exclusion of the unified credit, planners are increasingly seeking estate-tax inclusion for reasons that have nothing to do with transfer taxation, particularly as a way of obtaining the "step up." In *that* context, creating a presently exercisable general power may seem extravagant; for there is no transfer tax advantage to weigh against the fact that granting such a power gives the donee the legal ability to scrap existing arrangements under the default terms of the affected trust. And the latter consideration may loom large in any case, so that even in the context of GST-tax planning, the holder of a special power of appointment may prefer to spring the Trap without abandoning her takers in default to the discretion of the donee of a presently exercisable general power; she would prefer to spring the Trap without having to create such a power.

## VIII. Mechanics of the Proposal

The proposal below makes that possible, but it also does a little clean-up job by moving the anti-Trap provision from section 3 of PPTPA to section 2; for the terms defined in section 2 appear only in the anti-Trap provision of existing section 3(3), which means that in its current form, the statute violates the Legislative Service Bureau (LSB) style imperative according to which interpretive provisions defining terms that only appear in one section of an act should appear not in a separate "Definitions" section (like existing PPTPA section 2), but at the end of the section in which the defined terms occur. It is probably just due to PPTPA's dense complexity that the LSB missed this solecism initially, but, in any case, they will be glad to have the matter put right,

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[34] *See* Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes,* 68 J. Tax'n 242 (1988); James P. Spica, *A Practical Look at Springing the Delaware Tax Trap to Avert Generation Skipping Transfer Tax,* 41 Real Prop. Prob. & Tr. J. 165 (2006).

[35] *See* I.R.C. § 1014(a)(1), (b)(9); Treas. Reg. § 1.1014-2(b).

[36] *See supra* notes 31–33 and accompanying text.

[37] *See* Spica, *supra* note 33, at 377-78.

and it is easily put right by moving the current section 3(3) into a new section 2(1) and putting the statutory definitions in a new subsection (3).

New section 2(2) is the provision that allows the donee of a special power of appointment over personal property held in trust to spring the Trap without having to create a presently exercisable general power. But in order to keep the mere availability of the exception described in section 2(2) from vitiating the anti-Trap provision in section 2(1), new section 2(2)(a) requires that the "second power" in question must have been created by the exercise of a "first power" that was not itself created by the exercise of either a "first power" or a "second-order fiduciary power."

But for that limitation, if the donee of a special power over personal property held in trust, $p_1$, exercised $p_1$ to grant a like power, $p_2$, and did *not* opt out of anti-Trap treatment for interests granted by exercise of $p_2$, the donee of $p_2$ could be permitted (if the terms of the instrument exercising $p_1$ to grant $p_2$ did not provide otherwise)[38] to exercise $p_2$ so as to grant another like power, $p_3$, *and opt out of anti-Trap treatment for interests granted by exercise of* $p_3$; for, as far as the statute is concerned, what is a "second power" within the meaning of the anti-Trap provision in respect of one power of appointment may be a "first power" in respect of another.[39] Since in that case, $p_2$ could be validly exercised to grant an additional "second power," it *could be* validly exercised to postpone the vesting of future interests in the assets subject to $p_2$ *forever*, which, again, is a period ascertainable, if at all, without regard to the date of creation of $p_1$;[40] and so, regardless of the fact that the donee of $p_1$ did *not* opt out of anti-Trap treatment for interests granted by exercise of $p_2$, the Trap would be sprung upon the exercise of $p_1$ to grant $p_2$.[41]

That would mean the anti-Trap provision was broken—it would mean that in attempting to make it possible for the donee of $p_1$ to spring the Trap, if she wished to, without having to create a presently exercisable general power in the donee of $p_2$, we had succeeded in making it impossible for PPTPA's anti-Trap provision to disarm the Trap in any case! The proposal averts that result by imposing the limitation embodied in new section 2(2)(a), which effectively provides that whereas settlors and some trustees can create Trap-springing options under new section 2(2) by granting special powers of appointment, the donees of "second powers," as such, cannot.

## IX. The Proposal

A bill to amend 2008 PA 148, entitled "personal property trust perpetuities act," by amending sections 2 and 3 as amended by 2012 PA 484 to allow the donee of a qualifying special power of appointment over personal property held in trust deliberately to spring the so-called "Delaware tax trap" without having to create a presently exercisable general power of appointment over the property in question

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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[38] *See supra* note 32.
[39] *See* Mich. Comp. Laws § 554.92(b) (defining "first power").
[40] *See supra* Part V.
[41] *See supra* Part II.

**554.92 Exercise of second power; determination under uniform statutory rule against perpetuities~~Definitions~~**

Sec. 2.

(1) Except as provided in subsection (2), the period during which the vesting of a future interest in property may be postponed by the exercise of a second power shall be determined under the uniform statutory rule against perpetuities by reference to the time of the creation of the power of appointment that subjected property to, or created, the second power. Except as provided in subsection (2), a nonvested interest, general power of appointment not presently exercisable because of a condition precedent, or nongeneral or testamentary power of appointment created, or to which property is subjected, by the exercise of the second power is invalid, to the extent of the exercise of the second power, unless the interest or power satisfies the uniform statutory rule against perpetuities measured from the time of the creation of the power of appointment that subjected property to, or created, the second power.

(2) To the extent a second power is created or has property subjected to it by the exercise of a first power, subsection (1) does not apply to interests or powers created by exercise of the second power if both of the following apply:

(a) The first power was not itself created or augmented by the exercise of either a first power or a second-order fiduciary power.

(b) The instrument[42] exercising the first power to subject property to or create the second power expressly declares that subsection (1) shall not apply to interests and powers created by exercise of the second power. For purposes of such a declaration, subsection (1) may be referred to as the anti-Delaware-tax-trap provision of the personal property trust perpetuities act.

(3) As used in this ~~act~~section:

(a) "Fiduciary" means, with respect to a power of appointment, that the power is held by a trustee in a fiduciary capacity.

(b) "First power" means a nonfiduciary, nongeneral power of appointment over personal property held in trust that is exercised so as to subject the property to, or to create, another power of appointment.

(c) "Nonfiduciary" means, with respect to a power of appointment, that the power of appointment is not held by a trustee in a fiduciary capacity.

(d) "Second-order fiduciary power" means a fiduciary power of appointment that is created or has property subjected to it by the exercise of 1 of the following:

(i) A first power.

(ii) A fiduciary power of appointment that was created or had property subjected to it by the exercise of a first power.

(iii) A fiduciary power of appointment whose creation or control over property subject to the power is traceable through a succession of previous exercises of fiduciary powers to the exercise of a fiduciary power that was created or had property subjected to it by the exercise of a first power.

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[42] The requirement of a writing for the *creation* of a power, *see* Mich. Comp. Laws § 556.113, entails that an exercise that creates a "second power" within the meaning of PPTPA's anti-Trap provision must be in writing; for, by hypothesis, the exercise involves the creation of a power. *See id.* § 554.92(e) [which becomes § 554.92(3)(e) under the proposal] (defining "second powers" as proper subset of powers of appointment).

(e) "Second power" means a power of appointment over personal property held in trust, other than a presently exercisable general power, that is created or to which property is subjected by the exercise of either a first power or a second-order fiduciary power.

(f) "Uniform statutory rule against perpetuities" means the uniform statutory rule against perpetuities, 1988 PA 418, MCL 554.71 to 554.78.

**554.93 Personal property held in trust; interest in or power of appointment over; validity; ~~exercise of second power; determination under uniform statutory rule against perpetuities~~**

Sec. 3. (1) Except as provided in subsection (3), an interest in, or power of appointment over, personal property held in trust is not invalidated by a rule against any of the following:

(a) Perpetuities.

(b) Suspension of absolute ownership.

(c) Suspension of the power of alienation.

(d) Accumulations of income.

(2) Except as provided in subsection (3), all of the following may be indefinitely suspended, postponed, or allowed to go on with respect to personal property held in trust:

(a) The vesting of a future interest.

(b) The satisfaction of a condition precedent to the exercise of a general power of appointment.

(c) The exercise of a nongeneral or testamentary power of appointment.

(d) Absolute ownership.

(e) The power of alienation.

(f) Accumulations of income.

~~(3) The period during which the vesting of a future interest in property may be postponed by the exercise of a second power shall be determined under the uniform statutory rule against perpetuities by reference to the time of the creation of the power of appointment that subjected property to, or created, the second power. A nonvested interest, general power of appointment not presently exercisable because of a condition precedent, or nongeneral or testamentary power of appointment created, or to which property is subjected, by the exercise of the second power is invalid, to the extent of the exercise of the second power, unless the interest or power satisfies the uniform statutory rule against perpetuities measured from the time of the creation of the power of appointment that subjected property to, or created, the second power.~~

JPS
DETROIT 40411-1 1489976v4

# EXHIBIT 6

*MEMORANDUM*

To: Legislative Development and Drafting Committee

From: Katie L. and Georgette D.

Dated: 4/25/2019

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We were asked to review legislation from other states and decide if it seemed worthwhile to investigate whether the committee should consider presenting the issue of drafting vehicle transfer on death legislation to the council. We decided that this type of legislations is worthwhile and it seemed appropriate to begin an investigation and discussion.

1. Advantages and Disadvantages.

   Some advantages.

   A. Probate avoidance. The transfer on death designation lets beneficiaries receive assets at the time of the owner's death without going through probate. Transferring vehicles in Michigan under $60,000 do not require letters of authority and the probate factor is less applicable (although still a probate asset if a probate case is opened).
   B. Ease of asset distribution. The designation also lets the owner of the asset specify the designated beneficiary, which helps the personal representative distribute the decedent's assets after death.
   C. Retains owner control over asset. With TOD designation, the named beneficiary has no access to or control over the owner's asset as long as the person is alive.
   D. Modifiable and revocable. TOD is not permanent and can either be revoked or modified.
   E. Creditor Avoidance. TOD registration may allow for creditor avoidance, which can be an advantage in some instances, especially for lower socio-economic individuals who rely on a safe vehicle for access to employment.
   F. Widely accepted and familiar transfer tool. Many people are familiar with transfer on death registrations and beneficiary designations for other common assets. Many other typically more valuable assets have TOD registration available including:
      i. Individual Retirement accounts are TOD
      ii. Life Insurance is TOD
      iii. Brokerage and Bank Accounts can be TOD
      iv. Real Property in some states can be TOD

2. Some disadvantages and complications.

   A. Creditor Avoidance.
   B. Fraud tool. Another opportunity for fraud upon the elderly, incapacitated and unsophisticated owner, since this type of legislation may allow for titles with TOD to be recorded without the knowledge, intent or consent of the owner/transferor.
   C. Insurance complications. Would the deceased owner's insurance coverage remain in effect after death, even if the beneficiary has not re-titled the vehicle? What is the impact if the TOD beneficiary is not insurable and title cannot be transferred?

3. Some Legislation Issues and Decisions.

   We reviewed the legislation for 17 states and created a spreadsheet of relevant areas covered by the various statutes. A spreadsheet of the areas that need to be discussed and decisions that need to be made about this type of legislation is attached. Here is a list of some decisions that need to be made along with how Ohio and Indiana handle the issue in their statute, along with Georgette's and Katie's opinions.

   Ohio statute – Note that upon the death of a vehicle owner, the title may be transferred to a surviving spouse – does not include all heirs like Michigan. The value of the vehicle must be $65,000 or less.

   A. Where should this legislation be located? Under EPIC or Michigan's Motor Vehicle Statute? Someplace else?
      a. Ohio: Located in their probate code; Title 21 of their code.
      b. Indiana: Located in their property section of the Indiana Code. Specifically Title 32. Property. Article 17. Interests in Property. Chapter 14. Transfer on Death Act.
      c. G & K: Michigan does not have a General Transfer on Death Act, similar to Indiana's. Most states include this under their motor vehicle code. We feel more comfortable drafting under EPIC and believe this type of legislation belongs under non-probate transfers, Article 6, Part II. We would reference this EPIC section in Michigan's Motor Vehicle Code similar to how the updated Certificate of Trust legislation was placed in the Trust Code (MCL 700.7913), and the new COT statute is referenced in the Conveyances of Real Property code (MCL 565.431, MCL 565.434 and MCL 565.435).

   B. Should the legislation cover all motor vehicles as defined under the Motor Vehicle Code, **257.216 Vehicles subject to registration and certificate of title provisions; exceptions.**? This statute is attached.
      Should it cover farm equipment; motor homes; recreational vehicles; boats and motorcycles?

a. Ohio: the statute applies to:
   i. "motor vehicle" includes manufactured homes, mobile homes. recreational vehicles, and trailers and semitrailers whose weight exceeds four thousand pounds (ORC 4505.01)
   ii. "watercraft" includes: vessel operated by machinery either permanently or temporarily affixed; sailboat other than a sailboard; inflatable, manually propelled vessel that is required by federal law to have a hull identification number meeting the requirements of the United States coast guard; canoe, kayak, pedalboat, or rowboat; any of the following multimodal craft being operated on waters in this state: (1) amphibious vehicle, (2) submersible, and (3) airboat or hovercraft; vessel that has been issued a certificate of documentation with a recreational endorsement under 46 C.F.R. 67. (ORC 1546.01)
   iii. "Outboard motor"

b. Indiana: The applicability section, IC 32-17-14-2 states:
(e) Subject to IC 9-17-3-9(g), this chapter applies to a beneficiary designation for the transfer on death of a motor vehicle or a watercraft.
***Note, Title 9 is Indiana's Motor Vehicle Code.*** **Below are relevant provisions and a definition of "motor vehicle".**

   i. IC 9-17-3-9 provides:
   (g) In general, IC 32-17-14 applies to a certificate of title designating a transfer on death beneficiary. However, a particular provision of IC 32-17-14 does not apply if it is inconsistent with the requirements of this section or IC 9-17-2-2(b).

   **IC 9-17-2-2 Application; contents**
   Sec. 2. (a) A person applying for a certificate of title for a vehicle must submit an application in the form and manner prescribed by the bureau and provide the following information:

   (1) A full description of the vehicle, including the make, model, and year of manufacture of the vehicle.
   (2) A statement of any liens, mortgages, or other encumbrances on the vehicle.
   (3) The vehicle identification number or special identification number of the vehicle.
   (4) The former title number, if applicable.
   (5) The purchase or acquisition date.
   (6) The name and Social Security number or federal identification number of the person.
   (7) Any other information that the bureau requires, including a valid permit to transfer title issued under IC 6-1.1-7-10, if applicable.

   (b) This subsection applies only to a person that receives an interest in a vehicle under IC 9-17-3-9. To obtain a certificate of title for the vehicle, the person must do the following:

(1) Surrender the certificate of title designating the person as a transfer on death beneficiary.
(2) Submit proof of the transferor's death.
(3) Submit an application for a certificate of title in the form and manner prescribed by the bureau.
[Pre-1991 Recodification Citation: 9-1-2-1(a) part.] *As added by P.L.2-1991, SEC.5. Amended by P.L.83-2008, SEC.3; P.L.125-2012, SEC.72; P.L.81-2015, SEC.1; P.L.198-2016, SEC.203.*

**ii. IC 9-13-2-105"Motor vehicle"** Sec. 105. (a) "Motor vehicle" means, except as otherwise provided in this section, a vehicle that is self-propelled. The term does not include a farm tractor, an implement of agriculture designed to be operated primarily in a farm field or on farm premises, or an electric personal assistive mobility device.
(b) "Motor vehicle", for purposes of IC 9-21, means:
(1) a vehicle that is self-propelled; or
(2) a vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.
(c) "Motor vehicle", for purposes of IC 9-32, includes a semitrailer, trailer, or recreational vehicle.
[Pre-1991 Recodification Citations: subsection (a) formerly 9-1-1-2 part; 9-4-8-4 part; 9-7-3-1 part; 9-10-1-1 part; subsection (b) formerly 9-4-1-2(b); subsection (c) formerly 9-2-1-2(j).] *As added by P.L.2-1991, SEC.1. Amended by P.L.94-1997, SEC.1; P.L.143-2002, SEC.2; P.L.248-2003, SEC.2 and P.L.265-2003, SEC.2; P.L.210-2005, SEC.9; P.L.191-2007, SEC.1; P.L.9-2010, SEC.8; P.L.92-2013, SEC.25; P.L.221-2014, SEC.12; P.L.174-2016, SEC.8; P.L.198-2016, SEC.133.*

iii. **IC 9-13-2-198.5"Watercraft"**

Sec. 198.5. "Watercraft" means a contrivance used or designed for navigation on water, including a vessel, boat, motor vessel, steam vessel, sailboat, vessel operated by machinery either permanently or temporarily affixed, scow, tugboat, or any marine equipment that is capable of carrying passengers, except a ferry.
*As added by P.L.71-1991, SEC.8.*

c. G & K: We feel the definition should be as broad. We're not sure at this point if it should apply to farm equipment, tugboats, etc. For legislative drafting purposes, it may need to be broader than we intend.

C. Should the legislation authorize the TOD language on the motor vehicle title? By attachment? On the Registration? Both?
   a. Ohio: TOD language will be listed on the certificate of title.
   b. Indiana: TOD language on the certificate of title, even at the time of purchase.
   c. G & K: We agree the certificate of title is the most obvious place. If allowed at the time of purchase, we anticipate pushback from other organizations, such as the automotive industry.

D. Should the legislation allow TOD registration, even if the vehicle is jointly titled?
   a. Ohio: No. The vehicle must be solely owned. (ORC 2131.13(B))
   b. Indiana: Yes. Multiple owners allowed.

c. G & K: Multiple owners should be allowed. Consider including in legislation that surviving joint owner has authority to change TOD beneficiary.

E. Should the legislation allow the TOD beneficiary to be an LLC, Corporation, etc.
   a. Ohio: Yes. TOD may designate one or more persons as the beneficiary. "Person" means an individual, corporation, organization or other legal entity. (ORC 2131.13(A)(3))
   b. Indiana: Yes. Under IC 32-17-14-3 (2) "Beneficiary" means a person designated or entitled to receive property because of another person's death under a transfer on death transfer.
      Under IC 32-17-14-3 (2) "Person" means an individual, a sole proprietorship, a partnership, an association, a fiduciary, a trustee, a corporation, a limited liability company, or any other business entity.
   c. G & K: Yes. Note, we are not addressing whether the owner can be anything else than an individual or individuals because we need a living person to trigger the "transfer on death" event.
   d. Michigan definitions:
      "Beneficiary" includes, but is not limited to, the following:
      (i) In relation to a trust, a person that is a trust beneficiary as defined in section 7103.
      (ii) In relation to a charitable trust, a person that is entitled to enforce the trust.
      (iii) In relation to a beneficiary of a beneficiary designation, a person that is a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), of a pension, profit-sharing, retirement, or similar benefit plan, or of another nonprobate transfer at death.
      (iv) In relation to a beneficiary designated in a governing instrument, a person that is a grantee of a deed, devisee, trust beneficiary, beneficiary of a beneficiary designation, donee, appointee, taker in default of a power of appointment, or person in whose favor a power of attorney or power held in an individual, fiduciary, or representative capacity is exercised.
      MCL700.1103(d)

      "Organization" means a corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity.
      MCL700.1106(i)

      "Person" means an individual or an organization.
      MCL700.1106(o)

F. Should the legislation establish a value limit on the vehicle for TOD registration and if so, what is the limit and how is it determined?
   a. Ohio: No value limit for a TOD. Note: There is a $65,000 limit when the title is transferred via survivorship, to a surviving spouse.
   b. Indiana: None.
   c. G & K: No value limit for a TOD.

G. Should the legislation require that a lien be resolved before a TOD is added to a vehicle?
   Michigan law (MCL 257.236) allows an heir to transfer the Decedent's vehicle using a Death Certificate. The Certification From the Heir to a Vehicle (see attached) requires that a lien is terminated first.
   a. Ohio: No. The statute provides that this Section of OH law does not limit the rights of any creditor of the owner against any TOD beneficiary. Note: the lien does not have to be resolved when the title is transferred to a surviving spouse.
   b. Indiana: No.
   c. G & K: Yes, the lien should be resolved. We compared this process to that of a lady bird deed for real property – the transfer of real property with a lady bird deed does not require that a mortgage be paid off first. One difference though is that the lender maintains their lien on the real property and the ability to foreclose. It would be more difficult for a lien holder of a vehicle to repossess a car because it is mobile. But since two of our chosen states have allowed for TOD with an existing lien, we could be persuaded otherwise.

# EXHIBIT 7

## MOTOR VEHICLES TOD
## STATE STATUTE OVERVIEW

| STATE | Statute | Year Enacted | Statute location | Vehicles Covered? | TOD on Registration or Title | Joint Own allowed |
|---|---|---|---|---|---|---|
| Arizona | 28-2055 | 2016 | Vehicle Titles | Vehicle-broad | By attachment | Yes |
| Arkansas | 27-14-727 | 2012 | Transportation | Unclear | Yes | Yes |
| California | 4150.7 | ? | Vehicle Code | Unclear | Yes | No |
| Colorado | 42-6-110.5 | 2016 | Transportation & MV | Unclear | Title | Yes |
| Connecticut | 246-14-16 | 2003 | Motor Vehicles | Broad | Registration | No |
| Delaware | 21 Del. C. Sec 2304 | 2012 | Motor Vehicles | Broad | Title | Yes |
| Illinois | (625 ILCS 5/3-107) | ? | Motor vehicles | ? | Title | No |
| Indiana | IC 32-17-14 | 2012 | Property | Broad | Title | Yes |
| Kansas | KSA 59-3508 | 2015 | Probate Code | Broad | Title | Yes |
| Maryland | HB492 Chapter 684 | 2017 | Motor Vehicle Code | | Title | No |
| Missouri | 301.681 RSMo | 2004 | Motor Vehicles | | Title | Yes |
| Nebraska | NE.Rev.Stat.30-2715.01 | 2010, 2017 | Motor Vehicles | Motor vehicle | Title | Yes |
| Nevada | NRS 482.247 | 2007 | Motor Veh & Trailers | Broad | Title | Yes (no businesses or ten. in common) |
| Ohio | ORC 2131.13 | 2002 | Title 21-Miscellaneous | Broad | Title | No |
| Oklahoma | OAC 710:60-5-4 & | 2016 | Oklahoma Tax Commission | | Title or assignment | Yes |
| Oklahoma | 710:60-5-77 | 2016 | Chapter 60 Motor Vehicles | | Title | |
| Vermont | 23 VSA 2023 | 2015 | Title 23: Motor Vehicles | Broad | Title | No |
| Virginia | VA Code ANN 46.2-633.2 | 2013 | Title 46.2 Motor Vehicles | Broad | Title | No |

## MOTOR VEHICLES TOD
## STATE STATUTE OVERVIEW

| Beneficiaries Allowed | Rev. Trust Beneficiary? | Forms Available | Statute title | Value Limit? |
|---|---|---|---|---|
| Multiple-up to 4 | Unknown | Yes | Certificate of title; content requirements; transfer on death provision | |
| One individual | Unknown | Yes-TOD application | Transportation; MV Reg & Licensing; UMV Admin, Cert. of Title; Cert. of Title w bene | None |
| One individual | Unknown | Unknown | Unclear | None |
| Multiple beneficiaries | Unknown | Yes | Certificate of title;-arrangements for totupon death-beneficiary designation forms | None |
| One beneficiary | Unknown | Yes | Transfer of ownership.Designation of beneficiary. Fees. Penalties. | None |
| Two | Yes | Yes | Certificate of Title; Transfer -on-death | None |
| One individual | No | Yes | Contents and effect. | None |
| Broad | Yes | Yes | Transfer on death property act | None |
| Multiple | Unknown | Yes | Motor vehicles; transfer on death | None |
| Multiple | Unknown | Yes | Vehicle Laws - Certificate of Title - Transfer-on-Death Beneficiary Designation | None |
| Joint beneficiaries allowed | No | Yes | Certificate of ownership in beneficiary form | None |
| Up to 35 | Yes | yes | Motor vehicle; transfer on death; certificate of title. | None |
| Multiple | Unknown | Yes | Certificate of Title in Beneficiary form, etc. | |
| Ind., corp, entity | Yes | Yes | TOD of Motor Vehicle, Watercraft, or Outboard Motor | |
| Yes | Unclear | Yes | | |
| | 1 Unclear | Yes | Transfer of Interet in Vehicle | |
| One | Unclear | Yes | Transfer of Title on Death | |

## Motor Vehicle TODs
## Allowed Owners and Beneficiaries

| State | Ownership | Beneficiaries allowed |
|---|---|---|
| Arizona | Multiple | The statute suggests 1. The MV Div. ben.designation form |
| Arkansas | 1-3 persons | 1 individual-no businesses, etc. allowed |
| California | 1 owner | 1 TOD beneficiary |
| Colorado | Joint owners allowed but not ten. in common | One or more specifically named persons or entities |
| Connecticut | 1 natural person | One beneficiary |
| Delaware | 1 or more if ten. in com or joint tenants | Multiple |
| Illinois | 1 owner & not a bus. | One beneficiary |
| Indiana | Joint owners/bus allowed | Appears to be one |
| Kansas | 1 or joint | Multiple |
| Maryland | 1 owner only-Broad def | 1 beneficiary only |
| Missouri | Multiple (if joint tenants or tenants by entirety) | Multiple (if joint tenants or tenants by the entirety) |
| Nebraska | Joint (up to 35) | Up to 35 |
| Nevada | Joint owners allowed | Multiple |
| Ohio | 1 owner | Individual, corporation or entity |
| Oklahoma | Joint individual owners ok | Unclear but appears to be 1 |
| Vermont | Joint owners/partners allowed | Unclear, but appears to be multiple |
| Virginia | 1 natural person only | Unclear but appears to be 1 natural person |
| **Summary** | **6 of 17 allow 1 owner** | **10 of 17 allow only single beneficiary** |

## Motor Vehicle TOD

### Lienholder status by state

| State | Lien addressed | Transfer allowed w/ lien | LH consent for transfer |
|---|---|---|---|
| Arizona | Yes | Unclear | Unclear |
| Arkansas | Yes | No | NA |
| California | No | Unclear | NA |
| Colorado | No | Unclear | NA |
| Connecticut | Yes | Yes | Beneficiary rights subordinate to lienholder |
| Delaware | Yes | Yes | Subject to rights of lienholders |
| Illinois | No | NA | |
| Indiana | Yes | Yes | No, but subject to lien |
| Kansas | Yes | Yes, subject to lien | Forms require lienholder's consent to transfer title |
| Maryland | Yes | Yes, subject to lien | Statute refers to creditors of owner |
| Missouri | Yes | Subject to outstanding security interest | |
| Nebraska | Yes | Subject to the rights of LH | No, but subject to lien |
| Nevada | YEs | No | If a lienholder, no transfer |
| Ohio | Yes | Rights of creditors not limited | |
| Oklahoma | Yes | No | Vehicle cannot have a lien to be transferred TOD |
| Vermont | Yes | Yes | No, unless transfer is breach of security agreement |
| Virginia | Yes | No | Cannot add TOD beneficiary if lienholder on title |

## Motor Vehicle TODs

## Charity as TOD beneficiary by state

| State | Charity as Beneficiary | Miscellaneous information |
|---|---|---|
| Arizona | Unclear from statute. No definition in Chpt. 7 | Form does not prohibit |
| Arkansas | Not permitted | |
| California | Unclear from statute. No limitation. | |
| Colorado | Entities allowed | Statute does not prohibit |
| Connecticut | No mention. Beneficiary undefined | |
| Delaware | No mention. | Statute specifically allows a trust as beneficiary |
| Illinois | No mention | One "individual" permitted on claim form |
| Indiana | Unclear, but beneficiary includes "association" | |
| Kansas | Unclear | Beneficiary not defined |
| Maryland | Unclear | |
| Missouri | Unclear | |
| Nebraska | Yes, see definitions Neb Rev. Statutes 30-233 | |
| Nevada | Unclear | |
| Ohio | The term "charity" not used but allows legal entities | Beneficiary includes a "legal entity" |
| Oklahoma | Unclear | |
| Vermont | Unclear | |
| Virginia | Unclear, but owner needs to be 1 natural person | |

# Council Materials

**MEETING OF THE COUNCIL OF THE**
**PROBATE AND ESTATE PLANNING SECTION**
**OF THE STATE BAR OF MICHIGAN**
June 14, 2019
**Agenda**

I. Call to Order

II. Introduction of Guests

III. Excused Absences

IV. Lobbyist Report—Public Affairs Associates

V. Monthly Reports:

- A. Minutes of Prior Council Meeting – Attachment A
- B. Chair's Report
- C. Treasurer's Report – Attachment B
- D. Committee on Special Projects

VI. Other Committees Presenting Oral Reports

- A. Amicus Committee – Andrew Mayoras – Attachment C
- B. Court Rules, Forms, & Proceedings Committee—Melisa M.W. Mysliwiec – Attachment D
- C. Guardianships, Conservatorships, and End of Life Committee—Kathleen M. Goetsch
- D. Nominating Committee—Shaheen I. Imami—Attachment E

VII. Committees Present Written Reports

- A. Legislative Development and Drafting Committee—Nathan Piwowarski—Attachment F
- B. Taxation Section Liaison—Neal Nusholtz—Attachment G

VIII. Other Business

IX. Adjournment

Section Annual Meeting and Next Probate Council Meeting: Friday, September 20, 2019

# A

**Meeting of the Council of the**
**Probate and Estate Planning Section of the**
**State Bar of Michigan**

**April 12, 2019**
**Lansing, Michigan**

**Minutes**

I. Call to Order

The Chair of the Council, Marguerite Munson Lentz, called the meeting to order at 10:33 a.m.

II. Introduction of Guests

A. Meeting attendees introduced themselves.
B. The following officers and members of the Council were present: Marguerite Munson Lentz, Chair; David P. Lucas, Vice Chair; David L.J.M. Skidmore, Secretary; Mark E. Kellogg, Treasurer; Christopher J. Caldwell; Kathleen M. Goetsch (via remote attendance); Angela M. Hentkowski (via remote attendance); Hon. Michael L. Jaconette; Robert G. Labe; Michael G. Lichterman; Katie Lynwood; Raj A. Malviya; Richard C. Mills; Melisa M.W. Mysliwiec; Lorraine F. New (via remote attendance); Kurt A. Olson; Nathan R. Piwowarski; Christine M. Savage; James F. Anderton; Neal Nusholtz; Andrew W. Mayoras; and Nazneen S. Hasan (via remote attendance). A total of 22 Council officers and members were present, constituting a quorum.
C. The following ex officio members of the Council were present: Michael J. McClory; and Susan S. Westerman.
D. The following liaisons to the Council were present: Susan Chalgian; Jeanne Murphy; and Patricia M. Oullette.
E. Others present: Rebecca K. Wrock; Ryan Bourjaily; David Sprague; Angela Wetherby; Stephen Dunn; Warren Kreeger; Ken Silver; Joe Weiler; Diane Huff; Dan Hilker (via remote attendance); Sandy Glazer (via remote attendance); Ken Seavoy (via remote attendance); and Sam Auxoll (via remote attendance).

III. Excused Absences

The following officers and members of the Council were absent: Christopher A. Ballard, Chair Elect.

IV. Lobbyist Report – Public Affairs Associates

Becky Beckler of Public Affairs Associates provided a verbal report. Drafts of the EPIC omnibus amendments legislation are being reviewed by Nathan Piwowarski. Drafts of the ARP and voidable transactions legislation should be back in the next few weeks. After the drafts are reviewed and approved, the legislation will be introduced. There was also discussion about the vulnerable adults legislation and how quickly it is likely to move.

V. Monthly Reports

A. Minutes of Prior Council Meeting (David L.J.M. Skidmore):

It was moved and seconded to approve the Minutes of the March 8, 2019 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.

B. Chair's Report (Marguerite Munson Lentz):

The Chair reported on: (1) Nathan Piwowarski and Nazneed Hasan's appointment to the Elder Abuse Task Force; (2) a request for participation in the SBM Lawyer Referral Service; and (3) the updated committee and liaison lists.

It was moved and seconded to approve payment of $200 from the Hearts and Flowers fund for the cycling tour at the 2019 Probate Institute. On voice vote, the Chair declared the motion approved.

C. Treasurer's Report (Mark E. Kellogg):

The Treasurer reported on the year to date budget and reminded members to timely submit reimbursement requests.

D. Committee on Special Projects (Katie Lynwood):

Katie Lynwood reported on the discussion at the Committee on Special Projects meeting. She reported that Nathan Piwowarski led a discussion on the new proposed vulnerable adult legislation, and it was proposed to create an ad hoc committee to consider this legislation. She reported that Andy Mayoras's lawyer-drafter committee sought input whether to expand the proposed legislation to non-lawyers, and that the consensus on that question was "no."

Regarding the Safe Families for Children Act (discussion led by Kathy Goetsch), the committee's motion is:

To amend the Safe Families for Children Act, MCL 722.1551 et seq., by adding the phrase "under this act" to Sections 9(3), 11(a) and (b), and 13(2), as noted in the meeting materials.

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 a vote of 22 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 1 not voting.

VI. Other Committees Presenting Oral Reports

A. Court Rules, Forms, & Proceedings Committee

Melisa Mysliwiec reported that there is a committee memorandum in the materials regarding the Michigan Supreme Court's Order in ADM File No. 2002-37, adopting amendments to several court rules to accommodate e-filing.

B. Fiduciary Exception to the Attorney-Client Privilege Ad Hoc Committee

Warren Kreeger gave a report on the status of the committee's work.

C. Guardianships, Conservatorships, & End of Life Committee

Kathy Goetsch gave a report on two legislative proposals which were not related to the Section and which did not merit public policy positions from the Section.

D. Legislative Development and Drafting Committee

Nathan Piwowarski noted that there is a report from the committee in the meeting materials.

E. Tax Committee

Raj Malviya gave a report on two tax bills pending before Congress.

VII. Committees Presenting Written Reports (included in the meeting agenda materials)

A. State Bar & Section Journals

B. Taxation Section Liaison

VIII. Other Business

Angela Hentkowski reported that 4 requests had been received for the 2 Probate Institute registrations which the Section had available to give away.

It was moved and seconded to pay up to $730 (i.e., 2 x $365) to pay for two additional registration scholarships. On voice vote, the Chair declared the motion approved.

Michael Lichterman reported that the Listserv archives had been successfully transferred to SBM Connect.

Michael McClory reported that mandatory e-filing in probate courts is coming, but for attorneys only.

IX. Adjournment

Seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 11:18 a.m.

Respectfully submitted,
David L.J.M. Skidmore, Secretary

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# B

Probate and Estate Planning Section: 2018-2019

TREASURER'S MONTHLY ACTIVITY REPORT (APRIL)

| Revenue | State Bar Activity Report (April) | Cumulative Monthly (through April) | Budget 2018-19 | Comments |
|---|---|---|---|---|
| 1-7-99-775-1050 Probate/Estate Planning Dues | | $ 108,205.00 | $ 112,000.00 | |
| 1-7-99-775-1055 Probate/Estate Stud/Affil Dues | | $ 875.00 | $ 800.00 | |
| 1-7-99-775-1330 Subscription to Newsletter | $ - | $ - | $ - | |
| 1-7-99-775-1470 Publishing Agreement Account | $ - | $ - | $ 650.00 | |
| 1-7-99-775-1755 Pamphlet Sales Revenue | $ - | $ - | $ - | |
| 1-7-99-775-1935 Miscellaneous Revenue | | $ 325.00 | $ - | |
| **Total Revenue** | **$ -** | **$ 109,405.00** | **$ 113,450.00** | |
| | | | | |
| Hearts and Flowers Fund (in Fraser Law Trust Acct) | $ - | $ 844.01 | $ 844.01 | Not budgeted item, but this is the current carryover balance in Fraser Firm trust account |
| April Deposits (x3) $135.00<br>April Expenses (x3) $329.80 | | | | Expenses: Charity Capital Cycling Club-Protect Council; Mike McClory Father Sympathy Flowers; Rick Mills' Wife Sympathy Flowers! |
| Total Fund | $ - | $ 844.01 | $ 844.01 | |
| | | | | |
| **Expenses** | | | | |
| 1-9-99-775-1127 Multi-Section Lobbying Group | $ 2,500.00 | $ 17,500.00 | $ 30,000.00 | |
| 1-9-99-775-1145 ListServ | $ 10.00 | $ 60.00 | $ 225.00 | |
| 1-9-99-775-1276 Meetings | $ 1,166.00 | $ 13,216.62 | $ 16,000.00 | |
| 1-9-99-775-1283 Seminars | $ 350.00 | $ 5,350.00 | $ 20,000.00 | |
| 1-9-99-775-1297 Annual Meeting Expenses | $ - | $ - | $ - | |
| 1-9-99-775-1493 Travel | $ 403.68 | $ 5,472.59 | $ 15,000.00 | |
| 1-9-99-775-1528 Telephone | $ 0.52 | $ 88.11 | $ 1,250.00 | |
| 1-9-99-775-1549 Books & Subscriptions | $ - | $ - | $ 750.00 | |
| 1-9-99-775-1822 Litigation-Amicus Curiae Brief | $ - | $ - | $ 55,000.00 | |
| 1-9-99-775-1833 Newsletter | | $ 8,200.00 | $ 10,000.00 | |
| 1-9-99-775-1987 Miscellaneous | | $ 1,689.40 | $ 7,500.00 | Line item increased by $3,000 (networking reception @ Probate Institute) & $5,000 (networking lunch @ Drafting Estate Planning Documents Seminar) as budget amdmts |
| 1-9-99-775-1297 Annual Meeting Expenses | $ - | $ - | $ 1,000.00 | |
| 1-9-99-775-1861 Printing | $ - | $ - | $ 100.00 | |
| 1-9-99-775-1868 Postage | $ - | $ - | $ - | |
| **Total Expenses** | **$ 4,430.20** | **$ 51,576.72** | **$ 156,825.00** | |
| | | | | |
| **Net Income** | **$ (4,430.20)** | **$ 57,828.28** | **$ (43,375.00)** | |
| | | $ - | | |
| Beginning Fund Balance<br>1-5-00-775-0001 Fund Bal-Probate/Estate Plan | | $ 172,927.32 | $ 172,927.32 | |
| **Ending Fund Balance** | | **$ 230,755.60** | **$ 129,552.32** | |
| | | | | |
| Amicus Reserve | | $ - | | |
| Beginning Fund Balance | | $ 19,167.25 | $ 19,167.25 | |
| Withdrawals | | $ - | | |
| Ending Fund Balance | | $ - | | |
| General Fund | | $ 153,760.07 | $ 153,760.07 | |
| Total Fund | | $ 172,927.32 | $ 172,927.32 | |

Doc. #17545190

**Probate and Estate Planning Section: 2018-2019**
**TREASURER'S MONTHLY ACTIVITY REPORT (MARCH)**

| Revenue | | State Bar Activity Report (March) | Cumulative Monthly (through March) | Budget 2018-19 | Comments |
|---|---|---|---|---|---|
| 1-7-99-775-1050 | Probate/Estate Planning Dues | | $ 108,205.00 | $ 112,000.00 | |
| 1-7-99-775-1055 | Probate/Estate Stud/Affil Dues | | $ 875.00 | $ 800.00 | |
| 1-7-99-775-1330 | Subscription to Newsletter | $ - | $ - | $ - | |
| 1-7-99-775-1470 | Publishing Agreement Account | $ - | $ - | $ 650.00 | |
| 1-7-99-775-1755 | Pamphlet Sales Revenue | $ - | $ - | $ - | |
| 1-7-99-775-1935 | Miscellaneous Revenue | $ 325.00 | $ 325.00 | $ - | |
| **Total Revenue** | | **$ 325.00** | **$ 109,405.00** | **$ 113,450.00** | |
| | | | | | |
| Hearts and Flowers Fund (in Fraser Law Trust Acct) | | $ - | $ 1,038.81 | $ 1,038.81 | Not budgeted item, but this is the current narrower balance in Fraser firm trust account |
| Total Fund | | $ - | $ 1,038.81 | $ 1,038.81 | |
| | | | | | |
| **Expenses** | | | | | |
| 1-9-99-775-1127 | Multi-Section Lobbying Group | $ 2,500.00 | $ 15,000.00 | $ 30,000.00 | |
| 1-9-99-775-1145 | ListServ | $ 10.00 | $ 50.00 | $ 225.00 | |
| 1-9-99-775-1276 | Meetings | $ 2,332.00 | $ 12,050.62 | $ 16,000.00 | |
| 1-9-99-775-1283 | Seminars | $ 5,000.00 | $ 5,000.00 | $ 20,000.00 | |
| 1-9-99-775-1297 | Annual Meeting Expenses | $ - | $ - | $ - | |
| 1-9-99-775-1493 | Travel | $ 940.18 | $ 5,068.91 | $ 15,000.00 | |
| 1-9-99-775-1528 | Telephone | $ 3.77 | $ 87.59 | $ 1,250.00 | |
| 1-9-99-775-1549 | Books & Subscriptions | $ - | $ - | $ 750.00 | |
| 1-9-99-775-1822 | Litigation-Amicus Curiae Brief | $ - | $ - | $ 55,000.00 | |
| 1-9-99-775-1833 | Newsletter | | $ 8,200.00 | $ 10,000.00 | |
| 1-9-99-775-1987 | Miscellaneous | $ 1,546.30 | $ 1,689.40 | $ 7,500.00 | Line item increased by $3,000 (networking reception @ Probate Institute) & $5,000 (networking lunch @ Drafting Estate Planning Documents Seminar) as budget amdmts |
| 1-9-99-775-1297 | Annual Meeting Expenses | $ - | $ - | $ 1,000.00 | |
| 1-9-99-775-1861 | Printing | $ - | $ - | $ 100.00 | |
| 1-9-99-775-1868 | Postage | $ - | $ - | $ - | |
| **Total Expenses** | | **$ 12,332.25** | **$ 47,146.52** | **$ 156,825.00** | |
| | | | | | |
| **Net Income** | | **$ (12,007.25)** | **$ 62,258.48** | **$ (43,375.00)** | |
| | | | $ - | | |
| Beginning Fund Balance<br>1-5-00-775-0001 | Fund Bal-Probate/Estate Plan | | $ 172,927.32 | $ 172,927.32 | |
| **Ending Fund Balance** | | | **$ 235,185.80** | **$ 129,552.32** | |
| | | | | | |
| Amicus Reserve | | | $ - | | |
| | Beginning Fund Balance | | $ 19,167.25 | $ 19,167.25 | |
| | Withdrawals | | $ - | | |
| | Ending Fund Balance | | $ - | | |
| General Fund | | | $ 153,760.07 | $ 153,760.07 | |
| Total Fund | | | $ 172,927.32 | $ 172,927.32 | |

# C

BARRON, ROSENBERG,
MAYORAS & MAYORAS, P.C.

# MEMORANDUM

**To:** Probate Council
**From:** Andrew W. Mayoras
**Subject:** Application for Amicus Brief - Marilyn Burhop Conservatorship
**Date:** May 31, 2019

Overview

This is an appeal of hotly-contested litigation that was initiated by a conservator who sought to reclaim assets and to challenge changes made to estate planning documents that the conservator believed were improper, based on transfers and changes made prior to the initiation of the conservatorship.

After lengthy litigation in the Washtenaw County Probate Court, the parties settled the underlying dispute at mediation, but left open the issue of the conservator's entitlement to fiduciary fees and reimbursement of attorney fees. A separate evidentiary hearing was held in the Probate Court on that issue, after which a written opinion was issued. The Court granted the conservator's request for payment of fiduciary fees and reimbursement of attorney fees in full. The opposing party from the underlying litigation appealed that decision to the Michigan Court of Appeals, which affirmed the decision in an unpublished opinion.

The Appellant then filed an application for leave to appeal to the Michigan Supreme Court, which is pending. Seeking support for the application, the Appellant submitted an Amicus Request to the Probate and Estate Planning Section of the State Bar of Michigan. The Appellant raises four issues as follows:

(1) the scope of a conservator's authority under the Estates and Protected Individuals Code ("EPIC") related to a ward's pre-conservatorship acts;

(2) whether wills and will-substitutes (such as revocable trusts, beneficiary designations, and joint ownership arrangements) may be challenged pre-mortem;

(3) the purported abrogation of common law precedent decided prior to the effective date of EPIC regarding a conservator's compensation rules; and

(4) whether pure speculation by a conservator is sufficient to justify the payment of fiduciary and attorney fees from an estate for litigation commenced by the conservator.

Recommendation

The Amicus Committee recommends that the Probate Section deny the application to file an amicus brief at this time. Primarily, the Committee believed that the specific items challenged by the Appellant turns on factual disputes that the Court of Appeals determined contrary to the Appellant. Those issues relate to a fact-specific fee dispute that is not likely to have broader impact among Section Members and their clients.

In particular, the Court of Appeals found that the conservator's decision to initiate litigation was not based on speculation alone, and that the assets sought to be recovered in litigation did not relate purely to wills and will-substitutes, but also included assets that, if recovered, would have been available to the conservator for the benefit of the ward. Further, the Committee believes that the Court of Appeals appropriately analyzed the conservator's authority to initiate and prosecute a civil action for the return of property in the conservatorship estate, even though the challenged transfers occurred prior to the establishment of the conservatorship. The fee standards discussed in the Opinion were deemed not to be significant enough to warrant an amicus brief, at least at this stage where leave has not been granted.

Certainly, the appeal presents some interesting legal issues that may warrant further exploration if application for leave to appeal is granted by the Supreme Court, and the Committee would certainly welcome the opportunity to re-evaluate the issues if and when that were to happen.

PRINCE
LAW FIRM

Shaheen I. Imami
Kelli A. Nearhood
Chiara F. Mattieson
Karen Fairman
Ryan P. Bourjaily
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May 20, 2019
***Sent via Email and First-Class Mail***

**BODMAN PLC**
Attn: Marguerite Munson Lentz, Esq.
1901 Saint Antoine Street, Floor 6
Ford Field
Detroit, MI 48226-2336

**BARRON ROSENBERG MAYORAS & MAYORAS PC**
Attn: Andrew Mayoras, Esq.
1301 West Long Lake Road, Suite 340
Troy, MI 48098-6349

Re: *In re Marilyn Burhop Conservatorship*
Washtenaw County Probate Court File No. 14-326-CA
Court of Appeals File No. 340771
Michigan Supreme Court File No. 159428

Dear Ms. Lentz and Mr. Mayoras:

Please find the enclosed Application for Amicus Consideration (the "Application") regarding the above-captioned matter. As requested in the Application, please forward the enclosed documents to the Amicus Curiae Committee of the Probate and Estate Planning Section of the State Bar of Michigan (the "Section") for review and a determination as to whether our client's position would receive the Section's support through the filing of an Amicus Brief.

Further, please note that my Associate, Ryan Bourjaily, is a current member of the Amicus Committee. As Ryan has assisted me with the appeal in the above-captioned matter, his involvement in the Section's consideration of the enclosed Application presents a conflict and I understand that he will not have a vote on the Amicus Committee.

Thank you in advance for your consideration of this matter. If you have any questions, please do not hesitate to contact me. Thank you.

VERY TRULY YOURS,

SHAHEEN I. IMAMI
(Voice Mail Ext. 7771 □ sii@probateprince.com)

SII: rpb
http://pgpportal.probateprince.local/Client Documents/BURHOP - MARILYN - GA-CA/LT Attys Mayoras and Lentz encl Application for Consideration.docx

**Probate and Estate Planning Section of the State Bar of Michigan**
**Amicus Curiae Committee**
**Application for Consideration**

**DATE:** April 29, 2019

**NAME:** Shaheen I. Imami **P NUMBER:** P54128

**FIRM NAME:** Prince Law Firm

**ADDRESS:** 800 W. Long Lake Road, Suite 200

**CITY:** Bloomfield Hills **STATE:** Michigan **ZIP CODE:** 48302

**PHONE:** (248) 865-8810 **FAX:** (248) 865-0640

**EMAIL:** sii@probateprince.com

**NAME OF CASE:** *In the Matter of Marilyn Burhop, a Protected Individual*
(Washtenaw County Probate Court File No. 14-326-CA) (Court of Appeals File No. 340771)

**PARTIES INVOLVED:** Constance L. Jones, as Former Conservator for Marilyn Burhop (Petitioner-Appellee); Robert Sirchia, as Trustee of the Marilyn Burhop Revocable Trust and Agent of Marilyn Burhop (Respondent-Appellant).

**OTHER ATTORNEYS OF RECORD:**

Suzanne R. Fanning (P55793)
Attorneys for Petitioner/Appellee
Constance Jones
5340 Plymouth Road, Suite 203
Ann Arbor, MI 48105-9559
Phone: (517) 265-7242
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Laurie S. Longo (P42203)
Attorneys for Petitioner/Appellee
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Phone: (734) 730-3936

**PROCEDURAL POSTURE:**

After the guardianship and conservatorship proceedings initially began in early-2014, Constance Jones ("Appellee") commenced various litigation related to Marilyn Burhop ("Marilyn"), which developed into several proceedings and a civil action (collectively, the "Litigation"). Of the several proceedings, Robert Sirchia ("Appellant") and/or his wife ("Appellant's wife") commenced only the following two: (1) the petition to change the venue of the guardianship proceedings to Macomb County, filed in July 2015; and (2) the petition to terminate or modify the guardianship, filed in October 2016 (based on the conduct of Kathleen Carter, Marilyn's court-appointed temporary guardian). Both pleadings were filed in Marilyn's guardianship matter. All others were commenced by Appellee or others aligned with Appellee, including, but not limited to,

the Humane Society of Huron Valley ("HSHV").[1] The disputed fees were charged in the conservatorship proceeding, the guardianship proceeding, and the civil action – the conduct within each is relevant to Appellant's Application for Leave to Appeal to the Michigan Supreme Court ("Application for Leave") – which is why the Court of Appeals took judicial notice of each for purposes of the underlying appeal. *See* **Exhibit A**, Appellant's Application for Leave to Appeal to Michigan Supreme Court, without attachments ("Exhibit A").

As prefaced above, on July 29, 2015, Appellant obtained an order for change of venue to relocate Marilyn to a care facility that was geographically closer to Appellant and Appellant's wife. On July 30, 2015, Appellee filed a petition for instructions regarding Marilyn's change of residence and certain property which, in part, challenged Appellant's decision to change Marilyn's residence and guardianship from Washtenaw County to Macomb County, as well as a challenge to Appellant's decision to restrict access of certain individuals to Marilyn. The petition for instructions was filed by Appellee in her capacity as conservator in the conservatorship proceeding and also claimed that Appellant and Appellant's wife were misappropriating Marilyn's property. As a result of Appellee's petition for instructions, the probate court vacated the transfer of the guardianship from Washtenaw County to Macomb County.

On March 21, 2016, Appellee filed a petition to terminate or modify the guardianship, in her capacity as conservator, seeking the removal of Appellant and Appellant's wife as Marilyn's guardians based on the Appellee's "discovery" of a substantial gift from Marilyn; however, no allegations were made claiming that Appellant or Appellant's wife breached any of their duties as guardians. On April 11, 2016, Appellant filed objections to the petition to terminate or modify refuting Appellee's allegations and identifying the deficiencies in Appellee's request.

On April 21, 2016, the probate court held a hearing, suspended Appellant and Appellant's wife as Marilyn's guardians, and appointed Kathleen Carter ("Carter") as temporary guardian. During the hearing, Appellee did not produce any evidence that would constitute a breach of fiduciary duty under MCL 700.5301 that applies to a guardian's lack of care of or potential harm to their ward.

Also on April 21, 2016, Appellee filed her verified petition for return of property and to void certain estate planning documents. The verified petition sought to invalidate or set aside the following of Marilyn's acts undertaken between eight and 13 months prior to the establishment of the conservatorship: (1) a substantial cash gift from Marilyn to Appellant's wife in April 2013; (2) a July 2013 deed drafted by Marilyn's attorney creating a joint tenancy with rights of survivorship in Marilyn's house; (3) an August

[1] The multiplicity of proceedings is relevant in the analysis of Appellee's request the allowance of fiduciary and attorney fees in excess of over $200,000.00 that resulted from the Litigation. The vast majority of Appellee's fiduciary and attorney fees were the subject of Appellant's objections and the motivation behind filing his claim of appeal.

2013 will drafted by Marilyn's attorney naming Appellant's wife as the primary devisee of Marilyn's post-death estate in lieu of HSHV, consistent with Marilyn's August 2013 will.

On June 9, 2016, after retaining additional counsel, Appellee and her hand-picked Co-Plaintiff, HSHV, commenced a new civil action by filing their complaint for undue influence, fraud, and conversion. The complaint sought to invalidate the cash gift, the will, the deed, and the trust amendment – the counts in which were also provided in Appellee's prior petition for instructions filed in the conservatorship matter. Also on June 9, 2016, shortly after being appointed temporary guardian, Carter focused her efforts to marginalize and Appellant's wife from Marilyn by filing a petition for instructions to revoke all health care powers of attorney designating Appellant's wife as Marilyn's patient advocate. Additionally, Carter relocated Marilyn from Macomb County back to Washtenaw County, while refusing to communicate with or otherwise share information with Appellant and Appellant's wife (or their counsel).

On November 2, 2016, HSHV filed a motion to amend the complaint to add a count for tortious interference with business expectancy. On November 7, 2016, Appellant filed a response to the motion to amend and argued that tortious interference with business expectancy was not recognized in Michigan in the context of an incomplete gift or the creation of an *inter vivos* revocable trust that provides for a post-death gift. The probate court held a hearing on November 10, 2016, and again ruled against Appellant and Appellant's wife by permitting HSHV to amend its complaint. On November 14, 2016, Appellee and HSHV filed their amended complaint, consistent with the probate court's order.

On November 18, 2016, Appellant filed his: (1) answer and affirmative defenses to the amended complaint; and (2) objections and affirmative defenses to Appellee's verified petition for return of property and to void certain estate planning documents. Discovery was then conducted in the guardianship proceeding, the conservatorship proceeding, and the civil action.

Subsequently, Appellant filed three motions for summary disposition (or "MSDs") that intended to address all of Appellee's claims in the conservatorship proceeding and the civil action, including the repetitious nature of the claims in each. Appellee responded by filing her motion to strike – in which she claimed that Appellant's motions for summary disposition improperly addressed more than one issue and exceed the 20-page limit imposed by MCR 2.116. By agreement, the MSDs were amended, and limited to a single issue each as requested. This resulted in 14 amended MSD to which Appellee objected.

The initial mediation session in September 2016, among Appellant, Appellant's wife, Appellee, HSHV, and Carter did not result in a settlement; however, the following mediation session on February 20, 2017 (after Carter was replaced as temporary guardian) resulted in a settlement agreement that resolved all issues raised in the Litigation, except for the fiduciary and attorney fees sought by Appellee.

On March 6, 2017, Appellee filed her final account, as well as a petition to approve her first, second, and final accounts. Appellee supplemented her final account on March 13, 2017, by hand-delivering to Appellant's counsel additional fee invoices. In response, Appellant filed objections to Appellee's requested fiduciary and attorney fees, consistent with the provisions of the probate court's settlement order and the underlying settlement agreement.[2] Specifically, Appellant objected to at least $172,957.97 in fiduciary and attorney fees stated in the invoices attached to Appellee's accounts as: (1) being unrelated to any legitimate matter within Appellee's powers as conservator or Carter's powers as temporary guardian; (2) not being reasonable, necessary, or of benefit to Marilyn or her conservatorship estate; and (3) primarily benefitting HSHV.

On August 7, 2017, the probate court conducted an evidentiary hearing to address Appellee's fiduciary and attorney fees. The evidentiary hearing lasted one day, with Appellee being called as the only witness. Appellant did not object to the hourly rates charged by Appellee for legal services (versus fiduciary services), by attorneys retained by Appellee, or by Carter for legal services (versus fiduciary services). The probate court admitted 14 documents into evidence and made several evidentiary rulings in response to objections by Appellant's and Appellee's respective counsel. At the conclusion of the evidentiary hearing, the probate court permitted Appellant and Appellee to file written, closing arguments.

On October 3, 2017, the probate court issues its opinion and order approving and allowing the fiduciary and attorney fees paid by Appellee, as requested in Appellee's petition to allow her fiduciary accountings. *See* **Exhibit B**, Probate Court's Order and Opinion, dated October 3, 2017 ("Order and Opinion") ("Exhibit B"). Appellant thereafter timely filed his claim of appeal.

After being presented with oral arguments on February 5, 2019, the Court of Appeals issued its unpublished opinion on February 28, 2019, affirming the probate court's ruling. *See* **Exhibit C**, Court of Appeals Opinion (the "COA Opinion") ("Exhibit C"). In its opinion, the Court of Appeals initially erred by stating as follows:

> Jones clearly had the authority to prosecute a civil action for the protection of the property in the conservatorship estate. MCL 700.5423(2)(aa), and to employ an attorney to assist her in prosecuting the civil action. MCL 700.5423(2)(z). We appreciate that the cash gifts [Marilyn] made to the Sirchias and the conveyance of an interest in [Marilyn's] home to Anne Sirchia occurred before the conservatorship was established. We nonetheless construe MCL 700.5423(2)(aa) as allowing or authorizing a conservator to file a civil action to recapture property

[2] Appellant's objections to Appellee's petition to allow the accounting alleged that Appellee did not establish through Appellee Constance L. Jones accounts what portion, if any, of such fees were reasonable, necessary, or of the benefit to Marilyn or the conservatorship estate.

> that should and would have been part of the conservatorship estate but for previous unlawful transfers or conveyances. This proposition is consistent with a conservator's authority to '[c]ollect, hold, or retain estate property.' MCL 700.5423(2)(a).
>
> Robert Sirchia argues in conclusory fashion that the litigation lacked factual and legal merit. We disagree. The record reflects that conservator Jones presented viable claims that the probate court refused to dismiss when the Sirchias moved for summary disposition of the claims. Indeed, the Sirchia's filed 16[3] unsuccessful motions for summary disposition and served numerous voluminous discovery requests on Jones. Because of the Sirchias' scorched-earth approach to the litigation, Jones was effectively forced to settle the litigation to avoid depleting [Marilyn's] assets. Because the settlement resulted in the waiver and release of all claims and disputes, there was no adjudication on the merits. We cannot conclude that the litigation lacked merit. The denial of myriad motions for summary disposition revealed that Jones's allegations of wrongdoing were viable. Jones acted reasonably and had authority to commence and prosecute the litigation as part of an effort to protect and preserve the conservatorship estate for [Marilyn's] benefit.

Further, the Court of Appeals stated the following in regards to the *Valentino* case:

> [w]e conclude that Robert Sirchia's reliance on *In re Valentino Estate*, 128 Mich App 87; 339 NW2d 698 (1983), is misplaced. The probate court correctly observed that the *In re Valentino* panel decided that case before the Legislature enacted EPIC and, therefore the case was not controlling. Further, the probate court correctly ruled that EPIC grants a conservator authority to hire an attorney to take legal action to assist the conservator in carrying out duties to the conservatorship estate and ward. MCL 700.5423(2)(z). Additionally, while this Court in *In re Valentino* indicated that a benefit had to be achieved as a prerequisite to awarding legal fees

[3] Appellant initially filed two MSDs against Appellee, and then a third against HSHV that intended to address all of Appellee and HSHV's claims in the conservatorship proceeding and the civil action. Appellee responded by filing her motion to strike – in which she claimed that Appellant's MSDs improperly addressed more than one issue. Although Appellant's counsel disagreed with the bases for Appellee's motion to consolidate and to strike, after meeting with the probate court's staff attorney, it was agreed that Appellant would file amended MSDs – with each amended motion addressing a separate issue. As a result, filed a total of 14 MSDs – 12 in the civil action and two in the conservatorship proceeding.

> to counsel and a fiduciary, MCL 700.5423(2) focuses on whether a conservator acted 'reasonably in an effort to accomplish the purpose of the appointment.' And here, under the circumstances confronted by Jones upon her appointment, she acted reasonably in an effort to protect, preserve, and reclaim property relative to the conservatorship estate. Contrary to Robert Sirchia's assertion, the litigation commenced by Jones was not based on speculation but on factual circumstances that gave rise to a reasonable suspicion of wrongdoing.

**WHAT IS THE DATE BY WHICH AMICUS CURIAE MOTION MUST BE FILED?**

Since no decision has been rendered in relation to Appellant's pending Application for Leave, the Michigan Court Rules make no reference to a filing date on which an amicus submission must take place. Notwithstanding, Appellant requests a determination from the Probate and Estate Planning Section of the State Bar of Michigan ("PEPC") as to whether, if an Amicus Brief is filed, it would be in support in Appellant's position. If so, Appellant will file the appropriate motion with the Michigan Supreme Court.

**GIVE A BRIEF DESCRIPTION OF FACTS OF THE CASE:**

The Litigation was comprised of conservatorship proceedings (File No. 14-000326-CA), guardianship proceedings (File No. 14-000325-GA), and a civil action (File No. 14-000530-CZ) (collectively, the "Litigation") – all of which were before the Honorable Julia B. Owdziej, of the Washtenaw County Probate Court. As stated, *supra*, the Litigation collectively sought to invalidate Marilyn's 2013 will, her 2014 revocable trust amendment, a 2013 cash gift, and a 2013 deed creating a joint tenancy in Marilyn's residence. Appellee also sought to remove Appellant and Appellant's wife as Marilyn's guardians. Except for the cash gift, the other acts taken by Marilyn were known to Appellee prior to the commencement of the conservatorship proceeding in 2014.[4]

Eventually, the disputes underlying the Litigation were resolved through mediation; however, the issue of fiduciary and attorney fees paid and/or sought by Appellee remained unresolved. More than $200,000.00 in fiduciary and attorney fees

[4] At no time did Appellee ever discuss these acts with Marilyn, despite having the opportunity to do so. Further, Marilyn's estate planning attorney testified at deposition that she did not believe any of the documents (which included the disputed deed, will, and trust amendment) she drafted for Marilyn was invalid for any reason. Moreover, TCF Bank employee, Susan Fletcher, with whom Marilyn met to make the pre-conservatorship cash gift, also testified by affidavit that she "spent a lot of time with [Marilyn] to make sure she understood what she was doing and was not subject to any undue influence."

were paid by Appellee to herself and others acting as Appellee's agents throughout the Litigation (the "Disputed Fees"). The Disputed fees were incurred and paid from Marilyn's assets over a period of approximately two years, beginning in mid-2015, and ending upon the settlement reached during the February 2017, mediation. The entirety of the Litigation was commenced and maintained during Marilyn's lifetime (she is still alive), but without her knowledge, consent, or consultation by Appellee and without any statement by Marilyn that the challenged estate planning documents and gifts were contrary to her intent.

In the absence of a resolution pertaining to the Disputed Fees, an evidentiary hearing was conducted on August 7, 2017, with Appellee being the sole witness testifying in support of the Disputed Fees. Importantly, Appellee admitted that the Litigation was commenced and maintained based on Appellee's own personal *speculation*, rather than any objective evidence or personal knowledge. As discussed, *supra*, the August 7, 2017, evidentiary hearing led to the entry of the probate court's Opinion and Order, dated October 3, 2017. *See* **Exhibit B**.

Specifically, the Order and Opinion held that: (1) the commencement of the Litigation was within Appellee's authority as conservator and required by her fiduciary obligations; (2) the fiduciary rates charged by Appellee and the temporary guardian paid by Appellee were reasonable; (3) Appellee acted in a reasonable and prudent manner in the Litigation; (4) the allocation of time as fiduciary work or legal work was appropriate and saved Marilyn's estate; and (5) the time spent by Appellee and those paid under her employ were reasonable because of the "litigation style" used by Appellant and Appellant's wife. *See* **Exhibit B**.

**GIVE A BRIEF DESCRIPTION OF ISSUE(S) CONCERNING WHICH AMICUS SUPPORT IS SOUGHT.**

The issues for which Appellant seeks leave to appeal to the Michigan Supreme Court, as well as amicus consideration, present matters of first impression regarding: (1) the scope of a conservator's authority under the Estates and Protected Individuals Code ("EPIC") related to a ward's pre-conservatorship acts; (2) whether wills and will-substitutes (such as revocable trusts, beneficiary designations, and joint ownership arrangements) may be challenged pre-mortem; (3) the purported abrogation of common law precedent decided prior to the effective date of EPIC regarding a conservator's compensation rules; and (4) whether pure speculation by a conservator is sufficient to justify the payment of fiduciary and attorney fees from an estate for litigation commenced by the conservator.

**STATE THE REASON WHY THIS ISSUE IS OF PARTICULAR SIGNIFICANCE TO MEMBERS OF THE STATE BAR OF MICHIGAN.**

Please refer to Appellant's response to the previous question presented, *supra.* Further, if not reversed, the Court of Appeals' opinion will be used to justify a litany of overreaching and abuses by some conservators, as well as disgruntled and dissatisfied potential heirs and beneficiaries, that not only challenge a ward's actions taken before

the imposition of a conservatorship or a Settlor's action while pre-mortem, but also use the Ward/Settlor's assets to fund the related litigation. *See* **Exhibit D**, *Probate Law Case Summary of In re Burhop Conservatorship* ("Exhibit D"). More narrowly, the Court of Appeals' opinion creates a new judicial doctrine in Michigan that essentially approves pre-mortem challenges that impliedly overrules well-established law regarding expectant or "future" estates that only pass after an individual's death, renders limits on a conservator's powers contained in EPIC, and uses the enactment of EPIC erroneously to abrogate common law precedent interpreting nearly identical limits contained in the prior Revised Probate Code ("RPC").[5] These issues are specifically important to estate planning attorneys and their clients.

**OFFER REASON(S) WHY THE OUTCOME OF THIS CASE IS LIKELY TO HAVE AN IMPORTANT IMPACT ON THE LAW CONCERNING THIS ISSUE.**

MCR 7.215(C)(2) provides that a "published opinion of the Court of Appeals has precedential effect under the rule of stare decisis," both the probate court and the Court of Appeals chose to ignore the holding in *Valentino*, 128 Mich App 87; 339 NW2D 698 (1983). In its opinion, the Court of Appeals stated that the Appellant's reliance on *Valentino* was "misplaced" and that the "probate court correctly observed that [the] panel decided that case before the Legislature enacted EPIC and, therefore, the case was not controlling." *See* **Exhibit B.** The probate court provided no other discussion related to the issues, reasoning, or holding in *Valentino.*

Appellant contends that the positions taken by both the probate court and the Court of Appeals denying any present or continuing effect of *Valentino* is improper under the principles of state decisis and statutory abrogation. *Woodman v Kera LLC*, 486 Mich 228, 785 NW2d 1 (2010); *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996). These positions imply that *Valentino* was statutorily abrogated by EPIC. "Although statutory enactments can abrogate common-law rules, such rules may not be eliminated by implication, and statutes in derogation of the common law must be strictly construed." *Smith*, 216 Mich App 554 (citing *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 652-653; 513 NW2d 799 (1994)).

A review of EPIC reveals that Appellee lacked the authority to pursue the litigation because the subject-matter falls outside of the grant of powers to a conservator. The powers of a conservator are outlined in MCL 700.5423, MCL 700.5424, MCL 700.5425, and MCL 700.5426. MCL 700.5423(2)(aa) permits a conservator to "[p]rosecute or defend an action, claim, or proceeding in any jurisdiction for the protection of estate property and of the conservator in the performance of a fiduciary duty." Yet, nothing in MCL 700.5423 through MCL 700.5425 allows a conservator to take the breadth of action taken by Appellee in the Litigation where the goal clearly was to get Appellant and Appellant's wife out of Marilyn's life under the

[5] The Revised Probate Code was passed in 1978, and remained in place until the enactment of EPIC on April 1, 2000.

pretense of a breach of guardianship duties and to rewrite Marilyn's estate plan to benefit HSHV, or anyone other than Appellant or Appellant's wife.

Michigan common law supports the statutory analysis of EPIC that the fiduciary and attorney fees approved and allowed by the probate court, and affirmed by the Court of Appeals, were not proper expenses of Marilyn's conservatorship estate. Appellee admitted she: (a) commenced litigation based upon speculation; (b) had no personal knowledge of any denial of visitation; (c) had no personal knowledge of any of Marilyn's personal property being removed from Marilyn's home; (d) had no knowledge suggesting that Marilyn did not want Appellant and Appellant's wife as her guardians; (e) had no knowledge Marilyn's documents or gift did not reflect her wishes or that the documents or gift were invalid; and (f) the litigation could have been brought post-death at no cost to Marilyn, and the litigation was not necessary to provide support and car for Marilyn.

Appellee's proffered basis for commencing the litigation constitutes conjecture and speculation which is insufficient to sustain a reasonable claim. *Karbel v Comerica Bank*, 247 Mich App 90, 635 NW2d 69 (2001) (parties must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact); *Valentino*, 128 Mich App 94. Whe n a fiduciary is p[artially to blame for bringing unnecessary litigation, the fiduciary rather than the estate should be responsible for the attorney's fees. *Valentino*, *supra*, *see also In re Nestorovski Estate*, 283 Mich App 177; 769 NW2d 720 (2009).

The following facts are material to the resolution of the instant appeal and they are either undisputed in their entirety or cannot be reasonably disputed:

- The lower courts ignored Appellee's admission that her case against Appellant and Appellant's wife was based on her own personal speculation;

- The lower courts chose to ignore the fact that Appellee's commencement and pursuit of the litigation fell outside of the authority granted to a conservator under EPIC and other applicable Michigan law;

- The lower courts gave no consideration to the fact that Appellee had the opportunity to discuss any of her concerns about Appellant and Appellant's wife with Marilyn – both before and after the conservatorship and guardianship were imposed – but never did so; and

- Marilyn's estate planning attorney maintained throughout the duration of the Litigation that nothing contained Marilyn's will, the deed, or the trust amendment was contrary to Marilyn's expressed intent.

Against such facts, the Court of Appeals opinion should not be permitted to stand because it establishes precedent contrary to: (1) the legal and equitable principles that underlay an individual's right to leave their post-death estate to whomever they choose;

and (2) rights of protected individuals to ensure their assets are only used for their best interests and expended in a manner that is reasonable, necessary, and of benefit to the protected individual.

**GIVE A BRIEF DESCRIPTION OF THE ARGUMENT PROPONENT WISHES PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN TO MAKE IN AN AMICUS SUBMISSION?**

The lower courts erred when they condoned Appellee's commencement and pursuit of the Litigation, stated that the authority to do so was within a conservator's legal authority under Michigan law, and then compensated Appellee and Appellee's agents. In essence, the lower courts considered Appellee to be Marilyn's alter ego, possessed of every power that Marilyn could have exercised prior to being declared a protected individual under EPIC.

Appellant seeks amicus consideration and submission in support of a review by the Michigan Supreme Court to address the following legal issues: (1) no pre-mortem challenges to estate planning documents, particularly wills and revocable trusts; (2) challenges to pre-conservatorship financial transactions and gifts must be predicated on a benefit to a ward and not an intent to re-write the ward's known estate plan; (3) conservator's powers limited by MCL 700.5407, MCL 700.5423(2), MCL 600.5427, and MCL 700.5428; (4) no general power exists in a conservator to seek removal of a guardian based on concerns about pre-conservatorship financial transactions; and (5) *Valentino* is not abrogated by EPIC because EPIC did not change relevant portions of the Revised Probate Code related to the analysis of fiduciary and attorney fees.

http://pgpportal.probateprince.local/Client Documents/BURHOP - MARILYN - GA-CA/COA-GA Matter/Application for Consideration for Amicus Curiae Committee.docx

# EXHIBIT A

STATE OF MICHIGAN

IN THE SUPREME COURT

IN THE MATTER OF:

MARILYN BURHOP, A PROTECTED INDIVIDUAL

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| | |
|---|---|
| CONSTANCE L. JONES, as Former Conservator for Marilyn Burhop, | MSC _____ |
| Petitioner-Appellee, | COA 340771 (Swartzle, P.J., and Markey and Ronayne Krause, JJ.) |
| v. | |
| ROBERT SIRCHIA, as Trustee of the Marilyn Burhop Revocable Trust and Former Agent of Marilyn Burhop, | Washtenaw County Probate Court Lower Court File No. 14-326-CA Hon. Julia B. Owdziej |
| Respondent-Appellant. | |

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**RESPONDENT-APPELLANT ROBERT SIRCHIA'S APPLICATION FOR LEAVE TO APPEAL**

PRINCE LAW FIRM

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider Appellant Robert Sirchia's Application for Leave to Appeal under MCR 7.303(B)(1), MCR 7.305((B)(3), and MCR 7.305(B)(5). This application is being filed timely within 42 days of the Court of Appeals' unpublished per curiam opinion filed on February 28, 2019. MCR 7.305(C)(2)(a). A copy of the Court of Appeals' opinion is attached as Appendix 1a.

## JUDGMENT BEING APPEALED AND RELIEF SOUGHT

Appellant Robert Sirchia seeks leave to appeal to this Court from the Court of Appeals' unpublished per curiam opinion filed on February 28, 2019 (by Swartzle, P.J., and Markey and Ronayne Krause, JJ.), affirming the order and opinion of the Washtenaw County Probate Court (by the Hon. Julia B. Owdziej) in the above-captioned probate proceeding. (Appendix 1a, COA Opinion). The probate court's order and opinion approved and allowed nearly $200,000.00 of fiduciary and attorney fees paid to or by Appellee Constance L. Jones, while she was conservator for the now-deceased Marilyn Burhop,[1] for litigation commenced and pursued against Appellant Robert Sirchia and his wife, Anne Sirchia, which sought to invalidate and set aside a will, a revocable trust amendment, a will-substitute in the form of a deed, and a cash gift made by Marilyn Burhop primarily in favor of Anne Sirchia between eight and 13 months before the imposition of the conservatorship. (Appendix 2a, Probate Court Opinion). The probate court did not disallow or reduce any portion of the fees. The litigation involved separate, but related, proceedings in the conservatorship, the guardianship, and a civil action. In the civil action, Appellee Constance L. Jones recruited the Humane Society of Huron Valley[2] as a co-plaintiff to join in the pre-mortem challenge to the validity of Marilyn Burhop's pre-conservatorship actions. Although the litigation settled, the settlement agreement provided that Appellant Robert Sirchia retained his right to object to and challenge the fiduciary and attorney fees paid to or by Appellee Constance L. Jones from Marilyn Burhop's conservatorship estate.

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[1] Marilyn Burhop died on April 20, 2018, in the company of Appellant Robert Sirchia and Anne Sirchia, who never wavered in their care for her.

[2] The Humane Society of Huron Valley is not an interested person to the probate court's order and opinion or the resulting appellate proceedings.

Appellant Robert Sirchia asks that this Court peremptorily reverse the decisions of the Court of Appeals and the probate court, and enter judgment in Appellant Robert Sirchia's favor requiring the disgorgement of all fees paid to or by Appellee Constance L Jones related to the litigation, so such amounts may be added to Marilyn Burhop's post-death estate and distributed accordingly.[3] Alternatively, Appellant asks that this Court grant his application for leave to appeal because: (1) the issues presented involve legal principles of major legal significance or first impression to Michigan's jurisprudence, particularly related to the limits of a conservator's authority under Article V, Part 4, of the Estates and Protected Individuals Code, the sanctity of a ward's pre-existing estate plan and other acts occurring before the imposition of a conservatorship, and the use of a ward's assets to fund litigation that is not reasonable, necessary, or of benefit to Marilyn Burhop; and (2) the Court of Appeals opinion is clearly erroneous and will cause material injury to the beneficiaries of Marilyn Burhop's post-death estate and tacitly approves a conservator's *ultra vires* actions contrary to the authority provided by applicable statutes and common law.

[3] Under the settlement agreement, the Humane Society of Huron Valley was changed from a beneficiary entitled to specific post-death gift of $10,000.00, to a residuary beneficiary entitled to 20% of the residue of Marilyn Burhop's post-death estate. This is in addition to the $100,000.00 that the Humane Society of Huron Valley received from Marilyn Burhop's conservatorship estate and the $50,000.00 received from Appellant Robert Sirchia and Anne Sirchia under the settlement which occurred one year prior to Marilyn Burhop's death.

## STATEMENT OF GROUNDS FOR APPEAL

The litigation underlying this application for leave to appeal should never have been pursued during Marilyn Burhop's lifetime, yet its effects may go far beyond her death. In fact, the Court of Appeals' opinion disingenuously disregards and misstates the true nature and extent of the litigation commenced and prosecuted by Appellant Constance L. Jones against Appellant Robert Sirchia and his wife, as well as the entire record before the probate court, in order to justify and support the affirmance of the probate court's approval of more than $200,000.00 in fiduciary and attorney fees paid from Marilyn Burhop's conservatorship estate.

Considered broadly, if not reversed, the Court of Appeals' opinion undoubtedly will be used to justify a litany of overreaching and abuses by some conservators, as well as disgruntled and dissatisfied potential heirs and beneficiaries, that not only challenge a ward's actions taken before the imposition of the conservatorship or a Settlor's action while still alive, but also use Marilyn Burhop's or Settlor's assets to fund such challenges.[4] More narrowly, the Court of Appeals' opinion creates a new judicial doctrine in Michigan that tacitly approves pre-mortem challenges that impliedly overrules well-established law regarding "expectant" or "future" estates that only pass after an individual's death,[5] renders limits on a conservator's powers contained the Estates and Protected Individuals Code, and uses the passage of the Estates and

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[4] This remains true even though the Court of Appeals' opinion is unpublished. In fact, it is difficult to believe that the probate court will act any differently in future cases involving similar circumstances because its prior decision was "affirmed."

[5] *See generally, In re Estate of Jamieson*, 374 Mich 231, 237-238, 132 NW2d 1 (1965) (contingent remainders and vested remainders subject to divestment; *In the Estate of Finlay*, 430 Mich 590, 424 NW2d 272 (1988) (no accrued right in a will prior to the testator's death); *In re Estate of Smith*, 252 Mich App 120, 651 NW2d 153 (2002); *In the Matter of Dodge Testamentary Trust*, 121 Mich App 527, 330 NW2d 72 (1983).

Protected Individuals Code nugatory as a shovel to bury common law precedent interpreting nearly identical limits contained in the prior Revised Probate Code.[6]

Belying the cursory, truncated, and perfunctory review and analysis provided by the Court of Appeals, this case is worthy of this Court's attention because: (1) the issues presented involve legal principles of major legal significance or first impression to Michigan's jurisprudence, particularly related to the limits of a conservator's authority under Article V, Part 4, of the Estates and Protected Individuals Code, the sanctity of a ward's pre-existing estate plan and other acts occurring before the imposition of a conservatorship, and the use of a ward's assets to fund litigation that is not reasonable, necessary, or of benefit to Marilyn Burhop; and (2) the Court of Appeals opinion is clearly erroneous and will cause material injury to the beneficiaries of Marilyn Burhop's post-death estate and tacitly approves a conservator's *ultra vires* actions contrary to the authority provided by applicable statutes and common law.

These issues present matters of first impression regarding the scope of a conservator's authority under the Estates and Protected Individuals Code related to a ward's pre-conservatorship acts, whether wills and will-substitutes (such as revocable trusts, beneficiary designations, and joint ownership arrangements) may be challenged pre-mortem, the purported abrogation of common law precedent decided prior to the effective date of the Estates and Protected Individuals Code regarding certain fiduciary compensation rules, and whether pure speculation by a fiduciary is sufficient to justify the payment of fiduciary and attorney fees from an estate for litigation commenced by the fiduciary.

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[6] The Revised Probate Code was passed in 1978 and remained in place until the Estates and Protected Individuals Code became effective on April 1, 2000.

First, the Court of Appeals' opinion necessarily interprets MCL 700.5423(2)(z) and MCL 700.5423(2)(aa) as permitting a conservator to pursue any kind of action, regardless of limitations contained elsewhere in Article V, Part 4, of the Estates and Protected Individuals Code, particularly MCL 700.5423(1), MCL 700.5407, and MCL 700.5427. Second, the opinion essentially states that the precedent stated in *In re Valentino*, 128 Mich App 87; 339 NW2d 698 (1983), interpreting a conservator's and guardian's authority to litigate ceased having effect once the Estates and Protected Individuals Code became effective, even though the Revised Probate Code provisions remained nearly unchanged. Third, in order to reach the preordained conclusion to affirm the probate court's ruling, the Court of Appeals makes conclusions about Marilyn Burhop's abilities that are not contained in the record, but ignores Appellee Constance L. Jones' own testimony and the remainder of the probate court record showing the lengths to which the conservator went to use the legal process to pressure Appellant Robert Sirchia and his wife. Fourth, the opinion treats Appellee Constance L. Jones' admitted speculation as fact in concluding that "the litigation was not a matter of need and Burhop's standard of living, [rather] the litigation sought to rectify a perceived wrong and to make Burhop whole, as well as to hold the Sirchias accountable." In essence, this statement reads into Article V, Part 4, of the Estates and Protected Individuals Code, the good-faith exceptions contained in MCL 700.3720 and MCL 700.7904 that allow a personal representative or trustee, respectively, to receive fees and costs even if they do not prevail.

Finally, the issues raised in the application are of great interest to anyone who hopes to have an enforceable and predictable descent and distribution plan in Michigan, whether through a will, a revocable trust, other will-substitutes, or gifts; or who hopes to avoid her estate to be wasted on pyrrhic victories, while she still is alive, to satisfy a

fiduciary's ego or family member's anger. The entirety of the Court of Appeals' opinion turns fundamental principles of law on their collective heads by placing a judicial imprimatur on the notion that a conservator (or someone claiming to be similarly situated) can decide whom an individual can select as her friends and how and to whom she can show gratitude and leave her post-death estate. Notwithstanding noble and thoughtful measures to protect vulnerable adults, this kind of sweeping decision is not consistent with existing Michigan public policy and not for the judicial branch to impose, where the legislature has not seen fit to include it in the existing statutory scheme.

## STATEMENT OF QUESTIONS PRESENTED

I. **Whether the Court of Appeals, in an uninformed and perfunctory rubber-stamping of the probate court's approval of nearly $200,000.00 of fiduciary and attorney fees paid to and by Appellee Constance L. Jones, disregarded the plain language and clear intent of Article V, Part 4, of the Estates and Protected Individuals Code and well-established common law precedent in a way that effects a major change to Michigan's jurisprudence by essentially creating a new judicial doctrine permitting conservators (and other claiming to be similarly situated) to institute and maintain costly litigation for pre-mortem challenges to a ward's known estate plan, including a will, a revocable trust, will-substitutes, and pre-conservatorship life choices, that is funded by Marilyn Burhop's own assets during Marilyn Burhop's lifetime and which provides no necessary or reasonably measurable financial benefit to Marilyn Burhop, but only seeks to deny certain individuals a role in Marilyn Burhop's life and to change the manner in which Marilyn Burhop's post-death estate is distributed contrary to Marilyn Burhop's known estate plan.**

Appellant Answers: Yes.

Appellee Answers: No.

Probate Court Answers: No.

Court of Appeals Answers: No.

II. **Whether the Court of Appeals clearly erred when it refused to reverse the probate court's finding that the costs of litigation were solely the result of the "litigation style" employed by Appellant Robert Sirchia and his wife when they were defending multiple pieces of litigation commenced against them by Appellee Constance L. Jones and her hand-picked co-plaintiff that included efforts to invalidate Marilyn Burhop's known estate plan in favor of those whom Appellee Constance L. Jones determined to be more worthy of Marilyn Burhop's post-death estate and to remove guardians chosen by Marilyn Burhop where no objective evidence existed to support a breach of fiduciary duty by the guardians, but only Appellee Constance L. Jones' rank speculation that was unrelated to the guardianship, and sought damages from Appellee Robert Sirchia and his wife in excess of half a million dollars.**

Appellant Answers: Yes.

Appellee Answers: No.

Probate Court Answers: No.

Court of Appeals Answers: No.

**III. Whether the Court of Appeals clearly erred in holding that the probate court's denial of motions for summary disposition filed by Appellant Robert Sirchia and his wife necessarily meant that Appellee Constance L. Jones' allegations of wrongdoing were viable and that she acted reasonably in commencing and prosecuting the litigation, thereby justifying the fiduciary and attorney fees of nearly $200,000.00 paid to and by Appellee Constance L. Jones Bar from Marilyn Burhop's estate related to the litigation.**

Appellant Answers: Yes.

Appellee Answers: No.

Probate Court Answers: No.

Court of Appeals Answers: No.

**IV. Whether the Court of Appeals clearly erred when it refused to reverse the probate court's finding that the entirety of the litigation commenced and prosecuted by Appellee Constance J. Jones against Appellant Robert Sirchia and his wife was "part of an effort to protect and preserve the conservatorship estate" for Marilyn Burhop's benefit.**

Appellant Answers: Yes.

Appellee Answers: No.

Probate Court Answers: No.

Court of Appeals Answers: No.

**V. Whether the Court of Appeals clearly erred in ignoring Appellee Constance L. Jones' admissions during the evidentiary hearing, including one that the litigation was based on "pure speculation," and the entirety of the probate court's record in the conservatorship proceeding, guardianship proceeding, and civil action showing that the litigation was made complicated and expensive because of Appellee Constance L. Jones' own actions.**

Appellant Answers: Yes.

Appellee Answers: No.

Probate Court Answers: No.

Court of Appeals Answers: No.

VI. **Whether the court of appeals did not address the allegation that the probate court erred to the extent it relied on inadmissible evidence and/or evidence not introduced during the evidentiary hearing.**

Appellant Answers: Yes.

Appellee Answers: No.

Probate Court Answers: No.

Court of Appeals Answers: No.

## STATEMENT OF FACTS

### INTRODUCTION

Appellant Robert Sirchia ("Appellant") brings this application as the trustee[7] for the Marilyn Burhop Trust (the "trust") seeking leave to appeal the Court of Appeals' February 28, 2019. (Appendix 1a, COA Opinion). The precursor to this application was litigation commenced by Appellee Constance Jones ("Appellee") against Appellant and Appellant's wife, Anne Sirchia (sometimes, "Appellant's wife"), while Appellee was the conservator for Marilyn Burhop ("Marilyn"). The litigation spanned conservatorship proceedings (File No. 14-000326-CA), guardianship proceedings (File No. 14-000325-GA), and a civil action (File No. 14-000530-CZ) (collectively, the "litigation") – all of which were before the Honorable Julia B. Owdziej, of the Washtenaw County Probate Court. Collectively, the litigation sought to invalidate a 2013 will, a 2014 revocable trust amendment, a 2013 gift of cash, and a 2013 deed creating a joint tenancy in Marilyn's residence – all of which were executed between eight and 13 months before the conservatorship, as well as to remove Appellant and Appellant's wife as Marilyn's guardians.

Eventually, the disputes underlying the litigation were resolved through mediation; however, the issue of fiduciary and attorney fees paid and/or sought by Appellee remained unresolved. More than $200,000.00 in fiduciary and attorney fees were paid by Appellee to herself and others acting as agents or otherwise pursuing her agenda in the litigation. The disputed fees were incurred and paid from Marilyn's assets over a period of approximately two years, beginning in mid-2015 and ending just after

[7] At the time of the appeal to the Court of Appeals, Appellant also was Marilyn Burhop's agent under a durable power of attorney; however, Appellant's status as agent ceased upon Marilyn Burhop's death.

the mediation settlement in February 2017. The entirety of the litigation was commenced and maintained during Marilyn's lifetime, but without her knowledge, consent, or consultation by Appellee, and without any inquiry of or statement by Marilyn that the challenged estate planning documents, gifts or Appellant's and Appellant's wife's status as her guardians were contrary to her intent or desire. Appellee never discussed these issues with Marilyn during the several months prior to the imposition of the conservatorship and guardianship in May 2014, a period during which Appellee was aware that Marilyn's post-death estate primarily benefited Appellant's wife, or at any time through the settlement of the litigation.

An evidentiary hearing was conducted on August 7, 2017, with Appellee being the only witness testifying in support of the disputed fees.[8] Importantly, Appellee admitted that the litigation was commenced and maintained based on her own speculation, rather than any objective evidence or personal knowledge. On October 3, 2017, the probate court issued an opinion and order approving and allowing all fiduciary and attorney fees paid by Appellee, without any adjustments, including the disputed fees. (Appendix 2a, Probate Court Opinion). The opinion and order held that: (1) the commencement of the litigation was within Appellee's authority as conservator and required by her fiduciary obligations; (2) the fiduciary rates charged by Appellee and the temporary guardian paid by Appellee were reasonable; (3) Appellee acted in a reasonable and prudent matter in the litigation; (4) the allocation of time as fiduciary work or legal work was appropriate and saved money for Marilyn's estate; and (5) the time spent by Appellee and those paid by Appellee was reasonable because of the "litigation style" used by Appellant and Appellant's wife. (Appendix 2a, Probate Court

[8] None of the other attorneys paid by Appellee testified in support of the fiduciary or attorney fees each received from Marilyn's conservatorship estate.

Opinion).

Appellant timely filed a claim of appeal with the Court of Appeals seeking a reversal of the probate court's opinion and order. Although rejected by the Court of Appeals' opinion, Appellant believes that the probate court clearly erred in its evaluation of the reliable, admissible evidence proffered at the evidentiary hearing and abused its discretion in finding that the disputed fees were reasonable, necessary, and for the benefit of Marilyn's conservatorship estate. (Appendix 1a, COA Order; Appendix 2a, Probate Court Opinion).

## PROBATE COURT PROCEEDINGS

Throughout the litigation, Appellant contended that Appellee routinely overstepped her legal authority as conservator. Additionally, the record and procedural posture underlying this application are muddled based on the different probate proceedings and civil actions related to Marilyn pre-death affairs, as well as Appellee's use of the conservatorship proceedings as the primary vehicle to pursue much of her relief, regardless of whether the issue at hand was related to the conservatorship or not. Finally, in the entirety of the probate proceedings involving Marilyn, Appellee made a habit of mixing and repeating claims that were made or properly belonged in another proceeding or civil action. The result is a very convoluted record as the underlayment for this application. Because the disputed fees were charged in the conservatorship proceeding, the guardianship proceeding, and the civil action, the conduct within each is relevant to this application – which is why the Court of Appeals took judicial notice of each for purposes of the underlying appeal. (Appendix 3a, COA Order).

### *Marilyn Burhop's Estate Planning & Gifting Histories*

Marilyn's estate planning and gifting histories were thoroughly discussed and presented to the probate court through Appellant's various motions for summary

disposition. (Appendix 4a, Chart Summarizing Estate Plan Changes). Appellee never disputed that Marilyn regularly amended her estate plan and changed beneficiaries to whom she intended to leave post-death gifts. Although Marilyn made gifts to various charities over the years, the amounts of such gifts ebbed and flowed, as did the presence of charities as post-death recipients of specific or residuary gifts.

*Relevant Proceedings and Filings Involving Marilyn Burhop*

After the guardianship and conservatorship proceedings were originally commenced in early-2014, Appellee commenced various litigation related to Marilyn, which ultimately grew to encompass numerous proceedings[9] and a civil action (collectively, the "litigation"). Of the numerous proceedings, only two were commenced by Appellant and/or Appellant's spouse: (1) the petition to change the venue of the guardianship to Macomb County, filed in July 2015; and (2) the petition to terminate or modify the guardianship, filed in October 2016 (based on the conduct of Kathleen Carter, the temporary guardian appointed in response to Appellee's petition). Each of them was filed in the guardianship proceedings. All others were commenced by Appellee or others aligned with Appellee.

The multiplicity of proceedings is relevant in the analysis of Appellee's request for fiduciary and attorney fees in the litigation – as the disputed fees were paid from Marilyn's conservatorship estate. Because the only way the probate court have reached any of the conclusions in its opinion and order was to reference all of the proceedings and the civil action, it was appropriate for the Court of Appeals to take judicial notice of all of the proceedings and the civil action in evaluating the appeal. (Appendix 2a, Probate Court Opinion; Appendix 3a, COA Order).

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[9] Although there were only three separate file numbers assigned by the probate court, each petition constituted a separate "proceeding" under MCR 5.101(B).

On July 29, 2015, Appellant obtained an order for change of venue to relocate Marilyn to a care facility that was geographically closer to Appellant and Appellant's wife. (Appendix 5a, Appellant's Petition and Order to Change Venue in Guardianship). On July 30, 2015, Appellee filed a petition for instructions regarding Marilyn's change of residence and certain property which, in part, challenged Appellant's decision to change Marilyn's residence and guardianship from Washtenaw County to Macomb County, as well as a challenge to Appellant's decision to restrict access of certain individuals to Marilyn. (Appendix 6a, Appellee's Petition for Instructions in Conservatorship). The petition for instructions was filed by Appellee in her capacity as conservator in the conservatorship proceeding and also claimed that Appellant and Appellant's wife were misappropriating Marilyn's property. (Appendix 6a, Appellee's Petition for Instructions in Conservatorship). As a result of Appellee's petition for instructions, the probate vacated the transfer of the guardianship from Washtenaw County to Macomb County. (Appendix 7a, Order Rescinding Transfer in Guardianship).

On March 21, 2016, Appellee filed a petition to terminate or modify the guardianship, in her capacity as conservator, seeking the removal of Appellant and Appellant's wife as Marilyn's guardians based on the Appellee's "discovery" of a substantial gift from Marilyn to Appellant's wife in April 2013 to purchase a house in Marilyn's neighborhood; however, no allegations were made claiming that Appellant or Appellant's wife breached any of their duties as guardians. (Appendix 8a, Appellee's Petition to Modify in Guardianship). On April 11, 2016, Appellant filed objections to the petition to terminate or modify refuting Appellee's allegations and identifying the deficiencies in Appellee's request. (Appendix 9a, Appellant's Objections to Petition to Modify in Guardianship).

On April 21, 2016, the probate court held a hearing, suspended Appellant and

Appellant's wife as guardians, and appointed Kathleen Carter ("Carter") as temporary guardian. (Appendix 10a, Transcript of April 21, 2016, Hearing in Guardianship, at 22). During the hearing, Appellee did not produce any evidence that would constitute a breach of fiduciary duty under MCL 700.5301, *et. seq.*, that applies to guardians, particularly any lack of care of or potential harm to Marilyn. (Appendix 10a, Transcript of April 21, 2016, Hearing in Guardianship).

That same day, Appellee filed her verified petition for return of property and to void certain estate planning documents. (Appendix 11a, Appellee's Verified Petition in Conservatorship). The petition contained five counts and 55 paragraphs (plus subparagraphs) and sought to undo the following acts undertaken by Marilyn between eight and 13 months before the conservatorship was established: (1) a substantial cash gift from Marilyn to Appellant's wife in April 2013; (2) a July 22, 2013, deed drafted by Marilyn's attorney creating a joint tenancy with rights of survivorship in Marilyn's house (which previously was in Marilyn's trust); (3) a August 28, 2013, will drafted by Marilyn's attorney naming Appellant's wife as the primary devisee of Marilyn's post-death estate in lieu of HSHV; and (4) an April 2, 2014, sixth amendment to Marilyn's trust drafted by Marilyn's attorney naming Appellant's wife as the primary beneficiary of Marilyn's post-death trust estate in lieu of HSHV (consistent with the August 28, 2013, will). (Appendix 11a, Appellee's Verified Petition in Conservatorship). Except for the cash gift, the other acts were known to Appellee before the conservatorship proceeding was commenced in 2014. At no time did Appellee ever discuss these acts with Marilyn, despite having the opportunity to do so. (Appendix 12a, August 7, 2017, Hearing Transcript, at 88-89, 94). Marilyn's attorney testified at deposition that she did not believe any of the documents she drafted for Marilyn was invalid for any reason. (Appendix 13a, Deposition Transcript of Jennifer Lawrence, at 60-61, 72, 78-80, 82-83). Finally, the branch manager of

Marilyn's bank who processed the cash gift provided an affidavit that she questioned Marilyn thoroughly about the gift and was convinced that Marilyn understood the impact and made the gift of her own free will. (Appendix 14a, Affidavit of Susan Fletcher).

On June 9, 2016, after retaining additional counsel, Appellee and HSHV commenced a new civil action by filing their complaint for undue influence, fraud, and conversion. (Appendix 15a, Appellee's and HSHV's Complaint in Civil Action). The complaint contained six counts and 96 paragraphs and essentially restated the claims (i.e., seeking to invalidate the cash gift, the will, the deed, and the trust amendment) contained in Appellee's verified petition filed in the conservatorship proceeding. (*compare* Appendix 11a, Appellee's Verified Petition in Conservatorship, *with* Appendix 15a, Appellee's and HSHV's Complaint in Civil Action).

Also on June 9, 2016, almost immediately after being appointed temporary guardian, Carter took steps to marginalize Appellant and Appellant's wife from Marilyn. Carter first filed a petition for instructions to revoke all health care powers of attorney that Marilyn signed designating Appellant's wife as patient advocate. (Appendix 16a, Carter's Petition to Revoke in Guardianship). Next, Carter relocated Marilyn from Macomb County back to Washtenaw County, while refusing to communicate with or otherwise share information with Appellant and Appellant's wife (or their counsel). (Appendix 17a, Carter's Petition to Change Placement in Guardianship). Carter was doing all of this in association with, or at least with the knowledge of, Appellee.

Appellant, through newly retained counsel, challenged Carter's relocation of Marilyn and the underlying orders issued by the probate court that appointed Carter temporary guardian. (Appendix 18a, Appellant's Objection to Petition to Change Placement in Guardianship). The probate court sided with Carter. (Appendix 19a, Transcript of October 6, 2016, Hearing in Guardianship). Believing that the probate

court would find any reason to side against Appellant and Appellant's wife, Appellant filed a petition to terminate or modify the guardianship, as well as an application for leave to appeal the probate court's rulings to the Court of Appeals. (Appendix 20a, Appellant's Petition to Terminate or Modify in Guardianship; Appendix 21a, Appellant's Application for Leave to Appeal to COA in Guardianship, without attachments).

On November 2, 2016, HSHV filed a motion to amend the complaint to add a count for tortious interference with a business expectancy. (Appendix 22a, HSHV's Motion to Amend Complaint in Civil Action). On November 7, 2016, Appellant filed a response to the motion to amend and argued that tortious interference with a business expectancy was not recognized in Michigan in the context of an incomplete gift or the creation of an inter vivos revocable trust that provides for a post-death gift. (Appendix 23a, Appellant's Response to Motion to Amend Complaint in Civil Action). The probate court held a hearing on November 10, 2016, again ruled against Appellant and Appellant's wife, and permitted HSHV to amend the complaint as requested. (Appendix 24a, November 10, 2016, Hearing Transcript in Civil Action). On November 14, 2016, Appellee and HSHV filed their amended complaint, consistent with the probate court's order. (Appendix 25a, Appellee's and HSHV's Amended Complaint in Civil Action).

On November 18, 2016, Appellant filed his: (1) answer and affirmative defenses to the amended complaint; and (2) objections and affirmative defenses to Appellee's verified petition for return of property and to void certain estate planning documents. (Appendix 26a, Answer and Affirmative Defenses to Amended Complaint in Civil Action; Appendix 27a, Objections and Affirmative Defenses to Verified Petition in Conservatorship).

*Discovery Conducted Throughout the Litigation*

Discovery was conducted in the guardianship proceeding, the conservatorship

proceeding, and the civil action. Because of the conclusory and speculative nature of the allegations in Appellee's pleadings in each proceeding, Appellant needed to conduct substantial discovery to determine the bases for Appellee's claims. Initially, Appellant directed written discovery to Appellee, HSHV, and Carter. Both Appellant and Appellee directed subpoenas to various third parties and took depositions.

The written discovery served by Appellant on Appellee consisted of interrogatories, document requests, and requests for admissions. The discovery sought the factual support, including the sources for such support, underlying the specific allegations and conclusions stated by Appellee in her petitions and complaint. Appellant's discovery was issued under MCR 2.309, MCR 2.310, and MCR 2.312 to capture as much information as possible based on Appellee's allegations, narrow the issues presented by Appellee's allegations, and determine the scope of depositions required. The discovery served by Appellant and Appellant's spouse was commensurate in volume to the number of allegations contained in Appellee's pleadings filed in the litigation. (Appendix 28a, Appellant's Page Count Chart).

Because Appellee failed or refused to provide complete and verified responses to the written discovery, Appellant was forced to file a motion to compel.

*Appellant's Motions for Summary Disposition*

Appellant initially filed three motions for summary disposition intended to address all of Appellee's claims in the conservatorship proceeding and the civil action, including the repetition of claims in each: one against Appellee in the conservatorship proceeding; and one against each Appellee and HSHV in the civil action. Appellee responded by filing her motion to strike, in which she claimed that Appellant's motions for summary disposition improperly addressed more than one issue and exceeded the 20-page limit imposed by MCR 2.119. (Appendix 29a, Appellee's Motion to Strike).

Although Appellant's counsel disagreed with the bases for Appellee's motion to strike, during a meeting with the probate court's staff attorney, it was agreed that Appellant would file amended motions for summary disposition -- with each amended motion addressing a separate issue in a particular matter. It was this agreement that caused the number of motions for summary disposition to balloon.

The probate court held a hearing on February 1, 2017, in the conservatorship proceeding and the civil action and denied all of Appellant's amended motions for summary disposition. (Appendix 30a, Transcript of February 1, 2017, Hearing). As a result of the probate court's order, additional discovery was taken in the form of witness depositions, including the deposition of Appellee.

*Settlement of All Issues, Except Fiduciary and Attorney Fees Paid by Appellee*

The initial mediation session in September 2016 among Appellant, Appellant's wife, Appellee, HSHV, and Carter did not result in a settlement of any kind. The subsequent mediation session on February 20, 2017 (which was after Carter's replacement as temporary guardian), resulted in a settlement agreement that resolved all issues raised in the litigation, except for the fiduciary and attorney fees sought by Appellee. (Appendix 31a, Settlement Agreement). In exchange for a ratification of the disputed will, trust, deed, and cash gift, it was agreed that HSHV would be paid the sum of $100,000.00 from Marilyn Burhop's conservatorship estate and $50,000.00 from Appellant and Appellant's wife, as well as 20% of the residue of Marilyn's trust after her death. (Appendix 31a, Settlement Agreement). The settlement was approved by the probate court on March 13, 2017.

*Litigation Related to Fiduciary and Attorney Fees Paid by Appellee*

On March 6, 2017, Appellee filed her final account, as well as a petition to approve her first, second, and final accounts. (Appendix 32a, Appellee's Petition to

Allow Accounts in Conservatorship). Appellee supplemented her final account on March 13, 2017, by hand-delivering to Appellant's counsel additional fee invoices.

Appellant filed objections to the fiduciary and attorney fees sought and/or paid by Appellee, consistent with the provisions of the probate court's settlement order and the underlying settlement agreement. (Appendix 33a, Appellant's Objection to Fees in Conservatorship). The objection to fees alleged that Appellee did not established through Appellee Constance L. Jones accounts what portion, if any, of such fees were reasonable, necessary, or of benefit to Marilyn or the conservatorship estate. More specifically, Appellant objected to at least $172,957.97 in fiduciary and attorney fees stated in the invoices attached to Appellee Constance L. Jones accounts as: (1) being unrelated to any legitimate matter within Appellee's powers as conservator or Carter's powers as temporary guardian; (2) not being reasonable, necessary, or of benefit to Marilyn or Marilyn's conservatorship estate; and (3) primarily benefiting HSHV. (Appendix 33a, Appellant's Objection to Fees in Conservatorship). Both Appellant and Appellee provided supplemental exhibits to the probate court to support their respective positions.

*Evidentiary Hearing Related to Fiduciary and Attorney Fees Paid by Appellee*

On August 7, 2017, the probate court conducted an evidentiary hearing to address Appellee's fiduciary and attorney fees. The evidentiary hearing lasted one day, with Appellee being called as the only witness. Appellant did not object to the hourly rates charged by Appellee for legal services (versus fiduciary services), by attorneys retained by Appellee, or by Carter for legal services (versus fiduciary services). The probate court admitted 14 documents into evidence and made several evidentiary rulings in response to objections by Appellant's and Appellee's respective counsel. (Appendix 12a, August 7, 2017, Hearing Transcript). At the conclusion of the

evidentiary hearing, the probate court permitted Appellant and Appellee to file written, closing arguments.

*Opinion and Order Allowing All Fiduciary and Attorney Fees Paid by Appellee*

On October 3, 2017, the probate court issued its opinion and order. (Appendix 2a, Probate Court Opinion). The probate court's opinion and order approved and allowed the fiduciary and attorney fees paid by Appellee, as listed in Appellee Constance L. Jones accountings – which according the Appellee's testimony, exceeded $200,000.00. (Appendix 2a, Probate Court Opinion).

## FACTS PRESENTED TO THE PROBATE COURT ON THE FEE DISPUTE

By the time the disputes regarding Appellee's payment of fiduciary and attorney fees were presented, the probate court already had been presented with substantial information related to the claims made by Appellee, the defenses asserted by Appellant and Appellant's spouse, numerous documents and affidavits, copies of discovery requested by Appellant and the responses provided by Appellee, and several motions to compel discovery and for summary disposition. Such information was part of the probate court's file and appeared to be used by the probate court in the approval of the fiduciary and attorney fees and costs paid by Appellee related to the litigation. (Appendix 2a, Probate Court Opinion). The probate court also took notice, without specific testimony, of its familiarity with Appellee and Carter in approving and allowing Appellee's payment of fiduciary and attorney fees. (Appendix 2a, Probate Court Opinion, at 4-6).

*Testimony by Appellee*

At the evidentiary hearing on the fee petition, the only testimony provided was by Appellee. (Appendix 12a, August 7, 2017, Hearing Transcript). Although given the opportunity to call other witnesses, Appellee chose to rely only on her testimony, which

provided the following:

General Background

- Appellee admitted that the litigation against Appellant and Appellant's wife was commenced based on Appellee's speculation. (Appendix 12a, August 7, 2017, Hearing Transcript, at 230-231). Appellee met Marilyn only twice, and did not speak to Marilyn about her relationships with family, friends, or neighbors, despite having the opportunity to do so. (Appendix 12a, August 7, 2017, Hearing Transcript, at 88-89, 94).
- Appellee knew at the time of commencement of the guardianship proceedings and the conservatorship proceedings, in early-2014, that Attorney Jennifer Lawrence ("Lawrence") had prepared for Marilyn a new, durable power of attorney, health care power of attorney, deed, and amendment to her trust which favored Appellant and/or Appellant's wife. (Appendix 12a, August 7, 2017, Hearing Transcript, at 93). Marilyn never expressed to Appellee that documents prepared by Lawrence did not reflect Marilyn's intent. (Appendix 12a, August 7, 2017, Hearing Transcript, at 93).
- Appellee did not allege or otherwise suggest to the probate court during the hearing on the initial petitions that Appellant and Appellant's wife were unsuitable to act as Marilyn's co-guardians. (Appendix 12a, August 7, 2017, Hearing Transcript, at 99). Lawrence never indicated she believed the documents she prepared for Marilyn were invalid for any reason. (Appendix 12a, August 7, 2017, Hearing Transcript, at 101). Marilyn never expressed to Appellee any misgivings about Appellant or Appellant's wife. (Appendix 12a, August 7, 2017, Hearing Transcript, at 94).

Reasonableness of Fiduciary Rate

- Appellee provided no objective evidence to establish her fees were reasonable and necessary and of benefit to Marilyn's estate. (Appendix 12a, August 7, 2017,

Hearing Transcript, at 112).

- No specific testimony was given to support Appellee's claim all of her fees were legal in nature to be charged at an attorney rate of $225.00 per hour. (Appendix 12a, August 7, 2017, Hearing Transcript, at 26, 28).
- All testimony as to reasonableness of fees pertained to attorney billing rates, not fiduciary rates. (Appendix 12a, August 7, 2017, Hearing Transcript, at 25, 178-179).
- No evidence was provided as to the reasonableness of the fiduciary rate of $225.00 per hour charged by Appellee. (Appendix 12a, August 7, 2017, Hearing Transcript, at 22, 276-277).
- Appellee charges an hourly fiduciary rate ranging between $60.00 - $225.00 per hour or a monthly maintenance fee, which is a fiduciary fee, ranging between $60.00 to $200.00 per month. (Appendix 12a, August 7, 2017, Hearing Transcript, at 28).
- Appellee charged Marilyn a monthly maintenance fee of $150.00 per month and testified the balance of her time entries were attorney fees despite admitting a number of the tasks she billed for could have been done by a layperson. (Appendix 12a, August 7, 2017, Hearing Transcript, at 34, 296).
- Appellee's understanding of administration of a conservatorship estate is marshalling assets, managing assets, paying bills, paying necessary bills of that ward's care, tending to financial matters, banking, opening accounts, and reviewing financial statements. (Appendix 12a, August 7, 2017, Hearing Transcript, at 185).
- The monthly maintenance fee consisted of routine administration tasks of banking, making deposits, writing checks, paying bills, reconciling accounts, and numerous short phone calls or short e-mails that Appellee reads and does not respond to. (Appendix 12a, August 7, 2017, Hearing Transcript, at 28).

- The amount of the monthly maintenance fee depends on the volume of banking, bill paying, number of accounts to be reconciled, value of the total estate, and whether Appellee will spend an appreciable amount of time on non-substantive telephone conferences. (Appendix 12a, August 7, 2017, Hearing Transcript, at 29-30).
- Appellee testified the fiduciary fees in Marilyn's case were $4,650.00 over a 31-month period, which consisted of the monthly maintenance fee only. (Appendix 12a, August 7, 2017, Hearing Transcript, at 32-33).
- Of the 25 cases in which Appellee is currently serving as a fiduciary, in only between three and five cases is she charging equal to or above $225.00 per hour as a fiduciary; however, Appellee provided no testimony to why her fiduciary rate in the matters related to Marilyn justified a rate of $225.00 per hour versus a lower rate. (Appendix 12a, August 7, 2017, Hearing Transcript, at 10, 270, 277-278, 297).
- Appellee billed numerous fiduciary tasks at her attorney fee rate that, based on her testimony, should have been included in her monthly maintenance fee. (Appendix 12a, August 7, 2017, Hearing Transcript, at 177-178).

Appellee's Petition for Instructions Regarding Ward's Change of Residence, Visitation Issues and Real and Personal Property Belonging to Ward

- Prior to filing the petition, Appellee had contact with people who claimed to be friends, neighbors, or family members of Marilyn, consisting of both blood and non-blood relatives. (Appendix 12a August 7, 2017, Hearing Transcript, at 137-138).
- None of the friends, neighbors, or family members urged Appellee to take action against Appellant or Appellant's wife. (Appendix 12a, August 7, 2017, Hearing Transcript, at 138, 140).
- Appellee had no personal or objective knowledge of Marilyn's relationship with any of these friends, neighbors, or family members, or any knowledge from Marilyn as

to her relationship with these individuals. (Appendix 12a, August 7, 2017, Hearing Transcript, at 137-140).

- Appellee filed the petition for instructions because Appellant and Appellant's wife did not notify Appellee they were moving Marilyn to a facility in Macomb County until after the move was completed; despite Appellee testifying there was no legal duty to notify her. (Appendix 12a, August 7, 2017, Hearing Transcript, at 142-144).
- Appellee filed the petition for instructions based upon information and belief that personal property was being removed from Marilyn's home on a regular basis, but she testified that she had no personal knowledge of what allegedly was being removed, she had never conducted an inventory of Marilyn's personal property, and there was no way for her to actually know whether anything was missing. (Appendix 12a, August 7, 2017, Hearing Transcript, at 145-146).
- The petition for instructions was filed in the conservatorship proceedings, even though part of it challenged guardianship activities. (Appendix 12a, August 7, 2017, Hearing Transcript, at 142).
- There were no restrictions on Appellant's and Appellant's wife's authority as co-guardians to move Marilyn at time the petition for instructions was filed. (Appendix 12a, August 7, 2017, Hearing Transcript, at 221).
- Appellee provided individuals and entities with copies of Marilyn's estate planning documents, including documents that were superseded by later documents prepared by Lawrence, who are not defined as interested persons under the applicable court rules and statutes, but whom Appellee self-defined as interested persons, despite acknowledging she should be using the definition in the applicable court rules and statutes, and acknowledging she had no knowledge if these interested persons were

beneficiaries in Marilyn's estate planning documents. (Appendix 12a, August 7, 2017, Hearing Transcript, at 106-109).

Appellee's Attempts to Invalidate Cash Gift

- Appellee learned of the $467,000.00 gift in or around March 2016 by way of income tax returns provided by Appellant and Appellant's wife in late-2015, which Appellee did not review in detail until March 2016. (Appendix 12a, August 7, 2017, Hearing Transcript, at 134).
- The cash gift was made more than one year prior to the conservatorship being commenced. (Appendix 12a, August 7, 2017, Hearing Transcript, at 147).
- No evidence was presented that Appellee investigated the circumstances surrounding the gift, at the time the gift was made, before filing her verified petition.

Appellee's Petition to Modify Guardianship

- Appellee testified the basis for her request to remove Appellant and Appellant's wife as co-guardians was rooted in the transactions and documents related to pre- and post-death gifts that Appellee was challenging in the conservatorship proceedings, despite Appellant and Appellant's wife not having any control over Marilyn's assets at the time. (Appendix 12a, August 7, 2017, Hearing Transcript, at 226).
- Appellee testified the basis of her petition were statements from neighbors and family members that Appellant or Appellant's wife denied them visitation with Marilyn; Appellee testified if she had affidavits to evidence the denial of the visitation, those affidavits would be attached to her petition.[10] (Appendix 12a, August 7, 2017, Hearing Transcript, at 224).
- Appellee testified she filed the petition based upon speculation that Appellant

[10] No affidavits were attached to Appellee's petition to terminate or modify guardianship.

and Appellant's wife might not make decisions in the future in the best interests of Marilyn. (Appendix 12a, August 7, 2017, Hearing Transcript, at 230).

- Marilyn never stated to Appellee she did not want Appellant or Appellant's wife as her co-guardians. (Appendix 12a, August 7, 2017, Hearing Transcript, at 94, 97).
- Neither Appellee's testimony nor her petition provided evidence Appellant or Appellant's wife did not provide proper care to Marilyn or otherwise acted contrary to Marilyn's best interests related to the execution of their authority as co-guardians. (Appendix 12a, August 7, 2017, Hearing Transcript, at 164).

Appellee's Verified Petition for Return of Estate Property and to Void Certain Estate Planning Documents

- The funds Appellee sought to recover were not necessary for Marilyn's present care. (Appendix 12a, August 7, 2017, Hearing Transcript, at 149-150).
- Appellee reviewed Marilyn's estate planning documents drafted by Attorney Dennis Valenti ("Valenti") prior to filing her petition for instructions in July 2015 and was aware from reviewing the documents that Marilyn over the course of time made changes to her residuary beneficiaries. (Appendix 12a, August 7, 2017, Hearing Transcript, at 200-202).
- Appellee never performed a calculation to determine what funds would be necessary for Marilyn's care for the remainder of her life. (Appendix 12a, August 7, 2017, Hearing Transcript, at 160).
- Appellee testified she knew the gift of $467,000.00 did not make Marilyn insolvent; and that Marilyn's bills and expenses were able to be paid when due. (Appendix 12a, August 7, 2017, Hearing Transcript, at 207).
- Appellee was aware that there is no specific provision in EPIC that authorizes her as a conservator to seek to set aside estate planning documents. (Appendix 12a,

August 7, 2017, Hearing Transcript, at 254).

- Appellee admitted challenges to the validity of Marilyn's estate planning documents, the gift, and the deed could have been brought after Marilyn's death. (Appendix 12a, August 7, 2017, Hearing Transcript, at 129).
- Appellee understood that if a post-death action were brought, the litigation expenses would typically be borne by the party commencing the lawsuit as opposed to Marilyn's money funding the litigation, which occurred in this instance. (Appendix 12a, August 7, 2017, Hearing Transcript, at 130-131).

Appellee's and HSHV's Complaint Against Anne and Robert Sirchia for Undue Influence, Fraud, Conversion, Unjust Enrichment, and Other Relief

- Appellee did not articulate a reasonable basis for the filing of the complaint that contained many of the same claims that were included in the verified petition, beyond that she felt it was important to have an action against Appellant and Appellant's wife in their individual capacities, despite the verified petition being a petition against the them individually. (Appendix 12a, August 7, 2017, Hearing Transcript, at 264).
- It was Appellee and/or her counsel, Suzanne Fanning, that solicited HSHV to be a co-plaintiff, knowing HSHV could bring the action post-death at its own expense. (Appendix 12a, August 7, 2017, Hearing Transcript, at 197-198).

Litigation Costs

- Litigation expenses from Marilyn's estate for attorney and fiduciary fees were at least $200,000.00, plus the payment of $100,000.00 from Marilyn's estate to HSHV as part of settlement. (Appendix 12a, August 7, 2017, Hearing Transcript, at 120, 193-194).
- Prior to commencing the litigation, Appellee did not estimate how much the litigation might cost or consider a specific figure that would be an acceptable amount of

Marilyn's money to spend on the litigation. (Appendix 12a, August 7, 2017, Hearing Transcript, at 159).

- Appellee never calculated a figure of how much money was needed in Marilyn's estate to care for her as long as she lives; although her testimony indicates that was an element of her decision to settle the litigation. (Appendix 12a, August 7, 2017, Hearing Transcript, at 160).
- Appellee never asked HSHV for a contribution towards the litigation expenses. (Appendix 12a, August 7, 2017, Hearing Transcript, at 133).
- Appellee's risk-reward analysis for commencing litigation took into consideration how Marilyn was going to live for the rest of her life, where she was going to live, and who were going to be the people involved in her life, despite Appellee's testimony she met with Marilyn only twice, she did not discuss with Marilyn friends, neighbors, or family members, Marilyn never expressed she wanted Appellant or Appellant's wife not to be involved as her guardians, and Appellee did not estimate potential litigation costs or calculate a dollar figure of how much Marilyn needed for her care for the rest of her life. (Appendix 12a, August 7, 2017, Hearing Transcript, at 159, 162-163).

Appellee's Attempts to Invalidate Deed Creating Joint Tenancy

- There would have been no immediate financial benefit to Marilyn if the deed that made the residence joint between Marilyn and Appellant's wife were set aside. (Appendix 12a, August 7, 2017, Hearing Transcript, at 207-208).
- Appellee had no intention of selling the residence, even if the deed were set aside, because Marilyn wanted her ashes to be buried there. (Appendix 12a, August 7, 2017, Hearing Transcript, at 208-209).
- Appellee admits she stopped paying expenses for Marilyn's home and she did

not pay expenses for Marilyn's dogs prior to commencing the litigation.[11] (Appendix 12a, August 7, 2017, Hearing Transcript, at 209, 220).

Carter's Fees

- Appellee paid Carter $56,000.00 as temporary guardian for a 10-month period. (Appendix 12a, August 7, 2017, Hearing Transcript, at 233).
- $25,689.00 of the $56,000.00 fees were for Carter fighting an appeal taken by Appellant and Appellant's wife regarding a guardianship order issued by the probate court. (Appendix 12a, August 7, 2017, Hearing Transcript, at 235).
- Appellee never discussed with Carter her fees or expenses. (Appendix 12a, August 7, 2017, Hearing Transcript, at 236).
- No evidence exists to support Carter's fees were reasonable except for Appellee's testimony she is "familiar with Ms. Carter and her work." Carter did not testify and no evidence or argument was presented to suggest she was not able to testify. (Appendix 12a, August 7, 2017, Hearing Transcript, at 236).
- Appellee authorized Carter to respond to Appellant's and Appellant's wife's appeal; however, Appellee acknowledges Carter did not have to respond to the appeal, and they did not discuss a budget for the appeal fees. (Appendix 12a, August 7, 2017, Hearing Transcript, at 240-241, 243).
- Carter did not discuss the move from Arden Courts to Heartland with Appellee; Carter only told Appellee that Marilyn was moving. Appellee did not inquire into any insurance benefits prior to the move, nor did she undertake any due diligence to determine whether a move was financially or medically appropriate for Marilyn, despite the increase in cost in the facilities. (Appendix 12a, August 7, 2017, Hearing Transcript,

[11] These expenses were paid by Appellant and Appellant's wife.

at 241, 304-305).

Other Attorney Fees

- Appellee provided no evidence to establish the reasonableness or necessity of the fees paid to Kline Legal Group, who did not represent Appellee or Marilyn in the litigation, for Lawrence to provide deposition testimony and affidavits, along with counsel to represent Lawrence. (Appendix 12a, August 7, 2017, Hearing Transcript).
- Appellee provided no evidence to establish the reasonableness or necessity of the fees paid to Valenti who did not represent Appellee or Marilyn in the litigation. (Appendix 12a, August 7, 2017, Hearing Transcript).

## THE PROBATE COURT'S OPINION AND ORDER

The probate court's opinion and order contained the following findings of fact, purportedly based on the evidence presented during the evidentiary hearing, but is clear from the content that parts of the probate court's record in the conservatorship proceeding, the guardianship proceeding, and the civil action were used:

- Sometime in 2015 through 2016, Appellee became "concerned" about Appellant and Appellant's wife acting as fiduciaries for Marilyn (Appendix 2a, Probate Court Opinion, at 1);
- Appellee "saw numerous indicators of undue influence" (Appendix 2a, Probate Court Opinion, at 1);
- Appellant and Appellant's wife never denied receiving certain gifts from Marilyn or that Marilyn made changes to her estate plan that might have provided a post-death gift to Appellant's wife (Appendix 2a, Probate Court Opinion, at 2);
- In early-2016, Appellee "started actions to remove [Appellant and Appellant's wife] as co-guardians, to return assets, and to void estate planning documents"

(Appendix 2a, Probate Court Opinion, at 2);

- Appellant and Appellant's wife retained new counsel in 2016 and proceeded to file papers in the various matters consisting of 1,915 pages, not including an interlocutory application for leave to appeal and discovery requests (Appendix 2a, Probate Court Opinion, at 3);
- Appellee's "inducement to settle was the projected costs to Marilyn's estate in pursuing the litigation through a jury trial – litigation that would deplete the funds Marilyn needs to support herself for the balance of her life" (Appendix 2a, Probate Court Opinion, at 3);
- "The settlement disproportionately benefitted [Appellant and Appellant's wife]" (Appendix 2a, Probate Court Opinion, at 3);
- "As the litigation style of [Appellant and Appellant's wife] became more contentious and voluminous the fees increased exponentially" (Appendix 2a, Probate Court Opinion, at 4);
- The fees paid to Carter, as temporary guardian, were nearly all for attorney services at the rate of $200.00 per hour (Appendix 2a, Probate Court Opinion, at 4);
- Although Ms. Carter did not testify, the probate court was "well acquainted with [Carter] as an individual with lengthy legal experience and good standing in the Washtenaw County legal community [and] routinely appoints [Carter] as a fiduciary" (Appendix 2a, Probate Court Opinion, at 4);
- The cost to Marilyn's estate was less with Carter acting as an attorney, than if a separate attorney had been retained (Appendix 2, Probate Court Opinion, at 4);
- Appellee's testimony regarding her "legal experience and standing [was] credible and [was given] considerable weight" (Appendix 2a, Probate Court Opinion, at 5);

- The probate court was "convinced that the manner in which [Appellee] billed for her services did result in a lesser fee for many of the routine duties" (Appendix 2a, Probate Court Opinion, at 6);
- Appellee and Carter "both have high professional standing and experience in probate law" and the time spent was "extraordinary" because of Appellant's and Appellant's wife's "litigation style," which prevented Appellee from taking "other clients and or [sic] doing other work" (Appendix 2a, Probate Court Opinion, at 6);
- The number of hours expended by Appellee and other paid by her was reasonable (Appendix 2a, Probate Court Opinion, at 7);
- Appellee proceeded in a "prudent and reasonable manner" and it "would have been malfeasance on her part had she been presented with all of those issues and done nothing" (Appendix 2a, Probate Court Opinion, at 7);
- Appellant and Appellant's wife "made this matter significantly more complex and voluminous by virtue of their aggressive and excessive litigation tactics" and "these actions went beyond mere advocacy" (Appendix 2a, Probate Court Opinion, at 7);
- "It is solely [Appellant and Appellant's wife] who are to blame for the extraordinary costs" (Appendix 2a, Probate Court Opinion, at 7); and
- Appellee "met her burden" and the "fiduciary and attorney fees paid by [Appellee] are appropriate and [the probate court] will not increase or decrease them." (Appendix 2a, Probate Court Opinion, at 8).

## ARGUMENT

**I. The Court Of Appeals, In An Uninformed And Perfunctory Rubber-Stamping Of The Probate Court's Approval Of Nearly $200,000.00 Of Fiduciary And Attorney Fees Paid To And By The Conservator, Disregarded The Plain Language And Clear Intent Of Article V, Part 4, Of The Estates And Protected Individuals Code And Well-Established Common Law Precedent In A Way That Effects A Major Change To Michigan's Jurisprudence By Essentially Creating A New Judicial Doctrine Permitting Conservators (And Other Claiming To Be Similarly Situated) To Institute And Maintain Costly Litigation For Pre-Mortem Challenges To A Ward's Known Estate Plan, Including A Will, A Revocable Trust, Will-Substitutes, And Pre-Conservatorship Life Choices, That Is Funded By The Ward's Own Assets During The Ward's Lifetime And Which Provides No Necessary Or Reasonably Measurable Financial Benefit To The Ward, But Only Seeks To Deny Certain Individuals A Role In The Ward's Life And To Change The Manner In Which The Ward's Post-Death Estate Is Distributed Contrary To The Ward's Known Estate Plan.**

The probate court failed in its role as the gate-keeper to ensure that conservators act within the parameters imposed by Michigan law and the best interests of the ward. The probate court papered-over its mistakes and refused to critically assess Appellee's role in the litigation and adopted Appellee's pure speculation and false narrative about Appellant's and Appellant's wife's relationship with Marilyn. The probate court condoned Appellee's self-appointed role as "judge, jury, and executioner" and embraced the idea that the conservator's opinion of the wisdom or propriety of pre-conservatorship acts by the ward, including who should benefit from the ward's largesse and post-death estate, is automatically correct and superior to the ward's, such that litigation is appropriate during the ward's lifetime, and at the ward's expense, to change the ward's plan and benefit those whom the conservator deems more worthy.

Similarly, the Court of Appeals utterly failed in its roles as a reviewing court. Without any serious questioning or analysis, it doubled-down on the pure speculation and false narrative spun by Appellee and the probate court. It is clear from the Court of Appeals' opinion and questioning during oral argument that the panel was either unfamiliar with the entirety of the probate court's record in the underlying proceedings

and civil action, or that the panel predetermined that it was easier (and possibly more politically expedient and beneficial) to side with a court-appointed conservator alleging substantial elder financial abuse, regardless of existing law, than to be seen as potentially "soft" on the topic. Either way, the result is unacceptable because it is contrary to the Estates and Protected Individuals Code and established precedent, and creates a new judicial doctrine that dramatically expands a conservator's powers and tacitly, if not expressly, approves pre-mortem challenges to wills, revocable trusts, and other will-substitutes that are funded by the ward's or settlor's own assets.

### A. Standard Of Review

This Court may grant an application for leave to appeal if, among other grounds, the application shows that: (1) "the issue involves a legal principle of major significance to the state's jurisprudence;" (2) a Court of Appeals' decision "is clearly erroneous and will cause material injustice;" or (3) a Court of Appeals' decision "conflicts with a Supreme Court decision or another decision of the Court of Appeals." MCR 7.305(B)(3); MCR 7.305(B)(6).

A probate court's findings of fact are not reviewed *de novo*, but rather are reviewed for clear error. *In re Matter of Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988). A probate court's "[f]indings are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made." *Id.* Although a probate court's findings of fact are given deference, this Court "must examine the entire record and weigh all of the evidence, subjecting the trial court's findings of fact to 'closer scrutiny than we would employ on review of a jury verdict'" *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593, 596 (1983) (citation omitted). Thus, "[e]ven if there is evidence to support them, findings are considered clearly erroneous when, on the basis of all the evidence, the reviewing court develops the

definite and firm conviction that a mistake has been made." *In re Matter of Gass*, 173 Mich App 444, 447; 434 NW2d 427, 428-29 (1988).

The probate court's holdings related to a conservator's authority under the Estates and Protected Individuals Code (EPIC), such holdings involve the application and interpretation of statutes and, therefore, are reviewed de novo. *In re MCI Telecommunications Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999); *Hoste v Shanty Creek Mgmt Inc*, 459 Mich 561, 569; 592 Nw2d 360 (1999), *rehrg den* 460 Mich 1201; 598 NW2d 336 (1999). The probate court's decision regarding whether to grant an award of fiduciary or attorney fees and costs is reviewed for an abuse of discretion. *Doe v Boyle*, 312 Mich App 333, 343; 877 NW2d 918, 923–24 (2015). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Doe*, 312 Mich App 343.

Appellant contends that the probate court's findings of fact are clearly erroneous based on the testimony adduced at trial and the documents on which Appellee relied, the probate court committed legal error in its interpretation of a conservator's legal authority under EPIC, and that the probate court abused its discretion in approving Appellee's payment of at least $172,957.97 in fiduciary and attorney fees related to litigation that was neither necessary, reasonable, nor of benefit to Marilyn.

**B. The Litigation Commenced By Appellee Was Not Reasonable, Necessary, Or Of Benefit To Marilyn Burhop And, Therefore, The Related Fiduciary And Attorney Fees Awarded By The Probate Court Were Improper.**

Fiduciary and attorney fees may be charged against an estate only if the services were "on behalf of and beneficial to the estate." *In re Estate of Humphrey*, 141 Mich App 412, 437-438; 367 NW2d 873 (1985). The burden of proof for establishing the propriety of fees paid or sought is on the conservator or guardian seeking fees, and she must establish that the services rendered were necessary and that the charges for those

services were reasonable. *Comerica Bank v City of Adrian*, 179 Mich App 712, 722; 446 NW2d 553 (1989) (citing *In re Baird Estate*, 137 Mich App 634, 637; 357 NW2d 912 (1984)); *In re Estate of Benfer*, 2006 WL 3373157 (Mich App, Docket No. 262895) (unpublished opinion) (holding that "an attorney serving as a fiduciary is not automatically entitled to charge attorney rates for fiduciary services") (copy attached as Appendix 34a, pursuant to MCR 7.215(C)(1)). A fiduciary's failure to present records concerning her services is usually weighed against her. *In re Baird Estate*, 137 Mich at 638. Importantly, evidence establishing the value of services is insufficient to support a claim if the need for the services has not been proven. *Id.*

Below, the lower courts fundamentally misunderstood a conservator's role, authority, and limits regarding the administration of Marilyn's conservatorship estate in light of Marilyn's pre-conservatorship choices, the estate planning documents intended to dispose of her post-death estate, and her actual needs during the pendency of the conservatorship. Neither questioned Appellee's attempts to wield authority that does not belong to a conservator and to affect matters that have nothing to do with the administration of a conservatorship estate, including pre-conservatorship gifts that did not create an insolvency, guardianship matters, and post-death estate planning tools. Essentially, the lower courts condoned Appellee's unchecked conduct and allowed Appellee to use Marilyn's assets to fund Appellee's speculative, and apparently personal, crusade.

The disputed fees, totaling at least $172,957.97,[12] should be disgorged and borne individually by Appellee or those acting on her behalf, not by Marilyn's

[12] This amount is based on Appellant's calculation in reviewing the underlying fee statements; however, at the evidentiary hearing, Appellee did not provide any breakdown of those fees between the litigation and unrelated administration of the

conservatorship estate. *In re Estate of Valentino*, 128 Mich App 87, 94; 339 NW2d 698 (1983) (holding, in part, that "[l]itigation may sometimes be necessary to achieve a benefit to an estate, but litigation is not in itself beneficial"); *Ullman v Garcia*, 645 So2d 168 (DC App FL 1994) (copy attached as Appendix 35a).

1. Appellee Lacked The Legal Authority Under EPIC To Commence And Pursue The Litigation.

The lower courts erred when they condoned Appellee's commencement and pursuit of the litigation, stated that the authority to do so was within a conservator's legal authority under Michigan law, and then compensated Appellee and Appellee's agents. In essence, the lower courts considered Appellee to be Marilyn's alter ego, possessed of every power that Marilyn could have exercised prior to being declared a protected individual under EPIC and being subjected to a conservatorship estate, including powers that the probate court lacked under EPIC's plain language.

The rules involving the process of statutory interpretation and the resolution of conflicts between statutes are well-established. *Bailey v Oakwood Hospital*, 472 Mich 685; 698 NW2d 374 (2005); *Nowell v Titan Ins Co*, 466 Mich 478; 648 NW2d 157 (2002); *Murphy v Michigan Bell Tel Co*, 447 Mich 93; 523 NW2d 310 (1994); *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993); *Dodak v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993). The overriding goal is to give "effect to the intent of the Legislature" and "[n]othing will be read into a clear statute that is not within the intent of the Legislature as derived from the language of the statute itself." *In re Estate of Bennett*, 255 Mich App 545; 553, 662 NW2d 772 (2003) (citations omitted). If a statute does not define a term, the court is to ascribe its plain and ordinary meaning.

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conservatorship and guardianship. Even so, Appellee did not dispute Appellant's calculation.

*Inter Co-op Council v Tax Tribunal Dept of Treas*, 257 Mich App 219, 223; 668 NW2d 181 (2003). In such instances, courts "may consult dictionary definitions." *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002) (citation omitted). To the extent possible, a court is to "give effect to the Legislature's purpose and intent according to the common and ordinary meaning of the language it used." *Bailey*, 472 Mich 693. In construing a statute, courts "should give every word meaning, and should seek to avoid any construction that renders any part of the statute surplus or ineffectual." *In re Casey Estate*, 306 Mich App 252, 257; 856 NW2d 556 (2014) (quotation omitted); *Koontz,* 466 Mich 312. When ascertaining intent, differing statutory provisions are read "to produce an harmonious whole." *Id.* The goal of harmony not only applies to conflicting language within a statute, but also to conflicts between statutes. *Nowell*, 466 Mich 482; *Murphy*, 447 Mich 98; *Dodak*, 441 Mich 568. Further, "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington*, 442 Mich 210. The practical effect of these rules is that a court is bound to apply a statute, as written, if the language is clear and unambiguous. *Bennett*, 255 Mich App 553.

Courts also "presume the Legislature is familiar with the rules of statutory construction and knows of existing laws on the same subject." *Verizon North, Inc v Public Service Commission*, 26 MIch App 432, 438; 677 NW2d 918 (2004) (citation omitted). Likewise, courts "presume that the Legislature knows the state and effect of the interpretation given to its statutes." *Id.*

It is undisputed that a conservator, a guardian, and an attorney retained by a conservator are entitled to reasonable compensation. MCL 700.5315(1); MCL 700.5413; MCL 700.5423(2)(z). However, a conservator's authority to pay such fees is

constrained. First, conservator's exercise of all powers, including payments to fiduciaries and attorneys, must be "reasonably in an effort to accomplish the purpose of the appointment. . . ." MCL 700.5423(2). Second, a guardian only may receive compensation that is "reasonable under the circumstances" and related to the ward's "custody and care." MCL 700.5315(1). Third, the services for which an attorney is paid must be "necessary legal services or to advise or assist the conservator in the performance of the conservator's administrative duties. . . ." MCL 700.5423(2)(z) (emphasis added). With litigation, and unlike personal representatives and trustees, there is no statutory provision that allows a conservator to receive reasonable attorney fees and costs for litigation that is unsuccessful, but defended or prosecuted in good faith. MCL 700.3720; MCL 700.7904(2).

A review of EPIC reveals that Appellee lacked the authority to pursue the litigation because the subject-matter falls outside of the grant of powers to a conservator. The powers of a conservator are outlined in MCL 700.5423, MCL 700.5424; MCL 700.5425, and MCL 700.5426. MCL 700.5423(2)(aa) permits a conservator to "[p]rosecute or defend an action, claim, or proceeding in any jurisdiction for the protection of estate property and of the conservator in the performance of a fiduciary duty." [Emphasis added]. Yet, nothing in MCL 700.5423 through MCL 700.5426 allows a conservator to take the breadth of action taken by Appellee in the litigation where the goal clearly was to get Appellant and Appellant's wife our of Marilyn's life under the pretense of a breach of guardianship duties and to rewrite Marilyn's estate plan to benefit HSHV, or anyone other than Appellant or Appellant's wife. This conclusion is evident from the plain language of EPIC, but requires a level of analysis and adherence to the law that the probate court and the Court of Appeals were unwilling to undertake.

It also is important to understand the scope of the probate court's ability to grant powers to a conservator outside of those expressed in MCL 700.5423. Additional authority granted to the probate court is contained in, and limited by, MCL 700.5407, which provides, in pertinent part, that:

* * *

> (2) The court has the following powers that may be exercised directly or through a conservator in respect to a protected individual's estate and business affairs:
>
> (a) While a petition for a conservator's appointment or another protective order is pending and after preliminary hearing and without notice to others, the court has the power to preserve and apply property of the individual to be protected as may be required for the support of the individual or the individual's dependents.

* * *

> (c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to an individual for a reason other than minority, the court, for the benefit of the individual and members of the individual's immediate family, has all the powers over the estate and business affairs that the individual could exercise if present and not under disability, except the power to make a will. Those powers include, but are not limited to, all of the following:
>
> (i) To make gifts.
>
> (ii) To convey or release a contingent or expectant interest in property including marital property rights and a right of survivorship incident to joint tenancy or tenancy by the entirety.
>
> (iii) To exercise or release a power held by the protected individual as personal representative, custodian for a minor, conservator, or donee of a power of appointment.
>
> (iv) To enter into a contract.
>
> (v) To create a revocable or irrevocable trust of estate property that may extend beyond the disability or life of the protected individual.
>
> (vi) To exercise an option of the protected individual to purchase securities or other property.

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

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

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

(3) The court may exercise or direct the exercise of the following powers only if satisfied, after the notice and hearing, that it is in the protected individual's best interests and that the individual either is incapable of consenting or has consented to the proposed exercise of the power:

(a) To exercise or release a power of appointment of which the protected individual is donee.

(b) To renounce or disclaim an interest.

(c) To make a gift in trust or otherwise exceeding 20% of a year's income of the estate.

(d) To change a beneficiary under an insurance and annuity policy.

* * *

[Emphasis added].

Notably, MCL 700.5407(2)(c) states unequivocally that the probate court cannot "make a will" for a protected individual, and its subparts carefully describe positive and negative actions.[13] However, these powers must be expressly conferred by the probate court to a conservator – they may not be inferred. MCL 700.5427. Moreover, MCL 700.5428 mandates the probate court and the conservator consider a protected individual's known estate plan, "including a will, a revocable trust of which the individual is settlor, and a contract, transfer or joint ownership arrangement originated by the protected individual with provisions for payment or transfer of a benefit or interest at the

[13] The Uniform Probate Code ("UPC"), on which EPIC is based, contains optional language to allow conservators to "make, amend, or revoke" a ward's will. *See* Uniform Probate Code §5-411 and Comment (excerpt attached as Appendix 36a).

individual's death to another or others. . .," when exercising distributive duties and powers for the support, education, care or benefit of the individual, making gifts to charities from the individual's estate, and utilizing a power of revocation or withdrawal available for the protected individual's support. *Id.* Further:

> A conservator or plenary guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only to the extent expressly authorized by the terms of the trust and with the approval of the court supervising the conservatorship or guardianship.

MCL 700.7602(6). [Emphasis added].

The Reporter's Comment to MCL 700.7602 notes that:

> . . . there is an important distinction in [MCL 700.7602(6)] in contrast to [MCL 700.7602(5)]. Subsection 6 requires that the power to amend or revoke be included in the terms of the trust before the power to amend or revoke can be granted by a court to the conservator. . . In contrast, subsection (5) permits an agent under a durable power of attorney to have the power to amend or revoke a trust if the power of attorney expressly so provides, even if the trust agreement is silent on the question.

*Estates and Protected Individuals Code With Reporters' Commentary: January 2016 Update*, Martin and Harder (ICLE). [Emphasis added].

The conservator and the probate court have the duty to act for the protected individual's benefit, but not to substitute their judgment for each act the protected person performed prior to the imposition of the conservatorship. MCL 700.5407; MCL 700.5427. As such, a conservator's power is not absolute, and a conservator is not the alter ego of the protected individual. Instead, a conservator is a fiduciary who can only exercise her powers to accomplish the purpose for which she is appointed and "is not empowered by virtue of [her] office to act for the incompetent in matters involving the exercise of a personal discretion so as to change an act performed by the incompetent while mentally normal. . . ." *First Fed Sav & L Ass'n of Detroit v Savallisch*, 364 Mich

168, 175; 110 NW2d 724,728 (1961) (quoting 44 C. J.s. Insane Persons §49, pp. 134, 135); *see also, In re Estate of Wright*, 430 Mich 463; 424 NW2d 268 (1988); *Ullman, supra* (holding that a fiduciary whose duty is to protect an incapacitated ward's property cannot contest the validity of a will because it is not an asset or an instrument which the guardian can use in recovery of an asset, and cannot seek to set aside a revocable trust on the basis of undue influence during the settlor's lifetime because of "the unique nature of a revocable trust in that it reserves to the settlor the power to end the trust at any time") (copy attached as Appendix 35a).

As discussed, a court is bound to apply a statute, as written, if the language is clear and unambiguous. *Bennett*, 255 Mich 553. Against this standard, when MCL 700.5423 through MCL 700.5426 are read in conjunction with each other, and with the additional limitations imposed by MCL 700.5407, MCL 700.5427, MCL 700.5428, and MCL 700.7602(6), it is clear that Appellee acted outside of the authority granted to her under EPIC and Michigan law in her quest to invalidate Marilyn's pre-conservatorship estate planning documents and transfers. Importantly, the additional powers reserved to the probate court under MCL 700.5407 – but which do not include those that Appellee tried to exercise – are not automatically conferred upon a conservator. MCL 700.5423(1); MCL 700.5427. Further, Appellee admitted that she never discussed any aspect of the disputed will, trust amendment, deed, or gift with Marilyn, despite having the opportunity to do so, and was never told by Marilyn (or anyone else with personal knowledge) that the disputed will, trust amendment, deed, or gift did not comport with her intent. (Exhibit 12a, Transcript of August 7, 2017, Hearing, at 88-89, 93, 94, 97, 101, 140, 162-163). So, when Appellee instituted each proceeding in the litigation, no valid order existed authorizing Appellee to exercise the powers under MCL 700.5407. As a result, even to the extent Appellee might argue that certain of her actions fell within the

potential authority outlined in MCL 700.5407, she acted contrary to the limitations contained in MCL 700.5423(1) and MCL 700.5427. Likewise, the probate court clearly erred and abused its discretion when it held that Appellee acted consistent with her fiduciary obligations in commencing and pursuing the litigation. Marilyn's conservatorship estate should not be forced to bear the expense of Appellee's clearly *ultra vires* conduct.

2. The Probate Court And Court Of Appeals Improperly Concluded That *Valentino* Was Abrogated By EPIC And Was Irrelevant In Determining Whether Fees Incurred And Paid By Appellee Related To The Litigation Were Necessary Under The Circumstances.

Although MCR 7.215(C)(2) provides that a "published opinion of the Court of Appeals has precedential effect under the rule of stare decisis," both the probate court and the Court of Appeals chose to ignore the holding in *Valentino*, 128 Mich App 87. For its part, the Court of Appeals stated, blithely, that Appellant's reliance on *Valentino* was "misplaced" and that the "probate court correctly observed that [the] panel decided that case before the Legislature enacted EPIC and, therefore, the case was not controlling." (Appendix 1a, COA Opinion, at 5). There was no more discussion given to the issues, reasoning, or holding in *Valentino*. Appellant contends that the positions taken by the lower courts denying any present or continuing effect of *Valentino* is improper under the principles of stare decisis and statutory abrogation. *Woodman v Kera LLC*, 486 Mich 228; 785 NW2d 1 (2010); *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

As stated, the positions taken by the probate court and the Court of Appeals imply that *Valentino,* was statutorily abrogated by EPIC. "Although statutory enactments can abrogate the common-law rules, such rules may not be eliminated by implication, and statutes in derogation of the common law must be strictly construed.

*Smith*, 216 Mich App 554 (citing *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 652-653; 513 NW2d 799 (1994)).

Clearly, there is nothing in the plain language of EPIC, let alone in the provisions that related to guardians and conservators, that supports a conclusion that the rules established and restated in *Valentino* were intended to be abrogated. At the outset, the probate court's and Court of Appeals' reliance on undefined differences between the Revised Probate Code (RPC), which was in effect when *Valentino* was decided, and the subsequent passage of EPIC was improper and failed to recognize the exacting similarity of the provisions in the RPC and EPIC.[14] *Compare,* MCL 700.5407 *with* repealed MCL 700.468, MCL 700.5413 *with* repealed MCL 700.474, MCL 700.5423 *with* repealed MCL 700.484, MCL 700.5425 *with* repealed MCL 700.485(1), MCL 700.5426 *with* repealed MCL 700.485(2)-(5), and MCL 700.5428 *with* repealed MCL 700.487; (Appendix 37a, Selected RPC Provisions). The probate court's and Court of Appeal's excuse for disregarding *Valentino* was simply that "[Appellee] was acting under the explicit authority granted to her by MCL 700.5423. . .," but the "explicit authority" was not identified. (Appendix 1a, COA Opinion, at 5; Appendix 2a, Probate Court Opinion, at 8). In fact, according to the Reporter's Comment to MCL 700.5423, "[t]he reference to a conservator having 'the additional powers conferred by law on trustee'" does not free a conservator from the restrictions imposed on conservators (but not on trustees)." *See Estates and Protected Individuals Code With Reporters' Commentary: January 2016 Update*, Martin and Harder (ICLE). Because the authority of a conservator has not expanded significantly since the passage of EPIC, *Valentino* remains applicable and

[14] The legislative history of EPIC reflects that "Article V generally retains current Michigan law on guardianships and conservatorships for minors and incapacitated individuals." *See* SB 209 Enrolled Analysis, at 3 (copy attached as Appendix 38a).

governs Appellee's conduct in the litigation.

Given that EPIC did not abrogate *Valentino*, the only justification for not applying it to this case is that the public policy regarding a conservator's powers[15] and responsibilities should be changed to permit a conservator to undertake actions that do not have any reasonable connection to the financial benefit of a ward or a ward's conservatorship estate, including challenges to wills, revocable trusts, other will-substitutes, and pre-conservatorship life decisions. In *Woodman, supra*, this Court addressed the issue of preinjury liability waivers and whether the common law should be changed to allow such waivers. *Woodman*, 486 Mich 231. Addressing the specific issue before this Court, Justice Young reasoned that:

> In this case, we are (impliedly) asked to alter a common law doctrine that has existed undisturbed for well over a century. There is no question that, if this Court were inclined to alter the common law, we would be creating public policy for this state. Just as "legislative amendment of the common law is not lightly presumed, this Court does not lightly exercise its authority to change the common law. Indeed, this Court has acknowledged the prudential principle that we must "exercise caution and ... defer to the Legislature when called upon to make a new and potentially societally dislocating change to the common law." Whether to alter the common law is a matter of prudence and, because we share this authority with the Legislature, I believe we must consider whether the prudent course is to take action where the Legislature has not.
>
> * * *
>
> This Court has recognized that the Legislature is the superior institution for creating the public policy of this state:
>
> "As a general rule, making social policy is a job for the Legislature, not the courts. See In re Kurzyniec Estate, 207 Mich.App. 531, 543, 526 N.W.2d 191 (1994). This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for

[15] The allowance of pre-mortem challenges in the Court of Appeals' opinion will almost certainly result in others seeking to assert pre-mortem challenges to estate planning documents, regardless of whether the individual is subject to a conservatorship or not.

> drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.' O'Donnell v. State Farm Mut. Automobile Ins. Co., 404 Mich. 524, 542, 273 N.W.2d 829 (1979)."
>
> * * *
>
> This case illustrates why this Court should frequently defer policy-based changes in the common law to the Legislature. When formulating public policy for this state, the Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public. The Legislature can hold hearings, gather the opinions of experts, procure studies, and generally provide a forum for all societal factions to present their competing views on a particular question of public policy.
>
> * * *
>
> The judiciary, by contrast, is designed to accomplish the discrete task of resolving disputes, typically between two parties, each in pursuit of the party's own narrow interests. We are "'limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely private interests.'" We do not generally consider the views of nonparties on questions of policy, and we are limited to the record developed by the parties. The reality of our judicial institutional limitations is a significant liability in regard to our ability to make informed decisions when we are asked to create public policy by changing the common law.

*Woodman*, 486 Mich 245-248 (citations and notes omitted); *see also, Kimble v Marvel Entertainment, LLC*, 135 SCt 2401, 2409-2410 (2015) (copy attached as Appendix 39a).

In *Valentino, supra,* another panel of the Court of Appeals reversed a probate court's ruling compelling a personal representative of a decedent's estate to pay the attorney fees for litigation commenced between an heir's conservator and guardian. *Valentino*, 128 Mich App 90. While the decedent's estate could not be held liable for the attorney fees for the heir's conservator or guardian, the question remained whether such attorney fees were to be paid from the heir's own conservatorship estate or individually by the conservator and guardian. *Id.* at 94.

The court's analysis began with the basic proposition that "no authority gives a guardian any standing in issues concerning the conservatorship or gives a conservator any standing in issues concerning the guardianship. Therefore, when the guardian and the conservator here petitioned for the removal of each other, they did so as individuals and not as fiduciaries." *Id.* It then followed with the well-established principle that attorney fees may be charged to an estate "only where the services of the attorney were on behalf of or beneficial to the estate." *Id.* at 94-95 (citation omitted). And, while the court noted that "the probate court found that both sides performed a benefit to the estate because both sides were motivated by concern for the best interests of the child and raised arguably meritorious issues in good faith," it declined to use that sentiment as a justification for paying attorney fees from the heir's conservatorship estate. *Id.* at 97. "Litigation may sometimes be necessary to achieve a benefit to an estate, but litigation is not in itself beneficial. The probate court's result encourages the parties to litigate rather than settle their disputes, with a consequent increase in cost to the estate." *Id.* And "where the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary rather than the estate should be responsible for the attorney's fees." *Id.* at 95-96.

It seems apparent that the probate court and the Court of Appeals chose to disregard *Valentino, supra*, because it did not fit with the conclusion they wanted to reach. Quite simply, the facts of this case fall squarely within this Court's holding and the cautionary tale in *Valentino, supra*. Appellee made a conscious choice based on speculation, apparently with an understanding of the risks and costs involved in doing so. (Exhibit 12a, Transcript of August 7, 2017, Hearing, at 159-160, 162-163, 230-231). While Appellant maintains that Appellee lacked any legal authority to pursue the litigation, including an attempt to remove Marilyn's guardians, the simple fact is that no

purpose was served by instituting the litigation during Marilyn's lifetime and paying the costs with her assets. All of the disputed fiduciary and attorney fees (and other costs) would have been avoided if Appellee had demurred and left the fighting to those claiming an interest in Marilyn's post-death estate, after Marilyn's death. Appellee cannot avoid the conclusion that the litigation was unnecessary and that she was solely to blame for bringing it about. *Valentino*, 128 Mich App 95-96.

Michigan's common law supports the statutory analysis of EPIC that the fiduciary and attorney fees approved and allowed by the probate court, and affirmed by the Court of Appeals, were not proper expenses of Marilyn's conservatorship estate.[16] Appellee admitted she: (a) commenced litigation based upon speculation; (b) had no personal knowledge of any denial of visitation; (c) had no personal knowledge of any of Marilyn's personal property being removed from Marilyn's home; (d) had no knowledge suggesting that Marilyn did not want Appellant and Appellant's wife as her guardians; (e) had no knowledge Marilyn's documents or gift did not reflect her wishes or that the documents or gift were invalid; and (f) the litigation could have been brought post-death at no cost to Marilyn, and the litigation was not necessary to provide support and care for Marilyn. (Appendix 12a, Transcript of August 7, 2017, Hearing, at 88-89, 93, 97, 101, 129-131, 137-138, 140, 145-146, 158-160, 208, 218, 223, 226-227, 229-231). Appellee's proffered basis for commencing the litigation constitutes conjecture and speculation which is insufficient to sustain a reasonable claim. *Karbel v Comerica Bank*, 247 Mich App 90; 635 NW2d 69 (2001) (parties must present more than conjecture and speculation to meet their burden of providing evidentiary proof

[16] Moreover, Appellee lacked standing and was not the real party in interest to pursue the litigation. *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339; 833 NW2d 384 (2013).

establishing a genuine issue of material fact); *Valentino*, 128 Mich App 94; *Ullman, supra* (copy attached as Appendix 35a). When a fiduciary is partially to blame for bringing unnecessary litigation, the fiduciary rather than the estate should be responsible for the attorney's fees. *Valentino, supra; see also, In re Nestorovski Estate*, 283 Mich App 177; 769 NW2d 720 (2009).

3. Common Law In Jurisdictions With Similar Conservatorship Laws Support Appellant's Argument That The Fees Incurred And Paid By Appellee From Marilyn Burhop's Assets Related To The Litigation Did Not Benefit Marilyn Burhop.

Except for ending the ongoing cost of Appellee's pursuit of the Burhop litigation, the settlement agreement provided no benefit to Marilyn or her conservatorship estate. (Appendix 31a, Settlement Agreement). In fact, the settlement resulted in the sum of $100,000.00 being paid from Marilyn's assets to HSHV, even though HSHV was, at best, as post-death beneficiary of Marilyn's estate. (Appendix 31a, Settlement Agreement). As a result, Marilyn had approximately $300,000.00 less funds available to her after the Burhop litigation than she did before Appellee commenced it. *Ullman, supra* (Appendix 35a); *In re Guardianship of Sleeth*, 244 P3d 1169 (Ariz App 2012) (holding that fiduciaries must avoid the pursuit of pyrrhic victories and the court must exercise independent judgment in determining whether fees were reasonably incurred) (copy attached as Appendix 40a); *In re Guardianship of Snyder*, 2015 WL 3473001, at 4 (No. CA-CV 14-0118) (Ariz App 2015) (unpublished opinion) (holding that no statute authorizes a conservator to revise the ward's estate plan in favor of "certain putative beneficiaries over other [because] estate plans are not assets that may be used for [the ward's benefit]. . . [e]ven if the conservator believes that certain estate planning was the product of undue influence, the conservator's obligation is to account for the known estate plan.") (copy attached as Appendix 41a, consistent with MCR 7.215(C)(1)).

Marilyn was the only person with a present beneficial interest in her trust during her lifetime, which was for her sole benefit until her death, regardless of whether or not the disputed amendment was ultimately deemed valid.[17] The only beneficial interests that changed in the trust amendment and the will were future, contingent interests of persons or entities other than Marilyn that were subject to change again during Marilyn's lifetime. As set forth above, it was not alleged or established that setting aside the pre-conservatorship trust amendment or will benefited Marilyn in any way. In fact, seeking to do so in the litigation would not benefit Marilyn or serve any need to provide for her support, maintenance, health, or welfare because her interests in the trust, and the assets available to her, would not have been improved by doing so. Moreover, "wills, by their nature, are ambulatory until the testator dies.... This rule has been stated many ways. *See*, e.g., *In re Churchill Estate*, 230 Mich. 148, 155; 203 N.W. 118 (1925), stating, 'estates given by will take effect and become vested on the death of the testator ...'; *In re Jamieson Estate*, 374 Mich. 231, 247; 132 N.W.2d 1 (1965), stating, '[a] will, though often made while death is contemplated as a remote event, is to speak from the time the death takes place'; and *In re Marriage of Stephenson*, 121 Ill.App.3d 698, 700; 77 Ill.Dec. 142; 460 N.E.2d 1 (1983), stating, '*nemo est haeres viventis*'-no one can be an heir during the life of an ancestor." *Matter of Estate of Finlay*, 430 Mich 590, 600-601; 424 NW2d 272, 277 (1988).

It is undisputed that any challenge to the validity of the will, the trust amendment, the deed, and the cash gift would have survived Marilyn's death. *Finlay, supra*; MCL

[17] The simple notion of "ripeness" should have caused Appellee to rethink her course of action in commencing and pursuing the litigation, and it demonstrates, in yet another way, why the litigation was not reasonable, necessary, or of benefit to Marilyn. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615-16; 761 NW2d 127, 135 (2008).

700.3401, et seq; MCL 700.7604. This fact was recognized and admitted by Appellee during her examination at the evidentiary hearing before the probate court. (Exhibit 12a, Transcript of August 7, 2017, Hearing, at 129-131).

During the evidentiary hearing, Appellee claimed that she considered the impact that the litigation would have on Marilyn's assets. However, Appellee was unable to articulate the specific analysis she undertook in determining whether the commencement of the litigation would be beneficial or detrimental to Marilyn from a cost-benefit or risk-reward perspective. (Appendix 12a, Transcript of August 7, 2017, Hearing, at 159-160, 162-163, 230-231). In the end, it is obvious that Marilyn did not receive any benefit from the litigation.

## II. In Addition To The Fundamental Errors In Statutory Interpretation And Disregard Of Precedent, The Court Of Appeals Clearly Erred In Its Review Of The Remaining Elements Underpinning The Probate Court's Allowance Of Fiduciary And Attorney Fees.

Assuming, *arguendo*, that this Court were to determine that certain of the actions taken by Appellee in the litigation were permitted under EPIC, it still does not change the fact that none of the fiduciary and attorney fees related to the litigation should have been paid. This is because Appellee's own testimony amply demonstrates that the entirety of the litigation was a "shake-down" intended, not to benefit Marilyn, but to satisfy Appellee's belief that Appellant and Appellant's wife should be removed from Marilyn's life, deprive them of Marilyn's prior generosity, and deprive them of any interest in Marilyn's post-death estate. None of this was reasonable, necessary, or of benefit to Marilyn.

### A. Standard Of Review

The standards of review are identical to those listed in I.A., *supra.*

**B. The Court Of Appeals Clearly Erred When It Refused To Reverse The Probate Court's Finding That The Costs Of Litigation Were Solely The Result Of The "Litigation Style" Employed By Respondent-Appellant Robert Sirchia And His Wife When They Were Defending Multiple Pieces Of Litigation Commenced Against Them By The Conservator And The Conservator's Hand-Picked Co-Plaintiff That Included Efforts To Invalidate The Ward's Known Estate Plan In Favor Of Those Whom The Conservator Determined To Be More Worthy Of The Ward's Post-Death Estate And To Remove Guardians Chosen By The Ward Where No Objective Evidence Existed To Support A Breach Of Fiduciary Duty By The Guardians, But Only The Conservator's Rank Speculation That Was Unrelated To The Guardianship, And Sought Damages From The Guardians In Excess Of Half A Million Dollars.**

The probate court's findings of fact concerning the "litigation tactics" employed by Appellant and Appellant's counsel are clearly erroneous and unsupported, if not specious; and the probate court's resulting conclusion that the disputed fiduciary and attorney fees were the singular result of factors outside of Appellee's control was an abuse of discretion.

In reviewing Appellee's testimony and the probate court's opinion and order, it appears that each expected Appellant and Appellant's spouse to forego any defense of the serious allegations leveled by Appellee in her multiple filings or the need to conduct discovery to investigate the factual bases, if any, for such allegations. (Appendix 2a, Probate Court Opinion; Appendix 12a, Transcript of August 7, 2017, Hearing). Leaving aside the fact that Appellee lacked the legal authority to pursue most, if not all, of the claims in the litigation, it is indisputable that the burden of proving those claims rested with Appellee, yet her entire case was based on pure speculation. *Karbel, supra.* Yet, the probate court and the Court of Appeals acted as if Appellee's speculation could not, and should not, be investigated by Appellant through the discovery process.

The "litigation tactics" used by Appellant were a direct result of: (1) the conclusory and speculative allegations contained in Appellee's pleadings; (2) Appellee's failure to provide substantive responses to written discovery; and (3) the probate court's

failure or refusal to use its inherent authority and existing law to question the appropriateness of Appellee's conduct in instituting and maintaining the Burhop litigation, or otherwise make rulings reasonably intended to narrow the scope of the Burhop litigation to conform with applicable law.

In *Reed Dairy Farm v Consumers Energy Co*, 227 Mich App 614; 576 NW2d 709 (1988), this Court reiterated the long-standing view of Michigan courts regarding the role of discovery in litigation:

> It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. In addition, the Supreme Court has repeatedly emphasized that the purpose of discovery is to simplify and clarify issues. Thus, the rules should be construed in an effort to facilitate trial preparation and to further the ends of justice. Moreover, "[the discovery process] should promote the discovery of the facts and circumstances of a controversy, rather than aid in their concealment." Indeed, restricting parties to formal methods of discovery would serve to complicate trial preparation, rather than aid in the search for truth. MCR 1.105 explicitly states that the "[court] rules are to be construed to secure the just, speedy, and economical determination of every action."

*Reed*, 227 Mich App 616 (citations and quotations omitted).

The pleadings filed by Appellee through which she made her claims in the Burhop litigation against Appellant and Appellant's wife were almost utterly devoid of fact and, instead, barely constituted "notice" pleading under MCR 2.111(B)(1). *See* amended complaint in File No. 16-000530-CZ and verified petition in File No. 14-000326-CA. As a result, Appellant and Appellant's wife were forced to conduct extensive discovery to prepare their defense to the claims by Appellee and HSHV. Initially, this was done through written discovery under MCR 2.309, MCR 2.310, and MCR 2.312. Appellant's counsel reasonably expected that Appellee and HSHV would respond appropriately to the written discovery, so that the issues could be narrowed

where appropriate and Appellant and Appellant's wife could defend themselves. It is both unrealistic and unfair for the probate court to expect Appellant to forego the discovery necessary to prepare a defense and prevent surprise at trial. *Reed, supra.*

The probate court appeared to take judicial notice of the Appellant's filings in the litigation as a basis for justifying the fiduciary and attorney fees paid by Appellee. (Appendix 2a, Probate Court Opinion, at 3-4, 6-7). To the extent the probate court relied on the total number of pages contained in Appellant's filings to do so, it was clear error. First, the probate court's recitation of the number of pages fails to reflect that the vast majority of the "number of pages" consisted of exhibits to pleadings or motions. (Appendix 28a, Appellant's Page Count Chart). It is the practice of Appellant's counsel to provide the probate court with copies of documents relevant to the particular pleading or motion being filed, rather than risk not having a paper properly supported or expecting the probate court to search through its own files for documents provided previously. Second, Appellant's filings were responsive to Appellee's pleadings initiating the litigation and Appellee's failure to properly respond to Appellee's discovery requests. Third, the amended motions for summary disposition to which the probate court mockingly referred during the evidentiary hearing were filed in response to Appellee's motion to strike and at the request of the probate court's staff attorney.[18] All of Appellant's filings were consistent with applicable Michigan law regarding the substantive issues, as well as the procedural requirements of MCR 2.116, MCR 2.313, MCR 2.114, and MCR 5.114.

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[18] Appellee's motion to strike complained about the number of issues raised in Appellant's two original motions for summary disposition (one filed in the conservatorship proceedings and one filed in the civil action) and the fact that the combined motion and brief for each exceeded the 20-page limit imposed by MCR 2.119..

**C. The Court Of Appeals Clearly Erred In Holding That The Probate Court's Denial Of Motions For Summary Disposition Filed By Respondent-Appellant Robert Sirchia And His Wife Necessarily Meant That The Conservator's Allegations Of Wrongdoing Were Viable And That The Conservator Acted Reasonably In Commencing And Prosecuting The Litigation, Thereby Justifying The Fiduciary And Attorney Fees Of Nearly $200,000.00 Paid To And By The Conservator From The Ward's Estate Related To The Litigation.**

As discussed, *supra*, Appellant contends that his motions for summary disposition and to compel discovery were supported amply by existing Michigan law and Appellee's admission that the Burhop litigation was based entirely on her own speculation. The fact that such motions may have been denied by the probate court is irrelevant, to especially the extent the probate court did so in error. *See generally, Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999) (holding that motions for summary disposition are reviewed de novo). If the Burhop litigation had not settled, then Appellant would have preserved his appellate rights relative to those motions.

**D. The Court Of Appeals Clearly Erred When It Refused To Reverse The Probate Court's Finding That The Entirety Of The Litigation Commenced And Prosecuted By The Conservator Against Respondent-Appellant Robert Sirchia And His Wife Was "Part Of An Effort To Protect And Preserve The Conservatorship Estate" For The Ward's Benefit.**

Appellant restates and incorporates the argument contained in I.B., *supra*.

**E. The Court Of Appeals Did Not Address The Allegation That The Probate Court Erred To The Extent It Relied On Inadmissible Evidence And/Or Evidence Not Introduced During The Evidentiary Hearing.**

The contents of the probate court's opinion and order make it nearly impossible to determine which aspects of Appellee's testimony were used to support the factual findings that underpin the ruling that the disputed fiduciary and attorney fees were reasonable, necessary, and of benefit to Marilyn's conservatorship estate. (Appendix 2a, Probate Court Opinion). In responding to Appellee's testimony, Appellant's counsel made numerous objections – many based on Appellee's narratives and unsolicited addition of self-serving statements when no question was pending – which were

overruled by the probate court. (Appendix 12a, Transcript of August 7, 2017, Hearing). Given the lack of personal knowledge possessed by Appellee regarding the facts underlying her claims in the litigation, plus her admission that the litigation was based on her own speculation, all such statements should be held inadmissible and the probate court's ruling should be reversed to the extent it materially relied on such statements. *See generally*, *Drake Coal Co v Croze*, 165 Mich 120, 125-126; 130 NW 355 (1911); *Browning v Spiech*, 63 Mich App 271, 274; 234 NW2d 479 (1975).

## CONCLUSION

The most basic facts necessary to resolve this appeal are either undisputed or cannot be reasonably disputed. First, as discussed, the lower courts ignored Appellee's admission that her case against Appellant and Appellant's wife was based on speculation. Second, they ignored the fact that Appellee's commencement and pursuit of the litigation fell outside of the authority granted to a conservator under EPIC and other applicable Michigan law. Third, they gave no consideration to the fact that Appellee had the opportunity to discuss any of her concerns about Appellant and Appellant's wife with Marilyn – both before and after the conservatorship and guardianship were imposed – but never did so. Fourth, Appellee testified that the scrivener of the will, the deed, and the trust amendment that Appellee (and HSHV) sought to invalidate never stated that those documents were invalid or improper. Finally, the lower courts ignored that the litigation was a creature of Appellee's own making and no part of the disputed fiduciary and attorney fees related to it was reasonable, necessary, or benefit to Marilyn. *Valentino, supra*.

Against such facts, the Court of Appeals opinion should not be permitted to stand because it is anathema to: (1) the legal and equitable principles that underlay an individual's right to leave her post-death estate to whomever she chooses; and (2) the

rights of a protected individual to ensure that her assets are only used for her best interests and expended on items that are reasonable, necessary, and of benefit to her. The probate court and the Court of Appeals gave Appellee a complete pass. At the same time, the lower courts likely bypassed any consideration of Marilyn and probably figured that the disputed fiduciary and attorney fees simply meant that less money would be left for Appellant and Appellant's wife after Marilyn's death – because, in the words of the probate court's opinion and order, the "settlement agreement disproportionately benefitted" Appellant and Appellant's wife.

This Court may correct these egregious errors to ensure that Marilyn's rights are respected and restored and that Michigan's jurisprudence is respected and followed.

## RELIEF REQUESTED

WHEREFORE, Appellant Robert Sirchia, in his capacity as trustee of the Marilyn Burhop Trust, respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals opinion in its entirety and require Appellee Constance L. Jones to repay the entirety of the disputed fiduciary and attorney fees incurred and paid related to the litigation she commenced. Alternatively, Appellant Robert Sirchia asks this Court to grant this application for leave to appeal. Further, Respondent-Appellant Robert Sirchia requests his costs and attorney fees incurred in connection with this appeal.

RESPECTFULLY SUBMITTED,

**PRINCE LAW FIRM**

By: /s/ Shaheen I. Imami (electronically signed)
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Dated: April 11, 2019

# EXHIBIT B

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WASHTENAW

In re MARILYN BURHOP

Case No. 14-326 CA
Hon Julia B. Owdziej

/

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/

**OPINION AND ORDER**
**APPROVING ACCOUNTS AND FEES**

10-03-2017

Hon. Julia B. Owdziej
Probate Court Judge

**THE COURT FINDS:**

**Case history:** In the spring 2014, Anne and Robert Sirchia hired attorney Constance Jones to file petitions for guardianship and conservatorship of Marilyn Burhop. Ms. Jones was appointed conservator and the Sirchias were appointed as co-guardians of Marilyn Burhop.

Sometime in 2015, and through 2016, Ms. Jones becomes concerned about the Sirchias acting as fiduciaries for Marilyn Burhop. She saw numerous indicators of undue influence. She learned of significant "gifts" given to the Sirchias by Marilyn Burhop. Items causing her concern include:

- 2012: Marilyn is a widow with no close family. Marilyn exhibits erratic behavior resulting in hospitalization. Sirchias (former neighbors) appear and start spending the night with Marilyn, Sirchias fire the caregivers, they take possession of Marilyn's car, they accompany her to doctor visits, and they attend meeting with Marilyn's long-time attorney. Sirchias tell the attorney at

the meeting that Marilyn wants them to have the house. In a private meeting with the attorney Marilyn says that the Sirchias do not need the house.

- 2013: Anne Sirchia takes Marilyn to the bank where Marilyn liquidates two CD's to **gift $447,491 to the Sirchias**, and changes beneficiary designations to Anne Sirchia. Anne Sirchia accompanies Marilyn to new attorney's office where changes to her trust are made benefitting the Sirchias. Estate documents are changed benefitting the Sirchias. Marilyn executes a quit claim deed transferring her own home out of her trust and into her and Anne Sirchia's names as joint tenants with rights of survivorship. Marilyn is found wandering confused around neighborhood.
- 2014: Marilyn is moved to assisted living facility. Sirchias restrict visitors to Marilyn. Sirchias move their daughter into Marilyn's home.
- 2015: Sirchias move Marilyn to Macomb County with no notice to conservator Constance Jones. (Ms. Jones learned of the move when relatives of Marilyn called her looking for Marilyn.)

The truth of all of the above concerns were never litigated nor proven in court as the cases eventually settled, but the Sirchias, in their pleadings, have never denied the facts that they received a $447,491 gift and joint ownership of house with rights of survivorship; that they benefited from the change in Marilyn's estate plan; or that their child moved in to Marilyn's house after Marilyn moved to assisted living

After learning of the above, the first motion filed by Ms. Jones in July 2015 was a petition for instruction asking for instruction on: (1) Should Marilyn's move to Macomb County be upheld? (2) Should the Sirchias continue as guardians? (3) Who can visit Marilyn? (4) How is Marilyn's house to be maintained and paid for while Marilyn is alive? and (5) How should Marilyn's personal property be handled? A GAL was appointed for Marilyn Burhop who recommended that Marilyn's house (the one she quit claimed to herself and Anne Sirchia) be bought by the Sirchias for $360,000, and that "the sale price be apportioned between the joint tenants Sirchia and the ward according to a 75% ward - 25% Sirchia ownership ratio." "If said recommendation for distribution of property is not agreed upon by all parties, in writing; it is the recommendation of your Guardian Ad Litem that the property be listed for sale and distributed according to the above ownership ratio." The GAL reported in October 2015 that they were close to a resolution. The conservator reported in December of 2015 that they were still working on the house issues. Finally, in January 2016, parties reported that they could not come to a resolution as the Sirchias wanted a 50/50 split on the house and Ms. Jones wanted 75% for the ward and 25% for the Sirchias.

In the spring of 2016, Ms. Jones started actions to remove the Sirchias as co-guardians, to return assets, and to void estate planning documents. The parties went to mediation but attempts at mediation were unsuccessful at that time. The Court appointed a professional guardian (Kathleen Carter) as temporary guardian. The Sirchias and Ms. Carter had a difficult relationship, so a different temporary guardian was appointed later.

The Sirchias brought in a second attorney in the summer of 2016. The filings by the Sirchias' attorney in the 3 files included:

| | | |
|---|---|---|
| 9/2016 | Show cause the temporary guardian (GA) | 27 pages |
| 10/2016 | Objection to change of placement (GA) | 49 pages |
| | Petition to terminate GA | 3 pages |
| | Addendum to petition | 195 pages |
| 12/2016 | Motion to dismiss (CZ) | 170 pages |
| 1/2017 | Motion to dismiss Ms. Jones' petition (CA) | 262 pages |
| | Two Motions for summary disposition (CA) | 20 pages |
| | | 18 pages |
| | Exhibits (CA) | 152 pages |
| | Motion to compel (GA) | 89 pages |
| | 10 Motions for summary disposition (CZ) | 156 pages total |
| | Exhibits common to all 10 motions | 167 pages |
| | Motion to compel (CZ) | 193 pages |
| 4/2107 | Objection to account | 175 pages |
| | Exhibits | 239 pages |

This list does not include the interlocutory appeal that was filed in the Court of Appeals nor the discovery requests.

The parties eventually came to a resolution of all 3 cases. Ms. Jones indicated that the inducement to settle was the projected costs to Marilyn's estate in pursuing the litigation through a jury trial – litigation would deplete the funds Marilyn needs to support herself for the balance of her life. The settlement disproportionality benefitted the Sirchias. Ms. Jones was allowed to resign as the conservator and the conservatorship file was closed with the exception of a determination of the attorney and fiduciary fees. The power-of-attorney that gave the Sirchias agency over Marilyn was reinstated.

**Current objection to fiduciary and attorney fees:** Ms. Jones argues that the spirit of the settlement was to end litigation and that the issue of fee approval was only reserved because the Court is the only one who can approve the fees. However, the written agreement between the parties clearly states:

2. d. "....fiduciary and attorney fees shall be presented to the Washtenaw County Probate court for approval and the Sirchias retain all of their rights to object to such fees"

6. "...The parties agree that any objection to such final account shall be made in writing....within 45 days of service..."

The Sirchias did file an objection (414 pages including exhibits) to the attorney and fiduciary fees paid by Ms. Jones and contained in 3 accounts. The Sirchias demanded return of $172,957.97 to the estate of Marilyn Burhop. An evidentiary hearing was held, the only witness was Ms. Jones who testified for almost 6 hours.

The 1st Account (for June 2014 through May 2015) listed $7508 in conservator fees. The 2d account (June 2015 through May 2016) listed $15,985 in conservator fees (this covered normal/routine conservator duties as well as duties of Ms. Jones, as an attorney, in the actions against the Sirchias) and $11,425 paid to other attorneys for litigation expenses. The 3d/Final account (June 2016 to March 2017) listed $30,853.60 in conservator fees (again, this covered normal/routine conservator duties as well as duties of Ms. Jones as an attorney in the actions against the Sirchias) and $158,253 paid in litigation expenses, the far majority of which was money paid to other attorneys. As the litigation style of the Sirchias became more contentious and voluminous the fees increased exponentially.

Fees to Ms. Carter: The Sirchias also objected to the amount paid by Ms. Jones to Kathleen Carter during her time as temporary guardian. The fees to Ms. Carter, though listed under litigation expenses in the account also covered her duties as temporary guardian. Ms. Carter's invoices show that she was paid at a rate of $200 per hour and those invoices show that the $200 rate was nearly all for actions as an attorney. Ms. Carter had an associate who was paid $150 an hour. This Court is well acquainted with Ms. Carter as an individual with lengthy legal experience and good standing in the Washtenaw County legal community. This Court routinely appoints Ms. Carter as fiduciary. Though not called as a witness, through pleadings, Ms. Carter asked that her hourly rate be increased from $200 to $250 per hour. The 2d temporary guardian appointed charged $200 per hour for her services as the guardian and the Sirchias did not object to that rate. The 2nd temporary guardian, however, was not used as an attorney to answer the appeals, so it could appear that the objection is really to the fees paid to Ms. Carter for her work as an attorney. It has created some blurring of the lines to individuals acting as a fiduciary and attorney but since the fiduciaries/attorneys were already familiar with the case, it actually cost the estate less for them to serve as attorneys than it would have cost to hire a new attorney.

Ms. Carter also handled the interlocutory appeal that the Sirchias filed as a result of their removal as guardian and the appointment of a temporary guardian. Ms. Carter charged $250 per hour to answer this appeal and total fees just for that appeal were $25,689.

Law:
MCL 700.5413 provides: "If not otherwise compensated for services rendered, a ... attorney, ...conservator...appointed in a protective proceeding, is entitled to reasonable compensation from the estate."

MCL 700.5423 provides: "(2) Acting reasonably in an effort to accomplish the purpose of the appointment and without court authorization or confirmation, a conservator may do any of the following: (z) Employ an attorney to perform necessary legal services or to advise or assist the conservator... An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.
(aa) Prosecute or defend an action, claim, or proceeding in any jurisdiction for the protection of estate property and of the conservator in the performance of a fiduciary duty."

The person requesting the fee has the burden of proof.

This Court follows the analysis for determining the reasonableness of fees set forth by the Michigan Supreme Court in *Smith v Koury*, 481 Mich 519 (2008). The Court in *Smith* requires a trial court to begin its analysis by determining the fee customarily charged in the locality for similar legal services using reliable surveys to do so. In determining the fee customarily charged in the locality for similar legal services, trial courts have routinely relied on data contained in surveys such as the Economics of Law Practice Surveys published by the State Bar of Michigan. This number is then multiplied by the reasonable number of hours expended in this case and this number should serve as the starting point for calculating a reasonable attorney fee. Thereafter the court considers the remaining factors in *Wood v Detroit Auto*, 413 Mich 573 (1982) and MRPC 1.5(a).

The six factors in *Wood* are: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. Reasonableness of the attorney fee is also considered using factors under MRPC 1.5(a) as follows: (1) the time and labor required...difficulty of the questions involved and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar services; (4) the amount in question and the results achieved; (5) the time limitation imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the service; and (8) whether the fee is fixed or contingent.

Qualifications of Ms. Jones: The evidence presented at that hearing showed that Ms. Jones, is a graduate of the University of Michigan Law School and has been a practicing member of the State Bar of Michigan for 29 years. Ms. Jones is a sole practitioner with a dedicated office outside of the home located in Ann Arbor and practices primarily in Washtenaw County. Ms. Jones has concentrated her practice primarily in the area of probate for the last 20 years with her field of probate practice including guardianships, conservatorships, fiduciary appointments, trust and estate administration, litigation and planning. Ms. Jones has been appointed by this Court and other Michigan probate courts as Conservator and other fiduciary positions on

numerous occasions and she meets all requirements and is currently on the court-approved list of fiduciaries for Washtenaw County. Ms. Jones has 29 years of litigation experience and has been involved in multiple complex litigation cases in the course of her practice. Ms. Jones has received recognition from the Washtenaw County Bar Association for her achievements in the form of a Patriot award. The attorneys on the court's appointment list must attend regular trainings, Ms. Jones is a regular presenter at these trainings. This Court finds the testimony of Ms. Jones regarding her legal experience and standing to be credible and gives it considerable weight.

Rate and amount: Ms. Jones testified that she charged $225 as an hourly attorney fee in this matter for both attorney and conservator duties. Ms. Jones also testified that she charged a monthly fiduciary fee of $150 for routine fiduciary matters that a conservator would do, but that the significant majority of the fees incurred to this estate were for attorney fees related to the litigation involving the Sirchias. The $150 per month fee covered routine things such as short phone calls, monthly banking, bill paying and reconciling accounts. She stated that the $150 per month fee is less than what she would have charged if she charged an hourly rate for those things even if that hourly rate were less than $225. For other duties as a conservator she charged $225 an hour. This Court notes that some fees charged by Ms. Jones combined both legal and fiduciary activities and were charged under the higher legal fee. This Court recognizes that work done by a professional conservator of a routine nature that does not require a professional degree should be at a lower rate than work done which does require a degree or is done more completely because of the professional degree. However, Ms. Jones testified that she did not charge for many activities and her monthly $150 fee did not reflect the actual amount of fiduciary work she performed. The Court is convinced that the manner in which Ms. Jones billed for her services did result in a lesser fee for many of the routine duties. Accordingly, this Court does not find it necessary to adjust those fee entries.

This Court takes judicial notice of the 2014 Economics of Law Practice Attorney Income and Billing Rate Summary Report, which is the most recent survey on this issue by the Michigan Bar. Based on this report, this Court finds that the mean billing rate for an attorney with 26-30 years of practice is $279 an hour. In addition, this Court finds that the mean billing rate for an attorney with an office located in Ann Arbor is $290 and the mean rate for an attorney practicing in Washtenaw County and in the 22nd Circuit is $284. This Court finds that Ms. Jones' hourly billing rate is below the mean rate for an attorney of her years of practice in Washtenaw County. This Court finds that Ms. Carter's hourly rate is below the mean rate for an attorney in Washtenaw County.

Ms. Jones and Ms. Carter both have high professional standing and experience in probate law. They are skilled in probate law, and the time spent on this case was extraordinary. The case was made difficult by the Sirchias' litigation style. Ms. Jones, a sole practitioner, testified that the time spent on this case prevented her from taking other clients and or doing other work. There was a significant amount of money involved (at least $467,000 and the value of a house). Ms. Jones surely would have been negligent in her duties had she just ignored the actions of the Sirchias. The case

became very difficult to manage due to the litigation style of the Sirchias and required extensive time and labor be expended by Ms. Jones, Ms. Carter and the other attorneys hired by Ms. Jones.

The results achieved did not include the Sirchias returning the $467,000 gift but at some point Ms. Jones came to the realization that the cost to litigate the case outweighed the benefit to Ms. Burhop. Under the factors in *Wood* and MRPC 1.5(a), this Court finds that the fees paid to Ms. Carter as guardian and attorney, the fees paid to the other attorneys and the fees paid to Ms. Jones as conservator and attorney were reasonable under the circumstances.

Number of hours expended: This Court finds the number of hours expended by Ms. Jones and the other lawyers hired by Ms. Jones was reasonable. After discovering the concerning issues stated earlier in this opinion, Ms. Jones initially filed a petition for instruction, she tried to negotiate a resolution, only after all attempts failed did she file to have the Sirchias removed as guardians, to return assets and set aside estate planning documents. The Court finds that she proceeded in a prudent and responsible manner. It would have been malfeasance on her part had she been presented with all of those issues and done nothing. The large number of hours spent on this case is a direct result of the Sirchias' litigation style. A prudent conservator can anticipate the reasonable number of hours it would take to litigate a case and weigh the cost benefit to the estate. Ms. Jones did that. What she did not know is that the Sirchias would hire a firm that buried her. She later made the decision to settle because it became apparent that the cost of litigation would outweigh any benefit to Marilyn Burhop.

The Court finds that the number of hours expended by the conservator and her counsel incurred in this litigation were reasonable in light of the fact that the Sirchias made this matter significantly more complex and voluminous by virtue of their aggressive and excessive litigation tactics. These tactics were discussed in the history of the case and these actions went beyond mere advocacy. Ms. Jones testified that in 30 years of practice, she has never had a case with the frequency and quantity of pleadings and discovery filed as in this case. Ms. Jones also testified that the amount of time and effort she expended in addressing the litigation tactics of the Sirchias in this case was extraordinary and precluded her from accepting other matters. Pleadings from the Sirchias regularly had errors in either the title or body which only added to the time it took to answer them. Certainly there would be a cost to the estate in pursuing a suit against the Sirchias but it was the actions of the Sirchias that sent the costs in this case to a whole new level.

The Sirchias initially requested that Ms. Jones be the conservator, and a professional conservator is going to charge more than a non-professional. The Sirchias accepted enormous gifts from an elderly non-related woman with diminishing capacity. The Sirchias took this from a dispute which would have had some costs to a dispute that had enormous costs. It is solely the Sirchias who are to blame for the extraordinary costs.

The Sirchias rely on a pre-EPIC decision, *In Re Valentino Estate*, 128 Mich App 87 (1983) to maintain that Ms. Jones is not entitled to fees for her action in filing a petition in the guardianship case. This Court finds the reliance on *In Re Valentino Estate* to be misplaced. Ms. Jones was acting under the explicit authority granted to her by MCL 700.5423 in bringing a petition in the guardianship case and was doing so not as an individual but in her capacity as conservator. Accordingly, she has a statutory right to reasonable compensation pursuant to MCL 700.5413.

The Court finds that Ms. Jones has met her burden, that the fiduciary and attorney fees paid by Ms. Jones are appropriate and will not increase or decrease them.

IT IS ORDERED:

All accounts are approved. All fees as paid are approved. This is a final order and closes the file.

IT IS SO ORDERED.

10-3-2017

Julia B. Owdziej (P42715)
Washtenaw County Probate Court

PROOF OF SERVICE
I hereby certify that I served a copy of the foregoing document upon the attorneys of record and/or the parties in this case on the DATE NOTED below:
PERSONALLY on _____
~~FIRST-CLAS MAI~~ on 10/3/17
VIA FAX on _____
Teresa Killeen

email

# EXHIBIT C

# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* Conservatorship of MARILYN BURHOP.

ROBERT SIRCHIA and ANNE SIRCHIA,

Petitioners,

and

CONSTANCE L. JONES, Conservator of MARILYN BURHOP, a legally protected person,

Appellee,

v

ROBERT SIRCHIA, Trustee of the MARILYN BURHOP REVOCABLE TRUST,

Appellant.

UNPUBLISHED
February 28, 2019

No. 340771
Washtenaw Probate Court
LC No. 14-000326-CA

Before: SWARTZLE, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Robert Sirchia, as trustee of the Marilyn Burhop Revocable Trust, appeals by right the probate court's order approving accounts and fiduciary and legal fees incurred and paid by Constance Jones, acting as the conservator of Marilyn Burhop, a legally incapacitated person, following the settlement of disputes between conservator Jones and Robert and Anne Sirchia. We affirm.

During 2014, the probate court appointed the Sirchias, Burhop's former neighbors, as her co-guardians and appointed Jones the conservator of her estate because Burhop suffered from diminished mental capacity in the form of dementia. Shortly thereafter, the Sirchias placed Burhop in a residential facility. During 2015, the Sirchias moved Burhop to a different facility in another county without Jones's knowledge. Jones later learned that during 2013, among other acts, Burhop made multiple cash gifts totaling $467,491 to the Sirchias, deeded Anne Sirchia a joint interest in Burhop's home, and changed her estate planning documents to make the Sirchias

the beneficiaries of her estate. Jones investigated the asset transfers and questioned the Sirchias and Burhop's former and current estate planning attorneys regarding the transfers. Jones concluded that the Sirchias' responses to her inquiries raised serious concerns about their previous conduct and their ability to serve as fiduciaries for Burhop, the protected ward. Jones feared the Sirchias might cause further diminishment of Burhop's assets. Consequently, Jones petitioned the probate court to remove the Sirchias as guardians and to appoint a temporary guardian. Jones also petitioned the probate court for the return of estate property and to void Burhop's estate planning documents.

The probate court removed the Sirchias as Burhop's guardians and appointed a temporary guardian. In June 2016, Jones, as conservator of Burhop's conservatorship estate, sued the Sirchias in their individual capacities for recovery of estate property received by the Sirchias from Burhop through alleged undue influence, fraud, and conversion. The parties engaged in intense litigation, with the Sirchias serving voluminous discovery requests on Jones and filing 16 unsuccessful motions for summary disposition. As the case moved closer to trial, the parties participated in mediation and settled all disputes between them. Under the terms of their settlement agreement, Jones was required to seek the probate court's approval of her first, second, and final accounts related to the conservatorship, and the Sirchias retained the right to object to the fiduciary and attorney fees reported in the accounts. Subsequently, Jones submitted accounts to the probate court for approval. The Sirchias objected to the fiduciary and attorney fees reported in the accounts and to the payments of those fees the Jones made from the conservatorship estate. The probate court held an evidentiary hearing and later entered an opinion and order approving the accounts and requested fees. This appeal followed.

As a preliminary matter, Jones argues that this Court lacks jurisdiction over the appeal because Robert Sirchia, as trustee of Burhop's trust, is not an "aggrieved party" under MCR 7.203(A). Jones raised this identical issue in a motion to dismiss filed with this Court, and which the motion panel denied. *In re Conservatorship of Marilyn Burhop*, unpublished order of the Court of Appeals, entered July 10, 2018 (Docket No. 340771). The order denying the motion to dismiss did not indicate that the denial was without prejudice to Jones's raising the issue again in her appellate brief, but the order also did not indicate that the denial was with prejudice. *Id.* While we question the need to address Jones's jurisdictional argument for a second time under these circumstances, consistent with the order and for the reasons expressed below, we conclude that we do have jurisdiction over this appeal.

Jones contends that Robert Sirchia, as trustee of the trust, is not an aggrieved party entitled to file a claim of appeal from the probate court's order. Jones argues that the underlying settlement agreement allowed Robert and Anne Sirchia *in their individual capacities only* to litigate the fees. Jones bases this argument on language from the settlement agreement, which provided that "the Sirchias retain all of their rights to object to . . . fees" and "[t]he parties agree that the Sirchias do not waive any of their rights to object or pursue any action related to such fees." Notably, the quoted language does not specifically refer to the Sirchias in their *individual capacities*. Jones attempts to bolster her argument by indicating that the probate court's order addressed the Sirchias "only in their individual capacities." Again, nothing in the language of the order confirms that the trial court was considering the Sirchias only in their individual capacities. Jones concludes that because the claim of appeal was filed by Robert Sirchia as

trustee of the trust and not as an individual, this Court does not have jurisdiction. We hold that dismissal of the appeal is not warranted based on Jones's argument.

An aggrieved party is one who is not only merely disappointed over a certain result, but also is one who suffered a concrete and particularized injury, as would a party plaintiff initially invoking a court's power. *Manuel v Gill,* 481 Mich 637, 643-644; 753 NW2d 48 (2008). A litigant on appeal must demonstrate an injury arising from the actions of the trial court rather than an injury arising from the underlying facts of the case. *Id.* at 644. Here, Jones does not argue that the trust was not aggrieved by the order on appeal, i.e., that the trust did not suffer an injury from the approval of all of the fees paid by Jones. And, in fact, pursuant to the probate court's order, nearly $173,000 was not returned to the estate's assets. As such, the trust, which is part of the estate plan, can be viewed as an aggrieved party. Jones also does not argue that Robert Sirchia, as trustee of the trust, is not a proper party to represent the trust on appeal. Rather, Jones maintains that the settlement agreement only allowed the Sirchias as individuals to litigate the fee issue; consequently, the Sirchias, as individuals, are the only parties that may pursue this appeal. We disagree. The text of the settlement agreement does not limit the Sirchias to acting in their individual capacities. Further, as previously stated, the trust was aggrieved by the probate court's order on the matter of fees. And trustee Sirchia is a proper party to appeal the order on the aggrieved trust's behalf. Accordingly, we, like the motion panel, reject Jones's jurisdictional argument.

On appeal, trustee Robert Sirchia argues that the probate court erred in approving approximately $173,000 in fiduciary and attorney fees related to litigation against the Sirchias that sought to invalidate gifts from Burhop and to invalidate estate planning documents regarding Burhop's post-death estate executed by Burhop about one year before Jones was appointed conservator. According to trustee Sirchia, the probate court erred in approving those fees because the litigation was commenced and continued: (1) on the basis of speculation by Jones; (2) absent the knowledge, request, or consent of Burhop; and (3) despite the lack of any immediate or future need to maintain Burhop's standard of living sufficient to justify the litigation costs.

We review for an abuse of discretion a probate court's approval of fiduciary and attorney fees. *In re Estate of Adams*, 257 Mich App 230, 236; 667 NW2d 904 (2003); *In re Estate of Krueger*, 176 Mich App 241, 248; 438 NW2d 898 (1989); *In re Humphrey Estate*, 141 Mich App 412, 439; 367 NW2d 873 (1985). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Although we review for an abuse of discretion a probate court's dispositional rulings, this Court reviews for clear error the underlying factual findings made by the probate court. *In re Portus*, __ Mich App __, __; __ NW2d __ (2018); slip op at 3; *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). A probate court's factual finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake was made, even if there was evidence to support the finding. *Portus*, __ Mich App at __; slip op at 3; *Bibi Guardianship*, 315 Mich App at 329. In applying the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). We review de novo issues of statutory interpretation. *Portus*, __ Mich App at __; slip op at 3. The probate court abuses its discretion when it makes an error of law. *Id.*

This case implicates provisions contained in the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.* "If not otherwise compensated for services rendered, a visitor, guardian ad litem, attorney, physician, conservator, or special conservator appointed in a protective proceeding, is entitled to reasonable compensation from the estate." MCL 700.5413. MCL 700.5423 provides, in relevant part, as follows:

> (2) Acting reasonably in an effort to accomplish the purpose of the appointment and without court authorization or confirmation, a conservator may do any of the following:
>
> * * *
>
> (z) Employ an attorney to perform necessary legal services or to advise or assist the conservator in the performance of the conservator's administrative duties, even if the attorney is associated with the conservator, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.
>
> (*aa*) Prosecute or defend an action, claim, or proceeding in any jurisdiction for the protection of estate property and of the conservator in the performance of a fiduciary duty.

Jones clearly had the authority to prosecute a civil action for the protection of the property in the conservatorship estate, MCL 700.5423(2)(aa), and to employ an attorney to assist her in prosecuting the civil action, MCL 700.5423(2)(z). We appreciate that the cash gifts Burhop made to the Sirchias and the conveyance of an interest in Burhop's home to Anne Sirchia occurred before the conservatorship was established. We nonetheless construe MCL 700.5423(2)(aa) as allowing or authorizing a conservator to file a civil action to recapture property that should and would have been part of the conservatorship estate but for previous unlawful transfers or conveyances. This proposition is consistent with a conservator's authority to "[c]ollect, hold, or retain estate property." MCL 700.5423(2)(a).

The record reflects that after the probate court appointed Jones as Burhop's conservator, Jones learned of questionable transfers of property by Burhop to the Sirchias before the conservatorship estate was created. Jones testified at the evidentiary hearing that she investigated the transfers and that her investigation did not persuade her of the legitimacy of certain transfers and acts. This included Burhop's purportedly giving a substantial amount of money to the Sirchias, Burhop's deeding of a real property interest to Anne Sirchia, and Burhop's changes to her estate planning documents with the Sirchias' direct involvement behind the scenes. Jones testified that the surrounding circumstances, the conduct of the Sirchias, and their responses to her inquiry led her to believe in good faith that Burhop, a person of diminished mental capacity, had been unduly influenced by the Sirchias. Jones indicated that she attempted to negotiate with the Sirchias in an effort to recover Burhop's assets for placement into the conservatorship estate, but those negotiations failed. Consequently, Jones exercised her authority as a conservator under MCL 700.5423, in an effort to collect estate property that she thought the Sirchias had wrongfully obtained. To do so, Jones hired an attorney to provide her

legal advice and services as necessary to carry out her duties as conservator. The record also reveals that with the advice and assistance of counsel and after educating herself regarding her authority under EPIC and the cost and benefits to the conservatorship estate, Jones commenced the litigation against the Sirchias. No evidence controverted Jones's testimony in this regard.

We conclude, as did the probate court, that Jones acted appropriately, properly exercising her authority as a conservator under the authority granted by EPIC. The fiduciary and attorney fees paid for by the conservatorship estate were incurred in relation to Jones's efforts to fulfill her duties as a conservator. We agree with the probate court's conclusion that under the circumstances Jones would have been negligent in her duties had she not taken any action and pursued the litigation. The probate court's decision to approve the fiduciary and attorney fees did not fall outside the range of reasonable and principled outcomes.

Robert Sirchia argues in conclusory fashion that the litigation lacked factual and legal merit. We disagree. The record reflects that conservator Jones presented viable claims that the probate court refused to dismiss when the Sirchias moved for summary disposition of the claims. Indeed, the Sirchias filed 16 unsuccessful motions for summary disposition and served numerous voluminous discovery requests on Jones. Because of the Sirchias' scorched-earth approach to the litigation, Jones was effectively forced to settle the litigation to avoid depleting Burhop's assets. Because the settlement resulted in the waiver and release of all claims and disputes, there was no adjudication on the merits. We cannot conclude that the litigation lacked merit. The denial of myriad motions for summary disposition revealed that Jones's allegations of wrongdoing were viable. Jones acted reasonably and had authority to commence and prosecute the litigation as part of an effort to protect and preserve the conservatorship estate for Burhop's benefit.

We conclude that Robert Sirchia's reliance on *In re Valentino Estate*, 128 Mich App 87; 339 NW2d 698 (1983), is misplaced. The probate court correctly observed that the *In re Valentino* panel decided that case before the Legislature enacted EPIC and, therefore, the case was not controlling. Further, the probate court correctly ruled that EPIC grants a conservator authority to hire an attorney to take legal action to assist the conservator in carrying out duties to the conservatorship estate and ward. MCL 700.5423(2)(z). Additionally, while this Court in *In re Valentino* indicated that a benefit had to be achieved as a prerequisite to awarding legal fees to counsel and a fiduciary, MCL 700.5423(2) focuses on whether a conservator acted "reasonably in an effort to accomplish the purpose of the appointment." And here, under the circumstances confronted by Jones upon her appointment, she acted reasonably in an effort to protect, preserve, and reclaim property relative to the conservatorship estate. Contrary to Robert Sirchia's assertion, the litigation commenced by Jones was not based on speculation but on factual circumstances that gave rise to a reasonable suspicion of wrongdoing.

With respect to trustee Sirchia's argument that the probate court erred in approving the payment of fiduciary and attorney fees because Burhop did not have knowledge of, request, or consent to the litigation, we find the argument illogical. The argument ignores the fact that Burhop, suffering from dementia, was declared a legally incapacitated person in need of a guardianship and conservatorship, authorizing and allowing others to make decisions on her behalf and in her best interests. The argument is simply unavailing.

With respect to Robert Sirchia's contention that the probate court erred in approving the payment of fiduciary and attorney fees because there was no immediate or future need to maintain Burhop's standard of living sufficient to justify the litigation costs, we again find no merit in the argument. First, the argument unfairly views Jones's decision to litigate in hindsight. Jones certainly had no idea at the outset that the costs of litigation would reach the level they did, driven by the Sirchias' approach to the litigation. And, moreover, there was the prospect of returning nearly half a million dollars to the conservatorship estate had the litigation been successful. Second, the litigation was not a matter of need and Burhop's standard of living. Rather, the litigation sought to rectify a perceived wrong and to make Burhop whole, as well as to hold the Sirchias accountable.

Next, the probate court properly considered the skill, time, and labor involved in the litigation, the amount in controversy, the difficulty of the litigation, and the expenses incurred. See *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982); MRPC 1.5(a). The probate court appropriately found Jones's actions as conservator to be reasonable, considering the potential benefit to the conservatorship estate. Further, the probate court had firsthand knowledge of the complexity of the litigation and the reasons for the expenses incurred by the conservatorship. The record supports the probate court's conclusion that the litigation expenses escalated because of the Sirchias' aggressive and contentious litigation style. Jones had no choice but to respond to the Sirchias' numerous discovery requests and the voluminous summary disposition motions. The record shows that although Jones and her attorney faced every challenge, they did nothing to unreasonably increase the litigation expenses.

The probate court also appropriately considered Jones's decision to settle instead of pressing on to trial. The probate court found settlement reasonable under the circumstances, where Jones made the decision to settle after performing a cost-benefit analysis. The probate court based its conclusion on Jones's unrebutted testimony at the evidentiary hearing. Additionally, the probate court properly considered Jones's account statements and the documentary evidence she submitted that supported the request for approval of the fiduciary and attorney fees. Jones presented the probate court ample evidence to meet her burden of establishing justification for the fiduciary and attorney fees the conservatorship estate paid.

In sum, the probate court did not abuse its discretion in approving the payment of fiduciary and attorney fees, nor were any of the court's factual findings clearly erroneous. Reversal is unwarranted.

We affirm. Having prevailed on appeal, Jones may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Amy Ronayne Krause

# EXHIBIT 4

# EXHIBIT D


*Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.*

## PROBATE LAW CASE SUMMARY

**BY**: Alan A. May Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007-2017 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2019 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and
"Sons of Adam," an International Terror Mystery.

**DT**: March 27, 2019
**RE:** ***In re Burhop Conservatorship***
STATE OF MICHIGAN COURT OF APPEALS

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**"Alan, you cannot write about baseball all your life"**
**- Mrs. Pollinger**
**- 12th Grade English Comp**
**- Mumford High - 1959**

KEMPKLEIN
LAW FIRM
201 West Big Beaver, Suite 600, Troy, Michigan 48084 | Phone: 248.528.1111 | Fax: 248.528.5129 | www.kempklein.com

**BASEBALL – MEMORIES**

The King and his Court.

One of my most pleasant memories was going down to Briggs Stadium and watching an exhibition game with "The King and his Court". It's not baseball in the Major League sense, but it's baseball in my memory.

The King was Eddie Feigner. How he got this name, I'll never know because his real name was Myrle Vernon King. He and a catcher/first baseman and shortstop would take on local softball teams. He was phenomenal, not only because of his speed, but because of the variety of pitches he could throw underhanded. He would strike out a majority of the batters and would then drift back to second base and pitch and then to mid-center field and pitch. The local softball team that he played the night I was there added Detroit Red Wings, Gordie Howe and Terry Sawchuk. For those of you that don't know, Gordie Howe was a fantastic athlete separate and apart from his hockey career. After walking Terry Sawchuk, I saw Gordie Howe hit a softball coming in at a zillion miles an hour off the fence at the 340 mark in Briggs Stadium. Since there was no left fielder, Sawchuk scored and Howe ended up with a triple.

The night I was there, I was amazed as a 16-year-old, that the King and his Court carried a utility player who was a woman. This was probably the first time both males and females played on the same team in Briggs Stadium.

Feigner also took his team inside prison walls and played a lot of games. No one stole second base.

Another thing that Eddie did was put on a blindfold and pitch an inning.

Eddie passed away in 2007 at 81 years of age. He pitched into his 60's and was still over 100 mph.

Eddie, you never played for a Major League team, but you gave me some great memories.

**Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases**

**REVIEW OF CASE:**

**RE:** *In re Burhop Conservatorship*

- Conservator Challenges Ward's Estate Plan Change
- Conservator Challenges Fees.
- Effect of Settlement on Cause of Action.
- Duty to Pursue.
- Capacity as Aggrieved Party.
- Consent of Ward.
- Need.

Appellee was a Conservator, Appellants were individuals and Trustees, all in regard to a Mrs. Burhop. Appellee noticed irregularities with the actions of Appellee viz-z-viz Burhop. Appellee found evidence of wrongdoing and despite 16 Summary Disposition Motions filed against her persevered, prevailing on each motion. A settlement was ultimately entered. Conservator sought fees for herself and her attorney. The lower Court awarded same. The Trustees, as alleged, aggrieved parties appealed.

The Court of Appeals evaluates many issues and said much by way of Opinion in affirming the lower Court.

Appellee believed Appellant was not aggrieved since the settlement agreement appears to reserve the right for them to object to fees in their individual capacities. The Court of Appeals ruled that as there was no specific limit as to capacity, the Trustees, therefore, could Appeal and the Court of Appeals had jurisdiction. Caveat, this comes up often where fiduciaries are sued as individuals. Say what you mean, and that distinction wouldn't be determined to your detriment.

Although the Court of Appeals didn't make a determination, by implication, it held a conservator could challenge alleged changes in an inter vivos Trust as well as the actions of Trustee. In fact, the Court of Appeals went so far as to say it would be a breach of duty not to! The Appellate Court might have added the conservator must take the estate plan of the ward into consideration. By implication, that meant changes deemed improper or diminishing of an estate. Settlement can't be held against you in determining whether your action was meritorious. The Court held that having 16 Summary Disposition Motions against you and having to produce numerous documents was a good reason to settle.

The Court of Appeals ruled that MCL 700.5423(2)(a) authority to set aside unlawful transfers or conveyances.

You don't need the consent of the ward to litigate or settle.

It's the wrongdoing of the Defendant that counts, not the needs of the ward!

4810-4557-9149

# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* Conservatorship of MARILYN BURHOP.

ROBERT SIRCHIA and ANNE SIRCHIA,

Petitioners,

and

CONSTANCE L. JONES, Conservator of MARILYN BURHOP, a legally protected person,

Appellee,

v

ROBERT SIRCHIA, Trustee of the MARILYN BURHOP REVOCABLE TRUST,

Appellant.

UNPUBLISHED
February 28, 2019

No. 340771
Washtenaw Probate Court
LC No. 14-000326-CA

Before: SWARTZLE, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Robert Sirchia, as trustee of the Marilyn Burhop Revocable Trust, appeals by right the probate court's order approving accounts and fiduciary and legal fees incurred and paid by Constance Jones, acting as the conservator of Marilyn Burhop, a legally incapacitated person, following the settlement of disputes between conservator Jones and Robert and Anne Sirchia. We affirm.

During 2014, the probate court appointed the Sirchias, Burhop's former neighbors, as her co-guardians and appointed Jones the conservator of her estate because Burhop suffered from diminished mental capacity in the form of dementia. Shortly thereafter, the Sirchias placed Burhop in a residential facility. During 2015, the Sirchias moved Burhop to a different facility in another county without Jones's knowledge. Jones later learned that during 2013, among other acts, Burhop made multiple cash gifts totaling $467,491 to the Sirchias, deeded Anne Sirchia a joint interest in Burhop's home, and changed her estate planning documents to make the Sirchias

the beneficiaries of her estate. Jones investigated the asset transfers and questioned the Sirchias and Burhop's former and current estate planning attorneys regarding the transfers. Jones concluded that the Sirchias' responses to her inquiries raised serious concerns about their previous conduct and their ability to serve as fiduciaries for Burhop, the protected ward. Jones feared the Sirchias might cause further diminishment of Burhop's assets. Consequently, Jones petitioned the probate court to remove the Sirchias as guardians and to appoint a temporary guardian. Jones also petitioned the probate court for the return of estate property and to void Burhop's estate planning documents.

The probate court removed the Sirchias as Burhop's guardians and appointed a temporary guardian. In June 2016, Jones, as conservator of Burhop's conservatorship estate, sued the Sirchias in their individual capacities for recovery of estate property received by the Sirchias from Burhop through alleged undue influence, fraud, and conversion. The parties engaged in intense litigation, with the Sirchias serving voluminous discovery requests on Jones and filing 16 unsuccessful motions for summary disposition. As the case moved closer to trial, the parties participated in mediation and settled all disputes between them. Under the terms of their settlement agreement, Jones was required to seek the probate court's approval of her first, second, and final accounts related to the conservatorship, and the Sirchias retained the right to object to the fiduciary and attorney fees reported in the accounts. Subsequently, Jones submitted accounts to the probate court for approval. The Sirchias objected to the fiduciary and attorney fees reported in the accounts and to the payments of those fees the Jones made from the conservatorship estate. The probate court held an evidentiary hearing and later entered an opinion and order approving the accounts and requested fees. This appeal followed.

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trustee of the trust and not as an individual, this Court does not have jurisdiction. We hold that dismissal of the appeal is not warranted based on Jones's argument.

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> (*aa*) Prosecute or defend an action, claim, or proceeding in any jurisdiction for the protection of estate property and of the conservator in the performance of a fiduciary duty.

Jones clearly had the authority to prosecute a civil action for the protection of the property in the conservatorship estate, MCL 700.5423(2)(aa), and to employ an attorney to assist her in prosecuting the civil action, MCL 700.5423(2)(z). We appreciate that the cash gifts Burhop made to the Sirchias and the conveyance of an interest in Burhop's home to Anne Sirchia occurred before the conservatorship was established. We nonetheless construe MCL 700.5423(2)(aa) as allowing or authorizing a conservator to file a civil action to recapture property that should and would have been part of the conservatorship estate but for previous unlawful transfers or conveyances. This proposition is consistent with a conservator's authority to "[c]ollect, hold, or retain estate property." MCL 700.5423(2)(a).

The record reflects that after the probate court appointed Jones as Burhop's conservator, Jones learned of questionable transfers of property by Burhop to the Sirchias before the conservatorship estate was created. Jones testified at the evidentiary hearing that she investigated the transfers and that her investigation did not persuade her of the legitimacy of certain transfers and acts. This included Burhop's purportedly giving a substantial amount of money to the Sirchias, Burhop's deeding of a real property interest to Anne Sirchia, and Burhop's changes to her estate planning documents with the Sirchias' direct involvement behind the scenes. Jones testified that the surrounding circumstances, the conduct of the Sirchias, and their responses to her inquiry led her to believe in good faith that Burhop, a person of diminished mental capacity, had been unduly influenced by the Sirchias. Jones indicated that she attempted to negotiate with the Sirchias in an effort to recover Burhop's assets for placement into the conservatorship estate, but those negotiations failed. Consequently, Jones exercised her authority as a conservator under MCL 700.5423, in an effort to collect estate property that she thought the Sirchias had wrongfully obtained. To do so, Jones hired an attorney to provide her

legal advice and services as necessary to carry out her duties as conservator. The record also reveals that with the advice and assistance of counsel and after educating herself regarding her authority under EPIC and the cost and benefits to the conservatorship estate, Jones commenced the litigation against the Sirchias. No evidence controverted Jones's testimony in this regard.

We conclude, as did the probate court, that Jones acted appropriately, properly exercising her authority as a conservator under the authority granted by EPIC. The fiduciary and attorney fees paid for by the conservatorship estate were incurred in relation to Jones's efforts to fulfill her duties as a conservator. We agree with the probate court's conclusion that under the circumstances Jones would have been negligent in her duties had she not taken any action and pursued the litigation. The probate court's decision to approve the fiduciary and attorney fees did not fall outside the range of reasonable and principled outcomes.

Robert Sirchia argues in conclusory fashion that the litigation lacked factual and legal merit. We disagree. The record reflects that conservator Jones presented viable claims that the probate court refused to dismiss when the Sirchias moved for summary disposition of the claims. Indeed, the Sirchias filed 16 unsuccessful motions for summary disposition and served numerous voluminous discovery requests on Jones. Because of the Sirchias' scorched-earth approach to the litigation, Jones was effectively forced to settle the litigation to avoid depleting Burhop's assets. Because the settlement resulted in the waiver and release of all claims and disputes, there was no adjudication on the merits. We cannot conclude that the litigation lacked merit. The denial of myriad motions for summary disposition revealed that Jones's allegations of wrongdoing were viable. Jones acted reasonably and had authority to commence and prosecute the litigation as part of an effort to protect and preserve the conservatorship estate for Burhop's benefit.

We conclude that Robert Sirchia's reliance on *In re Valentino Estate*, 128 Mich App 87; 339 NW2d 698 (1983), is misplaced. The probate court correctly observed that the *In re Valentino* panel decided that case before the Legislature enacted EPIC and, therefore, the case was not controlling. Further, the probate court correctly ruled that EPIC grants a conservator authority to hire an attorney to take legal action to assist the conservator in carrying out duties to the conservatorship estate and ward. MCL 700.5423(2)(z). Additionally, while this Court in *In re Valentino* indicated that a benefit had to be achieved as a prerequisite to awarding legal fees to counsel and a fiduciary, MCL 700.5423(2) focuses on whether a conservator acted "reasonably in an effort to accomplish the purpose of the appointment." And here, under the circumstances confronted by Jones upon her appointment, she acted reasonably in an effort to protect, preserve, and reclaim property relative to the conservatorship estate. Contrary to Robert Sirchia's assertion, the litigation commenced by Jones was not based on speculation but on factual circumstances that gave rise to a reasonable suspicion of wrongdoing.

With respect to trustee Sirchia's argument that the probate court erred in approving the payment of fiduciary and attorney fees because Burhop did not have knowledge of, request, or consent to the litigation, we find the argument illogical. The argument ignores the fact that Burhop, suffering from dementia, was declared a legally incapacitated person in need of a guardianship and conservatorship, authorizing and allowing others to make decisions on her behalf and in her best interests. The argument is simply unavailing.

With respect to Robert Sirchia's contention that the probate court erred in approving the payment of fiduciary and attorney fees because there was no immediate or future need to maintain Burhop's standard of living sufficient to justify the litigation costs, we again find no merit in the argument. First, the argument unfairly views Jones's decision to litigate in hindsight. Jones certainly had no idea at the outset that the costs of litigation would reach the level they did, driven by the Sirchias' approach to the litigation. And, moreover, there was the prospect of returning nearly half a million dollars to the conservatorship estate had the litigation been successful. Second, the litigation was not a matter of need and Burhop's standard of living. Rather, the litigation sought to rectify a perceived wrong and to make Burhop whole, as well as to hold the Sirchias accountable.

Next, the probate court properly considered the skill, time, and labor involved in the litigation, the amount in controversy, the difficulty of the litigation, and the expenses incurred. See *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982); MRPC 1.5(a). The probate court appropriately found Jones's actions as conservator to be reasonable, considering the potential benefit to the conservatorship estate. Further, the probate court had firsthand knowledge of the complexity of the litigation and the reasons for the expenses incurred by the conservatorship. The record supports the probate court's conclusion that the litigation expenses escalated because of the Sirchias' aggressive and contentious litigation style. Jones had no choice but to respond to the Sirchias' numerous discovery requests and the voluminous summary disposition motions. The record shows that although Jones and her attorney faced every challenge, they did nothing to unreasonably increase the litigation expenses.

The probate court also appropriately considered Jones's decision to settle instead of pressing on to trial. The probate court found settlement reasonable under the circumstances, where Jones made the decision to settle after performing a cost-benefit analysis. The probate court based its conclusion on Jones's unrebutted testimony at the evidentiary hearing. Additionally, the probate court properly considered Jones's account statements and the documentary evidence she submitted that supported the request for approval of the fiduciary and attorney fees. Jones presented the probate court ample evidence to meet her burden of establishing justification for the fiduciary and attorney fees the conservatorship estate paid.

In sum, the probate court did not abuse its discretion in approving the payment of fiduciary and attorney fees, nor were any of the court's factual findings clearly erroneous. Reversal is unwarranted.

We affirm. Having prevailed on appeal, Jones may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Amy Ronayne Krause

# D

**To:** Probate and Estate Planning Council Members
**From:** Melisa M. W. Mysliwiec, Chair
**RE:** ADM 2002-37 and ADM 2018-30; Comments Due 07/12/19
**Date:** June 6, 2019

1.

**ADM File No. 2002-37: Comments Due July 12, 2019**

The State Bar may adopt a position on this item, and if we wish to submit comments for consideration by the Board of Commissioners, we must do so by **July 12, 2019.**

ADM File 2002-37: Proposed Amendments of E-Filing Rules

The proposed amendments of MCR 1.109, 2.107, 2.113, 2.116, 2.119, 2.222, 2.223, 2.225, 2.227, 3.206, 3.211, 3.212, 3.214, 3.303, 3.903, 3.921, 3.925, 3.926, 3.931, 3.933, 3.942, 3.950, 3.961, 3.971, 3.972, 4.002, 4.101, 4.201, 4.202, 4.302, 5.128, 5.302, 5.731, 6.101, 6.615, 8.105, and 8.119 and proposed rescission of MCR 2.226 and 8.125 would continue the process for design and implementation of the statewide electronic-filing system.

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We have already reviewed and commented on ADM File No. 2002-37; but those court rules changes were adopted in the Administrative Order dated March 20, 2019, and became effective May 1. This Administrative Order is dated May 15, 2019, and the comment period expires September 1. These proposed changes affect only a couple of the Chapter 5 Court Rules, namely 5.128, 5.302, and 5.731. The proposed amendments primarily deal with change of venue fee issues; and the one substantive change is useful, and regards e-filing a will with pleadings and then requiring the original will to be submitted to the court; it builds upon the original will filing requirement included in the set of amendments which took effect May 1. We have no opposition to these changes and do not see a need to comment.

2.

**ADM File No. 2018-30: Comments Due July 12, 2019**

The State Bar may adopt a position on this item, and if we wish to submit comments for consideration by the Board of Commissioners, we must do so by **July 12, 2019.**

ADM File 2018-30: Proposed Amendment of MCR 8.115

The proposed amendment of MCR 8.115, submitted by the Michigan State Planning Body, would explicitly allow the use of cellular phones (as well as prohibit certain uses) in a courthouse. The proposal is intended to make cell phone and electronic device use policies more

consistent from one court to another, and broaden the ability of litigants to use their devices in support of their court cases when possible.

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Let me begin by pointing out that the Michigan Probate Judges Association opposes this amendment. In support of the MPJA, our committee opposes this change to the court rules for security reasons, but the vote was not unanimous. Some committee members believe that uniformity across the state is extremely important, but appreciate the security concerns raised by the Michigan Probate Judges Association. The majority of the committee members were originally okay with this court rule change so long as a change was made to the definition of a "courtroom participant" to include parties in probate proceedings and civil actions. However, after reviewing the judge's concerns, we re-evaluated things and agree with the judges.

**Comment:**

We oppose this amendment to MCR 8.115 for security reasons. Further, we do not believe that there is a problem for which the proposed amendment is necessary to fix. In our experience, attorneys are permitted to use their cell phones and mobile devices in court, and we are reluctant to believe that there are many situations in which a litigant's access to an electronic device would have a material outcome in a proceeding. The security concerns involved, including those raised by the Michigan Probate Judges Association, outweigh any desire to broaden the ability of litigants to use their devices in support of their court cases when possible. We believe discretion of this matter should be left with the judges.

In the event that the Board of Commissioners disagrees, we would like to further comment that the proposed definition of "courtroom participants" in MCR 8.115(C)(2)(c) should be expanded to include parties in probate proceedings and civil actions instead of just plaintiffs and defendants.

**We request that the Council adopt the above comment as its public policy opinion with respect to ADM File No. 2018-30 and that the public policy opinion be submitted to the State Bar of Michigan's Board of Commissioners via a template located at the Public Policy Resource Center, on or before July 12, 2019, as required for all comments.**

Respectfully submitted,

Melisa M. W. Mysliwiec

# E

**Report of the Nominating Committee**
**To the Probate & Estate Planning Council of the State Bar of Michigan**
**June 14, 2019**

The Nominating Committee of the Probate and Estate Planning Section of the State Bar of Michigan consists of Shaheen I. Imami, James B. Steward, and Marlaine C. Teahan.

The Committee reminds the Council and Section that under Sections 4.2.3 and 5.2 of the Section's By-Laws the incumbent Chairperson Elect assumes the office of Chairperson upon the conclusion of the Section's annual meeting. Therefore, the Committee does not nominate a candidate for Chairperson of the Section, and the incumbent Chairperson Elect Christopher A. Ballard, will succeed to the office of Chairperson without action by the Committee, Council or Section.

The Committee met and pursuant to Section 4.1 of the Section By-Laws, the Committee nominates the following individuals for the positions shown opposite their names:

| | |
|---|---|
| Chairperson Elect | David P. Lucas |
| Vice Chairperson | David L.J.M. Skidmore |
| Secretary | Mark E. Kellogg |
| Treasurer | James P. Spica |

For the Council for a second three-year term:

Robert C. Labe
Richard C. Mills
Nathan R. Piwowarski
Nazneen S. Hasan

For the Council for an initial three-year term:

Andrew W. Mayoras
Kenneth F. Silver

Andrew W. Mayoras was elected to serve the balance of Geoffrey R. Vernon's term as a member of the Council, which ends on the last day of the fiscal year of the Section in 2019. If elected again, Mr. Mayoras still will be eligible for election to another three-year term as a member of the Council.

The Committee nominates Kenneth F. Silver to fill the seat of Lorraine F. New, who is term-limited after serving two consecutive three-year terms.

Finally, the Committee wants to make the Council aware that the criteria used by the Committee was consistent with those approved in June 2011 (a copy of which is attached). The Committee is aware that the change in the meeting days from Saturdays to Fridays and the expansion of remote attendance are not expressly considered in those criteria. As such, the Committee chose not to penalize or distinguish candidates if

meeting attendance dropped because of the day change or if the candidates regularly participated in meetings remotely. However, the Committee believes that the value of face-to-face, in-person meetings for the business of the Council, and the broader Section, cannot be overstated. Our practice area, unlike many others, is intensely personal, and the Committee believes the same is true for the Council. In preparing the nominations slate for 2019-2020, the Committee discovered that some candidates, especially those in the judiciary or with litigation practices, are unable to participate in Friday meetings with any regularity, even with the option of remote attendance, because of employment demands. Therefore, it appears to the Committee that Council risks permanently losing probate judges, probate litigation attorneys, and others whose regular work day demands frequently prevent weekday attendance. While the Committee understands, and in many ways appreciates, the changes implemented by the Council to encourage broader and easier participation, the Committee also does not want to sacrifice the qualities that make the Council special – and we dare say, unique – when compared to the other sections of the State Bar of Michigan. As a result, the Committee encourages the Council to critically and objectively analyze those recent changes, with an emphasis on maintaining the quality of the Council's work. For its part, and going forward, the Committee believes that greater weight should be given to in-person attendance, than to remote-attendance, when other factors are equal, and in-person attendance for offices and committee chairs should be the norm, unless a very good reason exists for not being able to attend in person. As a result, the Committee intends to work on amending the criteria approved in June 2011 to more accurately reflect these concerns and the role of technology in the conduct of the Council's business.

Respectfully submitted on behalf of the Nominating Committee,

Shaheen I. Imami, Chair

# F

*MEMORANDUM*

To: Legislative Development and Drafting Committee

From: Katie L. and Georgette D.

Dated: 4/25/2019

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We were asked to review legislation from other states and decide if it seemed worthwhile to investigate whether the committee should consider presenting the issue of drafting vehicle transfer on death legislation to the council. We decided that this type of legislations is worthwhile and it seemed appropriate to begin an investigation and discussion.

1. Advantages and Disadvantages.

   Some advantages.

   A. Probate avoidance. The transfer on death designation lets beneficiaries receive assets at the time of the owner's death without going through probate. Transferring vehicles in Michigan under $60,000 do not require letters of authority and the probate factor is less applicable (although still a probate asset if a probate case is opened).
   B. Ease of asset distribution. The designation also lets the owner of the asset specify the designated beneficiary, which helps the personal representative distribute the decedent's assets after death.
   C. Retains owner control over asset. With TOD designation, the named beneficiary has no access to or control over the owner's asset as long as the person is alive.
   D. Modifiable and revocable. TOD is not permanent and can either be revoked or modified.
   E. Creditor Avoidance. TOD registration may allow for creditor avoidance, which can be an advantage in some instances, especially for lower socio-economic individuals who rely on a safe vehicle for access to employment.
   F. Widely accepted and familiar transfer tool. Many people are familiar with transfer on death registrations and beneficiary designations for other common assets. Many other typically more valuable assets have TOD registration available including:
      i. Individual Retirement accounts are TOD
      ii. Life Insurance is TOD
      iii. Brokerage and Bank Accounts can be TOD
      iv. Real Property in some states can be TOD

2. Some disadvantages and complications.

   A. Creditor Avoidance.
   B. Fraud tool. Another opportunity for fraud upon the elderly, incapacitated and unsophisticated owner, since this type of legislation may allow for titles with TOD to be recorded without the knowledge, intent or consent of the owner/transferor.
   C. Insurance complications. Would the deceased owner's insurance coverage remain in effect after death, even if the beneficiary has not re-titled the vehicle? What is the impact if the TOD beneficiary is not insurable and title cannot be transferred?

3. Some Legislation Issues and Decisions.

   We reviewed the legislation for 17 states and created a spreadsheet of relevant areas covered by the various statutes. A spreadsheet of the areas that need to be discussed and decisions that need to be made about this type of legislation is attached. Here is a list of some decisions that need to be made along with how Ohio and Indiana handle the issue in their statute, along with Georgette's and Katie's opinions.

   Ohio statute – Note that upon the death of a vehicle owner, the title may be transferred to a surviving spouse – does not include all heirs like Michigan. The value of the vehicle must be $65,000 or less.

   A. Where should this legislation be located? Under EPIC or Michigan's Motor Vehicle Statute? Someplace else?
      a. Ohio: Located in their probate code; Title 21 of their code.
      b. Indiana: Located in their property section of the Indiana Code. Specifically Title 32. Property. Article 17. Interests in Property. Chapter 14. Transfer on Death Act.
      c. G & K: Michigan does not have a General Transfer on Death Act, similar to Indiana's. Most states include this under their motor vehicle code. We feel more comfortable drafting under EPIC and believe this type of legislation belongs under non-probate transfers, Article 6, Part II. References to and inclusions in Michigan's Motor Vehicle Code will most likely be necessary.

   B. Should the legislation cover all motor vehicles as defined under the Motor Vehicle Code, **257.216 Vehicles subject to registration and certificate of title provisions; exceptions.**? This statute is attached.
      Should it cover farm equipment; motor homes; recreational vehicles; boats and motorcycles?

a. Ohio: the statute applies to:
   i. "motor vehicle" includes manufactured homes, mobile homes, recreational vehicles, and trailers and semitrailers whose weight exceeds four thousand pounds (ORC 4505.01)
   ii. "watercraft" includes: vessel operated by machinery either permanently or temporarily affixed; sailboat other than a sailboard; inflatable, manually propelled vessel that is required by federal law to have a hull identification number meeting the requirements of the United States coast guard; canoe, kayak, pedalboat, or rowboat; any of the following multimodal craft being operated on waters in this state: (1) amphibious vehicle, (2) submersible, and (3) airboat or hovercraft; vessel that has been issued a certificate of documentation with a recreational endorsement under 46 C.F.R. 67. (ORC 1546.01)
   iii. "Outboard motor"

b. Indiana: The applicability section, IC 32-17-14-2 states:
(e) Subject to IC 9-17-3-9(g), this chapter applies to a beneficiary designation for the transfer on death of a motor vehicle or a watercraft.
***Note, Title 9 is Indiana's Motor Vehicle Code.*** **Below are relevant provisions and a definition of "motor vehicle".**

   i. IC 9-17-3-9 provides:
   (g) In general, IC 32-17-14 applies to a certificate of title designating a transfer on death beneficiary. However, a particular provision of IC 32-17-14 does not apply if it is inconsistent with the requirements of this section or IC 9-17-2-2(b).

   **IC 9-17-2-2 Application; contents**
   Sec. 2. (a) A person applying for a certificate of title for a vehicle must submit an application in the form and manner prescribed by the bureau and provide the following information:

   (1) A full description of the vehicle, including the make, model, and year of manufacture of the vehicle.
   (2) A statement of any liens, mortgages, or other encumbrances on the vehicle.
   (3) The vehicle identification number or special identification number of the vehicle.
   (4) The former title number, if applicable.
   (5) The purchase or acquisition date.
   (6) The name and Social Security number or federal identification number of the person.
   (7) Any other information that the bureau requires, including a valid permit to transfer title issued under IC 6-1.1-7-10, if applicable.

   (b) This subsection applies only to a person that receives an interest in a vehicle under IC 9-17-3-9. To obtain a certificate of title for the vehicle, the person must do the following:
   (1) Surrender the certificate of title designating the person as a transfer on death beneficiary.
   (2) Submit proof of the transferor's death.
   (3) Submit an application for a certificate of title in the form and manner prescribed by the bureau.

[Pre-1991 Recodification Citation: 9-1-2-1(a) part.]*As added by P.L.2-1991, SEC.5. Amended by P.L.83-2008, SEC.3; P.L.125-2012, SEC.72; P.L.81-2015, SEC.1; P.L.198-2016, SEC.203.*

**ii. IC 9-13-2-105"Motor vehicle"** Sec. 105. (a) "Motor vehicle" means, except as otherwise provided in this section, a vehicle that is self-propelled. The term does not include a farm tractor, an implement of agriculture designed to be operated primarily in a farm field or on farm premises, or an electric personal assistive mobility device.
(b) "Motor vehicle", for purposes of IC 9-21, means:
(1) a vehicle that is self-propelled; or
(2) a vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.
(c) "Motor vehicle", for purposes of IC 9-32, includes a semitrailer, trailer, or recreational vehicle.
[Pre-1991 Recodification Citations: subsection (a) formerly 9-1-1-2 part; 9-4-8-4 part; 9-7-3-1 part; 9-10-1-1 part; subsection (b) formerly 9-4-1-2(b); subsection (c) formerly 9-2-1-2(j).]*As added by P.L.2-1991, SEC.1. Amended by P.L.94-1997, SEC.1; P.L.143-2002, SEC.2; P.L.248-2003, SEC.2 and P.L.265-2003, SEC.2; P.L.210-2005, SEC.9; P.L.191-2007, SEC.1; P.L.9-2010, SEC.8; P.L.92-2013, SEC.25; P.L.221-2014, SEC.12; P.L.174-2016, SEC.8; P.L.198-2016, SEC.133.*

iii. **IC 9-13-2-198.5"Watercraft"**

Sec. 198.5. "Watercraft" means a contrivance used or designed for navigation on water, including a vessel, boat, motor vessel, steam vessel, sailboat, vessel operated by machinery either permanently or temporarily affixed, scow, tugboat, or any marine equipment that is capable of carrying passengers, except a ferry.
*As added by P.L.71-1991, SEC.8.*

c. G & K: We feel the definition should be as broad. We're not sure at this point if it should apply to farm equipment, tugboats, etc. For legislative drafting purposes, it may need to be broader than we intend.

C. Should the legislation authorize the TOD language on the motor vehicle title? By attachment? On the Registration? Both?
   a. Ohio: TOD language will be listed on the certificate of title.
   b. Indiana: TOD language on the certificate of title, even at the time of purchase.
   c. G & K: We agree the certificate of title is the most obvious place. If allowed at the time of purchase, we anticipate pushback from other organizations, such as the automotive industry.

D. Should the legislation allow TOD registration, even if the vehicle is jointly titled?
   a. Ohio: No. The vehicle must be solely owned. (ORC 2131.13(B))
   b. Indiana: Yes. Multiple owners allowed.
   c. G & K: Multiple owners should be allowed. Consider including in legislation that surviving joint owner has authority to change TOD beneficiary.

E. Should the legislation allow the TOD beneficiary to be an LLC, Corporation, etc.
   a. Ohio: Yes. TOD may designate one or more persons as the beneficiary. "Person" means an individual, corporation, organization or other legal entity. (ORC 2131.13(A)(3))
   b. Indiana: Yes. Under IC 32-17-14-3 (2) "Beneficiary" means a person designated or entitled to receive property because of another person's death under a transfer on death transfer.
      Under IC 32-17-14-3 (2) "Person" means an individual, a sole proprietorship, a partnership, an association, a fiduciary, a trustee, a corporation, a limited liability company, or any other business entity.
   c. G & K: Yes. Note, we are not addressing whether the owner can be anything else than an individual or individuals because we need a living person to trigger the "transfer on death" event.

F. Should the legislation establish a value limit on the vehicle for TOD registration and if so, what is the limit and how is it determined?
   a. Ohio: No value limit for a TOD. Note: There is a $65,000 limit when the title is transferred via survivorship, to a surviving spouse.
   b. Indiana: None.
   c. G & K: No value limit for a TOD.

G. Should the legislation require that a lien be resolved before a TOD is added to a vehicle?
   Michigan law (MCL 257.236) allows an heir to transfer the Decedent's vehicle using a Death Certificate. The Certification From the Heir to a Vehicle (see attached) requires that a lien is terminated first.
   a. Ohio: No. The statute provides that this Section of OH law does not limit the rights of any creditor of the owner against any TOD beneficiary. Note: the lien does not have to be resolved when the title is transferred to a surviving spouse.
   b. Indiana: No.
   c. G & K: Yes, the lien should be resolved. We compared this process to that of a lady bird deed for real property – the transfer of real property with a lady bird deed does not require that a mortgage be paid off first. One difference though is that the lender maintains their lien on the real property and the ability to foreclose. It would be more difficult for a lien holder of a vehicle to repossess a car because it is mobile. But since two of our chosen states have allowed for TOD with an existing lien, we could be persuaded otherwise.

**To: Probate and Estate Planning Council**

**From: Legislation Development and Drafting Committee**

**Re: June 2019 Committee Report**

Our Committee offers the following updates:

- **Omnibus.** Sen. Lucido and Rep. Elder are sponsoring the (now-lengthier) omnibus. I am working through some drafting questions from the LSB staff attorney responsible for this project.

- **TODs for motor vehicles.** Katie Lynwood and Georgette David's decision memo is included in the June CSP agenda.

- **Protective order notice fix**. This project will be inactive for the time being.

- **Delaware Tax Trap/ MCL 554.92-.93**. Jim Spica's decision memo is included in the June CSP agenda.

- **Entireties trusts (SB 905)**. I briefly met with Debbie Mittin at the Probate & Estate Planning Institute. The Michigan Bankers Association wishes to renew our discussions regarding entireties (and community property) trusts. A date has not been set to do so.

M E M O R A N D U M

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

**From:** James P. Spica

**Re:** Proposal to Amend MCL §§ 554.92–.93

**Date:** February 20, 2019

## I. Purpose of the Proposal

The proposal is to make the anti-Delaware-tax-trap provision of the Personal Property Trust Perpetuities Act (PPTPA) elective. This will allow the donee[1] of a qualifying special power of appointment[2] over personal property held in trust to spring the so-called "Delaware tax trap" without having to create a presently exercisable general power of appointment over the property in question.

## II. The Delaware Tax Trap

"Delaware tax trap" (Trap) is the colloquial name for Internal Revenue Code (Code) section 2041(a)(3) and its gift tax counterpart, Code section 2514(d). The Trap provides that assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) federal transfer tax base (gift tax base or gross estate depending on whether the triggering exercise is effectively testamentary) to the extent *H* exercises the power by creating another power over the assets in question (second power) that "under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[3] Thus, the Trap assumes that applicable local law limits the period during which the vesting of future interests can be postponed or the power of alienation suspended and that, under that law, when one power of appointment, $p_1$, is exercised so as to grant a second power of appointment, $p_2$, the date of the creation of $p_1$ may or may not be

[1] The "donee" of a power of appointment is the person to whom the power is granted or by whom it is retained—i.e., the *holder* of the power. *See* Mich. Comp. Laws § 556.112(e); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.2(b) (Am. Law Inst. 2011).

[2] A "special power" is a power of appointment whose permissible appointees do not include the donee of the power, her estate, her creditors, or the creditors of her estate. *See* Mich. Comp. Laws § 556.112(i). In other words, a "special power" is a power of appointment that is *not* a "general power." *See id.* § 556.112(h) (defining "general power" as power of appointment whose permissible appointees include donee, her estate, her creditors, or the creditors of her estate); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.3 (Am. Law Inst. 2011). The sense in which a "*qualifying* special power of appointment" *qualifies* is described *infra* in Part VIII apropos of proposed new PPTPA section 2(2)(a).

[3] I.R.C. § 2041(a)(3) (providing estate tax version of Trap); *see id.* § 2514(d) (providing gift tax version).

determinative of the remotest date on which interests granted by exercise of $p_2$ must vest (if at all, to be valid) or assets appointed by exercise of $p_2$ must become transferable within the meaning of an applicable rule against suspension of absolute ownership or the power of alienation. If the date of $p_1$'s creation is determinative, the Trap is not sprung. But if the date of $p_1$'s creation is irrelevant, the Trap is sprung, and the assets subject to $p_2$ are included in the transfer tax base of the donee of $p_1$ upon the granting of $p_2$.

Historically, the Trap was a legislative response to the peculiarity of Delaware law that allows the exercise of a testamentary general or special power of appointment to restart any applicable perpetuities testing or wait-and-see period; for Delaware is peculiar in applying the common law principle that the period determining the remotest date on which interests granted by exercise of a presently exercisable general power of appointment must vest (if at all, to be valid) is measured from the time the power is exercised (rather than from the time of the power's creation or deemed creation) to the exercise of *any* power of appointment, including a testamentary general or special power.[4] Before the enactment of the federal generation-skipping transfer (GST) tax, that peculiarity of Delaware law posed a serious threat to the integrity of the federal transfer tax base as a measure of wealth, a threat that the Trap was designed to neutralize:

> In at least one State a succession of powers of appointment, general *or limited*, may be created and exercised *over an indefinite period* without violating the rule against perpetuities. In the absence of some special provision in the [Code], property could be handed down from generation to generation without ever being subject to estate tax.[5]

### III. Application to Powers Subject to Michigan Law

Now, the Trap refers to postponement of vesting, on the one hand, and suspension of absolute ownership or the power of alienation, on the other,[6] in the disjunctive, but the disjunction has been interpreted as a reference to the particular vesting or alienation requirements actually imposed by local law.[7] Michigan has not had a rule against suspension of absolute ownership or

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[4] *See* 25 Del. Code Ann. tit. 25, § 501. As to the uniqueness of Delaware's rule on this point among common law jurisdictions, see, e.g., John C. Gray, The Rule Against Perpetuities § 514 n.1 (Roland Gray ed., 4th ed. 1942).

[5] S. Rep. No. 82-382, at 1 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1530, 1535 (emphasis added).

[6] Postponement of vesting is the conceptual province of all forms of rule against perpetuities, whereas suspension of absolute ownership or the power of alienation is the province of a conceptually distinct group of rules. *See, e.g.*, Gray, *supra* note 4, § 119; Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, 28 Est. Plan. 68, 70–71 (2001). Vesting is irrelevant to rules against the suspension of absolute ownership or the power of alienation, under which a suspension occurs when there is no person or group of persons living who can convey absolute ownership of the property in question, as when trust principal is directed to someone yet unknown or unborn. *See* Ira Mark Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 Alb. L. Rev. 261, 267–69 (1981). These rules are violated when such a suspension may last longer than a specified period that is often similar to the common law perpetuities testing period of a life in being plus twenty-one years (plus gestation). *See, e.g.*, Bloom, *supra*, at 268.

[7] *See* Estate of Murphy v. Comm'r, 71 T.C. 671 (1979), acq. 1979-2 C.B. 2.

the power of alienation since 1949,[8] after which the common law rule against perpetuities (RAP) applied with respect to both real and personal property until the enactment, in 1988, of the Uniform Statutory Rule Against Perpetuities (USRAP),[9] which PPTPA overlies.[10] That makes remoteness of vesting the relevant concern in Michigan for application of the Trap, which means that we can ignore the Trap's abstract concern with a rule against suspension of absolute ownership or the power of alienation: for our purposes, the Trap might simply provide that assets subject to a special power of appointment[11] (first power) are included in the power holder's (*H*'s) transfer tax base to the extent *H* exercises the power by granting another power over the assets in question (second power) that, under Michigan law, can be validly exercised so as to postpone the vesting of future interests in the assets for a period ascertainable without regard to the date of creation of the first power.[12]

## IV. The Relation-Back Principle

Under Michigan law, in the case of any power of appointment other than a presently exercisable general power, the remotest date (if any) on which interests granted by exercise of the power must vest (if at all, to be valid) is reckoned from the time the power was *created*; in the case of a presently exercisable general power, the remotest such date (if any) is reckoned from the time the power is exercised.[13] This is a particular implication of a more general account of special and testamentary general powers of appointment that is sometimes called the "relation back theory,"[14] but it is a particular implication that is often singled out for mention when the general theory is described, as when we read: "Where an appointment is made under a special power, the appointment is read back into the instrument creating the power (as if the donee were filling in blanks in the donor's instrument) *and the period of perpetuities is computed from the date the power was created.*"[15] As a general account of the meaning and effect of special and testamentary general powers, the relation-back theory is open to criticism;[16] but the particular implication of the theory pertaining to perpetuities[17] was thoroughly entrenched in the common law.[18]

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[8] *See* 1949 Pub. Acts 38 (codified at Mich. Comp. Laws § 554.51).

[9] *See* Mich. Comp. Laws § 554.53.

[10] *See id.* §§ 554.92(f), 554.93(3).

[11] Assets subject to a general power of appointment are included in the power holder's federal transfer tax base in any case—i.e., without regard to the Trap. *See* I.R.C. §§ 2041(a)(1)–(2), 2514(a)–(b). Thus, the Trap is not *a trap* for the donee of a general power of appointment.

[12] *Cf. id.* § 2041(a)(3) (regarding estate tax version of Trap); *cf. also id.* § 2514(d) (regarding gift tax version).

[13] *See* Mich. Comp. Laws § 556.124(1).

[14] *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.4 cmt. f (Am. Law Inst. 2011).

[15] Ronald H. Maudsley, The Modern Law of Perpetuities 62 (1979) (quoting W. Barton Leach) (emphasis added). *See also, e.g.*, Restatement (Second) of Conflict of Laws § 274 cmt. b (Am. Law Inst. 1971).

[16] *See, e.g.*, John A. Borron, Jr. et al., The Law of Future Interests §§ 913, 1274 at 274–75 (3d ed. 2004).

[17] I.e., the principle described *supra* in the text accompanying note 13.

[18] *See, e.g.*, Gray, *supra* note 4, §§ 474.2, at 467, 514-15; Borron, *supra* note 16, § 1274.

If we suppose a finite perpetuities-limitation period, like either the common law testing period (of a life in being plus twenty-one years plus gestation)[19] or the so-called "wait-and-see period" specified in the USRAP,[20] it is easy to see how, in the case of a special power of appointment, the relation-back principle meets the policy concern that motivated the Trap:[21] the terminus of a finite period measured from the date that the "first power" contemplated by the Trap came into existence (or from an *earlier* date on which that power is *deemed* to have come into existence under the relation-back principle) is bound to fall earlier (on the timeline) than the terminus of the same period measured from a date *later than* the date on which the first power came into existence, as when, for example, the period is measured—as it is in Michigan when a presently exercisable general power is exercised[22] (and in Delaware in any case)[23]—from the date on which the "second power" is *exercised.* Moving a finite period along the timeline is like laying down a ruler—the point at which one end is placed rigidly determines the point at which the other end falls.

## V. The Threat of Infinity

But what if the ruler is infinitely long? In that case, the point at which we place the nearer end does *not* determine where the further end falls—because there is no further end! PPTPA creates an infinitely long ruler: apart from its anti-Trap provision, and excepting certain personal property previously held in trusts that were irrevocable on September 25, 1985, PPTPA makes the USRAP and all other RAP-like rules inapplicable with respect to personal property held in any trust that was revocable on or created after May 28, 2008.[24] So, if PPTPA did not make an anti-Trap exception, given that Michigan does not have rule against suspension of absolute ownership or the power of alienation,[25] any "second power" over personal property subject to a trust of the right vintage that might be created by the exercise of a "first power" within the meaning of the Trap could postpone vesting for a period *without end.*

If there is any sense in which the further end (to continue the ruler metaphor) of an endless period is "ascertainable," what is ascertained must be merely that *there is no the further end,* and that is a realization to which the position of the period's nearer end (if it has one) is evidently irrelevant—the end of a period that has a beginning but no end cannot be drawn nearer by moving the period's origin to an earlier place on the timeline. Thus, under PPTPA, but for the effect of the anti-Trap provision, the period during which the exercise of any "second power" contemplated by the Trap could postpone the vesting of future interests would be "ascertainable," if at all, "without regard to the date of creation of the first power" (or any other event), and the Trap would, therefore, include the assets subject to the second power in the

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[19] *See, e.g.*, Gray, *supra* note 4, § 201, at 191 (famously formulating the RAP); *see also id.* §§ 220-21 (regarding periods of gestation).

[20] *See* Mich. Comp. Laws § 554.72(1)(b). As to the difference in general between the common law testing period a "wait-and-see period," see, e.g., Maudsley, *supra* note 15, at 80-81; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities,* 21 Real Prop. Prob. & Tr. J. 569, 571–73 (1986).

[21] I.e., the policy concern expressed in the legislative history quoted *supra* text accompanying note 5.

[22] *See supra* note 13.

[23] *See supra* notes 4–5 and accompanying text.

[24] *See* Mich. Comp. Laws §§ 554.93(1)–(2), 554.94.

[25] *See supra* notes 8–9 and accompanying text.

transfer tax base of the holder of the first power upon the exercise of the first power to grant the second.[26]

## VI. *Status Quo*

That is why PPTPA makes an anti-Trap exception, in section 3(3), for the case in which a nonfiduciary[27] special power of appointment over personal property held in trust is exercised to create, a "second power."[28] In that case, the period during which the vesting of a future interest in the property may be postponed by the exercise of the second power is determined under a modified USRAP (having a 360-year wait-and-see period) *by reference to the date on which the first power was created.*[29] By requiring interests created by exercise of the second power to vest—and powers of appointment created by an exercise of the second power to be irrevocably exercised or otherwise to terminate—within a finite testing period under the USRAP, PPTPA section 3(3) prevents the value of assets subject to the second power from being included by the Trap in the transfer tax base of the donee of the first power when she exercises the first power to create the second (in case the instrument that creates the second power, by exercising the first, does not itself avert the Trap by placing limitations on exercise of the second power).[30]

Now, the anti-Trap provision (PPTPA section 3(3)) does not apply when a "first power" is exercised to create a presently exercisable general power of appointment: section 2(e) excludes presently exercisable general powers from the extension of the term "second power" as defined for purposes of PPTPA.[31] That makes Trap springing elective to the extent the donee of a special power of appointment is able[32] and willing to create a presently exercisable general power over the trust assets in question.[33] And there are situations in which it can be advantageous to spring

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[26] *See* I.R.C. §§ 2041(a)(3), 2514(d). *See also* James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 Real Prop. Tr. & Est. L.J. 673, 682 (2009).

[27] Powers that are to be exercised only in a fiduciary capacity are not treated as powers of appointment under the federal transfer taxes. *See, e.g.,* Treas. Reg. § 20.2041-1(b)(1) (dispositive powers exercisable only in fiduciary capacity not treated as powers of appointment under I.R.C. § 2041).

[28] *See* Mich. Comp. Laws § 554.92(b), (e).

[29] *See id.* § 554.93(3), 554.75(2).

[30] *See* Spica, *supra* note 26, at 683.

[31] *See* Mich. Comp. Laws § 554.92(e).

[32] Unless the instrument granting a power of appointment manifests a contrary intent, a power of appointment can ordinarily be exercised to grant further powers of appointment in permissible appointees. *See, e.g.*, Restatement (Third) of Prop.: Wills & Other Donative Transfers § 19.14 (Am. Law Inst. 2011); *see also id.* § 17.1 (defining "power of appointment" circularly to include power to "designate recipients of . . . powers of appointment over the appointive property"); Unif. Powers of Appointment Act § 102(13) (Unif. Law Comm'n 2013) (defining "power of appointment" circularly to include power to "designate a recipient of . . . another power of appointment"). On the other hand, the donor a power of appointment can definitely rule out particular uses of the power, including the creation of further powers; for an exercise of a power must comply "with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power." Mich. Comp. Laws § 556.115(2); *see also* Hannan v. Slush, 5 F.2d 718, 722 (E.D. Mich. 1925); Restatement (Second) of Property: Donative Transfers §12.1 (Am. Law Inst. 1986).

[33] *See* James P. Spica, *Means to an End: Electively Forcing Vesting to Suit Tax Rules Against Perpetuities*, 40 ACTEC L.J. 347, 379-80 (2014).

the Trap, as when, for example, a special power holder's death would otherwise be a "taxable termination" within the meaning of the federal GST tax and the attributable GST tax would be more than the attributable estate tax under the Trap.[34] Trap springing can also be advantageous when the effective exclusion amount available to the holder (*H*) of a testamentary special power of appointment is ample enough to cover appreciated assets subject to the power: in that case, an exercise of the power to grant another power so as to spring the Trap, will be without transfer tax effect, thanks to the effective exclusion of the unified credit, but the appointed assets will have been acquired by *H*'s appointees "from a decedent" within the meaning of Code section 1014 and, hence, qualify for the so-called "step up" in basis.[35] In situations like these, the power holder can spring the Trap under PPTPA in its current form, but only by exercising her power so as to grant a presently exercisable general power of appointment.[36]

## VII. The Problem

Sometimes in the context of GST-tax planning, creation of a presently exercisable general power of appointment does not seem extravagant: if there is a lot of wealth involved, strategic placement of a presently exercisable general power will often yield transfer tax benefits in addition to attracting the federal estate or gift tax when GST tax would otherwise be payable.[37] But with recent increases in the effective exclusion of the unified credit, planners are increasingly seeking estate-tax inclusion for reasons that have nothing to do with transfer taxation, particularly as a way of obtaining the "step up." In *that* context, creating a presently exercisable general power may seem extravagant; for there is no transfer tax advantage to weigh against the fact that granting such a power gives the donee the legal ability to scrap existing arrangements under the default terms of the affected trust. And the latter consideration may loom large in any case, so that even in the context of GST-tax planning, the holder of a special power of appointment may prefer to spring the Trap without abandoning her takers in default to the discretion of the donee of a presently exercisable general power; she would prefer to spring the Trap without having to create such a power.

## VIII. Mechanics of the Proposal

The proposal below makes that possible, but it also does a little clean-up job by moving the anti-Trap provision from section 3 of PPTPA to section 2; for the terms defined in section 2 appear only in the anti-Trap provision of existing section 3(3), which means that in its current form, the statute violates the Legislative Service Bureau (LSB) style imperative according to which interpretive provisions defining terms that only appear in one section of an act should appear not in a separate "Definitions" section (like existing PPTPA section 2), but at the end of the section in which the defined terms occur. It is probably just due to PPTPA's dense complexity that the LSB missed this solecism initially, but, in any case, they will be glad to have the matter put right,

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[34] *See* Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes,* 68 J. Tax'n 242 (1988); James P. Spica, *A Practical Look at Springing the Delaware Tax Trap to Avert Generation Skipping Transfer Tax,* 41 Real Prop. Prob. & Tr. J. 165 (2006).

[35] *See* I.R.C. § 1014(a)(1), (b)(9); Treas. Reg. § 1.1014-2(b).

[36] *See supra* notes 31–33 and accompanying text.

[37] *See* Spica, *supra* note 33, at 377-78.

and it is easily put right by moving the current section 3(3) into a new section 2(1) and putting the statutory definitions in a new subsection (3).

New section 2(2) is the provision that allows the donee of a special power of appointment over personal property held in trust to spring the Trap without having to create a presently exercisable general power. But in order to keep the mere availability of the exception described in section 2(2) from vitiating the anti-Trap provision in section 2(1), new section 2(2)(a) requires that the "second power" in question must have been created by the exercise of a "first power" that was not itself created by the exercise of either a "first power" or a "second-order fiduciary power."

But for that limitation, if the donee of a special power over personal property held in trust, $p_1$, exercised $p_1$ to grant a like power, $p_2$, and did *not* opt out of anti-Trap treatment for interests granted by exercise of $p_2$, the donee of $p_2$ could be permitted (if the terms of the instrument exercising $p_1$ to grant $p_2$ did not provide otherwise)[38] to exercise $p_2$ so as to grant another like power, $p_3$, *and opt out of anti-Trap treatment for interests granted by exercise of* $p_3$; for, as far as the statute is concerned, what is a "second power" within the meaning of the anti-Trap provision in respect of one power of appointment may be a "first power" in respect of another.[39] Since in that case, $p_2$ could be validly exercised to grant an additional "second power," it *could be* validly exercised to postpone the vesting of future interests in the assets subject to $p_2$ *forever*, which, again, is a period ascertainable, if at all, without regard to the date of creation of $p_1$;[40] and so, regardless of the fact that the donee of $p_1$ did *not* opt out of anti-Trap treatment for interests granted by exercise of $p_2$, the Trap would be sprung upon the exercise of $p_1$ to grant $p_2$.[41]

That would mean the anti-Trap provision was broken—it would mean that in attempting to make it possible for the donee of $p_1$ to spring the Trap, if she wished to, without having to create a presently exercisable general power in the donee of $p_2$, we had succeeded in making it impossible for PPTPA's anti-Trap provision to disarm the Trap in any case! The proposal averts that result by imposing the limitation embodied in new section 2(2)(a), which effectively provides that whereas settlors and some trustees can create Trap-springing options under new section 2(2) by granting special powers of appointment, the donees of "second powers," as such, cannot.

## IX. The Proposal

A bill to amend 2008 PA 148, entitled "personal property trust perpetuities act," by amending sections 2 and 3 as amended by 2012 PA 484 to allow the donee of a qualifying special power of appointment over personal property held in trust deliberately to spring the so-called "Delaware tax trap" without having to create a presently exercisable general power of appointment over the property in question

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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[38] *See supra* note 32.

[39] *See* Mich. Comp. Laws § 554.92(b) (defining "first power").

[40] *See supra* Part V.

[41] *See supra* Part II.

**554.92 Exercise of second power; determination under uniform statutory rule against perpetuities~~Definitions~~**

Sec. 2.

(1) Except as provided in subsection (2), the period during which the vesting of a future interest in property may be postponed by the exercise of a second power shall be determined under the uniform statutory rule against perpetuities by reference to the time of the creation of the power of appointment that subjected property to, or created, the second power. Except as provided in subsection (2), a nonvested interest, general power of appointment not presently exercisable because of a condition precedent, or nongeneral or testamentary power of appointment created, or to which property is subjected, by the exercise of the second power is invalid, to the extent of the exercise of the second power, unless the interest or power satisfies the uniform statutory rule against perpetuities measured from the time of the creation of the power of appointment that subjected property to, or created, the second power.

(2) To the extent a second power is created or has property subjected to it by the exercise of a first power, subsection (1) does not apply to interests or powers created by exercise of the second power if both of the following apply:

(a) The first power was not itself created or augmented by the exercise of either a first power or a second-order fiduciary power.

(b) The instrument[42] exercising the first power to subject property to or create the second power expressly declares that subsection (1) shall not apply to interests and powers created by exercise of the second power. For purposes of such a declaration, subsection (1) may be referred to as the anti-Delaware-tax-trap provision of the personal property trust perpetuities act.

(3) As used in this ~~act~~section:

(a) "Fiduciary" means, with respect to a power of appointment, that the power is held by a trustee in a fiduciary capacity.

(b) "First power" means a nonfiduciary, nongeneral power of appointment over personal property held in trust that is exercised so as to subject the property to, or to create, another power of appointment.

(c) "Nonfiduciary" means, with respect to a power of appointment, that the power of appointment is not held by a trustee in a fiduciary capacity.

(d) "Second-order fiduciary power" means a fiduciary power of appointment that is created or has property subjected to it by the exercise of 1 of the following:

(i) A first power.

(ii) A fiduciary power of appointment that was created or had property subjected to it by the exercise of a first power.

(iii) A fiduciary power of appointment whose creation or control over property subject to the power is traceable through a succession of previous exercises of fiduciary powers to the exercise of a fiduciary power that was created or had property subjected to it by the exercise of a first power.

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[42] The requirement of a writing for the *creation* of a power, *see* Mich. Comp. Laws § 556.113, entails that an exercise that creates a "second power" within the meaning of PPTPA's anti-Trap provision must be in writing; for, by hypothesis, the exercise involves the creation of a power. *See id.* § 554.92(e) [which becomes § 554.92(3)(e) under the proposal] (defining "second powers" as proper subset of powers of appointment).

(e) "Second power" means a power of appointment over personal property held in trust, other than a presently exercisable general power, that is created or to which property is subjected by the exercise of either a first power or a second-order fiduciary power.

(f) "Uniform statutory rule against perpetuities" means the uniform statutory rule against perpetuities, 1988 PA 418, MCL 554.71 to 554.78.

**554.93 Personal property held in trust; interest in or power of appointment over; validity~~; exercise of second power; determination under uniform statutory rule against perpetuities~~**

Sec. 3. (1) Except as provided in subsection (3), an interest in, or power of appointment over, personal property held in trust is not invalidated by a rule against any of the following:

(a) Perpetuities.

(b) Suspension of absolute ownership.

(c) Suspension of the power of alienation.

(d) Accumulations of income.

(2) Except as provided in subsection (3), all of the following may be indefinitely suspended, postponed, or allowed to go on with respect to personal property held in trust:

(a) The vesting of a future interest.

(b) The satisfaction of a condition precedent to the exercise of a general power of appointment.

(c) The exercise of a nongeneral or testamentary power of appointment.

(d) Absolute ownership.

(e) The power of alienation.

(f) Accumulations of income.

~~(3) The period during which the vesting of a future interest in property may be postponed by the exercise of a second power shall be determined under the uniform statutory rule against perpetuities by reference to the time of the creation of the power of appointment that subjected property to, or created, the second power. A nonvested interest, general power of appointment not presently exercisable because of a condition precedent, or nongeneral or testamentary power of appointment created, or to which property is subjected, by the exercise of the second power is invalid, to the extent of the exercise of the second power, unless the interest or power satisfies the uniform statutory rule against perpetuities measured from the time of the creation of the power of appointment that subjected property to, or created, the second power.~~

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DETROIT 40411-1 1489976v4

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To: Probate Section
From: Neal Nusholtz, Liaison to the Tax Section
Re: April 11, 2019 - Tax Section Council Meeting

- The Tax Section Council met on April 11, 2019, from 9:03 AM to 10:40 AM at the Bloomfield Hills office of the Honigman law firm, located at 39400 Woodward Ave., # 101, Bloomfield Hills, Michigan 48304.
- The Estates and Trusts Committee of the Tax Section will be having a Committee event at 5:30 PM on June 5, 2019 hosted by the Michigan Humane Society at the Detroit Mackey Center. Robin Ferriby from Clark Hill will be discussing charitable tax issues for estate planners. Drinks and appetizers will be served and the Humane Society will give a tour of the facility after the presentation.
- The Tax Court Luncheon schedule is not set yet because the trial calendars are still not available.
- The following upcoming events are listed on the Tax Section website.
- Tax Section: Employee Benefits Committee Happy Hour
  Apr 18, 6:00 PM - 8:00 PM (ET)
  Grand Rapids, MI., United States (TBD
- Tax Section: Young Tax Lawyers Event
  When: April 25, 2019 from 5:00 PM to 7:30 PM (ET)
  Networking and a panel discussion with local attorneys and CPAs speaking about their career paths and offering their keys for success. Drinks and appetizers will be provided.
  Location: Detroit Beer Company, 1529 Broadway St., Detroit
  RSVP to Kimberly Hammond at kimberly.hammond@plantemoran.com
  Event is free to attend.
  - Tax Section: Annual Tax Conference
    May 23, 9:00 PM - 5:30 PM (ET)
    Plymouth, MI., United States
  - Tax Section: Employee Benefits Committee Retirement Plan Panel & Breakfast
    Jun 13, 7:00 PM - 9:00 PM (ET)
    Lansing, MI., United States
  - Tax Section: Employee Benefits Committee DOL Presentation
    Oct 17, 9:00 AM - 11:00 AM (ET)
    TBD, MI., United States

No submissions have been received for the student writing contest, which has monetary prizes for the winners. $1,000.00 first prize. $250.00 for the three runner-ups.

State Bar of Michigan
Taxation Section

Editor/Author: Sean H. Cook (Partner at Warner, Norcross + Judd, LLP)
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## Tax Highlights

[Updates will be posted at connect.michbar.org/tax/pubpolicy/highlights]

**Mission**: Tax Highlights is a summary of selected income, estate and gift legislative and regulatory tax developments of general interest. This is not a comprehensive reporter of all tax developments. YOUR input is welcome. You can submit proposals for topics to include by sending a message to Sean H. Cook at scook@wnj.com.

## Current Hot Issues

- Rev. Rul. 2019-11: Tax benefit rule explained for state income tax refunds received in a subsequent tax period
- 199A Guidance: Proposed Rulemaking becomes FINAL (see below)
- Meals and Entertainment Guidance: Notice (see below)
- Opportunity Zone Guidance: Rev. Rul. 2018-19; Proposed Rulemaking (see below)
- *Wayfair* Decision Guidance: R.A.B. 2018-16
- Michigan: Illegal Activities: Notice dated September 12, 2018
- Michigan's Adoption of the Tax Cuts and Jobs Act of 2017: Notice dated July 2, 2018 regarding repatriation, Base Erosion Anti-Abuse Tax and Global Intangible Low Tax Income; Michigan Department of Treasury Update 11/01/2018
- Centralized Partnership Audit Regime Notice 2019-6, 2019-3 IRB
- Michigan Department of Treasury has issued a release that summarized the Michigan income tax treatment of retirement and pension benefits effective for tax year 2018. February 4, 2019.
- Michigan Department of Treasury has updated its guidance on the sales and use tax bad debt deduction, for periods after September 30, 2019. This revised guidance incorporates a recent Michigan Supreme Court decision. Michigan Revenue Administrative Bulletin No. 2019-3, 02/15/2019.
- Gov. Whitmer proposes Gas Tax
- Gov. Whitmer proposes tax on flow-through entities to offset tax reinstitute the retirement income exclusion modifying the current age based exclusions

Proposed and Passed Tax Legislation

| Federal | Michigan |
|---|---|
| H.R. Setting Every Community up for Retirement Enhancement (SECURE) Act of 2019 | |
| S. Retirement Enhancement Savings Act of 2019 | |
| H.R. 7227, the "Taxpayer First Act" House approved H.R. 1957 | HB 4364 of 2019: Use tax – amends MCL 205.94 to exempt use tax on higher education books |
| JCX-1-19 "Tax Technical Clerical Corrections Act Discussion Draft" | HB 4363 of 2019: Sales tax – amends MCL 205.54a to exempt sales tax on higher education books |
| H.R. 264 "Financial Services and General Government Appropriations Act" which will fund the IRS through September 2019. Passed the House. Read for a second time in the Senate on 1/10/19 | HB 4388 of 2019: Individual income tax – amends MCL 206.1-206.713 to provide for credit for donation to certain charitable organizations and community foundations |
| S. 215 "Death Tax Repeal Act of 2019". Read twice and referred to Finance Committee on 1/24/19. | HB 4324 of 2019: Individual income tax – amends MCL 206.272 to increase the earned income tax credit |
| H.R. 942 "SAFETY Act" would provide research tax credits and excise taxes for certain firearms. Referred to House Ways and Means on 1/31/19. | SB 0186 of 2018: Gaming – creates new act for lawful internet gaming |
| H.R. 957 "Tax Cuts and Jobs Middle Class Enhancement Act" would increase standard deduction and reduce medical expense deduction floor. Referred to House Ways and Means on 2/4/19. | HB 4311 of 2019: Gaming – creates a new act for lawful internet gaming |
| S. 422/H.R. 1118 "Small Business Tax Equity Act of 2019" would exempt a business that conducts marijuana sales in compliance with state law from a provision in the Code that prohibits business-related tax credits or deductions for expenditures in connection with trafficking in controlled substances. Referred to Senate Finance Committee (2/7/19) and House Ways and Means (2/8/19). | HB 4298 of 2019: Individual income tax – amends MCL 206.272 to restore the earned income tax credit |
| S.437/H.R. 1142 "SALT Act" Would repeal the deduction limitation for state and local taxes and restore 39.6% individual tax bracket. Referred to Senate Finance Committee (2/12/19) and House Ways and Means (2/11/19). | HB 4278 of 2019: Individual income tax – amends MCL 206.30 to eliminate 3-tier limitations and restrictions on deductions for retirement plans or pension benefits based on taxpayer's age |

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| S. 687/H.R. 1300 "Taxpayer Penalty Protection Act of 2019" would provide temporary safe harbor for certain individuals' failure to pay estimated income tax. Referred to Senate Finance Committee (3/6/19) and House Ways and Means (2/15/19). | SB 0124 of 2019: Use tax - amends MCL 205.94 to exempt sale of feminine hygiene products |
| S. 617 "Tax Extender and Disaster Relief Act of 2019" would extend certain credits and deductions that will otherwise expire soon. Read a second time in Senate on 3/4/19 and placed on calendar. | SB 0123 of 2019: Sales tax - amends MCL 205.54a to exempt feminine hygiene products |
| S. 647/H.R.1516 "Wall Street Tax Act of 2019" would impose a tax on certain trading transactions. Referred to Senate Finance Committee (3/5/19) and House Ways and Means (3/5/19). | HB 4262 of 2019: Individual income tax - amends MCL 205.51d to increase and accelerate the collections earmarked to the Michigan transportation fund |
| S. 750 "New Markets Tax Credit Extension Act of 2019". Referred to Finance Committee on 3/12/19. | SB 0121 of 2019: Individual income tax – amends MCL 206.30 to provide for a tax incentive for contributions made to first-time home buyers program |
| S. 765/H.R. 1725 "Digital Goods and Services Tax Fairness Act of 2019" would prohibit discriminatory taxes on digital goods and services. Referred to Senate Finance Committee (3/13/19) and House Judiciary Committee (3/13/19). | SB 0120 of 2018: Individual income tax – Creates new act to create a Michigan first-time home buyer savings program |
| | HB 4204 of 2019: Use tax – amends MCL 205.92b to modify the definition of exemption for prosthetic devices |
| | HB 4203 of 2019: Sales tax - amends MCL 205.51a to modify the definition for exemption for prosthetic devices |
| | HB 4199 of 2019: Taxation – amends MCL 205.422 et seq. and repeals MCL 205.434 to earmark revenue and modify tax on certain electronic smoking devices and certain tobacco products |
| | HB 4190 of 2019: Economic development – amends MCL 207.808 to prohibit new agreements and certain amendments to tax credit agreements |
| | HB 4189 of 2019: Michigan business tax – amends and repeals parts of MCL 208.1101-208.1601to provide for an election to file a return under the Michigan business tax rather |

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| | than corporate income tax under certain circumstances |
| | HB 4188 of 2019: Taxation – amends MCL 205.422 et seq. and repeals MCL 205.434 to modify tax on certain electronic smoking devices and certain tobacco products and earmark revenue |
| | HB 4191 of 2019: Corporate income tax – amends MCL 206.680 to provide for an election to file a return under the Michigan business tax under certain circumstances |
| | HB 4169 of 2019: Use tax – amends MCL 205.94k to exempt purchase of certain aviation equipment |
| | HB 4116 of 2019: Use tax – amends MCL 205.94 to exempt sale of feminine hygiene products |
| | HB 4168 of 2019: Sales tax – amends MCL 205.54x to exempt purchase of certain aviation equipment |
| | HB 4165 of 2019: Sales tax – amends MCL 205.54a to exempt feminine hygiene products |
| | HB 4183 of 2019: Individual income tax – amends MCL 206.1-206.713 to create a child and dependent care credit |
| | HB 4171 of 2019: Individual income tax – amends MCL 206.30 to clarify limitations and restrictions on retirement income deductions for a surviving spouse |
| | HB 4182 of 2019: Corporate income tax – amends MCL 206.1-206.713 to create credit as incentive for certain taxpayers that provide child care for their employees |
| | HB 4180 of 2019: Corporate income tax – amends MCL 206.1-206.713 to create credit for certain taxpayers that provide employment to unemployed individuals |
| | SB 0107 of 2019: Individual income tax – amends MCL 206.272 to restore earned income tax credit |
| | HB 4125 of 2019: Individual income tax – amends MCL 206.51 & 206.51d and repeals MCL 206.51g to modify and eliminate earmark for school aid fund and the Michigan transportation fund |

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| | SB 0085 of 2019: Individual income tax – amends MCL 206.1-206.713 to create a child and dependent care credit |
| | SB 0086 of 2019: Individual income tax - amends MCL 206.1-206.713 to create individual income tax credit for payment of certain student loans |
| | HB 4100 of 2019: Individual income tax – amends MCL 206.1-206.713 by restoring the state historic preservation tax credit program |
| | HB 4110 of 2019: Individual income tax – amends MCL 206.522 to increase veteran property tax credit for certain qualified veterans. |
| | Michigan Regulation and Taxation of Marihuana Act (MRTMA) imposes an excise tax "at the rate of 10% of the sales price for marihuana sold or otherwise transferred to anyone other than a marihuana establishment" in addition to any other applicable state tax. |
| | Michigan Regulation and Taxation of Marihuana Act (MRTMA) imposes a 6% sales tax as marihuana constitutes "tangible personal property" under the General Sales Tax Act. |
| | SB 0063 of 2019: Individual income tax – amends MCL 206.30 to provide for deductions for the costs, care, and maintenance of a service animal |
| | HB 4089 of 2019: Income tax – amends MCL 141.502a et seq. to prohibit a city imposing an income tax on nonresidents |
| | SB 0058 of 2019: Taxation – amends MCL 205.427 to modify the cigarette tax |
| | SB 0055 of 2019: Individual income tax – amends MCL 206.1-206.713 by restoring tax credit for charitable donations to food banks, shelters, and community foundations |
| | SB 0054 of 2019: Individual income tax – amends MCL 206.1-206.713 by restoring the state historic preservation tax credit program |
| | SB 0043 of 2019: Use tax – provides exemption for contact lenses |
| | SB 0044 of 2019: Sales tax – provides for exemption for contact lenses. |

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| | Senate Joint Resolution D of 2019: Individual income tax - to amend sec. 7, art. IX of the state constitution to allow for a graduated income tax. |
| | SB 0016 of 2019: Business tax – provides for recapture of tax credits for businesses relocating outside of this state. |
| | SB 0018 of 2019: Individual income tax – provides for student loan forgiveness for disabled veterans under the total and permanent disability discharge program. |
| | SB 0015/0017 of 2019: Individual income tax – creates child care credit. |
| | SB 0013 of 2019: Individual income tax – eliminate 3-tier limitations and restrictions on deduction for retirement or pensions benefits based on taxpayer's age. |
| | HB 4038 of 2019: Individual income tax – credit for donation of agricultural products to hunger relief charitable organizations. |
| | PA 0460 of 2018: (*SB 0361 (2017)*): Corporate Income Tax – clarifies tax base of financial institutions. Approved by the Governor 12/26/18. |
| | SB 0362 of 2017: Corporate income tax – amends MCL 206.653 and 206.657 to clarify financial institutions and apportionment for unitary business group. Vetoed by Governor 12/28/18; (addenda added 12/31/18 to 2018 SJ 85.) |
| | PA 0589 of 2018: Individual tax- additional personal exemption for stillborn birth. |
| | PA 0588 of 2018: Individual tax- compensation for wrongful imprisonment and exempt from taxable income and total household resources under homestead property tax credit. |
| | PA 0456: HB 5025 and HB 4618 (see below) |
| | HB 5656 (2018): Excise Taxes – tax on bottled water from non-muni source |
| | PA 0530 of 2018 (*HB 5913 (2018)*): Sales tax – tax exempt status for 501(c)(19) organizations. Approved by Governor 12/27/18. |

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| | HB 6550 (2018): Use tax – purchase of certain aviation equipment – exemption. Vetoed by the Governor 12/28/18. |
| | HB 6549 (2018): Sales tax – purchase of certain aviation equipment – exemption. Vetoed by the Governor 12/28/18. |
| | HB 6433 (2018): Individual tax- credit for donation to certain charitable organizations |
| | HB 6434 (2018): Individual tax- credit for donation to a community foundation |
| | HB 6485 (2018): Individual tax- elimination of income and expenses of producing oil and gas Vetoed by the Governor 12/28/18; (addenda added 12/31/18 to 2018 HJ 86). |
| | PA 438 of 2018 (*HB 4412 (2018)*): Tax Tribunal Reform. Approved by Governor on 12/20/18. |
| | PA 0553 of 2018 (*HB 5025 (2017)*): Individual tax – Withholding tax refunds for unpaid city taxes administered by the state. Approved by Governor on 12/27/18. |
| | PA 456 of 2018 (*HB 4618 (2017)*): Individual tax – Modification to city income tax administration by the state. Approved by Governor on 12/20/18. |
| | HB 4926 (2017) Gaming – allow and regulate. Vetoed by the Governor 12/28/18; (addenda added 12/31/18 to 2018 HJ 86) |
| | PA 464-466, 625-626 of 2018 (*SB 0703-0707 (2018)*): Taxation- convention and tourism promotion act. Approved by Governor on 12/12/18; (addenda added 12/31/18 to 2018 SJ 85). |
| | SB 0304 (2017): Cigarette tax. Vetoed by Governor 12/28/18; (addenda added 12/28/18 to 2018 SJ 85). |
| | SB 0511 (2017): Individual income tax – First time home buyer savings program act. Vetoed by the Governor 12/21/18. |
| | SB 0512 (2017): Individual income tax – Tax incentive for contributions made to first time home buyers program. Vetoed by the Governor 12/21/18. |
| | PA 0673 of 2018 (*SB 0906 (2018)*): Sales Tax – Exemption of school bus. Approved by the Governor 12/28/18. |

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| | PA 0679 of 2018 (*SB 0907 (2018)*): Use Tax – Exemption of school bus. Approved by the Governor 12/28/18. |
| | SB 1097 (2018): Corporate Income Tax Interest Expense Deduction. Vetoed by the Governor 12/28/18. |
| | SB 1170 (2018): Taxation of Flow through entities. Vetoed by the Governor 12/28/18;<br>(addenda added 12/28/18 to 2018 SJ 85). |