PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for:

Meeting of the Committee on Special Projects (CSP);

Meeting of the Council of the Probate and Estate Planning Section

Saturday, June 16, 2018
9:00 am
University Club 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 16, 2018
9:00 a.m.

University Club
3435 Forest Road
Lansing, Michigan 48910

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

David P. Lucas, Secretary
Vandervoort, Christ & Fisher, PC
70 Michigan Ave. West, Suite 450
Battle Creek, Michigan 49017
voice: (269) 965-7000
fax: (269) 965-0646
email: dluca@vcflaw.com
STATE BAR OF MICHIGAN
PROBATE AND ESTATE PLANNING SECTION COUNCIL

Council Meetings of the
Probate and Estate Planning Section

Meeting Schedule for 2017-2018
June 16, 2018
September 8, 2018 (Annual Section Meeting)

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 Thursday falling 9 days before the next CSP meeting.
CSP materials are to be sent to Katie Lynwood, Chair of CSP (klynwood@blhlaw.com)

Schedule of due dates for CSP materials, by 5:00 p.m.: 
August 30, 2018 (for September meeting)

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

Schedule of due dates for Council materials, by 5:00 p.m.: 
August 31, 2018
## Officers of the Council for 2017-2018 Term

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

## Council Members for 2017-2018 Term

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

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Brian V. Howe; Shaheen I. Imami; Stephen W. Jones; Robert B. Joslyn; James A. Kendall; Kenneth E. Konop; Nancy L. Little; James H. LoPrete; Richard C. Lowe; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack
<table>
<thead>
<tr>
<th>Action Pending</th>
<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prop tax uncapping exempt.</td>
<td>- Tenants by Entirety Property bill</td>
<td>- Probate Appeals Rules</td>
<td>- who does the attorney for the fiduciary represent?</td>
<td>- Brochures State Bar Publication Agreement</td>
<td>- Promotion of &quot;Who Should I Trust?&quot; Program* (or similar)</td>
</tr>
<tr>
<td>-- ILIT trustee exoneration bill</td>
<td>- Jajuga legislation override</td>
<td>- SCAO Meetings*</td>
<td></td>
<td>- SCAO Meetings*</td>
<td>- 57th Annual P&amp;EP Institute</td>
</tr>
<tr>
<td>Priority Items</td>
<td>• Assisted Reproductive Technology</td>
<td>• New forms based on legislation</td>
<td></td>
<td>- Communications with members*</td>
<td>- Social events for Section members</td>
</tr>
<tr>
<td></td>
<td>- EPIC/MTC Updates</td>
<td></td>
<td></td>
<td>- Liaise with local bar associations</td>
<td>- Social media &amp; website*</td>
</tr>
<tr>
<td></td>
<td>- Guardian/Conservator Jurisdiction</td>
<td></td>
<td></td>
<td>- Brochures*</td>
<td>- Annual Institute/ICLE seminars*</td>
</tr>
<tr>
<td></td>
<td>- Tenants by Entirety Property in Trust bill</td>
<td></td>
<td></td>
<td>- Section Journal*</td>
<td></td>
</tr>
<tr>
<td>Secondary Priority Items</td>
<td>- Charitable Trust statute update</td>
<td>- Review Ch. 5 of MCR for potential updates (incl. attorney representation, but not fiduciary exception)</td>
<td></td>
<td>- Amend bylaws to better coordinate transition of new officers/members</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Expand Personal Residence Exemption</td>
<td></td>
<td></td>
<td></td>
<td>- Opportunities with ICLE</td>
</tr>
<tr>
<td></td>
<td>- attorney for the fiduciary (Perry v Cotton issue)</td>
<td></td>
<td></td>
<td></td>
<td>• Journal Advertising</td>
</tr>
<tr>
<td></td>
<td>- Michigan Community Property Trust Act</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Priority To Be Determined</td>
<td>• Parental rights assignment criminalization</td>
<td>- Estate Recovery</td>
<td></td>
<td></td>
<td>- Probate Court Opinion Bank</td>
</tr>
<tr>
<td></td>
<td>- EPIC changes to reflect UPC updates</td>
<td>- Budget Reporting</td>
<td></td>
<td></td>
<td>- Mentor program</td>
</tr>
<tr>
<td></td>
<td>- Dignified Death (Family Consent) Act</td>
<td>- State Bar of Michigan 21st Century Practice Task Force Report</td>
<td></td>
<td></td>
<td>- Outreach to COA to stay apprised of pending appeals &amp; need for involvement</td>
</tr>
<tr>
<td></td>
<td>- Directed/Separate Trustee Proposals</td>
<td></td>
<td></td>
<td></td>
<td>- Estate Recovery</td>
</tr>
<tr>
<td></td>
<td>- Further brochure updating</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*ongoing
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
June 16, 2018
Lansing, Michigan
9:00 – 10:15 AM

1. Christine Savage – Premarital and Marital Agreements Act – 25 minutes

   See attached: Uniform Premarital and Marital Agreements Act and Memorandum
   prepared by Kathleen Goetsch.

2. Jim Spica – Undisclosed Trusts – 20 minutes

   See attached Memorandum.

3. Melisa Mysliwiec – Discussion of moving council meetings from Saturday
to Friday – 30 minutes

   See attached Memorandum.
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

COPYRIGHT © 2012
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 2, 2013
# Uniform Premarital and Marital Agreements Act

## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Short Title</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>Definitions</td>
<td>3</td>
</tr>
<tr>
<td>3</td>
<td>Scope</td>
<td>6</td>
</tr>
<tr>
<td>4</td>
<td>Governing Law</td>
<td>7</td>
</tr>
<tr>
<td>5</td>
<td>Principles of Law and Equity</td>
<td>8</td>
</tr>
<tr>
<td>6</td>
<td>Formation Requirements</td>
<td>9</td>
</tr>
<tr>
<td>7</td>
<td>When Agreement Effective</td>
<td>10</td>
</tr>
<tr>
<td>8</td>
<td>Void Marriage</td>
<td>10</td>
</tr>
<tr>
<td>9</td>
<td>Enforcement</td>
<td>11</td>
</tr>
<tr>
<td>10</td>
<td>Unenforceable Terms</td>
<td>17</td>
</tr>
<tr>
<td>11</td>
<td>Limitation of Action</td>
<td>19</td>
</tr>
<tr>
<td>12</td>
<td>Uniformity of Application and Construction</td>
<td>20</td>
</tr>
<tr>
<td>13</td>
<td>Relation to Electronic Signatures in Global and National Commerce Act</td>
<td>20</td>
</tr>
<tr>
<td>14</td>
<td>Repeals; Conforming Amendments</td>
<td>20</td>
</tr>
<tr>
<td>15</td>
<td>Effective Date</td>
<td>20</td>
</tr>
</tbody>
</table>
UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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

SECTION 2. DEFINITIONS. In this act:

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

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

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

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

   (A) spousal support;

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

   (C) responsibility for a liability;

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

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

"Property" means anything that may be the subject of ownership and includes both personal and personal property, tangible or intangible, legal or equitable, or any interest therein.

"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.

"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.

"State" means a state of the United States, the District of Columbia, the Commonwealth 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 applies to a premarital agreement or marital agreement signed on or after [the effective date of this act].

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

(c) This act does not apply to:
(1) an agreement between spouses which affirms, modifies, or waives a
marital right or obligation and requires court approval to become effective; or
(2) an agreement between spouses who intend to obtain a marital
dissolution or court-decreed separation which resolves their marital rights or
obligations and is signed when a proceeding for marital dissolution or court-decreed
separation is anticipated or pending.

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

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], principles of law and equity supplement
this [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 party's consent to the agreement was involuntary or the result of fraud, duress, or mistake;

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

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

(4) Before signing the agreement, the party did not receive adequate financial disclosure under subsection (d), including disclosure of assets in a domestic asset protection trust.

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

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

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

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

(1) The term was unconscionable at the time of the agreement was signed; or

(2) Enforcement of the term may be unconscionable for a party at the time of enforcement because of a material change in circumstances arising after the agreement was signed that was not reasonably foreseeable at the time the agreement was signed.

(g) The court shall decide a question of unconscionability 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 affects a child's right to support;
(2) Limits or restricts a remedy available to a victim of domestic violence under law of this state other than this [act];

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

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

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

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] 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.

SEC. 15. EFFECTIVE DATE. This act takes effect ...
This presentation is intended to explore the possible application of the Uniform Marital Agreement Act to existing Michigan Law. As of this writing, and to this author’s knowledge, the Uniform Act is not being considered by either the House or the Senate of Michigan. There is a House Bill which has passed the House and has been introduced in the Senate, HB 4751 which its author intends to serve as a “fix” to the Allard III Court of Appeals decision. It was proposed by Representative Kesto. HB 4751 is addressed later in this presentation.

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

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

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

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

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

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

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

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

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

*Id.* at 699 – 700.

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

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

Further:

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

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

If any one of the factors is present, then the pre-nuptial agreement will not be enforced. Rinvelt at 381.

Rinvelt introduced the concept that a “change of circumstances” may affect the enforceability of a pre-nuptial agreement. So what about a natural change of circumstances over a period of years? This issue was addressed in Reed v Reed 265 MA 131 (2005). In Reed the court considered whether the length of the marriage and the growth of separate assets could be a change of circumstances. In making its analysis, it determined that a foreseeable change in circumstances did not justify setting aside the terms and conditions of a pre-nuptial agreement. The Reed Court found the length of marriage is foreseeable. Further that fact that a party's separate assets could grow at different rates and that one party's assets might grow significantly more than the others ("captains of their own financial ships") is a foreseeable event.

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

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

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

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

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

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

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

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

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

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

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

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

**SUBSTITUTE FOR**

**HOUSE BILL NO. 4751**

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

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

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

(A) THE PARTIES' CONSENT TO THE CONTRACT WAS THE RESULT OF FRAUD, DURESS, OR MISTAKE.

(B) BEFORE SIGNING THE CONTRACT, THE PARTY DID NOT RECEIVE ADEQUATE FINANCIAL DISCLOSURE, INCLUDING DISCLOSURE OF ASSETS IN A DOMESTIC ASSET PROTECTION TRUST. A PARTY HAS ADEQUATE FINANCIAL DISCLOSURE UNDER THIS SUBDIVISION IF 1 OF THE FOLLOWING APPLIES:

(i) THE PARTY RECEIVES A REASONABLY ACCURATE DESCRIPTION AND GOOD-FAITH ESTIMATE OF VALUE OF THE PROPERTY, LIABILITIES, AND INCOME OF THE OTHER PARTY.

(ii) THE PARTY EXPRESSLY WAIVES THE RIGHT TO FINANCIAL DISCLOSURE BEYOND THE DISCLOSURE PROVIDED.

(iii) THE PARTY HAS ADEQUATE KNOWLEDGE OR A REASONABLE BASIS FOR HAVING ADEQUATE KNOWLEDGE OF THE INFORMATION DESCRIBED IN SUBPARAGRAPH (i)

(3) A COURT MAY REFUSE TO ENFORCE A TERM OF THE CONTRACT OR THE ENTIRE CONTRACT IF, IN THE CONTEXT OF THE CONTRACT TAKEN AS A WHOLE, EITHER OF THE FOLLOWING APPLIES:

(A) THE TERM WAS UNCONSCIONABLE AT THE TIME THE CONTRACT WAS SIGNED.

(B) ENFORCEMENT OF THE TERM MAY BE UNCONSCIONABLE FOR A PARTY AT THE TIME OF ENFORCEMENT BECAUSE OF A MATERIAL CHANGE IN CIRCUMSTANCES ARISING AFTER THE CONTRACT WAS SIGNED THAT WAS NOT REASONABLY FORESEEABLE AT THE TIME THE CONTRACT WAS SIGNED.

(4) THE COURT SHALL DECIDE THE QUESTION OF UNCONSCIONABILITY UNDER SUBSECTION (3) AS A MATTER OF LAW.

(5) THIS SECTION APPLIES TO CONTRACTS RELATING TO PROPERTY MADE BETWEEN PERSONS IN CONTEMPLATION OF MARRIAGE MADE BEFORE AND AFTER THE EFFECTIVE DATE OF THE 2017 AMENDATORY ACT THAT AMENDED THIS SECTION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PREPARED BY:
KATHLEEN M. GOETSCH P-30574
THE LAW OFFICES OF KATHLEEN M. GOETSCH
121 SOUTH BARNARD STREET, SUITE #6
HOWELL, MI 48843
517-546-4134
AttorneyGoetsch@gmail.com
MEMORANDUM

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

From: James P. Spica

Re: Undisclosed Trusts Proposal

Date: June 7, 2018

I. Undisclosed Trusts and Secret Trusts Distinguished

Undisclosed trusts are sometimes misleadingly referred to as “secret trusts.” Technically, the term ‘secret trust’ refers to a testamentary trust that is enforceable (if it comes to light) notwithstanding that it is not disclosed in the will that transfers the res to the trustee. In that acceptation, ‘secret trust’ denotes a trust that is designed primarily to protect the settlor’s privacy, that is, therefore, generally not disclosed to anyone other than the trustee, and that is likely to be documented, if at all, only in private communications to the trustee. Now, for our purposes here, we do not care about the secret trust’s particular, technical association with the statute of wills; what is important for our purposes is that a secret trust is meant to be concealed from as many people as possible—to the world, a secret trust appears to be an outright gift.

As used in this memorandum, the term ‘undisclosed trust’ refers to something very different from a secret trust: an “undisclosed trust” is intended primarily, not to protect the settlor’s privacy, but to protect one or more beneficiaries of the trust from a possible deformation of character or of will; the settlor thinks the beneficiary is better off not knowing (at least for a time) of the trust’s existence (or of the extent or nature of the trust property), but as far as the trust itself is concerned, the settlor has no motivation to dissemble beyond what may be necessary to keep benighted beneficiaries in the dark. The settlor’s motivation is thus consistent with the trust’s being both well-documented and relatively widely disclosed. Indeed, to the extent she can do so without alerting the focal beneficiaries, the settlor may want to empower “enforcers” to hold the trustee’s feet to the (proverbial) fire.

---

1 Here we adopt the convenient, technical convention (common among logicians) of using single quotation marks “to construct a name for the [marked] expression.” ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 6 n.4 (1990). We shall use “[double quotes [sic] . . . in the many looser ways quotation marks can be used, often to mention a word and use it in the same breath.” Id.


3 See, e.g., PENNER, supra note 2, ¶ 6.50.

4 It is the testator’s failure satisfy the requirements of the wills statute that causes a “secret trust” (in the technical sense described supra in the text accompanying note 2) to be unenforceable as an express (as opposed to constructive) trust. See RESTATEMENT (THIRD) OF TRUSTS § 18 cmt. a (2003).
II. A Causal Connection

Michigan law does not permit a settlor to create an express trust that is “undisclosed” in the sense described above because (1) we have so far assumed that the trusts in question are for the benefit of definite or definitely ascertainable beneficiaries and (2) the statutory duty of a trustee to provide notice of a trust’s existence to trust beneficiaries cannot be waived by the terms of the trust. Thus, a Michigan settlor who is determined to create an undisclosed trust for one or more intended beneficiaries must either create a trust the meaning and effect of whose terms will be governed by the law of a state that permits undisclosed trusts or create a trust that is “secret” in the sense described above. In the latter case, the trust must look for all the world like a gift outright, for if the tacit trust relation should be detected (and enforced for the beneficiaries as such), the trustee will be bound to provide the beneficiaries notice.

Thus, a trust that could have been well-documented and somewhat widely disclosed, that might even have empowered “enforcers,” will likely not be disclosed to anyone other than the trustee and will be documented, if at all, only in private communications to the trustee. As a matter of policy, of course, such a triumph of subterfuge is regrettable: temptation can be expected to work mischief in the dark that daylight would prevent.

III. Purpose Trusts

What if our would-be settlor does not intend to benefit any definite or definitely ascertainable beneficiary? We can ask that question because, for the very reason of policy just mentioned, Michigan law countenances the “purpose trusts” currently permitted by Estates and Protected Individuals Code (EPIC) section 2722, trusts whose distinguishing characteristic is that they lack definite or definitely ascertainable beneficiaries. And here we find that the settlor can create an undisclosed trust, with Michigan’s blessing, as a purpose trust: a settlor who wishes to support the pursuit of some noncharitable endeavor without directly motivating the endeavor for certain potential adherents can articulate a purpose within the contemplation of EPIC section 2722(1) to which the concealment of means is integral.

---

6 There are currently twelve jurisdictions in the United States that permit undisclosed trusts in one form or another. These are Alaska, Arizona, Delaware, the District of Columbia, Maine, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Virginia, and Wyoming. (I am indebted for this information to a survey of state laws permitting undisclosed trusts that was compiled in 2017 by Richard C. Mills.)
7 It is true that the trustee’s duty to provide notice of trust existence is subject to the Michigan Trust Code’s “virtual” representation rules. See Mich. Comp. Laws § 700.7301. So, a settlor determined to create an undisclosed trust for definitely ascertainable beneficiaries could, for example, provide a nontrustee a special power of appointment over the trust assets and require the trustee to provide all required notices to the fewest possible trust beneficiaries. See id. §§ 700.7302 (virtual representation by holder of power of appointment). 7103(f)(ii) (‘trust beneficiary’ defined to include nontrustee holder of a power of appointment over trust property). But that would simply shift the “secret”: in that case, it is not the trust that is dissembled, but rather the purpose of the power of appointment, and the settlor has created a nominal “power of appointment” whose exercise would itself be a fraud on the power! (For the concept of fraud on a power, see Geraint Thomas, Thomas on Powers ¶ 9.05 (2d ed. 2012); John A. Borron, Jr. et al., The Law of Future Interests § 981 at 547 (3d ed. 2004).)
9 See Mich. Comp. Laws § 700.2722(1).

Probate and Estate Planning Council
June 16, 2018          (2018 - 06 - a)
Suppose, for example, that I am a highly distinguished concert violinist of a family that includes (a) a long line of highly distinguished concert violinists who have all espoused the use of a particular style of bow (A Line) and (b) a great many inveterate music-haters (B Class) whose parents, prospecting for genetically transmitted talent, subjected their unpromising offspring to arduous and thoroughly unprofitable courses of musical instruction. I would very much like to see the cult of the relevant bow flourish and the A Line continue, but I am very much loath to augment the B Class. So, I create a trust to support the future musical education of young and as yet unborn violinists who eventually display talent and in whom the cult of the relevant bow can be inculcated (through the trustees’ exertions), but to protect those innocent of talent within my own family from stray parental enthusiasm, I enjoin the trustees to pursue the trust’s purpose “for as long as possible (and to the greatest extent permitted by law)” without disclosing the existence of the trust, the source or extent of the trust fund, the trust’s purpose, or the considerations that inform the trustees’ dispositive discretions.

The bow-cult concert violinist is just one interpretation of the relevant model, viz., a settlor who wants to support a noncharitable endeavor she regards as a “calling” without stimulating disingenuous or misguided attempts to heed “the call.” One can easily imagine analogous stories involving draft-horse farming, heritage livestock breeding, artisan passementerie manufacture, etc. In each case, (it is submitted) the resultant trust is one that can be performed by the trustee for up to twenty-one years under EPIC section 2722(1)10 (up to twenty-five years under the Committee’s proposal to substitute Uniform Trust Code sections 408 and 40911 for section 2722). So, for the limited period permitted by section 2722 (or by Michigan Trust Code section 7409 if the Committee’s prior proposal, which has been approved by Council, becomes law), Michigan law permits undisclosed trusts12 when concealment of means is an integral part of the settlor’s pet project provided the settlor does not aim to benefit any “definite or definitely ascertainable beneficiary.”13

But, of course, a trust of the kind we have imagined might be drafted so that a particular person will become entitled, in certain circumstances, to a trust distribution or distributions. It may be, for example, that the trustee (in our hypothetical above) is instructed by the terms of the trust to engineer an anonymous, bow-style-referential gift to any devotee of the relevant bow who becomes a finalist in a certain international violin competition. In that case, if such a devotee becomes such a finalist during the trust’s continuance, she will have an equitable claim14 (to trust property) of which she is permitted by section 2722 to remain ignorant.15 If the trustee arranges the payment, the devotee’s ignorance does no harm, but if the trustee is derelict or obdurate, the devotee cannot assert her claim for want of information.16

This last example emphasizes that section 2722 permits trusts whose terms cannot be enforced (for lack of notice) by people who would otherwise be, in certain circumstances at least,

---

10 See id.
12 “Except as ordered by the court or required by the terms of the trust, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the [purpose trust].” MICH. COMP. LAWS § 700.2722(3)(e).
13 Id. § 700.2722(1) (UNIF. TRUST CODE § 409(1)).
14 EPIC section 2722 purports to make purpose trusts “enforceable” regardless of whether the terms of the “trust” designate someone to enforce it. See id. § 700.2722(3)(d) (UNIF. TRUST CODE § 409(2)).
15 See supra note 12.
16 In that case, it would fall to a person described in id. § 700.2722(3)(d) (UNIF. TRUST CODE § 409(2)), if there is one, to protect the devotee’s interest.
indistinguishable from ordinary trust beneficiaries. Yet that is the salient objection to nondisclosure of noncharitable trusts: “‘If the beneficiaries have no rights enforceable against the trustees, there are no trusts’ . . . [and] the beneficiaries cannot enforce [their] right[s] without information.”17 But why should a jurisdiction that allows a settlor to thwart these precepts (if only temporarily) for the advancement of a purpose prevent her from thwarting them (if only for the same duration) for the benefit—as she sees it—of particular persons? Shall we say that the policy of our law is laissez faire (in the relevant interval) provided the settlor means to confer benefits only on persons whose identities are indifferent to her; but that when she aims to confer benefits on particular persons, our respect for her intent is so great that we feel constrained (even in that narrow interval) to ignore what she thinks best for the persons in question?

It is true that under any conventional conception of the law of trusts, purpose trusts (pet trusts included) are anomalous.18 But at the level of policy, sanctioned anomalies are not self-limiting: if we are prepared to permit something anomalous by way of a purpose trust, it makes sense for us to ask whether we really have a rationale for limiting that permission to cases in which, from the settlor’s point of view, the persons benefited have only instrumental value (pun intended!) and are not ends in themselves. The proposal below eschews the need for such a rationale: it treats concealment of means itself as a permissible noncharitable trust purpose within the period permitted for the continuance of a purpose trust and it allows the settlor to confer, within that period, what she conceives as the benefit of concealment on definite or definitely ascertainable beneficiaries.

A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by adding new section 7409a.19

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700. 7409a Undisclosed trust

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

(a) During the nondisclosure period:

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

(ii) The trustee may administer the trust in accordance with the settlor’s expressed intent regarding nondisclosure of primary disclosure information to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any

17 PENNER, supra note 2, ¶¶ 10.60 (quoting Armitage v. Nurse, [1998] Ch. 241 at 253 (Eng.)).
18 See, e.g., id. at ¶ 9.30; Matthews, supra note 8; F. W. MAITLAND, The Unincorporate Body, in SELECTED ESSAYS 128, 137-39 (H. D. Hazeltine et al. eds., 1936). (For a decidedly unconventional conception that seeks to normalize trusts lacking beneficiaries, see LUPOL, supra note 2, at 2-3, 123-126, 178-83.)
19 The proposal would be supported by amendments providing cross references to the new section in MICH. COMP. LAWS §§ 700. 7105(2), .7110(2).
reporting obligations imposed on the trustee by law other than this [estates and protected individuals] code.

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

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

(b) Neither the trustee nor any nondisclosure correlative right holder shall be liable to any trust beneficiary on account of the trustee’s failure to follow the terms of the trust prescribing nondisclosure of prime disclosure information. The trustee’s duty (if any) to follow the terms of the trust prescribing nondisclosure of prime disclosure information during the trust’s nondisclosure period is owed solely to the holders (if any) of nondisclosure correlative rights, and the sole remedy of a nondisclosure correlative right holder for the trustee’s breach of that duty is removal.

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

(a) Upon the reasonable request of a nondisclosure correlative right holder or protection power holder at any time during the trust’s nondisclosure period, the trustee shall promptly furnish to the right or power holder a copy of the terms of the trust that describe or affect the holder’s right or power.

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

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

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

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

(5) As used in this section:

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

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

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

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

(e) “Protection power” means a power granted by the terms of a trust that allows the power holder to direct the trustee of the trust for the benefit of the trust beneficiaries during the trust’s nondisclosure period. A protection power may authorize the power holder to represent the trust beneficiaries in the sense described in section 7301(1) to (2) without regard to the application of sections 7302 to 7304.

(f) “Undisclosed trust” means a trust administered pursuant to this section during the nondisclosure period.

---

20 See supra notes 10-11 and accompanying text.
21 This is to analogize the period during which the vesting of future interests in the assets of a trust can be postponed by the exercise of a power of appointment: that period begins when the trust in question can no longer be revoked by the settlor, not when the trust instrument begins to govern a res. See Mich. Comp. Laws § 556.125. See generally John C. Gray, The Rule Against Perpetuities § 524.1 (4th ed. 1942); Ronald H. Maudsley, The Modern Law of Perpetuities 38 (1979).
TO: Committee on Special Projects  
FROM: Melisa M. W. Mysliwiec  
RE: Council Meetings  
DATE: June 7, 2018

I would like the Committee on Special Projects to discuss and make a recommendation to Council as to whether Council meetings should be moved to Friday mornings, beginning in January 2019, at the same time and place as they are currently held.

The Bylaws provide, in Section 6.8, that "[t]he Council will designate the time and place of its regular meetings."

**Background and Reasoning:**

The idea of a Friday Council meeting first came to me this past fall, but I didn't consider it again until our April Council meeting. I was speaking with a Council member who had to leave early to get one child to a soccer game nearby while their spouse took another child to a game in a different location, and I admitted that I felt awful because I was missing my daughter's first soccer game to attend the meeting. Shortly thereafter, we paid tribute to Geoff Vernon and Ev Zack's wife, Rose, both of whom had died in the weeks prior. Selfishly, I thought to myself that I should be with my family; I should be at that soccer game. During our break, I brought up the idea of a Friday meeting time to a couple of people, and received both positive and negative feedback. I then checked the bylaws on the issue, and learned that Council may set its meetings whenever it desires. With that information, I brought the idea to our Chairperson, who indicated that I could bring it before Council if I believed that there was enough support to put it on the agenda. Over the next several weeks, I researched the issue and reached out to our various Council members and officers, one by one, to see what their thoughts were on this issue. I learned that we are one of the only Sections of the State Bar of Michigan, in addition to the Elder Law and Disability Rights Section, that holds its meetings on Saturdays. Further, I received what I considered to be a great deal of positive feedback. With that in mind, I decided to reach out to the University Club to inquire whether Fridays would even be available if we desired to move meeting times at some time in the future. With the approval of our Chairperson and Chairperson-Elect, both Friday and Saturday mornings are temporarily being held by the University Club for 2019 in the event a change to Friday is made.
Many of our Council members have young families at home. With this comes family functions and children's extracurricular activities that cannot be attended at any time other than the scheduled time. Our Council members give so much of themselves to our Section and the Council. Based upon the feedback I've received, many of us would appreciate Friday meetings so that we may spend our weekends with our families; so that we aren't forced to miss our children's games, meets, and other events; and so we can be present for those moments that cannot be attended at any other time.

From those few who have expressed disinterest in moving the meeting time, the single largest reason seemed to be workload. However, one of the things I most appreciate about our profession is the flexibility and ability to work nearly whenever and from wherever. Whether you prefer to work remotely from home or in your office, each of us has the ability to work on evenings or weekends, if necessary. Those of us with a heavy workload during the particular week of a Council meeting would have the ability to work on the Saturday morning that would have otherwise been spent at a Council meeting. Or, if we have a child's game to attend on Saturday morning, the Friday meeting time would give us the flexibility to do both: attend the Saturday morning game and work remotely later in the day.

I truly believe that moving our Council meetings to Fridays will be beneficial to those with young families, should not have a negative impact on meetings of the Committee on Special Projects, and may even increase the amount of participation in Council by our Section members, many of whom may have been unable or unwilling to attend Saturday meetings.

Respectfully,

Melisa M. W. Mysliwiec
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

June 16, 2018
Lansing, Michigan

Agenda
10:30-12:00

1. Call to Order
2. Introduction of Guests
3. Excused Absences
4. Lobbyist Report (15 minutes), Public Affairs Associates
   - Intro of ART legislation; SB 1056, 1057, 1058
   - Intro of Divided & Directed Trusteeship legislation; HB 6129, 6130, 6131
   - Scrapping of SB 713 S-2 for now – What can we do to help this Summer?
   - September introduction of EPIC Omnibus Bill; and
   - Other items to report.
5. Minutes of April 21, 2018 Meeting of the Council
   Attachment 1
6. Chair's Report – Marlaine C. Teahan (4 minutes)
   Attachment 2
7. Committee Reports Requiring Votes
   A. Committee on Special Projects – Katie Lynwood (15 minutes)
      Report on
      - Moving Council meetings from Saturdays to Fridays and Council vote.
        In conjunction with this vote, see CSP materials and Attachment 3, report submitted by Melisa Mysliwiec;
      - Other CSP matters, including the Uniform Premarital and Marital Agreements Act, and the report on Undisclosed Trusts.
   B. Nominating Committee – Amy Morrissey (7 minutes)
      Report of Nominating Committee. Attachment 4
C. Electronic Communications Committee – Mike Lichterman (5 minutes)

Oral report of Committee regarding SBM Connect requesting vote of Council to approve $500 payment to SBM for preservation of Section mailing list archive so that it can be moved to SBM Connect.

See also written presentation by Mr. Lichterman that was presented at the 58th Annual Probate Institute in Acme, MI, May 2018. Attachment 5 Ms. Teahan gave a similar presentation at the 58th Annual Probate Institute in Plymouth, MI, June 2018.

D. Membership Committee – Rob Labe (5 minutes)

Written report requesting Council vote for funds to support networking lunch. Attachment 6

8. Oral Committee Reports (No Vote Requested)

A. Real Estate Committee – Mark Kellogg (7 minutes)


B. Amicus Committee – Andy Mayoras (8 minutes)


C. Court Rules, Forms & Proceedings Committee ADR Summit – Andy Mayoras (3 minutes) Attachment 10

9. Written Committee Reports (Without Oral Presentation)

- Court Rules, Forms & Proceedings Committee Attachment 11
- Divided and Directed Trusteeship Committee Attachment 12
- Uniform Fiduciary Income and Principal Act Ad Hoc Committee Attachment 13
- Chair Elect Report – Save the Date Attachment 14
- Legislative Monitoring – Public Affairs Associates Bill Tracking Attachment 15

10. Other Business

11. Adjournment

Next CSP Meeting (9-10), Annual Section meeting, with election of Council Members and Officers (10:15-10:30), and Regular Council meeting (10:30-Noon): Saturday, September 8, 2018. Note times are approximate.
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION OF
THE STATE BAR OF MICHIGAN

April 21, 2018
Lansing, Michigan

Minutes

1. Call to Order: The Chair of the Section, Marlaine C. Teahan, called the meeting to order at 10:20 am.

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

   Marlaine C. Teahan, Chair
   Marguerite Munson Lentz, Chair Elect
   Christopher A. Ballard, Vice Chair
   David P. Lucas, Secretary
   David L.J.M. Skidmore, Treasurer
   Christopher J. Caldwell
   Rhonda M. Clark-Kreuer
   Kathleen M. Goetsch
   Nazneen Hasan
   Angela M. Hentkowski
   Michael G. Lichterman
   Katie Lynwood
   Raj A. Malviya
   Andrew W. Mayoras
   Richard C. Mills
   Melisa M.W. Mysliwiec
   Lorraine F. New
   Kurt A. Olson
   Nathan R. Piwowarski
   Christine M. Savage

   A total of 20 Council officers and members were present, constituting a quorum

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

   Michael L. Jaconette
   Mark E. Kellogg
   Robert B. Labe

   b. The following officers and members of the Council were absent without excuse:

   none
c. The following ex-officio members of the Council were present:
   Robert D. Brower, Jr.
   George W. Gregory
   Amy N. Morrissey

d. The following liaisons to the Council were present:
   Susan Chalgian
   Jeanne Murphy
   James P. Spica

e. Others present:
   Aaron Bartell
   John Roy Castillo
   Dan Hilker
   John Hohman
   Neal Nusholtz
   Paul Vaidya

4. Geoffrey R. Vernon Tribute: the Chair informed the meeting that Geoffrey R. Vernon, a long
   time Council member and participant in Council and Section matters, died on April 3, 2018.  A
   time of sharing remembrances, Geoff’s achievements, and accolades for Geoff followed.  It was
   universally recognized that Geoff will be sorely missed, both personally and professionally.

The Chair also reported the death of Rosenele H. Zack, the spouse of Ev Zack (former Chair of
the Council), and shared remembrance of Ms. Zack.

5. Election of Council member: the Chair stated that, pursuant to the Section’s Bylaws, in the
   event of a vacancy in the Council’s membership by death of a Council Member, the Council may
   appoint a qualified individual to as a Member until the next election.  The Chair announced that
   since Geoffrey R. Vernon was going to be nominated by the Nominating Committee to serve as
   Treasurer next year, the Nominating Committee also planned to nominate Andy Mayoras to fill
   the remainder of Geoff’s remaining one-year term, after Geoff took on the role as Treasurer, if
   he was elected. Andy was asked if he would fill the rest of Geoff’s term this year term and he has
   agreed. Upon hearing a motion and second to the motion, after a unanimous voice vote, the
   Chair declared Mr. Mayoras elected to so serve, effective immediately.

The Chair announced that the Insurance ad hoc Committee that was chaired by Geoff Vernon
was disbanded, and after receiving input from the other Committee members, the Chair
reassigned the Committee's remaining projects to the Legislative Development and Drafting
Committee. The Chair also indicated that she will determine and announce the next Chair of the
Council’s Committee on Special Projects.

6. Minutes of March 24, 2018: Meeting of the Council: it was moved and seconded to approve the
   Minutes of the March 24, 2018 meeting of the Council, as included in the meeting agenda.
minutes of the meeting of the Council of the
Probate and Estate Planning Section
(2018 - 04 - b)

materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

7. Chair's Report – Marlaine C. Teahan: the Chair gave a report, including matters described in her written report, which was included with the meeting materials:
   a. The Chair received a request from the Young Lawyer’s Section for sponsorship for the Young Lawyer’s Summit. On motion duly made and seconded, on voice vote, the Council approved a sponsorship of $350 for the Young Lawyer’s Summit.
   b. The Chair stated that Howard S. Krooks contacted her about speaking for a Section event. After much discussion, Jeanne Murphy, the Section’s ICLE Liaison, recommended that Mr. Krooks be invited to ICLE for a video presentation. The Chair stated that she would follow-up with ICLE on this matter.
   c. The Chair stated that the Council’s Ethics Committee recommended taking no position on ADM File 2016-27, and after some discussion, no further action was taken by the Council on that matter.
   d. The Chair invited individuals to contact Doug Mielock or the Chair if that individual has an interest in serving on the Ad Hoc Committee on Electronic Wills.

8. Treasurer’s Report - David Skidmore: the Treasurer of the Section, David L.J.M. Skidmore reviewed the Treasurer’s report, which was included with the meeting materials. Mr. Skidmore noted that the balance of the Hearts and Flowers Fund was down, and requested that Council members consider making a contribution to the Fund.

9. Committee Reports
   a. Committee on Special Projects (CSP) - Marlaine Teahan reported for the Committee and reported that the CSP discussed the proposed definition of “charitable trust” in the proposed EPIC Omnibus. Given that the Committee currently has no Chair, a motion was made and seconded to approve the Committee’s definition of "charitable trust" as follows:

   The Probate and Estate Planning Section amends the Section’s Public Policy Position, originally adopted on November 11, 2017, entitled “Proposed Bill to Amend the Estates and Protected Individuals Code, by adding the phrase “if that charitable purpose is a material purpose of the trust” at the end of the proposal for amendment of EPIC section 7103(c).

   The Chair stated that since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded the vote of 20 in favor of the motion, 0 opposed to the motion, 0 abstain, and 3 not voting. The Chair declared the motion approved.
b. Legislative Development and Drafting Committee - Katie Lynwood: Ms. Lynwood reported on the status of HB 4410 (*Jajuga* fix). The Chair indicated that since we often get only a day or two notice of the need for testimony in support of our legislative positions, at House or Senate Committee hearings in Lansing, she’d like to assemble a list of 5-10 attorneys who practice in the Greater Lansing area who would be willing to attend future Legislative Committee hearings on behalf of the Section. Anyone willing to be on such a list should contact the Chair or Meg Lentz, the Chair-Elect. At the meeting, Dan Hilker volunteered to be so available.

c. ART Update - Nancy Welber: Ms. Teahan reported that she had been in touch with Ms. Welber and the Committee requests that the Council approve a modification to the Council’s Public Policy Position regarding Assisted Reproductive Technology to give the Committee Chair authority to make non-substantive modifications to the Section's ART legislative proposal. The motion was made and seconded, as follows:

> The Probate and Estate Planning Section amends the Section’s Public Policy Position, originally adopted on April 22, 2017, entitled “Proposed Changes to EPIC, MCL 700.1101 et seq.” by authorizing the Chair of the Council’s Assisted Reproductive Technology Ad Hoc Committee to make non-substantive modifications to such Position.

The Chair stated that since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded the vote of 18 in favor of the motion, 0 opposed to the motion, 0 abstain, and 5 not voting. The Chair declared the motion approved.

d. Tax Committee - Mark DeLuca: Raj Malviya, the Vice Chair of the Committee, reported that the Committee intends to have nationally known tax experts present on tax issues from the 2017 Tax Act that are related to trusts and estates. These presentations will be conducted as a conference call meetings, open to all Section members. The Committee will provide reports of those meetings; the Chair requested that the phone conferences and Committee reports include any drafting tips developed by the presenters. Mr. Malviya referred the Council members to the Committee’s Tax Nugget included with the meeting materials.

e. Electronic Communications Committee - Mike Lichterman: Mr. Lichterman reported on the status of the transition from use of the Section’s listserv to SBM Connect: use of SBM Connect has substantially increased, the Committee continues to publicize the transition, and that the Committee continues to work on the conversion of listserv archives to SBM Connect. Presentations at the annual Probate Institute on how to use the SBM Connect system within emails will be given at both Acme and Plymouth locations.
Minutes of the meeting of the Council of the
Probate and Estate Planning Section
(2018 - 04 - b)

f. Guardianship, Conservatorship, and End of Life Committee - Rhonda Clark: Ms. Clark reported on the status of SB 713, and HB 5075 and HB 5076.

g. Membership Committee - Nick Reister: On behalf of the Committee, the Chair reviewed and distributed the Membership Committee's invitation card for a Section member social gathering at the Acme location of the annual Probate Institute to be held on Friday, May 18, 2018 from 4-11 p.m..

h. Amicus Committee - David Skidmore: Mr. Skidmore reviewed the report of the Committee that updated the status of the 6 amicus briefs filed by our Section in 2017-18 and, included as a supplement to the meeting materials.

10. Liaison Reports

a. ADR Section - John A. Hohman: Mr. Hohman reported on activities of the ADR Section.

b. Taxation Section - George W. Gregory: Mr. Gregory reviewed the Liaison’s Report to the Council, included with the meeting materials.

11. Written Reports Without Oral Presentation: the Chair noted the several reports that were included with the meeting materials.

12. Other Business

HB 5811: Dan Hilker reported that HB 5811, regarding remote notarization, had been introduced. Mr. Hilker noted that such legislation has been adopted in Florida and Ohio. Mr. Hilker suggested that remote notarization be discussed as a future Council matter.

There was no other business offered or requested.

13. Adjournment: seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 11:59 am.

Respectfully submitted,
David P. Lucas, Secretary
1. **Chris Ballard** did an excellent job planning the 58th Annual Probate and Estate Planning Institute, May – Acme and June – Plymouth. The presenters and topics were excellent. There were many excellent networking opportunities as well. Thanks Chris for a job well done!

2. **Section members’ comments.** A compilation of comments, given to me at the 58th Annual Probate and Estate Planning Institute in Acme, May 2018, are attached.

3. **Add-on Seminar.** In addition, the Probate Institute add on seminar held on May 16, 2018 - Income Tax Planning for Family LPs, LLCs, and Disregarded Entities was also very well received. For more in depth training from our national speakers, look for these add-on seminars each year, held on the Wednesday afternoon prior to the beginning of the Institute in Acme.

4. **Lobbying.** Our lobbying efforts this past month heated up before the summer break. Many thanks to Becky Bechler and Jim Ryan of Public Affairs Associates. Highlights include:
   - Introduction of the Assisted Reproductive Technology legislation;
   - Introduction of the Divided and Directed Trustee ships legislation;
   - No vote taken on SB 713 S-2, with indication that more work on this proposed bill will take place over the summer. Please stay tuned to learn what you can do to help in this effort; and
   - Passage of PA 133 of 2018, HB 4905.

5. **ICLE Contract Renewal.** The Section contract with ICLE has been renewed as of May 31, 2018. In the past month, we obtained the signed contract from ICLE. This is in effect through Dec. 31, 2020.

6. The **Chair’s Annual Section Report** was provided to the State Bar of Michigan.

7. The **Annual Section Meeting** in September will be held on September 8, 2018 at the University Club, Lansing, Michigan. The meeting will follow the CSP Meeting and break and will precede the September regular Council meeting. Officers and Council Members for the Section will be voted on. Nominations for any open positions are made at the June Council meeting.

8. **Ad Hoc Committees.** More committee members are needed for the Ad Hoc Committee on Electronic Wills. The mission of this Ad Hoc Committee is to study the draft proposal on electronic wills of the Uniform Law Commission, determine problems and pitfalls of the formation, validity and recognition of electronic wills, and be prepared to respond to both the Uniform Law Commission’s proposal and any legislation introduced in Michigan. To join this Committee, please contact Doug at 517-371-8203 or dmielock@fosterswift.com.
9. **We took two Public Policy Positions in April on the following:**
   - The Probate and Estate Planning Section amends the Section’s Public Policy Position, originally adopted on November 11, 2017, entitled “Proposed Bill to Amend the Estates and Protected Individuals Code, by adding the phrase “if that charitable purpose is a material purpose of the trust” at the end of the proposal for amendment of EPIC section 7103(c).
   - The Probate and Estate Planning Section amends the Section’s Public Policy Position, originally adopted on April 22, 2017, entitled “Proposed Changes to EPIC, MCL 700.1101 et seq.” by authorizing the Chair of the Council’s Assisted Reproductive Technology Ad Hoc Committee to make non-substantive modifications to such Position.

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

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

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

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

13. **Upcoming Seminars ICLE/SBM –** [www.icle.org](http://www.icle.org)
    Elder Law Institute, 4th Annual, 09/13-14/18, Plymouth
    Hands-On Medicaid Part II: Planning Strategies and Divestment, 09/14/18, Plymouth
    Drafting an Estate Plan for an Estate Under $5 Million, 09/18/18, Plymouth
    Fundamentals of Estate Administration, 10/9/18, Plymouth
    Administration of Trusts Under the Michigan Trust Code, 11/1/18, Plymouth
Attachment to Chair's Report (June 16, 2018)

Suggestions received from Section members for Council Action at the May, 2018 Annual Probate and Estate Planning Institute:

NOTE: All Sections refer to EPIC; bracketed information was added to provide additional information. Suggestions received at the June, 2018 Annual Probate and Estate Planning Institute were not received prior to deadline for materials.

1. Add Section 7603(2) to Section 7105(2) to make application of 7603(2) mandatory.
   [Currently, 7603(2) can be drafted around in a trust so that a trustee need not report to anyone if the trustee reasonably believes that the settlor is an incapacitated individual.]

2. Address fact that Section 7803 has the word "impartiality" in title of Section but does not address this concept in the text of the Section. Add into text or remove from title.
   [Section 1212 includes a trustee's duty to be impartial.]

3. Enact UPC 6-102, Liability of Nonprobate Transferees For Creditor Claims and Statutory Allowances.


5. Enact 6-401 to 6-417, Uniform Real Property Transfer on Death Act.

6. Provide Section Members with ideas on how to best use the new Limited Scope Representation rules in a T&E practice. [See Order, ADM File No. 2016-41.]

7. Provide Section Members with ideas for how to deal with Title Companies in real estate transactions.

8. Address whether Michigan should enact legislation that invalidates springing powers of attorney. [e.g., Florida Statute 709.2108]

9. Petition and Order for Assignment Suggestions (made by former probate register):
   - Require use of a Testimony, or other affidavit identifying a decedent's heirs. [Counter argument – this form is a sworn statement and already includes the names of spouse and decedent's heirs, if there is no spouse. Response is that while this is true, lay persons who complete PC 556 do not complete it correctly and if required to use a Testimony (PC 565), the problems encountered by Probate Courts would be resolved.]
   - Indicate on form that funeral bills should be attached and there should be an indication of how much was paid, who paid it, and who is owed money relative to the funeral.
   - Statement indicating if any heir is waiving/disclaiming rights or assigning rights to another heir; and
   - Include a statement that a death certificate is attached so users know to attach it.
TO: Marlaine C. Teahan, Chairperson
FROM: Melisa M. W. Mysliwiec, Council member
RE: Motion re: Council Meetings
DATE: June 8, 2018

I respectfully move to change Council meetings to Friday mornings, at the same time and place as they are currently held, beginning in January 2019.

The Bylaws provide, in Section 6.8, that "[t]he Council will designate the time and place of its regular meetings."

It is my understanding that we currently have both Fridays and Saturdays temporarily reserved with the University Club for 2019 pending the results of this motion.

Those of us with a heavy workload during the particular week of a Council meeting would have the ability to work on the Saturday morning that would have otherwise been spent at a Council meeting.

Moving our Council meetings to Fridays will be beneficial to those with young families, should not have a negative impact on meetings of the Committee on Special Projects, and may even increase the amount of participation in Council by our Section members, many of whom may have been unable or unwilling to attend Saturday meetings.

Respectfully,

Melisa M. W. Mysliwiec
Report of the Nominating Committee  
To the Probate & Estate Planning Council of the State Bar of Michigan  
June 16, 2018

The Nominating Committee of the Probate and Estate Planning Section of the State Bar of Michigan consists of Amy N. Morrissey, Shaheen I. Imami and James B. Steward.

The Committee reminds the Council and Section that under the Section’s By-Laws the incumbent Chairperson Elect assumes the office of Chairperson upon the conclusion of the Section’s annual meeting. The Committee therefore does not nominate a candidate for Chairperson of the Section, and the incumbent Chairperson Elect, Marguerite Munson Lentz, 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 name:

<table>
<thead>
<tr>
<th>Position</th>
<th>Candidate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson Elect</td>
<td>Christopher A. Ballard</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>David P. Lucas</td>
</tr>
<tr>
<td>Secretary</td>
<td>David L. J. M. Skidmore</td>
</tr>
<tr>
<td>Treasurer</td>
<td>Mark E. Kellogg</td>
</tr>
</tbody>
</table>

For the Council for a second three year term:

Christopher J. Caldwell  
Kathleen M. Goetsch  
Katie Lynwood

For the Council for an initial three year term:

Angela M. Hentkowski  
Melisa M. W. Mysliwiec  
Neal Nusholtz

If Mark E. Kellogg is elected as Treasurer, the Committee nominates James (“JV”) F. Anderton, V to serve the balance of Mr. Kellogg’s term as a member of the Council, which ends on the last day of the fiscal year of the Section in 2020. Mr. Anderton will thereafter be eligible for election to two three-year terms as a member of the Council.

The Committee nominates Andrew W. Mayoras 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. Mr. Mayoras will thereafter be eligible for election to two three-year terms as a member of the Council.

Respectfully submitted on behalf of the Nominating Committee,

Amy N. Morrissey, Chair
Using *SBM Connect* to Connect with Other Probate & Estate Planning Section Lawyers
Features of Connect

- **Discussion** area with real-time or digest e-mails - replaced the Section mailing list (commonly referred to as the listserv)

- **Library** – share meeting agendas, newsletters, minutes

- **Announcements**

- **Event calendar** – seminars & meeting dates

- **Member Directory** – searchable and has advanced search features
Login

All State Bar attorneys, affiliates, and law student section members already have a login.

Forgot username/password? Click here

Username or P Number
Password
Log In

Prospective New Attorneys, New Law Student Section Members. Click here
Out-of-state and foreign lawyers seeking pro hac vice admission. Click here
Non-Members and Donors who are not State Bar members. Click here

Need help? Login FAQ

This website has been tested with Internet Explorer, Chrome, and Firefox. It may not work with other browsers.

Contact Information

State Bar of Michigan
Michael Franck Building
300 Townsend Street
Lansing, MI 48933-2012
Phone: (517) 346-6300
Toll Free: (800) 968-1442
Fax: (517) 482-5944
Mission

The purpose of this Section is to enhance and improve the practice and administration of law pertaining to probate; trust and estate planning, and administration; guardianships and conservatorships (including planning alternatives); and tax planning.

Join the Section

- Online Application (credit/debit card)
- Mail/Fax Form PCF (existing members)
- Mail/Fax Form PCF (newly admitted members; free for the balance of first year)

Upcoming Events

Probate Section: Probate & Estate Planning Institute
May 17 - 19, (ET)
Acme, MI, United States

Probate Section: Probate & Estate Planning Institute
### Discussion

1 to 50 of 355 threads (962 total posts)

<table>
<thead>
<tr>
<th>Thread Subject</th>
<th>Replies</th>
<th>Last Post</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oakland County Probate Court</td>
<td>1</td>
<td>9 hours ago by Andrew W. Mayoras</td>
</tr>
<tr>
<td>Medicaid referral for West Michigan</td>
<td>0</td>
<td>yesterday by Hayley Elizabeth Rohn-Dave</td>
</tr>
<tr>
<td>Who represents Adult Protective Services in Conservator or Guardian Proceedings?</td>
<td>1</td>
<td>yesterday by Kathleen M. Goetsch</td>
</tr>
<tr>
<td>Listing Inventory Items</td>
<td>0</td>
<td>yesterday by Julie L. Williams</td>
</tr>
<tr>
<td>Medicaid Estate Recovery Letter</td>
<td>5</td>
<td>yesterday by John B. Payne</td>
</tr>
<tr>
<td>DAPT: Request for input</td>
<td>1</td>
<td>2 days ago by Howard B. Young</td>
</tr>
<tr>
<td>Estate Planning attorney in New York City</td>
<td>1</td>
<td>3 days ago by John B. Payne</td>
</tr>
</tbody>
</table>

### Email Notifications

- **mike@baarlegal.com**
- **Change**
- **Real Time**
- **Real Time**
- **Daily Digest**
- **Plain Text**
- **No Email**
Discussion

1 to 50 of 355 threads (962 total posts)

<table>
<thead>
<tr>
<th>Thread Subject</th>
<th>Replies</th>
<th>Last Post</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oakland County Probate Court</td>
<td>1</td>
<td>9 hours ago by Andrew W. Mayoras, Original post by Gregory Richard Kish</td>
</tr>
<tr>
<td>Medicaid referral for West Michigan</td>
<td>0</td>
<td>yesterday by Hayley Elizabeth Rohn-Dave</td>
</tr>
<tr>
<td>Who represents Adult Protective Services in Conservator or Guardian Proceedings?</td>
<td>1</td>
<td>yesterday by Kathleen M. Goetsch, Original post by Denis C. Monahan</td>
</tr>
<tr>
<td>Listing Inventory Items</td>
<td>0</td>
<td>yesterday by Julie L. Williams</td>
</tr>
<tr>
<td>Medicaid Estate Recovery Letter</td>
<td>5</td>
<td>yesterday by John B. Payne, Original post by Jennifer Sadecki Parison</td>
</tr>
<tr>
<td>DAPT-Request for input</td>
<td>1</td>
<td>2 days ago by Howard B. Young, Original post by Beth Egner Applebaum</td>
</tr>
<tr>
<td>Estate Planning attorney in New York City</td>
<td>1</td>
<td>3 days ago by John B. Payne</td>
</tr>
</tbody>
</table>
My Account > Community Notifications
Discussion Override Email Address

Enter the email address at which you wish to receive the discussion email for the selected communities. Remove the address to receive the email at your primary address.

Override email address

enter email address

Select community discussions for override address

Select one or more

Note: Only communities enabled to allow override addresses appear in the list.

Save Close

Community Notifications

Community notification will be delivered to your primary address:

mike@baarlegal.com

To receive specific community notifications at an address other than your primary, set override(s) where desired.

Discussion Email: 📧

You have no override email addresses for discussion emails. add override addresses

Notification Settings
Probate & Estate Planning Section

Out-of-State Referrals
1. Hello List-mates, I am looking for referrals... Fran-Marie Silveri

Time Limit on Remand to Trial Court?
2. MI Court of Appeals (COA) affirmed in part and... Robert B. Bettendorf

Property Transfer Affidavit
3. When a joint owner, with rights of survivorship... Keith J. Beauchemin
4. MCL 211.27a(10) MCL 211.27a(6)(a-j) See if... J. David Kerr
5. You'll also need to review the Klooster case... Todd W. Simpson
1. Property Transfer Affidavit

Jul 29, 2017 12:45 PM
Keith J. Beauchemin

When a joint owner, with rights of survivorship passes away and you record his death cert. do you have to file a property Transfer Affidavit? The City has issued a $200 fine for failure to file the Affidavit.

Keith

--
Keith Beauchemin, Attorney at Law
Servant Estate Planning, PLLC
39111 Six Mile Rd.
Livonia, MI 48152
Phone: 734-221-0233
Email: Keith@ServantEP.com
Probate & Estate Planning Section

Out-of-State Referrals
1. Hello List-mates, I am looking for referrals... Fran-Marie Silveri

Time Limit on Remand to Trial Court?
2. MI Court of Appeals (COA) affirmed in part and... Robert B. Bettendorf

Property Transfer Affidavit
3. When a joint owner, with rights of survivorship... Keith J. Beauchemin
4. MCL 211.27a(10) MCL 211.27a(6)(a-j) See if... J. David Kerr
5. You'll also need to review the Klooster case... Todd W. Simpson
Michael Lichterman via State Bar of Michigan <Mail@ConnectedCommunity.org>

To Mike Lichterman

If there are problems with how this message is displayed, click here to view it in a web browser.

Probate & Estate Planning Section

Listserv Changeover to SBM Connect

Post New Message

May 1, 2018 7:58 AM
Michael G. Lichterman

**The Below Message was originally sent to the Probate and Estate Planning Section email listserv. It is being cross-posted here for informational purposes**

Dear Probate and Estate Planning Section Mailing List User,

You are receiving this email because you are signed up to receive emails from the Probate and Estate Planning Section's (the "Section") email list (more commonly referred to as the "Listserv"). On January 20, 2018, the Section Council voted to retire the Listserv and have all Section communications occur through the SBM Connect system. This email is a repeat of the monthly emails that have been sent to the Listserv since February.

We recognize the value of the Listserv to our Section members and will be continuing this benefit on the SBM Connect system. Among other benefits, the SBM Connect system reaches 2,500+ Section members (the Listserv reaches approximately 650), has a more user-friendly archive search, and provides a centralized library of all email attachments.
Re: Listserv Changeover to SBM Connect

MICHBAR_probate_ded6ab76-9d02-49d2-91f6-d3a9b1157191@ConnectedCommunity.org

To:
Cc:
Bcc:

Subject: Re: Listserv Changeover to SBM Connect
This e-mail address will allow you to automatically start a thread on the Probate & Estate Planning discussion board from your own personal e-mail client.

**NOTE:** However, the e-mail that you are **sending from** must be the e-mail address that we have tied to your Member Directory record or an SBM Connect “Override” address.
Mission

The purpose of this Section is to enhance and improve the practice and administration of law pertaining to probate, trust and estate planning, and administration; guardianships and conservatorships (including planning alternatives); and tax planning.

Join the Section

- [Online Application](#) (credit/debit card)
- [Mail/Fax Form](#) (existing members)
- [Mail/Fax Form](#) (newly admitted members; free for the balance of first year)

Upcoming Events

Probate Section: Annual Meeting & Council Meeting

Sep 9, 9:00 AM - 12:00 PM (ET)
Lansing, MI, United States

Probate Section: Council Meeting

Oct 14, 9:00 AM - 12:00 PM (ET)
Lansing
Mission

The purpose of this Section is to enhance and improve the practice and administration of law pertaining to probate; trust and estate planning, and administration; guardianships and conservatorships (including planning alternatives); and tax planning.

Join the Section
- Online Application (credit/debit card)
- Mail/Fax Form PDF (existing members)
- Mail/Fax Form PDF (newly admitted members; free for the balance of first year)
### Discussion

1 to 50 of 351 threads (571 total posts)

<table>
<thead>
<tr>
<th>Thread Subject</th>
<th>Replies</th>
<th>Last Post</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capturing life insurance proceeds from a defunct corporation</td>
<td>1</td>
<td>6 hours ago by Robert D. Nowak</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Original post by William R. Oudisma</td>
</tr>
<tr>
<td>YOU'RE INVITED! ICLE Acme Institute P&amp;E Section Reception</td>
<td>0</td>
<td>7 hours ago by Nicholas Andrew Reider</td>
</tr>
<tr>
<td>Guardianship Bank Account</td>
<td>2</td>
<td>7 hours ago by Barbara A. Bialko</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Original post by Melissa Marie Vreeman Weiswurz</td>
</tr>
<tr>
<td>Cleaning title to property in a Trust estate</td>
<td>3</td>
<td>15 hours ago by George W. Gregory</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Original post by Diane Kuhl</td>
</tr>
<tr>
<td>Medicaid referral for West Michigan</td>
<td>1</td>
<td>3 days ago by Robbi S. Hines</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Original post by Kayla Elizabeth Robinson</td>
</tr>
<tr>
<td>Possible Medicaid Recovery</td>
<td>6</td>
<td>3 days ago by Kenneth F. Tews</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Original post by Richard A. Korbassy</td>
</tr>
<tr>
<td>Connect presentation at the Probate &amp; Estate Planning Institute</td>
<td>0</td>
<td>4 days ago by Michael C. Lichterman</td>
</tr>
<tr>
<td>Oakland County Probate Court</td>
<td>1</td>
<td>6 days ago by Andrew W. Maykas</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Original post by Gregory Richard Kish</td>
</tr>
<tr>
<td>Who represents Adult Protective Services in Conservator or Guardian</td>
<td>1</td>
<td>7 days ago by Kathleen M. Geissel</td>
</tr>
<tr>
<td>Proceedings?</td>
<td></td>
<td>Original post by Dennis C. Manahan</td>
</tr>
<tr>
<td>Listing Inventory Items</td>
<td>0</td>
<td>7 days ago by Julie L. Williams</td>
</tr>
<tr>
<td>Medicaid Estate Recovery Letter</td>
<td>5</td>
<td>7 days ago by John B. Payne</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Original post by Jeffrey E. Deutsch</td>
</tr>
</tbody>
</table>
Discussion

1 to 50 of 236 threads (633 total posts)

<table>
<thead>
<tr>
<th>Thread Subject</th>
<th>Replies</th>
<th>Last Post</th>
</tr>
</thead>
<tbody>
<tr>
<td>Out-of-State Referrals</td>
<td>0</td>
<td>7 days ago by</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fran-Marie Silveri</td>
</tr>
<tr>
<td>Time Limit on Remand to Trial Court?</td>
<td>0</td>
<td>10 days ago by</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Robert B. Bettendorf</td>
</tr>
<tr>
<td>PETITION AND ORDER FOR ASSIGNMENT</td>
<td>1</td>
<td>13 days ago by</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Marlane C. Teahan</td>
</tr>
</tbody>
</table>

Discussion Page > Post New Message
Post a Message

To: Probate & Estate Planning Section

Cross Post To: No Additional Discussions

From: Andrew Marks

Subject:

[Email editor interface]

Yes Automatically insert content preview for links

Edit Insert View Styles
Updates for Recent Questions

• Must have public facing email
  – Work around is in the works
• Attachments not showing in the emails that come through
  – Section Library
• Mailing list archive import
For Questions or Assistance, contact Andrew Marks at the State Bar
amarks@michbar.org
(517) 367-6428
MEMORANDUM

To:       Probate and Estate Planning Council

From:    Membership Committee

Date:    June 5, 2018

The Membership Committee is exploring holding a potential networking event at the February 2019 Drafting Estate Planning Documents ICLE Seminar. The Membership Committee would like to know if the Section is willing to underwrite part of the cost of the event. Last year 147 people attended the Seminar in Plymouth. A lunch costs between 30 to 35 dollars per person. We can limit the event to a certain number of people if you desire.

We believe that it makes sense for the Probate and Estate Planning Section to sponsor the event since it will give us the opportunity to encourage a significant number of people to become active in the Section.

At the Council meeting in June the Membership Committee will be requesting that the Council vote to approve the networking event and allocate an appropriate amount of money for the event.
Memorandum

TO:       Probate and Estate Planning Council
FROM:     Mark E. Kellogg
          Chair of the Real Estate Committee
RE:       Real Estate Matters
DATE:     June 16, 2018 Council Meeting

1. **Breakey Case.** The Michigan Court of Appeals has issued an opinion in the case of Ann Breakey v. Department of Treasury. The issue involved the ability of Ann Breakey to claim the Principal Residence Exemption where she was the beneficiary of an irrevocable trust (Marital Trust established upon death of her spouse) granting her the right to remain in the marital home rent-free. The Department of Treasury and the Tax Tribunal ruled that Ms. Breakey was not an "owner" as defined by statute and accordingly was not able to claim the PRE exemption. In a published opinion the Court of Appeals reversed the decision of the Tax Tribunal and determined that Ms. Breakey was an owner under MCL 211.27dd(a)(iii) and therefore was entitled to the PRE. MCL 211.7dd(a)(iii) includes as an "owner," "a person who owns property as a result of being a beneficiary of a will or trust or as a result of intestate succession." The Court also pointed out the fact that the PRE Guidelines published by the Michigan Department of Treasury recognize petitioner's status as owner. (See the case attached).

2. **Update on SB 540.** The Local Government committee of the State Senate entertained testimony on SB 540 on May 22, 2018. David Fry (a member of the PEPC Real Estate Committee) and I testified in front of the committee in support of the Bill. The Michigan Chamber of Commerce also communicated its support of the Bill. In addition, there was a personal owner of a family cottage who testified and expressed the need for passage of the Bill to facilitate the maintenance of legacy properties within the family. The Treasury Department also testified and expressed concerns they had with the Bill in general terms. They indicated that they had not had enough time to review the Bill in its entirety to comment on more specific concerns.
STATE OF MICHIGAN
COURT OF APPEALS

ANN BREakeY, 
Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,
Respondent-Appellee.

Before: MURRAY, C.J., and SERVITTO and BOONSTRA, JJ.

MURRAY, C.J.

The question presented is whether petitioner Ann Breakey, as a result of an irrevocable trust granting her the ability to remain in the marital home rent-free in order to maintain the standard of living she enjoyed prior to her husband’s death, is an “owner” of the property for purposes of MCL 211.7(dd)(a), the personal residence exemption (PRE) under the General Property Tax Act (GPTA), MCL 211.1, et seq. The Tax Tribunal held that she was not an owner as defined by the statute, and as a result, denied her the use of the PRE. We conclude that she is an owner under MCL 211.7(dd)(a)(iii), reverse the decision of the tribunal, and remand for further proceedings to determine whether she is entitled to the PRE.

I. FACTS AND PROCEEDINGS

The subject property is a residential property located in the city of Bath, and was originally owned by petitioner and her late husband, William Breakey. On November 11, 1994, William Breakey created the “William E. Breakey Trust No. 1.” That same day, petitioner and William conveyed by quit claim deed their ownership of the Bath home to the Trust. Years later in February 2011, “[p]ursuant to the power to make amendments which [he] reserved in the Trust,” William “completely restat[ed] the Trust” in the “First Restatement of the William E. Breakey Trust No. 1,” naming himself and petitioner as co-trustees. The Trust was revocable by William, who “reserve[d] the right to amend or revoke this [Trust] Agreement, wholly or partly, by a writing signed by me or on my behalf and delivered to Trustee during my life,” and would “become irrevocable at my death.”

According to petitioner, she and William continued to reside in the Bath home until he passed away in 2012. Upon William’s death, William’s son, Thomas W. Breakey, was appointed successor trustee. The Trust also created a Marital Trust to provide for petitioner upon William’s death. The Marital Trust clause directs the trustee to hold the Trust property for the
benefit of petitioner and to use the Trust assets to “maintain the standard of living” that petitioner enjoyed prior to William’s death. It also mandates that the trustee permit petitioner “to use any real estate held in the Marital Trust rent free.” According to the Trust, petitioner has the right to remove any successor trustee without cause.

On October 15, 2015, petitioner received a letter from respondent, the Department of Treasury, informing her that it was denying her the PRE for the Bath home for the years 2012, 2013, 2014, and 2015, because “[t]he parcel did not contain a dwelling owned and occupied by a person(s) as his or her principal residence.” Petitioner challenged the denial and, after the Department held an informal telephone conference, the referee recommended that the PRE remain denied because petitioner “did not prove by a preponderance of the evidence that she owned the parcel at issue and that the parcel at issue was her principal residence during the years at issue.” The Department adopted this recommendation and upheld the denial.

Petitioner appealed the Department’s decision to the Tax Tribunal’s Small Claims Division. Before a hearing could be held, petitioner filed a motion for partial summary disposition on the legal question of whether she qualified as an “owner” within the meaning of MCL 211.7dd(a). In response, the Department maintained its position that petitioner was not an “owner” as defined by statute, and asked that summary disposition be entered in its favor. On July 3, 2017, the tribunal entered an order denying petitioner’s motion for partial summary disposition and granting summary disposition in favor of the Department pursuant to MCR 2.116(I)(2) (opposing party entitled to judgment) because “Petitioner is not an owner or partial owner of the subject property.”

II. ANALYSIS

This Court reviews the grant or denial of a motion for summary disposition de novo. Briggs Tax Serv, LLC v Detroit Pub Sch, 485 Mich 69, 75; 780 NW2d 753 (2010). However, “[t]his Court’s authority to review a decision of the Tax Tribunal is very limited.” Inter Coop Council v Dep’t of Treasury, 257 Mich App 219, 221; 668 NW2d 181 (2003) (quotation marks and citation omitted). “In the absence of an allegation of fraud,” review is restricted “to determining whether the tribunal committed an error of law or adopted a wrong legal principle.” Stege v Dep’t of Treasury, 252 Mich App 183, 187-188; 651 NW2d 164 (2002) (quotation marks and citations omitted).

“Statutory interpretation is a question of law that is reviewed de novo.” Inter Coop Council, 257 Mich App at 222. This Court’s primary goal in interpreting statutes is to determine and give effect to the Legislature’s intent. Briggs Tax Serv, LLC, 485 Mich at 76. However, this Court affords some deference to the Tax Tribunal’s interpretation of a tax statute. Inter Coop Council, 257 Mich App at 222. “Although tax laws are construed against the government, tax-exemption statutes are strictly construed in favor of the taxing unit.” Id.

As noted at the outset of this opinion, the issue before this Court is whether petitioner’s interest in a residential property held in an irrevocable trust for her lifetime benefit renders her an “owner” for purposes of the PRE. We hold that petitioner qualifies as an “owner” under the plain language of MCL 211.7dd(a).
Under the GPTA, all real property not expressly exempted is subject to taxation. MCL 211.1. One exemption under the GPTA is the PRE, which exempts qualifying property from “the tax levied by a local school district for school operating purposes.” MCL 211.7cc(1). In order to claim the PRE, a person must (1) own the property and (2) occupy it as his or her principal residence. MCL 211.7cc(2). A principal residence is “the place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established.” MCL 211.7dd(c).

MCL 211.7dd(a) provides, in relevant part, that for purposes of the PRE,

(a) “Owner” means any of the following:

* * *

(ii) A person who is a partial owner of property.

(iii) A person who owns property as a result of being a beneficiary of a will or trust or as a result of intestate succession.

* * *

(vi) A grantor who has placed the property in a revocable trust or a qualified personal residence trust.

Petitioner argues that she is an “owner” under both MCL 211.7dd(a)(ii) and (iii).

We first turn our attention to MCL 211.7dd(a)(iii), since there is no dispute that petitioner resides at the Bath house “as a result of being a beneficiary of a . . . trust.” To determine whether petitioner “owns” the Bath house under this statutory provision, we look to *Flowers v Bedford Twp*, 304 Mich App 661, 665; 849 NW2d 51 (2014), where this Court concluded that the definition of the term “owner” contained within MCL 211.7dd(a)(ii) is circular because it uses

---

1 This exemption is also commonly known as the “homestead exemption.” *EldenBrady v Albion*, 294 Mich App 251, 256; 816 NW2d 449 (2011).

2 Importantly, petitioner acknowledges that this is an issue of fact that she must establish before the tribunal; the only issue before the tribunal to date, and what is at issue here, is petitioner’s status as an “owner” of the Bath home. Whether she occupies the house as her principal residence must be decided on remand.

3 Additionally, amicus curiae the Probate and Estate Planning Section of the State Bar asserts that petitioner is an owner under MCL 211.7dd(a)(vi), as “[a] grantor who has placed the property in a revocable trust.” Amicus, however, cannot raise issues not raised by the parties, *Ketchum Estate v Dep’t of Health & Human Srvs*, 314 Mich App 485, 498 n 8; 887 NW2d 226 (2016), and petitioner did not make that argument before this Court.
the very term to be defined in the definition. According to the *Flowers* Court, a dictionary was consulted to provide meaning to the terms “own” and “owner.” *Flowers*, 304 Mich App at 665. Consulting *Random House Webster’s College Dictionary* (1997), the Court explained:

“Owner” is the derived, undefined noun form of “own.” “Own” is defined, in part, as “something that belongs to oneself” or “to have or hold as one’s own; possess.” And “ownership” is defined as “the state of or fact of being an owner” or “legal right of possession; proprietorship.” [*Flowers*, 304 Mich App at 665 (citations omitted).]

This Court continued, quoting from our Supreme Court’s opinion in *Barnes v Detroit*, 379 Mich 169; 150 NW2d 740 (1967):

“This Court has many times held that a person does not have to own property in fee simple to claim a homestead. The word ‘owner’ as used in the law has generally been treated as including all parties who had a claim or interest in the property, although the same might be an undivided one or fall short of an absolute ownership, and possession alone has frequently been held, in reference to personal property, as prima facie evidence of ownership.” [*Flowers*, 304 Mich App at 665, quoting *Barnes*, 379 Mich at 177.]

Applying these definitions, the *Flowers* Court held that the petitioner was an “owner” for purposes of MCL 211.7dd(a)(iii), and a partial owner under MCL 211.7dd(a)(ii), because her deceased husband’s will granted her a life estate in the property. *Id.* at 665-666. And a life estate allowed the petitioner to come within the definition of “owner” because, as the Court recognized, it gave the petitioner “the right to possess, control, and enjoy the property during the [petitioner]’s lifetime.” *Id.* at 665.

Utilizing these same definitions, we conclude that petitioner is an “owner” under MCL 211.7dd(a) because she holds as her own the Bath property as a result of being a beneficiary of the Marital Trust. MCL 211.7dd(a)(iii). There is no dispute that petitioner currently possesses the property. She resides on the property, makes use of it as she sees fit, and has done so for many years. Although the Trust owns the Bath home property, it holds it for petitioner’s benefit. Petitioner is granted the use “rent-free” so that it will not be cost prohibitive for her to continue living the lifestyle she lived when her husband was alive, and there are no restrictions preventing her from exclusively using the property for the remainder of her life. Indeed, as petitioner argues, she has the unfettered right to remove the successor trustee, ensuring that if that trustee were to seek her removal (or, for example, to sell the house without her permission), she could remove him for taking action inconsistent with the Trust and her wishes. Therefore, though the Trust is the legal owner of the Bath home, petitioner holds the equitable interest. See *Equitable Trust Co v Milton Realty Co*, 261 Mich 571, 577; 246 NW 500 (1933) (holding that “[t]o create a trust, there must be an assignment of designated property to a trustee with the intention of

---

This is similarly true of MCL 211.7dd(a)(iii), defining “owner” as “[a] person who owns property as a result of being a beneficiary of a will or trust . . . .” (Emphasis added.)
passing title thereto, to hold for the benefit of others”); MCL 555.16. Under these undisputed facts, petitioner held the Bath house as her own, and she qualifies as an owner under MCL 211.7dd(a)(iii).

Petitioner cites Barnes to support her claim that “possession alone” is the most relevant consideration in determining whether a person is an “owner.” But Barnes is not particularly helpful to petitioner. In that case, Mr. Barnes was attempting to claim a veteran’s homestead exemption, which contained language similar to that for the PRE. 5 Barnes, 379 Mich at 172. However, Mr. Barnes had a two-fifths undivided interest in common in a residential property, which in conjunction with his possession of the property, made him an “owner.” Id. at 177. Petitioner’s selective extraction of the phrase “possession alone” from the Barnes Court’s analysis ignores that the plaintiff had a two-fifths “claim or interest in the property.” Id. 6 Further, although Barnes noted that control was not an element of the homestead exemption statute at issue, the discussion of control that did occur in Barnes was focused on the rights of owners who hold property as part of a tenancy in common. Id. at 176. Barnes is helpful because “possess” is part of what “own” means, but it is not as dispositive as petitioner thinks.

In relation to the tribunal’s reference to the control one must maintain over the property to be an owner, we note that the Flowers Court did not utilize “control” in its definition of “owner” or “own.” Flowers, 304 Mich App at 665. Yet, in granting summary disposition in favor of the Department, the tribunal relied on one of its prior unpublished opinions, Johnson v Dep’t of Treasury, unpublished opinion of the Michigan Tax Tribunal, issued October 13, 2015 (Docket No. 12-007849), which expanded upon the Flowers definition by including the element of control. In Johnson, a trust held property for the petitioner that expressly allowed her to “occupy” and reside at the property “rent-free.” Johnson, unpub op at 3. An administrative law judge found that the petitioner was a partial owner of the property because of her legal right of possession. Id. The tribunal disagreed, explaining that the ALJ’s interpretation erroneously encompassed only occupation, but that the definition of “possession” also includes “[t]o have in one’s actual control,” and that control meant “[t]o exercise power or influence over.” Id., quoting Black’s Law Dictionary (10th ed) (alterations in original). Finding that the petitioner’s rent-free occupancy did not amount to “actual control” over the property, the tribunal concluded that she was not an “owner.” Johnson, unpub op at 3.

Although it was understandable for the tribunal to have relied upon the analogous Johnson decision, the definition of “owner” adopted in Johnson—and applied to petitioner here—is erroneous because it improperly alters the definition provided to “owner” and “own” in Flowers.

5 That exemption required that a property be “used and owned as a homestead” by a veteran. Barnes, 379 Mich at 176 (emphasis omitted).

6 Furthermore, if “possession alone” is what “the definition of ‘owner’ revolves around” as petitioner argues, then a renter who has no other discernable interest in the land would be an owner, but a renter is undoubtedly different under the law than an “owner.”
The words used by the Legislature are “the most reliable evidence of the Legislature’s intent.” Gillie v Genesee Co Treasurer, 277 Mich App 333, 345; 745 NW2d 137 (2007). As determined by Flowers, MCL 211.7dd(a) and its circular definition of the term “owner” does not include the term “control.” After properly consulting a lay dictionary to ascertain the meaning of “owner,” this Court provided a definition that did not include the term “control.” Flowers, 304 Mich App at 665. Although the Johnson tribunal consulted a legal dictionary, this Court had determined that, for purposes of defining “owner” for the PRE, it was appropriate to consult a lay dictionary. Flowers, 304 Mich App at 665. Utilizing a legal definition was contrary to Flowers, and to settled precedent. See Robinson v Detroit, 462 Mich 439, 456 n 13; 613 NW2d 307 (2000) (recognizing that “[i]t is appropriate to consult a lay dictionary when defining common words or phrases that have not acquired a unique meaning at law because ‘the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary and not a legal dictionary’”) (citation omitted). By using the legal definition of “possession,” the tribunal erroneously concluded that control was a necessary element of ownership.

We also cannot help but recognize that application of the Department’s own published guidelines confirms petitioner’s status as an owner. The Department provides the following published guidance to the public:

3. As the beneficiary of a trust, when are you considered eligible for a principal residence exemption?

Upon the death of the grantor of the trust, provided you occupy the property as your principal residence.

---

7 As noted, the term “control” was brought up in relation to the Court’s explanation of the general rights of a life estate holder—“to possess, control, and enjoy the property during the holder’s lifetime.” Flowers, 304 Mich App at 665 (emphasis added). The Flowers Court never discussed or relied upon any control that the petitioner exerted over the property in that case.

8 In the legal sense, to “own” is “[t]o rightfully have or possess as property; to have legal title to.” Black’s Law Dictionary (10th ed). To “possess” is “[t]o have in one’s actual control; to have possession of.” Id. To “control” is “[t]o exercise power or influence over . . . .” Id. Hence, even if control was a dispositive factor, the terms of the Trust direct the trustee to hold the residue of the Trust, including the Bath home, for the benefit of petitioner only. We agree with petitioner and amicus curiae that petitioner has “control” over the Bath home because she has the “right to exclude others” for the entirety of her life and because she has power over the Trust administration. It can be inferred, because petitioner is the only beneficiary of the Trust property, including the Bath home, that she is the only person permitted to use it. The trustee is not afforded any power to convey or grant ownership of the real estate. Finally, petitioner is solely afforded the right to remove any trustee without cause. In essence, because the Trust owns the property and because only petitioner may determine who the trustee is and how the Trust operates, she has “control” over the Bath home.
6. The owner of the principal residence died. Before his/her death, the owner placed the property in a revocable trust that specified that the surviving spouse was a life beneficiary. The surviving spouse occupies the home as a principal residence. Can he/she claim the exemption?

Yes. Upon the death of the grantor of the trust, the life beneficiary is considered the owner of the home and may claim a principal residence exemption on the property.\(^9\)

The tribunal ignored these guidelines because agency interpretations do not have the force of law. That is certainly a true statement, but this Court still affords an agency’s construction of a statute “‘respectful consideration,’” In re Rivas Complaint, 482 Mich 90, 103; 754 NW2d 259 (2008), as an agency’s interpretation can be “helpful in ascertaining the legislative intent,” Id. at 118. Although lacking the force of law, the Department’s own interpretation of the statute to include trust beneficiaries as “owners” is consistent with Flowers and our resolution of this case.

For these reasons, we reverse the tribunal’s order and remand for further proceedings on petitioner’s claim of entitlement to a PRE. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Mark T. Boonstra

---

Application for Consideration

If you believe that you have a case that warrants involvement of the Probate and Estate Planning Section of the State Bar of Michigan ("Section"), based upon the Section’s Policy Regarding Consideration of Amicus Curiae Matters, please complete this form and submit it to the Chair of the Amicus Curiae Committee, along with all relevant pleadings of the parties involved in the case, and all court orders and opinions rendered.

Date: May 22, 2018

Name: David L.J.M. Skidmore P Number: P58794

Firm Name: Warner Norcross & Judd LLP

Address: 111 Lyon Street N.W., 900 Fifth Third Center

City: Grand Rapids State: Michigan Zip Code: 49503

Phone Number: (616) 752-2491 Fax Number: (616) 222-2491

E-mail address: conor.dugan@wni.com

Attach Additional Sheets as Required

Name of Case: Mary S. Faupel v. Diane K. Giffin

Parties Involved: Plaintiff/Appellee – Mary S. Faupel, individually and as Trustee of Mary S. Faupel Revocable Trust; Defendant/Appellant – Diane K. Giffin, individually, as Trustee of the David R. Giffin Trust, and as Personal Representative of the Estate of David R. Giffin.

Current Status: Michigan Supreme Court Application filed 5/22/18

Deadlines Answer to Application due 6/19/18; Appellant Reply Brief due 7/10/18

Issue(s) Presented

1. Where the term “creditor” is defined by numerous dictionaries and is used elsewhere in EPIC to mean someone who is presently owed money, is a claim barred by MCL 700.3803(1)(a) when the claimant is not owed money at the time of the decedent’s death and fails to present his or her claim within four months of publication of notice to creditors?
2. In order to discharge the statutory duty to serve notice on “known creditors” who are “reasonably ascertainable,” is a trustee or personal representative, who is usually a layperson, required to conduct an extensive factual and legal analysis sufficient to identify any and all potential claimants?

Michigan Statute(s) or Court Rule(s) at Issue  Section 3803 of the Estates and Protected Individuals Code, MCL 700.3803; Section 1201 of EPIC, MCL 700.1201

Common Law Issues/Cases at Issue

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? There is a dearth of published caselaw on trusts and estates issues. In this case, that has had an effect. There are unpublished Court of Appeals cases directly on point but the trial court felt free to ignore them. Perhaps if there were published caselaw on these questions, the trial court would not have felt that it could impose its policy preferences onto the probate code.

If the Section were to file an amicus brief in this case, it would signal to the Michigan Supreme Court, the importance of this case and increase the chances that the lower courts would receive definitive guidance on certain trusts and estates issues. This Section’s involvement in this important case would help increase the chances that the application would be granted.

Do you believe that a decision in this case will substantially impact this Section’s attorneys and their clients? If so, how? Yes. First, the definition of creditor in EPIC opens or closes the door to many claims against trusts and estates. Thus, ensuring that the Legislature’s intent is effected with respect to “creditor” will have a gatekeeper effect. Whether someone is a creditor or not often has a case-dispositive effect—as it does here. The Section’s attorneys would be
significantly affected by this case. Second, one of EPIC’s goals is the timely resolution of questions regarding trusts and estates. The questions in this case go directly to that end. The trial court’s decision undermines that goal and will increase the expense and time involved in resolving those questions.
STATE OF MICHIGAN
IN THE SUPREME COURT

MARY S. FAUPEL, individually and as
Trustee of MARY S. FAUPEL REVOCABLE
TRUST,

Plaintiff-Appellee,

v

DIANE K. GIFFIN, individually, as Trustee of
the DAVID R. GIFFIN TRUST and as
Personal Representative of the Estate of
DAVID R. GIFFIN,

Defendant-Appellant,

and

GIFFIN FINANCIAL PLANNING
SERVICES, INC.; GIFFIN MORTGAGE
COMPANY, INC.; GIFFIN FINANCIAL
GROUP, INCORPORATED; DRG
INVESTMENT ADVISORY SERVICES,
LLC; MARINA INVESTORS GROUP, INC.;
and GIFFIN MANAGEMENT GROUP INC.,

Defendants.

Supreme Court Case No. __________
Court of Appeals Case No. 341068
Kalamazoo County Circuit Court
Case No. 17-0229-CK
Hon. Alexander C. Lipsey

APPELLANT DIANE K. GIFFIN'S
APPLICATION FOR
LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Robb S. Krueger (P66115)
Kreis, Enderle, Hudgings & Borsos, P.C.
Attorneys for Plaintiff-Appellee
P.O. Box 4010
Kalamazoo, Michigan 49003-4010
269-324-3000

David L.J.M. Skidmore (P58794)
Conor B. Dugan (P66901)
Warner Norcross & Judd LLP
Attorneys for Defendant-Appellant Diane K. Giffin,
Individually, as Trustee of the David R. Giffin Trust,
and as Personal Representative of the Estate of David
R. Giffin, Deceased
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503-2487
616-752-2000
conor.dugan@wnj.com

Matthew P. Allen (P57914)
Jeffrey A. Crapko (P78487)
Miller Canfield Paddock & Stone PLC
840 West Long Lake Road, Suite 150
Troy, Michigan 48098
248-879-2000

James L. Liggins, Jr. (P66816)
Miller Canfield Paddock & Stone PLC
277 South Rose Street, Suite 5000
Kalamazoo, Michigan 49007-4730
269-383-5897

Attorneys for Defendants Giffin Financial
Planning Services, Inc.; Giffin Mortgage
Company, Inc.; Giffin Financial Group,
Incorporated; DRG Investment Advisory
Services, LLC; and Marina Investors
Group, Inc.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF AUTHORITIES</td>
<td>ii</td>
</tr>
<tr>
<td>STATEMENT OF APPELLATE JURISDICTION</td>
<td>1</td>
</tr>
<tr>
<td>ORDERS APPEALED AND RELIEF SOUGHT</td>
<td>1</td>
</tr>
<tr>
<td>STATEMENT OF QUESTIONS PRESENTED</td>
<td>2</td>
</tr>
<tr>
<td>INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL</td>
<td>3</td>
</tr>
<tr>
<td>STATEMENT OF FACTS</td>
<td>5</td>
</tr>
<tr>
<td>The David R. Giffin Trust</td>
<td>5</td>
</tr>
<tr>
<td>The first consent order</td>
<td>6</td>
</tr>
<tr>
<td>David's death</td>
<td>6</td>
</tr>
<tr>
<td>Diane reviews David's records</td>
<td>7</td>
</tr>
<tr>
<td>Diane publishes Notice to Creditors</td>
<td>7</td>
</tr>
<tr>
<td>Giffin Mortgage winds down</td>
<td>8</td>
</tr>
<tr>
<td>The second consent order</td>
<td>8</td>
</tr>
<tr>
<td>Faupel presents an untimely claim to Diane</td>
<td>9</td>
</tr>
<tr>
<td>The lawsuit and the motion for summary disposition</td>
<td>9</td>
</tr>
<tr>
<td>STANDARD OF REVIEW</td>
<td>11</td>
</tr>
<tr>
<td>ARGUMENT</td>
<td>11</td>
</tr>
<tr>
<td>I.  Relevant EPIC provisions</td>
<td>12</td>
</tr>
<tr>
<td>II. Because Faupel does not qualify as a &quot;creditor,&quot; her claims are time-barred due to her failure to present such claims by March 3, 2017</td>
<td>14</td>
</tr>
<tr>
<td>III. The trial court adopted the wrong test for determining a &quot;known&quot; creditor</td>
<td>19</td>
</tr>
<tr>
<td>CONCLUSION AND REQUESTED RELIEF</td>
<td>22</td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

## Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Amburage v Sauder</em>, 238 Mich App 228; 605 NW2d 84 (1999)</td>
<td>11</td>
</tr>
<tr>
<td><em>Bailey v Schaaf</em>, 494 Mich 595; 835 NW2d 413 (2013)</td>
<td>11</td>
</tr>
<tr>
<td><em>Detroit Fire Fighters Association, IAFF Local 344 v City of Detroit</em>, 482 Mich 18, 28; 753 NW2d 579 (2008)</td>
<td>11</td>
</tr>
<tr>
<td><em>Michigan Education Association v Secretary of State</em>, 489 Mich 194; 801 NW2d 35 (2011)</td>
<td>18</td>
</tr>
<tr>
<td><em>People v Koonce</em>, 466 Mich 515; 648 NW2d 153 (2002)</td>
<td>15</td>
</tr>
<tr>
<td><em>People v Smith</em>, 496 Mich 133; 852 NW2d 127 (2014)</td>
<td>15</td>
</tr>
<tr>
<td><em>People v Stone</em>, 463 Mich 558; 621 NW2d 702 (2001)</td>
<td>15</td>
</tr>
<tr>
<td><em>Potter v Devine</em>, No. 308878, 2013 WL 3107498 (Mich Ct App, June 20, 2013)</td>
<td>17</td>
</tr>
</tbody>
</table>
Statutes

MCL 600.215.................................................................................................................. 1
MCL 700.1105.................................................................................................................. 16
MCL 700.1201................................................................................................................ passim
MCL 700.3801................................................................................................................ passim
MCL 700.3803................................................................................................................ passim
MCL 700.7608................................................................................................................ 2, 12, 13, 20

Rules

MCR 2.116....................................................................................................................... 11
MCR 7.303....................................................................................................................... 1
MCR 7.305....................................................................................................................... 1, 4, 11

Other Authorities

2A Singer & Singer, Sutherland Statutory Construction (7th ed) .............................................. 16

Black’s Law Dictionary (10th ed, 2014)............................................................................... 16

Merriam-Webster Dictionary (2017)..................................................................................... 16

STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals entered its Order denying Appellant’s Application for Leave to Appeal in this case on April 10, 2018. (Exhibit A, COA Order.) This Court has jurisdiction under MCL 600.215 and MCR 7.303(B)(1) to grant leave to appeal.

ORDERS APPEALED AND RELIEF SOUGHT

Pursuant to MCR 7.303(B)(1) and 7.305, Defendant-Appellant Diane Giffin, as Trustee of the David R. Giffin Trust and as Personal Representative of the Estate of David R. Giffin, seeks leave to appeal the October 24, 2017 Order of the Kalamazoo County Circuit Court and the Court of Appeals’ April 10, 2018 Order denying the Application for Leave to Appeal.

Appellant respectfully requests that this Court grant leave to appeal, reverse, and remand for entry of summary disposition in her favor because Plaintiff-Appellee’s claims are barred by the applicable statute of limitations. In the alternative, this Court should remand to the Court of Appeals as on leave granted.
STATEMENT OF QUESTIONS PRESENTED

The Michigan Estates and Protected Individuals Code requires trustees of trusts and personal representatives of estates to publish and serve notice to the creditors of the trust or estate’s decedent. See MCL 700.3801; MCL 700.7608. Trustees or personal representatives must personally serve known creditors, while publication suffices for all other creditors or claimants. Because EPIC is intended to “promote a speedy and efficient system” for concluding the administration of trusts and estates, MCL 700.1201(c), it bars claims against trusts and estates that are not presented within a short time limit. A “known creditor” has four months from publication or one month after he or she receives personal notice, whichever is later, to present his or her claim. MCL 700.3803(1)(b). All other persons with claims must present those claims within four months of publication to creditors. MCL 700.3803(1)(a). A claim not presented to a trustee or personal representative within these short windows is permanently barred. The trial court’s decision raises two issues:

1. Where the term “creditor” is defined by numerous dictionaries and is used elsewhere in EPIC to mean someone who is presently owed money, is a claim barred by MCL 700.3803(1)(a) when the claimant is not owed money at the time of the decedent’s death and fails to present his or her claim within four months of publication of notice to creditors?

   Defendant-Appellant says: Yes.

   Plaintiff-Appellee says: No.

   The trial court said: No.

2. In order to discharge the statutory duty to serve notice on “known creditors” who are “reasonably ascertainable,” is a trustee or personal representative, who is usually a layperson, required to conduct an extensive factual and legal analysis sufficient to identify any and all potential claimants?

   Defendant-Appellant says: No.

   Plaintiff-Appellee says: Yes.

   The trial court said: Yes.
INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

It is undisputed that Diane Giffin (as Trustee of the David R. Giffin Trust and as Personal Representative of the Estate of David R. Giffin) published a notice to creditors on November 3, 2016. It is also undisputed that publication of such notice triggered a statutory four-month period for persons (other than known creditors) with a claim against David to present a notice of such claim. MCL 700.3803(1)(a). Further, it is undisputed that at the time of his death, David did not owe anything to Plaintiff-Appellee Mary S. Faupel (individually or as Trustee of the Mary S. Faupel Revocable Trust). In other words, David was not indebted to Faupel at the time of his death. A claimant other than a “known creditor”\(^1\) is required to present her claims within the four months after the notice is published. See MCL 700.3803(1). Faupel failed to present her claims within this four-month period. Thus, if Faupel was not a “known creditor,” Faupel’s claims are barred by the statute of limitations set forth in MCL 700.3803(1)(a).

That is the question at the heart of this case. This application presents a recurring and important issue concerning the state’s trusts and estates jurisprudence: what did the Legislature intend by using the term “creditor” in the statute of limitations provisions in Section 3803(1)(b) of the Estates and Protected Individuals Code (“EPIC”)? The answer to that question has serious implications for all Michigan trusts and estates jurisprudence. EPIC establishes a short statute of limitations for creditors and claimants to bring a claim against a trust or estate so as to “promote a speedy and efficient system for liquidating a decedent’s estate and making distribution to the decedent’s successors.” MCL 700.1201(c). This means that if someone is not a known creditor, he or she has only four months from publication of the notice to bring a claim against the trust or

---

\(^1\) The statute refers to such a creditor as “a creditor known to the personal representative at the time of publication,” MCL 700.3803(1)(a), but this brief employs the phrase “known creditor,” for sake of brevity.
estate. Failure to bring a claim in that period bars one’s claims. Outside the context of trusts and estates jurisprudence this abbreviated claim period may seem harsh, but it promotes EPIC’s goal of facilitating the prompt administration of trusts and estates.

Here, the trial court refused to apply this straight-forward limitations period because it did not like the result to which it led. The trial court was “not convinced” that EPIC’s short statute of limitations was “the appropriate resolution” of this case. (10/4/2017 Hrg Tr.25.) But evaluating the propriety of a statutory limitations period is not the province of the courts; it is the province of the Legislature. The trial court’s error involves a legal principle of major significance to Michigan’s jurisprudence. MCR 7.305(B)(3). What the Legislature intended by using the term “creditor” in EPIC will have ramifications for a significant number of claims in the trusts and estates context. The ordinary meaning of “creditor” and the context in which the term is used in EPIC indicate that the Legislature intended it to mean someone to whom money is owed. This limits the reach of potential claims and helps to effect EPIC’s goal of timely resolution of questions regarding trusts and estates. The trial court’s decision undermines the ready of administration of trusts and estates and creates a situation under which the administration of trusts and estates can be delayed indefinitely.

The second jurisprudentially significant issue raised by this case is what is required to make someone a “known creditor” of a trust or estate. Given that personal representatives and trustees are typically laypeople, the Legislature intended the process of ascertaining a “known creditor” to be a straightforward and objective standard. In other words, personal representatives

---

2 It is not entirely surprising that the circuit court would blanch at an unfamiliar, expedited limitations period. In most cases, the probate court enforces this short statute of limitations. To those unfamiliar with EPIC and the premium it puts on quickly wrapping up the administration of trusts and estates, the limitations period may seem unduly short. This is all the more reason this Court should grant the application to help bring clarity and uniformity in this area of the law.
and trustees are not required to identify every person who might potentially have a legal claim against a decedent. Yet, the trial court’s decision requires just this sort of far-ranging subjective and speculative analysis. That will have significant effects on Michigan’s Trusts and Estates jurisprudence.

The trial court’s error is compounded by the dearth of published caselaw on trusts and estates questions in general, and the lack of published caselaw on the questions presented here in particular. Moreover, as demonstrated by the Court of Appeals’ multiple unpublished decisions on these questions, these are recurring issues, which necessitate this Court’s review and guidance. Thus, this case presents an ideal vehicle for this Court to answer these questions and provide clarity and uniformity to the state’s courts in the area of trusts and estates law.

Not only does the trial court’s decision involve legal issues of major significance, it also will cause material injustice to Diane if it is not corrected. In her capacity as trustee and personal representative, Diane will be required to defend her husband’s estate and trust against claims that are barred by the applicable statute of limitations. Thus, this is the type of case-dispositive error for which leave to appeal is warranted. Accordingly, this Court should grant leave to provide clear guidance on the meaning of “creditor” as used in MCL 700.3803(1)(b) and what constitutes a “known creditor;” align the trial court with EPIC’s purpose of promoting a speedy and efficient system for administering a decedent’s trust and estate, and correct the trial court’s egregious errors. In the alternative, this Court should remand to the Court of Appeals as on leave granted.

**STATEMENT OF FACTS**

**The David R. Giffin Trust**

During his lifetime, David R. Giffin created a revocable trust—the David R. Giffin Trust.

David designated himself as the initial Trustee of the Trust. Effective upon his disability or
death, David nominated his wife, Diane K. Giffin, as the Successor Trustee of the Trust. (Trust Agmt Excerpts, Ex B to Mot for Summ Disp.)

The first consent order

David’s Trust was the owner of DRG Investment Advisory Services, LLC (“DRG”), and the indirect owner of Giffin Mortgage Company, Inc. On September 9, 2016, a consent order was entered into by David, Giffin Mortgage, and the State of Michigan, resolving the State’s previously issued cease and desist order. (9/9/2016 Consent Order, Ex F to Mot for Summ Disp.) The cease and desist order alleged certain mistakes in connection with Giffin Mortgage’s issuance of Notes to investors. Giffin Mortgage and David denied any wrongdoing or liability in connection with the Notes.

To resolve the matter, however, Giffin Mortgage agreed to make a rescission offer to each holder of its Notes, permitting each Note holder to maintain, rescind, or extend the term of such Notes. Giffin Mortgage was required to serve that rescission offer on all Note holders by December 31, 2016. (Id.) Giffin Mortgage and David were required to repay each Note holder who elected to rescind his or her Notes. (Id.) Faupel was a client of DRG and held certain Notes issued by Giffin Mortgage.³

David’s death

On September 19, 2016, ten days after the consent order was entered, David died unexpectedly. (Giffin Aff ¶ 2, Ex A to Mot for Summ Disp, attached as Exhibit B to this application.) David was survived by his wife, Diane, two adult children from his first marriage, and two adult children from Diane’s first marriage. (Id. ¶ 4.) Following David’s death, Diane accepted her

³ Plaintiff Mary S. Faupel, individually and as Trustee of the Mary S. Faupel Revocable Trust, will be referred to herein as “Faupel.”
nominated and commenced to serve as Successor Trustee of the Trust. \(\text{Id.} \ ¶ 8.\) At David’s death, his assets were titled in the name of his Trust, and he left no probate assets requiring probate estate administration. \(\text{Id.} \ ¶ 9.\) Accordingly, Diane initially concluded that it was not necessary to open a probate estate for David with the probate court. \(\text{Id.} \ ¶ 10.\) \(^4\) Diane had no involvement in any of David’s businesses.

As a result of David’s death, the terms of the consent order were never implemented. The rescission offer was never sent to any of the Note holders; none of the Note holders elected to rescind any Notes; and David never became liable to repay any Note holder.

**Diane reviews David’s records**

Following David’s death, Diane reviewed his records in order to identify his creditors, if any. \(\text{Id.} \ ¶ 23.\) She found no documents indicating that David was personally liable to Faupel in connection with any services provided by DRG to Faupel. \(\text{Id.} \ ¶ 27.\) She found no documents indicating that David was personally liable to Faupel in connection with any Notes issued by Giffin Mortgage to Faupel. \(\text{Id.} \ ¶ 28.\) Consequently, nothing in David’s records suggested to Diane as Trustee that Faupel was owed anything by David. \(\text{Id.} \ ¶ 31.\)

**Diane publishes Notice to Creditors**

On November 3, 2016, Diane as Trustee published a notice to creditors. \(\text{Id.} \ ¶ 11.\) The notice provided that “all claims against the estate of DAVID ROBERT GIFFIN a/k/a DAVID R. GIFFIN will be forever barred unless presented to DIANE K. GIFFIN, Trustee of the Trust . . . within four (4) months after the date of publication of this Notice.” (Notice to Creditors, Ex C to

\(^4\) Diane eventually opened a probate estate for David in response to Faupel’s ultimatum that she would open an estate if Diane did not do so.
Mot for Summ Disp, attached as Exhibit C to this application.) Diane also mailed the notice to one known creditor (not Faupel) of David. (Ex B, Giffin Aff ¶ 12.)

The four-month period for creditors to present claims expired on March 3, 2017. Diane received no creditor claims by the March 3, 2017 deadline. (Id. ¶ 14.)

**Giffin Mortgage winds down**

Following David’s death, Giffin Mortgage began a process of orderly wind down of its affairs and retained an independent third party to manage such wind-down process. Faupel knew about these developments because she (and other Note holders) received correspondence from Sheldon Stone, Giffin Mortgage’s Chief Restructuring Officer, as early as December 14, 2016. (Stone Correspondence, Ex K to Pl’s Compl.) In his correspondence, Mr. Stone advised the Note holders, including Faupel:

> [D]avid R. Giffin passed away unexpectedly on September 19, 2016. [D]ue to his untimely passing, GMC [Giffin Mortgage] will not issue any new notes or make any new loans. Instead, GMC will undertake an orderly process, overseen by outside professionals, of liquidating its assets and making periodic distributions to you. [I]t is not anticipated that GMC will be able to make distributions to fully repay all of the outstanding notes, although we will work assiduously towards achieving the best outcome possible. [Id.]

Mr. Stone sent that correspondence to Faupel more than two months before the expiration of the creditor claims period.

**The second consent order**

On March 2, 2017, recognizing Giffin Mortgage’s orderly wind down of its affairs, the State of Michigan and Giffin Mortgage entered into an alternate consent order. (3/2/2017 Consent Order, Ex G to Mot for Summ Disp.) The second consent order provided: “This Consent Order supersedes and replaces, in its entirety, the cease and desist order and the Consent Order
dated September 9, 2016.” (Id.) David therefore never became liable to repay any Note
holders because no Note holders ever elected to rescind their Notes, and the consent order that
allowed them to do so was superseded by the second consent order.

**Faupel presents an untimely claim to Diane**

On May 15, 2017, more than two months after the expiration of the claims deadline,
Faupel presented her written Statement and Proof of Claim to Diane as Trustee. (Faupel Claim,
Ex D to Mot for Summ Disp.) Because the Statement and Proof of Claim were presented more
than two months after the creditor claims deadline expired, Diane subsequently denied the claim.
(Notice of Disallowance, Ex E to Mot for Summ Disp.)

**The lawsuit and the motion for summary disposition**

Before Diane denied Faupel’s claim, Faupel filed a lawsuit with the Kalamazoo County
Circuit Court, alleging twelve counts against Giffin Financial Planning Services, Inc., Giffin
Mortgage Company, Inc., Giffin Financial Group, Inc., DRG, and Diane—individually, as
Personal Representative, and as Trustee—for breach of fiduciary duty, conversion, fraudulent
transfer, misrepresentation, and unjust enrichment, among other things. Faupel’s claims against
the Trust and Estate derived from David’s alleged actions during his lifetime. Diane subse-
quently moved for summary disposition on the grounds that Faupel’s claims were barred by the
statute of limitations in MCL 700.3803(1)(a), because Faupel failed to present such claims
within four months after Diane published the notice to creditors. (Defs’ Mot for Summ Disp.)
Relying on several unpublished court of appeals’ decisions and several dictionary definitions of
the term “creditor,” Diane claimed that she was not required to personally serve Faupel with
notice because Faupel was not a “creditor” of David at his death and, not “known,” by Diane, to
possess a claim. *(Id. at 13.)* Therefore, because Faupel failed to file her claim within four months, her claims were barred by the statute of limitations in MCL 700.3803(1)(a). *(Id. at 14.)*

The trial court heard oral argument on October 4, 2017. In denying Diane’s motion, the trial court ignored the unpublished decisions of the court of appeals as well as the numerous dictionaries that define “creditor” as a person who is presently owed money. Instead, the trial court responded negatively to EPIC’s short statute of limitations: “I am not convinced that that is a—I am not convinced that the restrictions with regards to (C)(7) and the limitations of—in this case the four months—is the appropriate resolution of that matter.” *(10/4/2017 Hr’g Tr 25.)* The trial court entirely overlooked the first step of the analysis—determining whether Faupel qualified as a “creditor” at all—and made no attempt to interpret what the Legislature meant by the term “creditor” as used in MCL 700.3803(1)(b). Instead, the trial court assumed Faupel was a creditor and concluded that there was a question of fact as to whether Faupel was a “known” creditor. *(Id. at 24.)* Accordingly, on October 24, 2017, the court issued an order denying Diane’s motion for summary disposition. *(10/24/2017 Order, attached as Exhibit D.)*

Because of the case-dispositive nature of the issues involved—for Diane—and because of their larger importance for Michigan trusts and estates law, Diane filed an application for leave to appeal with the Court of Appeals.\(^5\) On April 10, 2018, the Court of Appeals denied the application for failure to persuade the court that immediate review was needed (see Exhibit A, COA Order). Because the urgency of deciding these issues *immediately* remains, Diane now files her application with this Court.

---

\(^5\) The other defendants moved for summary disposition on separate grounds, and Diane concurred in their motion. The trial court denied that motion as well, but that decision is not the subject of Diane’s appeal.
STANDARD OF REVIEW

Under MCR 2.116(C)(7), "the nonmovant’s well-pleaded allegations must be accepted as true and construed in the nonmovant’s favor and the motion should not be granted unless no factual development could provide a basis for recovery." *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if affidavits or other documentary evidence show that there is no genuine issue of material fact, the trial court must render judgment. *Paterek v 6600 Ltd.*, 186 Mich App 445, 447; 465 NW2d 342 (1990).

This Court reviews a trial court’s decision to grant or deny summary disposition de novo. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). This Court also reviews issues of statutory and contractual interpretation de novo. *Detroit Fire Fighters Ass’n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

ARGUMENT

This Court only grants leave to appeal for very limited reasons. Among those reasons is a showing that an issue involves a legal principle of major significance to Michigan’s jurisprudence or that a lower court decision is clearly erroneous and will cause material injustice. MCR 7.305(B). Diane recognizes that this is a high burden and that leave is only granted in rare instances. This, however, is one of those rare instances. The lower court’s decision involves two issues of major significance for Michigan’s trust and estates jurisprudence. The trial court’s decision also is clearly wrong and will cause Diane material injustice.

Here, the trial court failed to engage in the proper legal analysis and allowed claims, which are plainly barred by the statute of limitations, to survive because it did not like EPIC’s abbreviated statutory limitations period and did not want to apply it. If the trial court had
properly analyzed and applied the statute, Diane, as Personal Representative and Trustee, would be out of this case. In short, for Diane, as Personal Representative and Trustee, this motion is case dispositive. If this application is denied, Diane will be required to incur significant attorneys’ fees and legal costs litigating claims that the court of appeals likely will determine were barred when Diane eventually gets her appeal as of right. But, by then, the damage will be done. Further, if this Court denies leave, other potential claimants (i.e., other holders of Notes issued by Giffin Mortgage) may be incentivized to bring untimely claims against the Trust and Estate simply because there might be a factual issue as to whether they were known creditors, even though, undeniably, David owed them nothing at the time of his death. This Court can prevent such “gotcha” litigation by granting leave and applying the statute according to its plain meaning.

I. Relevant EPIC provisions.

Under EPIC, a trustee of a trust or a personal representative of an estate is required to publish and serve notice to creditors of such trust or estate’s decedent. See MCL 700.3801 (personal representative); MCL 700.7608 (trustee). Specifically, a personal representative shall publish a notice “notifying estate creditors to present their claims within 4 months after the date of the notice’s publication or be forever barred.” MCL 700.3801(1). In addition, a personal representative “shall also send . . . a copy of the notice or a similar notice to each estate creditor whom the personal representative knows at the time of publication or during the 4 months following publication.” Id. If no probate estate has been opened, a trustee “shall publish and serve a notice to creditors in the same manner, with the same duties, and with the same
protection for the trustee and the attorney for the trustee as described in section 3801 for a personal representative.” MCL 700.7608.6

Once notice is published for claimants and personally served on known creditors, EPIC provides a relatively short window for claimants or creditors to present their claims against the estate or trust. Specifically, MCL 700.3803(1) provides, in relevant part:

A claim against a decedent’s estate that arose before the decedent’s death, including a claim of this state or a subdivision of this state, whether due or to become due, absolute or contingent, liquidated or unliquidated, or based on contract, tort, or another legal basis, if not barred earlier by another statute of limitations or nonclaim statute, is barred against the estate, the personal representative, the decedent’s heirs and devisees, and nonprobate transferees of the decedent unless presented within 1 of the following time limits:

(a) If notice is given in compliance with section 3801 or 7608, within 4 months after the date of the publication of notice to creditors, except that a claim barred by a statute at the decedent’s domicile before the publication for claims in this state is also barred in this state.

(b) For a creditor known to the personal representative at the time of publication or during the 4 months following publication, within 1 month after the subsequent sending of notice or 4 months after the date of the publication of notice to creditors, whichever is later.

Thus, pursuant to these provisions, EPIC establishes the type of notice required to be given to (1) known creditors, and (2) all other potential claimants of trusts and estates. And it further establishes the time limitation for those known creditors and all other potential claimants to present their claims upon the trusts and estates. The template for the notice required and the corresponding time limits can be summarized in chart form with the following:

---

6 Diane was not required to republish this notice when she subsequently opened the probate estate. MCL 700.3801(1) requires a personal representative to publish a notice to creditors "[u]nless notice has already been given." Accordingly, because Diane published the notice as a trustee under MCL 700.7608, the statute of limitations applies equally to Faupel’s claims against David’s estate and trust.
In short, “known creditors” must present notice of their claims within one month after being personally served with notice or within four months of the date of publication of notice to the unknown creditors, whichever is later. All other persons with claims against trusts and estates are required to present notice of their claims within four months after the notice’s publication.

Stated differently, EPIC sets forth a two-step analysis for determining the appropriate statute of limitations. First, a court must determine whether a person qualifies as a “creditor” under Column I. If a person is not a “creditor,” the statute of limitations in Column II, Row B automatically applies. But if a person does qualify as a creditor, the court must next determine whether he or she is a “a creditor known to the personal representative at the time of publication” under Column I. MCL 700.3803(1)(b). “Known creditors” are subject to the statute of limitations in Column I, Row B, whereas all other persons with claims (including unknown creditors) are subject to the statute of limitations in Column II, Row B.

II. Because Faupel does not qualify as a “creditor,” her claims are time-barred due to her failure to present such claims by March 3, 2017.

Faupel does not dispute and cannot dispute any of the following material facts:

- David died on September 19, 2016;
- On his date of death, David did not owe any debt to Faupel;
Diane published the notice to creditors on November 3, 2016;
The four-month period for presentation of claims against the Trust (per MCL 700.3803) expired on March 3, 2017; and
Faupel did not present her claim to Diane within this four-month period.

Thus, if "creditor" means a person to whom a debt is currently owed, then there can be no factual dispute that Faupel was not a "creditor" of David at his death. If Faupel was not a "creditor," then she was not entitled to be served with a personal notice of the opportunity to present claims against the Trust. Faupel was only entitled to receive notice through publication, and she was required to present her claim within four months after publication. She did not do so.

Because Faupel was not a "creditor" under MCL 700.3803(1)(b), her claims fell within Notice Table’s Column II and Rows A & B and thus were barred when the four-month period for providing notice of claims expired. It is axiomatic that this Court must interpret the statute’s meaning by ascertaining and giving effect to the intent of the Legislature. People v Koonce, 466 Mich 515, 518; 648 NW2d 153 (2002). Based on the ordinary meaning of "creditor" and the context in which the term is used in EPIC, it is plain that the Legislature intended for the term "creditor" to refer to an individual who is owed money by the decedent, not simply a person with a potential claim against an estate.

"The words of a statute are the most reliable indicator of the Legislature’s intent and should be interpreted according to their ordinary meaning and the context within which they are used in the statute." People v Smith, 496 Mich 133, 138; 852 NW2d 127 (2014). EPIC does not define the term "creditor," so this Court may look to dictionary definitions to determine the term’s ordinary meaning. People v Stone, 463 Mich 558, 563; 621 NW2d 702 (2001) ("This Court may consult dictionaries to discern the meaning of statutorily undefined terms."). Dictionaries define creditor in the same way: as "[o]ne to whom a debt is owed." Black’s Law
Dictionary (10th ed, 2014); see also Merriam-Webster Dictionary (2017) ("one to whom a debt is owed"); Shorter Oxford English Dictionary (6th ed, 2007) ("a person to whom a debt is owing"). According to the plain language of the statute and the ordinary meaning of "creditor," then, a person qualifies as a creditor under MCL 700.3803(1)(b) only if he or she is owed money by the decedent at the time of his or her death.

The context in which this term is used further supports this conclusion. "When considering the correct interpretation, the statute must be read as a whole." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012). Elsewhere in EPIC, the Legislature plainly distinguishes between a "creditor" and a person with a claim against the estate. Specifically, MCL 700.1105(c) states in relevant part: "‘Interested person’ or ‘person interested in an estate’ includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual . . . ." (emphases added). If "creditor" meant the same thing as a person with a claim against the estate, the Legislature would not have distinguished between these two terms in the same statute. *United States Fid & Guar Co v Mich Catastrophic Claims Ass’n*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings."); 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 46:6, p 252 ("[T]he use of different terms within similar statutes generally implies that different meanings were intended."). It follows, then, that the Legislature intended "creditor" to mean something different from a person with a claim against the estate or trust. Indeed, if creditor meant the same thing as claimant, the Legislature would not have needed to use the term "creditor" in MCL 700.3801 or differentiate
between claimants and unknown creditors in MCL 700.3803(1). It could simply have used the terms “claim” and “claimant.”

Consequently, the Legislature’s intent is obvious: the statute of limitations set forth in MCL 700.3803(1)(b) applies only to known creditors—i.e., persons owed money by the decedent at the time of death and known to the personal representative at the time of the notice’s publication—whereas the statute of limitations set forth in subsection (a) applies to all other persons with potential claims against the estate (including unknown creditors).

The trial court rejected this conclusion because of its policy concerns that this statute of limitations period was too short. It stated: “I am not convinced that that is a—I am not convinced that the restrictions with regards to (C)(7) and the limitations of—in this case the four months—is the appropriate resolution of that matter.” (10/4/2017 Hr’g Tr 25.) But, of course, that is not a proper reason for disregarding the plain terms of the statute. See Chelsea Inv Grp LLC v Chelsea, 288 Mich App 239, 258; 792 NW2d 781 (2010) (“If the meaning of the language is plain and unambiguous, then we must apply the statute as written and not substitute our own policy preferences for those of the Legislature.”) And, as discussed above, one of the stated statutory ends of EPIC is to effect the speedy administration of trusts and estates after a decedent’s death.

7 Consistent with this interpretation, the Court of Appeals has on two prior occasions, albeit in unpublished decisions, determined that to qualify as a “creditor” under EPIC, a person cannot simply have a claim against a decedent, but rather, must be owed money at the time of the decedent’s death. See In re Estate of Donnelly, No. 331420, 2017 WL 1367100, at *2 (Mich Ct App, Apr 13, 2017) (distinguishing between a “creditor” and “person that has a right or cause of action” against the estate); Potter v Devine, No. 308878, 2013 WL 3107498, at *5 (Mich Ct App, June 20, 2013) (relying on the Random House Webster’s College Dictionary (1997) definition of “creditor” as “a person or firm to whom money is due,” this Court held that because decedent “did not owe plaintiff money at the time of his death, [plaintiff] cannot be properly characterized as a creditor”). The lack of a published decision on this point is all the more reason this Court should grant this application. The State needs a uniform definition of creditor under EPIC to bind all courts.
passes away. See MCL 700.1201. Thus, the trial court disregarded not only the clear language of EPIC's statute of limitations provision but also the clear statutory language as to EPIC's purpose.

By allowing its policy preferences to trump the Legislature's intent, the trial court failed to recognize the classes into which the Legislature divided potential claims against trusts and estates—known creditors and all other potential claimants—and focused entirely on whether Diane knew of Faupel's potential claim against the estate. But the trial court had a duty to first determine what was meant by "creditor." Indeed, statutory interpretation is a question of law for the court; it is not an issue that can be decided by the finder of fact. Mich Ed Ass'n v Sec'y of State, 489 Mich 194, 201; 801 NW2d 35 (2011). Thus, by failing to address this threshold question and instead submitting to the finder of fact the question of whether Diane knew of Faupel's potential claim, the trial court erred.

This error involves an issue of major significance for Michigan's jurisprudence. The question of who constitutes a creditor under EPIC is a recurring and important one. How the term "creditor" is construed frequently opens or closes the door to litigation in the trusts and estates context. Thus, by granting this application, this Court can offer clear guidance on an important issue seen daily by Michigan courts.

This error will also substantially harm Diane unless it is corrected. It is undisputed that David did not owe Faupel any money at the time of his death; therefore, there was no question of material fact that she was not a "creditor" under MCL 700.3803(1)(b). To be sure, under the terms of the consent order, Note holders were going to be given the opportunity to choose whether to rescind or extend the Giffin Mortgage Notes. However, the consent order provided that David and Giffin Mortgage both denied any wrongdoing or liability. Moreover, as a result
of David’s death, the offer to rescind the Notes was never served on any Note holders, so the Note holders were never able to rescind the Notes and David never became liable on any rescinded Notes. And importantly, the September 9, 2016 consent order was expressly superseded and replaced by the March 2, 2017 consent order. In other words, if David had lived, Faupel *might* have become David’s creditor, assuming she elected to rescind the Notes. However, because David died and did not become liable on the Notes before his death, David did not owe any money to Faupel when he died on September 9, 2016.

Thus, there is no question that Faupel is not a “creditor” as that term is used in EPIC. And because Faupel does not qualify as a “creditor” under MCL 700.3803(1)(b), she was required to provide notice of her claims against David’s estate and trust by March 3, 2017 under MCL 700.3803(1)(a). Because she failed to do so, her claims are time-barred. Any other outcome would seriously undermine EPIC’s purpose, which is to “promote a speedy and efficient system for liquidating a decedent’s estate and making distribution to the decedent’s successors,” MCL 700.1201(c), by allowing any *potential* claimants to bring untimely claims against the trust and estate simply because there might be a factual issue as to whether their existence was known. The trial court thus improperly denied Diane’s motion for summary disposition on this basis. For this reason, this Court should grant Diane’s Application for Leave to Appeal, or in the alternative, remand to the Court of Appeals as on leave granted.

**III. The trial court adopted the wrong test for determining a “known” creditor.**

As discussed above, the Legislature intended for “creditor” to mean someone who is owed money at the time of the decedent’s death. But even if this Court disagrees and holds that Faupel could somehow be characterized as a “creditor,” summary disposition was still warranted
because the record is devoid of any evidence that she is a “known” creditor under MCL 700.3803(1)(b). Consequently, Diane was not required to serve personal notice on Faupel pursuant to MCL 700.3801(1)(b), and Faupel’s claims are still barred by the four-month statute of limitations in MCL 700.3803(1)(a). By concluding otherwise, the trial court undermined the meaning of “known creditor.” This is the second issue of major jurisprudential significance.

EPIC defines a “known creditor” as follows:

[T]he personal representative knows a creditor of the decedent if the personal representative has actual notice of the creditor or the creditor’s existence is reasonably ascertainable by the personal representative based on an investigation of the decedent’s available records for the 2 years immediately preceding death and mail following death. [MCL 700.3801(1).]8

The Legislature drafted the creditor notice provisions of MCL 700.3801 and MCL 700.7608 to require a trustee or personal representative to serve a notice only upon a “creditor” who is “known” to the trustee or personal representative. The Legislature was cognizant of the fact that decedents’ trusts and estates are most often administered by a lay person family member serving as trustee or personal representative (perhaps for the first time). Identifying each “creditor” of the decedent—i.e., each person who is owed money by the decedent—is a relatively straightforward and objective standard, within the abilities of a trustee or personal representative who may be an inexperienced layperson. In contrast, identifying every person in the world who has grounds to bring a potential legal claim against the decedent would involve performing complex legal and factual analyses. That task would be beyond the abilities of the

---

8 The court of appeals construed the “reasonably ascertainable” provision in In re Estate of Zyla, No. 281355, 2009 WL 1361715 (Mich Ct App, May 14, 2009). In that case, the court of appeals held that a personal representative or trustee is not required to conduct a “thorough investigation” or provide “expansive notice” to reasonably ascertain a known creditor’s existence. Id. at *2. The Court also held that a person does not qualify as a “known creditor” merely because he or she might have a potential claim against the estate. Id.
average trustee or personal representative, which is almost certainly why the Legislature did not require service of notice upon every "known person with a potential claim."

Here, Diane fulfilled her duties as trustee by investigating David's available records for the two years preceding his death, as well as David's mail received following his death. (Ex B, Giffin Aff ¶ 23.) Diane signed an affidavit acknowledging that after conducting this review, she did not have actual notice that Faupel was a creditor of David's. (Id. ¶ 20.) Nor did this review provide Diane with any reason to believe that Faupel was a creditor, or even had a potential claim against the estate. (Id. ¶ 24.) Indeed, even if Diane was aware of the Giffin Mortgage Notes and the consent order, because David denied any liability in connection with the Notes and because the Notes were never rescinded by any of the Note holders, Diane could not possibly have known that Faupel had claims against the trust or the estate. It would be onerous and inequitable to require Diane, a non-lawyer, to research and ascertain whether the State's cease and desist order or its consent order with David and Giffin Mortgage or provided Faupel with any basis for a potential claim against David's trust or estate. Such requirements would seriously undermine EPIC's goal of "promot[ing] a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201(c). Indeed, for a creditor to be known, his or her status must be readily ascertainable. Any other definition of known would erode EPIC's purpose. Yet, this is the very definition effectively adopted by the trial court.

Thus, even if this Court disagrees that "creditor" means a person to whom a debt is owed rather than simply a person with a potential claim against the estate, this Court should grant leave to appeal to give clear guidance on what constitutes a "known creditor." Here, Faupel was not a "known creditor" and her claims were barred by the statute of limitations, and the trial court's
decision to deny summary disposition was improper. Diane’s Application for Leave to Appeal should be therefore be granted or, in the alternative, this Court should remand to the Court of Appeals as on leave granted.

CONCLUSION AND REQUESTED RELIEF

The word “creditor” as used in MCL 700.3803(1)(b) plainly means one to whom money is owed, and not merely someone with a potential claim against the decedent. This conclusion is obvious from the plain meaning of the term and the context in which it is used. Even if this Court disagrees, Faupel’s status as a “creditor” was not reasonably ascertainable by Diane, and the Legislature did not intend to hold trustees or personal representatives to any standard more onerous standard than “reasonably ascertainable.” In either case, the limitations period in MCL 700.3803(1)(a) bars Faupel’s claims against David’s estate and trust.

By failing to properly interpret and apply the term “creditor” as used in MCL 700.3803(1)(b), the trial court undermined the stated purpose of EPIC, and, ultimately, neglected its duty to resolve legal questions at the summary-disposition stage. The trial court compounded its error by effectively adopting the wrong definition of “known” creditor. The trial court’s errors involve legal principles of major significance on Michigan’s trusts and estates jurisprudence. Its errors also will cause Diane substantial harm. Without this Court’s intervention, she will have to defend claims that should have been dismissed as untimely. The dismissal of these claims would spell the end of the case for Diane as personal representative and trustee. Further, allowing the trial court’s erroneous decision to stand will give trial courts incentives to apply their policy preferences over a statute’s plain language. This Court should intervene and offer uniformity and clarity.
Accordingly, for these reasons and those set forth above, this Court should grant Diane’s Application for Leave to Appeal or, alternatively, should remand to the Court of Appeals as on leave granted. Respectfully submitted,

Respectfully submitted,

Dated: May 22, 2018

WARNER NORCROSS & JUDD LLP

By Conor B. Dugan
David L.J.M. Skidmore (P58794)
Conor B. Dugan (P66901)
Attorneys for Defendant-Appellant
Diane K. Giffin, Individually, as
Trustee of the David R. Giffin Trust,
and as Personal Representative of the
Estate of David R. Giffin, Deceased
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503-2487
616-752-2000
conor.dugan@wnj.com
Order

May 16, 2018

156689

In re CONSERVATORSHIP OF RHEA BRODY.

_________________________________________

MARY LYNEIS, as Conservator for RHEA BRODY,  
     Appellee,

v                                                                                      SC: 156689

ROBERT D. BRODY,  
     Appellant,

and

JAY BRODY,  
     Interested Party,

and

GERALD BRODY and CATHY B. DEUTCHMAN,  
     Interested Parties-Appellees.

_________________________________________

On order of the Court, the application for leave to appeal the September 19, 2017 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

We further note that the briefs filed by the parties and the amicus discuss three sentences that were included in the Court of Appeals September 19, 2017 slip opinion but are not included in the advance sheets version of the opinion, which was released after the parties and amicus filed their briefs in this Court. The slip opinion stated: “As Rhea’s husband, Robert was an individual entitled to priority consideration. However, Robert was not entitled to consideration unless the probate court considered an independent fiduciary and found him or her unsuitable. Lyneis, as trustee and independent fiduciary, had statutory priority over Robert, despite Robert’s marriage to Rhea. MCL 700.5409(1).” These sentences are omitted from the advance sheets version of the Court of Appeals opinion, and are therefore not part of that court’s final published opinion.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 16, 2018
June 8, 2018

156670 & (87)(90)

*In re RHEA BRODY LIVING TRUST,*

_________________________________________
ROBERT BRODY,
  Intervenor-Appellant,

v

CATHY B. DEUTCHMAN,
  Petitioner-Appellee,

and

MICHAEL BARTON, Special Fiduciary,
  Intervenor,

and

JAY BRODY,
  Intervenor-Appellant.

_________________________________________

On order of the Court, the motions to file a reply brief are GRANTED. The application for leave to appeal the September 12, 2017 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Section II of the Court of Appeals opinion, and we REMAND this case to the Court of Appeals for reconsideration of its standing analysis. On remand, the Court of Appeals should consider whether the terms “child” and “beneficiary” in MCL 700.1105 are modified by the phrase “and any other person that has a property right in or claim against a trust estate.” If so, then the Court of Appeals shall consider whether Cathy Deutchman is an “interested person” under this reading of the statute. The Court of Appeals may also consider the arguments made in this Court by the Probate and Estate Planning Section of the State Bar of Michigan, including that Cathy Deutchman has standing in light of MCR 5.125(C)(33)(g) and MCL 700.7603(2) and is a present (not contingent) beneficiary of the trust. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.
MEMO

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: Andrew W. Mayoras
Subject: ADR Summit Report (Court Rules, Forms, and Proceedings Committee)
Date: June 7, 2018

On behalf of the Section, I attended the May 11, 2018 ADR Summit and was asked to submit a report about the Summit to the Section.

The Summit was convened to develop and prioritize recommendations for the Michigan Supreme Court and the Michigan State Court Administrative Office regarding suggested changes to the Michigan Court Rules for Alternative Dispute Resolution, with a particular focus on mediation and case evaluation. The Summit was convened following a study commissioned by the Michigan Supreme Court and SCAO regarding the use of case evaluation and mediation to resolve civil cases in Michigan circuit courts, with an analysis of the effectiveness of both proceedings.

The Summit Members were provided with a copy of the study report. The link for the pdf for this report for all those are interested can be found here:


One of the topics discussed at the Summit was mandatory mediation, which is a concept that has been championed recently by the ADR Section. Throughout the Summit and my discussions with ADR Section Members who were involved in pursuing the legislative push for mandatory mediation, it is my understanding that the ADR Section has now decided to pull back from their efforts, both because of resistance they received from the State Bar but also in hopes that the ADR Summit itself would lead to changes that may accomplish the same or similar objectives. So as of now, the mandatory mediation proposal has been sidelined. If it does become re-introduced, the ADR section would welcome the input and participation of the Probate Section.

In terms of the Summit itself, it consisted of a very interesting series of brainstorming exercises to help develop and refine ideas to improve both mediation and case evaluation in the Michigan court system. While the efforts were primarily focused on circuit courts, they could be applied to probate proceedings in the future as well.

While the Summit led to many interesting ideas being introduced and developed, nothing concrete was proposed. Those in charge of the Summit indicated that a survey would be circulated to all Summit Members with a compilation of the various ideas, so that the members could vote and
prioritize the suggestions, which would then be submitted to the Supreme Court and SCAO for consideration.

It will be interesting to see if any of the ideas progress past the brainstorming stage and actually lead to concrete changes to the Michigan Court Rules. It appears that if any such changes are to be proposed in a concrete fashion, it will take some time to do so and only after a comment period.

AWM/sap
To: Probate and Estate Planning Council Members
From: Melisa M. W. Mysliwiec
RE: Committee Report
Date: June 8, 2018

1. Draft HB to amend MCL 720.220

Representative Runestad requested our feedback on 04919’17 Draft 1 before it's introduced. The draft bill, attached, would amend MCL 720.220 to require a public administrator serving as a personal representative to resign if it subsequently appears that the decedent left a surviving spouse of next of kin entitled to a distributive share.

In response, we submitted the following response, also attached, to Becky Bechler to forward to Representative Runestad’s office:

The Court Rules, Forms, and Procedures Committee has reviewed this Draft of the HB to modify MCL 720.220. Our initial reaction is that this change is entirely unnecessary. If a spouse or heir is located that the PA didn’t originally know about, that spouse or heir has the authority to petition for appointment as personal representative under EPIC already because they’d have priority for appointment over the PA. We believe that adding statutory language that isn’t necessary confuses people and muddies things, which is why we don’t think this is needed at all. However, if the sponsor intends to move forward anyway, we’d suggest simplifying the statute by saying something like:

If the state public administrator or a county public administrator is appointed personal representative of a decedent’s estate under this act, and it subsequently appears or is discovered that the decedent left a surviving spouse or heir entitled to a distributive share of the estate, then upon petition of an interested person, the appointed public administrator shall not benefit from any priority under EPIC by reason of his or her initial appointment.

2. State Court Administrative Office ADR Summit:

Andy Mayoras attended the ADR Summit convened by the State Court Administrative Office on May 11 as a representative of the Section. His report is attached.

Respectfully submitted,

Melisa M. W. Mysliwiec
Melisa Mysliwiec

From: Melisa Mysliwiec
Sent: Tuesday, May 22, 2018 10:42 AM
To: 'Becky Bechler'
Cc: Marlaine Teahan
Subject: Draft 1 of HB re: MCL 720.220

Becky,

The Court Rules, Forms, and Procedures Committee has reviewed this Draft of the HB to modify MCL 720.220. Our initial reaction is that this change is entirely unnecessary. If a spouse or heir is located that the PA didn’t originally know about, that spouse or heir has the authority to petition for appointment as personal representative under EPIC already because they’d have priority for appointment over the PA. We believe that adding statutory language that isn’t necessary confuses people and muddies things, which is why we don’t think this is needed at all. However, if the sponsor intends to move forward anyway, we’d suggest simplifying the statute by saying something like:

If the state public administrator or a county public administrator is appointed personal representative of a decedent’s estate under this act, and it subsequently appears or is discovered that the decedent left a surviving spouse or heir entitled to a distributive share of the estate, then upon petition of an interested person, the appointed public administrator shall not benefit from any priority under EPIC by reason of his or her initial appointment.

If you have questions, please let me know. Thank you,

Melisa

Melisa M. W. Mysliwiec | Attorney | Fraser Trebilcock
p: 616.301.0800 f: 517.492.0887
a: 125 Ottawa Avenue NW, Suite 153, Grand Rapids, MI 49503
w: fraserlawfirm.com

This e-mail and any attachments ("this message") are CONFIDENTIAL and may be protected by one or more legal privileges. This message is intended solely for the use of the addressee identified above. If you are not the intended recipient, any use, disclosure, copying or distribution of this message is UNAUTHORIZED.
A bill to amend 1947 PA 194, entitled

"An act to provide for the administration of the estates of deceased persons in certain cases; to provide for the appointment of a public administrator for the state; to provide for the appointment of county public administrators; and to define and prescribe their powers and duties,"

by amending section 20 (MCL 720.220).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 20. (1) Whenever IF the state public administrator or a county public administrator shall be IS appointed fiduciary PERSONAL REPRESENTATIVE of any A DECEDENT'S estate under the provisions of this act, and it shall subsequently appear APPEARS or be IS discovered that the deceased DECEDENT left surviving a husband, wife, SURVIVING SPOUSE or next of kin entitled to a distributive share in SUCH OF THE estate, and SUCH THE heir or next of kin shall, IS, under the provisions of the general probate laws
of this state, be competent and willing to administer THE 
estate, the state public administrator or THE county public
administrator shall nevertheless continue as fiduciary of such
estate. When such fiduciary shall be RESIGN AS PERSONAL
REPRESENTATIVE BY GIVING NOTICE AS REQUIRED UNDER SECTION 3610(3)
OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, 1998 PA 386, MCL
700.3610. THE RESIGNATION IS SUBJECT TO THE SURVIVING SPOUSE OR
NEXT OF KIN APPLYING OR PETITIONING FOR APPOINTMENT AS SUCCESSOR
PERSONAL REPRESENTATIVE AS PROVIDED IN SECTION 3610(3) OF THE
ESTATES AND PROTECTIVE INDIVIDUALS CODE, 1998 PA 386, MCL 700.3610.

(2) IF the state public administrator IS THE PERSONAL
REPRESENTATIVE OF A DECEDENT'S ESTATE AND THE RESIDUE OF THE ESTATE
IS NOT ASSIGNED TO THIS STATE AS AN ESCHEATED ESTATE, the judge of
probate COURT, before making the order assigning the residue in any
such OF THE estate, and wherein the residue is not assigned to the
state of Michigan as an escheated estate, shall first allow and
order paid to the said state public administrator out of the corpus
PRINCIPAL of said THE estate all of the expenses incurred by such
fiduciary THE PERSONAL REPRESENTATIVE in administering said THE
estate, together with such other fees, compensation, and allowances
as are authorized by the general probate laws of this state and by
order of such THE probate judge COURT to be paid to such fiduciary
out of such PERSONAL REPRESENTATIVE FROM THE estate. All monies so
paid to the THE state public administrator shall be forthwith
delivered by him DELIVER ALL MONEY PAID UNDER THIS SUBSECTION to
the state treasurer, who in turn, shall place such money to the
credit of BE CREDITED the general fund of the state.
Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.
MEMO

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: Andrew W. Mayoras
Subject: ADR Summit Report (Court Rules, Forms, and Proceedings Committee)
Date: June 7, 2018

On behalf of the Section, I attended the May 11, 2018 ADR Summit and was asked to submit a report about the Summit to the Section.

The Summit was convened to develop and prioritize recommendations for the Michigan Supreme Court and the Michigan State Court Administrative Office regarding suggested changes to the Michigan Court Rules for Alternative Dispute Resolution, with a particular focus on mediation and case evaluation. The Summit was convened following a study commissioned by the Michigan Supreme Court and SCAO regarding the use of case evaluation and mediation to resolve civil cases in Michigan circuit courts, with an analysis of the effectiveness of both proceedings.

The Summit Members were provided with a copy of the study report. The link for the pdf for this report for all those are interested can be found here:


One of the topics discussed at the Summit was mandatory mediation, which is a concept that has been championed recently by the ADR Section. Throughout the Summit and my discussions with ADR Section Members who were involved in pursuing the legislative push for mandatory mediation, it is my understanding that the ADR Section has now decided to pull back from their efforts, both because of resistance they received from the State Bar but also in hopes that the ADR Summit itself would lead to changes that may accomplish the same or similar objectives. So as of now, the mandatory mediation proposal has been sidelined. If it does become re-introduced, the ADR section would welcome the input and participation of the Probate Section.

In terms of the Summit itself, it consisted of a very interesting series of brainstorming exercises to help develop and refine ideas to improve both mediation and case evaluation in the Michigan court system. While the efforts were primarily focused on circuit courts, they could be applied to probate proceedings in the future as well.

While the Summit led to many interesting ideas being introduced and developed, nothing concrete was proposed. Those in charge of the Summit indicated that a survey would be circulated to all Summit Members with a compilation of the various ideas, so that the members could vote and
prioritize the suggestions, which would then be submitted to the Supreme Court and SCAO for consideration.

It will be interesting to see if any of the ideas progress past the brainstorming stage and actually lead to concrete changes to the Michigan Court Rules. It appears that if any such changes are to be proposed in a concrete fashion, it will take some time to do so and only after a comment period.

AWM/sap
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan

From: James P. Spica

Re: Divided and Directed Trusteeships ad Hoc Committee (DDTC) Chair’s Report

Date: June 8, 2018

The DDTC legislative proposal was introduced in the Michigan Legislature on Thursday, June 7, 2018, in the form of House Bills (HBs) 6129, 6130, and 6131. HB 6129 (sponsored by Rep. Klint Kesto) comprises the divided trusteeships proposal, which adds new section 7703b to the Michigan Trust Code (MTC); HB 6130 (sponsored by Rep. Julie Calley) comprises the bulk of the Uniform Directed Trust Act (UDTA), which is imported into the MTC as new section 7703a; and HB 6131 (sponsored by Rep. Brandt Iden) contains ancillary amendments to the MTC required for the MTC’s absorption of the UDTA. All three bills have been referred to the House Committee on Law and Justice.

JPS
DETOIT 40411-1 1416471v8
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Uniform Fiduciary Income and Principal Act ad Hoc Committee Chair’s Report
Date: June 8, 2018

The committee had its organizational meeting on Wednesday, May 30, 2018, at which it was decided that the committee will meet every other Wednesday (beginning June 13) during the summer (from 1:00 to 2:30 PM) to review the draft of the Uniform Fiduciary Income and Principal Act that is expected to be approved at the Uniform Law Commission’s Annual Meeting in July.

JPS
DEtroit 40411-1 1453452v3
MEMORANDUM

TO: Council of the Probate and Estate Planning Section of the State Bar of Michigan
FROM: Marguerite Munson Lentz
DATE: June 8, 2018
SUBJECT: Council Save the Dates

Save the Dates

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
<th>Time</th>
<th>Venue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Meeting of the Probate and Estate Planning</td>
<td>September 8, 2018</td>
<td>9:00 am</td>
<td>University Club, 3435 Forest Road Lansing, Michigan 48910</td>
</tr>
<tr>
<td>Section</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chair’s Dinner</td>
<td>October 12, 2018</td>
<td>6:00 pm</td>
<td>The Village Club, 190 East Long Lake Road, Bloomfield Hills, MI 48304</td>
</tr>
<tr>
<td>October Council Meeting</td>
<td>October 13, 2018</td>
<td>9:00 am</td>
<td>Doubletree Inn (formerly the Kingsley Inn), 39475 Woodward Avenue, Bloomfield Hills, MI 48304</td>
</tr>
</tbody>
</table>

More details about the Chair’s Dinner and October meeting will follow.
HB 4021 - PROBATE, Guardians and Conservators, Allow guardianship petitions probate judges to schedule certain hearings before minor turns 18 years of age. (Kosowski, Robert (D), 01/12/17)
(Status: 01/18/2017 - bill electronically reproduced 01/12/2017)

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

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

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

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

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

HB 4410 PA 143 - PROBATE, Wills and Estates, Allow exempt property decedent to exclude adult child by written instrument. (Lucido, Peter J. (R), 03/23/17)
(Status: 05/10/2018 - assigned PA 143'18 with immediate effect)

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

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

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

HB 4589 - OCCUPATIONS, Securities, Require financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults. (Graves, Joseph (R), 05/04/17)
(Status: 05/09/2017 - bill electronically reproduced 05/04/2017)

HB 4684 - PROBATE, Guardians and Conservators, Allow limited guardianship to supervise access to incapacitated individuals relative. (Lucido, Peter J. (R), 05/31/17)
(Status: 06/06/2017 - bill electronically reproduced 05/31/2017)

HB 4686 - HOUSING, Affordable, Authorize local units to impose rent limitation for senior citizens and individuals with disabilities and provide for tax exemptions and specific tax. (Chang, Stephanie (D), 05/31/17)
HB 4751 - FAMILY LAW, Marriage and Divorce, Clarify enforceability of prenuptial agreements. (Kesto, Klint (R), 06/13/17)
(Status: 01/30/2018 - PLACED ON ORDER OF THIRD READING WITH SUBSTITUTE S-1)

HB 4752 PA 33 - PROBATE, Wills and Estates, Revise fee ratio and reporting requirement and remove sunset (Kesto, Klint (R), 06/08/17)
(Status: 02/22/2018 - assigned PA 33'18 with immediate effect)

HB 4754 - COURTS, Jurisdiction, Authorize inter-circuit concurrent jurisdiction plan. (Barrett, Tom (R), 06/13/17)
(Status: 06/14/2017 - referred to Committee on Judiciary)

HB 4754 - COURTS, Jurisdiction, Authorize inter-circuit concurrent jurisdiction plan. (Barrett, Tom (R), 06/13/17)
(Status: 06/14/2017 - referred to Committee on Judiciary)

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

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

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

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

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

HB 4905 PA 133 - PROPERTY TAX, Principal Residence Exemption, Modify principal residence exemption for individual residing in nursing home or assisted living facility (Lucido, Peter J. (R), 09/07/17)
(Status: 05/03/2018 - assigned PA 133'18 with immediate effect)

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

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

HB 4994 - SENIOR CITIZENS, Crimes, Provide for public relations campaign to prevent elder abuse. (Kosowski, Robert L. (D), 09/20/17)
(Status: 09/26/2017 - bill electronically reproduced 09/20/2017)

HB 4995 - SENIOR CITIZENS, Crimes, Require neglect and mistreatment of senior citizens the department of health and human services to collect and analyze data. (Kosowski, Robert L. (D), 09/20/17)
(Status: 09/20/2017 - introduced by Representative Robert Kosowski)

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

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

HB 5073 - CIVIL PROCEDURE, Alternate Dispute resolution, Revise procedures for mediation and case evaluation of civil actions. (Kesto, Klint (R), 10/10/17)
(Status: 10/17/2017 - reported with recommendation for referral to Committee on Law and Justice)
HB 5075 - PROBATE, Patient Advocates, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patient's best interest. (Cole, Triston (R), 10/10/17)  
(Status: 10/11/2017 - bill electronically reproduced 10/10/2017)

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

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

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

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

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

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

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

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

HB 5546 - PROPERTY TAX, Assessments, Allow transfer of ownership from a general or limited partnership to certain individuals to be exempt from uncapping taxes after transfer. (Inman, Larry (R), 02/13/18)  
(Status: 02/14/2018 - bill electronically reproduced 02/13/2018)

HB 5813 - LAW ENFORCEMENT, Investigations, Require use of standard investigation form involving the physical or financial abuse of a vulnerable adult or elder adult. (Runestad, Jim (R), 04/17/18)  
(Status: 06/07/2018 - reported with recommendation without amendment)

SB 0039 - PROBATE, Other, Revise exceptions to definition of surviving spouse in relation to a funeral representative. (Jones, Rick (R), 01/18/17)  
(Status: 04/18/2017 - ASSIGNED PA 0020'17 WITH IMMEDIATE EFFECT)

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

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

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

SB 0345 - OCCUPATIONS, Securities, Require certain record keeping and posting of information for financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults (Jones, Rick (R), 05/02/17)  
(Status: 05/02/2017 - INTRODUCED BY SENATOR STEVEN BIEDA)
SB 0346 - OCCUPATIONS, Securities, Require financial advisors to report suspected cases of financial abuse of elderly or other vulnerable adults
(Ananich, Jim (D), 05/02/17)
(Status: 02/01/2018 - HOUSE SUBSTITUTE H-2 CONCURRED IN)

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

SB 0525 - COURTS, Reorganization, Modify reorganization of courts and number of judgeships (Jones, Rick (R), 09/06/17)
(Status: 01/30/2018 - ASSIGNED PA 06'18 WITH IMMEDIATE EFFECT)

SB 0540 - PROPERTY TAX, Assessments, Modify definition of transfer of ownership and certain excluded transfers. (Schuitmaker, Tonya (R), 09/07/17)
(Status: 09/07/2017 - INTRODUCED BY SENATOR TONYA SCHUITMAKER)

SB 0597 - HEALTH, Other, Establish procedure to withhold or withdraw a life-sustaining treatment to require physician and hospital to obtain the consent of certain persons. (Proos, John (R), 09/28/17)
(Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS)

SB 0598 - PROBATE, Patient Advocates, Provide for court determination of whether a patient advocate is acting within his or her authority or in a patient's best interest (Proos, John (R), 09/28/17)
(Status: 09/28/2017 - INTRODUCED BY SENATOR JOHN PROOS)

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

SB 0713 - PROBATE, Guardians and Conservators, Provide for visitation procedures for isolated adults. (Marleau, Jim (R), 12/06/17)
(Status: 06/07/2018 - REPORTED BY COMMITTEE OF THE WHOLE FAVORABLY WITH SUBSTITUTE S-2)

SB 0731 - PROPERTY, Recording, Change requirement that an instrument be filed to recorded. (Zorn, Dale (R), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0732 - PROPERTY, Recording, Modify recording waiver of mortgage priority. (Zorn, Dale (R), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0733 - LAND USE, Other, Modify certified survey map requirements. (Zorn, Dale (R), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0734 - PROPERTY, Recording, Require trust to be recorded separately under conveyance of a trust. (Conyers, Ian (D), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0735 - PROPERTY, Recording, Require death certificate for joint tenant to be recorded separately from deed. (Knezek, David (D), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0736 - PROPERTY, Recording, Remove recording requirements from exception for wills. (Hertel Jr., Curtis (D), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0737 - PROPERTY, Recording, Require recording with register of deeds an English translation document to be included. (Hertel Jr., Curtis (D), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0738 - PROPERTY, Recording, Provide certificates of correction for recording fee. (Proos, John (R), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0739 - PROPERTY, Condemnation, Repeal prima facie evidence of ownership in fourth class cities. (Proos, John (R), 12/13/17)
(Status: 05/29/2018 - ORDERED ENROLLED)

SB 0784 - HEALTH, Emergency Response, Allow a parent or guardian to execute do-not-resuscitate order on behalf of a minor child. (Warren, Rebekah
SB 0785 - EDUCATION, School Districts, Establish filing, storage, and notice rules regarding do-not-resuscitate orders and revocations of do-not-resuscitate orders. (Jones, Rick (R), 01/25/18)
(Status: 01/25/2018 - INTRODUCED BY SENATOR RICK JONES)

SB 0786 - PROBATE, Guardians and Conservators, Authorize a guardian of a minor to execute a do-not-resuscitate order. (Warren, Rebekah (D), 01/25/18)
(Status: 06/07/2018 - REPORTED BY COMMITTEE OF THE WHOLE FAVORABLY WITH SUBSTITUTE S-1)

SB 0827 - EDUCATION, School Districts, Create filing, storage and notice rules regarding do-not-resuscitate orders and comfort or care plans and limitation liability for providing a comfort or care measure. (Jones, Rick (R), 02/15/18)
(Status: 06/07/2018 - REPORTED BY COMMITTEE OF THE WHOLE FAVORABLY WITH SUBSTITUTE S-1)

SB 0905 - PROBATE, Trusts, Allow trust property treated as property held as tenants by the entirety under certain circumstances. (Jones, Rick (R), 03/15/18)
(Status: 03/15/2018 - INTRODUCED BY SENATOR RICK JONES)
The Commonly-Controlled Entity Exemption under MCL 211.27a(7)(m) after TRJ & E Properties, LLC v. City of Lansing

On April 17, 2018, the Court of Appeals published its Opinion in TRJ & E Properties, LLC v. City of Lansing, 2008 WL 1832093, in which the Court affirmed the Michigan Tax Tribunal’s grant of Summary Disposition in favor of TRJ&E, holding that the transfer to Petitioner from TRJ Properties, Inc. in 2015 was not a transfer of ownership under MCL 211.27a because the conveyance was exempt as a transfer between commonly controlled entities pursuant to MCL 211.27a(7)(m).

The Opinion provides precedential authority interpreting MCL 211.27a(7)(m) in a manner which is very different from our prior understanding of the exemption (based on STC guidelines) and which may afford clients with commercial, industrial and business real estate, as well as those with family vacation properties, numerous planning opportunities to avoid the “uncapping” of taxable values.

Background

In 2015, TRJ Properties, Inc. (TRJ, Inc.) transferred its interest in an apartment building to TRJ & E Properties, LLC (TRJ&E). TRJ, Inc. was owned by Hamid Farida (40%) and three of his sons: Tony, Ricky, and Jeffery (20% each). TRJ&E is owned by Tony, Ricky, Jeffery and their other brother, Eric, with each owning a 25% interest. The City of Lansing (Lansing) uncapped the taxable value of property for the 2016 tax year under MCL 211.27a(3). TRJ&E petitioned the Tax Tribunal to reverse the uncapping on the basis that the entities were commonly controlled, and therefore the transfer was exempt under MCL 211.27a(7)(m).

In the Tax Tribunal, Lansing and TRJ&E each moved for Summary Disposition. Lansing argued that RAB 1989-48, issued by the STC, which defined “commonly-controlled” to require identical ownership or the same five (or fewer) people owning 80% of both entities. TRJ&E argued that both entities were controlled by a majority of their shareholders or members, respectively, and such entities were both commonly-controlled by Tony, Rick, and Jeffery.

The Tax Tribunal found in favor of the Petitioner, and granted TRJ&E’s Motion for Summary Disposition. Lansing appealed.

Holding

The Court of Appeals expressly rejected the application of RAB 1989-48 to define common control; it also declined to adopt a specific percentage as the standard for MCL 211.27a(7)(m). Instead the Court of Appeals adopted the definition of control found else where in the General Property Tax Act (GPTA) under MCL 211.9o(7):

(b) “Control”, “controlled by”, and “under common control with” mean the possession of the power to direct or cause the direction of the management and policies of a related entity, directly or indirectly, whether derived from a management position, official office, or corporate office held by an individual; by an ownership interest, beneficial interest, or equitable interest; or by contractual agreement or other similar arrangement....
The Court adopted this definition to provide consistency throughout the GPTA and found it appropriate because, “it recognizes that different percentages of control may be necessary to direct the management of different corporate entities,” and because it, “focuses on the actual control of the business on the basis of its corporate structure.”

**Planning Opportunities**

The Court’s decision in *TRJ&E v. Lansing*, has the potential to provide numerous planning opportunities for clients, particularly in the areas of family business and business succession planning, as well as in the estate and gift tax planning and the family cottage/vacation property areas. Indeed, the definition adopted by the Court of Appeals is so broad and flexible that some opportunities afforded may border on abuse. Here are a few planning examples:

1: As was apparently the case in *TRJ&E v. Lansing*, a family should be able to use the commonly controlled exemption to avoid an “uncapping” on the transfer of partial interests to other family members where control of the entity remains within the family. This may also provide an attractive alternative (and a way to avoid) the 50% interest limitation provided in MCL 211.27a(6)(h) – See #3 below. This would also work in the context of business succession plans even when new partners/members are unrelated to the existing partner/members.

2: A wealthy client engaging in a taxable gift or estate freeze transaction should be able to transfer property from one LLC to another in which the transferor maintains only a small interest, provided the smaller interest maintains “control” of the new LLC. For example, The sole-owner of an LLC transfers property to a new LLC, in which he has maintains a 1% voting interest, and in which family members (or a trust) holds a 99% non-voting interest.

3: A family owning a vacation property through an LLC will generally face a “transfer of ownership at least once a generation (due to the transfer of more than 50% rule of MCL 211.27a(6)(h). However, a transfer to a commonly-controlled LLC would appear to reset the calculation of what constitutes, in the aggregate, a transfer of more than a 50% interest. And that is so, a family could avoid an uncapping by periodically transferring the property to a new LLC with similar ownership (and a virtually identical operating agreement) to avoid uncapping as younger generations become members of the LLC.

- Tangential Question: Is the State Tax Commission’s interpretation of MCL 211.27a(6)(h) that the cumulative transfer of more than 50% interests of an LLC is a transfer of ownership an invalid additional requirement (See page 11 of Oct. 2017 Guidelines); or is it a reasonable interpretation when viewed with MCL.27a(6)(h)(ii) which eliminates the cumulative transfer rule for corporations which are summer resort and park associations?

**Areas for Potential Abuse:**

1: Consider a commercial property owned by an LLC, with equal members A, B, and C, which desires to sell the property to unrelated parties D, E, and F. A complete transfer of the property to an LLC owned by DEF may be possible without an uncapping by using a series of transactions with successive LLCs (“ABC”, “BCD”, “CDE”, and “DEF”). Each transfer from ABC to BCD to CDE, and finally to DEF would appear to be a transfer between commonly-controlled entities as defined by MCL 211.27a(7)(m) and *TRJ&E v. Lansing*. 

Probate and Estate Planning Council
June 16, 2018         (2018 - 06 - a)
2: To make the facts more practical, let’s take a more straight forward, and perhaps more realistic situation. A owns LLC that owns commercial property, which she wants to sell to B. The following transactions occur:

- A sells to B a 49% interest in LLC, this should not trigger a transfer of ownership under MCL 211.27a(6)(h) because less than 50% interest in the LLC has changed hands;
- A and B establish LLC2 with A owning 51% and B owning 49%;
- LLC transfers the property to LLC2. LLC and LLC2 are both controlled by A, exempt under MCL 211.27a(7)(m);
- A sells 2% in LLC2 to B, so the ownership of LLC2 is now A with 49% and B with 51%. This should not be an uncapping because less than 50% has been transferred ownership under MCL 211.27a(6)(h).
- B establishes LLC3 as its sole member.
- LLC2 transfers the real estate to LLC3. Both are controlled by B, and should be exempt under MCL 211.27a(7)(m).

These above transactions would seem to avoid uncapping under MCL 211.27a, but would open the door to the avoidance of uncapping in nearly any commercial real estate transaction, provided the parties involved had sufficient patience and trust in each other.

I do not believe any Michigan court has ever applied the “step-transaction doctrine” to transfers of real estate when considering whether a transfer was exempt from uncapping. However, situations such as the above may lead to a Court considering such application.

Conclusion

The Court of Appeals decision in TRJ & E Properties, LLC v. City of Lansing is a major win for property owners, appears to provide a number of very powerful planning opportunities for clients. In fact, the decision could pave the way for strategies that utilize a series of exempt transfers to avoid an “uncapping” and convey property indirectly in a manner that would clearly be a transfer of ownership under MCL 211.27a if done directly. Whether the courts could, or would, step-in and apply the “step-transaction doctrine” or similar rationale to prevent what they may consider abuse is an open question.

Prepared by: Tim White Parker Harvey PLC, Traverse City twhite@parkerharvey.com or (231) 486-4512