

Ballard, Christopher A.

From: Nathan Piwowarski <nathan@mwplegal.com>
Sent: Friday, May 26, 2017 10:35 AM
To: 'Geoffrey R. Vernon'; 'Georgette David'; 'Henry Lee'; 'Howard Collens'; 'James P. Spica'; 'Kurt A. Olson'; 'Marguerite Lentz'; 'Dan Hilker'; 'Michael Lichterman'; 'Robert Tiplady'; 'Sueann Mitchell'; 'Susan M. Allan'; 'David Lucas'; Klynwood@BLLHlaw.com
Cc: 'James Steward'; 'Josh Ard'; schalgian@mielderlaw.com; konop@millercafield.com; rmills@marcouxallen.com; attorneygoetsch@gmail.com; 'George Bearup'; Lindsey Hall; 'Ryan P Bourjaily'; 'Marlaine Teahan'; 'Amy Morrissey'
Subject: LDDC 5/26/17 conference call follow-up items

All,

Thank you for your time and contributions today. Here are my notes from our call:

- Review CPI recommendations memo. **Dan Hilker has generously agreed to put together the memo the MPJA.**
- Standby guardian follow-up work from Kathy. **Deferred.**
- Apostille fix. **Deferred.**
- Attorney-in-fact's ability to settle a trust. **Deferred.**
- Statutory rate of interest for general bequests **We agreed that the threshold for needing judicial permission to fund UTMA account should be increased to \$50,000. Many thanks to Marlaine for reminding us to include this in our recommended package of reforms.**
- Petition and order of assignment for trust funding cleanup. **Deferred.**
- **MCR 5.125(C)(32). We agreed that this subsection should be amended to add any potentially-affected holder of a power of appointment to the list of persons entitled to notice. We also agreed that this subsection should add a reference to reformations as well as modifications.**
- **7411(3). Marlaine Teahan suggests that we harmonize the notice requirements specified here and in MCR 5.125(C)(32). In particular, she suggests adding qualified trust beneficiaries to the list of those entitled to notice under sub(3). The MTC Commentary regarding sub(3) is:**
 - Subsection (3) was modified by 2010 PA 325. As originally enacted, subsection (3) was phrased in the disjunctive, and notice might not have been given to a settlor because the person giving notice had a reasonable basis to believe the settlor was incapacitated, even though that belief was inaccurate or not correct. Although MCR 5.125(C)(32)(b) addressed this problem by requiring notice to the settlor and the representative, this provision was modified by 2010 PA 325 to change from the disjunctive to the conjunctive and to add a requirement of notice to the settlor in all circumstances and not leave the matter to the court rule.
 - **As I reviewed my notes, I do not believe that we adequately discussed this topic. I plan on adding it to a future agenda.**
- **MCR 5.125(C)(32) and (33). The committee agreed with Marlaine's suggestion that the Rules and Court Forms Committee take a look at sub(32) in two respects:**
 - **This subrule should be broadened to apply to reformation proceedings, as well as modification and termination proceedings.**
 - **This subrule should require notice to the holder of a power of appointment affected by the relief requested (just as is required by sub(33)).**
- **7410(2). Per Marlaine's suggestion, we discussed amending this subsection to maintain its inclusivity but also make it more precise. I've taken some organizational liberties here, but I would like to use this as the baseline for our discussions next Friday:**
 - **(2) A trustee or beneficiary may commence any of the following:**
 - **(a) A proceeding to confirm the termination of a trust under subsection (1)-~~or~~;**

To: Michigan Probate Judges Association

**From: Legislative Development and Drafting Committee
of the Probate and Estate Planning Council**

Re: Jajuga/Exempt Property Legislation

Over the last two years, our committee and the Council of the Probate and Estate Planning Section of the State Bar have deliberated over a proposal for remedial legislation concerning the exempt property allowance provision, as applied in the *Chelenyak v Veith (In re Estate of Jajuga)*, 312 Mich App 706 (2015).

In 2016, the Council of the Probate and Estate Planning Section took the position that MCL 700.2404 should be amended so that a testator has the ability to exclude any child—whether a minor or adult—from receiving the exempt property allowance. This, we believed, best balanced the public policy considerations of honoring testamentary intent and preventing impoverishment of families. In particular, we identified the need to exclude children for special needs planning purposes.

We understand that there is some concern regarding the disinheritance of minor children. We acknowledge that the proposal, as taken by the Council in 2016, would allow an individual to disinherit a minor child out of spite to the child or the child's parent. But it also would allow a parent to exclude a minor child for justifiable reasons:

- The child is separately provided for in a trust or other transfer by reason of death;
- A gift to the child would compromise current public benefits; or,
- A gift to the child would compromise anticipated public benefits upon the attainment of age 18 (a common concern when a developmental disability guardianship is anticipated).

In our judgment, at least, these noble reasons for exclusion are likely to far outnumber the ignoble ones.

Over the last half year, our committee has attempted to address concerns concerning excluding minor children, while at the same time allowing individuals to exclude them for appropriate reasons. A copy of the most recent version is attached to this memo.

As you can see, it has been exceedingly difficult to create workable carveouts, while still allowing for the “noble” exclusion of a minor. We identified two potential fact patterns where there is a compelling reason to allow for a minor’s exclusion.

First, the proposal would allow for the exclusion of a minor who “has or will receive property from the decedent by other than testate or intestate succession upon the decedent’s death, and that property’s value equals or exceeds what the child would have otherwise received under this section”, a nod to the spousal election rule’s consideration of nontestamentary transfers. This carveout, in our estimation, creates an inordinate amount of work (to verify the nature of the outside transfers) for what is a rather modest amount of money.

Second, this proposal would allow the exclusion of the minor child if “the child receives government benefits, and a distribution to the child under this section would diminish the child’s eligibility for the benefits.” We find this exclusion is overly narrow: it does not address *anticipated* SSI and Medicaid eligibility issues for children with special needs (because of asset-deeming rules, a developmentally-disabled person typically cannot apply for these essential benefits until attaining age 18).

As a general matter, these carveouts give rise to all manner of practical problems for the personal representative. It is unclear how one would handle questions of timing (e.g., do these exclusions only apply to minors if the circumstances are true on the testator’s date of death? Or does a change in circumstances change the exclusion’s application? And if so, for how long?). It is also unclear what the personal representative’s duty of inquiry would be. Or the parties’ burdens of proof as to whether the exclusions apply.

Given these difficulties, we ask that your association consider supporting (or taking no position as to) a proposal that allows for the exclusion of any child. Thank you for your consideration.

To: Michigan Probate Judges Association

**From: Legislative Development and Drafting Committee
of the Probate and Estate Planning Council**

Re: Adjustment to monetary thresholds in EPIC and related statutes

Summary: Monetary thresholds for formal proceedings under EPIC and related statutes should be raised, thereby increasing the use of less formal and less costly procedures. These changes will generate significant cost savings for individuals with modest assets. The changes will also be set to adjust automatically with the consumer price index under MCL 700.1210.

The Legislative Development and Drafting Committee of the Probate and Estate Planning Council deliberated over a proposal for legislation concerning statutes which provide monetary thresholds for certain probate proceedings. Some thresholds are corrected automatically by the cost-of-living-adjustments contained in MCL 700.1210; however many others are not adjusted annually and have not kept pace with the consumer price index.

In Michigan, the formal transfer of relatively small assets often requires the engagement of a lawyer, a court hearing, and significant delay. A pertinent example is MCL 700.3918(3) which requires the appointment of a conservator or a protective order when the Personal Representative or Trustee wishes to transfer more than \$5,000 for the benefit of an individual under legal disability, even when these transfers are made to a parent or sibling who is caring for the individual. The economics of making formal appointments in such cases can impose unnecessary financial hardship on individuals of modest means.

The legislature limited informal transfers in an attempt to balance competing needs: cost-efficient procedures and safeguards against fraud. Fraud protections are necessary and should not be eliminated; however, the financial burden on recipients of these transfers should be reduced. The committee suggests the adjustments identified in the table below. The committee also recommends that each change be tied to the consumer price index through MCL 700.1210, so that future adjustments would be automatic.

MCL Section	Description	Prior Amount	Proposed Amount
700.3605	Threshold for demands that the PR be bonded	2,500	25,000
700.3916	Unclaimed assets held by the PR (higher amounts must be deposited with the county treasurer)	250	1,000
700.3917	Service Charge by the county treasurer for holding unclaimed assets	1,000	1,500
700.3918	Distributions to persons under a disability without appointment of a conservator or protective order	5,000	25,000
700.5102	Payment or delivery regarding a minor (e.g. a distribution to the parent or guardian)	5,000	25,000
700.3981	Release of cash and wearing apparel to a decedent's family members (e.g. funeral homes, police, hospitals, etc).	500	1,000
257.236	Vehicle transfer by the Secretary of State	60,000	100,000
324.80312	Watercraft transfer by the Secretary of State	100,000	200,000
554.530	Payments by a PR or Trustee to a UTMA/UGMA account for a minor	10,000	50,000

The following statutes are already adjusted in accordance with the consumer price index. However, Michigan residents would benefit from higher thresholds for formal estate proceedings. The trend in other states is for higher monetary thresholds. For example, Arizona has a small estate transfer procedure under A.R.S. § 14-3971 which allows up to \$100,000 to be transferred without formal proceedings. The committee suggests that the following adjustments should be made:

MCL Section	Description	Amount as Currently Adjusted	Proposed Amount
700.3982	Small estate procedure (petitions and orders of assignment)	22,000	100,000
700.3983	Collection of personalty by sworn statement	22,000	50,000

Section 3982 is statutorily tied to section 5410, which requires a conservator to be bonded. Under the committee's proposal, a conservator will not be *required* to be bonded for an amount less than \$100,000; however, section 5410 does not limit judicial discretion, and the Court may require bond for any conservatorship estate.

The committee asks that the Michigan Probate Judges Association provide input with regard to the above proposals. The Committee would be glad to discuss these issues with the association or a representative at any time. Thank you for your consideration.

- **(b) A proceeding** to approve or disapprove a proposed modification or termination under sections 7411 to **7414, and 7416;**
 - **(c) A proceeding to reform a trust under section 7415;**
 - **(d) A proceeding for the division or consolidation of trusts** ~~or trust combination or division~~ under section 7417 ~~may be commenced by a trustee or beneficiary.~~
- **(3)** A proceeding to modify a charitable trust under section 7413 may be commenced by the persons with the power to enforce the terms of a charitable trust pursuant to section 7405.
- **3904, Interest rates on general bequests. This topic is courtesy of Amy Morrissey. MCL 700.3904 provides that a general pecuniary devise bears interest at the legal rate beginning one year after the first appointment of a personal representative until payment. MCL 700.3904. According to the Reporter's Commentary to Section 3904, this is 5 percent, the rate specified in MCL 438.31. The Reporter's Comment also suggests that 3904 applies to trusts per UPIA 555.601(c). The committee agreed that this topic bears additional discussion because of the mismatch between the statutory interest rate and the current economic environment. Jim Spica generously agreed to take a look at this and report back to the group.**

Cheers,

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