Probate and Estate Planning Section

Agenda

Saturday, September 21, 2013
8:30 a.m.

University Club of Michigan State University
Lansing, Michigan
PROBATE AND ESTATE PLANNING SECTION
OF THE
STATE BAR OF MICHIGAN

NOTICE OF MEETINGS

ANNUAL MEETING OF THE MEMBERS OF THE PROBATE AND ESTATE PLANNING SECTION,

MEETING OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION

-AND-

MEETING OF THE SECTION'S COMMITTEE ON SPECIAL PROJECTS

September 21, 2013

University Club of Michigan State University
3435 Forest Road
Lansing, Michigan

The above stated meetings of the Section will be held at the University Club of Michigan State University, on Saturday, September 21, 2013, at the above address. The Section’s Committee on Special Projects meeting will begin at 8:30 a.m., followed at 10:15 a.m. by the Annual Meeting of the Members of the Section, to be followed immediately thereafter by a meeting of the Council of the Section.

Shaheen I. Imami
Secretary

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COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE
STATE BAR OF MICHIGAN

Schedule and Location of Future Meetings
All at University Club, Lansing, MI, except October meetings
Meetings Begin at 9:00 a.m. unless otherwise noted on Meeting Notice

The following is a list of 2013-2014 meeting dates

September 21, 2013
(Annual Meeting Precedes Council Meeting)

October 12, 2013
Townsend Hotel, Birmingham, Michigan

November 16, 2013

December 14, 2013

January 18, 2014

February 15, 2014

March 15, 2014

April 19, 2014

June 7, 2014

September 6, 2014 (Annual Meeting)
ANNUAL MEETING OF THE MEMBERS
OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE
STATE BAR OF MICHIGAN

September 21, 2013
Lansing, Michigan

Agenda

I. Call to Order
II. Approval of Minutes of September 8, 2012, Annual Meeting of the Section
III. Chairperson’s Report – Mark K. Harder
IV. Treasurer Report – James B. Steward
V. Elections of Council Members and Officers
VI. Other Business
VII. Adjournment
JOINT ANNUAL MEETING OF THE SECTION MEMBERS
AND MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE
STATE BAR OF MICHIGAN

September 8, 2012
University Club
Lansing, Michigan

Minutes

1. Call to Order

The Chair of the Section, George Gregory called the Joint Annual Meeting of the Section Members and Meeting of the Council to order at 10:25 a.m.

2. Attendance

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

George Gregory, Chair             Hon. David Murkowski
Mark Harder, Chair Elect           Hon. Darlene O’Brien
Tom Sweeney, Vice Chair           Pat Ouellette
Amy Morrissey, Secretary          Rebecca Schnelz
Shaheen Imami, Treasurer          Jim Spica
Susan Allan                        Jim Steward
Chris Ballard                      Robert Taylor
George Bearup                      Marlaine Teahan
Constance Brigman                  Nancy Welber
David Kerr

B. The following officers and members of the Council were absent with excuse:

Josh Ard                           Robert Tiplady
Marguerite Lentz                   Ellen Sugrue-Hyman

C. The following officers and members were absent without excuse:

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

Phillip E. Harter                   Michael McClory
Nancy Little                        Douglas A. Mielock
E. Others in Attendance

J.V. Anderton       Rick Mills  
Rebecca Bechler     Jeanne Murphy 
Lynn Chard          Melisa M. W. Mysliwiec 
Rhonda M. Clark-Kreuer Lorraine New 
Dan Cogan           Neal Nusholtz 
Nina Dodge Abrams   Kurt A. Olson  
Keven DuComb        Linda Pohly  
Kathleen Goetsch    Shari L. Rolland Phillips 
Jill Goodell        Richard J. Siriani 
Carol M. Hogan      David Skidmore 
Fred Hoops          Amy Tripp 
Michael Lichterman  Serene Zeni 
David P. Lucas 

3. Annual Meeting Business

A. Minutes of the Annual Meeting

Minutes of the Annual Meeting of the Section of September 17, 2011 were distributed prior to the meeting. The following corrections are necessary: The names of Lorraine New and Hon. Darlene O’Brien were corrected, and Marlaine Teahan was added as being present at the meeting. Upon motion by George Gregory with support from David Kerr, the revised minutes were approved.

B. Chairperson’s Report

George Gregory presented award plaques for Ellen Sugrue-Hyman and Robert Tiplady, who were both absent from the meeting, in recognition of their years of service to the Council. Mr. Gregory also presented Mark Harder with a gavel as incoming Chairperson of the Section.

Mr. Gregory noted that Mr. Harder will be assigning committees and committee chairpersons. If any Section member would like to serve on a committee, he or she should make his or her preferences known to Mark Harder; one does not need to be a Council member to serve on a committee. The Section is looking for volunteers to serve on committees.

Mr. Harder commented on his observations about committees. He reported that he has already asked Council members if they wish to chair certain committees. He has also asked each committee chairperson to provide him with a list of such committee’s members. Some committees have mission statements and others do not. It is important that each committee have a defined scope of committee work.

Mr. Harder gave Mr. Gregory a plaque for his service as Chairperson.
C. Election of Council Officers and Members

On behalf of the Nominating Committee, Nancy Little recommended the following nominees for appointment to Council and for election as officers for the upcoming year commencing at the conclusion of the 2012 Annual Meeting and continuing until the conclusion of the 2013 Annual Meeting:

Chairperson: Mark K. Harder
Chairperson Elect: Thomas F. Sweeney
Vice-Chairperson: Amy N. Morrissey
Secretary: Shaheen I. Imami
Treasurer: James B. Steward

Nominees for a second three-year term as members of the Council, commencing at the conclusion of the 2012 Annual meeting and continuing until the conclusion of the 2015 Annual Meeting are as follows:

W. Josh Ard
Patricia M. Ouellette
James P. Spica

Nominees for a first three-year term as members of the Council, commencing at the conclusion of the 2012 Annual meeting and continuing until the conclusion of the 2015 Annual Meeting are as follows:

Rhonda M. Clark-Kreuer
David P. Lucas
David L. Skidmore

Following presentation of the nominees by the Chair of the Nominations Committee, the Section Chair called for a vote of the Section. Amy Morrissey supported the motion. The above nominees were elected with the consent of all of the members of the Section present.

4. Internal Governance

A. Minutes of June 9, 2012 Meeting of the Council

Minutes of the June 9, 2012, meeting of the Council had been previously distributed for the meeting. Marlaine Teahan noted that the following correction is necessary: In Part 3.E.3 of the minutes, reference to PA 451 should be changed to
PA 141. Upon motion by Hon. Darlene O’Brien with support from Hon. David Murkowski, the revised minutes were approved.

B. Treasurer Report

Shaheen Imami reported that the financial reports for May, June, and July, 2012 were previously distributed with the Agenda for the meeting (Attachment 1 in the meeting materials circulated prior to the meeting). Mr. Imami indicated that the fund balance as of July 31, 2012 was approximately $226,571.

C. Chairperson’s Report

George Gregory reported on correspondence of July 17, 2012 from Hon. Michael J. Anderegg, Probate Judge of Marquette County, to Attorney General Bill Schuette concerning the manner in which Public administrators are being appointed. The letter is attached as an exhibit to the minutes.

Mr. Gregory next discussed revisions proposed by the Master Lawyers Section to Rule 2 of the State Bar Rules of Michigan concerning procedures to identify an Inventory Attorney in the event of a lawyer’s disability, death, or disappearance. (Attachment 2 in the meeting materials circulated prior to the meeting). Attorney Linda Pohly commented on the proposed rules. Ms. Pohly noted that one of her concerns is that the proposal does not directly address the interest of the deceased, disabled or disappeared lawyer. She also noted that the proposed Rule 2 would give jurisdiction over such matters to the circuit court rather than probate court, in which she proposed that such matters should be heard. Ms. Pohly’s full comments are attached as an exhibit to these minutes. It was noted by others that there are materials on ICLE website as to how to handle related issues and that the State Bar of Michigan also has a process and materials concerning handling of the client files for a deceased or disabled lawyer.

Finally, Mr. Gregory gave the Chairperson’s Annual Report, noting many accomplishments of the Section during the fiscal year, such as the Section’s response to changes to powers of attorney statutes and the introduction of legislation concerning Federal estate taxes, foreign guardianships, decanting, and Uniform Principal and Income Act, among others. Mr. Gregory noted that the Annual Probate & Estate Planning Institute was successful. He mentioned the benefits of our SCAO liaison and the expanded and improved online services to members, such as the new listserv platform and the Section resources that are on the Section’s new webpage developed in conjunction with ICLE, to which the EPIC Q&A has migrated. He urged Section Members to take a look.

D. Standing Committee Reports

1. Budget – Mr. Imami reported that the Section fund balance is sound; therefore, there will be no increase in dues for the coming year. He noted that the Section may want to allocate funds to a dedicated account for Amicus briefs.
2. Long Range Planning – Mark Harder reminded all present that the October Council meeting will be held at the Haworth Inn in Holland on October 27. He suggested that those needing hotels make reservations soon.

3. Awards – Doug Mielock reported that the committee is working on Michael Irish Award for the coming year. In addition, work is almost complete on the compilation of a historical list of all past recipients of the Michael Irish Award.

4. Committee on Special Projects – Jim Steward reported on two matters:

   CSP discussed some of the draft proposed rules for specialization and certification and that discussion will continue at future meetings. The Section is moving in the direction of determining logistics and financing of the process to determine whether or not it is financially feasible to move this project forward.

   A number of concerns about the proposed rules were noted as follows:
   - Most states have mandatory CLE and Michigan does not. The Section needs to consider the infrastructure necessary to implement a mandatory CLE program and qualify CLE providers as accredited. It was suggested that the rules should allow the CLE provider to certify that its program meets the criteria.
   - Fees will be higher for implementation where numbers of participants are low.
   - The Bar will also want to make sure that methods and testing are nondiscriminatory and set up so clearly that the Bar is not litigating matters.
   - There was significant discussion about virtual offices and the extent of physical presence in the state as a requirement, as well as length of practice in general (i.e., part time versus full time).
   - A significant concern shared by many was that the rules do not provide for an appeal from Board hearing and need a process.
   - There was a comment that the proposed “duty to inform” rule in 6.2 (and 6.1.1 j) should refer to the acts that may be subject to the Board determination. Felony should not be automatic bar; it should be related to character & fitness to practice.
   - The specialization committee is adjunct to the Board’s discretion. There is no direct tie from the Board’s discretion to the application procedures.

   Mr. Steward also reported that discussion ensued concerning the draft family consent statute, in particular the liability clause. Three proposals were set forth. The Council instructed the Guardianship and Conservatorship Committee to rework a proposal concerning provider liability that addressed both the standard of care of providers and reliance on the health care representative’s decision under the Act. Discussion will continue at the next CSP meeting.

5. Legislation - Marlaine Teahan reported on three items.

   She met with Rebecca Bechler of Public Affairs Associates to discuss the possibility of amendments to Sections 861 and 863 of the Revised Judicature Act relative to appeals from Probate Court in the event the Supreme Court determines that it does not have the authority to amend Michigan Court Rule 5.801.
Ms. Teahan has been appointed to a work group to work on forms for the Peace of Mind Registry.

Ms. Teahan reported that there are concerns with Senate Bills 1215-1218. The bills involve minor guardianships under the Estates and Protected Individuals Code. Judge Murkowski reported that the proposed legislation would remove a judge’s authority to remove neglect cases to EPIC guardianships which rarely happens, but the larger concern is that probate courts rely on the Department of Human Services (DHS) to perform home studies, prepare integration plans, and to supervise the integration of minors back into their home. DHS does not want this role but presently there is no other organization to do it. The Michigan Probate Judges Association has taken a position in opposition to these bills and has provided a position paper to Sen. Caswell, sponsor of the bills. The position is that DHS must service the children under an abuse or neglect petition. Our Section will take up discussion on a future agenda.

Rebecca Bechler reported that there is a short session in the Michigan Legislature before the end of this year. Some of our proposed legislation will not be taken up in that time frame, but House Bills 5154 and 5237 should be taken up this week.

Ms. Bechler reported that Senate Bills 539, 192 and 978 are in the Judiciary Committee and may be completed before the end of the year but the large number of referendums on the ballot in November could impact the legislative schedule.

6. Probate Institute – Ms. Morrissey reported that she has been working with Jeff Kirkey and Jeanne Murphy on a draft schedule; national speakers will include Jonathan Blattmachr and Robert Fleming. Materials should be made available in downloadable format for ipad users and others who want to download.

7. Section Journal – Nancy Little reported that she is working with the SBM to have a survey of Section Members to determine whether they want a hard copy or electronic copy of the Journal and then to code them appropriately. The survey will be performed electronically.

8. ListServ – Mr. Gregory reported that he is hopeful that the Committee can develop some recommendations on listserv behavior.

9. Ethics – David Kerr distributed Formal Opinion R-21 concerning Rule 1.15A on a lawyer’s obligations when acting as a fiduciary, particularly a trustee. His report is attached as an exhibit to the minutes.

10. Unauthorized Practice - Bob Taylor reported that the regional seminars held on August 1 concerning estate planning decisions went well; the SBM materials were wonderful and the seminars were generally well attended. David Kerr’s presentation had 88 participants. Mr. Gregory suggested that Mr. Taylor inform the SBM that there are attorneys who want to present at future seminars. None of the seminars were held in Clinton, Eaton, and Ingham counties because no senior group offered to sponsor.
11. Court Rules/Forms – Marlaine Teahan reported that ADM 2011-28 was issued on August 24, 2012. Rule 5.101 (C) was amended with grammatical changes.

Ms. Teahan also reported that the SCAO forms committee for Estates and Trusts met this week, with Ms. Teahan, Keven DuComb and Mike McClory participating. The Guardianship and Conservatorship work group (of which Connie Brigman, Michael McClory and Rebecca Schnelz are members) is coming up. Rebecca Schnelz and Michael McClory are involved in the Mental Health/Commitment work group. Ms. Teahan suggests that these meetings occur annually but should occur twice annually due to the need to make more timely changes. Mr. Harder will be sending a letter to SCAO recommending this change; it is possible that the Michigan Probate Judges Association and the Probate Registers Association will join in this letter (or will send their own).

E. Ad Hoc Committees

1. Updating Michigan Estate/Trust Law – Tom Sweeney reported that he had a call with Deb Minton of the Michigan Banker’s Association on repealing Michigan’s inheritance tax statute. There are approximately 56 sections of the law. The issue is that there are pre-1993 trusts in existence where determination of inheritance tax was deferred without interest due to non-vested beneficial interests; banks, as trustees of many of these trusts, have to keep track of beneficiaries. Susan Allan notes that it would not be easy to extricate the problematic sections of the statute in order to keep what might be useful in the future.

The Committee is also working on an asset protection proposal. National attorneys volunteered time to look at what the committee has developed and are tweaking it.

2. Insurance – Sen. Schuitmaker introduced Senate Bills 1102 and 1103, which address insurable interests.

3. TBE entireties property in trust – The committee has begun research and hopes to have a draft this fall.

4. Online Guidance for Non-Lawyers – Rebecca Schnelz reported that the Solutions on Self Help website is now active.

5. Decanting – Senate Bills 978, 979, 980 passed the Senate and are in the Judiciary.

6. Power of Attorney – It was noted that someone on the listserv raised the question whether an acceptance by an agent under a power of attorney is truly required because the statute says that failure of an agent to sign an acceptance does not affect the agent’s authority, but the issue is that without the signed acceptance, an institution has a valid reason for not accepting the power of attorney.

7. Transfer Tax – Lorraine New reported that a draft Form 706 is out; one interesting change is the ability to elect not to have portability pertain to that estate.
8. Guardianships, Conservatorships and End of Life – Connie Brigman reported that the guardians and DNR bills will not likely move this year.

Some comments were made on the Guardian Accountability and Senior Protection Act proposal which is a Federal proposal that would allow funds for the courts to provide background checks for guardian and conservator and to monitor courts to see if they are complying with procedure to have more limited guardianships. The funds would go to the judiciary who must coordinate with the state attorney general.

9. ICLE Community

Lynn Chard presented on the ICLE Community online. She noted that there are more than 480 unique users and lots of hits. ICLE partners currently have access to the Community, but it is not open to all Section members yet because there is currently no arrangement with the Section for that to occur. ICLE uses licensed software that it cannot modify. Cost was about $5000 to set up and $4500 quarterly to run; it is a big investment.

Jeanne Murphy gave a visual demonstration of the ICLE Community. She reviewed user profiles, which can reveal a user’s credentials and other data to be edited by the user. She also explored other areas of the Community such as blogs and discussions. ICLE partners open forums is where discussions are taking place.

There was discussion concerning the response time of blog postings and how discussion topics are sent to a user. It was noted that sometimes on the listserv, comments are stale because posters don’t promptly read and respond to a post. Hopefully, the Community will have a resolution to this.

F. Specialty Areas and Liaisons

1. Probate Registers - Mike McClory mentioned that there are non-Section members who want access to EPIC Q&A website.

2. Elder Law/Liaison to Elder Law Section - Amy Tripp reported that the Elder Law Conference is October 3-5 at Crystal Mountain Resort in Thompsonville.

3. Family Law/Liaison to Family Law Section - Pat Ouellette commented on a Florida law that terminates beneficiary designations and similar governing instruments in the event divorce. Michigan does not currently have this type of statute. Nancy Little, Meg Lentz, Pat Ouellette and certain members of the Family Law Section are looking at this issue.

4. Tax Section Liaison - Fred Hoops reported that the annual meeting of the Taxation Section is September 27 in Novi; see the website.

5. ADR - Nina Dodge Abrams introduced herself as our Section’s Liaison to the ADR Section. Shari Rolland Phillips gave a report on two significant initiatives in
Michigan: the Michigan Mediates Campaign (MM!C) and the Government Task Force. See the written report attached as an exhibit to the Minutes.

6. Other Business

Tom Sweeney reported that Council members should feel free to propose topics for the Council’s 2-year plan.

Nancy Welber reported that the Sixth Circuit Court of Appeals recently held that Michigan’s bankruptcy-specific exemption statute (MCL 600.5451) is constitutional.

G. Adjournment

There being no other business brought before the Council, Nancy Little moved to adjourn; Pat Ouellette supported the motion. The meeting was adjourned at 12:24 p.m.

Respectfully submitted,

Amy Morrissey
Secretary
Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips  
REPORT TO PROBATE & ESTATE PLANNING SECTION - September 8, 2012  

The ADR Section met on July 13, 2012, at the State Bar of Michigan Office in Lansing, MI.  

Two significant initiatives were discussed in detail at this meeting:  

1. The Michigan Mediates! Campaign (MMIC) – An initiative to educate the public on the use and effectiveness of alternative dispute resolution. MMIC has merged with the Dispute Resolution Education Resource (DRER) of Lansing in order to gain 501(c)(3) status for purposes of raising funds through grants and corporate/individual sponsorships.  
   a. A self-directed website is in process. There is no referral system for those who want mediation.  
   b. There is a mediation campaign to address ADR needs in the areas of: Medicaid, Medicare, Family Law, Education, and the general public.  
2. The Government Task Force – Task Force Members have reached out to the executive, legislative and judicial branches of government to educate them on the cost benefits and effectiveness of ADR. This initiative has been met with positive response.  

The Effective Policies and Practices (EPP) Action Team reported that the Elder Law Section has signaled its objection to proposed changes to the Revised Uniform Arbitration Act (RUAA). The Elder Law Section’s objection concerns the issue of contracts of adhesion in a nursing home setting. The ADR Section recommends no further changes to the language of the RUAA at this time.  

A liaison from the ADR Section to the Probate & Estate Planning Section was named:  
Nina Dodge Abrams  
1212 S. Washington Avenue  
Royal Oak, MI 48067  
(248) 546-0900  
ninadabrams@abramspc.co  

The ADR Section Annual Meeting will be held on Friday & Saturday, October 5 & 6, 2012 at Michigan State University College of Law, 368 Law College Bldg., East Lansing, MI 48824. Registration information is available through the State Bar of Michigan website.  

Respectfully submitted,  

[Signature]  
Sharri L. Rolland Phillips  
Liaison to ADR Section
At the January 15, 2011 council meeting, James H. LoPrete brought up the problem of "unintended circumstances" with MRPC 1.15A. The issue was if literally interpreted where attorneys were acting in a fiduciary capacity in a number of circumstances. Council chair Doug Chalgian appointed a committee of council members to be headed by Thomas Sweeney. Howard Linden, a public administrator and I were to be on the committee. The council members were Doug Mielock and Marlaine Teahan. Tom Sweeney sent a letter to the State Bar about our concerns. There seemed to be silence in response. Jim LoPrete then asked for a formal opinion about "real world" situations. So far as I know, there has been nothing back from the Supreme Court Justices. Attached is the formal opinion from

The Problem

Attorneys may serve as trustee of many trusts, including their own self-trusteed trust, their spouse's wife's trust, and trusts for the attorney's children and grandchildren. They may also serve as trustee for many clients and on the governing board of non-profit institutions and their place of worship where the attorney is also the lawyer for the entity. The rule provides:

1. They "shall deposit all funds held in trust in accordance with Rule 1.15". "Funds held in trust" - includes "funds held in any fiduciary capacity in connection with a representation". (Emphasis added)

That means if an attorney is the trustee selected by the attorney's client to administer a trust unless the attorney has as the attorney's lawyer someone other than the attorney or a person affiliated with the firm with which the attorney is affiliated, the attorney is subject to the rule.

2. "Lawyer" is defined as including any "organization with which a lawyer is professionally associated". (Emphasis added) That means that because the attorney is on the board of trustees of several non-profit corporations and the attorney's place of worship and the attorney represents those entities (whether paid or pro bono - the rule doesn't distinguish), that "organization" is subject to the rule regarding the investment of its "funds" because the rule makes it a "Lawyer" by definition and because the attorney is both a "fiduciary" and "represent" it as its lawyer.

Rule 1.15(d) requires "All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded". You then must look to Rule 1.15A for how to appropriately safeguard those funds.

Rule 1.15A(a)(2) requires that "Lawyers (i.e., those organizations where the attorney is a
fiduciary and their lawyer) shall clearly identify any other accounts in which funds are held in
trust as "trust" or "escrow" accounts, and lawyers must inform the depository institution in
writing that such other accounts are trust accounts for the purposes of this rule". (Emphasis
added).

3. Then Rule 1.15A(b) provides a lawyer may only deposit "lawyer trust accounts" with a
"financial institution" "approved by the State Bar of Michigan". Subsection (c) then requires
that "No trust account shall be maintained in any financial institution that has not been so
approved" (by State Bar of Michigan). (Emphasis added)

The rule, read as written, says whenever an attorney is an (a) a trustee or personal
representative of a trust or estate established by someone the attorney
represents; (b) the attorney represents herself/himself or the attorney’s firm represents the
attorney as the fiduciary; and (c) the attorney has any cash to invest, that either the attorney
or any trust, estate or the organization with which the attorney is affiliated are limited as to
investment options for "funds" (i.e., cash) to "financial institutions" having an "approved status" by
the State Bar.

Statutes and perhaps the common law rules pertaining to fiduciary duty might the be violated:
Prudent Investor Rule as part of EPIC, the Uniform Prudent Management of Institutional
Funds Act,
June 11, 2012

306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

DELIVERED BY FACSIMILE MACHINE
TO: (248) 232-8955
AND BY FIRST CLASS MAIL

James H. LoPrete
LoPrete & Lynceis, P.C.
Attorneys at Law
40950 Woodward Avenue
Suite 306
Bloomfield Hills, MI 48304-5128

Re: Formal Opinion R-21, dated June 8, 2012

Dear Mr. LoPrete:

Please find enclosed Formal Opinion R-21 pertaining to the ethical management of trust accounts. This opinion was adopted as a formal opinion by the State Bar of Michigan Board of Commissioners on Friday, June 8, upon the recommendation by both the Standing Committee on Professional Ethics and the Professional Standards Committee (a Board committee).

Sincerely,

Dawn M. Evans
Director of Professional Standards

DME:dc
Enclosure
MRPC 1.15A neither enlarges nor alters lawyers' obligations to safeguard client or third person funds expressed in MRPC 1.15. The obligations of MRPC 1.15 and MRPC 1.15A are triggered only when a lawyer represents a client and, in the course of discharging duties as a lawyer, receives funds or other property that do not belong to the lawyer.

A lawyer serving as a bankruptcy trustee, who has statutory duties as an officer of the court but does not represent a client; a lawyer appointed as a receiver, who derives powers from the court appointment and does not have a client-lawyer relationship with the person or entity whose assets are subject to the receivership; and a lawyer who serves in a fiduciary role, such as a personal representative or attorney-in-fact, in an individual capacity as, for example, a family member of the decedent or principal under a power of attorney and not as a result of being retained as a lawyer to serve in that role, are not subject to the obligations of MRPC 1.15 and MRPC 1.15A when handling funds that belong to the bankruptcy estate, receivership, or probate estate.

Lawyers may have obligations as fiduciaries that are defined by common law, statutes, legal documents, court rules, court orders, or some combination thereof. The requirements of MRPC 1.15 and MRPC 1.15A do not supersede any obligations a lawyer performs as a fiduciary, such as, for example, a trustee's power to invest and reinvest trust property in accordance with the "Michigan prudent investor rule."

MRPC 1.15(d) requires that "[a]ll client or third person funds" be deposited into an IOLTA or non-IOLTA account. "Client or third person funds" include unearned legal fees and unincurred expenses that have been paid in advance, funds in which a third person has an interest, and funds in which two or more persons (one of whom may be the lawyer) claim an undivided interest. When the funds received are unearned fees and unincurred costs or expenses, they must be held in trust until earned or expended.

When a lawyer receives all or any portion of a fixed or flat fee before the work has been completed and when there is no agreement between the client and lawyer regarding when the fixed or flat fee is earned or whether any portion may be disbursed to the lawyer prior to the conclusion of the representation, the entire amount received must be deposited into a client trust account and held in trust until completion of the agreed upon legal services.
A lawyer is not permitted to commingle the lawyer's funds with client or third person funds. When funds are received from a client or third person in a "lump sum" that represents a combination of earned funds or incurred expenses along with unearned funds or unincurred expenses, the entire sum must be placed in trust and then any earned funds or incurred expenses must be promptly withdrawn.

Upon receipt of client or third person funds, lawyers are obligated to determine whether the funds should be deposited into an IOLTA or a non-IOLTA account. An IOLTA account refers to a pooled interest- or dividend-bearing account at an eligible institution that includes only client or third person funds that cannot earn income for the client or third person, because the individual amounts are too small or held too briefly to earn income in excess of the costs incurred. A "non-IOLTA account" refers to an interest- or dividend-bearing account in a bank, savings and loan association, or credit union, which contains larger or longer term funds that can earn net income for the client. Lawyers must ascertain whether the client or third person funds can earn net income. If the funds will earn income for the client or third person in excess of the costs incurred to safeguard the funds while held by the lawyer, they must be deposited into a non-IOLTA account. If the funds will not earn income in excess of the costs incurred, they must be deposited into an IOLTA account. A lawyer's good-faith decision regarding the deposit or holding of trust funds in an IOLTA account is not reviewable by a disciplinary body. However, a lawyer must review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively into a non-IOLTA account.

Planning for an orderly transition in the event of sudden death or disability is important to assure that funds held in the lawyer's trust accounts are appropriately safeguarded in keeping with MRPC 1.15. Solo practitioners without another lawyer in-house to manage accounts should consider including the name of a successor attorney as an alternative signatory on trust accounts who can perform the safeguarding duties required by MRPC 1.15 in the event of sudden death or disability. The successor lawyer's service in this capacity does not require membership or employment in the solo practitioner's law firm.

References: MRPC 1.2; 1.5(a); 1.8(e); 1.15(a), (b), (c), (d), (e), (g), (h) and (j); 1.15A(a); 1.16(d); R-7; RI-10; RI-69; RI-92; RI-93; RI-107; RI-189; RI-330; Grievance Administrator v Cooper, 482 Mich 1079; 757 NW2d 867 (2008) rev'd Grievance Administrator v Cooper, Case No. 06-36-GA (Sep 17, 2007).

TEXT

Since the adoption of Michigan Rule of Professional Conduct ("MRPC") 1.15A, commonly known as the TAON\(^1\) Rule, questions have been raised about the scope of its coverage. In particular, many lawyers are seeking clarification about the extent to which the TAON Rule applies to circumstances other than the traditional lawyer-client representation, such as when a lawyer is serving as a court-appointed receiver, trustee, personal representative or conservator; acting as a trustee pursuant to a trust instrument or other fiduciary pursuant to a probate and estate instrument;

\(^1\) TAON is an acronym for "trust account overdraft notification." The Michigan Supreme Court adopted the TAON Rule on December 15, 2009, with an effective date of September 15, 2010. Michigan was the 42nd jurisdiction to adopt the Rule.
or functioning as a bankruptcy trustee in federal court. As lawyers have sought to understand the “notice” provisions of the TAON Rule regarding non-IOLTA1 accounts, it has become apparent that confusion exists about when the use of a non-IOLTA account is required. Also, many lawyers are uncertain about how to handle funds that represent an advance toward unearned fees, settlement funds, or funds that are not clearly earmarked when received by the lawyer.

As a starting point, it is important to note that MRPC 1.15A neither enlarges nor alters lawyers’ obligations to safeguard client or third person funds expressed in MRPC 1.15, which has been in existence since 1990. Both MRPC 1.15 and MRPC 1.15A contain language that gives direction about when each Rule’s obligations are triggered, as well as the scope of their coverage.

MRPC 1.15(d) provides:

A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer’s own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.

MRPC 1.15A(a) provides:

Scope. Lawyers who practice law in this jurisdiction shall deposit all funds held in trust in accordance with Rule 1.15. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.

Common to both Rules is the phrase “in connection with a representation.” Although the term “representation” is not defined in the Michigan Rules of Professional Conduct, MRPC 1.2, entitled “Scope of Representation,” describes lawyers’ duties to their clients. As the phrase “in connection with a representation” is used in the MRPC, a lawyer serves in a representative capacity when rendering legal services on behalf of a client. Consistent with this usage, the obligations of MRPC 1.15 and MRPC 1.15A are triggered only when a lawyer represents a client and, in the course of discharging duties as a lawyer, receives funds or other property that do not belong to the lawyer. A lawyer serving as a bankruptcy trustee has statutory duties as an officer of the court but does not represent a client. For this reason, the obligations of MRPC 1.15 and MRPC 1.15A do not pertain to funds received by bankruptcy trustees in discharge of their duties under the Bankruptcy Code.2

Similarly, lawyers who are appointed receivers derive their powers from the court appointment and do not have a client-lawyer relationship with the person or entity whose assets are subject to the receivership.3 Accordingly, the obligations of MRPC 1.15 and MRPC 1.15A do not

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1 IOLTA stands for “Interest on Lawyers Trust Accounts.”

2 The Committee notes that federal law imposes requirements upon bankruptcy trustees as officers of the court in the handling of funds of a bankruptcy estate that in some ways are not dissimilar from the requirements of MRPC 1.15 and MRPC 1.15A, but this fact is not the basis upon which the Committee concludes that the funds handled by bankruptcy trustees do not fall within the scope of the trust account rules.

3 See also RI-339 (November 13, 2002), which provides in pertinent part:

A court appointed receiver is “a ministerial officer of the court appointing him.” Cohen v Bolognese, 216 N.W.2d 586, 587 (Mich. App 1974). The duty of the receiver is not to represent or advocate on behalf of a client, but
apply to funds received by a receiver. Finally, a lawyer who serves in a fiduciary role, such as a personal representative or attorney-in-fact, in an individual capacity as, for example, a family member of the decedent or principal under a power of attorney and not as a result of being retained as a lawyer to serve in that role, is not engaged in a “representation” that would trigger the requirements of MRPC 1.15 and 1.15A.

Lawyers may have obligations as fiduciaries (e.g., as trustees, personal representatives, conservators, guardians, and attorneys-in-fact) that are defined by common law, statutes, legal documents, court rules, court orders, or some combination thereof. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. The commentary to MRPC 1.15 provides in pertinent part: “The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services.” It is clear from the commentary that the requirements of MRPC 1.15 and MRPC 1.15A do not supersede any obligations a lawyer performs as a fiduciary, such as, for example, a trustee’s power to invest and reinvest trust property pursuant to the “Michigan prudent investor rule.”

Simply stated, the obligations under MRPC 1.15 and MRPC 1.15A are only triggered when the lawyer receives client or third person funds or other property in the course of a representation. If the lawyer’s access is through some other means, these Rules do not apply. For example, when a lawyer serves on a charitable foundation’s board and has check-writing ability as the organization’s treasurer, the funds in the account belong to the organization as the account holder and the lawyer’s access to the funds is based on the office held in the organization rather than “in connection with a representation.”

Some lawyers have advocated for an exemption from the requirements of MRPC 1.15 and MRPC 1.15A in circumstances where a lawyer serving a court-appointed function is required to post a surety bond and obtain court approval for payments from an account, contending that the trust account Rules are redundant and unnecessary because the court’s oversight is intended to provide the necessary safekeeping protections. Unfortunately, disciplinary orders and publicized criminal fraud convictions, albeit involving a small segment of Michigan lawyers, confirm that significant defalcations have occurred even with stringent court oversight. Moreover, there is no such exception provided for in MRPC 1.15 and MRPC 1.15A. For lawyers engaged in a representation that includes a fiduciary role, if there is no legal authority to place client or third person funds other than in an IOLTA or non-IOLTA account, then client and third person funds received must be handled in accordance with MRPC 1.15 and MRPC 1.15A. The safekeeping protections of MRPC 1.15A are intended to provide early notice that a lawyer may be engaging in financial misconduct likely to injure clients. In those instances where the trust account Rules apply to funds related to a court proceeding, the TAON Rule works in concert with the court’s oversight to enhance the safekeeping protections over funds held by lawyers in their trust accounts.

“under the order of the court, to preserve and care for the property and turn it over to the person who is ultimately decided to be entitled thereto.” Wetgat v Wetgat, 292 N.W. 569, 571 (Mich. 1940). “Figuratively, a receiver is the arm of the court, appointed to receive and preserve the litigating parties property.” Hafmeister v Randall, 335 N.W.2d 65, 67 (Mich. App. 1983). The receiver “is charged with preserving the assets of the debtor for the benefit of both debtor and creditor and the receiver’s jurisdiction over these assets is, in effect, that of the court itself.” Cohen, 216 N.W.2d at 587. The receiver’s power is derived from the court, not from representation of a litigating party.
A careful review of both trust account Rules is necessary in order for Michigan lawyers to be fully informed about their ethical duties when receiving funds or other property in which a client or third person has an interest. MRPC 1.15 requires lawyers to ethically manage client and third person funds received by them. This caretaker obligation consists of five essential elements—a duty to notify, safeguard, segregate, deliver, and account for funds belonging to the client or third person. These requirements apply upon the lawyer’s receipt of funds, so it is essential for the lawyer to have a clear understanding of which funds are properly characterized as trust funds before coming into possession of client or third person funds. Moreover, as the commingling of client or third person funds with funds belonging to the law firm or lawyer violates MRPC 1.15(a), it is equally important for lawyers to be able to determine which funds should not be deposited into their IOLTA or non-IOLTA accounts so as not to violate MRPC 1.15(a).

MRPC 1.15(d) requires that “[a]ll client or third person funds” be deposited into an IOLTA or non-IOLTA account. “Client or third person funds” include unearned legal fees and unincurred expenses that have been paid in advance, funds in which a third person has an interest, and funds in which two or more persons (one of whom may be the lawyer) claim an undivided interest. When the funds received are unearned fees and unincurred costs or expenses, they must be held in trust until earned or expended.

For purposes of MRPC 1.15, fees can be categorized in two ways: “earned” and “unearned.” Likewise, costs or expenses can be grouped into either “incurred” or “unincurred.” Lawyers must analyze all funds they receive to determine whether they represent fees that are earned or unearned and, if the funds are for costs or expenses, whether the costs or expenses have been incurred or are yet to be incurred. Funds that represent earned fees and incurred costs or expenses must not be deposited into a lawyer’s trust account.

Some lawyers remain unclear about how to handle a fixed or flat fee paid before the work has been completed. When a lawyer receives all or any portion of a fixed or flat fee before the work has been completed and when there is no agreement between the client and lawyer regarding when the fixed or flat fee is earned or whether any portion may be disbursed to the lawyer prior to the conclusion of the representation, the entire amount received must be deposited into a client trust account and held in trust until completion of the agreed upon legal services. This is true even if the legal services are expected to be completed in a short period of time or do not require substantial attorney time to complete due to the nature of the case.

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5 MRPC 1.15(b), (c), (d), (g), and (h).
6 MRPC 1.15(g).
7 MRPC 1.15(b)(1).
8 MRPC 1.15(c).
9 MRPC 1.15(d).
10 MRPC 1.15(a)(3).
11 Informal Ethics Op RI-69.
By contrast, earned fees remitted to a lawyer must not be deposited into a client trust account to avoid commingling the lawyer’s funds with trust funds. This would include, for example, funds paid for legal services already performed.12

When funds are received from a client or third person in a “lump sum” that represents a combination of earned funds or incurred expenses along with unearned funds or unincurred expenses, MRPC 1.15(g) and the second sentence of MRPC 1.15(d) require all unearned funds and unincurred expenses to be deposited into a trust account. At the same time, the first sentence of MRPC 1.15(d) requires a lawyer to hold the lawyer’s own property separate from property of clients or third persons. Prior opinions of this Committee have concluded that these Rules require the entire sum must be placed in trust and then any earned funds or incurred expenses must be promptly withdrawn.13 We agree.

A lawyer’s personal expenses must not be paid directly out of an IOLTA account or non-IOLTA account. Once funds on deposit in the trust account are earned, they become the lawyer’s property and must be withdrawn, whereupon they may be deposited into an operating or other account containing the lawyer’s property. Informal Opinion RI-10 identified a circumstance where a lawyer could ethically designate and retain a portion of a fee as something akin to liquidated damages after being discharged by a client without cause.14 Subsequently, the Supreme Court upheld as not violative of MRPC 1.5(a), 1.15(b), and 1.16(d) a fee agreement that provided for the portion of a fee paid in advance to be nonrefundable.15 When a lawyer receives payment for services already performed and expenses incurred, the lawyer must hold those funds separately from client or third person funds and must not deposit them into a trust account because they belong to the lawyer or firm.16 Depositing such funds into the lawyer’s trust account would constitute an inappropriate commingling of the lawyer’s funds with client or third person’s funds.17 The only exception to this rule is set forth in MRPC 1.15(f), which permits a lawyer to deposit the lawyer’s own funds into a client trust account in an amount reasonably necessary to pay service charges or other fees or to obtain a waiver of such charges or fees.18

12 **Id.** See also, MRPC 1.15(d).

13 After the check has cleared (i.e., the payor bank against which the check is drawn has paid the check), the portion attributable to earned fees and incurred expenses must then be withdrawn from the lawyer’s trust account and may be deposited into the lawyer’s general operating account. To avoid overdrafts to their trust accounts, lawyers should review the relevant portions of the applicable law, currently within the Commercial Transactions Code, to ensure that they understand when a check issued by a client or third person and deposited in the lawyer’s trust account has been paid.

14 Informal Ethics Op RI-10 concludes, “where a client has solicited a lawyer’s representation in complex litigation, and the client signs and understands a written fee agreement requiring payment of a large up-front "nonrefundable" retainer, then discharges the lawyer for reasons not attributable to the lawyer’s misfeasance after the lawyer has expended resources and declines other employment in reliance on the agreement, it is not unethical for the lawyer to keep the entire retainer even though the amount kept exceeds what would have been earned on an hourly rate basis.”


16 MRPC 1.15(d).

17 **Id.**

18 MRPC 1.15(f).
When a lawyer receives settlement proceeds on behalf of a client, the lawyer must promptly take several steps. The lawyer must (1) notify the client of the receipt of the funds; (2) determine whether the proceeds must be deposited into an IOLTA or non-IOLTA account (based upon the factors set forth in MRPC 1.15(e)); (3) deposit the funds in an IOLTA or non-IOLTA account; (4) determine who is entitled to receive the funds; (5) secure the client's consent to the distribution of funds; and, (6) disburse the funds in conformity with the consent given by the client. When two or more persons (one of whom may be the lawyer) claim an interest in the funds, the lawyer must keep separate the amount of money in dispute until the dispute is resolved. The funds not in dispute should be promptly distributed.

Fulfilling these obligations is best accomplished by ensuring that checks representing settlement proceeds are made payable either to the lawyer or law firm in trust for the client or jointly to the lawyer or law firm and the client. A lawyer may not ethically request that a payor issue separate checks to the lawyer and the client if the purpose in doing so is avoiding compliance with the lawyer's obligation to deposit settlement proceeds in an IOLTA or non-IOLTA trust account. Making such a request would be incompatible with a lawyer's obligations both to safeguard client property and to disburse client funds promptly. To the extent that RI-92 and RI-93 preclude a lawyer from making such a request, they are reaffirmed.

Additionally, a lawyer would violate both MRPC 1.8(e) and MRPC 1.15(d) by paying a client the settlement amount from funds in the law firm's operating account and thereafter depositing the proceeds of a settlement check into the law firm's operating account. Simply put, the lawyer who advances settlement monies out of the lawyer's funds engages in an impermissible provision of financial assistance to the client.

Upon receipt of client or third person funds, lawyers are obligated to determine whether the funds should be deposited into an IOLTA or a non-IOLTA account. An IOLTA account refers to

19 On the rare occasion that a lawyer receives a settlement check payable solely to the client where no other party, including the lawyer, claims any interest in the proceeds, the lawyer may promptly deliver the check to the client. Because there is no division of the proceeds to be made in that circumstance, depositing the check into an IOLTA or non-IOLTA account would only delay disbursement to the client of funds to which the client is promptly entitled, arguably violating Rule 1.15(b)(3).

20MRPC 1.8(e) provides in pertinent part, "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that ... a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client."

21 MRPC 1.15(d) provides, "[a] lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded."

22 See Informal Ethics Op RI-189, which provides in pertinent part, "Under the procedure proposed, the lawyer would be advancing not the court costs and expenses, but the very proceeds from the settlement or judgment entered. The lawyer is, in essence, providing financial assistance, albeit for the short term between resolution and payment by the opposing party. The general type of financial assistance posed by the lawyer here is proscribed by MRPC 1.8(e) and its two exceptions. Neither of the two exceptions applies here. Also, the fact that the litigation has been settled is irrelevant, otherwise the underlying spirit of MRPC 1.8(e) would be impeded."
a pooled interest- or dividend-bearing account at an eligible\(^\text{23}\) institution that includes only client or third person funds that cannot earn income for the client or third person, because the individual amounts are too small or held too briefly to earn income in excess of the costs incurred.\(^\text{24}\)

A non-IOLTA account refers to an interest- or dividend-bearing account in a bank, savings and loan association, or credit union, which contains larger or longer term funds that can earn net income for the client.\(^\text{25}\) A non-IOLTA account can either be a separate account for a particular client or a pooled account with subaccounting by the bank or by the lawyer, providing for computation of earnings for each client’s or third person’s funds.\(^\text{26}\)

MRPC 1.15A(c) requires that IOLTA and non-IOLTA accounts be maintained only at financial institutions approved\(^\text{27}\) by the State Bar of Michigan.

It is essential for lawyers to understand the differences between IOLTA and non-IOLTA accounts in order to ethically manage client or third person funds. For example, even large sums can be properly deposited into an IOLTA account if the net earnings do not exceed the cost of establishing and administering a non-IOLTA account (e.g., a settlement check deposited into an IOLTA account just long enough for the check to “clear” and the funds to be disbursed). Lawyers must ascertain whether client or third person funds can earn net income. If the funds will earn income for the client or third person in excess of the costs incurred to safeguard the funds while held by the lawyer, they must be deposited into a non-IOLTA account. If the funds will not earn income in excess of the costs incurred, they must be deposited into an IOLTA account. Factors to use in making this determination are set forth in MRPC 1.15(c).\(^\text{28}\)

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\(^{23}\)MRPC 1.15(a)(2) defines an eligible institution as “a bank or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or ... an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan” that “must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications.” Eligible institutions must also be State Bar-approved financial institutions under MRPC 1.15A.

\(^{24}\)MRPC 1.15(a)(3).

\(^{25}\)MRPC 1.15(a)(4).

\(^{26}\)MRPC 1.15(a)(4)(A-B).

\(^{27}\)Lawyers have questioned why certain types of institutions are not included on the State Bar’s approved list. MRPC 1.15(a) identifies the types of financial institutions that lawyers must use for IOLTA and non-IOLTA accounts, each of which must be authorized by federal or state law to do business in Michigan. IOLTA accounts can be maintained at banks or savings and loan associations with federally-insured deposits, and open-end investment companies registered with the Securities and Exchange Commission. In addition to those types of financial institutions, non-IOLTA accounts can be maintained at credit unions with federally-insured deposits. To receive approval, a financial institution must enter into an overdraft notification agreement with the State Bar of Michigan under the terms of which it agrees to provide overdraft reports under the circumstances and containing the information described in MRPC 1.15A.

\(^{28}\)MRPC 1.15(e) provides: In determining whether client or third person funds should be deposited in an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:

1. the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the
Whether to place funds into an IOLTA or a non-IOLTA account is a lawyer's decision; a client waiver to put otherwise non-IOLTA funds into an IOLTA account is not permissible. A lawyer's good-faith decision regarding the deposit or holding of trust funds in an IOLTA account is not reviewable by a disciplinary body. However, a lawyer must review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively into a non-IOLTA account.

Planning for an orderly transition in the event of sudden death or disability is important to assure that funds held in the lawyer's trust accounts are appropriately safeguarded in keeping with MRPC 1.15. Solo practitioners without another lawyer in house to manage accounts should consider including the name of a successor attorney as an alternative signatory on trust accounts who can perform the safeguarding duties required by MRPC 1.15 in the event of sudden death or disability. The successor lawyer's service in this capacity does not require membership or employment in the solo practitioner's law firm. Accordingly, RI-107 is distinguished from this opinion as overly broad to the extent it requires "that signatories on a law firm trust account must be members or employees of the [same] firm."

In summary, MRPC 1.15A was adopted to facilitate financial institution notification of overdrafts occurring in lawyer trust accounts, which is intended to provide an early warning of unethical activity. The ethical obligations set forth in MRPC 1.15 to safeguard clients and third parties are neither enlarged nor altered by MRPC 1.15A. A clear understanding of the requirements of both MRPC 1.15 and 1.15A is necessary for lawyers to ethically manage client and third person funds that come into their possession.

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likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.


MRPC 1.15(f).

MRPC 1.15(f).

[31] See Planning for an Orderly Transition, Dawn M. Evans (Sep 2009)

[32] The successor attorney should agree to the designation and be notified that it has been made; however, no trust account identifying information should be given at that time.
AVOIDING ESTATE PLANNING MISTAKES
SEMINAR FOR SENIORS ON AUGUST 1, 2012

J. David Kerr

The Probate and Estate Planning Council was requested to participate in a new approach to elder financial abuse which has boarded on the unauthorized practice of law. Many of have seen trusts sold after a free meal was offered, a free book offered, a non-lawyer visiting the home, etc. Many of us have been concerned because the plans written, many by licensed attorneys, do not line up with:

1. that which the beneficiaries tell us the deceased intended
2. our sense of that which we might expect clients would do
3. omitting important provision unique to a family’s situation such as an outright distribution to a child who is receiving needs based assistance
4. other provisions which just do not feel right if there had been professional assistance

Often these plans are sold at a low price, but are followed with a funding discussion in which an annuity is sold. We may suspect that these annuities were not suitable for the client(s).

The State Bar over the years has wanted a complaint from the client before processing an Unauthorized Practice of Law suit.

The problem has been that the person who might complain is deceased.

The Sub-committee of the Unauthorized Practice of Law Committee developed an education program to alert seniors to the tactics used to sell these plans and annuities. A PowerPoint program entitled Who Should You Trust was developed by the Sub-committee together with a packet of hand out materials. Presentation sites were arranged by Danon Garland and her team at the State Bar. The Probate and Estate Planning Section was requested to help fill speaker positions.

Our section and the Elder Law Section assisted in filling speaker positions. Personal contact with attorneys was the most effective recruiting technique. Several members of this Council suggested speakers and I know that our chair, George Gregory, assisted. Members of the Council and our section made presentations. Presentations were made at the prearranged sites on August 1. As the date drew nearer, inquires came in from attorneys in areas where there was no presentation asking about their areas.

Attendance at sites ranged from 8 to 88. Feedback on reaction of participants was very positive. Attorneys in areas not served asked whether the program was going to be presented again and presented in their areas.

This may be a way to address a chronic problem which we have observed for years. Education to inform choice may be a better way to protect the public than the Unauthorized Practice of Law suit. This program appeared to be a successful beginning.
September 8, 2012

Mr. George Gregory
Chair, Probate & Estate Planning Section
c/o State Bar of Michigan
Michael Franck Building
306 Townsend St.
Lansing, MI 48933-2012

re: Proposed Amendment to Rule 2

Dear Mr. Gregory:

The Master Lawyers Section proposes an amendment to Rule 2 of the State Bar Rules of Michigan. I submitted this proposed amendment to the Representative Assembly for comment at its next meeting on September 20, 2012. I attach a copy of the proposed amendment.

The proposed amendment would require that each member of the SBM representing any client, other than a governmental agency, identify in the annual dues statement another member of the SBM who will serve as "inventory attorney" in the event of the death, disability, or disappearance of the reporting member. The "inventory attorney" will agree to take appropriate action to "protect the interest of the clients". The proposed amendment does not directly address the interest of the deceased, disabled or disappeared lawyer. The proposed Rule appears to provide that the inventory attorney will perform this function unsupervised by a court, although the Attorney Grievance Administrator "may assist" the inventory attorney as co-counsel. Rule 2, after amendment, will supplement the procedures in MCR 9.113(G), which provides that the Attorney Grievance Administrator will protect the interest of the clients of a lawyer who has died, disappeared, or is otherwise unable to practice law for various reasons, and the interest of the lawyer, unless some responsible person is conducting the lawyer’s affairs. The Grievance Administrator acts as a receiver pursuant of Circuit Court Order.

I support the Master Lawyers Section in its attempt to propose a solution to a serious problem in our profession. I have personally served as the lawyer responsible for settling the affairs of two cherished colleagues. In one case, a young lawyer with a large active family law practice was suddenly stricken and incapable of practicing law, and died after 8 months in the hospital. In the other, an older but still active lawyer died unexpectedly while on vacation. I have also consulted or otherwise assisted with several similar cases in Genesee County. These matters are usually managed by friends or other lawyers of good will, sometimes at considerable personal sacrifice. The profession has offered little guidance in resolution of the many issues which arise when a lawyer is no longer able to manage a law practice due to death or disability. The SBM has begun to explore solutions to these issues, and has made serious effort to educate lawyers on the need for planning for disability and death. I do not believe, however, that this proposed Rule will provide many satisfactory solutions.
I request that the Section formally review these issues, and take a position requesting modification of this proposal at the Representative Assembly meeting and thereafter, for the following reasons:

1. **Most of these cases require court supervision.** Every lawyer understands that a legal practice is an asset which requires active management. Every probate lawyer understands that if an asset is to be managed by someone other than its beneficial owner, the manager must be accountable to someone other than themselves. Perhaps in a well planned estate, a legal practice could be managed by a trustee under the Michigan Trust Code, but in many cases the "Inventory Attorney" will assume responsibility at a time of crisis, with the need for immediate access to bank accounts, including trust accounts, and other resources of the dead, disabled or disappeared attorney. Access to those assets needs to be closely supervised to avoid mismanagement and fraud.

2. **The probate courts are the appropriate courts to supervise these cases.**
   a. **The probate courts have exclusive jurisdiction.** Section 1302 of EPIC, MCLA §700.1302 provides that the probate court has exclusive jurisdiction of matters which relate to the settlement of the affairs of a deceased individual, and of a proceeding that concerns a guardianship, conservatorship or protective proceeding. Section 5401(3)(a) provides that the probate court may appoint a conservator or enter a protective order if an individual is unable to manage his or her own affairs for a variety of reasons, including disability or disappearance. There is no statutory exception for the business affairs of lawyers.
   
   b. **The probate courts have the skills and procedures to provide appropriate supervision.** The probate courts are accustomed to supervision of on-going businesses, and have standardized procedures in place to ensure proper accountability.
   
   c. **All of the other affairs of the lawyer will be handled in probate court.** Administrative convenience and financial economy suggest that although there might be special considerations affecting a legal practice, there is no need for separate legal proceedings or procedures for the administration of what is, at heart, a specialized business with special regulations. Without common court supervision, conflicts are likely to arise between the "Inventory Attorney" who is charged with protecting the interest of the clients, and the personal representative or conservator who is charged with collecting assets of the estate such as unpaid fees, and who is accountable to the probate court.
   
   d. **It is possible to appoint a family member as Personal Representative to manage other affairs, and a Special Personal Representative to manage the practice.** Section 3614(b) provides that a probate court may appoint a Special Personal Representative if "... the court finds that the appointment is necessary to preserve the estate or to secure its proper administration, including its administration in circumstances in which a general personal representative cannot or should not act." (emphasis added). Although a court usually appoints a special personal representative to manage assets pending
appointment of the general personal representative, there is no such limitation in the statute. The Genesee County Probate Court appointed me as Special Personal Representative by a detailed Order specifying my responsibilities. I managed the practice, referred the active clients, collected (some) of the fees due, returned files to clients, and destroyed the files not returned. The Personal Representative was a family friend named in the Will. We both filed accountings with the Court, and I paid the net proceeds into the general estate when the practice was liquidated. A probate court could accomplish the same by protective order in the case of disability or disappearance.

3. **Section members will be directly affected by this Rule.** Many Section members are sole practitioners. Many of those practices have value which should be preserved for the benefit of the family of a deceased lawyer, or the disabled or disappeared lawyer. Every one of those practices has obligations to clients which need to be honored as well. This proposed amendment seeks only to protect the interest of the clients. Existing procedures in probate courts will permit protection of both the clients and the lawyer.

Thank you for your consideration. If asked, I will assist.

Very truly yours,

Linda A. Pohly
Rule 2, Rules Concerning the State Bar of Michigan

Those persons who are licensed to practice law in this state shall constitute the membership of the State Bar of Michigan, subject to the provisions of these rules. Law students may become law student section members of the State Bar. None other than a member's correct name shall be entered upon the official register of attorneys of this state. Each member, upon admission to the State Bar and in the annual dues statement, must provide the State Bar with the member's correct name and address, and such other information as may be required. If the address provided by the member is a mailing address only, the member also must provide a street or building address for the member's building or residence. No member shall practice law in this state until such information has been provided. Members shall notify the State Bar promptly in writing of any change of name or address. The State Bar shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a member to alter or change the member's name. The name and address on file with the State Bar at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by the member in the practice of law or in a judicial election or in an election for any other public office. Every member who represents any client other than a governmental agency, public body, or political subdivision, in the annual dues statement must identify and certify the name of an active member who has agreed to serve as inventory attorney in the event of the death, disability or disappearance of the reporting member. In the event the reporting member learns of the unavailability, incompetence or death of the inventory attorney, the reporting member shall identify to the State Bar within thirty days an active member of the State Bar who has agreed to serve as inventory attorney. The reporting member should maintain this information, together with instructions directing that the inventory attorney and the State Bar of Michigan be contacted upon the death, disability or disappearance of the reporting member. Upon receipt of such notification, the inventory attorney shall take such action as is appropriate to protect the interests of the clients, including but not limited to notifying clients of the changed status of the reporting member, returning files and papers as appropriate, and retaining files as appropriate. The Attorney Grievance Commission may assist the inventory attorney as co-counsel in this process. In the event the inventory attorney is unable or unwilling to act, MCR 9.119(C) shall apply. Every active member shall annually provide a certification as to whether the member or the member's law firm has a policy to maintain interest-bearing trust accounts for deposit of client and third-party funds. The certification shall be placed on the face of the annual dues notice and shall require the member's signature or electronic signature.
July 17, 2012

Bill Schuette
Attorney General
P.O. Box 30755
Lansing, MI 48909

Dear Mr. Schuette:

In yesterday’s mail, I received a notice that Michael Moody, the State Public Administrator, had appointed Karl A. Weber as a Public Administrator for Marquette County.

This is the second time in two months that I have been notified that a new Public Administrator has been appointed for Marquette County. I have served as Marquette County Probate Judge for 35 ½ years. Prior to May 2012, four attorneys have served as Marquette County Public Administrator, the most recent being attorney Thomas Clark, who has provided exemplary service for the past 25 years.

These two recent appointments are the first during my tenure which I was not asked for any input before the appointment was made. Earlier this year, Mr. Clark was asked by your office if he wanted to continue as Public Administrator, and he indicated that he did. To date, Mr. Clark has not been notified about whether his appointment was continued or terminated.

On May 9, I had a telephone conference with Mr. Moody. He indicated that the appointment of Mr. Sean Fosmire did not terminate Mr. Clark’s previous appointment. I asked him to send me a letter to that affect, with a copy to Mr. Clark. I have not yet received that letter. On July 10, 2012, I made the same request in a letter of my own to Mr. Moody. (Copy attached) His apparent response to that request was to appoint another unsolicited Public Administrator.

I understand that Mr. Moody has the statutory authority to appoint county Public Administrators, with or without my input. However, the Public Administrator is someone who must work closely with the Probate Judge, handling delicate and difficult matters. The judge determines when the public administrator will be appointed in
individual cases, and determines the reasonableness of the Public Administrator's compensation in individual cases. Like Mr. Fosmire, Mr. Weber has had little or no experience in handling probate matters in my court prior to his appointment. I intend to take that fact into account in determining which cases he should handle.

I do not know how widespread this recent practice has become, but I want to assure you that it is not one which inspires my confidence or admiration, either in your State Public Administrator or in his appointees.

Sincerely yours,

[Signature]

Michael J. Anderegg
Probate Judge

MJA/jth
cc: Michael Moody
    Thomas Clark
    M. Sean Fosmire
    Karl Weber
    Hon. Karen Tighe, President, MPJA
    George W. Gregory, Chair
    Probate & Trust Law Section,
    State Bar of Michigan
July 10, 2012

Michael Moody
State Public Administrator
P.O. Box 30212
Lansing, MI 48909

Dear Mr. Moody:

Two months ago, we had a telephone conference call about the appointment of M. Sean Fosmire as Marquette County Public Administrator. In a subsequent telephone call that same day, I asked you to send me written confirmation that your appointment of Mr. Fosmire did not terminate the appointment of attorney Thomas Clark, who has served as Marquette County’s Public Administrator for the past twenty-five years, and that you also send a copy of that letter to Mr. Clark.

To date I have not received a response to that request, and neither has Mr. Clark.

I believe that it is very important that you clarify this situation as soon as possible.

Sincerely yours,

Michael J. Anderegg
Probate Judge

MJA/jth
cc: Thomas Clark
ATTACHMENT 2
Probate and Estate Planning Council
Treasurer’s Report
for 9-21-2013

Income/Expense Report

Attached is the income and expense reports for May, June and July 2013 (unaudited). The dues revenue at the end of July 2013 is about $1,585 higher than through July 2012, and our total revenue is just slightly more than $2,000 over the total revenue budgeted for this year. Our entire total revenue for last year was higher due to additional items included under the “other” income category.

Our total expense payments at present are about $10,000 more than this time last year. About $4,300 of this is due to an additional Probate Journal publication expense payment that was made in July this year, that was made later last year. We remain on target for the Journal expense payments – we have slightly under $10,000 of our budget left for the Journal expense, and at present, the cost per issue is running about $7,750 ($3,750 for ICLE’s work, and just under $4,000 per issue for printing and mailing costs). The cost to create the searchable on-line archive data base was also charged to the journal budget. Therefore, we are very much on target with the projected revenue as shown in the budget. However, I do not know if there will be ongoing charges to update the archive.

Another $2,500 of the extra expense paid to date, compared to last year, is one additional lobbying payment included on this July report. This expense item remains on budget.

Also, last year the total support for the Annual Institute at this time came to $11,557 (which was the total for the year); whereas, this year our total is $13,688. Which is slightly more than $2,000 over last year, and $688 over budget. For this year. We should consider amending the budget to cover this additional expense (I doubt that there will be any more bills coming in for the Annual Institute, but I do not know that for sure.) I believe that one primary reason for the higher expense this year was a reduction in sponsor participation.

Overall, we remain within budget, even with the overage for the Institute, because several other items are coming in under budget. But, as some have suggested, we may need to discuss how we handle the support for the annual institute, including how we budget for it.

Expense Reimbursement Requests

Please keep in mind that the State Bar prefers that all expenses submitted to the State Bar of Michigan within 30 days of when the expense was incurred. As we near the end of the fiscal year, you will need to get our reimbursement expense vouchers in to me as quickly as reasonably possible after the September meeting, so we can be sure to have them included in this year’s expense report.

Also, as previously noted, the Bar has revised the expense reimbursement form to include the new mileage rate on some of the lines. This is available on the State Bar website at:
Again this month, I’ve also attached a blank (non fillable) pdf copy of the expense reimbursement form at the end of this report which can be printed off directly and filled out manually.

**Hearts and Flowers Fund:**

In late August, George Bearup was injured in a bicycling accident resulting in a fractured pelvis. We sent a card and flowers (from our Hearts & Flowers fund) wishing him a speedy recovery and to let him know we are thinking of him.

Jim Steward  
Council Treasurer
# Probate and Estate Planning Section
## Treasurer's Report as of May 31, 2013

<table>
<thead>
<tr>
<th>Revenue</th>
<th>March</th>
<th>April</th>
<th>May</th>
<th>FY to Date</th>
<th>Budget</th>
<th>Variance</th>
<th>Year to Date</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actual</td>
<td>Actual</td>
<td>Actual</td>
<td>Actual</td>
<td>2012-13</td>
<td></td>
<td>Percentage</td>
</tr>
<tr>
<td>Membership Dues</td>
<td>$175</td>
<td>$105</td>
<td>$140</td>
<td>$116,410</td>
<td>$115,000</td>
<td>$1,410</td>
<td>101%</td>
</tr>
<tr>
<td>Publishing Agreements</td>
<td>$</td>
<td>-</td>
<td>$350</td>
<td>$350</td>
<td>-</td>
<td></td>
<td>0%</td>
</tr>
<tr>
<td>Other</td>
<td>$</td>
<td>-</td>
<td>$350</td>
<td>$350</td>
<td>-</td>
<td></td>
<td>0%</td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>$175</td>
<td>$105</td>
<td>$140</td>
<td>$116,410</td>
<td>$115,700</td>
<td>$710</td>
<td>101%</td>
</tr>
</tbody>
</table>

| Disbursements                 |       |       |      |            |         |          |              |
| Journal                       | $75   | $75   | $3,750 | $13,964    | $27,500 | (13,536) | 51%          |
| Chairperson's Dinner          | $4,406|       |       | $6,500     | $2,094  |          | 68%          |
| Travel                        | $1,350| $983  | $2,571 | $13,657    | $18,000 | (4,343)  | 76%          |
| Lobbying                      | $5,000| $5,000 | $22,500 | $30,000    | (7,500) |          | 75%          |
| Meetings                      | $1,015| $1,945 | $5,374 | $12,000    | (6,626) |          | 45%          |
| Long-range Planning           | $     | -     | $1,000 | $1,000     | (1,000) |          | 0%           |
| Publishing Agreements         | $     | -     | $0    | $0         | -       |          | 0%           |
| Support for Annual Institute  | $1,140| $6,504 | $13,020| $13,000    | 20      |          | 100%         |
| Amicus Briefs                 | $     | -     | $10,000| $10,000    | (10,000)|          | 0%           |
| Electronic Communications*    | $75   | $75   | $75   | $525       | $1,400  | (875)    | 38%          |
| Postage                       | $1    | $1    | $1    | $100       | (99)    |          | 1%           |
| Telephone                     | $13   | $37   | $14   | $143       | $250    | (107)    | 57%          |
| Other**                       | $100  | $155  | $425  | $905       | $1,000  | (95)     | 90%          |
| **Total Disbursements**       | $7,554| $2,465| $20,284| $74,494    | $120,750| (46,256) | 62%          |

| Net Increase (Decrease)       | $41,916| (5,050) | 46,966 |

## Additional Information

- Fund Balance $242,921

*includes e-blast & other electronic communications to members

**includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit

***includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount
## Probate and Estate Planning Section
### Treasurer's Report as of June 30, 2013

<table>
<thead>
<tr>
<th></th>
<th>April</th>
<th>May</th>
<th>June</th>
<th>FY to Date Actual</th>
<th>Budget 2012-13</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenue</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Membership Dues</td>
<td>$105</td>
<td>$140</td>
<td>$70</td>
<td>$116,480</td>
<td>$115,000</td>
<td>$1,480</td>
<td>101%</td>
</tr>
<tr>
<td>Publishing Agreements</td>
<td>$500</td>
<td>$500</td>
<td>$350</td>
<td>$150</td>
<td>$350</td>
<td>$270</td>
<td>143%</td>
</tr>
<tr>
<td>Other</td>
<td>$620</td>
<td>$620</td>
<td>$350</td>
<td>$270</td>
<td>$350</td>
<td></td>
<td>177%</td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>$105</td>
<td>$140</td>
<td>$1,190</td>
<td>$117,600</td>
<td>$115,700</td>
<td>$1,900</td>
<td>102%</td>
</tr>
<tr>
<td><strong>Disbursements</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Journal</td>
<td>$75</td>
<td>$3,750</td>
<td>$13,964</td>
<td>$27,500</td>
<td>$13,964</td>
<td>$(13,536)</td>
<td>51%</td>
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<tr>
<td>Chairperson's Dinner</td>
<td>$4,406</td>
<td>$6,500</td>
<td>$18,000</td>
<td>$(2,944)</td>
<td>$6,500</td>
<td>$(2,944)</td>
<td>68%</td>
</tr>
<tr>
<td>Travel</td>
<td>$983</td>
<td>$2,571</td>
<td>$2,233</td>
<td>$15,890</td>
<td>$18,000</td>
<td>$(2,110)</td>
<td>88%</td>
</tr>
<tr>
<td>Lobbying</td>
<td>$5,000</td>
<td>$22,500</td>
<td>$30,000</td>
<td>$(7,500)</td>
<td>$30,000</td>
<td>$(7,500)</td>
<td>75%</td>
</tr>
<tr>
<td>Meetings</td>
<td>$1,945</td>
<td>$5,374</td>
<td>$12,000</td>
<td>$(6,626)</td>
<td>$5,374</td>
<td>$(6,626)</td>
<td>45%</td>
</tr>
<tr>
<td>Long-range Planning</td>
<td>-</td>
<td>$1,000</td>
<td>$1,000</td>
<td>$(1,000)</td>
<td>-</td>
<td>$(1,000)</td>
<td>0%</td>
</tr>
<tr>
<td>Publishing Agreements</td>
<td>-</td>
<td>$0</td>
<td>$0</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0%</td>
</tr>
<tr>
<td>Support for Annual Institute</td>
<td>$1,140</td>
<td>$6,504</td>
<td>$669</td>
<td>$13,688</td>
<td>$13,000</td>
<td>$688</td>
<td>105%</td>
</tr>
<tr>
<td>Amicus Briefs</td>
<td>-</td>
<td>$1,000</td>
<td>$1,000</td>
<td>$(1,000)</td>
<td>-</td>
<td>$(1,000)</td>
<td>0%</td>
</tr>
<tr>
<td>Electronic Communications*</td>
<td>$75</td>
<td>$75</td>
<td>$75</td>
<td>$600</td>
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<td>$(800)</td>
<td>43%</td>
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<td>$100</td>
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<td>$100</td>
<td>$(99)</td>
<td>1%</td>
</tr>
<tr>
<td>Telephone</td>
<td>$37</td>
<td>$14</td>
<td>$143</td>
<td>$250</td>
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<td>$(107)</td>
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<td>Other**</td>
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<td>$425</td>
<td>$905</td>
<td>$1,000</td>
<td>$(95)</td>
<td>$(95)</td>
<td>90%</td>
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<tr>
<td><strong>Total Disbursements</strong></td>
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<td>$20,284</td>
<td>$2,977</td>
<td>$77,471</td>
<td>$120,750</td>
<td>$(43,279)</td>
<td>64%</td>
</tr>
</tbody>
</table>

**Net Increase (Decrease)** $40,129 $ (5,050) $ 45,179

### Additional Information

- Fund Balance $241,134

*includes e-blast & other electronic communications to members

**includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit

***includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount
## Probate and Estate Planning Section  
**Treasurer's Report as of July 31, 2013**

<table>
<thead>
<tr>
<th></th>
<th>May</th>
<th>June</th>
<th>July</th>
<th>FY to Date Actual</th>
<th>Budget 2012-13</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenue</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Membership Dues</td>
<td>$ 140</td>
<td>$ 70</td>
<td>$ 105</td>
<td>$ 116,585</td>
<td>$115,000</td>
<td>$1,585</td>
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<td>$ 500</td>
<td>$ 500</td>
<td>$ 500</td>
<td>$350</td>
<td>$350</td>
<td>$ 150</td>
<td>143%</td>
</tr>
<tr>
<td>Other</td>
<td>$ 620</td>
<td>$ 620</td>
<td>$ 620</td>
<td>$350</td>
<td>$350</td>
<td>$ 270</td>
<td>177%</td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>$140</td>
<td>$1,190</td>
<td>$105</td>
<td>$117,705</td>
<td>$115,700</td>
<td>$ 2,005</td>
<td>102%</td>
</tr>
<tr>
<td><strong>Disbursements</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Journal</td>
<td>$ 3,750</td>
<td>$ 3,998</td>
<td>$ 17,962</td>
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<td></td>
</tr>
<tr>
<td>Chairperson's Dinner</td>
<td>$ 4,406</td>
<td>$ 6,500</td>
<td>$ 18,000</td>
<td>($2,110)</td>
<td>68%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td>$ 2,571</td>
<td>$ 2,233</td>
<td>$ 15,890</td>
<td>$18,000 ($2,110)</td>
<td>88%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lobbying</td>
<td>$ 5,000</td>
<td>$ 5,000</td>
<td>$ 27,500</td>
<td>$30,000 ($2,500)</td>
<td>92%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Meetings</td>
<td>$ 1,945</td>
<td>$ 5,374</td>
<td>$ 12,000</td>
<td>($6,626)</td>
<td>45%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Long-range Planning</td>
<td>$ -</td>
<td>$ 1,000</td>
<td>($1,000)</td>
<td>0%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Publishing Agreements</td>
<td>$ -</td>
<td>$ 0</td>
<td>$ 0</td>
<td>0%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Support for Annual Institute</td>
<td>$ 6,504</td>
<td>$ 669</td>
<td>$ 13,688</td>
<td>$13,000 ($688)</td>
<td>105%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Amicus Briefs</td>
<td>$ -</td>
<td>$ 10,000</td>
<td>($10,000)</td>
<td>0%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Electronic Communications*</td>
<td>$ 75</td>
<td>$ 75</td>
<td>$ 75</td>
<td>$1,400 ($725)</td>
<td>48%</td>
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<td></td>
</tr>
<tr>
<td>Postage</td>
<td>$ 1</td>
<td>$ 100</td>
<td>$ 100</td>
<td>($99)</td>
<td>1%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telephone</td>
<td>$ 14</td>
<td>$ 143</td>
<td>$ 250</td>
<td>($107)</td>
<td>57%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other**</td>
<td>$ 425</td>
<td>$ 905</td>
<td>$ 1,000</td>
<td>($95)</td>
<td>90%</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total Disbursements</strong></td>
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<td>$2,977</td>
<td>$9,073</td>
<td>$86,544</td>
<td>$120,750</td>
<td>($34,206)</td>
<td>72%</td>
</tr>
<tr>
<td><strong>Net Increase (Decrease)</strong></td>
<td>$31,161</td>
<td>($5,050)</td>
<td>$36,211</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td><strong>Additional Information</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fund Balance</td>
<td>$ 232,166</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*includes e-blast & other electronic communications to members  
**includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit  
***includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount
State Bar of Michigan
506 Townsend St., Lansing MI 48933-2012, 800-968-1442

Section
Expense Reimbursement Form

Please Provide Account Number | Amount
--- | ---

Select a Section

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

Amount Total

<table>
<thead>
<tr>
<th>Date</th>
<th>Description &amp; Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Note start &amp; end point for mileage.)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date</th>
<th>Description &amp; Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Note start &amp; end point for mileage.)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mileage</th>
<th>Lodging/Other Travel</th>
<th>Meals</th>
<th>Miscellaneous</th>
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<tr>
<td>Rate</td>
<td>Mileage</td>
<td>Reimbursement</td>
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<td></td>
</tr>
<tr>
<td>0.565</td>
<td>$0.00</td>
<td></td>
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<td>$0.00</td>
</tr>
<tr>
<td>0.565</td>
<td>$0.00</td>
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<td>0.565</td>
<td>$0.00</td>
<td></td>
<td></td>
<td>$0.00</td>
</tr>
</tbody>
</table>

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

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

| Date | Title | Approved by (signature)
--- | --- | ---
STATE BAR OF MICHIGAN

Section Expense Reimbursement Policies and Procedures

General Policies
1. Requests for reimbursement of individual expenses should be submitted as soon as possible following the event and no later than two weeks following the close of the fiscal year in which the expense is incurred so that the books for that year can be closed and audited.

2. All out of pocket expenses must be itemized.

3. Detailed receipts are recommended for all expenses but required for expenses over $25.

4. Meal receipts for more than one person must indicate names of all those in attendance unless the function is a section council meeting where the minutes of that meeting indicate the names of those present. Seminar meal functions should indicate the number guaranteed and those in attendance, if different.

5. Spouse expenses are generally not reimbursable.

6. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursement for mileage or travel expenses is limited to actual distance traveled; not distance from domicile to the meeting site.

7. Receipts for lodging expenses must be supported by a copy of the itemized bill showing the per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid.

8. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.
   A. Tickets should be at the best rate available for as direct a path as possible.

B. First class tickets will not be reimbursed in full but will only be reimbursed up to the amount of the best or average coach class ticket available for that trip.

C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.

D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

9. Reimbursement for car, bus or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

10. Outside speakers should be advised in advance of the need for receipts and the above requirements.

11. Bills for copying done by a firm should include the numbers of copies made, the cost per page and general purpose (committee or section meeting notice, seminar materials, etc.).

12. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

13. The State Bar of Michigan is Sales tax exempt. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

14. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of the Finance Department. If the State Bar of Michigan is paying your expenses or reimbursing you for a conference and you are aware you will receive a refund, please notify the finance department staff at the time you submit your request for payment.

15. Reimbursement will in all instances be limited to reasonable and necessary expenses.

Specific Policies
1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

September 21, 2013
Lansing, Michigan

Agenda

I. Call to Order

II. Excused Absences

III. Introduction of Guests

IV. Minutes of June 8, 2013, Meeting of the Council

V. Outgoing Treasurer’s Report – James B. Steward

VI. Incoming Chairperson’s Report – Thomas F. Sweeney

VII. Report of the Committee on Special Projects – Marlaine C. Teahan

VIII. Standing Committee Reports

A. Internal Governance

1. Budget – Shaheen I. Imami

2. Bylaws – Nancy H. Welber

3. Awards – Douglas A. Mielock

4. Planning – Amy N. Morrissey

5. Nominating – Harold G. Schuitmaker

6. Annual Meeting – Amy N. Morrissey

B. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L. Skidmore

2. Probate Institute – Shaheen I. Imami

3. State Bar and Section Journals – Amy N. Morrissey
4. Citizens Outreach – Rebecca A. Schnelz
5. Electronic Communications – William J. Ard

C. Legislation and Lobbying
   1. Legislation – Christopher A. Ballard
   2. Updating Michigan Law – Marguerite Munson Lentz
   3. Insurance Committee – Thomas F. Sweeney
   4. Artificial Reproductive Technology – Nancy H. Welber

D. Ethics and Professional Standards
   1. Ethics – J. David Kerr
   2. Unauthorized Practice of Law & Multidisciplinary Practice – Robert M. Taylor
   3. Specialization and Certification – James B. Steward

E. Administration of Justice
   1. Court Rules, Procedures and Forms – Marlaine C. Teahan
   2. Fiduciary Exception to Attorney Client Privilege – George F. Bearup

F. Areas of Practice
   1. Real Estate – George F. Bearup
   2. Transfer Tax Committee – Nancy H. Welber
   3. Charitable and Exempt Organization – Christopher A. Ballard
   4. Guardianship, Conservatorship, and End of Life Committee – Constance L. Brigman

G. Liaisons
   1. Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips
   2. Business Law Section Liaison – John R. Dresser
   3. Elder Law Section Liaison – Amy R. Tripp
4. Family Law Section Liaison – Patricia M. Ouellette
5. ICLE Liaison – Jeanne Murphy
6. Law Schools Liaison – William J. Ard
7. Michigan Bankers Association Liaison – Susan Allan
9. Probate Registers Liaison – Rebecca A. Schnelz
10. SCAO Liaisons – Marlaine C. Teahan
11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz
12. State Bar Liaison – David R. Brake
13. Taxation Section Liaison – Frederick H. Hoops, III

IX. Other Business

X. Hot Topics

XI. Adjournment
**STATE BAR OF MICHIGAN**  
**PROBATE AND ESTATE PLANNING SECTION COUNCIL**

### Officers for 2012-2013 Term

<table>
<thead>
<tr>
<th>Officer</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson</td>
<td>Mark K. Harder</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>Thomas F. Sweeney</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>Amy N. Morrissey</td>
</tr>
<tr>
<td>Secretary</td>
<td>Shaheen I. Imami</td>
</tr>
<tr>
<td>Treasurer</td>
<td>James B. Steward</td>
</tr>
</tbody>
</table>

### Council Members for 2012-13 Terms

<table>
<thead>
<tr>
<th>Council Member</th>
<th>Year elected to current term (partial, first or second full term)</th>
<th>Current term expires</th>
<th>Eligible after Current term?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Teahan, Marlaine C.</td>
<td>2010 (2nd term)</td>
<td>2013</td>
<td>No</td>
</tr>
<tr>
<td>Schnelz, Rebecca A.</td>
<td>2010 (2nd term)</td>
<td>2013</td>
<td>No</td>
</tr>
<tr>
<td>Brigman, Constance L.</td>
<td>2010 (1st term)</td>
<td>2013</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Lentz, Marguerite M.</td>
<td>2010 (1st term)</td>
<td>2013</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Allan, Susan M.</td>
<td>2010 (1st term)</td>
<td>2013</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>O’Brien Hon. Darlene</td>
<td>2010 (1st term)</td>
<td>2013</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Murkowski, Hon. David M.</td>
<td>2011 (2nd term)</td>
<td>2014</td>
<td>No</td>
</tr>
<tr>
<td>Kerr, J. David</td>
<td>2011 (2nd term)</td>
<td>2014</td>
<td>No</td>
</tr>
<tr>
<td>Taylor, Robert M.</td>
<td>2011 (2nd term)</td>
<td>2014</td>
<td>No</td>
</tr>
<tr>
<td>Ballard, Christopher A.</td>
<td>2011 (1st term)</td>
<td>2014</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Bearup, George F.</td>
<td>2011 (1st term)</td>
<td>2014</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Welber, Nancy H.</td>
<td>2011 (1st term)</td>
<td>2014</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Ard, W. Josh</td>
<td>2012 (2nd term)</td>
<td>2015</td>
<td>No</td>
</tr>
<tr>
<td>Ouellette, Patricia M.</td>
<td>2012 (2nd term)</td>
<td>2015</td>
<td>No</td>
</tr>
<tr>
<td>Clark-Kreuer, Rhonda M.</td>
<td>2012 (1st term)</td>
<td>2015</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Spica, James P.</td>
<td>2012 (2nd term)</td>
<td>2015</td>
<td>No</td>
</tr>
<tr>
<td>Lucas, David P.</td>
<td>2012 (1st term)</td>
<td>2015</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Skidmore, David L.J.M.</td>
<td>2012 (1st term)</td>
<td>2015</td>
<td>Yes (1 term)</td>
</tr>
</tbody>
</table>
Ex Officio Members

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

James H. LoPrete  
Richard C. Lowe  
John D. Mabley  
John H. Martin  
Michael J. McClory  
Douglas A. Mielock  
Russell M. Paquette  
Patricia Gormely Prince  
Douglas J. Rasmussen  
Harold G. Schuitmaker  
John A. Scott  
Fredric A. Sytsma  
Lauren M. Underwood  
W. Michael Van Haren  
Susan S. Westerman  
Everett R. Zack
**2012-13 Probate and Estate Planning Section Committees**

**Budget Committee**  
*Mission:* To develop the annual budget and to alert the Council to revenue and spending trends

Shaheen I. Imami, Chair  
Mark K. Harder  
James B. Steward

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

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

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

Thomas F. Sweeney, Chair

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

Harold G. Schuitmaker, Chair  
Douglas G. Chalgian  
George W. Gregory

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

Thomas F. Sweeney

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

Douglas A. Mielock, Chair  
Robert D. Brower, Jr.  
Phillip E. Harter  
Brian V. Howe  
Nancy L. Little  
Amy N. Morrisey

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

Marlaine C. Teahan, Chair

**Legislation Committee**  
*Mission:* In cooperation with the Section’s lobbyist, to bring to the attention of the Council recent developments in the Michigan
legislature and to further achievement of the Section’s legislative priorities, as well as to study legislation and recommend a course of action on legislation not otherwise assigned to a substantive committee of the Section

Christopher A. Ballard, Chair
William J. Ard
George W. Gregory
Harold G. Schuitmaker
Mark E. Kellogg
Sharri L. Rolland Phillips

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

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

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

Amy N. Morrisey

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

Amy N. Morrisey, Chair
Nancy L. Little, Managing Editor
Melisa Marie-Werkema Mysliwiec, Associate Editor
Richard C. Mills

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

Rebecca A. Schnelz, Chair (Liaison to Solutions on Self-help Task Force)
Rhonda M. Clark-Kreuer
Hon. Darlene A. O’Brien
James B. Steward
Nancy H. Welber
Phillip E. Harter
Michael J. McClory
Michael Dean
Kathleen M. Goetsch
Melisa Marie-Werkema Mysliwiec
Neal Nusholtz
Michael L. Rutkowski
Melinda V. Sheets
Ellen Sugrue Hyman
Electronic Communications Committee
Mission: To oversee all forms of electronic communication with and among members of the Section, including communication via the Section’s web site, the Section listserv, and the ICLE Online Community site, to identify emerging technological trends of importance to the Section and its members, and to recommend to the Council best practices to take advantage of technology in carrying out the Section’s and Council’s mission and work

William J. Ard, Chair
Rhonda M. Clark-Kreuer
Amy N. Morrissey
Jeanne Murphy (Liaison to ICLE)
Hon. Darlene A. O’Brien
Rebecca A. Schnelz
Phillip E. Harter
Nancy L. Little
Stephen J. Dunn
Neal Nusholtz
Michael L. Rutkowski
Serene K. Zeni

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

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

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

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

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

Marlaine C. Teahan, Chair (Liaison to SCAO for Estates & Trusts Workgroup)
Constance L. Brigman (Liaison to SCAO for Guardianship, Conservatorship, and Protective Proceedings Workgroup)
Rhonda M. Clark-Kreuer
Hon. David M. Murkowski
Rebecca A. Schnelz (Liaison to SCAO for Mental Health/Commitment Workgroup)
David L.J.M. Skidmore
Shaheen I. Imami
Douglas A. Mielock
Phillip E. Harter
James F. (“JV”) Anderton
Updating Michigan Law Committee  
*Mission:* To review, revise, communicate and recommend Michigan’s trusts and estates law with the goal of achieving and maintaining leadership in promulgating probate laws in changing times.

Marguerite Munson Lentz, Chair  
Robert P. Tiplady, II, Vice Chair  
Susan M. Allan  
Christopher A. Ballard  
Mark K. Harder  
Shaheen I. Imami  
James P. Spica  
Phillip E. Harter  
Henry P. Lee  
Michael G. Lichterman  
Richard C. Mills  
Christine M. Savage  
Patricia M. Ouellette

Artificial Reproductive Technology Ad Hoc Committee  
*Mission:* To review the 2008 Uniform Probate Code Amendments for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction.

Nancy H. Welber, Chair  
Christopher A. Ballard  
Larry Waggoner  
Keven DuComb

Real Estate Committee  
*Mission:* To recommend new legislation related to real estate matters of interest and concern to the Section and its members

George F. Bearup, Chair  
William J. Ard  
Rhonda M. Clark-Kreuer  
J. David Kerr  
David P. Lucas  
James B. Steward  
Douglas A. Mielock  
Stephen J. Dunn  
Mark E. Kellogg  
Michael G. Lichterman  
Katie Lynwood  
Richard C. Mills  
Melisa Marie-Werkema Mysliwiec

Insurance Ad Hoc Committee  
*Mission:* To recommend new legislation related to insurability and the administration of irrevocable life insurance trusts

Thomas F. Sweeney, Chair  
Mark K. Harder  
James P. Spica  
Stephen L. Elkins  
Stephen C. Rohr  
Geoffrey R. Vernon

Transfer Tax Committee  
*Mission:* To monitor developments concerning Federal and State transfer taxes and to recommend appropriate actions by the Section in response to developments or needs

Nancy H. Welber, Chair  
Marguerite Munson Lentz  
Thomas F. Sweeney  
George W. Gregory
Guardianship, Conservatorship, and End of Life Committee
Mission: To monitor the need for and make recommendations with respect to statutory and court rule changes in Michigan related to the areas of legally incapacitated individuals, guardianships, and conservatorships
Constance L. Brigman, Chair
William J. Ard
Rhonda M. Clark-Kreuer
Rebecca A. Schnelz
Michael J. McClory
Phillip E. Harter
Michael W. Bartnik
Ellen Sugrue Hyman
Kurt A. Olson

Specialization and Certification Ad Hoc Committee
Mission: To make recommendations to the Section with respect to the creation and implementation of a program that recognizes specialization and certification of specialization in the fields of probate, estate planning, and trust administration
James B. Steward, Chair
William J. Ard
Patricia M. Ouellette
Ronald A. Berridge
Wendy Parr Holtvluwer
Richard J. Siriani
Serene K. Zeni

Charitable and Exempt Organization Committee
Mission: To educate the Section about charitable giving and exempt organizations and to make recommendations to the Section concerning Federal and State legislative developments and initiatives in the fields of charitable giving and exempt organizations
Christopher A. Ballard, Chair
Michael W. Bartnik
Robin D. Ferriby
Richard C. Mills
Tracy A. Sonneborn

Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee
Mission: To review the statutes, case law, and court rules of Michigan and other jurisdictions concerning the scope of the Attorney Client Privilege for communications between trustees and their counsel and if necessary or appropriate, to recommend changes to Michigan law in this area
George F. Bearup, Chair
Shaheen I. Imami
David L.J.M. Skidmore
Michael J. McClory
Kalman G. Goren
Serene K. Zeni
David G. Kovac

Alternative Dispute Resolution Section Liaison
Sharri L. Rolland Phillips

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

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

Amy Rombyer Tripp

**Family Law Section Liaison**

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

Patricia M. Ouellette

**ICLE Liaison**

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

Jeanne Murphy

**Law Schools Liaison**

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

William J. Ard

**Michigan Bankers Association Liaison**

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

Susan M. Allan

**Probate Judges Association Liaisons**

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

Hon. David M. Murkowski
Hon. Darlene A. O'Brien

**Probate Registers Liaisons**

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

Rebecca A. Schnelz

**SCAO Liaisons**

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

Marlaine C. Teahan
Constance L. Brigman
Rebecca A. Schnelz
Solutions on Self-help Task Force Liaison
Mission: The liaison to the Solutions on Self-help (SOS) Task force is responsible for maintaining bilaterals communications between the Section and the Task Force

Rebecca A. Schnelz

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

including the Board of Commissioners and staff of the State Bar

David R. Brake

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

Frederick H. Hoops, III
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

June 8, 2013
Lansing, Michigan

Minutes

I. Call to Order

The Chair of the Section, Mark K. Harder, called the meeting to order at 10:36 a.m.

II. Attendance

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

Harder, Mark K. Imami, Shaheen I. Steward, James B. Sweeney, Thomas F. Allen, Susan M. Ard, W. Josh Ballard, Christopher A. Bearup, George F. Brigman, Constance L. Clark-Kreuer, Rhonda M. Kerr, J. David


A total of 21 council members and officers were present representing a quorum.

B. The following officers and members of the Council were absent with excuse:

Morrissey, Amy N. Ouellette, Patricia M.

C. The following officers and members were absent without excuse:

None.

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

George W. Gregory Harold G. Schuitmaker
E. **Others in attendance:**

Carol M. Hogan                    Rick Mills
Lorraine New                      Sharri L. Roland Phillips
Linsey Aten                       Amy Peterman
Robert Tiplady, III               Mark E. Kellogg
Jeanne Murphy                     Naznee H. Syed
Neal Nusholtz                     Loukas P. Kalliantasis
Julie Paquette                    Geoffrey R. Vernon
Michael Lichterman                Robert Ragosich

III. **Minutes of the April 13, 2013, Meeting of the Council**

Shaheen I. Imami presented the minutes of the April 13, 2013, Council meeting. The Hon. Darlene O'Brien moved for approval with support from Marguerite M. Lentz. The motion was approved on a voice-vote with no nays or abstentions.

IV. **Treasurer’s Report**

James B. Steward presented the Treasurer's report. Receipts and expenditures remain on track with the budget.

V. **Chairperson’s Report – Mark K. Harder**

Mark K. Harder presented the Chairperson’s report:

- Letter from Photographical Historical Society
- Letter to Sen. Jones re digital assets legislation
- Report from Naznee H. Syed regarding the SBM Diversity Summit. Ms. Syed noted that she would have liked the summit to more directly address the manner in which diversity will or might be accomplished. She also commented that it was not practical enough, but too theoretical.

VI. **Report of the Committee on Special Projects – Marlaine C. Teahan**

Marlaine C. Teahan reported that CSP heard from Court Rules Committee and Domestic Asset Protect Trust Committee (“DAPT Committee”) regarding the proposed amendment of various court rules, the creation of new probate court forms, and the status of the domestic asset protection trust (“DAPT”) legislation.

Ms. Teahan proposed package amendment to the various court rules discussed during CSP (MCR 5.125(B)(2), MCR 5.208(C)(1), MCR 5.208(F), MCR 5.108(B), MCR 5.125(C)(6), (19), (22), (24), & (27) as amended as CSP, and MCR 5.403(A)). Ms. Teahan moved for approval, with support by Marguerite M. Lentz. A friendly amendment was introduced by the
Hon. Darlene O'Brien, and accepted by Ms. Teahan, to delete "such" from MCR 5.125(C)(6)(h). The motion was approved on a Council vote of 21-0, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

Ms. Teahan next moved for approval of PC 556, PC 577, and PC 632, with support from Ms. Lentz. The motion was approved on a Council vote of 21-0, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

Robert Tiplady, III, presented the DAPT legislation, with minor modifications proposed by James P. Spica. Ms. Lentz moved for approval, with support and a friendly amendment from Shaheen I. Imami to recommend the proposal to the Legislature, find a sponsor, work with the Legislative Services Bureau, and to permit the DAPT Committee to make non-substantive changes during the process. During the comment period, James B. Steward would like to see the proposal expanded to include lower income individuals & ability to protected primary residences. Mr. Steward also noted some concerns about a trustee's ability to charge a trust related to litigation. The motion was approved on a Council vote of 18-3, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – Shaheen I. Imami

   No report.

2. Bylaws – Nancy H. Welber

   Nancy H. Welber reported on proposed changes to the Section’s bylaws. She addressed the potential of non-lawyer or out of state lawyers as associate members. A discussion ensued regarding the propriety and needs served by such membership & designation. Ms. Welber will take the proposals back to the committee for further work.

3. Awards – Douglas A. Mielock

   No report.

4. Planning – Thomas F. Sweeney

   No report.

5. Nominating – Harold G. Schuitmaker

   Harold G. Schuitmaker reported on the committee’s nominations for Council officers for FY 2013-2014 and members for a three-year term beginning in 2013:

   - Thomas F. Sweeney was nominated to become Chair;
• Amy N. Morrissey was nominated to become Chair-Elect;
• Shaheen I. Imami was nominated to become Vice-Chair;
• James B. Steward was nominated to become Secretary;
• Marlaine C. Teahan was nominated to become Treasurer;
• Michele Marquardt, Lorraine New, and Geoffrey R. Vernon were nominated as new Council members each for a three-year term beginning in 2013;
• Constance C. Brigman, Marguerite M. Lentz, and Susan M. Allen were nominated for a second, three-year term beginning in 2013; and
• No other nominations were made from the floor and the nominating slate was closed at the direction of the Chair, Mark K. Harder.

6. Annual Meeting – Thomas F. Sweeney
No report.

B. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L.J.M. Skidmore
No report.

2. Probate Institute – Amy N. Morrissey
No report.

3. State Bar and Section Journals – Amy N. Morrissey
No report.

4. Citizens Outreach – Rebecca A. Schnelz
No report.

5. Electronic Communications – William J. Ard

William J. Ard reported recommended policies and procedures for the Section’s webpage and listserve. Mr. Ard focused on removing outdated information from webpage and penalizing those who approve posting privileges on listserve. For the latter, he recommended a sliding scale of penalties to maintain free-flowing information. He also noted that a full-time moderator is impractical. He would like the enforcement of policies reserved to the committee or its chair.
C. Legislation and Lobbying

1. Legislation – Christopher A. Ballard

Christopher A. Ballard noted the existence of proposed cremation legislation offered by Henry Woloson – and while it has not been introduced, it apparently with the Legislative Services Bureau. Mr. Ballard recommended, with support by Rhonda Clark-Kreuer, that the Section support the proposal in principal to allow him to work with Mr. Woloson. The measure was approved on a voice-vote with no nays or absentions.

2. Updating Michigan Law – Marguerite Munson Lentz

No report.

3. Insurance Committee – Thomas F. Sweeney

No report.

4. Artificial Reproductive Technology – Nancy H. Welber

No report.

D. Ethics and Professional Standards

1. Ethics – J. David Kerr

No report.

2. Unauthorized Practice of Law & Multidisciplinary Practice – Robert M. Taylor

No report.

3. Specialization and Certification – James B. Steward

Jim referred to his report.

E. Administration of Justice

1. Court Rules, Procedures and Forms – Marlaine C. Teahan

Marlaine C. Teahan discussed MCR 7.205(F) and a proposal by Janet Welch to extend the period from 6 months to 12 months. Shaheen I. Imami moved to oppose such an extension, with support from Rhonda Clark-Kreuer. The motion was approved on a Council vote of 14-1-2. This is a PUBLIC POLICY POSITION to be reported to the SBM, if the proposal is introduced.

2. Fiduciary Exception to Attorney Client Privilege – George F. Bearup

George F. Bearup referred to his report in the materials.
F. **Areas of Practice**

1. **Real Estate – George F. Bearup**
   George F. Bearup referred to his report in the materials.

2. **Transfer Tax Committee – Nancy H. Welber**
   No report.

3. **Charitable and Exempt Organization – Christopher A. Ballard**
   No report.

4. **Guardianship, Conservatorship, and End of Life Committee – Constance L. Brigman**
   No report.

G. **Liaisons**

1. **Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips**
   No report.

2. **Business Law Section Liaison – John R. Dresser**
   No report.

3. **Elder Law Section Liaison – Amy R. Tripp**
   No report.

4. **Family Law Section Liaison – Patricia M. Ouellette**
   No report.

5. **ICLE Liaison – Jeanne Murphy**
   No report.

6. **Law Schools Liaison – William J. Ard**
   No report.

7. **Michigan Bankers Association Liaison – Susan Allan**
   No report.
   No report.

9. Probate Registers Liaison – Rebecca A. Schnelz
   Michael McClory reported on pending legislation regarding online access to court files.

10. SCAO Liaisons – Marlaine C. Teahan
    No report.

11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz
    No report.

12. State Bar Liaison – David R. Brake
    No report.

13. Taxation Section Liaison – Frederick H. Hoops, III
    No report.

VIII. Other Business

    Thomas F. Sweeney asked for committee chairs to report whether each is interested in continuing in current positions or assuming new positions. Also, he noted the dates for the remaining 2013 meetings as follows: September 21, 2013 (MSU University Club); October 12 2013 (Townsend Hotel, Birmingham); November 16, 2013 (MSU University Club); and December 14, 2013 (MSU University Club).

IX. Hot Topics

    None.

X. Adjournment

    Meeting adjourned by Mark K. Harder at 12:11 p.m.
Attachment 2
Probate and Estate Planning Council  
Treasurer’s Report  
for 9-21-2013

Income/Expense Report

Attached is the income and expense reports for May, June and July 2013 (unaudited). The dues revenue at the end of July 2013 is about $1,585 higher than through July 2012, and our total revenue is just slightly more than $2,000 over the total revenue budgeted for this year. Our entire total revenue for last year was higher due to additional items included under the “other” income category.

Our total expense payments at present are about $10,000 more than this time last year. About $4,300 of this is due to an additional Probate Journal publication expense payment that was made in July this year, that was made later last year. We remain on target for the Journal expense payments – we have slightly under $10,000 of our budget left for the Journal expense, and at present, the cost per issue is running about $7,750 ($3,750 for ICLE’s work, and just under $4,000 per issue for printing and mailing costs). The cost to create the searchable on-line archive data base was also charged to the Journal budget. Therefore, we are very much on target with the projected revenue as shown in the budget. However, I do not know if there will be ongoing charges to update the archive.

Another $2,500 of the extra expense paid to date, compared to last year, is one additional lobbying payment included on this July report. This expense item remains on budget.

Also, last year the total support for the Annual Institute at this time came to $11,557 (which was the total for the year); whereas, this year our total is $13,688. Which is slightly more than $2,000 over last year, and $688 over budget. For this year. We should consider amending the budget to cover this additional expense (I doubt that there will be any more bills coming in for the Annual Institute, but I do not know that for sure.) I believe that one primary reason for the higher expense this year was a reduction in sponsor participation.

Overall, we remain within budget, even with the overage for the Institute, because several other items are coming in under budget. But, as some have suggested, we may need to discuss how we handle the support for the annual institute, including how we budget for it.

Expense Reimbursement Requests

Please keep in mind that the State Bar prefers that all expenses submitted to the State Bar of Michigan within 30 days of when the expense was incurred. As we near the end of the fiscal year, you will need to get our reimbursement expense vouchers in to me as quickly as reasonably possible after the September meeting, so we can be sure to have them included in this year’s expense report.

Also, as previously noted, the Bar has revised the expense reimbursement form to include the new mileage rate on some of the lines. This is available on the State Bar website at:
Again this month, I’ve also attached a blank (non fillable) pdf copy of the expense reimbursement form at the end of this report which can be printed off directly and filled out manually

**Hearts and Flowers Fund:**

In late August, George Bearup was injured in a bicycling accident resulting in a fractured pelvis. We sent a card and flowers (from our Hearts & Flowers fund) wishing him a speedy recovery and to let him know we are thinking of him.

Jim Steward
Council Treasurer
Probate and Estate Planning Section  
Treasurer's Report as of May 31, 2013

<table>
<thead>
<tr>
<th>March</th>
<th>April</th>
<th>May</th>
<th>FY to Date Actual</th>
<th>Budget 2012-13</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Membership Dues</td>
<td>$175</td>
<td>$105</td>
<td>$140</td>
<td>$116,410</td>
<td>$115,000</td>
<td>$1,410</td>
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<tr>
<td>Publishing Agreements</td>
<td>$350</td>
<td>$350</td>
<td>$350</td>
<td>$350</td>
<td>$350</td>
<td>0%</td>
</tr>
<tr>
<td>Other</td>
<td>$350</td>
<td>$350</td>
<td>$350</td>
<td>$350</td>
<td>$350</td>
<td>0%</td>
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<tr>
<td>Total Receipts</td>
<td>$175</td>
<td>$105</td>
<td>$140</td>
<td>$116,410</td>
<td>$115,700</td>
<td>$710</td>
</tr>
</tbody>
</table>

| Disbursements |        |        |                   |                |          |                        |
| Journal | $75 | $3,750 | $13,964 | $27,500 | (13,536) | 51% |
| Chairperson's Dinner | $4,406 | $6,500 | (2,094) | 68% |
| Travel | $1,350 | $983 | $2,571 | $13,657 | $18,000 | (4,343) | 76% |
| Lobbying | $5,000 | $5,000 | $22,500 | $30,000 | (7,500) | 75% |
| Meetings | $1,015 | $1,945 | $5,374 | $12,000 | (6,626) | 45% |
| Long-range Planning | $1,000 | $1,000 | $1,000 | 0% |
| Publishing Agreements | $0 | $0 | 0% |
| Support for Annual Institute | $1,140 | $6,504 | $13,020 | $13,000 | 20 | 100% |
| Amicus Briefs | $75 | $75 | $75 | $1,400 | (875) | 38% |
| Electronic Communications* | $75 | $75 | $75 | $1,400 | (875) | 38% |
| Postage | $1 | $1 | $100 | $100 | (99) | 1% |
| Telephone | $13 | $37 | $14 | $143 | $250 | (107) | 57% |
| Other** | $100 | $155 | $425 | $905 | $1,000 | (95) | 90% |
| Total Disbursements | $7,554 | $2,465 | $20,284 | $74,494 | $120,750 | (46,256) | 62% |

Net Increase (Decrease) | $41,916 | $ (5,050) | $46,966 |

Additional Information

Fund Balance | $242,921 |

*includes e-blast & other electronic communications to members
**includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit
***includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount
## Probate and Estate Planning Section
Treasurer's Report as of June 30, 2013

<table>
<thead>
<tr>
<th></th>
<th>April</th>
<th>May</th>
<th>June</th>
<th>FY to Date</th>
<th>Budget</th>
<th>Variance</th>
<th>Year to Date</th>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>Actual</td>
<td>2012-13</td>
<td></td>
<td>Percentage</td>
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<td><strong>Revenue</strong></td>
<td></td>
<td></td>
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<td>$140</td>
<td>$70</td>
<td>$116,480</td>
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<td>101%</td>
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<td>Publishing Agreements</td>
<td>$500</td>
<td>$500</td>
<td>$350</td>
<td>$150</td>
<td>$350</td>
<td>$270</td>
<td>143%</td>
</tr>
<tr>
<td>Other</td>
<td>$620</td>
<td>$620</td>
<td>$350</td>
<td>$270</td>
<td>$350</td>
<td>$270</td>
<td>177%</td>
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<td>$140</td>
<td>$1,190</td>
<td>$117,600</td>
<td>$115,700</td>
<td>$1,900</td>
<td>102%</td>
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<td><strong>Disbursements</strong></td>
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<td></td>
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<tr>
<td>Journal</td>
<td>$75</td>
<td>$3,750</td>
<td>$13,964</td>
<td>$27,500</td>
<td>$13,536</td>
<td>51%</td>
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<tr>
<td>Chairperson's Dinner</td>
<td>$4,406</td>
<td>$6,500</td>
<td>$18,000</td>
<td>$27,500</td>
<td>$2,094</td>
<td>68%</td>
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<tr>
<td>Travel</td>
<td>$983</td>
<td>$2,571</td>
<td>$2,233</td>
<td>$15,890</td>
<td>$2,110</td>
<td>88%</td>
<td></td>
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<tr>
<td>Lobbying</td>
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<td>$22,500</td>
<td>$30,000</td>
<td>$7,500</td>
<td>75%</td>
<td></td>
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<tr>
<td>Meetings</td>
<td>$1,945</td>
<td>$5,374</td>
<td>$12,000</td>
<td>$6,626</td>
<td>45%</td>
<td></td>
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<tr>
<td>Long-range Planning</td>
<td>$1,140</td>
<td>$6,504</td>
<td>$669</td>
<td>$13,688</td>
<td>$688</td>
<td>105%</td>
<td></td>
</tr>
<tr>
<td>Support for Annual Institute</td>
<td>$1,140</td>
<td>$6,504</td>
<td>$669</td>
<td>$13,688</td>
<td>$688</td>
<td>105%</td>
<td></td>
</tr>
<tr>
<td>Amicus Briefs</td>
<td>$75</td>
<td>$75</td>
<td>$75</td>
<td>$600</td>
<td>$1,400</td>
<td>(800)</td>
<td>43%</td>
</tr>
<tr>
<td>Electronic Communications*</td>
<td>$37</td>
<td>$14</td>
<td>$143</td>
<td>$250</td>
<td>(107)</td>
<td>57%</td>
<td></td>
</tr>
<tr>
<td>Postage</td>
<td>$155</td>
<td>$425</td>
<td>$905</td>
<td>$1,000</td>
<td>(95)</td>
<td>90%</td>
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<tr>
<td>Total Disbursements</td>
<td>$2,465</td>
<td>$20,284</td>
<td>$2,977</td>
<td>$77,471</td>
<td>$120,750</td>
<td>(43,279)</td>
<td>64%</td>
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<td><strong>Net Increase (Decrease)</strong></td>
<td>$40,129</td>
<td>$ (5,050)</td>
<td>$ 45,179</td>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>

### Additional Information

- *includes e-blast & other electronic communications to members
- **includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit
- ***includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount

**Fund Balance**: $241,134
### Probate and Estate Planning Section

**Treasurer's Report as of July 31, 2013**

<table>
<thead>
<tr>
<th></th>
<th>May</th>
<th>June</th>
<th>July</th>
<th>FY to Date Actual</th>
<th>Budget 2012-13</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revenue</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Membership Dues</td>
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<td>$70</td>
<td>$105</td>
<td>$116,585</td>
<td>$115,000</td>
<td>$1,585</td>
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<td>$500</td>
<td>$350</td>
<td>$150</td>
<td>$350</td>
<td>$270</td>
<td>143%</td>
</tr>
<tr>
<td>Other</td>
<td>$620</td>
<td>$620</td>
<td>$350</td>
<td>$270</td>
<td>$350</td>
<td>$270</td>
<td>177%</td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>$140</td>
<td>$1,190</td>
<td>$105</td>
<td>$117,705</td>
<td>$115,700</td>
<td>$2,005</td>
<td>102%</td>
</tr>
<tr>
<td><strong>Disbursements</strong></td>
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<tr>
<td>Journal</td>
<td>$3,750</td>
<td>$3,998</td>
<td>$17,962</td>
<td>$27,500</td>
<td>(9,538)</td>
<td>65%</td>
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<tr>
<td>Chairperson's Dinner</td>
<td>$4,406</td>
<td>$6,500</td>
<td>$18,000</td>
<td>(2,110)</td>
<td>88%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td>$2,571</td>
<td>$2,233</td>
<td>$15,890</td>
<td>$30,000</td>
<td>(12,110)</td>
<td>92%</td>
<td></td>
</tr>
<tr>
<td>Lobbying</td>
<td>$5,000</td>
<td>$5,000</td>
<td>$27,500</td>
<td>$30,000</td>
<td>(2,500)</td>
<td>92%</td>
<td></td>
</tr>
<tr>
<td>Meetings</td>
<td>$1,945</td>
<td>$5,374</td>
<td>$12,000</td>
<td>(6,626)</td>
<td>45%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Long-range Planning</td>
<td>$-</td>
<td>$-</td>
<td>$1,000</td>
<td>(1,000)</td>
<td>0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Publishing Agreements</td>
<td>$-</td>
<td>$-</td>
<td>$0</td>
<td>(0)</td>
<td>0%</td>
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</tr>
<tr>
<td>Support for Annual Institute</td>
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<td>$13,688</td>
<td>$13,000</td>
<td>688</td>
<td>105%</td>
<td></td>
</tr>
<tr>
<td>Amicus Briefs</td>
<td>$-</td>
<td>$-</td>
<td>$10,000</td>
<td>(10,000)</td>
<td>0%</td>
<td></td>
<td></td>
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<tr>
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<td>1%</td>
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</tr>
<tr>
<td>Telephone</td>
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<td>$250</td>
<td>(107)</td>
<td>57%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other**</td>
<td>$425</td>
<td>$905</td>
<td>$1,000</td>
<td>(95)</td>
<td>90%</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total Disbursements</strong></td>
<td>$20,284</td>
<td>$2,977</td>
<td>$9,073</td>
<td>$86,544</td>
<td>$120,750</td>
<td>(34,206)</td>
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<td></td>
<td></td>
<td>$31,161</td>
<td>(5,050)</td>
<td>$36,211</td>
<td></td>
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</tbody>
</table>

**Additional Information**

- Fund Balance: $232,166

*includes e-blast & other electronic communications to members

**includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit

***includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount
State Bar of Michigan
506 Townsend St., Lansing MI 48933-2012, (800) 368-1442

**Section**
Expense Reimbursement Form

### Payee Name

<table>
<thead>
<tr>
<th>Payee Name</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Street</th>
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<table>
<thead>
<tr>
<th>City</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Zip Code</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>E-mail</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

### Please Provide Account Number | Amount
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Date</th>
<th>Description &amp; Purpose</th>
<th>Mileage</th>
<th>Lodging/Other Travel</th>
<th>Meals (Self + attach list of guests)</th>
<th>Miscellaneous (i.e. copying, phone, etc.)</th>
<th>TOTAL</th>
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</thead>
<tbody>
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<td></td>
<td></td>
<td>0.565</td>
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<td>0.565</td>
<td></td>
<td></td>
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<td>0.00</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Date</th>
<th>Title</th>
<th>Signature</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Date
Title
Approved by (signature)

Grand Total
$0.00

[Reset Form]
[Print Form]
STATE BAR OF MICHIGAN
Section Expense Reimbursement Policies and Procedures

General Policies
1. Requests for reimbursement of individual expenses should be submitted as soon as possible following the event and no later than two weeks following the close of the fiscal year in which the expense is incurred so that the books for that year can be closed and audited.

2. All out of pocket expenses must be itemized.

3. Detailed receipts are recommended for all expenses but required for expenses over $25.

4. Meal receipts for more than one person must indicate names of all those in attendance unless the function is a section council meeting where the minutes of that meeting indicate the names of those present. Seminar meal functions should indicate the number guaranteed and those in attendance, if different.

5. Spouse expenses are generally not reimbursable.

6. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursement of mileage or travel expenses is limited to actual distance traveled; not distance from domicile to the meeting site.

7. Receipts for lodging expenses must be supported by a copy of the itemized bill showing the per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid.

8. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.
   A. Tickets should be at the best rate available for as direct a path as possible.

B. First class tickets will not be reimbursed in full but will only be reimbursed up to the amount of the best or average coach class ticket available for that trip.

C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.

D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

9. Reimbursement for car, bus or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

10. Outside speakers should be advised in advance of the need for receipts and the above requirements.

11. Bills for copying done by a firm should include the numbers of copies made, the cost per page and general purpose (committee or section meeting notice, seminar materials, etc.).

12. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

13. The State Bar of Michigan is Sales tax exempt. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

14. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of the Finance Department. If the State Bar of Michigan is paying your expenses or reimbursing you for a conference and you are aware you will receive a refund, please notify the finance department staff at the time you submit your request for payment.

15. Reimbursement will in all instances be limited to reasonable and necessary expenses.

Specific Policies
1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.
Attachment 3
## 10/1/2013 TO 9/30/2015 BIENNIAL PLAN OF WORK

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**AP** = Action Pending and little work required

**P1** = Priority items in year 1

**P2** = Secondary Priority

**TBD** = Priority to be determined in future
Respectfully submits the following position on:

* Ducharme v. Ducharme, COA #314736

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

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

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

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 21. The number who voted opposed to this position was 0.
Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Shaheen I. Imami

E-Mail:
sii@probateprince.com

Regarding:
Ducharme v. Ducharme, COA #314736

Date position was adopted:
July 2, 2013

Process used to take the ideological position:
Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
21 Voted for position
0 Voted against position
0 Abstained from vote
2 Did not vote

Position:
The Probate & Estate Planning Section voted to file an amicus brief in Ducharme v Ducharme, COA #314736 (Eaton County Probate Court, File No. 12-49110-CZ). The due date for the amicus brief is July 16, 2013.

Explanation of the position, including any recommended amendments:
To support the position that Section 7905(1) of the MTC (MCL 700.7905(1)) sets forth the exclusive limitations period for a beneficiary’s claims against the trustee arising from a violation of the trustee’s duties to the beneficiary, provided that the conditions of Section 7905(1) are satisfied.
STATE OF MICHIGAN

IN THE COURT OF APPEALS

DONN R. DUCHARMME,  
 Plaintiff/Appellant,

v

MICHELLE K. DUCHARMME,

Defendant/Appellee.

Case No. 314736
Eaton County Probate Court
Case No. 12-49110-CZ

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BRIEF OF AMICUS CURIAE THE PROBATE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN
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BASIS OF JURISDICTION

Amicus curiae the Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan agrees with the parties’ statements of the basis of jurisdiction.
QUESTION PRESENTED

Whether Section 7905 of the Michigan Trust Code, MCL 700.7905, provides the exclusive period of limitations for a trust beneficiary to commence a proceeding against a trustee for a violation by the trustee of a duty the trustee owes to a trust beneficiary?

Appellant-Plaintiff answers: no.

Appellee-Defendant answers: yes.

The probate court answered: yes.

Amicus curiae answers: yes.
INTRODUCTION AND STATEMENT OF INTEREST

_Amicus curiae_ the Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan (the "Probate Council") acts to further the purposes of the Probate and Estate Planning Section (the "Probate Section"). The Section is composed of nearly 5,000 members. Membership in the Section is open to active, inactive, law student, affiliate, and emeritus members of the State Bar of Michigan.

The purpose of the Probate Section is to enhance and improve the practice and administration of law pertaining to probate and estate planning, in connection with advancing the proper preparation of wills, trusts, tax returns, and other documents; the efficient administration of trusts as well as estates of decedents, minors, incompetents, and missing persons; and the advance planning for the orderly disposition of property, minimization of taxes, and well-being of persons. These purposes are furthered by such means as: the study of statutes, cases, and procedures; the consideration, drafting, and active support or opposition of proposed legislation; and the providing of advice to courts during the course of pending litigation.

During the fall of 2003, the Probate Council authorized the formation of the Michigan Trust Code Committee (the "MTC Committee") of the Probate Section to study the Uniform Trust Code ("UTC"), promulgated in 2000. In a comprehensive undertaking, spanning a period of five years, the MTC Committee of the Probate Section, in close connection with the Michigan Bankers Association’s Trust Counsel Committee, prepared draft provisions of a state version of the UTC. After making edits to the proposed draft, the Legislature enacted the Michigan Trust Code ("MTC"), MCL 700.7101, _et seq._, which became effective on April 1, 2010.

The Probate Council is keenly interested in the Court’s determination of the question of law presented in this case, which involves the interpretation and application of the MTC. On
August 12, 2013, this Court granted the Probate Council’s motion for leave to file an *amicus curiae* brief in this matter.

**BACKGROUND**

**History of Statutes of Limitation for Breach of Trust: 1979-Present**

**A. Revised Probate Code Section 819: 1979-2000**

From 1979 to 2000, Michigan trust and estate law was primarily governed by the Revised Probate Code of 1978 ("RPC"), 642 PA 1978. Under Section 819 of the RPC, MCL 700.819, trust beneficiaries were “barred from action within six months after receipt of the final account or statement if the trustee fully disclosed all relevant documents, or within three years if the trustee did not disclose all documents but acted in good faith.” *In re Barnes*, 2000 WL 33418069, at *3 (Mich Ct App, June 27, 2000). Specifically, MCL 700.819 provided:

> Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

MCL 700.819 ("Limitations on proceedings against trustee after final account") (emphasis added); (repealed by 386 PA 1998 § 8102, Eff. April 1, 2000).

> “[A] final account or other statement fully disclosing the matter and showing termination of the trust relationship” was required to trigger the six-month period of limitation pursuant to
MCL 700.819. In re Ervin Testamentary Trust, 2005 WL 433573, at *6 (Mich Ct App, Feb 24, 2005). If a trustee did not comply with the procedure for invoking the six-month statutory period, then a trust beneficiary’s complaint for breach of fiduciary duty was timely filed within the three-year statutory period. LaFave v Jacobson, 1999 WL 33326822, at *3 (Mich Ct App, Dec 21, 1999).

B. Estates and Protected Individuals Code Section 7307: 2000-2010

In 1998, the Legislature enacted the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101, et seq, effective April 1, 2000.

1. April 1, 2000-August 31, 2004

Subsection 7307(1) of EPIC originally provided:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred unless a proceeding to assert the claim is commenced within 1 year after receipt of an annual or final account as to each beneficiary who receives the annual or final account.

MCL 700.7307(1) (emphasis added).

2. September 1, 2004-April 1, 2010

Effective September 1, 2004, the Michigan Legislature amended subsection 7307(1) of EPIC:

A beneficiary is barred from commencing a proceeding against a trustee for breach of trust if the proceeding is not commenced within 1 year after the date the beneficiary or a representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for commencing a proceeding. A beneficiary may also be barred from commencing a proceeding against a trustee for breach of trust by adjudication, consent, ratification, estoppel, or other limitation.
MCL 700.7307(1) (repealed by 2009 PA 46) (emphasis added).

The 2004 amendment of EPIC also added subsection (4) to Section 7307. See In re Jervis C Webb Trust, 2006 WL 173172, at *3 (Mich Ct App, Jan 24, 2006). Subsection (4) provides a five-year period of limitation for breach of trust if subsection (1) does not apply. Specifically:

If subsection (1) does not apply, a proceeding by a beneficiary against a trustee for breach of trust shall be commenced within 5 years of the first of the following to occur:

(a) The removal, resignation, or death of the trustee.

(b) The termination of the beneficiary’s interest in the trust.

(c) The termination of the trust.

MCL 700.7307(4) (repealed by 2009 PA 46).

C. **Michigan Trust Code Section 7905: 2010-Present**


Part 9 of the MTC addresses the liability of trustees and beneficiaries’ rights upon a breach of trust. *Id.* Section 7905 establishes a period of limitations for claims for breaches of trust. *Id.* In general, the rule requires that claims be filed within one year after a report that would put the recipient on notice of the claim is sent to the beneficiary. *Id.* Otherwise, claims must be brought within five years of the removal, resignation, or death of a trustee; or
termination of the beneficiary’s interest; or termination of the trust; whichever is first to occur.

Id.

MCL 700.7905 provides in its entirety as follows:

(1) The following limitations on commencing proceedings apply in addition to other limitations provided by law:

(a) A trust beneficiary shall not commence a proceeding against a trustee for breach of trust more than 1 year after the date the trust beneficiary or a representative of the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.

(b) A trust beneficiary who has waived the right to receive reports pursuant to section 7814(5) shall not commence a proceeding for a breach of trust more than 1 year after the end of the calendar year in which the alleged breach occurred.

(2) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the trust beneficiary or representative knows of the potential claim or should have inquired into the potential claim’s existence.

(3) If subsection (1) does not apply, a judicial proceeding by a trust beneficiary against a trustee for breach of trust shall be commenced within 5 years after the first of the following to occur:

(a) The removal, resignation, or death of the trustee.

(b) The termination of the trust beneficiary’s interest in the trust.

(c) The termination of the trust.

MCL 700.7905.

Current MTC Section 7905 repealed EPIC Section 7307. The MTC added an additional provision, subsection 7905(1)(b) to prevent beneficiaries from effectively gaining an extended period of limitations as a result of their own waiver of the right to receive a report. Harder, supra.
STANDARD OF REVIEW

The interpretation and application of a statute of limitations is a question of law that is reviewed de novo. Miller-Davis Co v Ahrens Const, Inc, 489 Mich 355, 361; 802 NW2d 33 (2011).

ARGUMENT

I. Section 7905 provides the exclusive period of limitations for a trust beneficiary sue a trustee for the trustee’s violation of a duty the trustee owes to the trust beneficiary

A. The Michigan Trust Code is a comprehensive statute that contains certain mandatory provisions.

The MTC, MCL 700.7101, et seq., is Michigan’s first comprehensive statute concerning the creation, administration, modification, and termination of trusts. The MTC also represents a continuation of the modernization of Michigan’s laws governing trusts and estates, which began with the enactment of EPIC, MCL 700.1101 et seq, effective April 1, 2000. The MTC, effective April 1, 2010, displaced the then-existing provisions of Article VII of EPIC. Although the MTC relies on the structure and provisions of the Uniform Trust Code (“UTC”) as the starting point for many provisions, the MTC is a uniquely Michigan document that draws from both the UTC and existing Michigan law to preserve long-established procedures, practices, and principles of Michigan trust law while also filling the numerous gaps that have existed in such body of law. Harder, supra.

Generally, the MTC is a set of default rules that apply to the extent not addressed or varied by the terms of the trust agreement. Trust agreements may be drafted to override all of the MTC provisions except for certain mandatory provision set forth in the MTC. Such
mandatory provisions include the MTC’s limitation periods for commencing proceedings. See MCL 700.7105.

The periods of limitation under Section 7905, for a trust beneficiary to commence a proceeding against a trustee for breach of trust, are mandatory and cannot be overridden by the terms of a trust agreement. Harder, supra. Section 7105 provides that: “The terms of a trust prevail over any provisions of this article except ... [p]eriods of limitation under this article for commencing a judicial proceeding.” MCL 700.7105(2)(m). “The duty of a trustee to administer a trust in accordance with section 7801” also cannot be overridden. MCL 700.7105(2)(b).

The MTC applies to all trusts. MCL 700.8206(1)(a); In re Tiffany Smith Trust, No 303128, 2012 WL 5290282, at *2 (Mich Ct App, Oct 25, 2012). Further, the MTC applies “to all judicial proceedings concerning trusts commenced on or after [April 1, 2010].” MCL 700.8206(1)(b). This litigation began on October 31, 2012. Thus, the MTC applies to this case.

B. Section 7905 governs all claims concerning a violation by a trustee of the trustee’s duties to a trust beneficiary

The MTC expressly provides that: “A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust.” MCL 700.7901(1). In other words, “[a]ccording to the Michigan Trust Code, any violation of a duty owed to the beneficiary by the trustee is considered a ‘breach of trust.’” In re Tiffany Smith Trust, 2012 WL 5290282, at *2 (citing MCL 700.7901(1)). Accord Restatement (Third) of Trusts §93 (2012) (“A breach of trust is a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries, or to further the charitable purpose, of the trust.”).

The duties a trustee owes to trust beneficiaries are “determined by consideration of the trust, the relevant probate statutes and the relevant case law.” In re Green Charitable Trust, 172 Mich App 298, 312; 431 NW2d 492 (1988). Part 8 of the MTC codifies certain duties the trustee
owes to a trust beneficiary, the violation of which is a breach of trust. Section 7801 of the MTC provides that “the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article.” MCL 700.7801 (“Administration of trust; duties of trustee.”).

Section 7802(1) provides that “[a] trustee shall administer the trust solely in the interests of the trust beneficiaries.” See MCL 700.7802 (“Duty of loyalty.”). Section 7803 imposes upon the trustee the duty of impartiality, and the duty to follow the standards of the Michigan Prudent Investor Rule. MCL 700.7803. Section 7811 provides that “[a] trustee shall keep adequate records of the administration of the trust” and that “[a] trustee shall keep trust property separate from the trustee’s own property.” MCL 700.7811(1)-(2). Section 7813 imposes upon the trustee the duty to locate trust property and compel delivery. MCL 700.7813(1) (“A trustee shall take reasonable steps to locate trust property and to compel a former trustee or other person to deliver trust property to the trustee.”). Section 7814(1) provides that “[a] trustee shall keep the qualified trust beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a trust beneficiary’s request for information related to the administration of the trust.” See MCL 700.7814 (“Duty to inform and report.”).

Further, under EPIC, a trustee, is by definition, a “fiduciary.” MCL 700.1104(e) (“‘Fiduciary’ includes ... trustee ...”). Regarding the “Fiduciary Relationship,” EPIC provides in pertinent part:

A fiduciary stands in a position of confidence and trust with respect to each ... beneficiary ... for whom the person is a fiduciary. A fiduciary shall observe the standard of care described in section 7803 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and
beneficiaries; care and prudence in actions; and segregation of
assets held in the fiduciary capacity ....

MCL 700.1212(1) ("Fiduciary relationship.") Thus, a violation of a fiduciary duty the trustee
owes a trust beneficiary is a breach of trust. MCL 700.7901(1).

A "breach of trust" is not a separate cause of action, much less a new statutory cause of
action created by the MTC. (Contra Appellant’s Br at 15, 17-18, 19.) Rather, a breach of
fiduciary duty claim is a claim for breach of trust. The phrases "breach of trust" and "breach of
fiduciary duty" are synonymous in the trust context.

The periods of limitation for commencing a claim against a trustee for breach of trust,
pursuant to MCL 700.7905’s predecessor statutes under EPIC and the RPC, have been applied
claims alleging breach of fiduciary duty. E.g., In re Estate of Ewbank Trust, 2007 WL 704982,
at *3 (Mich Ct App Mar 8, 2007) (determining MCL 700.7307 applicable to actions for breach
of fiduciary duties); In re Barnes, 2000 WL 33418069 at *3 (concluding plaintiffs are barred
from action for breach of fiduciary duty against trustee pursuant to MCL 700.819). Conversely,
in cases applying the three-year limitations period under the general tort statute of limitations,
this Court has equated claims of breach of fiduciary duty with claims of breach of trust. E.g.,
Prentis Family Found v Barbara Ann Karmanos Cancer Inst, 266 Mich App 39, 47; 698 NW2d
900 (2005) (quoting Bay Mills Indian Cnty v Michigan, 244 Mich App 739, 751; 626 NW2d 169
(2001) ("A claim of breach of fiduciary duty or breach of trust accrues when the beneficiary
knew or should have known of the breach" (emphasis added))).

When a trust beneficiary brings suit against a trustee for breach of duty in administering
the trust, the beneficiary’s claims can bear many different labels, even though they all arise from
the trustee’s breach of duties owed to the beneficiary by virtue of the trustee-beneficiary
relationship. At the general level, the beneficiary may state a cause of action for “breach of
fiduciary duty” or “breach of trust.” At a more particular level, the beneficiary may label his claims by reference to particular duties that the trustee is alleged to have violated (e.g., breach of the duty of loyalty, the duty of impartiality, the duty to account, the duty to provide information, the Prudent Investor Rule, etc.). If the beneficiary alleges that the trustee has taken trust property to which the trustee is not entitled, in breach of the trustee’s duty of loyalty to the beneficiary’s interests, then the beneficiary may frame the claim as one for conversion or misappropriation. Furthermore, it is common for a beneficiary to label a claim for breach of fiduciary duty by reference to the type of relief sought from the probate court:

- Claim for accounting, when the beneficiary wants the probate court to order the trustee to prepare and serve an accounting, in order to remedy the trustee’s breach of the duty to account.

- Claim for surcharge, when the beneficiary wants the probate court to order the trustee personally to reimburse the trust for damages caused by the trustee’s breach of duty.

- Claim to compel return of trust property, when the beneficiary wants the probate court to order the trustee to return converted or misappropriated assets to the trust, taken in violation of the trustee’s duty of loyalty to the beneficiaries.

Appellant-Plaintiff’s “breach of fiduciary duty” claim is based on alleged violations by the trustee of duties the trustee owes a trust beneficiary, and therefore it constitutes a claim for breach of trust. MCL 700.7901(1) (“A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust.”). Specifically, Appellant-Plaintiff alleged that Appellee-Defendant, as the trustee, breached her fiduciary duties by converting trust property, failing “to produce accurate accounting which were understandable, and failing to keep trust property in good repair. (Compl ¶¶ 27-42.)
To the extent the other counts in Appellant-Plaintiff’s complaint, regardless of the labels, are based on the trustee’s alleged violation of duties owed to a trust beneficiary, they also constitute a breach of trust. MCL 700.7901(1). Count II of Appellant-Plaintiff’s complaint, labeled as “Conversion of Assets,” even expressly alleges that the trustee breached a duty under Section 7813(4) of the MTC. (Compl ¶ 53.) The remainder of the counts in Appellant-Plaintiff’s complaint all appear to allege breaches of various duties that are codified in the MTC. For instance, Count III alleges that the trustee commingled trust assets, which would be in violation of the duty set forth in Section 7811 of the MTC, requiring that “[a] trustee shall keep trust property separate from the trustee’s own property.” MCL 700.7811 (2).

Further, the remedies in Appellant-Plaintiff’s request for relief are entirely consistent with the “[r]emedies for breach of trust” set forth in the MTC. See MCL 700.7901 (“Remedies for breach of trust.”). Specifically, Section 7901(2) provides that “[t]o remedy a breach of trust that has occurred or may occur, the court may do any of the following:”

(a) Compel the trustee to perform the trustee’s duties.
(b) Enjoin the trustee from committing a breach of trust.
(c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means.
(d) Order a trustee to account.
(e) Appoint a special fiduciary to take possession of the trust property and administer the trust.
(f) Suspend the trustee.
(g) Remove the Trustee as provided in section 7706.
(h) Reduce or deny compensation to the trustee.
(i) Subject to section 7912, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.
(j) Order any other appropriate relief.

MCL 700.7901(2)(a)-(j).

Appellant-Plaintiff requests remedies including, that the probate court: provide for the proper administration of the trust estate; order an accounting; compel the trustee to file a bond in order to protect trust property; and compel the trustee to indemnify Appellant-Plaintiff for the disposal and misappropriation of trust property. (See Compl at 20-21.) The relief sought all falls within that which the probate court may grant for breach of trust. Id.

II. **A specific statute of limitation controls over a general statute of limitations**

Under the general rules of statutory construction, “[w]hen two statutory provisions appear to be in conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails.” *Allen v Farm Bureau Ins Co*, 210 Mich App 591, 596; 534 NW2d 177 (1995). “[A] specific statute of limitations controls over a general statute of limitations.” *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 13; 687 NW2d 309 (2004).

MCL 700.7905 is a specific statute of limitations. Specifically, MCL 700.7905(1)(a) “provides a limitations period of one year to claim breach of trust where the trustee ‘sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.’” *In re Ilene G. Barron Revocable Trust*, 2013 WL 275913, at *6 (Mich Ct App Jan 24, 2013), citing MCL 700.7905(1)(a). MCL 700.7905(3) provides a limitations period of five years where subsection (1) does not apply. MCL 700.7905(3).

MCL 600.5805 is a general statute of limitations. “MCL 600.5805 is entitled ‘Injuries to persons or property.’ It is commonly known as the general tort statute of limitations[.]” *Miller-Davis Co*, 489 Mich at 363. Under MCL 600.5805(10): “Except as otherwise provided in this
section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property.” MCL 600.5805(10).

There is no specific statute of limitations for a breach of fiduciary duty claim. (Contra Appellant’s Br at 18.) Rather, “this Court has applied the general three-year period of limitation for tort actions to breaches of fiduciary duty.” In re Ervin Testamentary Trust, 2005 WL 433573 at *6.

In In re Ervin Testamentary Trust, this Court determined that the probate court had erred in determining that a trust beneficiary’s claims were barred by the statute of limitations pursuant to Section 7307(1) of EPIC, because the claims had accrued before EPIC’s effective date, and thus the statute, which was not given retroactive effect, did not apply. Id. at *5-*6. However, this Court noted that assuming that EPIC applied, petitioner’s claim was arguably barred, because petitioner did not assert her claim against the trustee within one year after the last account was filed, on March 2, 2000. Id. at *5. The trust beneficiary did not file her provision for order on supervision and appointment of a successor trustee until August 31, 2001. Id.

This Court concluded that the predecessor statute of limitations under the RPC, governing “a claim against a trustee for breach of trust,” was also not applicable because the beneficiary did not receive “a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary,” which this Court noted was required to trigger the period of limitations under MCL 700.819. Id. at *5. And because MCL 700.819 was not applicable, this Court applied the general three-year period of limitation for tort actions pursuant to MCL 600.5805(10). Id. at *6.
Notably, the Legislature amended Section 7307 of EPIC in 2004, adding subsection (4), which provides:

If subsection (1) does not apply, a proceeding by a beneficiary against a trustee for breach of trust shall be commenced within 5 years of the first of the following to occur:

(a) The removal, resignation, or death of the trustee.

(b) The termination of the beneficiary’s interest in the trust.

(c) The termination of the trust.

MCL 700.7307(4) (repealed by 2009 PA 46). See In re Jervis C Webb Trust, 2006 WL 173172 at *3 (rejecting petitioner’s reliance on MCL 700.7304(4) for the proposition that he had five years to file his breach of fiduciary duty claims because “[s]ubsection (4) of that statute was not added until the statute was amended, effective September 1, 2004”).

Section 7307(4) was replaced by a nearly identical provision of the MTC. MCL 700.7905(3). It provides:

If subsection (1) does not apply, a judicial proceeding by a trust beneficiary against a trustee for breach of trust shall be commenced within 5 years after the first of the following to occur:

(a) The removal, resignation, or death of the trustee.

(b) The termination of the trust beneficiary’s interest in the trust.

(c) The termination of the trust.

MCL 700.7905(3).

The enactment of MCL 700.7307(4), subsequently replaced by MCL 700.7905(3), evinces a legislative intent to abrogate the applicability of the general tort statute of limitations for a trust beneficiary’s claims against a trustee for breach of fiduciary duty. See Ostroth, 263 Mich App at 14 (recognizing that by enacting certain statutes, “the Legislature knowingly and
necessarily abrogated the applicability of the general statute of limitations” for certain claims). Whereas prior to the 2004 amendment of EPIC Section 7307, if the period of limitations for breach of trust was not triggered, the general tort statute of limitation applied, the inclusion of EPIC subsection 7307(4) and MTC subsection 7905(3) provides a comprehensive statute of limitations for a trust beneficiary to commence a proceeding against a trustee for breach of trust. The promulgation of MCL 700.7307(4), and subsequently MCL 700.7905(3), means that the Legislature intended for the general tort statute of limitations to no longer apply in actions for breach of trust by a trust beneficiary against a trustee. “The Legislature is presumed to be familiar with the rules of statutory construction and to have considered the effect of a new law on existing laws.” Ostroth, 263 Mich App at 14. By its express terms, “[i]f subsection (1) does not apply,” the period of limitations for a trust beneficiary to commence a proceeding against a trustee for breach of trust is governed by subsection (3). MCL 700.7905(3). The fact that claims are subject to a longer 5-year limitations period under MCL 700.7905(3) than the 3-year limitations period under MCL 600.5805(10) further confirms that MCL 700.7905 is intended to be the exclusive period of limitations for a trust beneficiary’s breach of fiduciary duty claims against a trustee.

Moreover, whether or not a trust beneficiary’s claim against a trustee “sounds in tort” is not the relevant inquiry for determining whether the one-year limitation period in MCL 700.7905(1)(a) may be invoked. Appellant-Plaintiff misplaces reliance on this Court’s statement in Miller v Magline, Inc, 76 Mich App 284, 313; 256 NW2d 761 (1977), which indicated: “Plaintiff’s action is premised upon a breach of fiduciary duty, which sounds in tort, and therefore their action was timely filed under the general statute of limitations contained in [MCL 600.5805(10)].” Id. at 313.
In *Magline*, this Court held that the statute of limitations contained in the General Corporation Act in effect at the time, did not bar an action by minority shareholders to compel payment of dividends. *Id. at* 312-13. This Court held that the specific statute of limitations did not apply, not because the action “sounds in tort,” but because in order “[f]or the statute to apply, the wrongs alleged must have injured or damaged the corporation.” *Id. at* 313. “Plaintiffs have not alleged that defendants’ refusal to declare a dividend constitutes a violation of defendants’ duties ‘whereby the corporation has been or will be injured or damaged, or its property lost, or wasted, or transferred to one or more of them’, nor do plaintiffs seek to enjoin or set aside an unlawful transfer of the corporate property.” *Id. at* 312-13, quoting MCL 450.47 (repealed by 1972 PA 284). “Plaintiffs claim only that defendants have breached their fiduciary duty to the stockholders by refusing to declare a dividend out of the supplies being retained by the corporation.” *Id.*

An action where the specific corporation statute applied also “sounds in tort,” as the statute provides the period of limitations for actions “for the violation of, or failure to perform, the duties above prescribed or any duties prescribed by this act.” See MCL 450.47 (repealed by 1972 PA 284). In *Magline*, the relevance of noting that “Plaintiff’s action is premised upon a breach of fiduciary duty, which sounds in tort,” was to explain the applicability of the general tort statute of limitations. See *Magline*, 76 Mich App at 313. It was not to indicate, as Appellant-Plaintiff suggests, that the general tort statute of limitations should apply to a claim which “sounds in tort,” in lieu of an otherwise applicable specific statute of limitations. Cf *Miller-Davis Co*, 489 Mich at 364 (as between whether a claim is subject to the general tort statute of limitations, or the general contract statute of limitations, “the nature and origin of a cause of action determine[s] which limitations period applies”).
CONCLUSION

Amicus curiae the Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan respectfully requests that this Court conclude that Section 7905 of the Michigan Trust Code provides the exclusive limitations period for a trust beneficiary to commence a proceeding against the trustee for a violation by the trustee of a duty the trustee owes to a trust beneficiary.

WARNER NORCROSS & JUDD LLP

Dated: September 3, 2013

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UNPUBLISHED CASES
Not Reported in N.W.2d, 2000 WL 33418069 (Mich.App.)
(Cite as: 2000 WL 33418069 (Mich.App.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
In the Matter of the Estate of James T. BARNES, Sr.,
Deceased, and the James T. Barnes, Sr., Revocable
Trust Agreement under date of May 26, 1978.

Barbara Barnes MANNING, Jay David Manning,
Shannon Manning Kruger, Melissa Manning Persons,
and Rachel Christine Manning, Plaintiffs-Appellants,
v.

James Thomas BARNES, Jr., and Honigman Miller
Schwartz & Cohn, Defendants-Appellees,
and

Richard A. POLK, Marcus Plotkin, Peter M. Alter,
Leslie Smith Moulton, and Plotkin, Yoiles, Siegel,
Schultz & Polk, Defendants.

No. 211968.

Before: GRIFFIN, P.J., HOLBROOK, Jr., and J.B.
SULLIVAN, JJ.

FN* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

*1 Plaintiffs appeal as of right from the probate court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). Plaintiffs argue the probate court incorrectly held that plaintiffs' claims were barred by res judicata and the statute of limitations and that there was not an attorney-client relationship between plain-
tiff Barbara Barnes Manning and the defendant law firm. We affirm.

This case was brought by plaintiffs in an attempt to upset two separate, but related, probate court rulings entered in 1980 and 1986 regarding the trust and estate of James Thomas Barnes, Sr. (hereinafter "decedent" or "Barnes, Sr."). Plaintiffs include Barbara Barnes Manning ("plaintiff Manning"), decedent's daughter and Jay David Manning, Shannon Manning Kruger, Melissa Manning Persons, and Rachel Christine Manning, decedent's grandchildren. Defendants include James Thomas Barnes, Jr. (hereinafter "Barnes, Jr."), decedent's son and successor co-trustee of the James T. Barnes, Sr., Revocable Trust Agreement Under Date of May 26, 1978 (hereinafter "trust"), and the law firm of Honigman, Miller, Schwartz & Cohn.

The probate court succinctly set forth the extensive facts of this case in its opinion granting defendants' motion for summary disposition. We adopt that statement as our own for purposes of this appeal, without the need for reiteration, and proceed directly to consideration of plaintiffs' issues raised on appeal.

The gravamen of plaintiffs' complaint is that Barnes, Jr., breached his fiduciary duty to them in connection with the settlement agreements pertaining to the decedent's trust and estate approved by the probate court in its orders of June 26, 1980, and August 18, 1986. Plaintiffs claim defendant Honigman also breached attorney and fiduciary duties to them in the same transactions. Specifically, plaintiffs argue Barnes, Jr., with the help of defendant law firm, fraudulently breached his fiduciary duty to the trust and the beneficiaries by improperly utilizing trust assets, rather than his own and those by Midland Mortgage Company ("Midland"), to settle the debts of the trust and estate. Plaintiffs further contend, contrary to the probate court's determination, that defendants'
fraud tolled the otherwise applicable statute of limitations and precluded applicability of the doctrine of res judicata. Thus, we must determine as a preliminary matter whether Barnes, Jr.'s actions as a trustee constituted fraud.

Pursuant to the 1980 agreement approved by the probate court, decedent's trust and estate were the sole debtors to Manufacturers National Bank of Detroit and Detroit Bank & Trust Company. The proceeds the trust could potentially receive from the redemption of its Midland stock was capped at $66,28 pursuant to a 1972 recapitalization agreement. Although Midland seemingly may have benefited from the lion's share of the proceeds after the unrelated sale of the Peoples Bank of Port Huron, it was Midland's success that ultimately gave full value to the trust of its Midland stock. Moreover, plaintiff Manning's signature was on every relevant document. Therefore, we agree with the probate court's ruling that all of the relevant documents and transactions were disclosed to plaintiff Manning; thus, there was no genuine issue of material fact regarding whether fraud occurred. *Quinto v. Cross & Peters Co*, 451 Mich. 358, 362; 547 NW2d 314 (1996).

*2 Res judicata bars a plaintiff from relitigating a prior action between the same parties when the evidence or essential facts are identical. *Dart v. Dart*, 460 Mich. 573, 586; 597 NW2d 82 (1999). The Dart Court outlined the following prerequisites to the application of res judicata: (1) the first action must have been decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.; Eaton Co Bd of Co Rd Comm'n v. Schutz*, 205 Mich.App 371, 375-376; 521 NW2d 847 (1994). Moreover, the Dart Court stated that "Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.; Sprague v. Buhagiar*, 213 Mich.App 310, 313; 539 NW2d 587 (1995).

Addressing the first prerequisite, probate court orders are final orders and have the same res judicata effect as those of any other court. *Prawdziak v. Heidema Bros., Inc.*, 352 Mich. 102, 110; 89 NW2d 523 (1958); *In re Humphrey Estate*, 141 Mich.App 412, 429; 367 NW2d 873 (1985). Furthermore, it is not necessary that plaintiffs did not raise the claims that are the subject of the instant action as long as they could have been raised in the previous action. *Sprague, supra* at 313. Here, the probate court decided on the merits that the proposed 1980 settlement agreement was in the best interest of the estate and trust. Additionally, the court later approved the 1986 petition authorizing the redemption of the Midland stock. Accordingly, we hold that both probate court orders authorized the settlement agreements on the merits.

Addressing the second prerequisite, plaintiffs' claims could have been brought in either of the two prior probate court decisions. Plaintiff Manning had an opportunity to raise the issues she now asserts. Plaintiff Manning signed the 1980 settlement agreement as both a director and a shareholder of Midland, received the petition for the probate court order authorizing the settlement with the banks and notice of the hearing, and received a copy of the order authorizing the settlement.

With respect to the 1986 agreement, plaintiff Manning received a letter outlining the potential redemption; she signed a consent to the redemption of the stock as a director of Midland; she signed an agreement authorizing the termination of Barnes, Jr., and his issue's interest in the trust; she received a petition to the probate court detailing the transaction; and she received the notice of hearing for the closure of the estate and the resulting order. Plaintiff Manning could have claimed that the trust should not have had to pay the entire debt to the banks at the time the redemption was authorized by the probate court.
Addressing the third prerequisite, plaintiffs concede on appeal that the parties involved are the same. This Court therefore concludes that the three prerequisites for the application of res judicata are present. Plaintiffs nonetheless argue that misrepresentation or fraud creates an exception to the application of the res judicata doctrine. Sprague, supra at 313. However, given our holding that defendants did not act fraudulently, plaintiffs' argument is without merit.

*3 Plaintiffs next contend the fraudulent concealment statute, M.C.L. § 600.5855; MSA 27A.5855, applies where, as alleged here, the one perpetrating the fraud conceals the existence of the claim from the harmed party. As noted supra, we hold defendants' actions did not constitute fraud. Absent an allegation of fraud, there are two statute of limitations that could arguably be applied to the facts of the instant case. First, if a general breach of a fiduciary duty is alleged, M.C.L. § 600.5805; MSA 27A.5805 provides in pertinent part:

A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

(8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Second, if a specific allegation is made against the trustee, M.C.L. § 700.819; MSA 27.5819, provides:

FN1. The text of this section was repealed effective April 1, 2000, under the provisions of M.C.L. § 700.8102; MSA 27.18102.

However, the statute is nonetheless applicable to the instant matter. See M.C.L. § 700.8101(2)(d); MSA 27.18101(2)(d).

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

Thus, under M.C.L. § 600.5805; MSA 27A.5805, plaintiffs' action would have been barred three years after the injury, in this case three years after the August 20, 1986, redemption of the stock or possibly three years after the probate court issued the March 25, 1987, order closing the estate. By either date, the statute would have barred any action by plaintiffs as of 1990, four years before plaintiffs filed suit. Under M.C.L. § 700.819; MSA 27.5819, plaintiffs are barred from action within six months after receipt of the final account or statement if the trustee fully disclosed all relevant documents, or within three years if the trustee did not fully disclose all documents but acted in good faith. Thus, under either statute of limitations, plaintiffs' claims were time barred in 1990. Accordingly, res judicata and the statute of limitations each barred plaintiffs' suit against defendant Barnes, Jr. We therefore conclude the probate court did not err in dismissing the claims against Barnes, Jr., pursuant to MCR 2.116(C)(7). Horace v. City of Pontiac, 456
*4 Finally, plaintiffs contend the probate court incorrectly held that no attorney-client relationship existed between the defendant law firm and plaintiff Manning. In order to maintain an action for legal malpractice, plaintiffs have the burden of proving all of the following elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and the extent of the injury. Barrow v. Pritchard, 235 Mich.App. 478, 483-484; 597 NW2d 853 (1999).

Plaintiffs argue defendant law firm held itself out as the legal representative for the beneficiaries. On the basis of plaintiff Manning's own admissions in her affidavit, the probate court held plaintiffs could not meet the burden of establishing the existence of an attorney-client relationship.

In her affidavit, plaintiff Manning stated the following with respect to John E. Amerman, attorney from defendant Honigman:

13. That I did not know that John Amerman was acting as my legal counsel on any of the transactions that I signed.

14. That John Amerman never indicated to me he was acting on my behalf as legal counsel.

15. That John Amerman never advised me one way of the other, and never advised me, period, regarding any of the transactions which I entered into. Further, that John Amerman never advised me to seek independent legal counsel regarding the trust.

Based on the positive assertions in plaintiff Manning's affidavit that Amerman did not act as her attorney, we agree with the probate court and hold an attorney-client relationship did not exist between Honigman (through Amerman) and plaintiff Manning.

Plaintiffs allege that two documents containing general recitations to the effect defendant Honigman was representing the trust, estate, and the beneficiaries created an attorney-client relationship between the defendant law firm and plaintiff Manning. Plaintiff Manning, however, did not allege in her affidavit that she relied on either of these documents or believed she had retained defendants to act as her counsel. We therefore hold plaintiffs' claims in this regard are without merit.

In the alternative, plaintiffs argue that, even if the probate court was correct that an attorney-client relationship did not exist, under Michigan law an attorney may have a duty to a third party under certain circumstances. Plaintiffs argue pursuant to the Michigan Supreme Court's decision in Mieras v. DeBona, 452 Mich. 278; 550 NW2d 202 (1996), a lawyer owes a duty to the intended and specifically identifiable beneficiaries of a testator, to effectuate the intent of the testator as expressed in the will. In Mieras, the Court carefully restricted its holding to state that identified beneficiaries of a will may sue the attorney who drafted the will for negligent breach of the standard of care owed to a third-party beneficiary. Id. at 290 (opinion by Levin, J.). The Court reasoned that the personal representative in the above situation is the client and the representative's interest is necessarily limited to the disposition of the estate. If the attorney who drafted the will negligently carried out the testator's intent and the testator's beneficiaries were subsequently harmed, the representative likely does not have an interest in who obtains the money to be distributed and thus would have no incentive to sue the attorney. Id. Accordingly, in this limited situation, the Court held the intended beneficiaries of the will must be able to maintain an action. Id.

*5 In the instant case, the client is the trustee. If the attorney for the trustee commits malpractice in detriment to the trust, then the trustee is under an
obligation to sue the attorney. If the trustee fails to bring a suit, the beneficiaries may have a cause of action against the trustee. Moreover, in Mieras, there was no actual or potential conflict between the interest of the testator and the beneficiary because the interests are the same. Mieras, supra at 302 (opinion by Boyle, J.). Here, on the other hand, the client's sole interest is in the administration of the trust and might be in conflict with the interests of the individual beneficiaries. In fact, that is exactly what has happened in the instant case. The trustee, by and through his attorneys, administered the estate in order to give benefit to the trust. Now, plaintiffs attempt to claim the attorneys were negligent in their administration. We conclude that the limited holding in Mieras does not apply to the instant case. Cf. Beaty v. Hertzberg & Golden, PC, 456 Mich. 247, 259-262; 571 NW2d 716 (1997).

Affirmed.

In re Barnes
Not Reported in N.W.2d, 2000 WL 33418069 (Mich.App.)

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Not Reported in N.W.2d, 2013 WL 275913 (Mich.App.)
(Cite as: 2013 WL 275913 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
In re ILENE G. BARRON REVOCABLE TRUST.
Michael Scullen, Trustee, Appellant,
v.
Richard Barron, Marjorie Schneider, and Kathleen Barron, Appellees.

Docket No. 307713.

Wayne Probate Court; LC No.2008-730919-TV.

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

*1 Appellant, successor trustee of the Ilene G. Barron Revocable Trust, appeals as of right the probate court's order reducing his hourly rate for his fiduciary fees to $100 per hour. FN1 We affirm the probate court's determination of a reasonable fiduciary fee rate; however, we conclude that certain of appellees' objections to appellant's fees are barred by the doctrine of res judicata, and we remand for consideration of whether appellees' objections are otherwise barred by the language of the trust agreement or the statute of limitations.

FN1. Appellees are the trust's beneficiaries. Only appellees Richard Barron and Marjorie Schneider were petitioners in the probate court.

I. PROBATE COURT'S FEE EVALUATION

Appellees, beneficiaries of the Ilene G. Barron Revocable Trust, were unsatisfied with appellant's performance as successor trustee of the trust, and filed numerous objections with the probate court concerning this administration. The probate court held an evidentiary hearing regarding appellees' various petitions. Relevant to this appeal, appellees testified that appellant charged the trust approximately $150,000 in total fees during his over three-year administration; these fees included fiduciary fees and fees for legal work, including legal assistant fees. Appellant testified that his current hourly rate as an attorney is $195 and he typically does not charge a different fee for acting as a fiduciary in administering a trust, but charges his regular attorney fee. Further, testimony from a trust beneficiary established that appellant charged the trust $185 to $195 per hour for his services throughout his administration of the trust, and additionally charged $75 per hour for legal assistant fees. The probate court found appellant's fee to be excessive relative to the custom in the community and reduced his hourly rate for his fiduciary services to $100 per hour.

Appellant first claims that the probate court abused its discretion in reducing his hourly rate for his fiduciary services because there was no evidence to support the court's ruling and the court failed to consider the appropriate factors in evaluating the reasonableness of a trustee's fees. We disagree. In In re Temple Marital Trust, 278 Mich.App 122, 128; 748 NW2d 265 (2008) this Court set forth the standard of review for probate court decisions as follows:

Issues of statutory construction present questions of law that this Court reviews de novo. But appeals from a probate court decision are on the record, not de novo. The trial court's factual findings are reviewed for clear error, while the court's dispositional rulings are reviewed for an abuse of discretion. The trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. [Citations omitted.]

Under the Michigan Estates and Protected Individuals Code ("EPIC"), "[i]f the terms of a trust, do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." MCL 700.7708. In Comerica v. Adrian, 179 Mich.App 712, 724-725; 446 NW2d 553 (1989), this Court enumerated several factors that probate courts may utilize in determining the reasonableness of a trustee fee, including:

*2 (1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10), the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services.

However, "[t]he weight to be given any factor and the determination of reasonable compensation is within the probate court's discretion." Id. at 724; see also In re Thacker Estate, 137 Mich.App 253, 258; 358 NW2d 342 (1984). The probate court has the "broadest discretion" in evaluating "the worth of services rendered in light of its experience and knowledge of such matters" and in determining "[t]he weight to be given any factor." Comerica, 179 Mich.App at 724; Thacker, 137 Mich.App at 258. Further, when evaluating a petition for review of the trustee's fees, the probate court must review the requested fees for reasonableness with "an eye toward preservation of the estate's assets for the beneficiaries." In re Sloan Estate, 212 Mich.App 357, 364; 538 NW2d 47 (1995).

Although the expert testimony presented on the excessiveness of appellant's fee was found inadmissible and the billing statements and accountings were not admitted into evidence, we conclude that the evidence, in light of the probate court's extensive experience and knowledge in evaluating the reasonableness of trustee fees, supported the court's reduction in appellant's hourly rate for his fiduciary services. Comerica, 179 Mich.App at 724; Thacker, 137 Mich.App at 258. It is evident from testimony at the evidentiary hearing, as well as the numerous petitions before the court concerning the administration of the trust, that the court was keenly aware of the factors pertinent to the probate court's determination of the reasonableness of a trustee's fee under Michigan law. Notably, testimony revealed the value, complexity, and composition of the assets comprising the trust, appellant's specific actions in administering the trust, specific issues that arose during the administration, appellant's level of experience in the practice of trust administration, and the adversarial nature of the relationship between two of the appellees and appellant. We believe, on this record, the probate court could adequately evaluate the reasonableness of appellant's fiduciary fee in accordance with the pertinent factors enumerated in Comerica, 179 Mich.App at 724, especially in light of the court's extensive experience and knowledge in evaluating such matters. Thacker, 137 Mich.App at 258.

FN2. The probate court excluded the expert testimony from evidence, finding that the testimony was not properly admitted in accordance with MRE 703.

We also believe the probate court properly relied on its own personal knowledge and extensive experience in reviewing trustee fees, in light of the testimony regarding the trust's administration, in determining a reasonable rate for appellant's fiduciary services. In fact, this Court has recognized that the probate court is encouraged to rely upon personal knowledge in determining the reasonableness of an attorney fee. Thacker, 137 Mich.App at 258; citing Boch v. Miller, 279 Mich. 629, 640-641; 273 NW 294 (1937). It was also proper, in light of the court's experience, knowledge, and broad discretion in evaluating the worth of trustee services, to place significant weight on the customary fee charged in the community for fiduciary services, especially in light of the testimony indicating

a lack of any specialized skill or experience on the part of appellant in trust administration. Comerica, 179 Mich.App at 724; Thacker, 137 Mich.App at 258. On this record, we believe the probate court's decision reducing appellant's fiduciary fee to $100 per hour was within the range of reasonable and principled outcomes, and thus, did not constitute an abuse of discretion. Temple, 278 Mich.App at 128.

*3 Appellant asserts that the probate court did not reference the factors enumerated in Comerica, 179 Mich.App at 724, to be used in evaluating the reasonableness of a trustee's fees in its opinion. Instead, the court referenced the factors enumerated under Michigan Rule of Professional Conduct (MRPC) 1.5(a) for use in evaluating the reasonableness of attorney fees. Many of those factors are similar to the factors used to evaluate the reasonableness of trustee fees identified in Comerica, i.e., the skill and time involved, the customary fee, the amount in question or size of the trust or estate, and the experience of the attorney/trustee. Accordingly, we do not believe the court's reference to the factors enumerated under MRPC 1.5(a), instead of the factors enumerated in case law, constituted reversible error, especially considering the probate court's broad discretion in this area. Comerica, 179 Mich.App at 724; Thacker, 137 Mich.App at 258. It is evident that the court placed significant weight on the customary fee for trustee services in the community in evaluating the reasonableness of appellant's fee, a factor identified as pertinent to the reasonableness of both an attorney's and a trustee's fee. Furthermore, the court did reference Comerica in a prior opinion, wherein the court indicated that in determining whether the trust accounts contain excessive trustee fees, it considers, among other factors, the factors enumerated in Comerica, which indicates that the court was, in fact, aware of the factors pertinent to evaluating the reasonableness of a trustee's fee.

We also disagree with appellant's contention that the probate court improperly considered the trust's accountings and his billing statements in reaching its decision. To support his argument, appellant claims that the court's reference in its opinion to $29,288.61 in "trustee administration fees" shows that the court impermissibly "went outside the record" and based its reasoning on its own review and analysis of the interim trust accountings and/or appellant's billing statements, which were not admitted into evidence. However, it is apparent that the court obtained the amount from appellant's proposed plan of distribution, which was filed with the court and properly admitted at the evidentiary hearing and represents the estimated additional expenses of administering the trust. Therefore, contrary to appellant's argument, the probate court's reference to the $29,288.61 amount does not necessarily indicate that the court improperly considered evidence not admitted at the evidentiary hearing. In fact, it is uncontested that appellant's total fees throughout the administration of the trust approximated $150,000; this amount was reflected in the federal estate tax return introduced by appellant at the evidentiary hearing.

We conclude that the trial court did not abuse its discretion in determining a reasonable fee for fiduciary services. We note that the order of the probate court specifies that appellant's "fiduciary fees shall be billed to the Trust at a rate of $100 per hour." (Emphasis added). We do not read the probate court's order as imposing a reduced rate for attorney fees charged to the trust by appellant for legal services. According to the record before this Court, these two fees appear to have been invoiced separately in the interim accountings provided to appellees by appellant.

II. APPELLEES' OBJECTIONS TO THE APRIL 14, 2008 ACCOUNTING ARE BARRED BY RES JUDICATA

*4 We note that appellant's accounting for the period ending April 14, 2008, had been filed with the probate court at the time appellees filed a petition in October 2008 objecting to appellant's allegedly improper payment of a claim against the trust. Appellees did not object to the payment of ap-
pellant's trustee fees in the 2008 petition. We agree with appellant that the doctrine of res judicata bars appellees from objecting to that accounting on the basis that appellant's fees were excessive, because they could have raised that objection in their earlier petition. "Michigan courts have broadly applied the doctrine of res judicata" and have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Dart v. Dart, 460 Mich. 573, 586; 597 NW2d 82 (1999); see also, Washington v. Sinai Hosp. of Greater Detroit, 478 Mich. 412, 418; 733 NW2d 755 (2007); Begin v. Mich. Bell Tel. Co., 284 Mich.App 581, 600; 773 NW2d 271 (2009). Res judicata applies "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." Sewell v. Clean Cut Management, Inc., 463 Mich. 569, 575; 621 NW2d 222 (2001); Limbach v. Oakland Co. Rd. Comm., 226 Mich.App 389, 395; 573 NW2d 336 (1997).

There is no dispute that both of the petitions at issue involve the same exact parties, i.e., the appellees Richard Barron and Marjorie Schneider and appellant. Further, the earlier petition was decided on the merits for purposes of res judicata by the probate court’s entry of a stipulated order resolving appellees’ objection to the trust accounting for the period ending April 14, 2008. Sewell, 463 Mich. at 575. "Probate court orders are final orders and have the force and effect of judgments in courts of record and are res judicata of the matters disposed of therein." Banks v. Billsps, 351 Mich. 628, 634; 88 NW2d 255 (1958). Finally, the "matter contested in the second action was or could have been resolved in the first." Sewell, 463 Mich. 575; see also, Washington, 478 Mich. at 420; Begin, 284 Mich.App at 599–601. It is evident that both petitions shared a common motivation, i.e., appellees’ need to protect their beneficial interests in the trust’s assets. Both actions sought to recover monies that Richard Barron and Marjorie Schneider believed appellant im-

properly disbursed from the trust, were related in time in that they concerned trust disbursements occurring during the period ending April 14, 2008, and originated from the same interim accounting prepared by appellant. Therefore, the actions were sufficiently related in motivation, time, and origin, and would have formed a "convenient trial unit" to constitute the same transaction for purposes of res judicata. Begin, 284 Mich.App at 601. Although the earlier and subsequent petitions did not necessarily rely on the same evidence, i.e., the evidence relevant in the earlier action concerned the nature and source of a specific claim allowed against the trust, whereas the evidence relevant in the subsequent action concerned the reasonableness of appellant’s fees, “under Michigan’s broad application of res judicata applying the 'same transaction' test, whether evidence necessary to support a first lawsuit differs somewhat from that necessary for subsequent claims will not be dispositive.” Id., 284 Mich.App at 601. Because appellees could have raised their objection to appellant’s trustee fee disbursed during the accounting ending in April 14, 2008 in his earlier action had they exercised reasonable diligence, it is now barred by res judicata. Begin, 284 Mich.App at 600, 603, 605.

III. REMAND IS NECESSARY FOR THE PROBATE COURT TO CONSIDER BARS TO APPELLEES’ OBJECTIONS TO THE TRUST ACCOUNTINGS

*5 Appellant next claims that appellees were precluded from objecting to certain trust accountings because the trust agreement imposes a 90-day limitations period during which the beneficiaries are allowed to object to the accountings received from the trustee; otherwise the accounting is deemed to be accepted. Although the probate court did not decide this issue, we address it because appellant raised it before the court and it presents an issue of law. See Detroit Leasing Co. v. City of Detroit, 269 Mich.App 233, 237–238; 713 NW2d 269 (2005), citing Steward v. Panek, 251 Mich.App 546, 554; 652 NW2d 232 (2002). However, because further fact finding is needed to resolve this
issue, we remand for further consideration of the trust accountings to determine whether the limitations periods imposed by the terms of the trust agreement or MCL 700.7905 preclude appellees from objecting to appellant's trustee fees disclosed in those accountings.

In order to provide guidance to the trial court on remand, we make the following observations. In the absence of court supervision over the trust or a petition for review, the administration of the trust, including the payment of a trustee's fees, should proceed expeditiously in the hands of the trustee, consistent with the terms of the trust, free of judicial intervention. Tempie, 278 Mich.App at 137-138; MCL 700.7201(2); MCR 5.501(B), (C).

The trust agreement contains a provision requiring the trustee, at least annually, to furnish the income beneficiaries with accountings of the principal, income, and disbursements of the trust. The provision also requires income beneficiaries to object to the accountings within 90 days of their receipt, or else the accountings are “deemed to be accepted.” Accordingly, under the terms of the trust agreement, which govern the administration in the absence of judicial supervision or a petition for review, appellees were required to object within 90 days of their receipt of the accountings. Therefore, failure by appellees to object to the accountings within the time prescribed by the trust agreement constitutes acquiescence in the amount of trustee fees paid to appellant and precluded any challenge to the trustee fees disclosed in those accountings.

FN3. The probate court's jurisdiction was initially invoked when two of the appellees filed a petition seeking court supervision of the trust on the basis that appellant had an adversarial relationship with them and continued to display bias against them. There is no indication in the lower court record that the court ever ordered supervision of the trust, and thus, the trust's administration should proceed consistent with the terms of the trust.

Appellant claims that he furnished quarterly trust accountings disclosing the amount of his fees to appellees following the grantor's death on January 28, 2008. However, the record before this Court contains no evidence, with the exception of the first accounting for the period ending April 14, 2008, from which it can be determined when appellant provided the interim accountings, because neither the accountings nor appellant's monthly billing statements were admitted in evidence or filed with the probate court as part of appellees' objections to the interim accountings. There was also no admissible testimony at the evidentiary hearing regarding this issue. Therefore, this Court is unable to determine whether any interim accountings disclosing appellant's fees were furnished to appellees before March 16, 2010, without objection. If so, then appellees are precluded from objecting to those accountings in accordance with the limitations period imposed under the trust agreement, which in the absence of judicial supervision, governed its administration. MCL 700.7201(2).

*6 Additionally, appellees may also be barred from objecting to certain accountings under MCL 700.7905(1)(a), which provides a limitations period of one year to claim breach of trust where the trustee “sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.” In the absence of the accountings or testimony regarding this issue, however, we cannot ascertain whether appellant adequately informed appellees of the time allowed for commencing a proceeding against a trustee for breach of trust as required to invoke the one-year time limitation period. MCL 700.7905(1)(a), (2).

We affirm the probate court's order reducing appellant's hourly rate for his fiduciary fees to $100 per hour. We remand for further consideration of whether appellee's objections to the trust accountings are barred by language of the trust agreement or MCL 700.7905(1)(a), with the caveat that objections to the April 14, 2008 accounting are barred by
res judicata. We do not retain jurisdiction.

In re Ilene G. Barron Revocable Trust
Not Reported in N.W.2d, 2013 WL 275913
(Mich.App.)

END OF DOCUMENT
PER CURIAM.

*1 In Docket No. 249974, petitioner Jane Pearson Evans, also known as Mary Jane Pearson Evans, (Petitioner) appeals by leave granted an order of the circuit court that reversed the probate court's decision not to disqualify petitioner's counsel. In Docket No. 253745, petitioner appeals by right two orders denying her motion for partial summary disposition and granting respondent's (the bank) motion for summary disposition. In Docket No. 253824, petitioner Andrea Evans (Andrea), petitioner's daughter, appeals by right the orders appealed by petitioner in Docket No. 253745. The appeals have been consolidated on appeal. We affirm.

Interested party Ervin, whose voting shares are held in trust by the bank, and interested parties Pearson, Nancy Pearson Rodolph, Anne Jorgenson, and Mary Ervin Pearson, beneficiaries of five of the trusts, have filed briefs on appeal. The State Bar of Michigan Probate and Estate Planning Section was granted leave to file an amicus brief with respect to Docket No. 249974. This case arose when petitioner became unhappy with her brother John Pearson's management of Ervin Industries, Inc. (Ervin), the bank's supervision of Ervin's management, and the bank's management of the six trusts.

Petitioner first argues that the circuit court erred in disqualifying her attorney on conflict of interest grounds. FN1 We disagree.

FN1. Petitioner argues that Bank One Trust Company was not the proper trustee in the instant suit. Although the probate court later indicated that Bank One Trust Company was the proper trustee when it denied petitioner's motion to remove Bank One Trust Company, we analyzed this issue as though the trustee were Bank One because of petitioner's claim that she has appealed the probate court's decision. Nevertheless, if the proper trustee is Bank One Trust Company, the bank's case is even
stronger because petitioner's argument with respect to separate legal entities would fail.

As an initial matter, plaintiff argues that the court did not have the power to disqualify her attorney. Michigan Rules of Professional Conduct are judicially enforceable. *Evans & Luptak v. Lizza*, 251 Mich.App 187, 194; 650 NW2d 364 (2002). It is the judiciary's exclusive constitutional prerogative under Const 1963, art 3, § 2, to define and regulate the practice of law with respect to judicial proceedings, and the power to regulate and discipline members of the state bar constitutionally belongs to our Supreme Court pursuant to Const 1963, art 6, § 5. *Attorney Gen v. Public Service Comm*, 243 Mich.App 487, 491; 625 NW2d 16 (2000). Moreover, "'[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.' "*Evans, supra* at 200, quoting Michigan Code of Judicial Conduct Canon 3(B)(3). Therefore, the court had the power to disqualify plaintiff's attorney on conflict of interest grounds. "The application of 'ethical norms' to a decision whether to disqualify counsel is reviewed de novo." *Rymal v. Buerger*, 262 Mich.App 274, 317; 686 NW2d 241 (2004), citing *General Mill Supply Co v. SCA Services, Inc*, 697 F.2d 704, 711 (CA 6, 1982). With respect to conflict of interest, MRPC 1.7(a) states:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

*2 The plain language of the rule does not indicate, as the circuit court found, that disqualification is automatic when a conflict exists. Instead, there are numerous variables that must be considered. For example, the parties' interest must be directly adverse, counsel may reasonably believe that neither attorney-client relationship will be affected, or the client may consent. Thus, we find that a case-by-case analysis is required with respect to disqualification proceedings pursuant to MRPC 1.7(a), and provide the following analysis to be conducted before an attorney is disqualified: (1) the court should determine whether a conflict exists; (2) if a conflict exists, the court should determine whether it is directly adverse; (3) if the conflict is directly adverse, representation is prohibited unless (a) the attorney reasonably believes the dual representation will not adversely affect the attorney-client relationship with either client, and (b) both clients consent after consultation.

A trial court's determination whether a conflict of interest exists is reviewed for clear error. *Rymal, supra* at 316. A conflict of interest is defined in relevant part as a "real or seeming incompatibility between the interests of two of a lawyer's clients." Black's Law Dictionary (8th ed). Here, a fee agreement signed by a representative of Berry Moorman but not by a representative of the bank-specifically incorporated the bank's guidelines for outside counsel. The bank's guidelines for outside counsel stated in relevant part that "[a]ll of Bank One's subsidiaries and affiliates should be treated as clients for the purposes of [MRPC] 1.7," and that waivers would not be extended to matters of litigation or adversarial representation.

Although the agreement was not signed by the bank, an acceptance of an offer "arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *In re Costs and Attorney Fees*, 250 Mich.App 89, 96-97; 645 NW2d 697 (2002), quoting *Kraus v. Gerrish Twp*, 205 Mich.App 25, 45; 517 NW2d 756 (1994), aff'd in part and remanded in part on other grounds sub nom *Kraus v. Dep't of Commerce*, 451 Mich. 420 (1996). The bank's re-
tention of the firm indicated an unequivocal act of acceptance of the firm’s offer to be bound by the bank’s guidelines for outside counsel; thus, a contract regarding representation existed, which contained the guidelines for outside counsel, and the firm could not later deny the contract’s existence. Therefore, the firm was bound by its agreement that representation of one affiliate constituted representation of Bank One, and dual representation of Bank One and plaintiff constituted a conflict of interest.

The probate court’s conclusion that a conflict existed, and the circuit court’s treatment of the issue as though a conflict existed, were not clearly erroneous. *Rymal, supra* at 316.

FN2. Pennwalt Corp. v. Plough, Inc., 85 FRD 264 (D Del, 1980), cited by petitioner as the leading case for the proposition that an attorney who represents a corporation in an unrelated matter is not disqualified from representing an adversary of the corporation’s affiliate, was not accurately portrayed. Although the court found that disqualification in the case against the affiliate was not required, id. at 274, this was after the firm’s motion to withdraw from representing the corporation had been granted on the ground that if it were not permitted to withdraw a conflict would arise, id. at 268, 272. The court acknowledged that choosing to represent the more favored client in a conflict situation was expressly disfavoring, but found that no current conflict existed at the time of withdrawal because the corporations had recently become affiliated without the knowledge of counsel, and the in-house legal departments of the two corporations had not yet merged. Id. at 266, 272.

FN3. Petitioner also cites Riggs Nat’l Bank of Washington, DC v. Zimmer, 355 A.2d 709 (Del Ch, 1976), Moeller v. Los Angeles Superior Court, 16 Cal 4th 1124; 947 P.2d 317 (Cal, 1997), and Martin v. Valley Nat’l Bank of Arizona, 140 FRD 291 (SD NY, 1991) for the proposition that trustees should be treated differently with respect to their respective capacities. However, each of these cases involved the assertion of the attorney-client privilege and work product privilege to avoid discovery; the issue was not whether counsel engaged in a conflict of interest. Riggs Nat’l Bank of Washington, DC, supra, 355 A.2d at 711, 713-714, Moeller, supra, 16 Cal 4th at 1129, Martin, supra, 140 FRD at 317-318. Although the court in Martin, supra, 140
FRD at 318-319, noted that the firm would have engaged in a conflict of interest if it had represented both the bank and the trust, the court's comments were not germane to whether the documents were protected by the attorney-client privilege and, thus, were dicta. Furthermore, although several Michigan statutes cited by petitioner recognize the different fiduciary and individual capacities of a trustee, MCL 700.7306, MCL 700.7403, MCL 700.1214, the statutes govern the conduct of the trustee; they do not govern the conduct of a judicial officer, nor do they indicate that a trustee in its fiduciary capacity is any less entitled to loyal representation by legal counsel than other clients in this state.

The bank cites Harrison v. Fisons Corp, 819 F Supp 1039 (MD Fla, 1993), for the proposition that a law firm may not sue a bank in its fiduciary capacity when it represents the bank in other matters. The court in that case noted, “Because [the bank] has fiduciary responsibilities [as the guardian of the minor’s estate] and has its own commercial interest in management of the property of its ward, it is more than a nominal party.” Harrison, supra, 819 F Supp at 1040. The court, citing Florida’s equivalent to MRPC 1.7 and its similar commentary, acknowledging the hardship to the defendant from the firm’s disqualification, and having noted that one office of the firm represented the bank while a separate office represented the defendant, granted the bank’s motion to disqualify the firm. Id. at 1040-1042.

Although none of the authority cited by either party is binding on this Court, we found the authority cited by the bank to be more persuasive because it was on point, it invoked a rule remarkably similar to MRPC 1.7, and the rule’s commentary was very similar. We thus conclude that no distinction should be drawn between a trustee in its fiduciary capacity and a trustee in its individual capacity. Because the parties’ interests were directly adverse, disqualifica-

...
635, citing McDannel, supra at 311. Thus, if material facts were omitted, res judicata arguably would not apply.

Nevertheless, our Supreme Court has also indicated that "if the party seeking relief was aware of the facts at the time of the settlement of the account, then the subsequently sought relief will be refused." In re Humphrey Estate, 141 Mich.App 412, 429; 367 NW2d 873 (1985), quoting McDannel, supra, 270 Mich. at 311-312. FN4 Moreover, res judicata has been held to bar claims that the parties failed to raise but could have raised had they used reasonable diligence. Adair, supra at 121, citing Dart v. Dart, 460 Mich. 573, 586; 597 NW2d 82 (1999). With respect to diligence, petitioner stated numerous times that she did not read all the information sent to her by the bank or the company because she relied on the bank and her brother to look out for her. Petitioner admitted that Pearson had held bi-annual shareholder meetings to explain Ervin's financial status, but very few questions were asked.

FN4. This Court's decision in In re Humphrey Estate, 141 Mich.App 412, 429; 367 NW2d 873 (1985), was made pursuant to MCL 700.564 of the Revised Probate Code, and no similar statute was enacted under EPIC; however, McDannel v. Black, 270 Mich. 305, 310, 312; 259 NW 40 (1935), appears to be based on common law. "Unless displaced by the particular provisions of [EPIC], general principles of law and equity supplement this act's provisions." MCL 700.1203(1).

She also acknowledged that Ervin complied with several valuations of the company, and that one of the valuations indicated that the strategic plan was for moderate growth in sales and research and development for new applications. Moreover, she noted that the trust officer had always attempted to answer her questions. However, she claimed she did not read the reports of the companies she separately hired to valuate Ervin. Petitioner did not demonstrate reasonable diligence where the company and bank clearly cooperated with her requests for information, she did not ask the questions she now complains were unanswered, and she did not read the information she did request. Because she did not exercise reasonable diligence, she failed to raise claims she could have raised, and the court properly dismissed her claims on res judicata grounds. Adair, supra at 121, citing Dart, supra at 586. FN5

FN5. Andrea argues that res judicata did not apply to her because the fiduciary's accounts did not disclose material facts regarding transactions that affected her interest. Res judicata operates to bar claims with respect to parties and their privies. Peterson Novelities, Inc v. City of Berkley, 259 Mich.App 1, 12; 672 NW2d 351 (2003), citing In re Humphrey Estate, supra, 141 Mich.App at 434. Privity exists when "the interests of the non-party are presented and protected by the party in the litigation." Peterson Novelities, Inc; supra, 259 Mich.App at 13, quoting Phineas v. Rogers, 229 Mich.App 547, 553-54; 582 NW2d 852 (1998). Here, because Andrea merely adopts her mother's arguments, she has failed to demonstrate that she had unprotected interests. Therefore, because she is a privy to the instant action and the previously filed accounts, Andrea is likewise barred by res judicata. Moreover, Andrea argues that as a presently vested beneficiary, she was entitled to receive annual accounts, and because she did not receive the accounts, res judicata cannot bar her claims. Although In re Childress Trust, 194 Mich.App 319, 322-323, 327; 486 NW2d 141 (1992) supports Andrea's claim that she was a presently vested beneficiary entitled to annual accounts under the revised probate code MCL 700.814(4), Andrea was a minor during this time. MCL 700.32
provides in relevant part, “[i]n all proceedings under this act notice to a parent is notice to minor children residing with the parent.” And Jane acknowledged receiving annual accounts and financial statements. Therefore, Andrea's claim has no merit under the revised probate code. Under EPIC, a trustee must only furnish an unsolicited annual account to each current beneficiary; the trustee must furnish an account upon request to all other beneficiaries. MCL 700.7303(3)(b). A current beneficiary is one who is “currently eligible to receive income from the trust.” In re Childress Trust, supra, 194 Mich.App at 327. Because Andrea's interest was a presently vested future interest, she was not currently eligible to receive income from the trust and was not entitled to unsolicited annual accounts, and she provided no evidence that she requested annual accounts from the trustee. Therefore, Andrea's claim fails under EPIC as well.

*5 Petitioner next argues that the court erred when it determined that her claims were barred by the statute of limitations pursuant to MCL 700.7307(1) because her claims accrued before EPIC became effective. FN6 We agree.

FN6. Additionally, Andrea argues that MCL 700.7303 did not bar her petition because MCL 700.7307 only applies to receipt of accounts and Andrea never received the accounts. Because we agree that MCL 700.7307 did not apply to claims that accrued before EPIC's effective date, we do not reach Andrea's claim.


At the time the court made its decision, MCL 700.7307(1) provided:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred unless a proceeding to assert the claim is commenced within 1 year after receipt of an annual or final account as to each beneficiary who receives the annual or final account. FN7

FN7. MCL 700.7307(1) was amended by 2004 PA 314 to read:

A beneficiary is barred from commencing a proceeding against a trustee for breach of trust if the proceeding is not commenced within 1 year after the date the beneficiary or a representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for commencing a proceeding. A beneficiary may also be barred from commencing a proceeding against a trustee for breach of trust by adjudication, consent, ratification, estoppel, or other limitation.

MCL 700.7307(1) is part of EPIC, MCL 700.1101, et seq. 1998 PA 386. Assuming that EPIC applied, petitioner's claim was arguably barred because the last account was filed March 2, 2000, and petitioner did not file her petition for order on supervision and appointment of a successor trustee until August 31, 2001. With respect to the retroactivity of the act, EPIC provides in relevant part:

(1) This act takes effect April 1, 2000.

(2) Except as provided elsewhere in this act, on this act's effective date, all of the following apply:

(b) The act applies to a proceeding in court pending on that date or commenced after that date regardless of the time of the decedent’s death except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice.

(d) This act does not impair an accrued right or an action taken before that date in a proceeding. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that commences to run by the provision of a statute before this act’s effective date, the provision remains in force with respect to that right. [MCL 700.8101(1), (2)(b), (d).]

Petitioner claims that her rights accrued before April 1, 2000 and, thus, EPIC does not apply pursuant to MCL 700.8101(d). The trustee argues that MCL 700.992 of the revised probate code contained substantially similar language to MCL 700.8101, the Michigan Supreme Court has construed this language to mean that the revised probate code applied to a proceeding begun after its effective date, and EPIC should be construed in the same fashion. Although the Supreme Court in In re Finlay Estate, 430 Mich. 590, 596-597; 424 NW2d 272 (1988), indeed found that the revised probate code was the applicable law pursuant to MCL 700.992, the case did not involve an issue with respect to the applicable statute of limitation. Nor, for that matter, did this Court’s decision in In re Smith Estate, 252 Mich.App 120; 651 NW2d 153 (2002), involve a statute of limitation issue. Instead, this Court has indicated that statutes of limitation are generally not given retroactive effect. Gorte v. Dep’t of Transportation, 202 Mich.App 161, 167; 507 NW2d 797 (1993).


Nevertheless, MCL 700.819 was not the applicable statute of limitation as petitioner argues, because the trustee did not give petitioner “a final account or other statement fully disclosing the matter and showing termination of the trust relationship,” which was required to trigger the period of limitation pursuant to MCL 700.819. Instead, this Court has applied the general three-year period of limitation for tort actions to breaches of fiduciary duty. Miller v. Magline, Inc., 76 Mich.App 284, 313; 256 NW2d 761 (1977). See also Smith v. First Nat’l Bank & Trust Co. of Sturgis, 177 Mich.App 264, 270; 440 NW2d 915 (1989).FN8


Petitioner claims that the trustee fraudulently concealed these events from her by not including the events in the annual accounts, and that this tolled the statute of limitations pursuant to MCL 600.5855. “Generally, for fraudulent concealment to postpone the running of a limitation period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in an arrangement or contrivance of an affirmative character designed to prevent subsequent discovery.” Witherspoon v. Guilford, 203 Mich.App 240, 248; 511 NW2d 720 (1994), citing Draws v. Levin, 332 Mich. 447, 452; 52 NW2d 180 (1952). However, a fiduciary has an affirmative duty to disclose to his principal. Brownell v. Garber, 199 Mich.App 519, 527; 503 NW2d 81 (1993). On the other hand, if liability was discoverable from the outset, then MCL 600.5855 will not toll the applicable period of limitation. Witherspoon, supra, 203 Mich.App at 248-249. If a plaintiff knows of a cause of action, there can be no concealment. Eschenbacher v. Hier, 363 Mich. 676, 681; 110 NW2d 731 (1961). With respect to whether a plaintiff is aware of a cause of action, our Supreme Court stated:

*7 “It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has that knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim.” [ Eschenbacher, supra, 363 Mich. at 682, quoting 37 CJ, Limitation of Actions, § 359, p 976.]

As previously discussed with respect to res judicata, petitioner was presented with sufficient evidence to place her on notice of the now-challenged events. “A plaintiff cannot claim to have been defrauded where he had information available to him that he chose to ignore.” Nieves v. Bell Industries, 204 Mich.App 459, 465; 517 NW2d 235 (1994), citing Webb v. First of Michigan Corp, 195 Mich.App 470, 475; 491 NW2d 851 (1992). Therefore, the statute was not tolled by MCL 600.5855, and given the abundance of information provided to petitioner, as well as the company's cooperation with respect to investigations performed on behalf of petitioner, we find that all claims that arose more than three years before August 31, 2001 were barred by MCL 600.5805(10).FN10 Thus far, petitioner's only claims that have survived res judicata and the statute of limitation are the Barnsteel transaction, which occurred in January, 1999, and the guaranteed loans that occurred in 2000 and 2001. FN11

FN10. Andrea argues that because she did not receive notice of accounts, she was not subject to the period of limitation under MCL 600.5805(10). However, because Andrea was a minor, she did receive notice of the accounts through her mother's notice pursuant to the revised probate code, MCL 700.32, and because she was not a current income beneficiary, she was not entitled to receive automatic, unsolicited notice of the accounts under EPIC, MCL 700.7303(3)(b). Therefore, any claims that were barred to
her mother were also barred to her pursuant to MCL 700.32. And under EPIC, because she did not request the annual accounts, she sat on her rights. Any claim that did not fall within the three-year period before she filed her concurrence with Jane’s petition should have been barred by MCL 600.5805(10) because she should have discovered the alleged breach. Bay Mills Indian Comm, supra, 244 Mich.App at 751, citing Baks, supra, 227 Mich.App at 493-494.

FN11. Petitioner argues that the trial court improperly granted summary disposition to the bank on all her claims where several of her claims were not raised in the bank’s motion for summary disposition but were raised in the bank’s draft order that the court signed. Petitioner has not cited a single case to support her argument. An appellant may not merely announce his position without providing authority to support his claims. Wilson v. Taylor, 457 Mich. 232, 243; 577 NW2d 100 (1998). We decline to review this issue.

Petitioner next argues that the court erred by failing to grant her summary disposition with respect to the bank’s self-dealing loans. The court found that the revised probate code did not apply, and the loans were proper under EPIC because they were not made to the trust, they were permitted by MCL 700.7403, MCL 700.7401(2)(q), and MCL 450.1545a, and because Ervin’s disinterested directors approved the loans. MCL 700.7403 states:

(1) If the trustee’s duty and the trustee’s individual interest or the trustee’s interest as a trustee of another trust conflict in the exercise of a trust power, the power may be exercised if any of the following are true:

(c) The transaction is otherwise permitted by statute.

MCL 700.7401 provides in relevant part:

(1) A trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust property to accomplish the desired result of administering the trust legally and in the trust beneficiaries’ best interest.

(2) Subject to the standards described in subsection (1) and except as otherwise provided in the trust instrument, a trustee possesses all of the following specific powers:

(q) To borrow money for any purpose from the trustee or others and to mortgage or pledge trust property.

Thus, assuming that the trust agreement did not prohibit the bank from lending money to Ervin, the bank had the power to do so if the loan was reasonable and prudent. The trust authorized the bank to borrow money on behalf of the trust and to exercise the same control over the property as the settlor might if living. Importantly, the trust did not preclude the bank from lending money to Ervin. Moreover, MCL 450.1545a(1) provides in relevant part:

₈ A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:

(a) The transaction was fair to the corporation at the time entered into.

(b) The material facts of the transaction and the director’s or officer’s interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the
board, committee or independent director or directors authorized, approved, or ratified the transaction.

An affidavit by Mareta indicated that besides himself, Ervin's board of directors consisted of members of Ervin's management James Stephenson, John Pearson, Lynn Rogers, and outside directors Amherst H. Turner and Richard Sarns. Mareta also stated:

8. Ervin obtains competitive bids from multiple financial institutions before it enters into any loan transaction with any lender.

9. Neither I nor any other member of Bank One (i.e. Bank One Trust Company, N.A.) has had any involvement in the decision by any Bank One affiliate to make any loan to Ervin. The terms and conditions of these loans were negotiated entirely between the Bank One affiliates and Ervin without my involvement or the involvement of other members of our trust group.

10. In each circumstance where a Bank One affiliate was a lender to Ervin, the loan from the Bank One affiliate was on terms that were much more favorable to Ervin than those offered by any other lender. At no time did Ervin enter into any loan with a Bank One affiliate as an inducement to, or reward for, any action by Bank One as trustee.

Similar statements were made by Richard Cohn, who was the Vice-President, Secretary, and Treasurer of Ervin. The practice of obtaining competitive bids and the fact that the trust group did not participate in the loan negotiations indicated that the loan transactions between the bank and Ervin were fair. Moreover, a consent resolution signed by all members of the board of directors indicated that the material facts of all transactions and the bank's interests were known by all directors, and the directors approved the loans because they were fair and in Ervin's best interest. Therefore, the interested loans were authorized by statute on two separate grounds. MCL 450.1545a(1)(a), (b). We disagree with petitioner's contention that MCL 450.1545a does not apply to trustees. Our Supreme Court in In re Butterfield Estate, 418 Mich. 241, 257; 341 NW2d 453 (1983), noted that when trustees serve as corporate directors, it is necessary to consult both the law of corporations and the law of trusts to determine the trustees' duties to the creditors, shareholders, and beneficiaries.

Petitioner further argues that while MCL 700.7401(2)(q) gives a trustee the power to borrow money from itself, the power can only be exercised within the confines of MCL 700.1214. MCL 700.1214 provides:

*9 Unless the governing instrument expressly authorizes such a transaction or investment ... a fiduciary in the fiduciary's personal capacity shall not engage in a transaction with the estate that the fiduciary represents.... A fiduciary's deposit of money in a bank or trust company, in which the fiduciary is interested as an officer, director, or stockholder, does not constitute a violation of this section.

Notably, MCL 700.1214 does not contain an exclusion like MCL 700.7403, "otherwise permitted by statute." Thus, there appears to be some conflict between MCL 700.7401(2)(q), which authorizes a trustee to lend money to the trust, and MCL 700.1214, which appears to strictly prohibit self-dealing. Apparent inconsistencies between statutes should be reconciled if possible. Novell v. Titan Ins Co, 466 Mich. 478, 483; 648 NW2d 157 (2002). Statutes relating to the same subject are in pari materia and must be read collectively as one law. State Treasurer v. Schuster, 456 Mich. 408, 417; 572 NW2d 628 (1998).

When interpreting statutes, the goal is to discover and give effect to legislative intent. Neal v. Wilkes, 470 Mich. 661, 665; 685 NW2d 648 (2004). To determine intent, appellate courts first look at the specific language of the statute. Halloran v. Bhon, 470 Mich. 572, 577; 683 NW2d 129 (2004). Unless defined in the statute, every word should be
accorded its ordinary meaning given the context in which the word is used. *Lee v. Robinson*, 261 Mich.App 406, 409; 681 NW2d 676 (2004). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich. 467, 474; 573 NW2d 51 (1998). MCL 700.1214 does not specifically address loans; in fact, the only word that could potentially refer to a loan is the word “transaction.” However, transaction is used in conjunction with the word investment, “transaction or investment.”

Although “or” is a disjunctive term, *Auto-Owners Ins v.stenberg Bros, Inc.* 227 Mich.App 45; 575 NW2d 79 (1997), it is also “used to connect alternative terms for the same thing” and “used to correct or rephrase what was previously said.” *Random House Webster’s College Dictionary* (2001). In this context, the word transaction is synonymous with investment. MCL 487.14405 refers a fiduciary bank’s investment of trust property, and MCL 700.1214 prohibits the fiduciary from (a) engaging in a transaction with the estate, (b) investing estate money in an affiliate of the fiduciary or (c) making a profit by purchasing, selling, or transferring estate property. Although the word transaction certainly could encompass a loan, the context of the statute indicates that the term transaction should be more narrowly construed.

Without this construction, the statutes cannot be harmonized; petitioner’s interpretation disregards the provision in MCL 700.7403(c), which authorizes the transaction if otherwise permitted by statute. When the conflict cannot be harmonized, the specific statute controls. *Gebhardt v. O’Rourke*, 444 Mich. 535, 542-543; 510 NW2d 900 (1994). Here, MCL 700.7401(2)(q) specifically grants a trustee power to make a loan to the trust. This provision is more specific than MCL 700.1214, which prohibits transactions or investments by fiduciaries in general. Moreover, MCL 700.7401(2)(q) is listed under the portion of EPIC specifically dealing with trusts, MCL 700.7201, *et seq.*, while MCL 700.1214 is listed under the construction and general provisions portion of EPIC, MCL 700.1201, *et seq.* Therefore, because the more specific statute controls, the loans by the bank to Ervin were not prohibited under EPIC. Petitioner’s claims with respect to the guaranteed loans all involved transactions occurring in 2000 and 2001; petitioner’s evidence indicated that she did not receive notice of these loans until March 29, 2002. Therefore, petitioner’s claims did not accrue until after EPIC’s effective date of April 1, 2000, and the claims were barred. MCL 700.8101(1), (2)(b).

*10 Petitioner next argues that Bank One and Bank One Trust Company did not comply with the requirements of MCL 487.14402; because they did not comply, neither Bank One nor Bank One Trust Company was the proper trustee; and the court erroneously denied her summary disposition with respect to this issue. We disagree.

As a current income beneficiary of a testamentary trust, petitioner was entitled to notice of substitution sent by certified mail, which explained her right to object. In her affidavit, petitioner claimed she did not receive this notice. If the affidavit had been the only evidence admitted, it arguably would have been sufficient to support granting summary disposition to petitioner on this ground. Nevertheless, petitioner’s deposition testimony contradicted the affidavit, and the deposition testimony controlled. In her deposition, petitioner stated numerous times that she did not read all the information sent to her by the bank or the company because she relied on the bank and her brother to look out for her interests. Because petitioner’s deposition testimony clearly indicated that she did not remember one way or the other whether she received notice from the bank, and she stated numerous times throughout the deposition that she did not read information provided to her, the deposition testimony contradicted petitioner’s statement in her affidavit. And an affidavit may not be used to create an issue of material fact by contradicting damaging deposition testimony. *Dykes v. William Beaumont Hosp.*, 246 Mich.App 471, 478-480; 633 NW2d 440.

Because this issue was raised in petitioner's motion for summary disposition, petitioner had the initial burden of supporting her position with admissible evidence. Smith v. Globe Life Ins Co, 460 Mich. 446, 455; 597 NW2d 28 (1999). Petitioner did not meet this burden. If the nonmoving party is entitled to summary disposition, the court may grant it to the nonmoving party. MCR 2.116(1)(2).

Maretta asserted in his affidavit that he sent petitioner statutorily sufficient notice of the substitution and her right to object. Because petitioner did not meet the initial burden, and the bank provided evidence that it complied with the requirements of MCL 487.14402, summary disposition was appropriately granted to the bank. Dykes, supra, at 478-479.

Petitioner's sole remaining claim to survive summary disposition on statute of limitation and res judicata grounds is with respect to the Barnstee acquisition. Petitioner claims the bank had a conflict of interest because it was a lender for the Barnstee transaction, and the analysis performed by the bank showed numerous risks involved with the purchase, none of which were disclosed to the beneficiaries. The documents presented by petitioner to support her claim appear to be internal company documents evaluating Barnstee's strengths and weaknesses, evaluating the positives and negatives of the proposed acquisition, and establishing a maximum price Ervin was willing to pay for the business. One of the reasons in support of the purchase was to protect or increase Ervin's market share. We find that protection of market share was a prudent reason for the investment.

*11 Had petitioner presented evidence indicating that the investment was not prudent, an issue of material fact would have existed requiring a trial on this issue. However, petitioner did not provide any affidavits from financial or business experts indicating that the investment was imprudent at the time it was made. Moreover, this was evidence petitioner could have presented, which did not rely on the completion of discovery. "[A]n adverse inference may be drawn against a party who fails to produce evidence within its control." Grossheim v. Associated Truck Lines, Inc, 181 Mich.App 712, 715; 450 NW2d 40 (1989), citing Griggs v. Saginaw & F R Co, 196 Mich. 258, 265-266; 162 NW 960 (1917).

If the opposing party is entitled to judgment, the court may render judgment in its favor. Auto-Owners Ins v Allied Adjusters & Appraisers, Inc, 238 Mich.App 394, 397; 605 NW2d 685 (1999). De novo review requires this Court to review the evidence in the same manner as the trial court to determine whether an issue of material fact existed. Morales v. Auto-Owners Ins, 458 Mich. 288, 294; 582 NW2d 776 (1998). The bank argued in its reply brief to petitioner's motion for summary disposition that it had acted prudently and had not breached its fiduciary duties. Therefore, the issue was before the trial court. Although failure to raise an issue of material fact was not the ground on which the trial court granted summary disposition-the trial court granted summary disposition on statute of limitations grounds pursuant to MCL 700.7307(1)-a decision that reaches the right result for the wrong reason will not be reversed on appeal. Grand Trunk W R, Inc v. Auto Warehousing Co, 262 Mich.App 345, 354; 686 NW2d 756 (2004).

Because petitioner's petition was properly dismissed in its entirety, we need not reach petitioner's argument that a trustee is liable for assets held outside the trust.

Affirmed.


In re Ervin Testimentary Trust
Not Reported in N.W.2d, 2005 WL 433573
(Mich.App.)

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Westlaw.

Not Reported in N.W.2d, 2007 WL 704982 (Mich.App.)
(Cite as: 2007 WL 704982 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
In re ESTATE OF Helen D. EWANK TRUST.
Philip P. Ewbank, Scott S. Ewbank, and Brian B. Ewbank, Petitioners-Appellants,

v.

Karin H. Swanson, Co-Trustee, and Robert C. Tuck, Former Co-Trustee, Respondents-Appellees.
In re Estate of Paul C. Ewbank Trust.
Philip P. Ewbank, Scott S. Ewbank, and Brian B. Ewbank, Petitioners-Appellants,

v.

Karin H. Swanson, Co-Trustee, and Robert C. Tuck, Former Co-Trustee, Respondents-Appellees.

Docket Nos. 264606, 264608.

Calhoun Probate Court; LC Nos. 01-001032-TT, 01-001033-TT.

Before: WHITBECK, C.J., and BANDSTRA and SCHUETTE, JJ.

PER CURIAM.

*1 Petitioners appeal the order of probate Judge Donald Halstead dismissing their Restated Petitions to Surcharge trustees Karin Swanson and Robert Tuck and dismissing all claims for acts before June 1, 1992. We affirm in part, and remand in part for additional findings.

On October 11, 1977, Paul and Helen Ewbank, husband and wife, executed mirror-image trusts, which are now the subject of this suit. Both trust agreements were completely revocable and reserved all incidents of ownership of trust assets to the settlor. Each trust agreement named the surviving spouse as the beneficiary for life, and each provided for identical distribution of the assets after the death of the surviving spouse to their daughter and daughter-in-law for life, and the remainder to their six grandchildren, who were named in the trust agreements. Petitioners are grandsons and remainder beneficiaries of both Paul and Helen. Respondent Swanson is their granddaughter, and she is also a remainder beneficiary. Respondent Tuck was a co-trustee with Swanson and a successor to Theodore Van Dellen, the Ewbanks' attorney and family friend, who was initially a trustee for both trusts.

Paul Ewbank died on November 10, 1980, and Helen Ewbank died on October 24, 1999. After Helen's death, Van Dellen resigned as trustee, and Swanson took responsibility for distributing the assets. Eventually, Tuck was appointed as a co-trustee. Unhappy with the pace of distribution of the trusts’ assets, petitioners filed a petition to replace Swanson and Tuck as trustees, and eventually filed a petition to surcharge both for breach of their fiduciary duties. Petitioners also requested that the co-trustees provide them with accountings for both trusts since their inception in 1977. Respondents protested, arguing that petitioners were not entitled to accountings between 1977 and 1999 because petitioners were not currently vested beneficiaries, but merely contingent, remainder beneficiaries, until Helen died in 1999. The probate court noted that, before this Court decided In re Childress Trust, 194 Mich.App. 319; 486 NW2d 141 (1992), trustees were not required to provide remainder beneficiaries with accountings, and thus, respondents would not be required to provide accountings for the trusts' investments before June 1992. The court then dismissed the petition to surcharge for claims based on acts that occurred before June 1, 1992.

Petitioners argue on appeal that the trial court wrongly dismissed the surcharge action for claims before 1992 because, applying Childress, it found that the trustees owed no duty to provide informa-
tion regarding the trusts’ administration before 1992, and thus, they could not be surcharged for a breach of fiduciary duty for any breach before 1992. We conclude that the trial court's holding was incorrect.

A trustee’s duties to beneficiaries are determined by the trust agreement and the intent of the settlor. In re Butterfield Estate, 418 Mich. 241, 259; 341 NW2d 453 (1983). Relevant statutes and case law also define what duties the trustee owes. In re Green Charitable Trust, 172 Mich.App 298, 312; 431 NW2d 492 (1988). Whether a trustee has breached his duties is determined by the facts of each case. Id. A trustee owes a duty of care to both the income beneficiaries and the remainder beneficiaries of a trust. In re Butterfield Estate, supra at 256. The duty of care is defined in part by the prudent investor rule, codified in the revised probate code at MCL 700.813, and now codified in the Estates and Protected Individuals Code (EPIC): “Except as otherwise provided by the terms of the trust, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills ... the trustee is under a duty to use those skills.” MCL 700.7302. Long before the prudent person rule was codified, the Michigan Supreme Court held that “a trustee must show the utmost good faith. He must exercise in the execution of the trust the degree of care and diligence which a man of ordinary prudence would exercise in the management of his own affairs.” Michigan Home Missionary Soc v. Corning, 164 Mich. 395, 402; 129 NW 686 (1911). The Court defined prudence as “acting with care, diligence, ‘integrity, fidelity and sound business judgment.’” In re Messer Trust, 457 Mich. 371, 380; 579 NW2d 73 (1998), quoting In re Buhl’s Estate, 211 Mich. 124, 132; 178 NW2d 651 (1920).

In addition, a trustee must act with honesty, good faith, and loyalty, and must refrain from acting in his or her own self-interest. In re Green Charitable Trust, supra at 313. If a trustee acts in good faith, with reasonable diligence, he is not liable for mere mistakes in judgment. In re Estate of Norris, 151 Mich.App 502, 512; 391 NW2d 391 (1986); In re Tolfree’s Estate, 347 Mich. 272, 285-286; 79 NW2d 629 (1956). Further, a trustee must act impartially between successive beneficiaries, respecting the differing interests each has. Restatement Trusts, 3d (Prudent Investor Rule) (1992), § 232, at 181; In re Butterfield Estate, supra at 257.

In this case, the trial court dismissed the surcharge claims for any acts prior to June 1, 1992. It apparently decided that because the trustees had no duty to account to the remainder beneficiaries before 1992, they had no fiduciary duties at all to those remainder beneficiaries. The parties and the trial court in this case focused on whether Childress was applicable and whether it required the trustees to provide notice to the petitioners. Such focus, however, was misplaced. A trustee’s fiduciary duties are not swept away simply because there is no obligation to provide account reports to beneficiaries. Although a trust agreement may relieve a trustee’s duty to account to beneficiaries, it cannot relieve the duty to account to the probate court. Raak v. Raak, 170 Mich.App. 786, 793; 428 NW2d 778 (1988). Even in situations where beneficiaries have no right to receive trust reports, “the trustee will, nevertheless, be required in a suit for an accounting to show that he faithfully performed his duty and will be liable to whatever remedies may be appropriate if he was unfaithful to his trust.” Id. at 792, citing Wood v. Honeyman, 169 P.2d 131, 166 (Or 1946). In Raak, this Court held that the trustee could be required to account for the trust’s assets to determine what happened to $70,000 of the corpus because, without an accounting, there was no way to prove the faithful performance of the trustee’s duties. Id. at 790. Therefore, in this case, even if the trustees had no duty to account to the petitioners as remainder beneficiaries, they still had fiduciary duties to the petitioners, which may have been breached. In re Butterfield Estate, supra at 256. As such, they may be required to account for the trust.
funds. *Childress* does not address whether a trustee can be surcharged for negligence, and the trial court's reliance on the case to resolve the issue was improper.

A beneficiary may petition the probate court to "surcharge" the trustee for a breach of fiduciary duties. *In re Tolfree's Estate*, supra at 288; *In re Green Charitable Trust*, supra at 309; MCL 700.7306(4). Further, any beneficiary of the trust may file for a surcharge, including remainder beneficiaries. See *In re Messer Trust*, supra at 373. Thus, a surcharge action by the petitioners in this case was the proper remedy to address the trustees' alleged breach of fiduciary duties.

*3* The trial court erred by dismissing the surcharge petition solely on the basis that the trustees had no duty to provide accounts to the remainder beneficiaries. We note, however, that the trial court could have properly considered whether petitioners' claims were barred by laches. Respondents raised that defense below, and the trial court acknowledged that it could consider the defense in its ruling. Nevertheless, it did not make findings of fact or conclusions on that issue.

Laches is an equitable affirmative defense that is primarily applicable where circumstances make it inequitable to grant relief to a plaintiff who unreasonably delays filing a claim. *Yankee Springs Twp. v. Fox*, 264 Mich.App 604, 611; 692 NW2d 728 (2004). The unreasonable delay must cause a change in a material condition, which results in prejudice. *Id.* at 612. The defendant bears the burden of proving that a lack of due diligence by the plaintiff caused him prejudice. *Id.* While laches is not generally applied when the parties have a fiduciary relationship, *Schmude Oil Co v. Omar Operating Co*, 184 Mich.App 574, 583; 458 NW2d 659 (1990), it will be applied in certain circumstances where there is a fiduciary relationship. See *Seguin v. Madison*, 328 Mich. 600, 607-608; 44 NW2d 150 (1950) (allowing laches as a defense where beneficiaries delayed suit 35 years).

In this case, petitioners claim a breach of fiduciary duty for poor investments since 1977, and they particularly point to the failure to sell Eagle-Picher Industries stock in the late 1980s when the company was embroiled in asbestos litigation and declared bankruptcy. Petitioners waited well over ten years to assert their claims. During that time, memories faded, old accountings and files were lost, and two trustees died—Helen Ewbank and Van Dellen. Respondents have clearly been prejudiced by the delay because evidence necessary for their defense is unavailable. Petitioners argue that they did not receive accountings and had no knowledge of the trusts until their grandmother died, and so the delay in asserting their claims is not unreasonable. A factual issue thus exists, which should be resolved by the trial court on remand.

Further, we note that both parties claim that MCL 700.7307 supports their arguments for and against a conclusion that this action is barred by the applicable statute of limitations. The statutory provision relied upon is part of the Estates and Protected Individuals Code, which has a section that makes it applicable to actions, like those at issue here "commenced after [April 1, 2000] ... except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of applying this act's procedure." MCL 700.8101(2)(b). On remand, the trial court should consider and apply these statutory provisions, as appropriate, especially with regard to respondents' argument that petitioners' claim for breach of fiduciary duties prior to 1992 should be barred because, under the doctrine of "virtual representation," their interests were represented by Helen, the primary beneficiary of both trusts until her death in 1999. Also, see MCL 700.7303(3)(a).

*4* On appeal, respondent Tuck separately argues that the trial court's dismissal of the petition for surcharge for claims arising before 1992 should be affirmed, at least as to Tuck, because it is undisputed that he did not become a trustee until April
18, 2000. An appellee may argue alternative grounds for affirmance as long as he is not seeking to enlarge the relief granted by the trial court. Middlebrooks v. Wayne Co., 446 Mich. 151, 166 n 41; 521 NW2d 774 (1994). Tuck is not seeking to enlarge the relief previously granted to him, but he is merely arguing alternative grounds to affirm the lower court's dismissal. Thus, we may address his argument.

Tuck was named a trustee of both trusts in April 2000. Any cause of action against Tuck for failing to pursue a claim against Van Dellen accrued after Tuck became a trustee, which was well after June 1, 1992. We therefore affirm the court's dismissal of surcharge claims against respondent Tuck for trustee actions before June 1, 1992.

In reaching our conclusion, we note that petitioners, in their reply brief, indicate that they wish to appeal the dismissal of post-1992 claims as well. However, petitioners failed to include those claims in the statement of questions presented, and they are not properly presented for this Court's review. Grand Rapids Employees Independent Union v. Grand Rapids, 235 Mich.App 398, 409-410; 597 NW2d 284 (1999). Further, a reply brief may only contain rebuttal argument; raising an issue in a reply brief is insufficient to properly present it for appeal. MCR 7.121(G); Maxwell v. Dep't of Environmental Quality, 264 Mich.App 567, 576; 692 NW2d 68 (2004). Therefore, we will not address the dismissal of any post-1992 claims.

We affirm the trial court's order dismissing petitioners' claims against respondent Tuck. We otherwise reverse the trial court's order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

In re Estate of Ewbank Trust
Not Reported in N.W.2d, 2007 WL 704982 (Mich.App.)

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On December 1, 1995, plaintiff filed a three-count complaint alleging breach of fiduciary duty, misrepresentation, and innocent misrepresentation. Specifically, plaintiff alleged that she married David Alan Finkelstein on January 15, 1988. Following the marriage, an irrevocable trust entitled “The Deborah Jo Siegelhsis Trust” was created. The trust was primarily funded with assets consisting of stock and bonds, and defendant served as its trustee. On December 31, 1991, the trust purchased 5,000 shares of Cortech. In 1991, Finkelstein commenced divorce proceedings against plaintiff, but the pair reconciled. In 1993, the parties separated and activated the divorce proceedings. Defendant undertook the legal representation of Finkelstein and continued to serve as trustee of the trust. During the course of the divorce proceeding, defendant made representations regarding the value of the trust and number of stock shares. Although a stock split had caused the number of shares of Cortech stock to deplete to 2,500, defendant represented to plaintiff that she still had 5,000 shares. Shortly after making this representation to plaintiff, defendant withdrew from representing Finkelstein in the divorce proceeding. However, plaintiff allegedly relied on defendant’s representation in reaching an equitable property division in the consent judgment of divorce which entered on January 27, 1994. Following entry of the judgment, plaintiff requested that defendant, as trustee, distribute the assets of the trust for liquidation purposes, but defendant did not distribute the bulk of the assets, which included the Cortech stock. When the stock was finally turned over to plaintiff, the value of the stock had dropped significantly, causing a substantial loss to plaintiff. Although defendant filed both an answer and amended answer to the complaint, defendant did not raise the statute of limitations as an affirmative defense.

On December 5, 1996, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(10). Specifically, defendant argued that exclusive jurisdiction of the claims against defendant rested in the probate court. Additionally, defendant argued that plaintiff had failed to mitigate her damages by seeking to modify the consent judgment of divorce based on a mutual mistake of fact. Defendant did not seek transfer of the litigation to the probate court, but outright dismissal. On January 29, 1997, the circuit court heard oral arguments regarding defendant’s motion for
summary disposition. The circuit court held that the probate court had exclusive jurisdiction of plaintiff’s complaint. However, the trial court declined to grant defendant’s motion for dismissal pursuant to MCR 2.116(C)(4), but rather ordered that the case be transferred to the probate court pursuant to MCR 2.227(A)(2), with plaintiff bearing the cost of the transfer fee. The circuit court also ordered that the entire file would be transferred to the probate court.

*2 On May 14, 1997, defendant filed its second motion for summary disposition before the probate court based on the statute of limitations. Defendant asserted that plaintiff learned of all facts which gave rise to her complaint for breach of fiduciary duty and misrepresentation no later than July 22, 1994. However, plaintiff did not file suit until December 1, 1995. Pursuant to the six-month statute of limitation period set forth in M.C.L. § 700.819; MSA 27.5819, defendant asserted that plaintiff’s complaint was barred. In opposition to the motion, plaintiff asserted that the six-month limitation period did not apply because defendant had never provided plaintiff with a final accounting or given a full disclosure of the state of the trust.

On June 17, 1997, the probate court heard oral arguments regarding defendant’s second motion for summary disposition. The probate court held that plaintiff had filed her complaint in circuit court in order to avoid the six-month limitation period set forth in the probate code. The probate court held that a formal accounting was unnecessary to commence the statutory period, and defendant’s resignation from the position and appointment of a successor was sufficient. Furthermore, the probate court held that plaintiff admitted in her deposition that she was aware of all of the facts necessary for bringing her complaint for seventeen months prior to the actual filing date.

On February 24, 1998, plaintiff filed a motion to set aside the order granting defendant’s motion for summary disposition. Plaintiff argued that the statute of limitations period was not six-months, but three-years due to defendant’s failure to provide an accounting. On April 23, 1998, the probate court heard oral arguments regarding plaintiff’s motion to set aside the order and defendant’s motion for attorney fees and costs. The probate court held that there was no doubt that defendant acted improperly as a trustee by not advising plaintiff, in a timely manner, of the status of the trust. However, plaintiff learned in 1994 of the status of the trust. Once plaintiff acquired that knowledge, irrespective of the source, the statute began to run. The probate court went on to state that it no longer opined that plaintiff had filed the action initially in circuit court to avoid the statute of limitations. Lastly, the probate court denied defendant’s motion for attorney fees and costs, holding that any award was discretionary, and in any event, defendant came before the court with unclean hands.

Plaintiff first argues that the trial court erred in holding that the six-month statute of limitations period applied. We agree. Our review of a trial court’s order of summary disposition is de novo. Dobie v. Morrison, 227 Mich.App 536, 538; 575 NW2d 817 (1998).\footnote{2} MCL 700.819; MSA 27.5819 provides:

\footnote{2} Defendant contends that plaintiff’s motion to set aside the order of summary disposition should have been entitled a motion for reconsideration and the abuse of discretion standard of review should apply on appeal. Appellate review of the original grant of defendant’s motion for summary disposition is appropriate. Gavulic v. Boyer, 195 Mich.App 20, 23-24; 489 NW2d 124 (1992).

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the
final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

*3 If statutory language is clear and unambiguous, additional judicial construction is neither necessary nor permissible, and the language must be applied as written. Ahearn v. Bloomfield Twp. 235 Mich.App 486, 498; 597 NW2d 858 (1999). The primary goal of statutory interpretation is to give effect to the intent of the legislative body. Ballman v. Borges, 226 Mich.App 166, 168; 572 NW2d 47 (1997). Meaning should be given to every word of a statute, and no word should be treated as surplusage or rendered nugatory if at all possible. Hoste v. Shanty Creek Mgt, Inc, 459 Mich. 561, 574; 592 NW2d 369 (1999). Furthermore, a statute should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. McAuley v. General Motors Corp, 457 Mich. 513, 518; 578 NW2d 282 (1998). Interpretation and application of a statute presents a question of law which is reviewed de novo. Id.

In the present case, the probate court held that a final accounting was unnecessary to trigger the running of the six-month statute of limitations period, and defendant's withdrawal from representation of the trust was sufficient to trigger the statutory period. Furthermore, the probate court held that plaintiff's knowledge impacted the six-month limitation period. We disagree. Applying the rules of statutory interpretation and construction, any event of withdrawal is insufficient to trigger the commencement of the six-month limitations period. Rather the trustee must provide a "final account or other statement fully disclosing the matter and showing termination of the trust relationship ..."

The statute does not set forth any exceptions or substitutions for this required action. In this case, defendant failed to provide a final account to plaintiff of the status of the trust. Alternatively, defendant could have withdrawn with the condition that he provide a statement fully disclosing the matters surrounding the trust. While defendant did, in fact, withdraw from representation of the trust, he did not provide a statement fully disclosing the status of the trust. Instead, plaintiff, through her counsel, had to communicate with defendant's former law firm in an attempt to learn the status of her stock shares. The interpretation of the statute by the probate court would lead to injustice and absurd results. McAuley, supra. It would allow a trustee to remove himself from further representation of a trust without performing any disclosure functions. If a plaintiff was unable to determine whether a breach of fiduciary duty had occurred within six months, there would be no sanction for the breach of fiduciary duty. Additionally, it appears that the knowledge of a plaintiff is irrelevant because there is no language in the statute to indicate that a plaintiff's knowledge has any bearing on the trigger date for the six-month period. Ahearn, supra. Plaintiff's complaint was timely filed within the three year statutory period due to defendant's failure to comply with the procedure for invoking the six-month statutory period.

*4 Our statutory interpretation is consistent with the legislative intent in enacting M.C.L. § 700.819; MSA 27.5819. The House Legislative Analysis for 1978 PA 642 indicates that "If all beneficiaries had received the final account and there had been full discharge, the trustee would not be liable after three years from filing the final account." House Bill Analysis HB 4475, July 39, 1979. Accordingly, the probate court erred in applying the six-month statute of limitations where defendant failed to provide a final accounting or give a full disclosure with his withdrawal from representation.

Plaintiff next argues that the probate court erred in granting defendant's motion for summary
disposition when the statute of limitations was not
pled as an affirmative defense. Our holding that the
six-month statutory period did not apply and that
plaintiff was within the three year limitations
renders this issue moot. FN3

FN3. In In re Crawford Estate, 115
Mich.App 19, 23-25; 320 NW2d 276
(1982), we held that the court rules regard-
ing failure to plead affirmative defenses
did not apply in probate proceedings be-
cause those rules had not been adopted by
the probate court. However, since the
Crawford decision has issued, MCR 5.001
was adopted which provides that
"[p]rocedure in probate court is governed
by the rules applicable to other civil pro-
cceedings, except as modified by the rules
in this chapter." The viability of the Craw-
ford decision is unclear because the terms
used in the probate proceedings differ from
the terms applied to civil proceedings, and
court rules governing the discrepancy have
not been created. 5 Martin, Dean & Web-
ster, Michigan Court Rules Practice, Au-
thors' Comment, pp 334-335. But see In re
Pitre, 202 Mich.App 241, 243; 508 NW2d
140 (1993). Because this issue is moot we
decide to examine whether the adoption of
MCR 5.001 indicates that MCR
2.111(F)(3) may be applied in probate pro-
ceedings.

On cross-appeal, defendant argues that the pro-
bate court erred in failing to award costs and attor-
ney fees for defending in the wrong court as re-
quired by MCR 2.227(A)(2). We disagree. We re-
view a lower court's interpretation of court rules de
novo. McAuley, supra. Where the issues remain the
same and the case proceeds uninterrupted, there are
no additional expenses and the request for attorney
fees is unreasonable. Michigan State Employees As-
sociation v Civil Service Commission, 177
Mich.App 231, 238-239; 441 NW2d 423 (1989). De-
defendant contends that the present factual scen-
ario is distinguishable because it, in fact, incurred
additional expenses when it filed its motion for
summary disposition. However, the motion for
summary disposition was not based solely on sub-
ject matter jurisdiction, but also based on plaintiff's
alleged failure to mitigate her damages. Therefore,
defendant did not incur additional expenses in at-
tending in the wrong court, and defendant did not
seek transfer of the litigation to the probate court.
Rather, defendant hoped to obtain outright dis-
missal of the litigation by moving pursuant to MCR
2.116(C)(4) and (C)(10). Accordingly, the probate
court did not err in refusing to award defendant
costs and attorney fees. Michigan State, supra.

Affirmed in part, reversed in part. We do not
retain jurisdiction.

LaFave v. Jacobson
Not Reported in N.W.2d, 1999 WL 33326822
(Mich.App.)

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Not Reported in N.W.2d, 2012 WL 5290282 (Mich.App.)  
(Cite as: 2012 WL 5290282 (Mich.App.))

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
In re TIFFANY SMITH TRUST.
Judy Anderson, Guardian for Joshua A. Smith, and
Julie Melchiori, Trustee for the Tiffany Smith
Trust, Appellees,
v.
Loretta A. Plumley, Appellant,
and
Chris Paquin, Not Participating.
Docket No. 303128.

Gogebic Probate Court; LC No.2009-000042-TR.

Before: MURPHY, C.J., and SAWYER and
HOEKSTRA, JJ.

PER CURIAM.

Appellant, Loretta Plumley, appeals as of right the probate court’s order imposing a surcharge of $168,058.84 for misappropriation of funds from the Tiffany Smith Trust. We affirm the surcharge but remand for the reasons stated in this opinion.

Although Chris Paquin is named as an appellant, he subsequently settled his claim, and is no longer a party to the appeal. The term “appellant” in this opinion will refer exclusively to Loretta Plumley.

When Tiffany Smith learned that she was dying, she established a trust for the benefit of her minor son. The trust named Smith’s cousin, Loretta Plumley (appellant), as managing trustee and, additionally, named Smith’s mother, Judy Anderson, as both guardian of Smith’s minor son and cotrustee.

FN2. Loretta Plumley is referred to by her maiden name, Loretta Wrosch, in the Tiffany Smith Trust. To avoid confusion, “Plumley” or “appellant” will be used throughout this opinion to mean either Loretta Plumley or Loretta Wrosch.

The trust was funded by Smith’s life insurance policy and was created with a $400,751.09 payment upon Tiffany’s death. Of these funds, a $50,000 gift was to be paid directly to appellant, and an additional $50,000 gift was to be paid directly to Chris Paquin. The remaining balance was to be invested and used for the minor son’s benefit.

Contrary to the express terms of the trust, appellant failed to fund an account for the son’s daily expenses and, likewise, failed to report all trust activity to Anderson. Anderson, therefore, filed a petition in Gogebic Probate Court to compel appellant to make an accounting of the trust activity. Several court proceedings ensued.

Appellant and Anderson stipulated to have Julie Melchiori, an accountant and unrelated third party, named as replacement trustee of the Tiffany Smith Trust. The stipulated order compelled appellant to cooperate with Melchiori’s requests for information regarding the accounting and management of the trust’s funds. Despite the order, appellant continued to not follow Melchiori’s requests.

The probate court held a series of hearings to consider sanctions against appellant and to review Melchiori’s trust report. Appellant refused to testify at these hearings due to a possible criminal investigation into her misappropriation of funds.

At the conclusion of these hearings, the probate court found that appellant “misappropriated and embezzled” funds from the Tiffany Smith Trust.

The court then surcharged appellant a total of $168,058.84. This figure was based on the court's acceptance of Melchiori's report and consisted of $115,558.84 in funds spent inappropriately, $2,500 in appellant's incurred legal expenses paid from the trust, and the $50,000 gift that was owed Paquin. Paquin testified in a previous hearing that, although he allowed appellant to use a portion of his gift, he did not waive his right to the gift.

Plaintiff first argues that the probate court's order violated her due process rights by failing to give notice of her criminal contempt and order to repay $168,058.84. Plaintiff's argument fails because she was not found in contempt. Rather, the probate court imposed a surcharge for her mishandling of the trust.

Appellant next argues that the probate court erred by denying her compensation for time spent on trust services and expenses related to the minor son. Appellant believes this error should result in a reduction of her surcharge. We disagree that appellant was denied rightful compensation. Instead, the probate court acted within its statutory authority when it denied appellant her requested compensation.

We review a probate court's decision to impose a surcharge on a trustee for an abuse of discretion. In re Baldwin Trust, 274 Mich.App 387, 397; 733 NW2d 419 (2007). And we review a probate court's findings of fact for clear error. In re Estate of Raymond, 483 Mich. 48, 53; 764 NW2d 1 (2009). A finding of fact is considered clearly erroneous when this Court is left with a firm and definite conviction that a mistake was made. In re Green Charitable Trust, 172 Mich.App 298, 311; 431 NW2d 492 (1988). The Michigan Trust Code applies to all trusts. MCL 700.8206(1)(a). According to the Michigan Trust Code, any violation of a duty owed to the beneficiary by the trustee is considered a "breach of trust." MCL 700.7901(1). A court has the power to remedy a breach of trust through various methods. MCL 700.7901(2)(a)-(j). Among these methods, is a court's right to "[r]educe or deny compensation to the trustee." MCL 700.7901(2)(h). Likewise, "[a] court may reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust." MCL 700.7904(3).

We conclude that the probate court did not clearly err when it found that appellant was in breach of the trust. Appellant violated several terms of the trust that were established for the benefit of Smith's minor son. Appellant failed to fund an account to provide for Smith's son's daily expenses and refused to give an accounting of the fund to her co-trustee. Additionally, appellant failed to provide appropriate documentation for her claimed services as trustee and expenses for the minor child. The probate court, therefore, acted within its statutory authority under MCL 700.7901 and MCL 700.7904 when it denied appellant her requested compensation. We, therefore, affirm the probate court's decision on this issue.

Finally, appellant argues that the probate court erroneously found that Paquin had not waived his $50,000 gift from the trust. Appellant believes this error should result in a reduced surcharge. We affirm the probate court's finding, but conclude that appellant's surcharge should be reduced by $50,000 because appellant has settled her claim with Paquin.

We review a probate court's findings of fact for clear error. In re Estate of Raymond, 483 Mich. at 53. A lower court's decision is considered clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. In re Green Charitable Trust, 172 Mich.App at 311. Here, the probate court made no mistake in finding that Paquin had not intentionally waived his gift of $50,000 from the trust. Paquin testified in a previous hearing that he had not intended to waive his gift. However, Paquin subsequently settled his dispute with appellant. That settlement is not a matter before this Court. Therefore, because Paquin has been satisfied by the terms of the settlement, appellant's surcharge will be reduced by the $50,000 that would have been gifted to Paquin. Appellant's ad-
justed surcharge is $118,058.84.

*3 For these reasons we affirm the probate court's decision to impose a surcharge, but remand the matter to the probate court to reduce appellant's surcharge to $118,058.84 for the reason stated above. We do not retain jurisdiction. No costs.

In re Tiffany Smith Trust
Not Reported in N.W.2d, 2012 WL 5290282
(Mich.App.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
In the Matter of the Jervis C. WEBB Trust.
Christopher J. WEBB, Petitioner-Appellant,
v.
Jervis H. WEBB, Trustee, and Joyce W. Clark,
Former Trustee, Respondents-Appellees.
In the Matter of the Jervis B. & Maureen C. WEBB
Trust.
Christopher J. WEBB, Petitioner-Appellant,
v.
Susan M. WEBB, Trustee, Barbara J. Webb, Trust-
see, and Joyce W. Clark, Former Trustee, Respond-
ents-Appellees.
Christopher J. WEBB, Petitioner-Appellant,
v.
Barbara M. WEBB, Personal Representative of the
Estate of George H. Webb, Deceased, Respondent-App-
pellee.

No. 263759, 263900.

Before: SAWYER, P.J., and WILDER and H. HOOD, JJ.

FN* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[UNPUBLISHED]

PER CURIAM.

In these consolidated cases, petitioner alleges that the trustees of his father's and grandpar-
ents' trusts breached their fiduciary duties by retaining stock held in the family's closely owned corpo-
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...
Webb, George Webb, and Joyce Clark, comprise the second generation. Petitioner is the son of Jervis C. Webb. Petitioner and his six siblings, along with six children of George and Joyce, comprise the third generation.

FN2. According to respondents, "Maurene" is the correct spelling of petitioner's grandmother's name, but her name is incorrectly spelled as "Maureen" on the trust agreement.

There has been a long history of family members working for the Company. Petitioner worked for the Company after graduating from law school and served as a vice president and general counsel for the Company until November 2002.

In 1946, Jervis B. and Maurene Webb established a trust naming their three children, Jervis C., George, and Joyce, as co-trustees. That trust (hereinafter referred to as the "1946 trust") was funded solely with the Company's stock.

In 1989, Jervis C. Webb, petitioner's father, created a trust for the benefit of his children who had jobs with the Company (hereinafter referred to as the "1989 trust"). Jervis C. Webb named his siblings, George and Joyce, as the trustees.

At issue in this case are petitioner's claims that the trustees of both trusts breached their fiduciary duties. The probate court concluded that petitioner's claims were barred by the three-year limitations period prescribed in MCL 600.5805(10) and, therefore, granted summary disposition under MCR 2.116(C)(7). The court additionally held that there was no genuine issue of material fact that the trustees did not breach their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets and, therefore, granted summary disposition under MCR 2.116(C)(10).

FN2 This Court reviews a trial court's decision on summary disposition de novo. Spiek v. Dept of Transportation, 456 Mich. 331, 337; 572 NW2d 201 (1998). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. As explained in Turner v. Mercy Hospitals & Health Services of Detroit, 210 Mich.App 345, 348; 533 NW2d 365 (1995), [a] defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); Patterson v. Kleinman, 447 Mich. 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff.

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." Holmes v. Michigan Capital Medical Ctr, 242 Mich.App 703, 706; 620 NW2d 319 (2000).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Babula v. Robertson, 212 Mich.App 45, 48; 536 NW2d 834 (1995).

The trial court held that petitioner's claims were governed by the three-year period of limitations prescribed in MCL 600.5805(10). MCL 600.5827 addresses when a claim accrues for purposes of determining when the statute of limitations begins to run:

Except as otherwise provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sec-
tions the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Sections 5829 to 5838 do not apply to this case. Therefore, pursuant to MCL 600.5827, petitioner's claim accrued at the time the alleged wrong was committed, regardless of when damages resulted, unless the discovery rule applies. The parties disagree whether the discovery rule can be applied to extend the period of limitations to claims involving breaches of fiduciary duty. We agree with the trial court that the discovery rule does not apply to this case.

In Boyle v. General Motors Corp., 468 Mich. 226, 228-229, 231-232; 661 NW2d 557 (2003), the Supreme Court reversed this Court's determination that the discovery rule applies to fraud claims. The Supreme Court's decision was based on MCL 600.5827, as well as its prior decisions in Thatcher v. Detroit Trust Co., 288 Mich. 410; 285 NW 2 (1939), and Ramsey v. Child, Hulsitt & Co., 198 Mich. 658; 165 NW 936 (1917), where the Court refused to apply the discovery rule in fraud cases. FN3 In Boyle, supra at 231-232, the Court stated:

FN3. Thatcher also involved a claim for breach of fiduciary duty by a trustee which was barred by the statute of limitations.

*3 The discovery rule has been adopted for certain cases. For example, in Johnson v. Caldwell, [371 Mich. 368; 123 NW2d 785 (1963),] the Court held that the discovery rule applies to actions for medical malpractice. This Court has not, however, overruled Ramsey and Thatcher, or held that the discovery rule applies to actions for fraud or intentional misrepresentation. Moreover, after Ramsey and Thatcher were decided the Legislature enacted MCL 600.5827, which provides:

"Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

Under MCL 600.5827 a claim accrues when the wrong is done, unless §§ 5829 to 5838 apply. Plaintiff does not claim that any of those sections apply.

The Court of Appeals erred in holding that the discovery rule applies to the accrual of actions for fraud. That holding directly contradicts Ramsey and Thatcher and ignores the plain language of MCL 600.5813 and 600.5827.

Plaintiffs' cause of action accrued when the wrong was done, and they had six years thereafter to file a complaint. Because plaintiffs failed to do so, their cause of action is barred. [Footnotes omitted.]

Although Boyle involved a fraud claim, the principle applies here as well: the language of MCL 600.5827 is clear and unambiguous that a claim accrues when the wrong is committed, not when it is discovered, unless it falls within §§ 5829 to 5838. Thus, because the claim here does not fall within §§ 5829 to 5838, the proper test for determining when petitioner's claim for breach of fiduciary duty accrued is not when he knew or should have known of the alleged breach, but when the alleged wrong was committed, causing the alleged harm. Boyle, supra at 231 n.5.

FN4. To the extent that this Court has held that a claim for breach of fiduciary duty accrues when the beneficiary knew or should have known of the breach, see Bay Mills Indian Community v. Michigan, 244 Mich.App 739, 751; 626 NW2d 169 (2001), we believe those cases have been overruled by Boyle. However, an exception to this rule exists for claims of fraudulent concealment. See The Meyer & Anna Prentis Family Foundation, Inc v Barbara
Ann Karmanos Cancer Institute, 266 Mich.App 39, 45-48; 698 NW2d 900 (2005); MCL 600.5855. Petitioner has not argued that MCL 600.5855 applies in this matter.

On the basis of the undisputed documentary evidence presented below, it is apparent that petitioner was clearly aware of both trusts and their holdings of the Company's stock for many years before these actions were filed. Because any alleged harm arising from respondents' alleged breaches of their fiduciary duties occurred more than three years before these actions were filed, the trial court properly granted summary disposition under MCR 2.116(C)(7).

We find no merit to petitioner's argument that his claims are not subject to the statute of limitations. Our Supreme Court has clarified that statutes of limitation apply to claims for breach of fiduciary duty that are cognizable at law. See Thatcher, supra at 416-417. Thus, MCL 600.5805 was properly applied to petitioner's claims.

In addition, petitioner's reliance on MCL 700.7307(4) for the proposition that he had five years to file his claims is misplaced. Subsection (4) of that statute was not added until the statute was amended, effective September 1, 2004. Statutes of limitation generally are not given retroactive effect unless such an intent clearly and unequivocally appears from the context of the statute itself. Gore v. Dep't of Transportation, 202 Mich.App 161, 167; 507 NW2d 797 (1993). No such intent appears here and, therefore, MCL 700.7307(4) may not be applied retroactively.

Petitioner next argues that the trial court erred in holding that there was no genuine issue of material fact with respect to petitioner's claims that the trustees breached their fiduciary duties by retaining the Company stock and not diversifying the trusts' assets.

We must refer to the trust instruments to determine the powers and duties of the trustees and the intent of the settlors regarding the purpose of the trusts. In re Butterfield Estate, 418 Mich. 241, 259; 341 NW2d 453 (1983). In addition, relevant statutes and case law define a trustee's duties. In re Green Charitable Trust, 172 Mich.App 298, 312; 431 NW2d 492 (1988). Whether there has been a breach of duty and any resulting liability is dependent upon the facts of each case. Id.

Generally, trustees must meet the standard of care of a prudent person when dealing with trust property. In re Green Charitable Trust, supra at 312. This rule is codified at MCL 700.7302 (formerly MCL 700.813 FN5):

FN5. MCL 700.813, repealed by 1998 PA 386, provided as follows:

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

Except as otherwise provided by the terms of the trust, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.

To be prudent means to act with care, diligence, integrity, fidelity, and sound business judgment. In re Messer Trust, 457 Mich. 371, 380; 579 NW2d 73 (1998). In addition, a trustee is bound by the fiduciary duties of honesty, loyalty, good faith, and restraint from self-interest. In re Green Charitable Trust, supra at 313.
The prudent investor rule may require a trustee to diversify a trust’s investments. That rule is summarized in Restatement Trusts, 3d (Prudent Investor Rule) (1990), § 227(b), p 8, as follows:

In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

While there may generally be a duty to diversify investments, a settlor may always authorize a trustee not to diversify. Baldus v. Bank of California, 12 Wash App 621, 628; 530 P.2d 1350, 1355 (1975).

Liability for lack of diversification is based upon a breach of a fiduciary’s duty to prudently manage the estate. In re Estate of Janses, 165 Misc.2d 743; 630 N.Y.S.2d 472 (1995). To determine whether such a breach of duty occurred, the Court must evaluate the fiduciary’s actions along with relevant factors which affected or ought to have affected the fiduciary’s decisions; for instance, the performance of the market, the corpus of the estate (both in size and composition), the situation and needs of the beneficiaries, potential tax consequences, the time (investment) horizon of the estate, the terms of the governing instrument ... and the intent of the settlor....

*5 In this extensive and non-exhaustive list, the terms of the governing instrument are highly important because the terms of the instrument itself can set the stage for the weight to be applied to the other factors, and can completely reframe the fiduciary’s perspective in monitoring the interplay between them. [In the Matter of Will of Charles G Dumont, 4 Misc.3d 1003(A); 791 N.Y.S.2d 868 (N.Y. Sur. 2004).]

An examination of the trust provisions in these cases reveal that the settlors of both trusts relieved the trustees of any duties to diversify assets and follow the prudent man investor rule with respect to the Company’s stock.

The 1946 trust specifically gave the trustees the authority to retain the Company stock even if it might be imprudent to do so:

6. The Trustees shall invest and reinvest the trust estate in such investments as they deem proper. They shall not be required to dispose of stock in the Jervis B. Webb Company, or any company succeeding to part or all of the business of Jervis B. Webb Company, and they may retain the same or may make loans to or additional investments in any such company regardless of whether they consider it a prudent investment for trustees. Stock dividends and stock rights are to be treated as corpus. Any action of the Trustees, including voting stock or deciding on investments or sales, shall be valid if taken by a majority.... [Emphasis added.]

The 1989 trust similarly allowed the trustees to retain the Company stock, and further expressed the settlor’s intent that the purpose of the trust was to retain the Company’s stock so that his children, who were employed by the Company, would thereby benefit.

Five of Settlor’s seven children and the spouse of a sixth are employed by the Jervis B. Webb Company. Settlor believes it would enhance the interest of these six children and their spouses in the Webb Companies as that term is defined below and would strengthen the companies if the six children were to acquire a beneficial interest in them on the terms set forth below. Settlor owns stock in the companies and wants to use it to set up such a beneficial interest. Accordingly, Settlor by these presents assigns, transfers, conveys and delivers to the Trustees the property described in the schedule attached hereto and made a part hereof. The Trustees agree to hold the same on the following terms and conditions.

(b) Powers of Trustee.

(i) The Trustees specifically are authorized to
retain all shares of stock in any Webb companies without regard to any rule or requirement of diversification of investments, and even if such stock does not pay dividends or pays only a small dividend. For purposes of this trust, the term "Webb companies" shall include Jervis B. Webb Company and any corporation now or hereafter affiliated with or growing out of Jervis B. Webb Company, and "stock of Webb companies" shall include stock received as a result of a change in capital structure, liquidation, partial liquidation, reorganization, split-up, spin-off, dissolution or merger involving Jervis B. Webb Company or any other Webb Company.

*6 (ii) Subject to (i), above, the Trustees shall have the power to invest and reinvest the trust assets in such stocks, bonds and other securities and properties as they may deem advisable, including unsecured obligations, undivided interests, interests in investment funds, mutual funds, legal and discretionary common trust funds, leases, properties which are outside of the State of Michigan and partnerships, all without diversification as to kind or amount and without being restricted in any way by any statute or court decision (now or hereafter existing) regulating or limiting investments by fiduciaries; and to register and carry any property in their own names or in the names of their nominee or to hold it unregistered.

(iii) In addition to the powers granted above and elsewhere in this Agreement and to all powers granted by law to trustees generally, the Trustees shall have the powers and authority set forth in Article 8 of the Revised Probate Code, being Public Act 642 of Michigan, 1978, which Article is incorporated herein by reference, as it exists on the date of this Agreement. [Emphasis added.]

Although both trusts vested the trustees with the discretion to sell the Company's stock, they also vested the trustees with the authority to retain the stock even if it would not be prudent to do so, without regard to the rules of diversification, and even if the stock did not pay dividends. The 1989 trust also made it clear that the settlor intended that the trustees should retain the Company stock so that the family could maintain control of the Company and continue to have employment opportunities with the Company.

The trial court properly determined that both trusts relieved the trustees of any duty of diversification. Because both trusts allow the trustees to retain the stock even if it would not be prudent to do so, there is no genuine issue of material fact that the settlors of both trusts intended that the trustees would not be subject to the prudent investor rule with respect to the Company stock. Accordingly, petitioner cannot rely on that rule to argue that respondents breached their fiduciary duties as trustees by holding onto the stock.

Respondents acknowledge that a court of equity may intervene and change the terms of a trust if some unusual exigency arises that was not contemplated by the settlor. Young v. Young, 255 Mich. 173, 179-180; 237 NW 535 (1931). Here, however, petitioner has not demonstrated that such an exigency existed.

In light of the plain language of the trust instruments that clearly demonstrate that the trustees may retain the Company stock even if it would not be prudent to do so, the trial court did not err in concluding that petitioner failed to establish a genuine issue of material fact with regard to his claims that the trustees breached their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets.

Affirmed.

In Matter of Jervis C. Webb Trust
Not Reported in N.W.2d, 2006 WL 173172 (Mich.App.)

END OF DOCUMENT

STATE OF MICHIGAN
IN THE COURT OF APPEALS

DONN R. DUCHARMÉ,

Plaintiff/Appellant,

v

MICHELLE K. DUCHARMÉ,

Defendant/Appellee.

Case No. 314736
Eaton County Probate Court
Case No. 12-49110-CZ

Sheila K. McCoy (P63551)
MCCOY LAW, PLLC
6604 West Saginaw Highway, Suite A
Lansing, Michigan 48917
517.702.1742
mccoylaw1@gmail.com
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Attorneys for Defendant-Appellee

Matthew T. Nelson (P64768)
David L.J.M. Skidmore (P58794)
Julie Lam (P71293)
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000
Attorneys for Proposed Amicus Curiae

PROOF OF SERVICE

The undersigned states that she is an employee of Warner Norcross & Judd LLP, and that on September 3, 2013, she served a copy of the Brief of Amicus Curiae The Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan, and this Proof of Service on Sheila K. McCoy and David R. Russell at their above-indicated address, by placing copies of said document in first-class United States mail, postage pre-paid.

Jill M. Bonter

9311543-3
PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

*MCR 5.108(B), 5.125(B)(2), 5.125(C)(6), 5.125(C)(19),
5.125(C)(22), 5.125(C)(24), 5.125(C)(27), 5.208(C)(1),
5.208(F)(2), 5.403(A)*

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

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

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

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 21. The number who voted opposed to this position was 0.
Report on Public Policy Position

Name of Section:
Probate & Estate Planning Section

Contact person:
Shaheen I. Imami

E-Mail:
sii@probateprince.com

Regarding:
MCR 5.108(B), 5.125(B)(2), 5.125(C)(6), 5.125(C)(19), 5.125(C)(22), 5.125(C)(24), 5.125(C)(27), 5.208(C)(1), 5.208(F)(2), 5.403(A)

Date position was adopted:
June 8, 2013

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

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
21 Voted for position
0 Voted against position
0 Abstained from vote
2 Did not vote

Position:
The Probate & Estate Planning Section wishes to pursue specific amendments to MCR 5.108(B), 5.125(B)(2), 5.125(C)(6), 5.125(C)(19), 5.125(C)(22), 5.125(C)(24), 5.125(C)(27), 5.208(C)(1), 5.208(F)(2), 5.403(A) in order to clarify interested persons in proceedings under the Estates and Protected Individuals Code and the Michigan Trust Code, and to reflect changes in the law by MCL 700.5202a, MCL 700.5301a, and MCL 700.5433.
Rule 5.108 Time of Service

(A) Personal. Personal service of a petition or motion must be made at least 7 days before the date set for hearing, or an adjourned date, unless a different period is provided or permitted by court rule. This subrule applies regardless of conflicting statutory provisions.

(B) Mail.

   (1) Petition or Motion. Service by mail of a petition or motion must be made at least 14 days before the date set for hearing, or an adjourned date.

   (2) Application by a Guardian or Conservator Appointed in Another State.

      (a) A court may appoint a temporary guardian or conservator without a hearing pursuant to MCL 700.5202a, MCL 700.5301a, or MCL 700.5433.

      (b) If a court appoints a temporary guardian or conservator pursuant to MCL 700.5202a, MCL 700.5301a or MCL 700.5433, the temporary guardian or conservator must, not later than 14 days after the appointment, serve notice of the appointment by mail to all interested persons.

(C) Exception: Foreign Consul. This rule does not affect the manner and time for service on foreign consul provided by law.

(D) Computation of Time. MCR 1.108 governs computation of time in probate proceedings.

(E) Responses. A written response or objection may be served at any time before the hearing or at a time set by the court.
Rule 5.125 Interested Persons Defined

(A) [Unchanged]

(B) Special Conditions for Interested Persons.
(1) [Unchanged]
(2) Devisee. Only a devisee whose devise remains unsatisfied, or a trust beneficiary whose beneficial interest remains unsatisfied, need be notified of specific proceedings under subrule (C).
(3 – 5) [Unchanged]

(C) Specific Proceedings.
(1-5) [Unchanged]
(6) The persons interested in a proceeding for examination or approval of an account of a fiduciary are:
   (a) for a testate estate, the devisees under the will (and if one of the devisees is a trustee or a trust, and the persons referred to in MCR 5.125(B)(3)),
   (b) for an intestate estate, the heirs,
   (c) for a conservatorship, the protected individual (if he or she is 14 years of age or older and can be located), the presumptive heirs of the protected individual, and the guardian ad litem, if any,
   (d) for a final conservatorship or guardianship account following the death of the protected person, the personal representative, if one has been appointed,
   (e) for a guardianship, the ward (if he or she is 14 years of age or older and can be located), the presumptive heirs of the ward, and the guardian ad litem, if any,
   (f) for a revocable trust, the settlor (and if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2)), the current trustee, and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector.
(g) for an irrevocable trust, the current trustee, the qualified trust beneficiaries, as defined in MCL 700.7103(g), and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector.

(h) in all matters described in this subsection (6), claimants, and

(i) in all matters described in this subsection (6), any person whose interests would be adversely affected by the relief requested, including an insurer or surety who might be subject to financial obligations as the result of the approval of the account, or a claimant.

(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3);

(b) heirs of an intestate estate,

(c) protected person and presumptive heirs of the protected person in a conservatorship,

(d) ward and presumptive heirs of the ward in a guardianship,

(e) claimants,

(f) settler of a revocable trust,

(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2),

(h) current trustee,

(i) qualified trust beneficiaries described in MCL 700.7103(g)(i), for a trust accounting, and

(j) other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.

*********

(7)-(18)[Unchanged.]

(19) The persons interested in an application for appointment of a guardian of a minor by a guardian appointed in another state and in a petition for appointment of a guardian for of a minor are
(a) the minor, if 14 years of age or older;

(b) if known by the petitioner or applicant, each person who had the principal care and custody of the minor during the 63 days preceding the filing of the petition or application;

(c) the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor;

(d) the nominated guardian and

(e) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to make decisions regarding the person of a minor.

(20)-(21)[Unchanged.]

(22) The persons interested in an application for appointment of a guardian of an incapacitated individual by a guardian appointed in another state or in a petition for appointment of a guardian of an alleged incapacitated individual are:

(a) the alleged incapacitated individual or the incapacitated individual,

(b) if known, a person named as attorney in fact under a durable power of attorney,

(c) the alleged incapacitated individual's spouse or the incapacitated individual’s spouse,

(d) the alleged incapacitated individual’s adult children and the individual's parents or the incapacitated individual’s adult children and parents,

(e) if no spouse, child, or parent is living, the presumptive heirs of the individual,

(f) the person who has the care and custody of the alleged incapacitated individual or of the incapacitated individual—and

(g) the nominated guardian and

(h) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to have care and control of the incapacitated individual.

(23)[Unchanged.]
(24) The persons interested in an application for appointment of a conservator for a protected individual by a conservator appointed in another state or for the petition for the appointment of a conservator or for a protective order are:

(a) the individual to be protected if 14 years of age or older,
(b) the presumptive heirs of the individual to be protected,
(c) if known, a person named as attorney in fact under a durable power of attorney,
(d) the nominated conservator, and
(e) a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending [,
and
(f) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to manage the protected individual’s finances.

(25)-(26)[Unchanged]

(27) The persons interested in receiving a copy of an inventory or account of a conservator or of a guardian are:

(a) the protected individual or ward, if he or she is 14 years of age or older and can be located,
(b) the presumptive heirs of the protected individual or ward,
(c) the claimants, and
(d) the guardian ad litem, and
(e) the personal representative, if any.

(28-33) [Unchanged]

MCR 5.125 (D-E) [Unchanged]

**Rule 5.208 Notice to Creditors, Presentment of Claims**

(A – B) [Unchanged]

(C) Publication of Notice to Creditors and Known Creditors by Trustee. A notice that must be published under MCL 700.7608 must include:

(1) The name, and, if known, last known address, date of death, and date of birth of the trust’s deceased settlor;
(2 – 5) [Unchanged]
(D – E) [Unchanged]

(F) A claim is considered presented
(1) [Unchanged]
(2) in all other cases, when received by the personal representative, or trustee or the attorney for the personal representative or trustee or in the case of an estate when filed with the court.

For purposes of this subrule (F), personal representative includes a proposed personal representative.

Rule 5.403 Proceedings on Temporary Guardianship

(A) Limitation. The court may appoint a temporary guardian only in the course of a proceeding for permanent guardianship or pursuant to an application to appoint a guardian serving in another state to serve as guardian in this state.

(B)-(D)[Unchanged.]
September 10, 2013

Linda Rexer, Angela Tripp and Janet Welch

Executive Director
Michigan State Bar Foundation
306 Townsend St Fl 4
Lansing, MI 48933

Managing Attorney
Michigan Poverty Law Program
220 E Huron St Ste 600A
Ann Arbor, MI 48104

Executive Director
State Bar of Michigan
306 Townsend St
Lansing, MI 48933

Dear Ms. Rexer, Tripp and Welch:

On behalf of the Elder and Disability Rights Section of the State Bar of Michigan and its approximately 1,700 members, I write to express our concerns about the Michigan Legal Help Program (MLH).

Our section has qualms about the program, and the way it circumvents use of attorneys for legal matters and information, but most particularly because it seems poised to offer “self-help” documents in the future not at all related to court appearances—nor self-help—for those representing themselves in civil matters.

We have had a chance to learn about the program through presentations by others, meetings with officers, and by way of a presentation to the Council.
as a whole. Indeed we were approached to help provide a name for someone who could serve as an elder law expert for a probate/elder content review committee. We have declined to do so.

We have been informed that MLH will continue to try to gather experts for their probate/elder law content committee, to post probate/elder law information and forms sometime in the fall of 2013 or later. We find this troublesome, and hope the Bar, and Foundation and MPLP will reconsider such irresponsible developments.

While the discussion about the distinction between legal information and advice will likely continue for some time, and the definition of the practice of law remain a bit elusive, it does not strike us that providing “fill-in-the-blank” forms for DPOAs is the better part of wisdom. (We also have some concerns as well about “form” Patient Advocate designations, even though we are aware some are in circulation already.)

We understand the program places great emphasis on decision trees—and have been told that some users should stop and not finish the paperwork as the matter is complicated, or a lawyer is need, and so on.

But we are not at all sanguine about such claims, and “protections” particularly when the site itself has a 9 page adhesion “terms of use” section with terms and conditions—little read by users—by which the Michigan Poverty Law Program and the Michigan State Bar Foundation walk away from all responsibility to end users and even requires the poor to indemnify and defend and hold harmless the Foundation and the Program not only by users claims and claims by the Foundation and Program, but even claims by third parties.

This is such a contrast to the responsibilities an attorney has to clients, responsibilities that can’t be shrugged off without separate legal counsel so advising, under the Michigan Rules of Professional Conduct Rule 1.8 (h), that MLH should find it disquieting they even need this terms of use disclaimer for a site that claims to be providing mere legal information.

We also reminded you all that misuse of durable power of attorney forms loomed large when the Governor’s Task Force on Elder Abuse made its report in August 2006. Making forms easier to get, without an attorney, is hardly a solution to this known problem.
And given the fact that poor senior citizens (particularly those over 75) are among the least likely to use the internet themselves, per some studies such as the Pew Research study, MLH plans only stand to exacerbate the problem. This is because it is likely non-attorneys (whether family members, neighbors, librarians, or so on) will actually be "making" the forms. And as the Utah Cost of Financial Exploitation study by Jilienne Gunther found, about 72 per cent of abusers were well known to the victim. This finding is not uncommon.

There also seems to be a certain amount of mission creep involved if you go the route of form creation by use of MLH. When Michigan Supreme Court Chief Justice Marilyn Kelly established the "Solutions on Self-Help (SOS) Task Force" in April of 2010, it was to promote greater centralization, coordination and quality of support for persons representing themselves in legal matters in Michigan. The goal then seemed to be to help non-lawyers represent themselves as best as possible. In such a setting, a judge can observe what is happening—in effect, there is an authority who can call time out, if problems develop. That is not the case with a DPOA or Patient Advocate document.

So expansion beyond the original SOS scope seems unwise and unwarranted. The documents we were asked about, patient advocate designations and creation of an agency relationship via a durable power of attorney are powerful important and very often nuanced documents. One could mean an early end to life or a life prolonged despite possible medical futility, the other could allow an agent to rob you blind. If ever there were documents that deserved proper review consideration and advice, those arrangements fill the bill. They are hardly suitable as "standardized" forms.

And a lot of damage can happen with such "standardized" forms, before any court involvement would be involved. In fact, these arrangements are often undertaken to avoid trips to court. As Just Levin observed in *State Bar of Michigan v. Cramer*, 399 Mich 116, 249 NW2d1 (1976), at 15:

> There is far less risk of harm to the public resulting from misuse of a 'divorce kit' than from misuse of form deeds of conveyance, land contracts, business on residential property leases, intervivos trusts or wills.

> If a complaint for divorce is improperly filed, a judge has the opportunity to notice the defect and it can be
remedied or a new complaint filed. When an error is discovered in other legal forms, indiscriminately available to the public, it is often too late to correct the mistake.

Given our concerns, we hope you will not use bar dues money or ATJ funding to make non-court related documents or forms indiscriminately available via the internet. We think the promotion of decision tree internet-based form creation may actually be a disservice to the public especially when such forms are not to be used in court by self-represented litigants.

Sincerely,

[Signature]

Bradley A. Vauter
Chair, Elder and Disability Rights
Section of the State Bar of Michigan

CC
Bruce Courtade
Candace Crowley
Terri Stangl
Erika Lorraine Davis
Barbara BakerOmerod
Dana M Warnez
Robert J Buchanan
Mark K Harder ✓
Marilyn Kelly
ATTACHMENT 8
Mr. Mark Harder  
Council of the Probate & Estate Planning Section of the State Bar  
85 E. 8th St, Ste 310  
Holland, MI 49423

Dear Mark:

Enclosed, for your records, is a stamped copy of the Financial Report Summary, which was filed at the Secretary of State's office. This form reported direct lobbying expenditures during the period January 1 through July 31, 2013, and was filed by the September 3, 2013 deadline.

The next report will be for the period, August 1 through December 31, 2013, and will be due January 31, 2014. You will be hearing from us the first part of January with our statement for that period.

Please call or email (jane@paaonline.com) if you have any questions. Thank you.

Sincerely,

Jane Cheesmond

Enclosure

August 23, 2013
**LOBBY REGISTRATION**

**FINANCIAL REPORT SUMMARY**

**READ INSTRUCTIONS BEFORE COMPLETING THIS FORM**

**2013**

1. **REGISTRANT'S NAME**
   - Council of the Probate & Estate Planning Section of the State Bar

2. **REGISTRANT'S ID NUMBER**
   - L-6350-3

3. **TELEPHONE NUMBER**
   - (810) 540-0555

4a. **MAILING ADDRESS (ALL MAILINGS WILL BE SENT TO THE ADDRESS LISTED HERE)**
   - ATTN: Mr. Mark Harder
   - 85 E. 8th St, Ste 310
   - Holland, MI 49423

4b. **IF INDIVIDUAL, RESIDENTIAL ADDRESS**

4c. **BUSINESS ADDRESS**

( ) CHECK BOX IF THIS ADDRESS HAS CHANGED SINCE LAST REPORT FILED

5. **TYPE OF REPORT:**
   - a. (X) JANUARY - JULY **2013** (DUE AUGUST 31)
   - c. ( ) AMENDMENT TO ITEM(S)
   - b. ( ) AUGUST - DECEMBER (DUE JANUARY 31)
   - d. ( ) TERMINATION
   - e. ITEMIZED EXPENDITURES FORM IS ATTACHED ( ) YES (X) NO

6. **BRIEF DESCRIPTION OF LOBBYING ACTIVITIES:**
   - Communicating with public officials for the purpose of influencing official action of interest to our organization.

   CHECK HERE IF THERE WAS NO LOBBYING ACTIVITY DURING THIS PERIOD: ( )

7. **EXPENDITURES BY CATEGORY**

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<th>Category</th>
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<td>a. FOOD AND BEVERAGE FOR PUBLIC</td>
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<td>b. MASS MAILINGS AND ADVERTISING</td>
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<td>c. ALL OTHER LOBBYING EXPENDITURES</td>
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<td>d. TOTAL LOBBYING EXPENDITURES (TOTAL OF a, b &amp; c)</td>
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8. **NAME AND ADDRESS OF EACH ADDED OR DELETED PERSON EMPLOYED, COMPENSATED OR REIMBURSED FOR LOBBYING.**
   - NOTE: THE ENTRY OF A PERSON'S NAME AND ADDRESS UNDER THIS ITEM DOES NOT REGISTER OR TERMINATE THE PERSON AS A LOBBYIST OR A LOBBYIST AGENT.

| ( ) ADD | N/A |
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9. **VERIFICATION:**
   - I certify that all reasonable diligence was used in the preparation of the above form, and the contents are true and accurate, to the best of my knowledge.

   **Rebecca L. Bechler**

   **TYPE OR PRINT NAME OF AUTHORIZED SIGNATORY**

   **SIGNATURE**

   **8 9 2013**

   **MONTH  DAY  YEAR**

**IT IS UNLAWFUL TO USE THIS INFORMATION FOR ANY COMMERCIAL PURPOSE**
**Expense Reimbursement Form**

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

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<th>Description &amp; Purpose</th>
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I certify that the reported expense was actually incurred while performing my duties for the State Bar of Michigan as

Date | Title | Signature
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Grand Total: $0.00

Approved by (signature):

Date | Title | Approved by (signature)
|------|-------|-----------------------------
|      |       |                             |
STATE BAR OF MICHIGAN
Section Expense Reimbursement Policies and Procedures

General Policies
1. Requests for reimbursement of individual expenses should be submitted as soon as possible following the event and no later than two weeks following the close of the fiscal year in which the expense is incurred so that the books for that year can be closed and audited.

2. All out of pocket expenses must be itemized.

3. Detailed receipts are recommended for all expenses but required for expenses over $25.

4. Meal receipts for more than one person must indicate names of all those in attendance unless the function is a section council meeting where the minutes of that meeting indicate the names of those present. Seminar meal functions should indicate the number guaranteed and those in attendance, if different.

5. Spouse expenses are generally not reimbursable.

6. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursement of mileage or travel expenses is limited to actual distance traveled; not distance from domicile to the meeting site.

7. Receipts for lodging expenses must be supported by a copy of the itemized bill showing the per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid.

8. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.
   A. Tickets should be at the best rate available for as direct a path as possible.
   B. First class tickets will not be reimbursed in full but will only be reimbursed up to the amount of the best or average coach class ticket available for that trip.
   C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.
   D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

9. Reimbursement for car, bus or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

10. Outside speakers should be advised in advance of the need for receipts and the above requirements.

11. Bills for copying done by a firm should include the numbers of copies made, the cost per page and general purpose (committee or section meeting notice, seminar materials, etc.).

12. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

13. The State Bar of Michigan is Sales tax exempt. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

14. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of the Finance Department. If the State Bar of Michigan is

15. Reimbursement will in all instances be limited to reasonable and necessary expenses.

Specific Policies
1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.
CSP Agenda – Probate and Estate Planning Council

September 21, 2013

8:30 a.m.

1. Guardianship Committee – Connie Brigman and John Lindley of Public Affairs Associates
   • Discussion of a Guardian's authority relative to do-not-resuscitate orders – HB 4382, HB 4383 and HB 4384

2. Court Rules, Forms and Procedures Committee – Marlaine C. Teahan
   • Probate Appeals – Proposed Legislation
   • Automatic Stays in Probate Court – Proposed Legislation

3. Real Estate Committee – George F. Bearup, Chair
   • MCL 211.27a – Proposed Legislation
PROBATE APPEALS PROPOSED LEGISLATIVE FIX
September 21, 2013 Report to Committee on Special Projects
Subcommittee of the Courts, Rules, Forms and Procedures Committee

Goal It has been a long-standing goal of Probate Council to get all probate court appeals to the Court of Appeals. We tried accomplishing this by changing various court rules; however, the Supreme Court recently indicated an unwillingness to go that route. See ADM File No. 2011-30. The Supreme Court has supported our goal in theory but declined to accomplish this goal by court rule changes. Others supporting this goal include the Michigan Probate Judges, the Rules Committee of the Court of Appeals, and the Michigan Judges Association.

Legislative Fix Given that the rules change approach was not successful, a subcommittee of the Court Rules, Forms and Procedures Committee has worked hard this summer to find a legislative fix. The committee is comprised of the Hon. David M. Murkowski (Probate Chief, Kent County), Shaheen I. Imami (The Prince Law Firm), Marlaine C. Teahan (Fraser Trebilcock), Liisa Speaker (Speaker Law Firm, PLLC, Appellate Practice Section) and Gary L. Chambon, Jr. (Michigan Court of Appeals).

Considerations and Suggested Changes

2. The following legislative changes are noted (see attachments for each statute referenced below):
   a. MCL 600.308 will be modified as indicated on the attached redline;
   b. MCL 600.309 needs no modification;
   c. MCL 600.861 will be repealed in its entirety;
   d. MCL 600.863 will be repealed in its entirety; and
   e. MCL 600.866 needs no modification.

3. MCR 5.801 will be amended as indicated on the attached redline of a .pdf.

4. Other statutes that provide for circuit court review of appeals from probate court are most easily found by reviewing MCR 8.117(C)(4)(c). This rule identifies miscellaneous matters in probate court. We will provide this list to the Legislative Service Bureau to assist them in the task of locating all laws that will need modification so that all probate appeals will go to the court of appeals and not the circuit court. Death by accident/disaster - Insurance Code (Section 500.244 deals with judicial review), EPIC Filing of letters by foreign personal representatives, EPIC Kidney Transplants, Public Health Code and EPIC Lost Instruments - Public Funds/UCC, Conveyance of Real Property, Fraudulent Conveyance of Real Property, Opening of Safe deposit box, EPIC Review of Adoption Subsidy - Social Welfare Act (Section 400.115k deals with review), Review of Mental Health Financial Liability - Mental Health Code (the reviewing court is the probate court), Secret Marriage Licenses - Marriage Act (closest language for a reviewing court is in 551.203), Substance Abuse Treatment of Minors - Public Health Code Support of Poor Persons - Social Welfare Act (400.58) and Poor Law (402.5 - superintendent review), Uniform Gifts to Minors - Uniform Gifts to Minors Act (there is no section dealing with review).

5. Rep. Klint Kesto is on board as our sponsor. Shaheen will continue to coordinate, as needed. As we get closer to submitting this to the sponsor, we will seek Becky Bechler's input before moving ahead. The first page of Rep. Kesto's website is attached as background information.
Order

June 19, 2013

ADM File No. 2011-30

Proposed Amendments of Rules 5.801, 7.102, 7.103, 7.108, and 7.109 of the Michigan Court Rules

On order of the Court, the proposed amendments of Rules 5.801, 7.102, 7.103, 7.108, and 7.109 of the Michigan Court Rules having been published for comment at 490 Mich ___ (2012), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendments. This administrative file is closed without further action.
Sec. 308.

(1) The court of appeals has jurisdiction on appeals from the following orders and judgments which shall be appealable as a matter of right:

   (a) All final judgments from the circuit court, court of claims, and recorder's court, except judgments on ordinance violations in the traffic and ordinance division of recorder's court and final judgments and orders described in subsections (2) and (3).

   (b) Those orders of the probate court from which an appeal as of right exists as determined by court rule may be taken under section 864.

(2) The court of appeals has jurisdiction on appeal from the following orders and judgments which shall be reviewable only upon application for leave to appeal granted by the court of appeals:

   (a) A final judgment or order made by the circuit court under any of the following circumstances:

      (i) In an appeal from an order, sentence, or judgment of the probate court under section 863(1) and (2).

      (ii) In an appeal from a final judgment or order of the district court appealed to the circuit court under section 8342.

      (iii) An appeal from a final judgment or order of a municipal court.

      (iv) In an appeal from an ordinance violation conviction in the traffic and ordinance division of recorder's court of the city of Detroit if the conviction occurred before September 1, 1981.

   (b) An order, sentence, or judgment of the probate court if the probate court certifies the issue or issues under section 863(3).

   (c) A final judgment or order made by the recorder's court of the city of Detroit in an appeal from the district court in the thirty-sixth district under section 8342(2).

   (d) A final order or judgment from the circuit court or recorder's court for the city of Detroit based upon a defendant's plea of guilty or nolo contendere.

   (e) Any other judgment or interlocutory order as determined by court rule.

(3) An order concerning the assignment of a case to the business court under chapter 80 shall not be appealed to the court of appeals.
600.309 Appeals as of right; appeals by leave of court.

Sec. 309. Except as provided in section 308, all appeals to the court of appeals from final judgments or decisions permitted by this act shall be a matter of right. All other appeals from other judgments or orders to the court of appeals permitted by statute or supreme court rule shall be by right or by leave as provided by the statute or the rules promulgated by the supreme court.

600.861 Appeal of orders as matter of right.

Sec. 861. A party to a proceeding in the probate court may appeal the following orders as a matter of right to the court of appeals:

(a) A final order affecting the rights or interests of any interested person in an estate or trust.

(b) An order entered before January 1, 1998 in an adoption proceeding under chapter X of Act No. 288 of the Public Acts of 1939, being sections 710.21 to 710.70 of the Michigan Compiled Laws, and appealed in accordance with section 65 of chapter X of Act No. 288 of the Public Acts of 1939, being section 710.65 of the Michigan Compiled Laws.

(c) The following final orders entered before January 1, 1998 by the juvenile division of the probate court:

(i) An order of disposition placing a child under the supervision of the court or removing the child from his or her home.

(ii) An order terminating parental rights.

(d) A final order in a condemnation case entered before January 1, 1998 under the drain code of 1956, Act No. 40 of the Public Acts of 1956, being sections 280.1 to 280.630 of the Michigan Compiled Laws.

600.863 Appeal to circuit court and court of appeals; interlocutory appeal.

Sec. 863. (1) Except when prohibited by statute, a person aggrieved by an order, sentence, or judgment of the probate court, other than an order appealable under section 861, may appeal from that order, sentence, or judgment to the circuit court in the county in which the order, sentence, or judgment is rendered. An interlocutory appeal under this subsection shall be by application and not as a matter of right.

(2) An appeal to the court of appeals from a judgment entered by the circuit court on an appeal from the probate court under subsection (1) shall be by application.

(3) Instead of appeal under subsection (1), a party may appeal directly to the court of appeals upon certification of the issue or issues by the probate judge. An appeal under this subsection shall be by application and not as a matter of right.

600.866 Appeals to be on record; trial de novo prohibited; notice of appeal; appeals governed by supreme court rule.

Sec. 866. (1) All appeals from the probate court shall be on a written transcript of the record made in the probate court or on a record settled and agreed to by the parties and approved by the court. An appeal shall not be tried de novo.

(2) Notice of appeal shall be given to all interested parties as provided by supreme court rule.

(3) Except as otherwise provided in sections 861 to 867, appeals from the probate court or a judge thereof shall be governed by supreme court rule.

PROPOSED RULE CHANGES
MCR 5.801

Rule 5.801 Appeals from the Probate Court

(A) General Provisions. A party to a civil action or an interested person in a proceeding aggrieved by an order of the probate court may appeal as provided by this rule, except for those appeals of an order of the probate court under the Drain Code of 1956, MCL 280.1 et seq and the Public Health Code, MCL 333.1101 et seq.

(B) Right to Appeal. A final order affecting the rights or interests of either a party to a civil action in a probate court or an interested person in a proceeding in the probate court is appealable as a matter of right to the Court of Appeals. A probate court order is "final" if it qualifies as a final order under MCR 7.202(6)(a), or if it affects with finality the rights or interests of a party or an interested person in the subject matter, including, but not limited to, orders:
(a) appointing or removing a personal representative, conservator, trustee, or trust protector as referred to in MCL 700.7103(n), or denying such an appointment or removal;
(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;
(c) determining the validity of a governing instrument;
(d) interpreting or construing a testamentary instrument or inter vivos trust;
(e) approving or denying a settlement relating to a governing instrument;
(f) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;
(g) granting or denying a petition to consolidate or divide trusts;
(h) discharging or denying the discharge of a surety on a bond from further liability;
(i) allowing, disallowing, or denying a claim;
(j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;
(k) authorizing or denying the continuation of a business;
(l) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;
(m) authorizing or denying rights of election;
(n) determining heirs, devisees, or beneficiaries;
(o) determining title to or rights or interests in property;
(p) authorizing or denying partition of property;
(q) authorizing or denying specific performance;
(r) ascertaining survivorship of parties;
(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;
(t) granting or denying a petition to determine cy pres;
(u) directing or denying the making or repayment of distributions;
(v) determining or denying a constructive trust;
(w) determining or denying an oral contract relating to a will;
(x) allowing or disallowing an account, fees, or administration expenses;
(y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);
(z) determining or directing payment or apportionment of taxes;  
(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;  
(bb) assigning residue;  
(cc) granting or denying a petition for instructions;  
(dd) authorizing disclaimers;  
(ee) allowing or disallowing a trustee to change the principal place of a trust’s administration;  
(ff) affecting the rights and interests of an adult or minor in a guardianship proceeding under the Estates and Protected Individuals Code, MCL 700.1101 et seq., or the Mental Health Code, MCL 330.1600 et seq.;  
(gg) affecting the rights or interests of a person in a proceeding that may result in an individual receiving involuntary mental health treatment under the Mental Health Code, MCL 330.1400 et seq., or judicial admission of an individual with a developmental disability to a center under the Mental Health Code, MCL 330.1500 et seq.

(C) Interlocutory Orders. An interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the Court of Appeals and only by leave of that court. The Court of Appeals shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.

Note: the section entitled, "Transfer of Appeals From Court of Appeals to Circuit Court," currently MCR 5.801(E), has been deleted completely. With the modification to sub (A), adding in the Drain Code of 1956 and the Public Health Law, the Appellate Practice Section no longer wishes to retain the "savings clause." At the April 2012 Council meeting, Probate Council gave the subcommittee direction to remove the savings clause.
Rep. Klint Kesto, District 39 (Republican)

Bio

DISTRICT
State Representative Klint Kesto was first elected to serve the 39th District in the Michigan House of Representatives in November 2012, representing the residents of the city of Wixom, Commerce Township, a portion of West Bloomfield Township and the village of Wolverine Lake.

EDUCATION
Kesto graduated from the University of Michigan with a political science degree in 2002 and then attended Wayne State University Law School, graduating in 2006.

PROFESSIONAL
Klint served for more than five years as a prosecuting attorney with the Wayne County Prosecutor’s office. He also is a manager of his family’s small business, Buscemi’s Pizza and Sub Shop. Klint also previously worked for the United States Department of Energy and the United States Department of Justice.

PUBLIC AFFILIATIONS
Klint is a board member of the Chaldean American Chamber of Commerce; a member of the Chaldean Bar Association; the American Bar Association; and the state Bar of Michigan. He is also an active member of the Greater West Bloomfield Republicans.

COMMITTEES
Kesto serves as vice chair for the House Judiciary Committee. He also serves on the House Criminal Justice, Health Policy, Regulatory Reform, and Family, Children and Seniors committees.
Goal  While working on the probate appeals legislation, and since we were already proposing amendments to sections of the Revised Judicature Act (RJA) and Michigan Court Rules, we decided to propose a fix for the conflict between the RJA and MCRs dealing with automatic stays in probate court. Specifically, these sections and rules are: MCL 600.867, MCR 5.802, MCR 7.208 and MCR 7.209. Redlines of these sections and rules are attached.

Under current law, the law and court rules are conflicting. Probate Courts often ignore them for this reason. The changes attempt a compromise that avoids staying all orders of probate court and changes the law to provide instead a mechanism for automatic stays in probate court that more closely resembles those in the circuit courts.
600.867 Cessation of further proceedings in pursuance of order, sentence, or judgment appealed from; exception; suspension of order; application for delayed appeal.

Sec. 867.

(1) After an appeal of right is claimed and notice of the appeal is given at the probate court, all further proceedings in pursuance of the order, sentence, or judgment appealed from shall cease for a period of 21 days or, if a motion for stay pending appeal is granted, until the appeal is determined, except as otherwise provided by supreme court rule or in subsection (2) and in section 65(2) of chapter 10 of Act No. 288 of the Public Acts of 1939, being section 710.65 of the Michigan Compiled Laws.

(2) The pendency of an appeal from the juvenile division of the probate court or from an order of the probate court entered pursuant to Act No. 258 of the Public Acts of 1974, as amended, being sections 330.1001 to 330.2106 of the Michigan Compiled Laws shall not suspend the order unless the court to which the appeal is taken specifically orders the suspension. An application for a delayed appeal from an order of the juvenile division shall be filed within 6 months after entry of the order.
MCR 5.802 Appellate Procedure; Stays Pending Appeal

(A) Procedure. Except as modified by this subchapter, chapter 7 of these rules governs appeals from the probate court.

(B) Record.

(1) An appeal from the probate court is on the papers filed and a written transcript of the proceedings in the probate court or on a record settled and agreed to by the parties and approved by the court.

(2) The probate register may transmit certified copies of the necessary documents and papers in the file if the original papers are needed for further proceedings in the probate court. The parties shall not be required to pay for the copies as costs or otherwise.

(C) Stays Pending Appeals. An order removing or appointing a fiduciary; appointing a special personal representative or a special fiduciary; granting a new trial or rehearing; granting an allowance to the spouse or children of a decedent; granting permission to sue on a fiduciary’s bond; or suspending a fiduciary and appointing a special fiduciary, is not stayed pending appeal unless ordered by the court on motion for good cause.
MCR 7.208 Authority of Court or Tribunal Appealed From

(A) Limitations. After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

(1) by order of the Court of Appeals,

(2) by stipulation of the parties,

(3) after a decision on the merits in an action in which a preliminary injunction was granted, or

(4) as otherwise provided by law.

In a criminal case, the filing of the claim of appeal does not preclude the trial court from granting a timely motion under subrule (B).

(B) Postjudgment Motions in Criminal Cases.

(1) No later than 56 days after the commencement of the time for filing the defendant-appellant’s brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence.

(2) A copy of the motion must be filed with the Court of Appeals and served on the prosecuting attorney.

(3) The trial court shall hear and decide the motion within 28 days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment.

(4) Within 28 days of the trial court’s decision, the court reporter or recorder must file with the trial court clerk the transcript of any hearing held.

(5) If the motion is granted in whole or in part,

(a) the defendant must file the appellant’s brief or a notice of withdrawal of the appeal within 42 days after the trial court’s decision or after the filing of the transcript of any hearing held, whichever is later;

(b) the prosecuting attorney may file a cross appeal in the manner provided by MCR 7.207 within 21 days after the trial court’s decision. If the defendant has withdrawn the appeal before the prosecuting attorney has filed a cross appeal, the prosecuting attorney may file a claim of appeal or an application for leave to appeal within the 21-day period.

(6) If the motion is denied, defendant-appellant’s brief must be filed within 42 days after the decision by the trial court, or the filing of the transcript of any trial court hearing, whichever is later.

(C) Correction of Defects. Except as otherwise provided by rule and until the record is filed in the Court of Appeals, the trial court or tribunal has jurisdiction
(1) to grant further time to do, properly perform, or correct any act in the trial court or tribunal in connection with the appeal that was omitted or insufficiently done, other than to extend the time for filing a claim of appeal or for paying the entry fee or to allow delayed appeal;

(2) to correct any part of the record to be transmitted to the Court of Appeals, but only after notice to the parties and an opportunity for a hearing on the proposed correction.

After the record is filed in the Court of Appeals, the trial court may correct the record only with leave of the Court of Appeals.

(D) Probate Proceedings and Civil Actions. The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding or civil action from which an appeal was filed.

(Ed) Supervision of Property. When an appeal is filed while property is being held for conservation or management under the order or judgment of the trial court, that court retains jurisdiction over the property pending the outcome of the appeal, except as the Court of Appeals otherwise orders.

(FE) Temporary Orders. A trial court order entered before final judgment concerning custody, control, and management of property; temporary alimony, support or custody of a minor child, or expenses in a domestic relations action; or a preliminary injunction, remains in effect and is enforceable in the trial court, pending interlocutory appeal, except as the trial court or the Court of Appeals may otherwise order.

(GE) Stays and Bonds. The trial court retains authority over stay and bond matters, except as the Court of Appeals otherwise orders.

(HG) Matters Pertaining to Appointment of Attorney. Throughout the pendency of an appeal involving an indigent person, the trial court retains authority to appoint, remove, or replace an attorney except as the Court of Appeals otherwise orders.

(JH) Acts by Other Judges. Whenever the trial judge who has heard a case dies, resigns, or vacates office, or is unable to perform any act necessary to an appeal of a case within the time prescribed by law or these rules, another judge of the same court, or if another judge of that court is unavailable, another judge assigned by the state court administrator, may perform the acts necessary to the review process. Whenever a case is heard by a judge assigned from another court, the judicial acts necessary in the preparation of a record for appeal may be performed, with consent of the parties, by a judge of the court in which the case was heard.

(JI) Attorney Fees and Costs. The trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise.
MCR 7.209 Bond; Stay of Proceedings

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614(D) or MCL 600.867, an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a case in which a party has appealed a trial court’s denial of the party’s claim of governmental immunity.

(2) A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court.

(3) A motion for bond or a stay pending appeal filed in the Court of Appeals must include a copy of the trial court’s opinion and order, and a copy of the transcript of the hearing on the motion in the trial court.

(B) Responsibility for Setting Amount of Bond in Trial Court.

(1) Civil Actions and Probate Proceedings. Unless determined by law, the dollar amount of a stay or appeal bond in a civil action or probate proceeding must be set by the trial court in an amount adequate to protect the opposite party.

(2) Criminal Cases. In a criminal case the granting of bond pending appeal and the amount of it are within the discretion of the trial court, subject to applicable law and rules. Bond must be sufficient to guarantee the appearance of the defendant. Unless bond pending appeal is allowed and a bond is filed with the trial court, a criminal judgment may be executed immediately, even though the time for taking an appeal has not elapsed.

(C) Amendment of Bond. On motion, the trial court may order an additional or different bond, set the amount, and approve or require different sureties.

(D) Review by Court of Appeals. Except as otherwise provided by rule or law, on motion filed in a case pending before it, the Court of Appeals may amend the amount of bond set by the trial court, order an additional or different bond and set the amount, or require different or additional sureties. The Court of Appeals may also refer a bond or bail matter to the court from which the appeal is taken. The Court of Appeals may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just.

(E) Stay of Proceedings by Trial Court.

(1) Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires.
(a) When the stay is sought before an appeal is filed and a bond is required, the party seeking the stay shall file a bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to

(i) perform and satisfy the judgment or order stayed if it is not set aside or reversed; and

(ii) prosecute to completion any appeal subsequently taken from the judgment or order stayed and perform and satisfy the judgment or order entered by the Court of Appeals or Supreme Court.

(b) If a stay is sought after an appeal is filed, any bond must meet the requirements set forth in subrule 7.209(F).

(2) If a stay bond filed under this subrule substantially meets the requirements of subrule (F), it will be a sufficient bond to stay proceedings pending disposition of an appeal subsequently filed.

(3) The stay order must conform to any condition expressly required by the statute authorizing review.

(4) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings shall be stayed during the pendency of the appeal, unless the Court of Appeals directs otherwise.

(F) Conditions of Appeal Bond.

(1) Civil Actions and Probate Proceedings. In a bond filed for stay pending appeal in a civil action or probate proceeding, the appellant shall promise in writing:

(a) to prosecute the appeal to decision;

(b) to perform or satisfy a judgment or order of the Court of Appeals or the Supreme Court;

(c) to perform or satisfy the judgment or order appealed from, if the appeal is dismissed;

(d) in an action involving the possession of land or judgment for foreclosure of a mortgage or land contract, to pay the appellee the damages which may result from the stay of proceedings; and

(e) to do any other act which is expressly required in the statute authorizing appeal.

(2) Criminal Cases. A criminal defendant for whom bond pending appeal is allowed after conviction shall promise in writing:

(a) to prosecute the appeal to decision;

(b) if the sentence is one of incarceration, to surrender himself or herself to the sheriff of the county in which he or she was convicted or other custodial authority if the sentence is affirmed on appeal or if the appeal is dismissed;

(c) if the judgment or order appealed is other than a sentence of incarceration, to perform and comply with the order of the trial court if it is affirmed on appeal or if the appeal is dismissed;
(d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial is allowed;

(e) to remain in Michigan unless the court gives written approval to leave; and

(f) to notify the trial court clerk of a change of address.

(G) Sureties and Filing of Bond. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court which entered the order or judgment to be stayed.

(1) Civil Actions and Probate Proceedings. A bond in a civil action or probate proceeding need not be approved by a court or clerk before filing but is subject to the objection procedure provided in MCR 3.604.

(2) Criminal Cases. A criminal defendant filing a bond after conviction shall give notice to the county prosecuting attorney of the time and place the bond will be filed. The bond is subject to the objection procedure provided in MCR 3.604.

(H) Stay of Execution.

(1) If a bond is filed before execution issues, and notice is given to the officer having authority to issue execution, execution is stayed. If the bond is filed after the issuance but before execution, and notice is given to the officer holding it, execution is suspended.

(2) The Court of Appeals may stay or terminate a stay of any order or judgment of a lower court or tribunal on just terms.

(3) When the amount of the judgment is more than $1000 over the insurance policy coverage or surety obligation, then the policy or obligation does not qualify to stay execution under MCL 500.3036 on the portion of the judgment in excess of the policy or bond limits. Stay pending appeal may be achieved by complying with that statute and by filing a bond in an additional amount adequate to protect the opposite party or by obtaining a trial court or Court of Appeals order waiving the additional bond.

(4) A statute exempting a municipality or other governmental agency from filing a bond to stay execution supersedes the requirements of this rule.

(I) Ex Parte Stay. Whenever an ex parte stay of proceedings is necessary to allow a motion in either the trial court or the Court of Appeals, the court before which the motion will be heard may grant an ex parte stay for that purpose. Service of a copy of the order, with a copy of the motion, any affidavits on which the motion is based, and notice of hearing on the motion, shall operate as a stay of proceedings until the court rules on the motion unless the court supersedes or sets aside the order in the interim. Proceedings may not be stayed for longer than necessary to enable the party to make the motion according to the practice of the court, and if made, until the decision of the court.
Real Estate Committee – Report to CSP on MCL 211.27a(7)(s)

George F. Bearup, Chair (submitted on his behalf by Marlaine C. Teahan1)

September 21, 2013

Subcommittee Report At the June 8, 2013 Council Agenda, the Real Estate Subcommittee on MCL 211.27a submitted a report containing a suggested amendment to MCL 211.27a(7)(s):

(s) Beginning December 31, 2013, a transfer of residential real property if the transferee is related to the transferor by blood or affinity to the first degree and the use of the residential real property does not change following the transfer. As used in this subdivision, (i) "residential real property" means real property classified as residential real property under section 34c; and (ii) "transferor" shall include those who act on behalf of a person including a conservator, as defined in MCL 700.1103(h), a guardian as defined in MCL 700.1104(l), a personal representative as defined in MCL 700.1106(o), and a trustee, as defined in MCL 700.1107(o) of a revocable trust as defined in MCL 700.7103(h)."

Task at CSP in September At CSP in September, we hope to have a general discussion about the best approach to take in amending MCL 211.27a(7)(s).

Many believe this section needs amendment both to further clarify the meaning of "by blood or affinity to the first degree" and to clarify who would qualify as a "transferor". The subcommittee thought about various approaches to these issues and decided that a minimalist approach might be best. Others think that a broader more comprehensive approach would be best. [This section does not take effect until 12-31-13.]

Another amendment to MCL 211.27a On Feb. 28, 2013, HB 4347 was introduced proposing an amendment to MCL 211.27a by adding a section (7)(T):


Attached are:

- The June 8, 2013 Real Estate Subcommittee report
- MCL 211.27a in its current form
- Comments from other attorneys who have been considering these issues

1 Upon consultation with Mr. Bearup.
THE REAL ESTATE SUBCOMMITTEE RECOMMENDS
THE FOLLOWING PROPOSED CHANGE TO P.A. 497 OF 2012

MCL 211.27a describes what constitutes a “transfer of ownership,” and what qualifies as an exemption for purposes of “uncapping” the taxable value of real estate. A “transfer of ownership” does not include:

(s) Beginning December 31, 2013, a transfer of residential real property if the transferee is related to the transferor by blood or affinity to the first degree and the use of the residential property does not change following the transfer. As used in this subdivision, “residential real property” means real property classified as residential real property under Section 34c.

Bulletin 5 of 2013, of the State Tax Commission, published May 13, 2013, addressed P.A. 497 of 2012, Transfer of Ownership, by providing the following additional definitions:

- “Transferee” is defined as the person to whom the conveyance is made.
- “Transferor” is defined as one who conveys a title, right or interest in the property.
- “Affinity” to the first degree includes the following relationship: spouse, father or mother, father or mother of the spouse, son or daughter, including adopted children and son or daughter of the spouse.

A proposed technical correction to P.A. 497 of 2012 is necessary to address transfers of residential real estate by a fiduciary.

The proposed change is to add the following to the last sentence of MCL 211.27a(s):

“ As used in this subdivision:

(i) “residential real property” means real property classified as real property under Section 34c; and

[Proposed additional language]

(ii) “transfer” shall include those who act on behalf of a person including a conservator, as defined in MCL 100.1103(h), a guardian as defined in MCL 700.1104(l), a personal representative as defined in MCL 700.1106(o), and a trustee, as defined in MCL 700.1107(o) of a revocable trust as defined in MCL 700.7103(h).”

George F. Bearup
Chairman
211.27a Property tax assessment; determining taxable value; adjustment; exception; "transfer of ownership" defined; qualified agricultural property; notice of transfer of property; applicability of subsection (10); definitions.

Sec. 27a. (1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.

(2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:

(a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.

(b) The property's current state equalized valuation.

(3) Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer.

(4) If the taxable value of property is adjusted under subsection (3), a subsequent increase in the property's taxable value is subject to the limitation set forth in subsection (2) until a subsequent transfer of ownership occurs. If the taxable value of property is adjusted under subsection (3) and the assessor determines that there had not been a transfer of ownership, the taxable value of the property shall be adjusted at the July or December board of review. Notwithstanding the limitation provided in section 53b(1) on the number of years for which a correction may be made, the July or December board of review may adjust the taxable value of property under this subsection for the current year and for the 3 immediately preceding calendar years. A corrected tax bill shall be issued for each tax year for which the taxable value is adjusted by the local tax collecting unit if the local tax collecting unit has possession of the tax roll or by the county treasurer if the county has possession of the tax roll. For purposes of section 53b, an adjustment under this subsection shall be considered the correction of a clerical error.

(5) Assessment of property, as required in this section and section 27, is inapplicable to the assessment of property subject to the levy of ad valorem taxes within voted tax limitation increases to pay principal and interest on limited tax bonds issued by any governmental unit, including a county, township, community college district, or school district, before January 1, 1964, if the assessment required to be made under this act would be less than the assessment as state equalized prevailing on the property at the time of the issuance of the bonds. This inapplicability shall continue until levy of taxes to pay principal and interest on the bonds is no longer required. The assessment of property required by this act shall be applicable for all other purposes.

(6) As used in this act, "transfer of ownership" means the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. Transfer of ownership of property includes, but is not limited to, the following:

(a) A conveyance by deed.

(b) A conveyance by land contract. The taxable value of property conveyed by a land contract executed after December 31, 1994 shall be adjusted under subsection (3) for the calendar year following the year in which the contract is entered into and shall not be subsequently adjusted under subsection (3) when the deed conveying title to the property is recorded in the office of the register of deeds in the county in which the property is located.

(c) A conveyance to a trust after December 31, 1994, except if the settlor or the settlor's spouse, or both, conveys the property to the trust and the sole present beneficiary or beneficiaries are the settlor or the settlor's spouse, or both.

(d) A conveyance by distribution from a trust, except if the distributee is the sole present beneficiary or the spouse of the sole present beneficiary, or both.

(e) A change in the sole present beneficiary or beneficiaries of a trust, except a change that adds or substitutes the spouse of the sole present beneficiary.

(f) A conveyance by distribution under a will or by intestate succession, except if the distributee is the decedent's spouse.

(g) A conveyance by lease if the total duration of the lease, including the initial term and all options for renewal, is more than 35 years or the lease grants the lessee a bargain purchase option. As used in this subdivision, "bargain purchase option" means the right to purchase the property at the termination of the lease for not more than 80% of the property's projected true cash value at the termination of the lease. After December 31, 1994, the taxable value of property conveyed by a lease with a total duration of more than 35
(k) Normal public trading of shares of stock or other ownership interests that, over any period of time, cumulatively represent more than 50% of the total ownership interest in a corporation or other legal entity and are traded in multiple transactions involving unrelated individuals, institutions, or other legal entities.

(l) A transfer of real property or other ownership interests among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entities if the entities involved are commonly controlled. Upon request by the state tax commission, a corporation, partnership, limited liability company, limited liability partnership, or other legal entity shall furnish proof within 45 days that a transfer meets the requirements of this subdivision.
requirements of this subdivision. A corporation, partnership, limited liability company, limited liability partnership, or other legal entity that fails to comply with a request by the state tax commission under this subdivision is subject to a fine of $200.00.

(m) A direct or indirect transfer of real property or other ownership interests resulting from a transaction that qualifies as a tax-free reorganization under section 368 of the internal revenue code, 26 USC 368. Upon request by the state tax commission, a property owner shall furnish proof within 45 days that a transfer meets the requirements of this subdivision. A property owner who fails to comply with a request by the state tax commission under this subdivision is subject to a fine of $200.00.

(n) A transfer of qualified agricultural property, if the person to whom the qualified agricultural property is transferred files an affidavit with the assessor of the local tax collecting unit in which the qualified agricultural property is located attesting that the qualified agricultural property is subject to the recapture tax provided in the agricultural property recapture act, 2000 PA 261, MCL 211.1001 to 211.1007, if the qualified agricultural property is converted by a change in use, as that term is defined in section 2 of the agricultural property recapture act, 2000 PA 261, MCL 211.1002. If property ceases to be qualified agricultural property at any time after being transferred, all of the following shall occur:

(i) The taxable value of that property shall be adjusted under subsection (3) as of the December 31 in the year that the property ceases to be qualified agricultural property.

(ii) The property is subject to the recapture tax provided for under the agricultural property recapture act, 2000 PA 261, MCL 211.1001 to 211.1007.

(o) A transfer of qualified forest property, if the person to whom the qualified forest property is transferred files a qualified forest taxable value affidavit with the assessor of the local tax collecting unit in which the qualified forest property is located and with the register of deeds for the county in which the qualified forest property is located attesting that the qualified forest property shall remain qualified forest property. The affidavit under this subdivision shall be in a form prescribed by the department of agriculture and rural development. The qualified forest taxable value affidavit shall include a legal description of the qualified forest property, the name of the new property owner, the year the transfer of the property occurred, a statement indicating that the property owner is attesting that the property for which the exemption is claimed is qualified forest property and will be managed according to an approved forest management plan, and any other information pertinent to the parcel and the property owner. The property owner shall provide a copy of the qualified forest taxable value affidavit to the department. The department shall provide 1 copy of the qualified forest taxable value affidavit to the local tax collecting unit, 1 copy to the conservation district, and 1 copy to the department of treasury. These copies may be sent electronically. The exception to the recognition of a transfer of ownership, as herein stated, shall extend to the land only of the qualified forest property. If qualified forest property is improved by buildings, structures, or land improvements, then those improvements shall be recognized as a transfer of ownership, in accordance with the provisions of section 7jj. An owner of qualified forest property shall inform a prospective buyer of qualified forest property that the qualified forest property is subject to the recapture tax provided in the qualified forest property recapture act, 2006 PA 379, MCL 211.1031 to 211.1036, if the qualified forest property is converted by a change in use, as that term is defined in section 2 of the qualified forest property recapture act, 2006 PA 379, MCL 211.1032. If property ceases to be qualified forest property at any time after being transferred, all of the following shall occur:

(i) The taxable value of that property shall be adjusted under subsection (3) as of the December 31 in the year that the property ceases to be qualified forest property, except to the extent that the transfer of the qualified forest property would not have been considered a transfer of ownership under this subsection.

(ii) Except as otherwise provided in subparagraph (iii), the property is subject to the recapture tax provided for under the qualified forest property recapture tax act, 2006 PA 379, MCL 211.1031 to 211.1036.

(iii) Beginning June 1, 2013 and ending November 30, 2013, owners of property enrolled as qualified forest property prior to January 1, 2013 may execute a new qualified forest taxable value affidavit with the department of agriculture and rural development. If a landowner elects to execute a qualified forest taxable value affidavit, that owner is not required to pay the $50.00 fee required under section 7jj(2). If a landowner elects not to execute a qualified forest taxable value affidavit, the existing affidavit shall be rescinded, without subjecting the property to the recapture tax provided for under the qualified forest property recapture tax act, 2006 PA 379, MCL 211.1031 to 211.1036, and the taxable value of that property shall be adjusted under subsection (3).
(p) Beginning on December 8, 2006, a transfer of land, but not buildings or structures located on the land, which meets 1 or more of the following requirements:

(i) The land is subject to a conservation easement under subpart 11 of part 21 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140 to 324.2144. As used in this subparagraph, "conservation easement" means that term as defined in section 2140 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140.

(ii) A transfer of ownership of the land or a transfer of an interest in the land is eligible for a deduction as a qualified conservation contribution under section 170(h) of the internal revenue code, 26 USC 170.

(q) A transfer of real property or other ownership interests resulting from a consolidation or merger of a domestic nonprofit corporation that is a boy or girl scout or camp fire girls organization, a 4-H club or foundation, a young men's Christian association, or a young women's Christian association and at least 50% of the members of that organization or association are residents of this state.

(r) A change to the assessment roll or tax roll resulting from the application of section 16a of 1897 PA 230, MCL 455.16a.

(s) Beginning December 31, 2013, a transfer of residential real property if the transferee is related to the transferor by blood or affinity to the first degree and the use of the residential real property does not change following the transfer. As used in this subdivision, "residential real property" means real property classified as residential real property under section 34c.

(8) If all of the following conditions are satisfied, the local tax collecting unit shall revise the taxable value of qualified agricultural property taxable on the tax roll in the possession of that local tax collecting unit to the taxable value that qualified agricultural property would have had if there had been no transfer of ownership of that qualified agricultural property since December 31, 1999 and there had been no adjustment of that qualified agricultural property's taxable value under subsection (3) since December 31, 1999:

(a) The qualified agricultural property was qualified agricultural property for taxes levied in 1999 and each year after 1999.

(b) The owner of the qualified agricultural property files an affidavit with the assessor of the local tax collecting unit under subsection (7)(n).

(9) If the taxable value of qualified agricultural property is adjusted under subsection (8), the owner of that qualified agricultural property shall not be entitled to a refund for any property taxes collected under this act on that qualified agricultural property before the adjustment under subsection (8).

(10) The register of deeds of the county where deeds or other title documents are recorded shall notify the assessing officer of the appropriate local taxing unit not less than once each month of any recorded transaction involving the ownership of property and shall make any recorded deeds or other title documents available to that county's tax or equalization department. Unless notification is provided under subsection (6), the buyer, grantee, or other transferee of the property shall notify the appropriate assessing office in the local unit of government in which the property is located of the transfer of ownership of the property within 45 days of the transfer of ownership, on a form prescribed by the state tax commission that states the parties to the transfer, the date of the transfer, the actual consideration for the transfer, and the property's parcel identification number or legal description. Forms filed in the assessing office of a local unit of government under this subsection shall be made available to the county tax or equalization department for the county in which that local unit of government is located. This subsection does not apply to personal property except buildings described in section 14(6) and personal property described in section 8(h), (i), and (j).

(11) As used in this section:

(a) "Additions" means that term as defined in section 34d.

(b) "Beneficial use" means the right to possession, use, and enjoyment of property, limited only by encumbrances, easements, and restrictions of record.

(c) "Inflation rate" means that term as defined in section 34d.

(d) "Losses" means that term as defined in section 34d.

(e) "Qualified agricultural property" means that term as defined in section 7dd.

(f) "Qualified forest property" means that term as defined in section 7ff[1].


Popular name: Act 206
Jeff Ammon, Miller Johnson
I’d love to see another (simple?) change to remove doubt as to what methods of transfer between parent and child can qualify. Under the existing section, we know for sure that a deed during lifetime from a parent to child works. But what if the property is owned by a trust, and upon death (or otherwise) the beneficiary changes from parent to child? Is that a qualifying “transfer”? Seems like it should be, but the statute leaves that open to question. Same lack of certainty of the property is owned by an LLC, and the transfer from parent to child is of LLC interests instead of real property interests. To remove these two doubts, I’d add clarifying language after your proposed language: "Transfer" under this subsection includes direct and indirect methods of transfer of ownership, such as by deed, inheritance, trust beneficiary change, transfer of ownership interests in a legal entity owning real property, or otherwise."

Jeffrey R. Wonacott, Smith Haughey Rice & Roegge
My comments are more in line with the portion of Jeff Ammon’s e-mail that addresses HB 4347, which relates to the “proportionate ownership” exemption, and not the uncapping exemption for transfers to family members of the first degree….I would like to see an amendment to the “uncapping” statute that would exempt two types of conveyances from the definition of the term “transfer of ownership”: (1) a transfer of real estate to an entity (such as an LLC) when the ownership of the property before the conveyance and ownership of the entity after the conveyance are identical; and (2) a transfer of real estate from an entity (such as an LLC) to its owners when the ownership of the entity before the transfer and the ownership of the real estate after the conveyance are identical.

The first type of transfer (i.e., a transfer to an entity) is the type of transfer addressed in HB 4347. If HB 4347 is passed it would add a new exemption to MCL 211.27a which would codify what is commonly referred to as the “proportionate ownership” exemption. The “proportionate ownership” exemption is the notion that if the ownership of real estate prior to the conveyance of the property to the LLC is the same as the ownership of the LLC after the conveyance, then there is no “transfer of ownership” and, therefore, no uncapping of the taxable value. Many local assessors follow the “proportionate ownership” exemption by relying on the STB Guideline, which cites the “commonly controlled” exemption [MCL 211.27a(7)(l)] as the legal authority despite the fact that all of the technical requirements of the “commonly controlled” exemption are not strictly met.

According to in HB 4347, if passed, the new exemption would state that a “transfer of ownership” would not include the following: “Beginning December 31, 2013, a transfer of real property to a limited liability company if at the time of the transfer the ownership the limited liability company is the same as the ownership of the property.”

Initially, that sounds like good news. Because of the “commonly controlled” exemption technically should not apply, this legislative effort seems like a positive move to establish clarity that the “proportionate ownership” exemption is now a valid exemption. However, it does not address a conveyance of real estate “out” of the LLC and back into the hands of its members.
By codifying the “proportionate ownership” exemption for conveyance to an LLC, I wonder whether conveyances of real estate “out” of the LLC back to the members would now be deemed a “transfer of ownership” that would uncap the taxable value. Many assessors in northern Michigan presently recognize the “proportionate ownership” exemption for transfers to and from an LLC. With the effort to codify the “proportionate ownership” exemption only to an LLC I wonder if that will create vulnerability to an uncapping of the taxable value if the property is conveyed out of the LLC and into the names of the members. It is has become increasingly common for clients to convey real estate out of an LLC and into the names of the members who want to create a concurrent form of ownership to prevail on the taxable value cap preservation strategy that Klooster and its progeny now affords.

Michael D. Shelton, Smith Haughey Rice & Roegge
I agree with Scott. Also, it appears that the proposed amended statute would require an agent acting under a DPOA to go to court and obtain a guardianship, which is what we try to avoid through the DPOA. The proposed amendment defines “transferor” to include guardians either appointed by the court or appointed by a parent’s or spouse’s will. Any time an agent acting under the DPOA after the principal becomes incapacitated attempts to transfer real property to the children, they may have to resort to the probate court to benefit from this statute.

I recognize that the statute would use the word “including”, and appears that it would not be intended to limit the applicability to only those listed fiduciaries, but I think there is a real possibility that the assessors and courts could apply a narrow interpretation. On the other hand, if the revision is not intended to include agents acting under a DPOA perhaps that should be clarified.

Scott D. Harvey, Smith Haughey Rice & Roegge
Totally agree with Ammon’s suggestion regarding including the methods of transfer that qualify. I would also suggest that “blood or affinity to the first degree” be revised (or interpreted) to include transfers between siblings. We will undoubtedly run into issues where multiple siblings inherit property from a parent and then subsequently transfer their interest in the property to one sibling, which would result in a proportionate uncapping. It doesn’t seem to comport with the intent of the statute that property that is transferred from mom and dad to their children would uncap even partially where one (or more) children remain as the owner(s) of that property.