SBM
State Bar of Michigan

PROBATE & ESTATE PLANNING SECTION

Probate and Estate Planning Section

Agendas & Attachments

For

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

-AND

MEETING OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION

-AND

MEETING OF THE SECTION'S COMMITTEE ON SPECIAL PROJECTS

Saturday, September 6, 2014
9:00 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,

-AND-

MEETING OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION

-AND-

MEETING OF THE SECTION'S COMMITTEE ON SPECIAL PROJECTS

September 6, 2014

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 6, 2014, at the above address. The Section's **Committee on Special Projects** meeting will begin at 9:00 a.m., followed immediately by the **Annual Meeting of the Members of the Section**. The meeting of the **Council of the Section** will follow after the conclusion of the Annual Meeting of the Members of the Section.

James B. Steward
Secretary

Steward & Sheridan, PLC
205 South Main St.
Ishpeming, Michigan 49849
Telephone: 906.485.6311
Fax: 906.485.6315
E-mail:
jamessteward@stewardsheridan.com

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 2014-2015 meeting dates

September 6, 2014

(**Annual Meeting Precedes Council Meeting)**

October 25, 2014 – Weber's Inn – Ann Arbor

November 15, 2014

December 13, 2014

January 17, 2015

February 14, 2015

March 14, 2015

April 11, 2015

June 13, 2015

September 12, 2015 (Annual Section Meeting)

ANNUAL MEETING OF THE MEMBERS

OF THE

PROBATE AND ESTATE PLANNING SECTION

OF THE

STATE BAR OF MICHIGAN

September 6, 2014

Lansing, Michigan

Agenda

I. Call to Order

II. Approval of Minutes of September 21, 2013, Annual Meeting of the Section

See Attachment 1

III. Chairperson's Report – Thomas F. Sweeney

IV. Treasurer Report – Marlaine C. Teahan

See Attachment 2

V. Elections of Council Members and Officers

See Attachment 3 -- Nominating Committee Report and

Attachment 4 – June 7, 2014, Council meeting minutes.

VI. Other Business

- **Proposed Bylaws Amendments**
  See Attachment 5

- **Vote to approve the Council recommendation that beginning with the Winter 2014 edition, the Probate and Estate Planning Journal will only be in electronic form. As stated in the April 2014 Council Minutes:**

  "Mr. Sweeney discussed the process we use to produce the Probate & Estate Planning Journal with Nancy Little and Jeanne Murphy to quantify the likely cost savings of changing to an electronic only Journal. At present, we utilize 3 steps: our State Bar and Section Journals Committee collects and edits the articles; ICLE sets up the format; and E.P. Horak Company prints the Journal and sends out the paper version, which currently costs about

$5,000 per issue for the printing and mailing of the paper copies to only about 17% of our membership; the State Bar handles the electronic distribution. If we go to an all-electronic version, the first two steps would not change, but the step handled by E.P. Horak Company would be eliminated. At that point, the only way to obtain access to the Journal would be "on line". Announcements would be primarily electronic, which we now doing for the most part anyway. The State Bar Journal will still be printed on paper (for now). Saving the mailing & printing expense would allow us to support a broader range of programs for our members."

VII. Adjournment of Annual Meeting of Section Membership

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

September 6, 2014
Lansing, Michigan

Agenda

I. **Call to Order**

II. **Excused Absences**

III. **Introduction of Guests**

IV. **Minutes of June 7, 2014, Meeting of the Council**

See Attachment 4 – note Minutes Supplement at end of regular Minutes

V. **Treasurer Report – Marlaine C. Teahan**

See Attachment 2

VI. **Chairperson's Report – Amy N. Morrissey**

VII. **Report of the Committee on Special Projects – Marguerite C. Lentz**

See attachment 6

VIII. **Standing Committee Reports**

A. **Internal Governance**

1. Budget – James B. Steward
2. Bylaws – Nancy H. Welber
3. Awards – Douglas A. Mielock
4. Planning – Amy N. Morrissey
5. Nominating – Douglas G. Chalgian
6. Annual Meeting – Amy N. Morrissey

B. **Education and Advocacy Services for Section Members**

1. *Amicus Curiae* – David L. Skidmore

2. Probate Institute – James B. Steward

3. State Bar and Section Journals – Amy N. Morrissey

4. Citizens Outreach – Constance L. Brigman

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 – Geoffrey R. Vernon

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 – Michele C. Marquardt – See attachment 7 for Probate Court Appeals Project update & proposed change.

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

F. **Areas of Practice**

1. Real Estate – George F. Bearup

2. Transfer Tax Committee – Lorraine F. New

3. Charitable and Exempt Organization – Christopher A. Ballard

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

G. **Liaisons**

1. Alternative Dispute Resolution Section Liaison –
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
8. Michigan Probate Judges Association Liaison – Hon. Judge David M. Murkowski
9. Probate Registers Liaison – Rebecca A. Schnelz
10. SCAO Liaisons – Marlaine C. Teahan, Constance L. Brigman, Rebecca A. Schnelz
11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz
12. State Bar Liaison – Richard Siriani
13. Taxation Section Liaison – George W. Gregory

IX. **Other Business**

X. **Hot Topics**

XI. **Adjournment**

STATE BAR OF MICHIGAN
PROBATE AND ESTATE PLANNING SECTION COUNCIL

Officers for 2014-2015 Term

Officer	Position
Chairperson	Amy N. Morrissey
Chairperson Elect	Shaheen I. Imami
Vice Chairperson	James B. Steward
Secretary	Marlaine C. Teahan
Treasurer	Lentz, Marguerite Munson

Council Members for 2014-2015 Terms

Council Member	Year elected to current term (partial, first or second full term)	Current term expires	Eligible after Current term?
Ard, W. Josh.	2012 (2nd term)	2015	No
Ouellette, Patricia M.	2012 (2nd term)	2015	No
Spica, James P.	2012 (2nd term)	2015	No
Clark-Kreuer, Rhonda M.	2012 (1st term)	2015	Yes (1 term)
Lucas, David P.	2012 (1st term)	2015	Yes (1 term)
Skidmore, David L.J.M.	2012 (1st term)	2015	Yes (1 term)
Brigman, Constance L.	2010 (2nd term)	2016	No
Allan, Susan M.	2010 (2nd term)	2016	No
Mills, Richard C.	2014 (1st partial term)	2016	Yes (2 terms)
Marquart, Michele C.	2013 (1st term)	2016	Yes (1 term)
New, Lorraine F.	2013 (1st term)	2016	Yes (1 term)
Vernon, Geoffrey R.	2013 (1st term)	2016	Yes (1 term)
Ballard, Christopher A.	2014 (2nd term)	2017	No
Bearup, George F.	2014 (2nd term)	2017	No
Welber, Nancy H.	2014 (2nd term)	2017	No
Jaconette, Hon Michael L.	2014 (1st term)	2017	Yes (1 term)
Kellogg, Mark E.	2014 (1st term)	2017	Yes (1 term)
Malviya, Raj A.	2014 (1st term)	2017	Yes (1 term)

Ex Officio Members

John E. Bos
Robert D. Brower, Jr.
Douglas G. Chalgian
George W. Gregory
Henry M. Grix
Mark K. Harder
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
Thomas F. Sweeney
Lauren M. Underwood
W. Michael Van Haren
Susan S. Westerman
Everett R. Zack

2013-14 Probate and Estate Planning Section Committees

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

James B. Steward, Chair
Marlaine Teahan
Shaheen I. Imami

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 Biennial Plan of Work

Amy N. Morrissey, Chair

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

Douglas G. Chalgian, Chair
George W. Gregory
Mark K. Harder

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

Amy N. Morrissey

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
George W. Gregory
Nancy L. Little
Amy N. Morrissey

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

Marguerite C. Lentz, 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
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. 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

Shaheen I. Imami

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. Morrissey, 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

Constance L. Brigman, Chair
Rebecca A. Schnelz, (Liaison to Solutions on Self-help Task Force)
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 listserve, 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
Amy N. Morrissey
Jeanne Murphy (Liaison to ICLE)
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

Michele C. Marquardt, Chair
Marlaine C. Teahan, (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. 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
Patricia M. Ouellette
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

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

Geoffrey R. Vernon, Chair
Mark K. Harder
Thomas F. Sweeney
James P. Spica
Stephen L. Elkins
Robert Z. Rogosich

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
J. David Kerr
David P. Lucas
James B. Steward
Douglas A. Mielock
Stephen J. Dunn
Mark E. Kellogg
Michael G. Lichterman
Katie Lynwood
Melisa Marie-Werkema Mysliwiec

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

Lorraine F. New, Chair
Nancy H. Welber,
Marguerite Munson Lentz
Geoffrey R. Vernon

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

Rhonda M. Clark-Kreuer, Chair
Katie Lynwood – Vice Chair
William J. Ard
Michael J. McClory
Phillip E. Harter
Michael W. Bartnik
Ellen Sugrue Hyman
Kurt A. Olson
Raymond A. Harris

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
Wendy Parr Holtvluwer
Sharri L. Rolland Phillips
Daniel Simjanovski
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
William R. Bloomfield
Lorraine F. New

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. 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

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

Richard Siriani

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

George W. Gregory

ATTACHMENT 1

ANNUAL MEETING OF THE MEMBERS
OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE
STATE BAR OF MICHIGAN

September 21, 2013
Lansing, Michigan

Minutes

I. Call to Order - 10:26 am

II. Approval of Minutes of September 8, 2012, Annual Meeting of the Section - David Skidmore, support from SII - no objections & approved

III. Chairperson's Report – Mark K. Harder

A) Referred to annual report submitted to SBM in May 2013

1) Commended how functional and active the Section is - we should be proud

2) Sponsored/co-sponsored 11 seminars with ICLE

3) 1/2 dozen critical legislative initiatives passed, & took positions on another 9 or so

4) DAPT, Digital Asset, & Appeals legislation

5) Amicus activity

B) Acknowledged Judge Darlene O'Brien & Becky Schnelz for contributions

C) Thanked members for differing perspectives & helping him

IV. Treasurer Report – James B. Steward

A) On track, with possibility that support for Institute may have gone a little higher

V. Elections of Council Members and Officers

A) Officers & new members per June 2013 slate

B) Voice vote - all in favor, none opposed.

VI. Other Business - SII to take minutes

VII. Adjournment - 10:36 a.m.

ATTACHMENT 2

Probate and Estate Planning Council
Treasurer's Report
September 6, 2014

Income/Expense Reports

An unaudited report through July 31, 2014 is attached. This month's spreadsheet covers from April, 2014 to July, 2014. The August data has not yet been received from the State Bar.

A few highlights regarding the attached spreadsheet:

- We have received more membership dues than expected and are at 100.50% of our expected revenue.
- We have spent less than expected and with two months of the fiscal year left to report, we are at 67% of our expected disbursements.
- With two months remaining in the fiscal year, it is estimated that we will be under budget in many categories and at or under budget in all categories.

Reimbursements for Fiscal Year 2013-14 deadline

To be counted for this Fiscal Year, the State Bar requires that all reimbursements for travel, invoices, and other expenses advanced on behalf of the Section be submitted by September 30, 2014. In order to allow time for processing these, submission of your reimbursement forms MUST be received by the Treasurer by Friday, September 26, 2014 at midnight.

Mileage Reimbursement Rate

The IRS business mileage reimbursement rate for 2014 is $0.56 per mile. If you are eligible for reimbursement of your mileage for Probate Council business, please use this rate on your SBM expense reimbursement forms. The SBM forms have been updated. The form and instructions are attached.

Expense Reimbursement Requests

- Instructions: http://www.michbar.org/generalinfo/pdfs/sectexp_instruction.pdf .
- Form: http://www.michbar.org/generalinfo/pdfs/sectexp.pdf
- Email forms to mteahan@fraserlawfirm.com or provide paper copies in person or by mail.

Marlaine C. Teahan, Treasurer
Probate and Estate Planning Section

Mailing Address: Marlaine C. Teahan
Fraser Trebilcock
124 West Allegan Street, Suite 1000
Lansing MI 48933

Probate and Estate Planning Section
Treasurer's Report through July 31, 2014

Beginning General Fund	$ 245,615.63	$ 235,426.93	$ 228,696.91	$ 219,133.65	$ 180,511.60			
Beginning Amicus Fund	$ 25,785.00	$ 25,785.00	$ 25,785.00	$ 25,785.00	$ 25,785.00			
Beginning Total Fund Balance	$ 271,400.63	$ 261,211.93	$ 254,481.91	$ 244,918.65	$ 206,296.60			
Use of Amicus Fund overage	-	-	-		(361.50)			

	April	May	June	July	FY to Date Actual	Budget 2013-14	Variance	Year to Date Percentage
Revenue								
Membership Dues	70.00	140.00	105.00	175.00	115,570.00	115,000.00	570.00	100.50%
Publishing Agreements	-	-	-	-	650.00	650.00	-	100%
Other	-	-	-	-	35.00	350.00	(315.00)	10%
Total Receipts	70.00	140.00	105.00	175.00	116,255.00	116,000.00	255.00	100%
Disbursements								
Journal	3,750.00	75.00	6,990.54	-	15,898.82	25,000.00	(9,101.18)	64%
Chairperson's Dinner(1)	-	-	-	-	5,457.20	6,500.00	(1,042.80)	84%
Travel	2,286.79	564.34	686.00	179.20	14,306.13	18,500.00	(4,193.87)	77%
Lobbying	2,500.00	-	-	5,000.00	25,000.00	30,000.00	(5,000.00)	83%
Meetings(2)	926.88	-	1,916.72	1,620.82	10,662.28	14,000.00	(3,337.72)	76%
Long-range Planning	-	-	-	-	-	1,000.00	(1,000.00)	0%
Support for Annual Institute	636.00	6,230.68	-	45.00	11,911.68	14,000.00	(2,088.32)	85%
Amicus Briefs	-	-	-	-	-	10,000.00	(10,000.00)	0%
ListServ(3)	159.03	-	75.00	150.00	834.03	1,400.00	(565.97)	60%
Postage	-	-	-	-	-	100.00	(100.00)	0%
Telephone	-		-	-	-	250.00	(250.00)	0%
Seminars	-	-	-	-	-	4,000.00	(4,000.00)	0%
Other(4)	-	-	-	-	21.33	1,000.00	(978.67)	2%
Total Disbursements	10,258.70	6,870.02	9,668.26	6,995.02	84,452.97	125,750.00	(41,658.53)	67%
Net Increase (Decrease)	(10,188.70)	(6,730.02)	(9,563.26)	(6,820.02)	31,802.03	(9,750.00)	41,913.53	
Ending Fund Balance (5)	**261,211.93**	**254,481.91**	**244,918.65**	**238,098.63**	**238,098.63**			

Footnotes

(1)Includes plaques for outgoing Chair and Council Members
(2)includes SBM Leadership Conference expenses for incoming Chair and Chair Elect
(3)includes ListServ, telephone, e-blast & other electronic communications
(4)includes copying costs; budget for this line increased to $1,000 & now includes $750 for Young Lawyers' Summit
(5)includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount

State Bar of Michigan

306 Townsend St., Lansing MI 48933-2012, (800) 968-1442

Section
Expense Reimbursement Form

Payee Name

Street

City

State Michigan Zip Code

E-mail

Phone

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.

Please Provide Account Number	Amount
Amount Total	

Date	Description & Purpose (Note start & end point for mileage.)	Mileage Rate	Mileage	Reimbursement	Lodging/ Other Travel	Meals (Self + attach list of guests)	Miscellaneous (i.e. copying, phone, etc.)	TOTAL
		0.56		$0.00				$0.00
		0.56		$0.00				$0.00
		0.56		$0.00				$0.00
		0.56		$0.00				$0.00
		0.56		$0.00				$0.00
		0.56		$0.00				$0.00
		0.56		$0.00				$0.00

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

Date Title Signature

Grand Total $0.00

Date Title Approved by (signature)

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 f scal 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

MEMORANDUM

TO: Thomas F. Sweeney
FROM: Douglas G. Chalgian
George W. Gregory
Mark K. Harder
DATE: May 21, 2014

RE: **Nominating Committee Report**

As the members of the 2013-14 Nominating Committee of the Probate and Estate Planning Section of the State Bar of Michigan, we are pleased to submit this Report to you as Chair of the Section. Pursuant to Article IV, Section 1 of the Bylaws of the Probate and Estate Planning Section, the Nominating Committee is charged with submitting nominations for Council officers and members of the Council at the meeting of the Council prior to the Section's Annual Meeting. This Report is submitted in satisfaction of this requirement for delivery to the full Council at the June 7, 2014, meeting.

The Nominating Committee met several times by telephone or in person. Names of several well-qualified candidates were considered following receipt of nominations from several members of the Section, as well as on the Committee's own initiative. In completing its work the Committee considered the criteria that have been historically considered by the Committee.

We submit the following nominations for officers and members of the Council of the Section:

Officers

Chairperson	Amy N. Morrissey
Chairperson Elect	Shaheen I. Imami
Vice Chairperson	James B. Steward
Secretary	Marlaine C. Teahan
Treasurer	Marguerite M. Lentz

Members

For a second full three year term, concluding with the elections at the 2017 annual meeting of the Section:

Christopher A. Ballard
George F. Bearup
Nancy H. Welber

For a first full three year term, concluding with the elections at the 2017 annual meeting of the Section:

Honorable Michael L. Jaconette
Mark E. Kellogg
Raj A. Malviya

Contingent upon the election of Marguerite M. Lentz as Treasurer of the Section, to fill the unexpired term of Marguerite M. Lentz, which concludes with the elections at the 2016 annual meeting of the Section:

Richard C. Mills

ATTACHMENT 4

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

June 7, 2014
Lansing, Michigan

Minutes

I. Call to Order

The Chair of the Section, Thomas F. Sweeney, called the meeting to order at 10:15 a.m.

II. Attendance

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

Thomas F. Sweeney
Susan M. Allan
Josh A. Ard
Christopher A. Ballard
George F. Bearup
Marguerite Munson Lentz
David P. Lucas
Lorraine F. New
Patricia M. Ouellette
Robert M. Taylor
Geoffrey R. Vernon
Nancy H. Welber

A total of 12 council members and officers were present, representing a quorum.

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

Constance L. Brigman
Rhonda M. Clark-Kreuer
Shaheen I. Imami
David J. Kerr
Michelle C. Marquardt
Amy M. Morrissey
Hon. David M. Murkowski
David Skidmore
James P. Spica
James B. Steward

Marlaine C. Teahan

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

None.

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

Douglas G. Chalgian
George W. Gregory
Hon. Philip E. Harter
Nancy L. Little

E. **Others in attendance:**

Raymond Harris
Hon. Michael L. Jaconette
Katie Lynwood
Marta Manildi
Rick Mills
Neal Nusholtz
Robert O'Reilly
Nick Reisler
Scott Robbins
Nazneen Syed
Robert Tiplady
Joe Viviano

III. Minutes of April 19, 2014, Meeting of the Council

The minutes of the April 19, 2014, Meeting of the Council were included in the meeting materials posted on the Section's web page prior to the meeting. Ms. Lentz moved that the minutes be approved. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions.

IV. Treasurer Report – Marlaine C. Teahan

No report.

V. Reports Taken Out of Order

Because some council members had to leave early, which would mean that the Council would no longer have a quorum, certain matters were taken out of order.

A. **Report of the Committee on Special Projects – Marguerite Munson Lentz**

The Council had previously approved the draft Domestic Asset Protection Legislation. Robert Tiplady presented to the Committee on Special Projects two proposed changes to the legislation that were negotiated with the Michigan Bankers Association. The two changes were the addition of subsections (j) and (k) to section 5 of the proposed legislation. (Black-lined copy of the proposed legislation showing those additions is attached hereto as Attachment A.) With these changes, the Michigan Bankers General Counsel would not oppose the legislation. The Committee on Special Projects voted in favor of recommending to Probate Council that Probate Council approve this legislation. If approved, the next step would be finding a legislative sponsor. Ms. Lentz moved that Probate Council approve these changes to the Domestic Asset Protection Legislation. The motion was approved on a Council vote of 12-0, with no nays and no abstentions.

B. **Nominating Committee – Douglas G. Chalgian**

A report was submitted by the Nominating Committee, which consisted of Douglas G. Chalgian, George W. Gregory, and Mark K. Harder. That report is attached hereto as Attachment B. The nominating committee submitted the following nominations for officers and members of the Council of the Section:

Officers

Chairperson	Amy N. Morrissey
Chairperson Elect	Shaheen I. Imami
Vice Chairperson	James B. Steward
Secretary	Marlaine C. Teahan
Treasurer	Marguerite Munson Lentz

Members

For a second full three-year term, concluding with the elections at the 2017 annual meeting of the Section:

Christopher A. Ballard
George F. Bearup
Nancy H. Welber

For a first full three-year term, concluding with the elections at the 2017 annual meeting of the Section:

Honorable Michael L. Jaconette
Mark E. Kellogg
Raj A. Malviya

Contingent upon the election of Marguerite Munson Lentz as Treasurer of the Section, to fill the unexpired term of Marguerite Munson Lentz, which concludes with the elections at the 2016 annual meeting of the Section:

Richard C. Mills

Mr. Sweeney reported that he had received no other nominations. Susan Allen moved that the Probate Council approve these nominations and forward these nominations to the Section for a vote at the annual meeting of the Section on September 6, 2014. The motion was seconded. The motion was approved by a vote of the Council, 12-0, with no nays and no abstentions.

C. **Amicus Curiae – David L. Skidmore**

Patricia Oulette made the report. The amicus committee received a request for an amicus brief in *Carter et al v Woodwyk and Wilson,* Allegan County Probate Court. That application is attached hereto as Attachment C. The issue is whether, in a wrongful death case, the decedent's step-children are potential claimants. The facts: the decedent had no children. When he married his wife, she had six young boys. The decedent's wife predeceased him. The decedent died and a wrongful death action was filed with respect to the decedent's death. The decedent had no will, and his heirs are his sisters. The wrongful death statute includes among the potential claimants of a wrongful death claim the children of the decedent's spouse. In a prior case, *In re Combs,* the Michigan Court of Appeals reasoned that if the biological parent died before the decedent, there was no "spouse" and therefore, no children of the decedent's spouse; the Court held that the decedent's step-children could not be potential beneficiaries of the wrongful death claim since the biological parent had predeceased the decedent. The trial court in *Carter* followed the holding of *Combs*. The appellate court is bound by *Combs* because of *stare decisis,* but appellants are asking the Michigan appellate court to rule that, but for *Combs,* the step-children could be potential claimants. Then the Michigan appellate court can convene a special panel to determine the issue.

After discussion, a motion was made and seconded to prepare and file the amicus brief, which passed by a majority of the Council members present and voting (6 yays, 5 nays, 1 abstention). After further discussion, Robert Taylor moved to reconsider the motion, which was seconded by George Gregory. The motion for reconsideration was approved by a vote of the Council 12-0, with no nays and no abstentions. Mr. Taylor then moved to prepare and file the amicus brief. This motion was defeated by a vote of the Council 0-12, with no ayes and no abstentions.

The Honorable Philip E. Harder moved that a letter be sent that could accompany the appellants' brief. This letter would state that, in the Council's opinion, the holding in *Combs* was too restrictive of a reading of the wrongful death statute. The legislature did not intend to treat step-children differently depending on the fortuity of whether the biological parent dies before the decedent. Such a restrictive reading could exclude step-children who have a close personal relationship with the decedent and have suffered a great loss due to the decedent's death. The Council supports complete appellate review of the issue and overruling the holding in *Combs*. This motion was seconded by Ms. Lentz. This motion was approved by a vote of the Council, 12-0, with no nays and no abstentions.

VI. **Chairperson's Report – Thomas F. Sweeney**

Chairperson, Thomas F. Sweeney, presented the Chairperson's report:

- Mr. Sweeney received a request to send members of the Council to a presentation about a website called Zeekbeek. The Council members who attended the presentation were David Lucas, Richard Mills, Hon. Philip C. Harder, and Katie Lynwood. A description of this program was presented to the Council for their individual consideration.
- Mr. Sweeney received the report of the Recommendations of the Task Force of the Michigan State Bar on the issue of a voluntary bar. Several recommendations concern the advocacy activities of the Sections, which are funded with voluntary dues (copy of the Task Force Report recommendations pertaining to Section advocacy is attached as Attachment D). The officers of the Council will have a conference to consider possible responses.

VII. **Standing Committee Reports**

A. **Internal Governance**

1. Budget – James B. Steward

No report.

2. Bylaws – Nancy H. Welber

The bylaws were published in June State Bar Journal. The bylaws will be voted on at the Section's annual meeting in September. Then, the by-laws, if approved, will be sent to the State Bar's Board of Commissioners for approval.

3. Awards – Douglas A. Mielock

No report.

4. Planning – Amy N. Morrissey

No report.

5. Nominating – Douglas G. Chalgian

Report given above.

6. Annual Meeting – Amy N. Morrissey

Mr. Sweeney reported that the annual meeting of the Section will be Sept 6th and will be held at the University Club.

B. **Education and Advocacy Services for Section Members**

1. *Amicus Curiae* – David L. Skidmore

See above for the report by Ms. Ouellette.

2. Probate Institute – Shaheen I. Imami

No report.

3. State Bar and Section Journals – Amy N. Morrissey

No report.

4. Citizens Outreach – Constance L. Brigman

No report.

5. Electronic Communications – William J. Ard

No report.

C. **Legislation and Lobbying**

1. Legislation – Christopher A. Ballard

Mr. Ballard reported that SB 425, which would allow the principal residence exemption (PRE) to be claimed for trust owned property (if the property is the principal residence of a beneficiary of the trust), passed in the Senate and is pending in the House.

Mr. Ballard further reported that HB 5552, which would change the rules for uncapping for transfers into and out of trusts, passed the House and is pending in the Senate.

Mr. Ballard also reported that a three-bill package (HB 4638, 4639, and 4640), which permits recording of photocopies with an affidavit, passed in the House and is now pending in the Senate.

2. Updating Michigan Law – Marguerite Munson Lentz

Ms. Lentz gave an update on the fiduciary access to digital assets legislation. According to our lobbyist, Becky Bechler, Representative Cotter's office will be working on the bill over the summer with the intention of taking it up in the fall legislative session.

3. Insurance Committee – Geoffrey R. Vernon

Mr. Vernon reported that the committee is working on an exoneration statute in connection with irrevocable life insurance trust. The committee hopes to bring a proposal to the Council in the fall.

4. Artificial Reproductive Technology – Nancy H. Welber

Ms. Welber reported that the committee is continuing its work and hopes to bring a proposal to the Council in the fall.

D. **Ethics and Professional Standards**

1. Ethics – J. David Kerr

No report.

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

Mr. Taylor reported that the plans for the community outreach on August 6, 2014 for seniors entitled, "Who Do You Trust," are proceeding. There are presently 106 confirmed centers. The committee is matching presenters with centers.

3. Specialization and Certification – James B. Steward

No report.

E. **Administration of Justice**

1. Court Rules, Procedures and Forms – Michele C. Marquardt

No report.

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

No report.

F. **Areas of Practice**

1. Real Estate – George F. Bearup

Mr. Bearup was informed that Representative Pettalia will be working on legislation which will avoid uncapping in transactions involving LLC's, corporations and partnerships.

2. Transfer Tax Committee – Lorraine F. New

No report.

3. Charitable and Exempt Organization – Christopher A. Ballard

Mr. Ballard reported that SB 623, SB 623, and SB 929, which would make changes to the nonprofit corporation act, passed in the Senate and are pending in the House.

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

No report.

G. **Liaisons**

1. Alternative Dispute Resolution Section Liaison –

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.

8. Michigan Probate Judges Association Liaison – Hon. Judge David M. Murkowski

Hon. Michael L. Jaconette gave the report. Earlier in the meeting, a question was raised whether the MPJA was a committee of the State Bar. Judge Jaconette checked during the meeting and reported that MPJA is not a committee of the State Bar. The MPJA may be an association through the Supreme Court. Judge Jaconette will research the question.

9. Probate Registers Liaison – Rebecca A. Schnelz

No report.

10. SCAO Liaisons – Marlaine C. Teahan, Constance L. Brigman, Rebecca A. Schnelz

No report.

11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz

No report.

12. State Bar Liaison – Richard Siriani

No report.

13. Taxation Section Liaison – George W. Gregory

Mr. Gregory reported that the Taxation Section held a conference in Plymouth, which was well attended.

VIII. **Other Business**

Lorraine New reported that the IRS issued final regulations regarding the 2% floor for deduction of certain expenses on the 1041's of estates and trusts. If the fiduciary has bundled fees, the fiduciary will need to determine how much of the bundled fees are investment fees (subject to 2% floor) or how much are fees which are unique to estates or trusts (not subject to 2% floor). The standard for deduction for estate tax purposes is broader than the standard for deduction for income tax purposes. See Tax Nugget attached hereto as Attachment E for further details.

Ms. New submitted a copy to Nancy Little for inclusion in the Michigan Probate Journal.

IX. **Hot Topics**

None.

X. **Adjournment**

Meeting adjourned by Mr. Sweeney at 11:15 a.m.

MINUTES SUPPLEMENT

Report of e-mail Voting

Taken during July, 2014

On February 13, 2014, the Michigan Supreme Court entered Administrative Order 2014-53 establishing the Task Force on the Role of the State Bar of Michigan. On June 2, 2014, that

Task Force issued its "Report to the Michigan Supreme Court, Task Force on the Role of the State Bar of Michigan" (hereinafter referred to as the "Report"). John Nevin, Communications Director for the Michigan Supreme Court, invited comments concerning that Report.

A committee of the officers of the Probate & Estate Planning Section Council met to discuss the Report and subsequently developed a draft letter to respond and comment on the Report (hereinafter referred to as the "Probate Council Letter"), which was submitted to the Council members for voting electronically on July 10, 2014; that vote was completed on July 17, 2014. That Probate Council Letter, with revisions, was approved by that electronic vote of the Council: 12 in favor, none against, no abstentions and 11 absent.

Due to the number of Council members who were unavailable to vote regarding the Probate Council Letter during the earlier part of July 2014, the final form of the Probate Council Letter was again submitted electronically to all of the Council members for a vote on July 27, 2014, and that vote was completed on July 28, 2014. The Probate Council Letter was approved by that vote of the Council as follows: 21 in favor, none against, no abstentions and 2 absent. This Council action was incorporated into a Public Policy Position Statement and submitted to the State Bar as per the usual procedure for public policy position statements adopted by sections. The entirety of that the Probate Council Letter is attached as Attachment F.

James B. Steward
Council Secretary

ATTACHMENT A

Blackline

§ 1. Short Title

This act shall be known and may be cited as the "qualified dispositions in trust act."

§ 2. Definitions

As used in this act:

(1) "Advisor" means a person who is given authority by the terms of a trust instrument to remove and/or to appoint one or more trustees or to direct, consent to, approve or veto a trustee's actual or proposed investment or distribution decisions. A person shall be considered an advisor even if that person is denominated by another title, such as trust protector. Any person may serve as an advisor except that a transferor and any person who is related or subordinate to that transferor within the meaning of Section 672(c) of the Internal Revenue Code, 26 USC 672(c), may act as an advisor only in connection with investment decisions.

(2) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

(3) "Creditor" means, with respect to a transferor, a person who has a claim.

(4) "Debt" means liability on a claim.

(5) "Disposition" means a transfer of property that either creates a new fiduciary relation between at least 1 trustee and a trust beneficiary or newly subjects property to a preexisting fiduciary relation between at least 1 trustee and a trust beneficiary. The transfer may be by conveyance or assignment, by exercise of a power of appointment (including a power to substitute 1 trustee for another or to add 1 or more new trustees) or a power of revocation or amendment or (except as provided below) by disclaimer, release or relinquishment. A disposition, however, shall not include a disclaimer, release or relinquishment of property that was previously the subject of a qualified disposition. For this purpose, as between a given trustee and a given beneficiary, a new fiduciary relation is created whenever the terms of the governing trust instrument are materially altered (including alteration by an election described in section 5(f)) with respect to the trust beneficiary in question.

(6) "Distribution decision" means any decision regarding the distribution of trust property to or for the benefit of a trust beneficiary. Distribution decision also includes a decision regarding whether to make or guaranty a loan to or for the benefit of any trust beneficiary.

(7) "Fiduciary disposition" means a disposition made by a trustee acting in a fiduciary capacity.

(8) "Fiduciary qualified disposition" means a qualified disposition made by a trustee acting in a fiduciary capacity.

(9) "General power of appointment" means a general power as defined in section 2(h) of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112(h), provided that a power

exercisable in favor of the donee, his estate, his creditors or the creditors of his estate that is limited by an ascertainable standard, as that term is defined in section 7103(b) of the Michigan trust code, 2009 PA 46, MCL 700.7103(b), shall not be considered a general power of appointment.

(10) "Investment decision" means any decision regarding whether or not to purchase, sell, exchange, tender or pledge any trust property. Investment decision also includes decisions regarding other transactions affecting the ownership of or rights in any trust property, other than distribution decisions. Unless otherwise provided in the trust instrument, investment decision shall include a decision regarding whether to make or guaranty a loan to or on behalf of any entity in which the trust owns an interest, directly or indirectly, in the entity's debt or equity.

(11) "Organization" means that term as defined in section 1106(h) of the estates and protected individuals code, 1998 PA 386, MCL 700.1106(h).

(12) "Person" means that term as defined in section 1106(n) of the estates and protected individuals code, 1998 PA 386, MCL 700.1106(p).

(13) "Property" means that term as defined in section 1106(u) of the estates and protected individuals code, 1998 PA 386, MCL 700.1106(u).

(14) "Qualified disposition" means a disposition after which the subject property is:

(a) Owned by 1 or more trustees at least 1 of whom is a qualified trustee; and

(b) Governed by a trust instrument (including a trust instrument as modified by an election described in section 5(f)) under which the transferor only has rights, powers and interests which are permitted by section 4(2) of this act.

However, a disposition is not a qualified disposition to the extent that, at the time of the disposition, the transferor is in arrears on a child support obligation by more than 30 days.

(15) "Qualified trust beneficiary" means that term as defined in section 7103(g) of the Michigan trust code, 2009 PA 46, MCL 700.7103(g).

(16) "Qualified trustee" means a person other than the transferor:

(a) Who in the case of a natural person, is a resident of this state or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the Office of Financial and Insurance Regulation, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision or any successor thereto;

(b) Who maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in this state; and

(c) Whose usual place of business where some of the records pertaining to the trust are kept is located in this state or, if the person does not have such a place of business, the person's residence is in this state. For a corporate trustee, the usual place of business is the business location of the primary trust officer.

(17) "Retirement benefit" means an interest in one of the following types of assets if payable to the trust as a beneficiary or owned by the trust: a qualified or nonqualified annuity; a benefit under a qualified or nonqualified plan of deferred compensation; any account in, or benefit payable under, any pension, profit-sharing, stock bonus or other qualified retirement plan; any individual retirement account or trust; and any and all benefits under any plan or arrangement that is established under sections 401, 403, 408, 408A, 457, or similar provision of the Internal Revenue Code, 26 USC 401, 403, 408, 408A, 457.

(18) "Special power of appointment" means a special power as defined in section 2(i) of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112(i).

(19) "Spouse" and "former spouse" means only a person to whom the transferor was married at, or before, the time the qualified disposition is made.

(20) "Transferor" means:

(a) A person (and in the case of several owners of undivided interests, each of several persons) who, as a beneficial owner of certain property, or as the holder of a general power of appointment over certain property, directly or indirectly, makes a disposition of the property or causes a disposition to be made; or

(b) In the case of a fiduciary disposition, the person or persons who, as of the time of the fiduciary disposition, most recently fit the description in paragraph (a) of this subsection with respect to the property subject to the fiduciary disposition.

(21) "Trust beneficiary" means that term as defined in section 7103(l) of the Michigan trust code, 2009 PA 46, MCL 700.7103(l).

(22) "Trust instrument" means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition that:

(a) Expressly incorporates the law of this state to govern the validity, construction and administration of the trust;

(b) Is irrevocable; and

(c) Provides that the interest of the transferor or other trust beneficiary in the trust property may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute trust property to the trust beneficiary, and that provision of the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of section 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision.

§3. Jurisdiction; Venue.

(a) The probate court shall have exclusive jurisdiction over any action regarding the validity of the trust, whether a transfer is a qualified disposition, the extent of the transferor's interest in, or the income from, a qualified disposition, or the appointment of a trustee. The probate court shall have concurrent jurisdiction over any action brought pursuant to section 5(b) of this act.

(b) Venue for a proceeding under section 3(a) is in the place of registration, if the trust is registered, or any place where the trust properly could be registered, if the trust is not registered.

(c) If a trust has no qualified trustee, has not been registered and there is no place in this state where the trust properly could be registered, venue for a proceeding under section 3(a) is in the following order of priority, except to the extent otherwise provided by court rule:

i. In a county in this state in which the immediately prior qualified trustee had its usual place of business or residence.

ii. In a county in this state in which a trust beneficiary resides.

iii. In a county in this state in which any trust property is located.

iv. In any county in this state.

§ 4. Interests of transferor

(1) The transferor shall have only the powers and rights that are conferred by the trust instrument. Except as permitted by subsection 2, a transferor shall have no powers or rights with respect to the property that is the subject of a qualified disposition or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater powers or authority shall be void.

(2) A trust instrument may allow or provide for any or all of the following rights, powers or interests, none of which grants or shall be deemed to be, either alone or in any combination, a power to revoke a trust:

(a) The transferor's power to direct the investment decisions of the trust;

(b) The transferor's power to veto a distribution from the trust;

(c) A special power of appointment exercisable by will or other written instrument of the transferor effective only upon the transferor's death;

(d) The transferor's potential or actual receipt of income, including rights to the income retained in the trust instrument;

(e) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in section 664 of the internal revenue code, 26 USC 664, and any successor provision thereto; and the transferor's right, at any time and from time to time by written instrument delivered to the trustee, to release the transferor's interest in that trust, in whole or in part, in favor of a charitable organization that has or charitable organizations that have a succeeding beneficial interest in the trust;

(f) The transferor's potential or actual receipt of income or principal from a grantor-retained annuity trust or grantor-retained unitrust as those terms are defined in section 2702 of the internal revenue code, 26 USC 2702, and any successor provision thereto or the transferor's receipt each year of a percentage (not to exceed 5 percent) specified in the governing instrument of the initial value of the trust property (which may be described either as a percentage or a fixed amount) or their value determined from time to time pursuant to the governing instrument.

(g) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a trustee's acting:

A. Pursuant to a discretionary trust provision within the meaning of section 7103(d) of the Michigan trust code, 2009 PA 46, MCL 700.7103(d);

B. Pursuant to a support provision within the meaning of section 7103(k) of the Michigan trust code, 2009 PA 46, MCL 700.7103(k); or

C. At the direction of an advisor acting: (i) Pursuant to a discretionary trust provision within the meaning of section 7103(d) of the Michigan trust code, 2009 PA 46, MCL 700.7103(d); or (ii) Pursuant to a support provision within the meaning of section 7103(k) of the Michigan trust code, 2009 PA 46, MCL 700.7103(k).

(h) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor;

(i) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of that term as described in section 2702(c) of the internal revenue code, 26 USC 2702(c), and any successor provision thereto, or the transferor's possession and enjoyment of a qualified annuity interest within the meaning of that term as described in United States Treasury Regulation Section 25.2702-5(c)(8), 26 CFR 25.2702-5(c)(8), and any successor provision thereto;

(j) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if the potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly provides for the payment of those taxes and if the potential or actual receipt of income or principal would be the result of a qualified trustee's or qualified trustees' acting:

A. In the qualified trustee's or qualified trustees' discretion or pursuant to a mandatory direction in the trust instrument; or

B. At the direction of an advisor who is acting in the advisor's discretion; and

(k) After the transferor's death, the ability of a qualified trustee to pay the transferor's debts, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate, no matter the source of the qualified trustee's ability.

(l) The transferor's actual or potential receipt of any minimum required distributions as defined in 26 USC 4974(b) with respect to any retirement benefit.

§ 5. Avoidance of qualified dispositions

(a) Notwithstanding any other provision of this act or any other law to the contrary, with respect to any qualified disposition, a creditor or other person shall have only the rights provided in section 5 and section 7 of this act.

(b) Any action brought at law or in equity by a creditor or other person for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition shall:

i. only be brought pursuant to sections 4 and 5 of the Michigan uniform fraudulent transfers act, 1998 PA 434, MCL 566.34 and 566.35;

ii. in the case of a creditor whose claim arose after a qualified disposition, involve a qualified disposition that was made with actual intent to defraud the creditor; and

iii. be proved by clear and convincing evidence.

(c) Notwithstanding any law to the contrary, no creditor or other person shall bring or maintain an action under subsection (b) of this section unless the action is commenced within the periods prescribed in this subsection (c):

i. If the claim arose before the qualified disposition was made, upon the later of:

1. 2 years after the qualified disposition was made or the obligation was incurred; or,

2. 1 year after the qualified disposition or obligation was or could reasonably have been discovered by the claimant, if the person who is or may be liable for any claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, although the action would otherwise be barred by the period of limitations; or

ii. If the claim arose concurrent with or subsequent to the qualified disposition, 2 years after the qualified disposition is made.

(d) If a trust beneficiary who has an interest in a qualified disposition or in property that is subject to a qualified disposition is a party to an action for annulment of a marriage, divorce, or separate maintenance:

i. If the trust beneficiary is not the transferor of the qualified disposition, then the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition shall not be considered marital property, shall not be considered (directly or indirectly) part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.

ii. If the trust beneficiary is the transferor of the qualified disposition, and if either (A) the trust beneficiary transferred the property that is the subject of the qualified disposition more than 30 days before the trust beneficiary's marriage which is the subject of the action, or (B) the parties to the marriage agree that this paragraph shall apply to the qualified disposition, then the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition shall not be considered marital property, shall not be considered (directly or indirectly) part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.

iii. If neither of the two previous paragraphs apply, then subsections (b) and (c) shall not be interpreted as limiting the transferor's spouse's property division claims.

(e) For purposes of this Act, a fiduciary qualified disposition is deemed made as of the time the property that is subject to that disposition was first transferred to the trustee who is making the fiduciary qualified disposition (or any predecessor of that trustee in an unbroken succession of fiduciary ownership of the property) in a form that either (i) meets the requirements of a qualified disposition, or (ii) meets the requirements of section 2(14)(b) of this act and meets the requirements to be considered a qualified disposition or its equivalent under the laws of another state, provided that if the property that is subject to the qualified disposition was originally transferred to the trustee making that disposition (or a predecessor trustee described above) prior to the effective date of this act in a form that would otherwise meet the requirements of a qualified disposition, the qualified disposition shall be deemed to have been made as of the effective date of this act.

(f) If a trustee of an existing trust proposes to make a disposition that, but for the exercise of authority granted in this subsection, would not conform to the

requirements of a qualified disposition due to the transferor's nonconforming power(s) of appointment, the trustee may modify the trust instrument by delivering to the qualified trustee an irrevocable written election to modify the transferor's nonconforming power(s) to conform to the requirements of section 4(2)(c) or section 4(2)(k) of this Act.

For purposes of this Act, the irrevocable written election must include:

i. a description of the transferor's modified powers of appointment, and

ii. the transferor's written consent to the modification.

The transferor's consent is not a disposition within the meaning of section 2(5) of this Act.

(g) With respect to any qualified disposition, no creditor or other person shall have any claim or cause of action at law or in equity against any of the following:

i. the trustee of a trust that is the subject of a qualified disposition,

ii. an advisor of a trust that is the subject of a qualified disposition, or

iii. any person involved in the counseling, drafting, preparation, execution or funding of a trust that is the subject of a qualified disposition.

(h) In circumstances where more than 1 qualified disposition is made by means of the same trust instrument, then with respect to a prior qualified disposition:

i. The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim is extinguished as provided in subsection (c) of this section.

ii. The making of a subsequent qualified disposition shall be disregarded in determining, as provided in subsection (d) of this section, whether a trust beneficiary's interest in a qualified disposition or in property that is the subject of a qualified disposition (1) is considered marital property, (2) is considered part of a trust beneficiary's real or personal estate, or (3) may be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.

Any distribution to a trust beneficiary is deemed to have been made from the most recent qualified disposition.

(i) In any action against a trustee that received property in a qualified disposition, if a court takes any action declining to apply the law of this state in determining the validity, construction or administration of the trust, or the effect of a spendthrift provision in the trust instrument, the trustee shall immediately upon the court's

action and without the further order of any court, cease in all respects to be trustee of the trust. That former trustee shall have no power or authority other than to convey the trust property to the successor trustee and, at the former trustee's election, to petition the court for appointment of a successor trustee and collect its attorney fees, costs and expenses as provided below.

If the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, the probate court, upon the request of any qualified trust beneficiary of the trust, shall appoint a successor trustee upon the terms and conditions it determines to be consistent with the purposes of the trust and this statute.

If the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, a former trustee may, but has no duty to, petition the probate court to appoint a successor trustee if a petition for appointment of a successor trustee is not brought by a qualified trust beneficiary within 30 days of the date on which the former trustee ceases to be a trustee of the trust. In that case, if the former trustee elects to petition for the appointment of a successor trustee, the former trustee shall be entitled to reimbursement for all attorney fees, costs and expenses associated with the petition, which shall be a lien against the trust's property.

(j) Any valid lien attaching to property prior to a qualified disposition of that property shall survive the disposition, and the trustee shall take title to the property subject to the valid lien and the trustee shall be subject to any agreements that created or perfected the valid lien.

(k) A transferor may agree in writing with a creditor as follows:

(i) The transferor will have a continuing or periodic obligation to disclose any qualified dispositions to the creditor;

(ii) Any qualified disposition will require the prior written approval of the creditor; or

(ii) that the transferor shall be under those other obligations as the creditor may require with respect to qualified dispositions.

If a transfer which would otherwise be a qualified disposition is made in violation of an agreement with a creditor, then with respect to that creditor only the transfer shall not be a qualified disposition and the provisions of this Act shall not affect or diminish the rights of that creditor

§ 6. Affidavit Requirement

(1) Except as provided in subsection (7), for purposes of this section 6, a "qualified affidavit" shall mean a written statement authenticated by verification under oath by the transferor in which the transferor states that at the time of the transfer of the property to the trust:

(a) The transferor has full right, title, and authority to transfer the property to the trust;

(b) The transfer of the property to the trust will not render the transferor insolvent;

(c) The transferor does not intend to defraud a creditor by transferring the property to the trust;

(d) The transferor does not know of or have reason to know of any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;

(e) The transferor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit;

(f) The transferor is not currently in arrears on a child support obligation by more than 30 days;

(g) The transferor does not contemplate filing for relief under the bankruptcy provisions of Title 11 of the United States Code; and

(h) The property being transferred to the trust was not derived from unlawful activities.

(2) The transferor shall sign a qualified affidavit before a qualified disposition is made.

(3) The qualified affidavit is defective if it materially fails to meet the criteria set forth in subsection (1), provided that a qualified affidavit is not defective due to any of the following:

(a) Nonsubstantive variances from the language set forth in subsection (1);

(b) Statements or representations in addition to those set forth in subsection (1) if the statements or representations do not contradict those required by subsection (1); or

(c) Technical errors in administering an oath if the errors were not the fault of the transferor and the transferor reasonably relied upon another person to prepare or administer the oath.

(4) Notwithstanding any other provision of this section 6, a qualified affidavit shall not be required:

(a) From the settlor in the case of a fiduciary qualified disposition;

(b) From a transferor who is not the settlor of the qualified disposition, except to the extent the transferor is a beneficiary of the qualified disposition and the property subject to the qualified disposition was not previously subject to a qualified disposition with respect to which the transferor signed a qualified affidavit; or

(c) In connection with dispositions that are part of, required by, or the direct result of a prior qualified disposition supported by a qualified affidavit that otherwise complies with the requirements of subsection (1).

(5) If a qualified affidavit is required by this section 6, and a transferor fails to timely sign a qualified affidavit or signs a defective affidavit, then the failure or defect may be considered as evidence in any proceeding commenced pursuant to section 5(b) to the extent permitted by the Michigan Rules of Evidence, but the validity of the qualified disposition shall not be affected in any other way due to the failure or defect.

(6) For the purposes of this section 6, "settlor" means that term as defined in section 7103(i) of the Michigan trust code, 2009 PA 46, MCL 700.7103(i).

(7) If a qualified affidavit is required by this section 6 because of the exception in subsection (4)(b), then the required affidavit shall omit the statements described in paragraphs (a) and (c) of subsection (1), and include a statement that the qualified disposition is not intended to defraud any creditor.

§ 7. Effect of avoidance of qualified dispositions

(1) A qualified disposition shall be avoided only to the extent necessary to satisfy or provide for the present value, taking into consideration any uncertainty, of the transferor's debt to the creditor at whose instance the disposition had been avoided.

(2) If all or any portion of a qualified disposition is avoided as provided in subsection (1), then:

(a) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition, both of the following apply:

(i) The trustee shall have a lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney fees, incurred by the trustee in the defense of any action to avoid the qualified disposition. The lien shall have priority over all other liens against the property, whether or not the other liens accrued or were recorded before the accrual of the lien created by this Act.

(ii) The qualified disposition shall be avoided subject to the fees, costs, preexisting rights, claims and interests of the trustee (and of any predecessor trustee that has not acted in bad faith).

(b) If the court is satisfied that a trust beneficiary has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of the trust beneficiary to retain any distribution received prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this Act, it shall be presumed that the trust beneficiary, including a trust beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) For purposes of this subsection (2), it shall be presumed that a trustee did not act in bad faith merely by accepting the property, with or without a qualified affidavit, or by making any distribution in accordance with the terms of the trust.

(3) A creditor shall have the burden of proving by clear and convincing evidence that a trustee or trust beneficiary acted in bad faith as required under subsection (2), except that, in the case of a trust beneficiary who is also the transferor, the burden on the creditor shall be to prove that the transferor-beneficiary acted in bad faith by a preponderance of the evidence. The preceding sentence provides substantive not procedural rights under Michigan law.

(4) With respect to a qualified disposition, levy, attachment, garnishment, notice of lien, sequestration or other legal or equitable process shall be permitted only in those circumstances permitted by the express terms of this act.

(5) Notwithstanding any other provision of this act or MCL 556.123, a creditor shall have no right against the interest of a trust beneficiary in a trust (or portion of a trust) that was a qualified disposition solely because the trust beneficiary has the right to authorize or direct the trustee to pay all or part of the trust property in satisfaction of estate or inheritance taxes imposed

upon or with respect to the trust beneficiary's post-death estate, or the debts of the trust beneficiary's post-death estate, or the expenses of administering the trust beneficiary's post-death estate, unless the trust beneficiary actually directs the payment of the taxes, debts or expenses, and then only to the extent of the direction.

(6) Where a husband and wife make a qualified disposition of property and, immediately before the qualified disposition, the property, any part of the property, or any accumulation to the property was, pursuant to applicable law, owned by them as tenants by the entireties, then notwithstanding the qualified disposition and except where the provisions of the trust instrument may expressly provide to the contrary, that property, any part of that property, and any accumulation to that property shall, while held in trust during the lifetime of both spouses, be treated as though it were tenancy by the entireties property and be dealt with in a manner consistent with that applicable law but in every other respect shall be dealt with in accordance with the terms of the trust instrument. Furthermore, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the qualified disposition, the sole remedy available to the creditor with respect to trust property treated as though it were tenancy by the entireties property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.

(7) Subject to all of the foregoing provisions of this section, and except as otherwise provided in subsection (6), upon avoidance of a qualified disposition to the extent permitted under subsection (1), the sole remedy available to the creditor shall be an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor's debt to the creditor at whose instance the disposition has been avoided.

§ 8. Qualified Trustees

a. In the event that a person serving as qualified trustee ceases to meet the requirements of a qualified trustee and there remains no trustee that meets the requirements of a qualified trustee, the person serving as qualified trustee shall be deemed to have resigned as of the time of the cessation, and thereupon the successor qualified trustee provided for in the trust instrument shall become a qualified trustee of the trust upon the successor qualified trustee's acceptance of trusteeship, or in the absence of any successor qualified trustee provided for in the trust instrument, the probate court shall, upon petition of a qualified trust beneficiary, appoint a successor qualified trustee.

b. A disposition that was a qualified disposition shall not cease to be treated as a qualified disposition as a result of a subsequent vacancy in the position of qualified trustee, provided that a successor qualified trustee is appointed (or a proceeding for the appointment of a successor qualified trustee is commenced) within a reasonable time after the person(s) with authority to appoint a qualified trustee or commence a proceeding to appoint a qualified trustee know of the vacancy.

§ 9. Restraint on Alienation

a. A trust beneficiary shall have no power or capacity to make any transfer whatsoever of any of the income from a trust (or portion of a trust) that is a qualified disposition by his or her

order, voluntary or involuntary, and whether made upon the order or direction of any court or courts, whether of bankruptcy or otherwise.

b. Except as otherwise provided in this act, the interest of a beneficiary in a trust (or portion of a trust) that is a qualified disposition shall not be subject to any process of attachment issued against the beneficiary, and shall not be taken in execution under any form of legal process directed against the beneficiary or against the trustee, or the trust estate, or any part of the income thereof, but the whole of the trust estate and the income of the trust estate shall go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of and from any and all obligations of the beneficiary whatsoever and of all responsibility therefor.

c. The trustee of a qualified disposition shall disregard and oppose every assignment or other act, voluntary or involuntary, that is attempted contrary to the provisions of this section. The trustee is entitled to reimbursement for all attorney fees, costs and expenses associated with carrying out this duty which shall be a lien against the property that is the subject of the qualified disposition. No trustee shall be liable for, and no trust beneficiary or any successor thereto shall have any claim or cause of action at law or in equity against a trustee, for any breach of this duty unless the trustee's breach was in bad faith or the result of reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

d. This section does not prohibit a beneficiary from disclaiming any interest in a trust (or portion of a trust) that is a qualified disposition or from exercising a power of appointment.

§ 10. Application of act

(1) This act shall apply to qualified dispositions made on or after the effective date of this act.

(2) If any provision of this act conflicts with any provision of the statute of uses and trusts, 1846 RS 63, the estates and protected individuals code, 1998 PA 386, or the Michigan trust code, 2009 PA 46, the provision of this act prevails.

ATTACHMENT B

MEMORANDUM

TO: Thomas F. Sweeney
FROM: Douglas G. Chalgian
George W. Gregory
Mark K. Harder
DATE: May 21, 2014

RE: **Nominating Committee Report**

As the members of the 2013-14 Nominating Committee of the Probate and Estate Planning Section of the State Bar of Michigan, we are pleased to submit this Report to you as Chair of the Section. Pursuant to Article IV, Section 1 of the Bylaws of the Probate and Estate Planning Section, the Nominating Committee is charged with submitting nominations for Council officers and members of the Council at the meeting of the Council prior to the Section's Annual Meeting. This Report is submitted in satisfaction of this requirement for delivery to the full Council at the June 7, 2014, meeting.

The Nominating Committee met several times by telephone or in person. Names of several well-qualified candidates were considered following receipt of nominations from several members of the Section, as well as on the Committee's own initiative. In completing its work the Committee considered the criteria that have been historically considered by the Committee.

We submit the following nominations for officers and members of the Council of the Section:

Officers

Chairperson	Amy N. Morrissey
Chairperson Elect	Shaheen I. Imami
Vice Chairperson	James B. Steward
Secretary	Marlaine C. Teahan
Treasurer	Marguerite M. Lentz

Members

For a second full three year term, concluding with the elections at the 2017 annual meeting of the Section:

Christopher A. Ballard
George F. Bearup
Nancy H. Welber

For a first full three year term, concluding with the elections at the 2017 annual meeting of the Section:

Honorable Michael L. Jaconette
Mark E. Kellogg
Raj A. Malviya

Contingent upon the election of Marguerite M. Lentz as Treasurer of the Section, to fill the unexpired term of Marguerite M. Lentz, which concludes with the elections at the 2016 annual meeting of the Section:

Richard C. Mills

ATTACHMENT C

Amicus Curiae Committee
Probate and Estate Planning Section of the State Bar of Michigan

Application for Consideration

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

Date May 13, 2014

Name Kenneth A. Puzycki P Number P45404

Firm Name Law Office of Kenneth A. Puzycki, PLLC

Address 380 Garden Avenue

City Holland State MI Zip Code 49424

Phone Number 616.738.8800 Fax Number 616.738.8801

E-mail address kapuzycki@puzycki.com

Attach Additional Sheets as Required

Name of Case *In re Cliffman Estate* Court of Appeals Case no: 321174

Parties Involved Elmer Carter, Philip Carter, David Carter and Douglas Carter (step-sons of the decedent) v. Betty Woodwyk and Virginia Wilson (sisters of the decedent)

Current Status Appeal and Cross-appeal have been filed, appellants' brief (in chief) has been filed, awaiting Appellees' briefs

Deadlines Appellees' reply brief is due June 5, 2014. Appellees' brief on their cross-appeal is due June 13, 2014, and Appellants' reply brief will be due 28 days after Appellees have filed their brief

Issue(s) Presented Whether the Wrongful Death Act permits all step-children to file claims for a portion of the wrongful death proceeds arising out of a step-parent's death, or whether such claims are limited only to those step-children whose biological parent is living at the time of the step-parent's death.

Michigan Statute(s) or Court Rule(s) at Issue MCL 600.2922 – Wrongful Death Act

Common Law Issues/Cases at Issue *In re Combs*, 257 Mich App 622; 669 NW2d 313 (2003); cert denied 469 Mich 1021; 678 NW2d 440 (2004)

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? This case has very far-reaching effects for every family where a step-parent/step-child relationship exists. The current published case law *(Combs)* prohibits step-children from filling claims for wrongful death proceeds if their biological parent has pre-deceased the step-parent. This is exactly what the legislature wanted to avoid when it amended the Wrongful Death Act in 1985. The legislative history is unambiguous on this issue. The transcript of Joe Buttiglieri's testimony at the legislative committee hearings bear this out. However, the only published case on the issue, *In re Combs*, 257 Mich App 622; 669 NW2d 313 (2003); cert denied 469 Mich 1021; 678 NW2d 440 (2004), holds that in order for a step-child to file a claim, the decedent's spouse must be living. This is inconsistent with the legislative history, and should be overruled.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? In today's society, many, if not most, families involve at least one "re-marriage." Sometimes those re-marriages are the results of death, divorce, etc. Some such re-marriages, such as in the case on appeal, occur early in life, when one spouse has minor children. Not surprisingly, many of those re-marriage situations create very close and lasting relationships between the step-parent and step-children. These types of relationships are exactly what the Wrongful Death Act was designed to provide relief for when step-children were added to that statute in 1985. In the event that a step-parent dies, ALL step-children should have the right to file a claim for the loss of a step-parent. Under *Combs*, a whole class of step-children is being left out. This does not mean that such step-children will receive a portion, but they should be allowed to file a claim, and to prove that they had a relationship with the step-parent sufficient to establish a compensable loss.

ATTACHMENT D

SECTION ADVOCACY RECOMMENDATIONS

As voluntarily-funded entities, Sections of the State Bar are not subject to the same constraints as the State Bar itself, but the Task Force nevertheless makes several recommendations concerning Section advocacy.

Recommendations:

1. Sections should be allowed to engage in ideological, but not partisan, activities using voluntary dues money.
2. Sections should be free to engage in legislative or executive branch advocacy, but must do so by creating a separate entity not identified in any way with State Bar.
3. Legislative advocacy done by the Section's separate entity should not be subject to the current elaborate reporting requirements of AO 2004-1, but the separate entity must still report its positions to the State Bar, to ensure compliance with the requirements of the Supreme Court rules and orders and the State Bar bylaws.
4. The State Bar should not subsidize any non-*Keller*-permissible activities of Sections.
5. The State Bar may collect voluntary dues for Sections' legislative or executive branch activities as long as the Sections pay the cost of collection activities.
6. Section advocacy information hosted on Section webpages on the State Bar website should be accessible only to Section members.
7. Sections should be allowed to use the State Bar building and facilities on the same terms as all other lawyer groups, but should reimburse the State Bar for special services that may support non-*Keller*-permissible activities provided by the State Bar.
8. The State Bar should conduct annual mandatory training for Section officers on compliance with these requirements.

Rationale: Sections of the State Bar enhance the quality of legal services in Michigan by providing members with educational and networking opportunities in specific practice areas. The State Bar provides the administrative infrastructure for all Sections – collecting dues and maintaining membership databases – and offers other support services at cost. Three sections – the Young Lawyers Section, the Judicial Section, and the Master Lawyers Section – are supported by mandatory State Bar dues. The operations of all other Sections are funded through voluntary member dues. There are approximately 35,000 voluntary paid Section memberships. If their membership is voluntary, Sections are not subject to the restrictions of *Keller* in the use of their members' dues. But because of the risk that Sections' advocacy will be mistaken for the advocacy of the State Bar itself, Michigan and other mandatory bar states subject sections to requirements intended to distinguish the Sections' activities from those of the State Bar itself. These requirements have not been sufficiently successful in eliminating confusion or preventing the misidentification of Section advocacy with the advocacy of the State Bar. We believe the approach we recommend can overcome the problem of misidentification.

ATTACHMENT E

TAX NUGGET
June, 2014

Treasury has issued final regulations (Regulation Section 1.67-4, 5/8/2014) on the trust/estate expenses that escape the 2% AGI floor for miscellaneous itemized deductions.
Proposed regulations were issued in 2007 indicating that costs were not deductible unless they were unique to the estate or trust. Questions subsequently arose about the deduction of investment fees, particularly bundled fees, and IRS issued new proposed regulations in 2011 (Prop Reg section 1.67-4).

The final regulations do not change those proposed regulations but indicate that some expenses may be fully deductible under code sections 62(a)(4), 162, and 164(a) and add some clarification.

Certain tax return fees are not subject to the 2% floor: estate and generation skipping transfer tax returns, fiduciary income tax returns, and the decedent's final income tax return.

Investment fees are subject to the 2% floor unless the extra amount of the fee that is generally charged to an individual investor is attributable to an unusual investment objective of the trust or estate or specialized balancing of the interest of various parties. If so the extra fee would not be subject to the 2% floor.

Appraisal fees used by an estate or trust to determine the fair market value of assets as of the decedent's date of death, to determine the value for the purpose of making distributions or as required to properly prepare estate, generating skipping or trust tax returns are not subject to the 2% floor.

The regulations list fiduciary expenses such as probate court fees and costs, fiduciary bond premiums, legal publication costs of notices, certified copies of decedent's death certificates cost, and costs related to fiduciary accounts which are not subject to the 2% floor.

The regulations are effective for tax years that begin on or after May 9, 2014. Calendar year trusts and estates who make payments of bundled costs by December 31, 2014 can take advantage of the "safe harbor" provided by Notice 2011-37.

Lorraine New
George W. Gregory PLLC
Troy, MI
(248) 647-5700

ATTACHMENT F

SBM STATE BAR OF MICHIGAN

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

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

www.michbar.org

PROBATE & ESTATE PLANNING SECTION

July 18, 2014

Honorable Robert P. Young, Jr., Chief Justice
And Justices of the Michigan Supreme Court
Office of Administrative Counsel
P.O. Box 30052
Lansing, MI 48915

Submitted by email to ADMcomment@courts.mi.gov

Re: Response of the Council of the Probate and Estate Planning Section of the State Bar of Michigan to the Supreme Court Task Force Report on the Role of the State Bar of Michigan ("Report")

Dear Chief Justice and Justices of the Michigan Supreme Court:

As the current chair and chair-elect, and on behalf of the elected Council of the Probate & Estate Planning Section ("Section") of the State Bar of Michigan ("SBM"), we appreciate the opportunity to respond with respect to two of the five major recommendations in the Report including:

Recommendation 1: Continue the State Bar as a Mandatory Bar,[1] and

Recommendation 2: Section Advocacy recommendations 1 through 8.[2]

With respect to Recommendation 1, our Council supports the continuation of the mandatory bar. On February 15, 2014, the Council approved a public policy statement opposing SB 0743 that would eliminate the mandatory bar.

With respect to the Section Advocacy recommendations numbered 1 through 8 under Recommendation 2, we believe the premise underlying recommendations 1 and 2 is faulty. While the Task Force acknowledges that the sections are "...voluntarily-funded entities..." and "...are not subject to the same constraints as the State Bar itself..."[3], it expresses a concern about section

[1] Report, pp. 5-7.
[2] Report, pp. 13-14.
[3] Report, p. 13.

advocacy "...because of the risk that [s]ections' advocacy will be mistaken for the advocacy of the State Bar itself...."[4] First, the public policy statements reflecting the majority opinion of the 23-member Council are published on the Section's website and clearly identified as Section statements only. Second, one of the two principal functions of this Section is to analyze and comment on issues unique to the Section's expertise. There are less intrusive ways to make it abundantly clear that any published statement is not that of the SBM membership as a whole. Unfortunately, there are no recitations in the Report of occasions when section statements were misconstrued as SBM statements. It is difficult to address a speculative problem.

Also, the assumption that section advocacy abridges a section member's First Amendment right is flawed. As the Task Force acknowledges, sections are voluntary organizations under the umbrella of the State Bar. State Bar members are not compelled to join any particular section. Every section member receives notice and an opportunity to be heard at monthly Council meetings.

Clearly, the Council performs a valuable public service that is not available otherwise. The Section's mission statement is clear that the Section's purpose "...is to enhance and improve the practice and administration of law pertaining to probate and estate planning...."[5] Therefore, in the last two years, the Section through its Council and its committees actively involved itself in the drafting, introduction and passage of nine separate bills. The Section retains a lobbyist to communicate with the Legislature. Five years ago, the Legislature approved a massive codification of Michigan trust law following six years of drafting by the Section involving thousands of hours of volunteer time. In addition to the foregoing efforts, each year the Council reviews numerous other bills related to probate and estate planning and often offers suggestions to the bill sponsors. The Council is also asked from time to time to file amicus curiae briefs by counsel or the appellate courts on important legal issues before the judiciary. The Council also regularly reviews and suggests changes to court rules and court forms to improve the administration of probate and estate planning law. Our advocacy puts our words into observable actions that enhance and improve the practice and administration of Michigan law. The voluntary dues of the Section members support our Section's mission statement that we will advocate for

[4] Report, p. 14.
[5] Probate and Estate Planning Mission Statement contained in its Bylaws

improvements in the laws, court rules and court forms that impact probate and estate planning in Michigan.

The Michigan Legislature does not have the time, expertise or focus to benefit Michigan probate and estate planning in the manner that we do. The Council calls upon attorneys in the Section, many of whom are highly experienced and have specialized knowledge to assist in its drafting and advocacy functions. These efforts serve a critical function for legislators who lack our specialized knowledge or experience. Our work is credible, reliable and informed. It is a valuable service to the public good.

Turning to Section Advocacy recommendation 2 under Recommendation 2, the Task Force proposes that sections create "...a separate entity not identified in any way with the State Bar." In fact, a separate entity would create greater confusion and misunderstanding about what such an entity is and whom it represents.

Under recommendation 3 of Recommendation 2, the Task Force suggests treating such a separate entity as a quasi-SBM entity to ensure compliance with SBM rules and bylaws. However, compliance with SBM rules and regulations is the same role now filled by the sections. It is confusing as to what type of *legal* entity this quasi-SBM entity would be. What are the tax and regulatory reporting requirements of such an organization? The current identification of a public policy statement of a section is actually *more* transparent and *less* confusing than the proposed solution of using a quasi-SBM entity to make public policy statements for a section. For clarity reasons alone, we believe sections should retain the ability to advocate public policy positions as is presently done.

With respect to recommendations 3 through 8 of Recommendation 2 regarding Section Advocacy, we have the following comments:

We do not find the reporting requirement of AO 2004-1 burdensome, but do not oppose efforts to improve them as long as the sections can continue their legislative advocacy. (3)

We do not oppose any efforts to eliminate any subsidy for non-Keller permissible activities of sections. (4)

We do not oppose having the State Bar collect voluntary section dues and the charging of the sections for the cost of collecting such dues. (5)

We do not believe that access to advocacy-related information on section websites should be restricted to section members as long as there is a disclaimer that the advocacy is by the section and not the State Bar. (6)

We do not oppose reimbursing the State Bar for special services while using the State Bar building and facilities that may support non-Keller permissible activities. (7)

We do not oppose annual mandatory training for section officers on compliance with reasonable requirements implementing the concerns expressed in recommendations 3 through 8 above. (8)

We believe that the present advocacy practices of this Section are compliant with Keller, since our membership is voluntary, all members are free to attend our monthly meetings, our public policy statements are published on our website, are identified as issued by this Section, and are available to all Section members. We are supportive of public disclosure of our public policy statements and a disclaimer that those statements are not the position of the State Bar. Our efforts to improve the laws and administration of justice of probate and estate planning matters are an important public service and should be permitted to continue.

Respectfully submitted,

Thomas F. Sweeney, Chair

Amy N. Morrissey, Chair-Elect

"A problem well put is half solved."

-- John Dewey

cc: Brian D. Einhorn, President, State Bar of Michigan
Council Members of the Probate and Estate Planning Section

ATTACHMENT 5

Probate and Estate Planning Section of the State Bar of Michigan

Pursuant to Article IX of the bylaws of the Probate and Estate Planning Section of the State Bar of Michigan, the Council has recommended that certain amendments be adopted by a vote of the section at its 2014 annual meeting on Saturday, September 6. The recommendations from the Council include modernizing the bylaws, allowing probate registers and probate court administrators to become members of the section at no charge while they are serving in their respective capacities, clarifying the terms of the officers and Council members, allowing more extensive use of electronic communication, changing the procedure for amending the bylaws, and making other clarifications to the section bylaws. Questions regarding the Council recommendations may be directed to Nancy H. Welber at (248) 932-1230 or nhwelberpc@gmail.com.

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

ARTICLE I NAME AND PURPOSE

SECTION 1.1 NAME. This Section ~~shall be~~is known as the Probate and Estate Planning Section of the State Bar of Michigan.

SECTION 1.2 PURPOSE. The purpose of this Section ~~shall be~~is to enhance and improve the practice and administration of law pertaining to probate; trust and estate planning ~~by the study of statutes, cases~~, and ~~procedures, by the consideration, drafting, and active support or opposition of proposed legislation, by the providing of advice to courts during the course of pending litigation, and by the sponsoring of meetings and institutes (together with publishing and disseminating pamphlets, brochures, a Journal of the Section and legal writings) as a means of educating members of the Bar and the public, all 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~~; guardianships and conservatorships (including planning ~~for the orderly disposition of property, minimization of taxes, and well being of persons.~~alternatives); and tax planning.

ARTICLE II MEMBERSHIP

SECTION 2.1 SECTION MEMBERSHIP FOR MEMBERS OF THE STATE BAR OF MICHIGAN. Active, inactive, law student, affiliate, and emeritus members of the State Bar of Michigan may become members of the Section by paying to the Section dues in an amount as may be determined from time to time by the Council, and ~~shall~~will then become members of the Section for the current fiscal year. Thereafter, dues ~~shall be~~are payable in advance at the beginning of the fiscal year of the State Bar of Michigan. Any member of the Section whose annual dues ~~shall be~~are more than six months past due ~~shall~~will cease to be a member of this Section. Members enrolled and whose dues are paid ~~shall~~ constitute the membership of the Section. All lawyers admitted to practice in Michigan ~~shall be~~are considered members of the Section until the end of the fiscal year of the State Bar of Michigan following the year of their admission to practice and ~~shall~~are not ~~be~~ required to pay dues until after that time.

~~**SECTION 2.** Only active members of the State Bar of Michigan who are members of the Section shall be eligible to vote or hold office.~~

SECTION 2.2 SECTION MEMBERSHIP BY PROBATE REGISTERS AND PROBATE COURT ADMINISTRATORS. All Probate Registers and Probate Court Administrators are entitled to membership in the Section and any requirement to pay Section dues is waived. Membership in the Section under this Section 2.2, including the waiver of dues, will continue until a member under this Section 2.2 no longer serves as a Probate Register or Probate Court Administrator. If a Probate Register or Probate Court Administrator is a lawyer, then he or she will have the benefits of membership afforded to Section members who are lawyers. If a Probate Register or Probate Court Administrator is not a lawyer, then he or she will have the benefits of membership afforded to non-lawyer members of the Section.

SECTION 2.3 ELIGIBILITY TO VOTE; COUNCIL PARTICIPATION. Only lawyers who are active members of the State Bar of Michigan and who are members of the Section are eligible to vote on any matter before the Section or to be elected as members or officers of the Council.

SECTION 2.4 INVITED GUESTS. Without a vote of the Council, the chairperson may invite guests who are not Section members to address one or more Council meetings from time to time concerning issues that the Chairperson believes will assist the Council in its consideration of particular issues that are before the Council.

ARTICLE III COUNCIL AND OFFICERS

SECTION 3.1~~:~~ NUMBER OF MEMBERS AND OFFICERS. There ~~shall be~~is a Council of the Section consisting of the Chairperson, Chairperson-Elect, Vice-Chairperson, Secretary and a Treasurer, together with 18 other members to be elected as ~~hereinafter~~ provided below. Past Chairpersons ~~shall~~ also automatically remain as ex-officio members of the Council so long as they maintain membership in the Section. However, ~~past Chairpersons shall not be~~ex-officio members of the Council are not included in determining whether a quorum is present at any meeting and they ~~shall~~ have no right to vote on matters brought before the Council.

SECTION 3.2~~.~~ ELECTION OF OFFICERS. The Chairperson, Chairperson-Elect, Vice-Chairperson, Secretary and Treasurer ~~shall~~will be nominated and elected in the manner ~~hereinafter~~ provided in the following sections at each annual meeting of the Section ~~to~~. Each officer,

other than the Chairperson, will hold office for a term commencing at the beginning ~~at~~of the ~~close of~~Section's fiscal year following the annual meeting of the Section at which ~~they have been~~the officers are elected, and ending at the close of the next succeeding ~~annual meeting~~fiscal year of the Section, and until their successors ~~shall~~ have been elected and qualified. The Chairperson's term will automatically commence after the close of the annual meeting of the Section at which the Chairperson is elected and qualified or automatically succeeds to the office of Chairperson, as provided in Section 4.2.3.

SECTION 3.3 ~~Subject to the provisions of the next sentence, six~~ ELECTION OF COUNCIL MEMBERS. Six members of the Council ~~shall~~will be elected at each annual meeting of the Section for terms of three years. ~~At the annual meeting in 2004 only, eight member of the council shall be elected, six of whom shall serve terms of three years, one of whom shall serve a term of two years, and one of whom shall serve a term of one year. (~~"Year" as ~~herein~~ used in these Bylaws means a term beginning ~~at~~on the ~~close~~first day of the ~~annual meeting at which~~fiscal year of the ~~Council member shall have been elected~~Section and ending ~~at~~on the ~~close~~last day of the ~~succeeding annual meeting~~fiscal year of the Section~~.)~~.

SECTION ~~4. No~~3.4 TERM LIMITS FOR COUNCIL MEMBERS. A person ~~shall be~~is not eligible for election other than as an officer if he~~/~~ or she has served without interruption for six consecutive years immediately preceding the term for which the election is held.

SECTION 3.5~~. No~~ TERM LIMITS FOR OFFICERS. A person who has served as Chairperson, Chairperson-Elect, Vice-Chairperson, Treasurer or Secretary without interruption for 2 consecutive terms ~~shall be~~is not eligible for election to that office.

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

ARTICLE ~~IV~~4
ELECTIONS

SECTION 4.1~~:~~ NOMINATIONS.

4.1.1 Nominating Committee. The Nominating Committee ~~shall~~will submit nominations to the Section for the offices of Chairperson, if needed, Chairperson-Elect, Vice-Chairperson, Secretary, Treasurer and members of the Council, to succeed those whose terms will expire at the close of the ~~forthcoming~~ fiscal year following the annual meeting of the Section at the regular meeting of the Council prior to the annual meeting of the Section, and to fill vacancies for unexpired terms existing at the time of such report at any other regular meeting of the Council~~.~~. The Nominating Committee ~~shall~~will continue to function as needed and report nominations to the Council to fill vacancies in the office of an officer or member of the Council in accordance with ~~Article VI, Section~~ Section 6.3. The Nominating Committee ~~shall~~will consist of the three immediately past Chairpersons of the Section, unless ~~such~~the committee ~~shall be~~is otherwise appointed by the Chairperson and the Chairperson-Elect.

4.1.2 Close of Nominations. All nominations, including nominations from the floor, for the offices of Chairperson, if the Chairperson-Elect has given notice as provided in Section 4.2.3 that he or she will not serve as chair or there is otherwise a vacancy in the office of the Chairperson, Chairperson-Elect, Vice Chairperson, Secretary, Treasurer and members of the Council, to succeed to those whose terms will expire at the close of the fiscal year following the forthcoming annual meeting of the Section, or at the close of the forthcoming annual meeting of the Section in the case of the Chairperson, will be made at the regular meeting of the Council prior to the annual meeting of the Section.

SECTION ~~2. ELECTIONS~~4.2 ELECTION PROCEDURES.

4.2.1 Vacancies. When there is only one candidate nominated for a vacancy, that election ~~shall~~will be held by voice vote at the meeting during which the nomination has been made. When there is more than one candidate nominated, the election ~~shall~~will be held at the next regular council meeting where the Chairperson may conduct that election by voice vote, or may direct another method of conducting the election, such as a show of hands, paper ballot or other method. This section 4.2.1 does not apply to interim vacancies as described in section 6.3.

4.2.2 Annual Meeting. ~~All nominations, including nominations from of the floor, for~~Section. Except as provided in Sections 4.1.2 and 4.2.1, the election for the offices of Chairperson~~;~~ (if the Chairperson-Elect has given notice as provided in Section 4.2.3 that he or she will not serve as chair or there is otherwise a vacancy in the office of the Chairperson), Chairperson-Elect, Vice Chairperson, Secretary, Treasurer and members of the Council, ~~to succeed to those whose terms will expire at the close of the forthcoming annual meeting shall be made at the regular meeting of the Council prior to the annual meeting. The election for such offices and Council members shall~~will be held at the annual meeting of the Section, where the Chairperson may conduct that election by voice vote, or may direct another method of conducting the election, such as a show of hands, paper ballot or other method.

4.2.3 Automatic Succession of Chairperson-Elect. Unless the Chairperson-Elect gives written notice to the Chairperson before the regular meeting of the Council prior to the annual meeting of the Section, the Chairperson-Elect will automatically succeed to the office of the Chairperson after the close of the Annual Meeting of the Section.

ARTICLE ~~V~~5
DUTIES OF OFFICERS

SECTION 5.1~~:~~ CHAIRPERSON. The Chairperson ~~shall preside~~presides at all meetings of the Section and of the Council. The Chairperson

~~shall~~will formulate and present at each Annual Meeting of the State Bar of Michigan a report of the work of the Section for the ~~then~~ past year. The Chairperson ~~shall~~ will perform ~~such~~ other duties and acts as usually pertain to ~~such officer's~~the Chairperson's office.

SECTION 5.2. CHAIRPERSON-ELECT. Upon the death, resignation or during the disability of the Chairperson, or upon ~~such officer's~~his or her refusal to serve, the Chairperson-Elect ~~shall~~will perform the duties of the Chairperson for the remainder of the Chairperson's term except in the case of the Chairperson's disability and then only during so much of the term as the disability continues. The Chairperson-Elect ~~shall~~ automatically ~~succeed~~succeeds to the office of the Chairperson ~~the day~~ after the close of the annual meeting ~~succeeding~~of the ~~annual meeting~~Section at which the Chairperson-Elect is elected.

SECTION 5.3. VICE-CHAIRPERSON. Upon the death, resignation, or during the disability of both the Chairperson and the Chairperson-Elect, or upon the refusal of both to serve, the Vice-Chairperson ~~shall~~will perform the duties of the Chairperson and the Chairperson-Elect until either of them is again able to serve in such officer's elected capacity, to the end of the termination of the respective terms of each.

SECTION 5.4. SECRETARY. The Secretary ~~shall be~~is the custodian of all books, papers, documents, and other property of the Section except money. ~~Such officer shall keep~~The Secretary keeps a true record of the proceedings of all meetings of the Section and of the Council. ~~With~~Along with the Chairperson, ~~such officer shall~~the Secretary will prepare a summary or digest of the proceedings of the Section at its annual meeting for publication in the Annual Report of the State Bar of Michigan, after approval by the Commissioners of the State Bar of Michigan. The Secretary, along with the appropriate Section committee chair and personnel from the State Bar, will review and maintain the Section webpages on the State Bar website. The Secretary, in conjunction with the Chairperson, as authorized by the Council, attends generally to the business of the Section. ~~Commissioners of the State Bar of Michigan. Such officer, in conjunction with the Chairperson, as authorized by the Council, shall attend generally to the business of the Section.~~

SECTION 5.5 TREASURER. The Treasurer reports regularly on the finances of the Section to the Council and to the State Bar of Michigan. The Treasurer is not responsible for the Section funds but will transmit a financial report for presentation to the membership of the Section annually. The officer of the State Bar of Michigan designated for such purpose will be the custodian of all funds and will keep a record of all monies received and disbursed and report ~~thereon~~ on the status of the funds to the Council or Treasurer ~~of the Section~~ whenever requested. ~~The Treasurer~~ Payment of expenses by the Section ~~shall not~~, before being paid, must be ~~responsible for such funds but shall transmit a financial report for presentation to the membership~~approved by the Treasurer, except those of the ~~Section annually. **SECTION 6. TREASURER.** The~~ Treasurer ~~shall~~, which must be approved by the Chairperson or the Chairperson-Elect, or otherwise as the Council directs, and checks for all disbursements will be signed by the officer of the State Bar of Michigan designated for such purpose. The Treasurer will sign any application for, and execute, any bond as may be requested by any officer of the Section and/or member of the Council pursuant to any resolution ~~duly~~ adopted for any bond for the purpose of protecting the monies of the Section. Any cost or premium for ~~such~~the bond, however, ~~shall~~will not be borne by the Treasurer, but ~~shall~~will be an expense of the Section and paid from the funds of the Section. ~~The Treasurer shall submit a financial report regularly~~.

ARTICLE ~~VI~~6
DUTIES AND POWERS OF THE COUNCIL

SECTION 6.1 IN GENERAL. The Council ~~shall have~~has general supervision and control of the affairs of the Section subject to the Supreme Court Rules Concerning the State Bar of Michigan and the Bylaws of the State Bar of Michigan and the Bylaws of the Section. ~~It shall authorize~~The Council authorizes all commitments or contracts which ~~shall entail~~require the payment of money and ~~shall authorize~~authorizes the expenditure of all monies appropriated for the use or benefit of the Section.

SECTION 6.2 COMMITTEES. The Council may authorize the Chairperson, with the Chairperson-Elect, to appoint committees and their chairpersons from Section members to perform such duties and exercise such powers as the Council may direct. The Chairperson, on direction from the Council, ~~shall~~will remove any chairperson or member from such committees and fill vacancies on such committees created by removal or resignation.

SECTION 6.3 FILL INTERIM VACANCIES. The Council, during the interim between annual meetings of the Section, may fill vacancies in its own membership or in the offices of the Vice-Chairperson, Secretary or Treasurer, or, in the event of a vacancy in both the office of Chairperson and Chairperson-Elect, then in the office of Chairperson. Members of the Council and officers ~~shall~~, other than the Chairperson, serve until the close of the fiscal year of the Section. The Chairperson serves until the close of the next annual meeting of the Section~~, at which the~~. The vacancies ~~shall be~~are filled for the remainder of their respective terms by a special election conducted concurrently with the regular elections as provided in Article ~~IV herein~~4.

SECTION 6.4 QUORUM. A quorum of the Council ~~shall consist~~ consists of a majority of the ~~officers and elected~~voting members~~.~~ of the Council then in office. A quorum being present, the Council ~~shall act~~acts on the affirmative vote of a majority of those present at any meeting.

SECTION 6.5. ~~Members~~ VOTING PROCEDURES. A member of the Council, when ~~personally~~ present at a meeting of the Council, ~~shall vote~~votes in person or electronically, but when absent may communicate ~~their~~his or her vote, in writing, upon any proposition, to the Secretary and have it counted, with the same effect as if cast personally at ~~such~~the meeting.

SECTION 6.6 PRESENCE AT A MEETING. A member will be deemed "present" at a meeting if the member is physically in attendance at

the meeting or participates in the meeting by electronic communication. For purposes of this Article 6, "electronic communication" means any form of communication designed to allow a person to attend a meeting from a remote location, as long as the member's presence is identified, all participants are advised of the communications equipment, and all in-person attendees and attendees at any remote location are able to communicate effectively with each other.

SECTION 6.7 WRITTEN VOTE. The Chairperson of the Section at any time may, and upon the request of any member of the Council ~~shall~~will, submit or cause to be submitted in writing, to each of the members of the Council, any proposition upon which the Council may be authorized to act, and the members of the Council may vote upon such proposition or propositions so submitted, by communicating their vote ~~thereon~~on the proposition, in writing over their respective signatures, to the Secretary, who ~~shall~~will record ~~upon~~in his or her minutes each proposition so submitted, when, how, at whose request ~~same~~the proposition was submitted, and the vote of each member of the Council ~~thereon~~on the proposition, and keep on file ~~such~~the written and signed votes. If the recorded votes of a majority of the members of the Council ~~shall be~~are in favor of ~~such~~the proposition, or if ~~such~~a majority ~~shall be~~is against ~~such~~the proposition, ~~such~~the majority vote ~~shall constitute~~constitutes the binding action of the Council. A submission by the Chairperson or a vote by the members by email or other electronic means is deemed to be in writing.

SECTION ~~7~~6.8 MEETINGS. The Council ~~shall~~will designate the time and place of its regular meetings. Special meetings may be called upon notice by the Chairperson or upon written request to the Secretary of any 5 members of the Council. Council and committee meetings may be held by ~~a telephone conference or by other similar communications equipment through which all persons participating in the meeting may communicate with the other participants. All participants will be advised of the communications equipment, and the names of the participants in the conference will be divulged to all participants. Such participation will constitute presence in person at the meeting~~electronic communication. A regular meeting will not take place during the annual meeting of the State Bar of Michigan, unless it is held in conjunction with the annual meeting of the State Bar.

SECTION ~~8~~6.9 ABSENCES Any member of the Council (except Past Chairpersons) who ~~shall be~~are absent without having been excused by the Chairperson at three ~~consecutive~~ meetings of the Council ~~shall be deemed to have resigned~~during a year may be removed at the discretion of the Chairperson and the vacancy ~~thereby~~ created ~~shall~~by the member's removal will be filled by the Council. The "year" for this purpose begins on the first day of the fiscal year of the Section and ends on the last day of the fiscal year of the Section.

SECTION ~~9~~6.10 POWERS OF THE COUNCIL. The powers of the Council ~~will~~ include the power to act to further the purposes of the Section, including the power to consider, draft, and actively support or oppose proposed legislation through committees or agents consistent with the Bylaws of the State Bar of Michigan. The Council has the additional powers to consider, draft, and actively support or oppose proposed court rules; to further Section efforts to provide advice to courts during the course of pending litigation and sponsor meetings and institutes (together with publishing and disseminating information in print or online) as a means of educating the Bar and the public concerning the role of estate planning, guardianships and conservatorships (including planning alternatives), tax planning, trust planning and administration, and probate.

ARTICLE ~~VII~~7
SECTION MEETINGS

SECTION 7.1: ANNUAL MEETING OF THE SECTION. The annual meeting of the Section ~~shall~~will be held ~~during the Annual Meeting of the State Bar of Michigan,~~ in ~~the same city or place as such Annual Meeting of the State Bar of Michigan, or~~ September of each year at ~~such other~~a place and time as ~~may be~~ arranged by the Council, with ~~such~~the program and order of business as ~~may be~~ arranged by the Council. The annual meeting of the Section may not take place during the annual meeting of the State Bar of Michigan, unless it is held in conjunction with the annual meeting of the State Bar.

~~**SECTION 3.**~~
SECTION 7.2 SPECIAL MEETINGS. Special meetings of the Section may be called by the Chairperson upon the approval of the Council at a time and place as the Council may determine. A special meeting may not take place during the annual meeting of the State Bar of Michigan, unless it is held in conjunction with the annual meeting of the State Bar.

SECTION 7.3 QUORUM. The members of the Section present at any meeting ~~shall~~ constitute a quorum for the transaction of business.

ARTICLE ~~VIII~~8
MISCELLANEOUS PROVISIONS

SECTION 8.1 FISCAL YEAR. The fiscal year of the Section ~~shall be~~is the same as that of the State Bar of Michigan.

~~**SECTION 2.** All bills incurred by the Section before being paid shall be approved by the Treasurer, except those of the Treasurer, which shall be approved by the Chairperson or the Chairperson elect, or otherwise as the Council shall direct, and checks for all disbursements shall be signed by an officer of the State Bar of Michigan, or someone designated by the State Bar Commissioners.~~
SECTION 8.2 COMPENSATION. No salary or compensation will be paid to any officer, Council member, or member of a committee for fulfilling his or her duties to the Section and the Council. Authorization to compensate an officer or Council member for a service to the Section by the officer or Council member or his or her law firm or other organization that is not defined by the Section's bylaws as a duty of an officer, Council member, or Section member requires a two-thirds vote of the Council. The person to be compensated, or the person whose firm or other organization is to be compensated,

may not participate in the vote. The vote must be recorded in the minutes of the meeting, and the minutes must be made available on the Section's website.

SECTION 8.3 WHEN EFFECTIVE.

~~**SECTION 3.** No salary or compensation shall be paid to any officer, councilor or member of a committee.~~ ~~**SECTION 4.**~~ These Bylaws ~~shall~~ become effective upon ~~the~~their approval ~~thereof~~ by the Commissioners of the State Bar of Michigan and by the Section in the same manner provided in Article ~~IX~~9 for their amendment.

SECTION ~~5~~8.4 PRINTING. All printing for the Section or for the Council or any committee of the Section ~~shall be~~is done under the supervision of the Executive Secretary of the State Bar of Michigan.

ARTICLE ~~IX~~9 AMENDMENTS

SECTION 9.1 PROCEDURE. These Bylaws may be amended at any ~~annual~~ meeting of the Section at which a quorum is present, by a ~~majority~~two-thirds (2/3) vote of the members of the Section present and voting, provided such proposed amendment ~~shall~~has first ~~have~~ been submitted to the Council for its recommendation~~, further, that no~~. No amendment so adopted shall become effective until approved by the Board of Commissioners of the State Bar of Michigan.

SECTION ~~2.~~9.2 PROPOSED AMENDMENTS. Any proposed amendment ~~shall~~must be submitted in writing to the Council ~~in the form of a motion by an officer or member of the Council or by a petition by~~ by at least ~~10 other~~three (3) members of the Section. The Council ~~shall~~will consider the proposed amendment and ~~shall~~if it is approved by Council, the Council will prepare recommendations ~~thereon which recommendations, together with~~, and provide to members of the Section a complete and accurate text of ~~said~~the proposed amendment~~, shall be published in the Michigan Bar Journal or the Journal of the Section~~ at least ~~15~~thirty (30) days prior to the ~~annual~~ meeting of the Section at which it is to be ~~voted upon~~considered. Notice of the proposed amendment may be communicated in writing by in-person delivery, first-class mail, electronic mail, facsimile, publication in the Michigan Bar Journal, or by any other means reasonably likely to provide adequate written notice, including any form of notice authorized by the State Bar of Michigan.

Adopted September 14, 1955
Amended 10/14/94
Amended 9/22/00
Amended 9/27/02
Amended 9/15/03
Amended 7/23/04 Effective 9/11/04 Amended 1/21/05
Dues increase effective 6/9/06
Dues increase effective 6/19/07

ATTACHMENT 6

CSP Agenda – Probate and Estate Planning Council

September 6, 2014

9:00 a.m.

1. Fiduciary Access to Digital Assets – Meg Lentz (Exhibit A)
    - Revised proposed legislation
    - Black-line from last version
    - Uniform Law Commissions' final draft
2. Status of Separate Trustee Proposal
3. Future Projects for CSP

EXHIBIT A-1

FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This act may be cited as the Michigan Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this act:

(1) "Account holder" means:

(a) a person that has entered into a terms-of-service agreement with a custodian; and

(b) a fiduciary for a person described in subsection (1)(a).

(2) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(3) "Carries" means engaging in the transmission of electronic communications.

(4) "Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) "Conservator" means a person that is appointed by a court to manage all or part of the estate of a protected individual. The term includes a limited conservator.

(6) "Content of an electronic communication" means information not readily accessible to the public concerning the substance or meaning of an electronic communication.

(7) "Court" means the probate court or, when applicable, the circuit court.

(8) "Digital asset" means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

(9) "Digital custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(10) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(11) "Electronic communication" means a digital asset stored by an electronic communication service or carried or maintained by a remote-computing service. The term includes the catalogue of electronic communications and the content of an electronic communication.

(12) "Electronic communication service" means a digital custodian that provides to the public the ability to send or receive an electronic communication.

(13) “Fiduciary” means each person who is an original, additional, or successor personal representative, conservator, agent, or trustee.

(14) “Governing instrument” means a will, a trust, an instrument creating a power of attorney, or other dispositive or nominative instrument.

(15) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(16) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(17) “Personal representative” has the meaning as stated in MCL 700.1106(o).

(18) “Power of attorney” means a record that grants an agent authority to act in the place of a principal.

(19) “Principal” means an individual who grants authority to an agent in a power of attorney.

(20) “Protected individual” includes a protected individual as defined in MCL 700.1106(v); a legally incapacitated individual as defined in MCL 700.1105(i); a minor for whom a guardian has been appointed but no conservator has been appointed; and a developmentally disabled person as defined in MCL 330.110a(25).

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

(22) “Remote-computing service” means a digital custodian that provides to the public computer processing services or storage of digital assets by means of an electronic communication system, as defined in 18 U.S.C. Section 2510(14).

(23) “Terms-of-service agreement” means an agreement that controls the relationship between an account holder and a digital custodian.

(24) “Trustee” has the meaning stated in MCL 700.1107(o).

(25) “Will” has the meaning stated in MCL 700.1108(b).

SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL ASSETS OF A DECEDENT.

(a) Subject to Section 7(b) and unless otherwise provided by the court or the will of a decedent, a personal representative of the decedent has the right to access:

(1) the content of an electronic communication sent or received by the decedent if the electronic communication service or remote-computing service is permitted to

disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the decedent; and

(3) any other digital asset in which the decedent has a right or interest.

(b) A person interested in an estate as defined in MCL 700.1105(c) may file a petition in the court for an order to limit, eliminate, or modify the personal representative's power over the decedent's digital assets. On receipt of a petition under this subsection, the court shall set a date for a hearing on the petition. The hearing date shall not be less than 14 days and not more than 56 days after the date the petition is filed.

SECTION 4. ACCESS BY CONSERVATOR TO DIGITAL ASSETS OF A PROTECTED INDIVIDUAL.

(a) The court, after an opportunity for a hearing, may grant a conservator the right to access:

(1) the content of an electronic communication sent or received by the protected individual if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the protected individual; and

(3) any other digital asset in which the protected individual has a right or interest.

(b) In granting to a conservator the right to access under subsection (a), the court shall consider:

(1) the intent of the protected individual with respect to the access granted to the extent that intent can be ascertained; or

(2) whether granting access to a conservator is in the protected individual's best interest.

SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS.

(a) To the extent a power of attorney grants authority to an agent over the content of an electronic communication of the principal, the agent has the right to access the content of an electronic communication sent or received by the principal if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended.

(b) Except as provided in subsection (a) and unless otherwise provided by a power of attorney or the court, an agent has the right to access:

(1) the catalogue of electronic communications sent or received by the principal; and

(2) any other digital asset in which the principal has a right or interest.

SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS. Subject to Section 7(b) and unless otherwise provided by the court or the settlor in the terms of a trust, a trustee or a successor of the trustee:

(a) that is an original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received by the trustee and the content of an electronic communication; and

(b) that is not an original account holder has the right to access:

(1) the content of an electronic communication sent or received by the original or any successor account holder if the electronic communication service or the remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the original or any successor account holder; and

(3) any other digital asset in which the original or any successor account holder has a right or interest.

SECTION 7. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary that is an account holder or has the right under Sections 3, 4, 5, or 6 of this act to access a digital asset of an account holder:

(1) subject to the terms-of-service agreement and copyright or other applicable law, may take any action concerning the digital asset to the extent of the account holder's authority and the fiduciary's powers under law of this state;

(2) has, under applicable electronic privacy laws, the lawful consent of the account holder for the digital custodian to divulge the content of an electronic communication to the fiduciary; and

(3) is, under applicable computer fraud and unauthorized access laws, including MCL 752.795, an authorized user.

(4) is deemed to have the consent of the device holder under MCL 750.157n to the extent that the digital asset is a financial transaction device within the meaning of MCL 750.157n; and

(5) is deemed to have the authority to access the digital assets under MCL 752.795 to the extent that the digital asset is subject to MCL 752.795.

(b) If a provision in a terms-of-service agreement limits a fiduciary's access to the digital assets of the account holder, the provision is void as against the strong public policy of this state.

(c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this act to the extent the provision designates law that enforces a limitation on a fiduciary's access to digital assets which limitation is void under subsection (b).

(d) A fiduciary's access under this act to a digital asset does not violate a terms-of-service agreement, notwithstanding a provision of the terms-of-service agreement which limits third-party access or requires notice of change in the account holder's status.

(e) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, protected individual, principal, or settlor:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for purposes of any applicable computer fraud and unauthorized access laws, including MCL 752.795 and MCL 750.157n.

SECTION 8. COMPLIANCE.

(a) If a fiduciary with a right under this act to access a digital asset of an account holder complies with subsection (b), the digital custodian shall comply with the fiduciary's request in a record for:

(1) access to the digital asset;

(2) control of the digital asset; or

(3) a copy of the digital asset to the extent permitted by copyright law.

(b) If a request under subsection (a) is made by:

(1) a personal representative with the right of access under Section 3, the request must be accompanied by a certified copy of the letters of the personal representative as defined in MCL 700.1105(j) or a small estate affidavit pursuant to MCL 700.3983;

(2) a conservator with the right to access under Section 4, the request must be accompanied by a certified copy of the court order that gives the conservator authority over the

digital asset or by a certified copy of the letters of the conservator as defined in MCL 700.1105(j) that gives the conservator authority over the digital asset;

(3) an agent with the right of access under Section 5, the request must be accompanied by an original or a copy of a currently-effective power of attorney that authorizes the agent to exercise authority over the digital asset and a sworn statement executed by the agent pursuant to MCL 700.5505; and

(4) a trustee with the right of access under Section 6, the request must be accompanied by a certificate of the trust under MCL 700.7913 that authorizes the trustee to exercise authority over the digital asset.

(c) A digital custodian shall comply with a request made under subsection (a) not later than 56 days after receipt of the request. If the digital custodian fails to comply, the fiduciary may petition the court for an order directing compliance. A digital custodian is liable for damages, costs, expenses, and legal fees if the court determines that the digital custodian was not acting pursuant to a legal requirement in failing to comply with a request made under subsection (a).

(d) So long as any payments under an applicable terms-of-service agreement are kept current or brought current within 56 days of any default, a digital custodian may not destroy, disable or dispose of any digital assets of the protected individual for 2 years after the custodian receives a request or order under subsections (a) and (c). If the digital custodian has obligations under other state or federal laws to preserve records, this act does not override those other obligations.

(e) A recipient of a certificate of trust under subsection (b)(4) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(f) A digital custodian that acts in reliance on a certificate under subsection (b)(4) without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certificate.

(g) A person that in good faith enters a transaction in reliance on a certificate of trust under subsection (b)(4) may enforce the transaction against the trust assets as if the representations contained in the certificate were correct.

(h) A person that demands the trust instrument in addition to a certificate of trust under subsection (b)(4) or excerpts under subsection (e) is liable for damages to the same extent the person would be liable under MCL 700.7913(8).

(i) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

SECTION 9. DIGITAL CUSTODIAN IMMUNITY. A digital custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this act.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq.*, but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 12. SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 13. APPLICABILITY.

(a) Subject to subsections (b) and (c), this act applies to:

(1) A fiduciary acting under a will, trust, or power of attorney executed before, on, or after the effective date of this act, except as otherwise provided in this act.

(2) Each proceeding pending in court or commenced after the effective date of this act, unless the court determines that it is not feasible to apply the act or, in the interests of justice, the act should not apply.

(b) This act does not impair an accrued right or an action taken in a proceeding before the effective date of this act in a proceeding.

(c) This act does not apply to a digital asset of an employer used by an employee in the ordinary course of business.

SECTION 14. EFFECTIVE DATE. This act takes effect immediately.

EXHIBIT A-2

FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This act may be cited as the Michigan Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this act:

(1) "Account holder" means:

~~(1) "Account holder" means~~ (a) a person ~~who~~that has entered into a terms-of-service agreement~~. The term includes a deceased individual who entered into the terms-of-service agreement during the individual's lifetime.~~ with a custodian; and

(b) a fiduciary for a person described in subsection (1)(a).

(2) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(3) "Carries" means engaging in the transmission of electronic communications.

(4) ~~(3)~~ "Catalogue of electronic communications" means ~~the record of the name of~~information that identifies each person with which an account holder ~~communicated~~has had an electronic communication, the time and date of the communication, and the electronic address of ~~each person in an electronic communication that is controlled by an electronic communication service or a remote computing service~~the person.

(5) ~~(4)~~ "Conservator" means a person that is appointed by a court to manage all or part of the estate of a protected individual. The term includes a limited conservator.

(6) ~~(5)~~ "Content of an electronic ~~communications~~communication" means information not readily accessible to the public concerning the substance or meaning of an electronic communication ~~that is controlled by an electronic communication service or a remote computing service that is not readily accessible to the public~~.

(7) ~~(6)~~ "Court" means the probate court or, when applicable, the circuit court.

(8) ~~(7)~~ "Digital asset" means ~~an electronic record. The term includes the catalogue of electronic communications and the content of electronic communications~~a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

(9) ~~(8)~~ "Digital custodian" means a person that carries, maintains, processes, receives, or stores~~, or has control of,~~ a digital asset ~~or electronic communication~~ of an account holder.

(10) ~~(9)~~ "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(11) ~~(10)~~ "Electronic communication" means ~~an electronic record while in electronic storage~~a digital asset stored by an electronic communication service ~~and an electronic record which is~~or carried or maintained by a remote -computing service. The term includes the catalogue of electronic communications and the content of an electronic communication.

(12) ~~(11)~~ "Electronic communication service" means ~~any service~~a digital custodian that provides to the public the ability to send or receive an electronic ~~communications~~communication.

(13) ~~(12)~~ "Fiduciary" means each person who is an original, additional, or successor personal representative, conservator, agent, or trustee.

(14) ~~(13)~~ "Governing instrument" means a will, a trust, an instrument creating a power of attorney, or other dispositive or nominative instrument.

(15) ~~(14)~~ "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or ~~similar intelligence of any nature~~the like.

(16) ~~(15)~~ "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(17) ~~(16)~~ "Personal representative" has the meaning as stated in MCL 700.1106(o).

(18) ~~(17)~~ "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(19) ~~(18)~~ "Principal" means an individual who grants authority to an agent in a power of attorney.

(20) ~~(19)~~ "Protected individual" includes a protected individual as defined in MCL 700.1106(v); a legally incapacitated individual as defined in MCL 700.1105(i); a minor for whom a guardian has been appointed but no conservator has been appointed; and a developmentally disabled person as defined in MCL 330.110a(25).

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

(22) ~~(21)~~ "Remote -computing service" means ~~any service~~a digital custodian that provides to the public computer processing services or storage of ~~electronic records~~digital assets by means of an electronic communication system, as defined in 18 U.S.C. Section 2510(14).

(23) ~~(22)~~ "Terms-of-service agreement" means an agreement that controls the relationship between an account holder and a digital custodian.

(24) ~~(23)~~ "Trustee" has the meaning stated in MCL 700.1107(o).

(25) ~~(24)~~ "Will" has the meaning stated in MCL 700.1108(b).

~~**SECTION 3. SCOPE.** This act applies only to a grant of authority to a fiduciary who is acting lawfully in accordance with fiduciary obligations and duties.~~

SECTION ~~4. AUTHORITY OF~~3. ACCESS BY PERSONAL REPRESENTATIVE ~~OVER~~TO DIGITAL ASSETS OF A DECEDENT.

(a) ~~Unless prohibited by~~Subject to Section 7(b) and unless otherwise provided by the court or the will of a decedent, ~~a court, law of this state other than this act, or federal law,~~ a personal representative of the decedent ~~may~~has the right to access:

(1) ~~any digital asset of the decedent, other than~~ the content of an electronic communication sent or received by the decedent if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the decedent; and

(3) ~~the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.~~any other digital asset in which the decedent has a right or interest.

(b) A person interested in an estate as defined in MCL 700.1105(c) may file a petition in the court for an order to limit, eliminate, or modify the personal representative's power over the decedent's digital assets. On receipt of a petition under this subsection, the court shall set a date for a hearing on the petition. The hearing date shall not be less than 14 days and not more than 56 days after the date the petition is filed.

SECTION ~~5. AUTHORITY OF~~4. ACCESS BY CONSERVATOR ~~OVER~~TO DIGITAL ASSETS OF A PROTECTED INDIVIDUAL.

(a) The court, after an opportunity for a hearing, may ~~authorize~~grant a conservator the right to access:

(1) ~~any digital asset of~~the content of an electronic communication sent or received by the protected individual~~, other than the content of electronic communications;~~ if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) the catalogue of electronic communications sent or received by the protected individual; and

(3) ~~the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.~~any other digital asset in which the protected individual has a right or interest.

(b) In granting ~~authority~~ to a conservator the right to access under subsection (a), the court shall consider:

(1) the intent of the protected individual with respect to the ~~authority~~access granted to the extent that intent can be ascertained; or

(2) whether granting ~~authority~~access to a conservator is in the protected individual's best interest.

SECTION ~~6. CONTROL~~5. ACCESS BY AGENT ~~OF~~TO DIGITAL ASSETS.

~~(a) Unless prohibited by a power of attorney, an agent may access any digital assets of the principal, including the catalogue of electronic communications sent or received by the principal, but not including the content of those electronic communications.~~

(a) ~~(b) If~~To the extent a power of attorney grants authority to an agent over the content of an electronic ~~communications~~communication of the principal, the agent ~~may~~has the right to access the content of an electronic ~~communications~~communication sent or received by the principal~~,~~ if the electronic communication service or remote -computing service is permitted ~~under~~to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) ~~to disclose the content~~, as amended.

(b) Except as provided in subsection (a) and unless otherwise provided by a power of attorney or the court, an agent has the right to access:

(1) the catalogue of electronic communications sent or received by the principal; and

(2) any other digital asset in which the principal has a right or interest.

SECTION ~~7. CONTROL~~6. ACCESS BY TRUSTEE ~~OF~~TO DIGITAL ASSETS.

Subject to Section 7(b) and unless otherwise provided by the court or the settlor in the terms of a trust, a trustee or a successor of the trustee:

(a) ~~Unless prohibited by the settlor in the terms of a trust, the trustee~~ that is an ~~initial~~original account holder ~~may~~has the right to access each digital asset held in trust, including the

catalogue of electronic communications sent or received by the ~~account holder~~trustee and the content of ~~those~~an electronic ~~communications, held in the trust.~~communication; and

(b) ~~Unless prohibited by the settlor in the terms of a trust, when the trustee is a successor account holder, the trustee may access:~~that is not an original account holder has the right to access:

(1) ~~the digital assets, including the catalogue of electronic communications sent or received by the account holder (or any account holder who was a prior trustee of the trust), but not including the content of those electronic communications, held in the trust; and~~

~~(2) the content of electronic communications described in subsection (b)(1)~~the content of an electronic communication sent or received by the original or any successor account holder if the electronic communication service or the remote -computing service is permitted ~~under~~to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) ~~to disclose the content~~, as amended;

(2) the catalogue of electronic communications sent or received by the original or any successor account holder; and

(3) any other digital asset in which the original or any successor account holder has a right or interest.

SECTION ~~8.~~7. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary that is an account holder or ~~that~~ has the right under Sections 3, 4, 5, or 6 of this act to access a digital asset of an account holder:

(1) ~~may take actions~~subject to the terms-of-service agreement and copyright or other applicable law, may take any action concerning the digital asset to the extent of the account holder's authority and the fiduciary's powers under law of this state ~~other than this act, subject to copyright and other law and the terms-of-service agreement~~;

(2) ~~is deemed to have~~has, under applicable electronic privacy laws, the lawful consent of the account holder for the digital custodian to divulge the content of an electronic communication to the fiduciary ~~pursuant to state and federal electronic privacy law;~~ ; and

(3) is, under applicable computer fraud and unauthorized access laws, including MCL 752.795, an authorized user ~~under the federal Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 *et seq.* and MCL 752.795;~~ .

(4) is deemed to have the consent of the device holder under MCL 750.157n to the extent that the digital asset is a financial transaction device within the meaning of MCL 750.157n; and

(5) is deemed to have the authority to access the digital assets under MCL 752.795 to the extent that the digital asset is subject to MCL ~~752.795;~~752.795.

(b) ~~Any~~If a provision in a terms-of-service agreement ~~that~~ limits a fiduciary's access to the digital assets of the account holder ~~under this act~~, the provision is void as against the strong public policy of this state~~, unless the limitations of that provision are signed by the account holder separately from the other provisions of the terms-of-service agreement~~.

(c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this act to the extent the provision designates law that enforces a limitation on a fiduciary's access to digital assets which limitation is void under subsection (b).

(d) ~~(c) Subject to Section 9(a), a~~A fiduciary's access under this act to a digital asset ~~is~~does not ~~a violation of~~violate a terms-of-service agreement, notwithstanding a provision ~~in~~of the terms-of-service agreement ~~that bars~~which limits third -party access~~.~~ or requires notice of change in the account holder's status.

(e) ~~(d) A~~As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the ~~equipment~~property of a decedent, protected individual, principal, or settlor ~~that can receive, store, process, or send an electronic record may access that equipment and any electronic record stored on it.~~:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for purposes of any applicable computer fraud and unauthorized access laws, including MCL 752.795 and MCL 750.157n.

SECTION ~~9.~~8. COMPLIANCE.

(a) If a fiduciary ~~that has~~with a right under this act to access a digital asset of an account holder ~~under this act and~~ complies with subsection (b), the digital custodian shall comply with the fiduciary's request in a record for:

(1) access to the digital asset;

(2) control of the digital asset; or

(3) a copy of the digital asset ~~unless the digital asset is subject~~ to the extent permitted by copyright ~~of a third party~~law.

(b) If a request under subsection (a) is made by:

(1) a personal representative with the right of access under Section ~~4,~~3, the request must be accompanied by a certified copy of the letters of the personal representative as defined in MCL 700.1105(j) or a small estate affidavit pursuant to MCL 700.3983;

(2) a conservator with the right to access under Section ~~5,~~4, the request must be accompanied by a certified copy of the court order that gives the conservator authority over the digital asset or by a certified copy of the letters of the conservator as defined in MCL 700.1105(j) that gives the conservator authority over the digital asset;

(3) an agent with the right of access under Section ~~6,~~5, the request must be accompanied by an original or a copy of a currently-effective power of attorney that authorizes the agent to exercise authority over the digital asset and a sworn statement executed by the agent pursuant to MCL 700.5505; and

(4) a trustee with the right of access under Section ~~7,~~6, the request must be accompanied by a certificate of the trust under MCL 700.7913 that authorizes the trustee to exercise authority over the digital asset.

(c) A digital custodian shall comply with a request made under subsection (a) not later than 56 days after receipt of the request. If the digital custodian fails to comply, the fiduciary may petition the court for an order directing compliance. A digital custodian is liable for damages, costs, expenses, and legal fees if the court determines that the digital custodian was not acting pursuant to a legal requirement in failing to comply with a request made under subsection (a).

(d) So long as any payments under an applicable terms-of-service agreement are kept current or brought current within 56 days of any default, a digital custodian may not destroy, disable or dispose of any digital assets of the protected individual for 2 years after the custodian receives a request or order under subsections (~~b~~a) and (c). If the digital custodian has obligations under other state or federal laws to preserve records, this act does not override those other obligations.

(e) A recipient of a certificate of trust under subsection (b)(4) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(f) A digital custodian that acts in reliance on a certificate under subsection (b)(4) without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certificate.

(g) A person that in good faith enters a transaction in reliance on a certificate of trust under subsection (b)(4) may enforce the transaction against the trust assets as if the representations contained in the certificate were correct.

(h) A person that demands the trust instrument in addition to a certificate of trust under subsection (b)(4) or excerpts under subsection (e) is liable for damages to the same extent the person would be liable under MCL 700.7913(8).

(i) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

SECTION ~~10.~~ 9. DIGITAL CUSTODIAN IMMUNITY. A digital custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this act.

SECTION ~~11.~~ 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION ~~12.~~ 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq.*, but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION ~~13.~~ 12. SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 13. APPLICABILITY. ~~This~~

(a) Subject to subsections (b) and (c), this act applies to:

(1) A fiduciary acting under a will, trust, or power of attorney executed before, on, or after the effective date of this act, except as otherwise provided in this act.

(2) Each proceeding pending in court or commenced after the effective date of this act, unless the court determines that it is not feasible to apply the act or, in the interests of justice, the act should not apply.

(b) ~~(3)~~ This act does not impair an accrued right or an action taken in a proceeding before the effective date of this act in a proceeding.

(c) This act does not apply to a digital asset of an employer used by an employee in the ordinary course of business.

SECTION ~~15.~~ 14. EFFECTIVE DATE. This act takes effect immediately.

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Description	#3283319v7<Detroit> - fiduciary access to digital assets legislation - draft 3 010914
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Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	133
Deletions	128
Moved from	9
Moved to	9
Style change	0
Format changed	0
Total changes	279

EXHIBIT A-3

UNIFORM FIDUCIARY ACCESS TO

DIGITAL ASSETS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-THIRD YEAR
SEATTLE, WASHINGTON
JULY 11 - JULY 17, 2014

WITH PREFATORY NOTE AND COMMENTS

July 31, 2014

*The following text is subject to revisions by the Committee on Style of the National Conference of Commissioners on Uniform State Laws.

DRAFTING COMMITTEE ON UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

SUZANNE BROWN WALSH, P.O. Box 271820, West Hartford, CT 06127, *Chair*
DAVID BIKLEN, 799 Prospect Ave., West Hartford, CT 06105
STEPHEN Y. CHOW, 125 Summer St., Boston, MA 02110-1624
VINCE DELIBERATO, JR., Legislative Reference Bureau, Main Capitol Bldg., Harrisburg, PA 17120-0033
MARC FEINSTEIN, 431 N. Phillips Ave., Suite 301, Sioux Falls, SD 57104
GENE HENNIG, 500 IDS Center, 80 S. 8th St., Minneapolis, MN 55402-3796
STAN KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903
SUSAN KELLY NICHOLS, 3217 Northampton St., Raleigh, NC 27609-0625
DAN ROBBINS, 15301 Ventura Blvd., Bldg. E, Sherman Oaks, CA 91403
LANE SHETTERLY, 189 SW Academy St., P.O. Box 105, Dallas, OR 97338
NAOMI CAHN, George Washington University Law School, 2000 H St. NW, Washington, DC 20052, *Reporter*

EX OFFICIO

HARRIET LANSING, 1 Heather Pl., St. Paul, MN 55102-2615, *President*
GAIL HAGERTY, South Central Judicial District, P.O. Box 1013, 514 E. Thayer Ave., Bismarck, ND 58502-1013, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

KARIN PRANGLEY, 500 N. Dearborn St., Suite 200, Chicago, IL 60654-3372, *ABA Advisor*
VICKI LEVY ESKIN, 1732 N. Ronald Reagan Blvd., Longwood, FL 32750-3409, *ABA Section Advisor*
CHRISTINA KUNZ, 484 Montrose Ln., St. Paul, MN 55116, *ABA Section Advisor*
DAVID SHULMAN, 401 E. Las Olas Blvd., Suite 130-491, Fort Lauderdale, FL 33301-2210, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
312/450-6600
www.uniformlaws.org

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Prefatory Note

This act vests fiduciaries with the authority to access, control, or copy digital assets and accounts. The act applies only to fiduciaries, which must always act in compliance with their fiduciary powers and duties. The goal of the Uniform Fiduciary Access to Digital Assets Act (UFADAA) is to remove barriers to a fiduciary's access to electronic records; other law, such as fiduciary, probate, trust, banking, investment securities, and agency law, remains unaffected by UFADAA. Moreover, UFADAA does not change existing law, which would prohibit any fiduciary from violating fiduciary responsibilities through divulging or publicizing any information the fiduciary obtains while carrying out his or her fiduciary duties.

UFADAA addresses four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons and individuals, agents acting pursuant to a power of attorney, and trustees. It distinguishes the authority of fiduciaries, which exercise authority subject to this act only on behalf of the account holder, from any other efforts to access the digital assets. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this act.

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. Few laws exist on the rights of fiduciaries over digital assets. Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. And these assets have real value: according to a 2011 survey from McAfee, Intel's security-technology unit, American consumers valued their digital assets, on average, at almost $55,000. Kelly Greene, *Passing Down Digital Assets*, WALL STREET JOURNAL (Aug. 31, 2012), http://goo.gl/7KAaOm. These assets range from online gaming items to photos, to digital music, to client lists. There are millions of Internet accounts that belong to dead people. Some Internet service providers have explicit policies on what will happen when an individual dies, others do not; even where these policies are included in the terms-of-service agreement, most consumers click through these agreements.

The situation regarding fiduciaries' access to digital assets is less than clear, and is subject to federal and state privacy and computer "hacking" laws as well as state probate law. A minority of states has enacted legislation on fiduciary access to digital assets, and numerous other states have considered, or are considering, legislation. Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary included, and whether the principal's death or incapacity is covered. A uniform approach among states will provide certainty and predictability for courts, account holders, fiduciaries, and Internet service providers. It gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries' ability to access the electronic records of a decedent, protected person, principal, or a trust. For issues on which states diverge or on which the law is unclear or unknown, the act will for the first time provide uniform rules.

The general goal of the act is to facilitate fiduciary access while respecting the privacy and intent of the account holder. It adheres to the traditional approach of trusts and estates law, which respects the intent of the account holder and promotes the fiduciary's ability to administer the account holder's property in accord with legally-binding fiduciary duties.

With regard to the general scope of the act, the act's coverage is inherently limited by the definition of "digital assets." The act applies only to electronic records, which do not include the underlying asset or liability unless it is itself an electronic record.

The act is divided into fifteen sections. Sections 1-2 contain general provisions and definitions, including those relating to the scope of the fiduciary's authority.

Sections 3-6 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different opt-in and default rules based on the presumed intent of the account holder and the applicability of other state and federal laws. A personal representative is presumed to have access to all of the decedent's digital assets unless that is contrary to the decedent's will or to other applicable law. A conservator may access the assets pursuant to a court order. An agent acting pursuant to a power of attorney is presumed to have access to all of a principal's digital assets not subject to the protections of other applicable law; if another law protects the asset, then the power of attorney must explicitly grant access. And a trustee may access any digital asset held by the trust unless that is contrary to the terms of the trust or to other applicable law.

Section 7 contains provisions relating to the rights of the fiduciary to access digital assets. Section 8 addresses compliance, and Section 9 grants immunity to custodians. Sections 10-15 address miscellaneous topics, including retroactivity, applicability, the effective date of the act, and similar issues. The act addresses only the rights of the four types of fiduciaries, and it is designed to provide access without changing the ownership of the digital asset.

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Account holder" means:

(A) a person that has entered into a terms-of-service agreement with a custodian; and

(B) a fiduciary for a person described in subparagraph (A).

(2) "Agent" means an attorney in fact granted authority under a durable or nondurable power of attorney.

(3) "Carries" means engaging in the transmission of electronic communications.

(4) "Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) "[Conservator]" means a person appointed by a court to manage the estate of a living individual. The term includes a limited [conservator].

(6) "Content of an electronic communication" means information not readily accessible to the public concerning the substance or meaning of an electronic communication.

(7) "Court" means the [insert name of court in this state having jurisdiction in matters relating to the content of this act].

(8) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(9) "Digital asset" means a record that is electronic. The term does not include an

underlying asset or liability unless the asset or liability is itself a record that is electronic.

(10) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(11) "Electronic communication" means a digital asset stored by an electronic-communication service or carried or maintained by a remote-computing service. The term includes the catalogue of electronic communications and the content of an electronic communication.

(12) "Electronic-communication service" means a custodian that provides to the public the ability to send or receive an electronic communication.

(13) "Fiduciary" means a person that is an original, additional, or successor personal representative, [conservator,] agent, or trustee.

(14) "Governing instrument" means a will, trust, instrument creating a power of attorney, or other dispositive or nominative instrument.

(15) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(16) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(17) "Personal representative" means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this [act].

(18) "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(19) "Principal" means an individual who grants authority to an agent in a power of

attorney.

(20) "[Protected person]" means an individual for whom a [conservator] has been appointed. The term includes an individual for whom an application for the appointment of a [conservator] is pending.

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

(22) "Remote-computing service" means a custodian that provides to the public computer processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14)[as amended];

(23) "Terms-of-service agreement" means an agreement that controls the relationship between an account holder and a custodian.

(24) "Trustee" means a fiduciary with legal title to an asset pursuant to an agreement or declaration that creates a beneficial interest in others.

(25) "Will" includes a codicil, testamentary instrument that only appoints an executor, and instrument that revokes or revises a testamentary instrument.

***Legislative Note**: States should insert the appropriate term for a conservatorship or comparable state proceeding in subsection (5), the appropriate court in subsection (7), and the appropriate term for the individual that would be subject to a conservatorship or comparable state proceeding in subsection (20).*

In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (22).

Comments

Many of the definitions are based on those in the Uniform Probate Code: agent (UPC Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)), electronic (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), governing instrument (UPC Section 1-201(18)), person (UPC Section 5B-101(6)), personal representative (UPC Section 1-201(35)), power of attorney (UPC Section 5B-102(7)), principal (UPC Section 5B-102(9)), property (UPC Section 1-201(38)), protected person (UPC

Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1-201(57. The definition of "information" is based on that in the Uniform Electronic Transactions Act, Section 2, subsection (11). Many of the other definitions are either drawn from federal law, as discussed below, or are new for this act.

An account holder includes any person who entered into a terms-of-service agreement, including a deceased individual who entered into the agreement during the individual's lifetime. A fiduciary is defined as a person, and a fiduciary can be an account holder when the fiduciary opens the account.

The definitions of carries is drawn from federal law, 47 U.S.C. Section 1001(8).

The act includes a definition for "catalogue of electronic communications." This is designed to cover log-type information about an electronic communication. The term "content of an electronic communication" is adapted from 18 U.S.C. Section 2510(8), but it refers only to information that is not readily accessible to the public because, if the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 *et seq*. See S. Rep. No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the content of an electronic communication, the act's legislative history notes the requirements for disclosure: "Either the sender or the receiver can directly or through authorized agents authorize further disclosures of the contents of their electronic communication." S. Rep. No. 99-541, at 37 (1986).

ECPA does not apply to private e-mail service providers, such as employers and educational institutions. See 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl and Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404 (2014) (available at: http://goo.gl/T9jX1d).

A custodian includes any Internet service provider as well as any other entity that provides or stores electronic data of an account holder. A custodian does not include most employers because an employer typically does not have a terms-of-service agreement with an employee. The treatment of digital assets of an employer used by an employee in the ordinary course of the employer's business is discussed in Section 13.

The definition of a digital asset specifies that it is "a record that is electronic." Because records may exist in both electronic and non-electronic formats, this definition clarifies the scope of the act and the limitation on the type of records to which it applies. The term includes products currently in existence and yet to be invented that are available only electronically. It refers to any type of electronically-stored information, such as: 1) any information stored on a computer and other digital devices; 2) content uploaded onto websites, ranging from photos to documents; and 3) rights in digital property, such as domain names or digital entitlements associated with online games. See Lamm, *et al, supra*, at 388. Both the catalogue and content of an electronic communication are covered by the term "digital assets."

The fiduciary's access to a record defined as a "digital asset" does not mean that the fiduciary is entitled to "own" the asset or otherwise engage in transactions with the asset. Consider, for example, funds in a bank account or securities held with a broker or other custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar presence. This act affects records concerning the bank account or securities, but does not affect the authority to engage in transfers of title or other commercial transactions in the funds or securities, even though such transfers or other transactions might occur electronically. UFADAA simply reinforces the right of the fiduciary to access all relevant electronic communications and the online account that provides evidence of ownership or similar rights. An entity may not refuse to provide access to online records any more than the entity can refuse to provide the fiduciary with access to hard copy records.

The definition of "electronic communication" is adapted from the language of 18 U.S.C. Sections 2510(12) and 2702(a)(1) and (2), the definition of "electronic-communication service" is drawn from 18 U.S.C. Section 2510(15), and the definition of "remote-computing service" is adapted from 18 U.S.C. Section 2711(2), to help ensure the act's compliance with federal law. Electronic communication is a subset of digital assets and covers only the category of digital assets subject to the privacy protections of the Electronic Communications Privacy Act. For example, material stored on a computer's hard drive is a digital asset but not an electronic communication.

A "fiduciary" under this act occupies a status recognized by state law, and a fiduciary's powers under this act are subject to the relevant limits established by other state laws. The definition of fiduciary specifically applies to "each person" in order to cover co-fiduciaries.

The term "record" includes information available in both tangible and electronic media. The act applies only to electronic records.

The "terms-of-service agreement" definition relies on the definition of "agreement" found in UCC Section 1-201(b)(3) ("the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade"). It refers to any agreement that controls the relationship between an account holder and a custodian, even though it might be called a terms-of-use agreement, a click-wrap agreement, a click-through license, or a similar term. State and federal law determine capacity to enter into a binding terms-of-service agreement.

SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL ASSETS OF DECEDENT. Subject to Section 7(b) and unless otherwise provided by the court or the will of a decedent, a personal representative of the decedent has the right to access:

(1) the content of an electronic communication sent or received by the decedent if the electronic-communication service or remote-computing service is permitted to disclose the

content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

(2) the catalogue of electronic communications sent or received by the decedent; and

(3) any other digital asset in which the decedent at death had a right or interest.

***Legislative Note**: In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (1).*

Comments

This section is modeled on the formulation of the personal representative's default power set out in UPC Section 3-715. The phrase, "Unless otherwise provided by the will," is intended to indicate that a will controls the personal representative's authority. As is true more generally with respect to interpretation of wills, public policy can override the explicit terms of a will.

The section clarifies the difference between fiduciary authority over digital assets other than the content of an electronic communication protected by ECPA and authority over ECPA-covered content of an electronic communication. For the content of an electronic communication, subsections (1) and (2) establish procedures that cover: first, the ECPA-covered content of communications and, second, the catalogue (logs and records) that electronic communications service providers may release without consent under the ECPA. Federal law distinguishes between the permissible disclosure of the "content" of an electronic communication, covered in 18 U.S.C. Section 2702(b), and of "a record or other information pertaining to a" subscriber or customer, covered in 18 U.S.C. Section 2702(c); *see* Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 Wm. & Mary L. Rev. 2105 (2009).

Content-based material can, in turn, be divided into two types of communications: those received by the account holder and those sent. Material when the account holder is the "addressee or intended recipient" can be disclosed either to that individual or to an agent for that person, 18 U.S.C. Section 2702(b)(1), and it can also be disclosed to third parties with the "lawful consent" of the addressee or intended recipient. 18 U.S.C. Section 2702(b)(3). Material for which the account holder is the "originator" can be disclosed to third parties only with the account holder's "lawful consent." 18 U.S.C. Section 2702(b)(3). (Note that, when the account holder is the addressee or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that when the account holder is the originator, lawful consent is required under (b)(3).) See the Comments concerning the definitions of the "content of an electronic communication" after Section 2. By contrast to content-based material, non-content material can be disclosed either with the lawful consent of the account holder or to any person (other than a governmental entity) even without lawful consent. This information includes material about any communication sent, such as the addressee, sender, date/time, and other subscriber data, which

this draft defines as the "catalogue of electronic communications." (Further discussion of this issue and examples are set out in the Comments to Section 7, *infra*.)

SECTION 4. ACCESS BY [CONSERVATOR] TO DIGITAL ASSETS OF PROTECTED PERSON. Subject to Section 7(b), the court, after an opportunity for hearing under [state conservatorship law], may grant a [conservator] the right to access:

(1) the content of an electronic communication sent or received by the [protected person] if the electronic-communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

(2) the catalogue of electronic communications sent or received by the [protected person]; and

(3) any other digital asset in which the [protected person] has a right or interest.

***Legislative Note**: In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (1).*

Comments

Section 4 establishes that the conservator must be specifically authorized by the court to access the protected person's digital assets. Each of the different levels of access to the content of an electronic communication, to the catalogue of electronic communications, and to any other digital assets must be specifically granted by court order. The requirement in Section 4 for express authority over digital assets does not limit the fiduciary's authority over the underlying "brick–and-mortar" assets, such as a bank account. The meaning of the term "hearing" will vary from state to state, as it will vary under state law and procedures.

Section 4 is comparable to Section 3. It responds to the concerns of Internet service providers who believe that the act should be structured to clarify the difference between fiduciary authority over digital assets other than the content of an electronic communication protected by federal law (the Electronic Communications Privacy Act (ECPA)), and fiduciary authority over ECPA-protected content of an electronic communication. Consequently, this draft sets out procedures that cover all digital assets as well as the catalogue of electronic communications (logs and records) that relevant service providers may release without consent under ECPA, and then it addresses ECPA-covered content of an electronic communication separately.

The section refers to an individual or a protected person because a conservator may be appointed for a single transaction or without a finding that the person is a protected person.

State law will establish the criteria for when a court will grant power to the conservator. For example, UPC Section 5-411(c) requires the court to consider the decision the protected person would have made as well as a list of other factors. Existing state law may also set out the requisite standards for a conservator's actions. Under Section 7, the conservator has the same power over digital assets as the account holder. The conservator must exercise authority in the interests of the protected person.

SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS OF PRINCIPAL.

(a) To the extent a power of attorney expressly grants authority to an agent over the content of an electronic communication of the principal and subject to Section 7(b), the agent has the right to access the content of an electronic communication sent or received by the principal if the electronic-communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended].

(b) Except as provided in subsection (a) and unless otherwise provided by a power of attorney or the court, an agent has the right, subject to Section 7(b), to access:

(1) the catalogue of electronic communications sent or received by the principal; and

(2) any digital asset in which the principal has a right or interest.

***Legislative Note**: In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a).*

Comments

This section establishes that the agent has default authority over all of the principal's digital assets, other than the content of the principal's electronic communications. When the principal does not want the agent to exercise this authority, then the power of attorney must explicitly prevent an agent from doing so.

The situation is different with respect to the content of an electronic communication. In that case, the principal must specifically authorize the agent to access the content of the principal's electronic communications. This provision is modeled on UPC Section 5B-201(a). Because a power of attorney contains the consent of the account holder, ECPA should not prevent the agent from exercising authority over the content of an electronic communication. See the Comments concerning the definitions of the "content of an electronic communication" after Section 2. There should be no question that an explicit delegation of authority in a power of attorney constitutes authorization from the account holder to access digital assets and provides "lawful consent" to allow disclosure of the content of an electronic communication from an electronic-communication service or a remote-computing service pursuant to applicable law. Both authorization and lawful consent are important because 18 U.S.C. Section 2701 deals with intentional access without authorization and 18 U.S.C. Section 2702 allows a service provider to disclose with lawful consent. Federal courts have not yet interpreted how ECPA affects a fiduciary's efforts to access the content of an electronic communication. E.g., In re Facebook, Inc., 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

States may need to amend their power of attorney statutes and forms to include this power.

SECTION 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS. Subject to Section 7(b) and unless otherwise provided by the court or the settlor in the terms of a trust, a trustee or a successor of the trustee:

(1) that is an original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received by the trustee and the content of an electronic communication; and

(2) that is not an original account holder has the right to access:

(A) the content of an electronic communication sent or received by the original or any successor account holder if the electronic-communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended];

(B) the catalogue of electronic communications sent or received by the original or any successor account holder; and

(C) any other digital asset in which the original or any successor account holder has a right or interest.

***Legislative Note**: In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (2)(A).*

Comments: Subsection (1) clarifies that access to digital assets, including the content of electronic communications, is presumed with respect to assets for which the trustee is the initial account holder. A trustee may have title to digital assets when the trustee opens an account as trustee; under those circumstances, the trustee can access the content of each digital asset that is in an account for which the trustee is the original account holder, although not necessarily each digital asset held in the trust.

Subsection (2) addresses situations involving an inter vivos transfer of a digital asset into a trust, a transfer into a testamentary trust, or a transfer via a pourover will or other governing instrument of a digital asset into a trust. In those situations, a trustee becomes a successor account holder when the settlor transfers a digital asset into the trust. There should be no question that the trustee with legal title to the digital asset was authorized by the settlor to access the digital assets so transferred, including both the catalogue and content of an electronic communication, and this provides "lawful consent" to allow disclosure of the content of an electronic communication from an electronic-communication service or a remote-computing service pursuant to applicable law. See the Comments concerning the definitions of the "content of an electronic communication" after Section 2. Nonetheless, subsection (2) distinguishes between the catalogue and content of an electronic communication in case there are any questions about whether the form in which property transferred into a trust is held constitutes lawful consent. Both authorization and lawful consent are important because 18 U.S.C. Section 2701 deals with intentional access without authorization and because 18 U.S.C. Section 2702 allows a service provider to disclose with lawful consent.

The underlying trust documents and default trust law will supply the allocation of responsibilities between and among trustees.

SECTION 7. FIDUCIARY AUTHORITY.

(a) A fiduciary that is an account holder or has the right under Sections 3, 4, 5, or 6 of this [act] to access a digital asset of an account holder:

(1) subject to the terms-of-service agreement and copyright or other applicable law, may take any action concerning the asset to the extent of the account holder's authority and the fiduciary's powers under [the law of this state];

(2) has, under applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary; and

(3) is, under applicable computer fraud and unauthorized access laws, including [this state's law on unauthorized computer access], an authorized user.

(b) If a provision in a terms-of-service agreement limits a fiduciary's access to the digital assets of the account holder, the provision is void as against the strong public policy of this state, unless the account holder, after [the effective date of this [act]], agreed to the provision by an affirmative act separate from the account holder's assent to other provisions of the terms-of-service agreement.

(c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this [act] to the extent the provision designates law that enforces a limitation on a fiduciary's access to digital assets which limitation is void under subsection (b).

(d) Except as provided in subsection (b), a fiduciary's access under this [act] to a digital asset does not violate a terms-of-service agreement, notwithstanding a provision of the agreement which limits third-party access or requires notice of change in the account holder's status.

(e) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, [protected person,] principal, or settlor:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for purposes of any applicable computer fraud and unauthorized access laws, including [this state's law on unauthorized computer access].

***Legislative Note**: States with a computer trespass statutes should add the appropriate reference in Sections 7(a)(3) and (e), and may want to amend those statutes to be in accord with this act.*

Comment

This issue concerning the parameters of the fiduciary's authority potentially arises in two situations: 1) the fiduciary obtains access to a password or the like directly from the account holder, as would be true in various circumstances such as for the trustee of an inter vivos trust or someone who has stored passwords in a written or electronic list and those passwords are then transmitted to the fiduciary; and 2) the fiduciary obtains access pursuant to this act.

This section clarifies that the fiduciary has the same authority as the account holder if the account holder were the one exercising the authority (note that, where the account holder has died, this means that the fiduciary has access as of the hour before the account holder's death). This means that the fiduciary's authority to access the digital asset is the same as the account holder except where, pursuant to subsection (b), the account holder has explicitly opted out of fiduciary access. In exercising its responsibilities, the fiduciary is subject to the duties and obligations established pursuant to state fiduciary law and is liable for breach of those duties. Note that even if the digital asset were illegally obtained by the account holder, the fiduciary would still need access in order to handle that asset appropriately. There may, for example, be tax consequences that the fiduciary would be obligated to report.

In exercising its responsibilities, the fiduciary is subject to the same limitations as the account holder more generally. For example, a fiduciary cannot delete an account if this would be fraudulent. Similarly, if the account holder could challenge provisions in a terms-of-service agreement, then the fiduciary is also able to do so. *See Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013).

Subsection (a) is designed to establish that the fiduciary is authorized to exercise control over digital assets in accordance with other applicable laws. The language mirrors that used in Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also known as the Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see*, *e.g.*, Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004). The subsection clarifies that state law treats the fiduciary as "authorized" under the two federal statutes that prohibit unauthorized access to computers and computer data, ECPA and the Computer Fraud and Abuse Act, as well as pursuant to any comparable state laws criminalizing unauthorized access. Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 (2006); Lamm, *et al.*, *supra*. (State law may be useful to federal courts interpreting these statutes.)

ECPA contains two potentially relevant prohibitions. The first, 18 U.S.C. Section 2701(a), defines the crime of unlawful access to stored communications, which applies to a person who "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility…." Thus, someone who has authorization to access the facility is not engaging in criminal behavior. Moreover, this section does not apply to "conduct authorized . . .

by a user of that service with respect to a communication of or intended for that user." 18 U.S.C. Section 2701(a), (c)(2).

The second, 18 U.S.C. Section 2702, entitled "Voluntary disclosure of customer communications or records," concerns actions by the service provider. It prohibits an electronic-communication service or a remote-computing service from knowingly divulging the content of an electronic communication that is stored by or carried or maintained on that service unless disclosure is made (among other exceptions) "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient" or "with the *lawful consent* of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote-computing service." 18 U.S.C. Section 2702(b)(1), (3) (emphasis added). See the Comments concerning the definitions of the "content of an electronic communication" after Section 2. The statute permits disclosure of "customer records" that do not include content, either with lawful consent from the customer or "to any person other than a governmental entity." 18 U.S.C. Section 2702(c)(2) and (6). Thus, in contrast to its restrictions on the release of content, the electronic-communication or remote-computing service provider is permitted to disclose the catalogue of electronic communications to anyone except the government.

The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers. 18 U.S.C. Section 1030. Like ECPA, the CFAA similarly protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access." 18 U.S.C. Section 1030(a).

State laws vary in their coverage, but typically prohibit unauthorized computer access.

By defining the fiduciary as an authorized user: 1) the fiduciary has authorization under applicable law to access the digital assets under the *first* relevant provision of ECPA, 18 U.S.C. Section 2701, as well as under the CFAA; and 2) the fiduciary has "the lawful consent" of the originator/subscriber under applicable law so that the service provider can voluntarily disclose the digital assets pursuant to the *second* relevant provision of ECPA, 18 U.S.C. Section 2702, including the content of an electronic communication. Moreover, this language should be adequate to avoid liability under the state unauthorized computer access laws.

Subsection (b) addresses whether account holders can opt out of the rules in this act and whether Internet service providers can prevent fiduciary access. First, a terms-of-service agreement in which an account holder has made an affirmative choice to limit a fiduciary's right to access will supersede any contrary provision in a will, trust, protective order, or power of attorney. The affirmative act must clearly demonstrate the account holder's deliberate intent to prevent fiduciary access. Second, the subsection provides that any other term in a terms-of-service agreement that bars fiduciary access is void as against the state's strong public policy. While all of a state's laws could be considered that state's public policy, the phrase "strong public policy" is to be construed under conflict of laws principles to protect fiduciary access to digital assets under this act, notwithstanding a contrary terms-of-service agreement provision and even if the terms-of-service agreement chooses the law of another state or country

to govern its contractual rights and duties. See Restatement (Second) Conflict of Laws § 90 and § 187 cmt. G; see also Uniform Trust Code § 107(1). However, a terms-of-service agreement provision for which an account holder has made an affirmative choice, separate from the account holder's assent to other provisions of the terms-of-service agreement, to limit a fiduciary's access to the account holder's digital assets is not voided by this act and will supersede any contrary provision in a will, or trust. (See Example 5).

Subsection (c) supports the importance of fiduciary access by providing that any choice of law governing the effect of a terms-of-service agreement that prevents fiduciary access is unenforceable.

Subsection (d) reinforces the concept that the fiduciary "steps into the shoes" of the account holder, with no more – and no fewer – rights. For example, the terms-of-service agreement controls the rights of the account holder (settlor, principal, incapacitated person, decedent). The act does not permit the account holder's fiduciary to override the terms-of-service agreement in order to make a digital asset or collection of digital assets "descendible," although it does preserve the rights of the fiduciary to make the same claims as the account holder. See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013); David Horton, *Indescendibility*, 102 Calif. L. Rev. 543 (2014).

Under subsection (d), access by a fiduciary should not be considered a transfer or other use that would violate the anti-transfer terms or other terms of a terms-of-service agreement.

Subsection (e) clarifies that the fiduciary is authorized to access digital assets stored on tangible personal property, such as laptops, computers, smartphones or storage media of the decedent, protected person, principal, or settlor, exempting fiduciaries from application for purposes of state or federal laws on unauthorized computer access. For criminal law purposes, this clarifies that the fiduciary is authorized to access all of the account holder's digital assets, whether held locally or remotely.

Example 1 – Access to digital assets by personal representative. D dies with a will that is silent with respect to digital assets. D has a bank account for which D received only electronic statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account with a company that provides electronic-communication services to the public. The personal representative of D's estate needs access to the electronic bank account statements, the photo account, and e-mails.

The personal representative of D's estate has the authority to access D's electronic banking statements and D's photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to the personal representative, then the bank and the photo account service must give access to the personal representative when the request is made in accordance with Section 8. If the terms-of-service agreement permits D to transfer the accounts electronically, then the personal representative of D's estate can use that procedure for transfer as well.

The personal representative of D's estate is also able to request that the e-mail account service provider grant access to e-mails sent or received by D; ECPA permits the service provider to release the catalogue to the personal representative. The service provider also must provide the personal representative access to the content of an electronic communication sent or received by D if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

Example 2 – Access to digital assets by conservator. C is seeking appointment as the conservator for P. P has a bank account for which P received only electronic statements, P has stored photos in a cloud-based Internet account, and P has an e-mail account with a company that provides electronic communication services to the public. C needs access to the electronic bank account statements, the photo account, and e-mails.

Without a court order that explicitly grants access to P's digital assets, including electronic communications, C has no authority pursuant to this act to access the electronic bank account statements, the photo account, or the e-mails. Based on law outside of this act, the bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

Example 3 – Access to digital assets by agent. X creates a power of attorney designating A as X's agent. The power of attorney expressly grants A authority over X's digital assets, including the content of an electronic communication. X has a bank account for which X receives only electronic statements, X has stored photos in a cloud-based Internet account, and X has a game character and in-game property associated with an online game. X also has an e-mail account with a company that provides electronic-communication services to the public.

A has the authority to access X's electronic bank statements, the photo account, the game character and in-game property associated with the online game, all of which fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to A as X's agent, then the bank, the photo account service provider, and the online game service provider must give access to A when the request is made in accordance with Section 8. If the terms-of-service agreement permits X to transfer the accounts electronically, then A as X's agent can use that procedure for transfer as well.

As X's agent, A is also able to request that the e-mail account service provider grant access to e-mails sent or received by X; ECPA permits the service provider to release the catalogue. The service provider also must provide A access to the content of an electronic communication sent or received by X if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

Example 4 – Access to digital assets by trustee. T is the trustee of a trust established by S. As trustee of the trust, T opens a bank account for which T receives only electronic statements. S transfers into the trust to T as trustee (in compliance with a terms-of-service agreement) a game character and in-game property associated with an online game and a cloud-based Internet account in which S has stored photos. S also transfers to T as trustee (in compliance with the terms-of-service agreement) an e-mail account with a company that provides electronic-communication services to the public.

T is an original account holder with respect to the bank account that T opened, and T has the ability to access the electronic banking statements. T, as successor account holder to S, may access the game character and in-game property associated with the online game and the photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to T as trustee, then the bank, the photo account service provider, and the online game service provider must give access to T when the request is made in accordance with Section 8. If the terms-of-service agreement permits the account holder to transfer the accounts electronically, then T as trustee can use that procedure for transfer as well.

T as successor account holder of the e-mail account for which S was previously the account holder is also able to request that the e-mail account service provider grant access to e-mails sent or received by S; the ECPA permits the service provider to release the catalogue. The service provider also must provide T access to the content of an electronic communication sent or received by S if the service provider is permitted under 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not subject to the ECPA.

Example 5 – Access notwithstanding terms in a terms-of-service agreement. D, who is domiciled in state X, dies. D was a professional photographer who stored valuable digital photos in an online storage account provided by C. P is appointed by a court in state X to administer D's estate. P needs access to D's online storage account to inventory and appraise D's estate assets and to file D's estate tax return. During D's lifetime, D entered into a terms-of-service agreement with C for the online storage account. The choice-of-law provision selects the law of state Y to govern the contractual rights and duties under the terms-of-service agreement. A provision of the terms-of-service agreement prohibits fiduciary access to the digital assets of an account holder, but D did not agree to that provision by an affirmative act separate from D's assent to other provisions of the terms-of-service agreement. UFADAA has been enacted by state X but not by state Y. Because P's access to D's assets is fundamental to carrying out P's fiduciary duties, a court should apply subsections (b) and (c) of this act under the law of state X to void the terms-of-service agreement provision prohibiting P's access to D's online account, even though the terms-of-service agreement selected the law of state Y to govern the contractual rights and duties under the terms-of-service agreement.

SECTION 8. COMPLIANCE.

(a) If a fiduciary with a right under this [act] to access a digital asset of an account holder complies with subsection (b), the custodian shall comply with the fiduciary's request in a record for:

(1) access to the asset;

(2) control of the asset; and

(3) a copy of the asset to the extent permitted by copyright law.

(b) If a request under subsection (a) is made by:

(1) a personal representative with a right of access under Section 3, the request must be accompanied by a certified copy of [the letter of appointment of the representative or a small-estate affidavit or court order];

(2) a [conservator] with the right of access under Section 4, the request must be accompanied by a certified copy of the court order that gives the [conservator] authority over the digital asset;

(3) an agent with the right of access under Section 5, the request must be accompanied by an original or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) a trustee with the right of access under Section 6, the request must be accompanied by a certified copy of the trust instrument[, or a certification of the trust under [cite trust-certification statute, such as Uniform Trust Code Section 1013],] that authorizes the trustee to exercise authority over the digital asset.

(c) A custodian shall comply with a request made under subsection (a) not later than

[60] days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(d) [Instead of furnishing a copy of the trust instrument under subsection (b)(4), the trustee may provide the certification of trust. The certification:

(1) must contain the following information:

(A) that the trust exists and the date the trust instrument was executed;

(B) the identity of the settlor;

(C) the identity and address of the trustee;

(D) that there is nothing inconsistent in the trust with respect to the trustee's powers over digital assets;

(E) whether the trust is revocable and the identity of any person holding a power to revoke the trust; and

(F) whether a cotrustee has authority to sign or otherwise authenticate, and whether all or fewer than all cotrustees are required to exercise powers of the trustee;

(2) must be signed or otherwise authenticated by a trustee;

(3) must state that the trust has not been revoked, modified or amended in a manner that would cause the representations contained in the certification of trust to be incorrect; and

(4) need not contain the dispositive terms of the trust.

(e) A custodian that receives a certification of trust under subsection (d) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(f) A custodian that acts in reliance on a certification under subsection (d) without

knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of facts stated in the certification.

(g) A person that in good faith enters into a transaction in reliance on a certification of trust under subsection (d) may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person that demands the trust instrument in addition to a certification of trust under subsection (d) or excerpts under subsection (e) is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i)] This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

Legislative Note*: The bracketed material in subsections (d)-(i) allows states that have already enacted the Uniform Trust Code or a similar law permitting a certification of trust in lieu of furnishing a complete copy of the trust instrument to use the shorter version when setting out procedures concerning a trustee's request. Those states that have not adopted the Uniform Trust Code or a certification of trust procedure may choose to include the bracketed material, which is a slight modification of the language in Uniform Trust Code Section 1013.*

Comment

Subsection (a) allows a fiduciary to request access, control, or a copy of the digital asset. The term "control" means only the ability to move (unless prohibited by copyright law) or delete that particular asset. A fiduciary's control over a digital asset is not equivalent to a transfer of ownership or a laundering of illegally obtained material. Thus, this subsection grants the fiduciary the ability to access electronic records, and the disposition of those records is subject to other laws. For example, where the account holder has an online securities account or has a game character and in-game property associated with an online game, then the fiduciary's ability to sell the securities, the game character, or the in-game property is controlled by traditional probate law. The act is only granting access and "control" in the sense of enabling the fiduciary to do electronically what the account holder could have done electronically. Thus, if a terms-of-service agreement precludes online transfers, then the fiduciary is unable to make those transfers electronically as well.

Example – Fiduciary control over a digital asset. D dies with a will disposing of all D's assets to D's spouse, S. E is the personal representative for D's estate. D left a bank account, for which D only received online statements, and a blog.

E as personal representative of D's estate has access to both of D's accounts and can request the passwords from the custodians of both accounts. If D's agreement with the bank requires that transferring the underlying title to the account be done in person, through a hard copy signed by the account holder and the bank manager, then E must comply with those procedures (signing as the account holder) and cannot transfer the funds in the account electronically. If the terms-of-service agreement for the blog permitted D to transfer the blog electronically, then E can make the transfer electronically as well.

Subsection (c) establishes 60 days as the appropriate time for compliance. This is true regardless of the procedure for supplying the requisite trust instrument. If applicable law other than this act does not prohibit the custodian from complying, then the custodian must grant access to comply. This provision should be read in conjunction with the state's power of attorney act.

SECTION 9. CUSTODIAN IMMUNITY. A custodian and its officers, employees, and agents are immune from liability for any act done in good faith in compliance with this [act].

Comment

This section establishes that custodians are protected from liability when they act in accordance with the procedures of this act and in good faith. The types of actions covered include disclosure as well as transfer of copies. The critical issue in conferring immunity is the source of the liability. Direct liability is not subject to immunity; indirect liability is subject to immunity.

Direct liability could only arise from noncompliance with a judicial order issued under section 8. Upon determination of a right of access under sections 4, 5, 6, or 7, a court may issue an order to grant access under section 8. Noncompliance with that order would give rise to liability for contempt. There is no immunity from this liability.

Indirect liability could arise from granting a right of access under this act. Access to a digital asset might invade the privacy or the harm the reputation of the protected person, might harm the family or business of the protected person, and might harm other persons. The grantor of access to the digital asset is immune from liability arising out of any of these circumstances if the grantor acted in good faith to comply with this act. If there is a judicial order under section 8, compliance with the order establishes good faith. Absent a judicial order under section 8, good faith must be established by the grantor's assessment of the requirements of this act.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq*., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 12. [SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note*: Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 13. APPLICABILITY.

(a) Subject to subsection (b), this [act] applies to:

(1) a fiduciary or agent acting under a will or power of attorney executed before, on, or after [the effective date of this [act]];

(2) a personal representative acting for a decedent who died before, on, or after [the effective date of this [act]];

(3) a [conservatorship] proceeding, whether pending in a court or commenced before, on, or after [the effective date of this [act]]; and

(4) a trustee acting under a trust created before, on, or after [the effective date of this [act]].

(b) This [act] does not apply to a digital asset of an employer used by an employee in the

ordinary course of the employer's business.

Comment

This act does not change the substantive rules of other law, such as agency, banking, conservatorship, contract, copyright, criminal, fiduciary, privacy, probate, property, security, trust, or other applicable law except to vest fiduciaries with authority, according to the provisions of this act, to access, control, or copy digital assets of a decedent, protected person (or other individual under Section 4), principal, settlor, or trustee.

Subsection (a)(2) covers the situations in which a decedent dies intestate, so it falls outside of subsection (a)(1), as well as the situations in which a state's procedures for small estates are used.

Subsection (b) clarifies that the act does not apply to a fiduciary's access to an employer's internal email system.

Example 1 – Fiduciary access to an employee e-mail account. D dies, employed by Company Y. Company Y has an internal e-mail communication system, available only to Y's employees, and used by them in the ordinary course of Y's business. D's personal representative, R, believes that D used Company Y's e-mail system to effectuate some financial transactions that R cannot find through other means. R requests access from Company Y to the e-mails.

Company Y is not a custodian subject to the act. Under Section 2(7), a custodian must carry, maintain or store an account holder's digital assets. An account holder, in turn, is defined under Section 2(1) as someone who has entered into a terms-of-service agreement. Company Y, like most employers, did not enter into a terms-of-service agreement with D, so D was not an account holder.

Example 2 – Employee of electronic-communication service provider. D dies, employed by Company Y. Company Y is an electronic-communication service provider. Company Y has an internal e-mail communication system, available only to Y's employees and used by them in the ordinary course of Y's business. D used the internal Company Y system. When not at work, D also used an electronic-communication service system that Y provides to the public. D's personal representative, R, believes that D used Company Y's internal e-mail system as well as Company Y's electronic-communication system available to the public to effectuate some financial transactions. R seeks access to both communication systems.

As is true in Example 1, Company Y is not a custodian subject to the act for purposes of the internal email system. The situation is different with respect to R's access to Y's system that is available to the public. Assuming that Y can disclose the communications under federal law, then Y must disclose them to R.

SECTION 14. REPEALS; CONFORMING AMENDMENTS.

(a) ….

(b) ….

(c) ….

SECTION 15. EFFECTIVE DATE. This [act] takes effect ….

ATTACHMENT 7

Probate Appeals Legislative Project
Marlaine C. Teahan, Subcommittee Chair's Report
August 29, 2014

Status

The probate appeals legislative project is a legislative approach that will provide that all appeals coming out of the probate court will be heard by the Court of Appeals. At the subcommittee level, work is ongoing with changes to the Legislative Service Bureau (LSB) proposed statutory package. Many meetings have been held over the summer. We have final versions ready to go to LSB pending approval of the requested action in this report. We are hopeful for a September introduction of this legislation.

New Issue

Recently, the subcommittee noticed that MCL 700.1303, Concurrent jurisdiction; removal; policy, needs revision as part of the Probate Appeals Legislative Project. While two proposed revisions are within the Subcommittee Chair's authority to make minor conforming changes consistent with Council's prior approval, the third change is beyond this authority. **Therefore, a vote of Council is needed to approve the changes on the attached redline for MCL 700.1303.**

Background: EPIC Section 1303 deals with the concurrent jurisdiction of the probate and circuit courts. Jurisdiction, for the cases that are delineated in Section 1303(1)(a-k), lies in either the probate or circuit courts. In certain situations, Section 1303(2) allows the circuit court, on motion of a party, to send the action or proceeding to probate court.

The attached redline illustrates the following three proposed changes:

- First, the penultimate phrase of the last sentence of subsection 2 presumes that the circuit court is an appellate court for the probate court and may ultimately hear an appeal on the case sent back to probate court. This phrase is deleted in the redline. (Without color – this is really a blackline.)
- Second, the last phrase of the last sentence of subsection 2 overlooks the fact that MCR 5.101(A) provides for two forms of probate court actions, a "proceeding" and a "civil action." Deletion of this last phrase that references only proceedings in probate court is appropriate. An alternative approach would be to add in a "civil action" after "proceeding"; however, the subsection seems clearer without either reference. This phrase is deleted in the redline.
- Third, it has been suggested by a member of the subcommittee that the transfer should only be allowed on consent of the probate court. The redline adds the phrase "if the probate court consents to the transfer" at the end of the first sentence of subsection 2.

Marlaine C. Teahan, Subcommittee Chair, Probate Appeals Legislative Project
Court Rules, Procedures and Forms Committee
Probate and Estate Planning Section

700.1303 Concurrent jurisdiction; removal; policy.

Sec. 1303.

(1) In addition to the jurisdiction conferred by section 1302 and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:

(a) Determine a property right or interest.

(b) Authorize partition of property.

(c) Authorize or compel specific performance of a contract in a joint or mutual will or of a contract to leave property by will.

(d) Ascertain if individuals have survived as provided in this act.

(e) Determine cy-pres or a gift, grant, bequest, or devise in trust or otherwise as provided in 1915 PA 280, MCL 554.351 to 554.353.

(f) Hear and decide an action or proceeding against a distributee of a fiduciary of the estate to enforce liability that arises because the estate was liable upon some claim or demand before distribution of the estate.

(g) Impose a constructive trust.

(h) Hear and decide a claim by or against a fiduciary or trustee for the return of property.

(i) Hear and decide a contract proceeding or action by or against an estate, trust, or ward.

(j) Require, hear, or settle an accounting of an agent under a power of attorney.

(k) Bar an incapacitated or minor wife of her dower right.

(2) If the probate court has concurrent jurisdiction of an action or proceeding that is pending in another court, on the motion of a party to the action or proceeding and after a finding and order on the jurisdictional issue, the other court may order removal of the action or proceeding to the probate court, if the probate court consents to the transfer. If the action or proceeding is removed to the probate court, the other court shall forward to the probate court the original of all papers in the action or proceeding. ~~After that transfer, the other court shall not hear the action or proceeding, except by appeal or review as provided by law or supreme court rule, and the action or proceeding shall be prosecuted in the probate court as a probate court proceeding.~~

(3) The underlying purpose and policy of this section is to simplify the disposition of an action or proceeding involving a decedent's, a protected individual's, a ward's, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court.