Agendas and Attachments for

- Meeting of the Committee on Special Projects (CSP);
- Meeting of the Members of the Probate and Estate Planning Section
- Meeting of the Council of the Probate and Estate Planning Section

Saturday, September 9, 2017
9:00 am
University Club
3435 Forest Road
Lansing, Michigan 48910
Probate and Estate Planning Section of the State Bar of Michigan

Notice of Meetings

Meeting of the Section’s Committee on Special Projects (CSP)

And

Meeting of the Members of the Probate and Estate Planning Section

And

Meeting of the Council of the Probate and Estate Planning Section

September 9, 2017

9:00 a.m.

University Club

3435 Forest Road

Lansing, Michigan 48910

The above stated meetings of the Section will be held at the University Club, 3435 Forest Road, Lansing, Michigan 48910, on Saturday, September 9, 2017. The Section’s Committee on Special Projects (CSP) meeting will begin at 9:00 am, followed immediately by the meeting of the Members and then followed immediately by the meeting of the Council of the Section. If time allows and at the discretion of the Chair, we will work further on CSP materials after the Council of the Section meeting concludes.

Christopher Ballard, Secretary

Varnum LLP

300 N. 5th Ave Ste 230
Ann Arbor, Michigan 48104

Phone: (734) 372-2912
Fax: (734) 372-2940
Email: caballard@varnumlaw.com
Schedule and Location of Future Meetings

Probate and Estate Planning Section

Of the

State Bar of Michigan

Unless otherwise noted, CSP meetings are held at 9:00 a.m., immediately followed by the Council meeting for the Section at approximately 10:15 a.m., at the University Club, 3435 Forest Road, Lansing, Michigan 48910.

Meeting Schedule for 2017-2018

September 9, 2017 (Annual Section Meeting)

October 14, 2017
(Crowne Plaza Lansing West, 925 S. Creyts Road, Lansing, MI 48917)

November 11, 2017

December 16, 2017

January 20, 2018

February 17, 2018

March 24, 2018

April 21, 2018

June 16, 2018

September 8, 2018 (Annual Section Meeting)
CALL FOR MATERIALS
Council Meetings of the Probate and Estate Planning Section

Schedule of Dates for Materials for Committee on Special Projects

All materials are due on or before 5:00 p.m. of the Thursday falling 9 days before the next CSP meeting. CSP materials are to be sent to Geoffrey Vernon, Chair of CSP (gvernon@joslynvernon.com).

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

August 31, 2017 (for September meeting)

Schedule of Dates for Materials for Council Meeting

All materials are due on or before 5:00 p.m. of the Friday falling 8 days before the next Council meeting. Council materials are to be sent to Chris Ballard, Secretary (caballard@varnumlaw.com).

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

September 1, 2017
**STATE BAR OF MICHIGAN**  
**PROBATE AND ESTATE PLANNING SECTION COUNCIL**

**Officers for 2016-2017 Term**

<table>
<thead>
<tr>
<th>Officer</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairperson</td>
<td>James B. Steward</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>Marlaine C. Teahan</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>Marguerite Munson Lentz</td>
</tr>
<tr>
<td>Secretary</td>
<td>Christopher A. Ballard</td>
</tr>
<tr>
<td>Treasurer</td>
<td>David P. Lucas</td>
</tr>
</tbody>
</table>

**Council Members for 2016-2017 Term**

<table>
<thead>
<tr>
<th>Council Member</th>
<th>Year Elected to Current Term (partial, first or second full term)</th>
<th>Current Term expires</th>
<th>Eligible after Current Term?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bearup, George F.</td>
<td>2014 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2017</td>
<td>No</td>
</tr>
<tr>
<td>Jaconette, Hon Michael L.</td>
<td>2014 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Kellogg, Mark E.</td>
<td>2014 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Lichterman, Michael G.</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; partial term)</td>
<td>2017</td>
<td>Yes (2 terms)</td>
</tr>
<tr>
<td>Malviya, Raj A.</td>
<td>2014 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2017</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Welber, Nancy H.</td>
<td>2014 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2017</td>
<td>No</td>
</tr>
<tr>
<td>Caldwell, Christopher J.</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Clark-Kreuer, Rhonda M.</td>
<td>2015 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2018</td>
<td>No</td>
</tr>
<tr>
<td>Goetsch, Kathleen M.</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Lynwood, Katie</td>
<td>2015 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2018</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Mysliwiec, Melisa M.W.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; partial term)</td>
<td>2018</td>
<td>Yes (2 terms)</td>
</tr>
<tr>
<td>Skidmore, David L.J.M.</td>
<td>2015 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2018</td>
<td>No</td>
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<tr>
<td>Labe, Robert B.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Mills, Richard C.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; full term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
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<tr>
<td>New, Lorraine F.</td>
<td>2016 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2019</td>
<td>No</td>
</tr>
<tr>
<td>Piwowarski, Nathan R.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Syed, Nazneen H.</td>
<td>2016 (1&lt;sup&gt;st&lt;/sup&gt; term)</td>
<td>2019</td>
<td>Yes (1 term)</td>
</tr>
<tr>
<td>Vernon, Geoffrey R.</td>
<td>2016 (2&lt;sup&gt;nd&lt;/sup&gt; term)</td>
<td>2019</td>
<td>No</td>
</tr>
</tbody>
</table>
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
Shaheen I. Imami
Stephen W. Jones
Robert B. Joslyn
James A. Kendall
Kenneth E. Konop
Nancy L. Little
James H. LoPrete
Richard C. Lowe
John D. Mabley
John H. Martin
Michael J. McClory
Douglas A. Mielock
Amy N. Morrissey
Patricia Gormely Prince
Douglas J. Rasmussen
Harold G. Schuitmaker
John A. Scott
Thomas F. Sweeney
Fredric A. Sytsma
Lauren M. Underwood
W. Michael Van Haren
Susan S. Westerman
Everett R. Zack
Michael W. Irish Award

Mission: To honor a practitioner (supported by recommendations from his or her peers) whose contributions to the Probate and Estate Planning Section of the State Bar of Michigan and whose service to his or her community reflect the high standards of professionalism and selflessness exemplified by Michael W. Irish.

Recipients
1995  Joe C. Foster, Jr.
1996  John H. Martin
1997  Harold A. Draper
1998  Douglas J. Rasmussen
1999  James A. Kendall
2000  NO AWARD PRESENTED
2001  John E. Bos
2002  Everett R. Zack
2003  NO AWARD PRESENTED
2004  Brian V. Howe
2005  NO AWARD PRESENTED
2006  Hon. Phillip E. Harter
2007  George Cooney (April 3, 2007)
2008  Susan A. Westerman
2009  Russell M. Paquette (posthumously)
2010  Fredric A. Sytsma
2011  John A. Scott
2012  NO AWARD PRESENTED
2013  Michael J. McClory
2014  Sebastian V. Grassi, Jr.
2015  NO AWARD PRESENTED
2016  Douglas A. Mielock

The Michael W. Irish Award was first presented in 1995 in honor of the late Michael W. Irish. The award reflects the professionalism and community leadership of its namesake.
The George A. Cooney Society

What: This award is presented by the Institute of Continuing Legal Education and the Probate & Estate Planning Section of the State Bar of Michigan to a Michigan estate planning attorney for outstanding contributions to continuing legal education in Michigan.

Who: As of November 2015, there have been five recipients:

- John E. Bos (2007)
- Everett R. Zack (2009)
- John H. Martin (2011)
- John A. Scott (2013)
- Phillip E. Harter (2015)
- George W. Gregory (2017)

When: This award is not necessarily given every year. So far we’ve given awards in 2007, 2009, 2011, 2013, and 2015.

Where: The award is presented at the Annual Probate & Estate Planning Institute. ICLE will invite the recipient to attend the Institute, and one of the Section officers will present the individual award at the start of the Institute.

Why: With George Cooney’s passing, the State Bar of Michigan lost one of its premier estate planning and elder law attorneys. The Section and ICLE have chosen to jointly create the George A. Cooney Society to recognize a select group of lawyers who epitomize George's dedication to his fellow attorneys and in recognition of his long-term, significant contributions to continuing legal education in Michigan.

How: ICLE will nominate candidates based upon the specific criteria contained in the Guidelines for Selection and will send a nominating letter to the Section for approval by the Executive Board. The Section’s leadership and at-large members may also recommend candidates to ICLE for consideration.

Guidelines for Selection:

- Significant CLE contributions to probate and estate planning over a substantial period of time.
- Outstanding quality of contributions.
- A wide range of contributions, e.g. multiple contributions for the following: speaker, author, editor, advisory board member, curriculum advisor, creating case study scenarios, preparing Top Tips, How-To Kits or other online resources, etc.
- Generous mentorship and assistance to colleagues with their probate and estate planning career development as well as activities and active involvement with the Probate & Estate Planning Section of the State Bar of Michigan.
Amicus Curiae Committee
Mission: To review requests made to the Section to file, and to identify cases in which the Section should file, amicus briefs in pending appeals and to engage and oversee the work of legal counsel retained by the Section to prepare and file its amicus briefs

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

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

Amy N. Morrissey, Chair
Robert D. Brower, Jr.
George W. Gregory
Phillip E. Harter
Nancy L. Little

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

Marlaine C. Teahan

Assisted 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
Robert M. O’Reilly
Lawrence W. Waggoner
Edward Goldman
James P. Spica

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

Christopher A. Ballard, Chair
Marguerite Munson Lentz,
David P. Lucas

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
John Roy Castillo
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 J. Caldwell, Chair
Christopher A. Ballard
Michael W. Bartnik
William R. Bloomfield
Robin D. Ferriby
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

Melisa M. W. Mysliwiec, Chair
Kathleen M. Goetsch
Katie Lynwood
Michael J. McClory
Neal Nusholtz
Jessica M. Schilling
Rebecca A. Schnelz, (Liaison to Solutions on Self-help Task Force)
Nancy H. Welber
Nicholas Vontroba

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

Geoffrey R. Vernon, Chair

Community Property Trusts Ad Hoc Committee
Mission: To review the statutes, case law, and legislative analysis of Michigan and other jurisdictions (including pending legislation) concerning community property trusts and, if advisable, to recommend changes to Michigan law in this area

Neal Nusholtz, Chair
George W. Gregory
Lorraine F. New
Nicholas A. Reister
Rebecca K. Wrock

Divided and Directed Trusteeships ad Hoc Committee
Mission: To review the forthcoming Uniform Directed Trust Act and other legislative proposals concerning the division of fiduciary labor and responsibility among non trustee directors, co-trustees, and divided trusteeships and, if advisable, to recommend changes to Michigan law in this area

James P. Spica, Chair
Probate & Estate Planning Section Committees 2016-2017

Judith M. Grace
Raj A. Malviya
Gabrielle M. McKee
Richard C. Mills
Marlaine C. Teahan
Robert P. Tiplady
Geoffrey R. Vernon
Nancy H. Welber

Electronic Communications Committee
Mission: To oversee all forms of electronic communication with and among members of the Section, including communication via the Section’s web site, the Section listserv, and the ICLE Online Community site, to identify emerging technological trends of importance to the Section and its members, and to recommend to the council best practices to take advantage of technology in carrying out the section’s and Council’s mission and work

Michael G. Lichterman, Chair
William J. Ard
Amy N. Morrissey
Jeanne Murphy (Liaison to ICLE)
Neal Nusholtz
Michael L. Rutkowski

Ethics & Unauthorized Practice of Law 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, including identifying the unauthorized practices of law, reporting of such practices to the appropriate authorities, and educating the public regarding the inherent problems relying on non-lawyers

Katie Lynwood, Chair
William J. Ard
Raymond A. Harris
J. David Kerr
Robert M. Taylor
Amy Rombyer Tripp

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 W. Bartnik
Raymond A. Harris
Phillip E. Harter
Michael J. McClory
Kurt A. Olson
James B. Steward
Paul Vaidya

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

Geoffrey R. Vernon, Chair
Stephen L. Elkins
James P. Spica
Joseph D. Weiler, Jr.

Legislation Analysis & Monitoring 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

Katie Lynwood, Chair
recommend a course of action on legislation not otherwise assigned to a substantive committee of the Section

Ryan P. Bourjaily, Chair
Christopher A. Ballard
Georgette E. David
Mark E. Kellogg
Daniel S. Hilker
Michele C. Marquardt
Jonathon Nahhat

Legislation Development & Drafting 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. May work alone or in conjunction with other substantive standing or ad hoc committees.

Nathan Piwowarski, Chair
Howard H. Collens
Georgette David
Henry P. Lee
Marguerite Munson Lentz
Michael G. Lichterman
Sueann Mitchell
Kurt A. Olson
James P. Spica
Robert P. Tiplady, II
Geoffrey R. Vernon

Mardigian Case Review and Drafting Ad Hoc Committee
Mission: To follow the progress and outcome of the Mardigian case, and make recommendations for possible statutory changes to better deal with the situation where a lawyer prepares an instrument for a non-relative which includes a gift for that lawyer.

Sueann Mitchell, Chair
George W. Gregory
David P. Lucas
Kurt A. Olsen

Litigation, Proceedings, and Forms Committee
Mission: To consider and recommend to the Council action with respect to contested and uncontested proceedings, the Michigan Court Rules, and published court forms, including the interpretation, use, and amendment of them

David L.J.M. Skidmore, Chair
James F. (“JV”) Anderton
Constance L. Brigman (Liaison to SCAO for Guardianship, Conservatorship, and Protective Proceedings Workgroup)
Rhonda M. Clark-Kreuer
Phillip E. Harter
Michael D. Holmes
Shaheen I. Imami
Hon. Michael L. Jaconette
Hon. David M. Murkowski
Rebecca A. Schnelz (Liaison to SCAO for Mental Health/Commitment Workgroup)

Membership Committee
Mission: To strengthen relations with Section members, encourage new membership, and promote awareness of and participation in Section activities

Nicholas A. Reister, Chair
Daniel S. Hilker, Vice Chair
David Borst
Nicholas R. Dekker
Daniel A. Kosmowski

06.19.2017
Probate & Estate Planning Section Committees 2016-2017

Nominating Committee

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

Thomas F. Sweeney, Chair
Amy N. Morrissey
Shaheen I. Imami

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

Marlaine C. Teahan, Chair

Premarital Agreements Legislation Ad Hoc Committee

Mission: To review and compare Michigan’s statutes & case law (particularly the Allard decision) regarding enforcement and potential effects on estate planning and estate administration with the Uniform Premarital and Marital Agreements Act and similar acts from other states, and recommend changes to our laws as needed.

George F. Bearup, (chair)
Kathleen M. Goetsch
Daniel S. Hilker
Gabrielle M. McKee
Patricia M. Ouellette (family law liaison)

Probate Institute

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

Marguerite Munson Lentz, Chair

Real Estate Committee

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

Mark E. Kellogg, Chair
Jeffrey S. Ammon
William J. Ard
David S. Fry
J. David Kerr
Michael G. Lichterman
Melissa M. W. Mysliwiec
James T. Ramer
James B. Steward

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

Richard C. Mills, Chair
Nancy L. Little, Managing Editor
Melissa M. W. Mysliwiec, Assoc. Editor

Tax Committee

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

Lorraine F. New, Chair
Christopher J Caldwell
Robert B. Labe
Raj A. Malviya
Nazneen H. Syed
Alternative Dispute Resolution Section Liaison
Milton L. Mack, Jr.

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 and Disability Rights Section Liaison
Mission: The liaison to the Elder Law and Disability Rights 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 in 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 in matters of mutual interest and concern
Susan M. Allan

Probate Judges Association Liaisons
Mission: The liaisons to the MPJA are responsible for developing and maintaining bilateral communication between the Section and the MPJA on matters of mutual interest and concern
Hon. David M. Murkowski
Hon. Michael L. Jaconette
Probate Registers Liaison

*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*

Constance L. Brigman
(Guardianship, Conservatorship, and Protective Proceedings Workgroup)

Michele C. Marquardt
(Estates & Trusts Workgroup)

Rebecca A. Schnelz
(Mental Health/Commitment Workgroup and Guardianship, Conservatorship, and Protective Proceedings Workgroup)

Solutions on Self-help Task Force Liaison

*Mission: The liaison to the Solutions on Self-help (SOS) Task force is responsible for maintaining bilateral communications between the Section and the Task Force*

Kathleen M. Goetsch

State Bar Commissioner 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*

[vacant]

Taxation 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
<table>
<thead>
<tr>
<th>Action Pending</th>
<th>Statutory/Legislative</th>
<th>Court Rules, Procedures and Forms</th>
<th>Council Organization &amp; Internal Procedures</th>
<th>Professional Responsibility</th>
<th>Education &amp; Service to the Public &amp; Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Prop tax uncapping exempt. (HB5552)</td>
<td>-Fiduciary Access to Digital Assets (HB5366-5370)</td>
<td>-Supreme Court Task Force Report</td>
<td>-Bylaw Update</td>
<td></td>
<td>&quot;Who Should I Trust?&quot; Program</td>
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<tr>
<td>-PR access to online accts (SB 293)</td>
<td>-Hearings minors &lt; 18 (SB 144 &amp; 177)</td>
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<td>-55th Annual P&amp;EP Institute</td>
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<td>-Funeral Representative (HB 5162/SB 731)</td>
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<thead>
<tr>
<th>Priority Items</th>
<th>-Domestic Asset Protection Trusts</th>
<th>-SCAO Meetings*</th>
<th>-Inventory Lawyer</th>
<th>-Opportunities with ICLE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>-ILIT Trustee Liability Protection</td>
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<td>-Digital Journal</td>
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<td>-Artificial Reproductive Technology</td>
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<td>-Charitable Trust</td>
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<td>-Probate Appeals</td>
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<thead>
<tr>
<th>Secondary Priority</th>
<th>-EPIC/MTC Updates</th>
<th>-Budget Reporting</th>
<th>-Probate Court Opinion Bank</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>-Directed Investment Trusts</td>
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<td></td>
<td>-TBE Trusts</td>
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<td>-ADR Revision</td>
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<td>-Property tax on trust property</td>
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<td></td>
<td>-Uniform Real Property TOD Act</td>
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</tbody>
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<tr>
<th>Priority To Be Determined</th>
<th>-Dignified Death (Family Consent) Act</th>
<th>-Budget Reporting</th>
<th>-Probate Court Opinion Bank</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>-Pooled income trust exclusion</td>
<td></td>
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CSP MATERIALS
PROBATE & ESTATE PLANNING COUNCIL
AGENDA FOR
COMMITTEE ON SPECIAL PROJECTS

September 9, 2017

1. Divided and Directed Trusteeships ad Hoc Committee (9:00 - 9:20 am)

   Introduction of divided and directed trusteeships legislative proposal. The following are included in the following meeting materials:
   
   • Text of the proposed legislation.
   • Venn Diagram re MTC “Trust Protectors” and UDTA “Trust Directors.”
   • UDTA / MTC 7703a Parallel Tables

2. Legislation Development and Drafting Committee (9:20 - 9:35 am)

   Further discussion and update of the standby guardian proposal. A memo from Nathan Piwowarski to the CSP and the proposed legislation are included in the following meeting materials.

3. Legislation Development and Drafting Committee (9:35 - 9:50 am)

   Introduction of undisclosed trusts proposal. A memo from Jim Spica to the Legislation Development and Drafting Committee is included in the following meeting materials.
A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by amending sections 7103, 7105, 7108, 7411, 7703, and 7704 as amended by 2009 PA 46, 2010 PA 325, and 2012 PA 483; by deleting (and reserving the numerical designation of) section 7809; and by adding sections 7703a and 7703b.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700.7103 Definitions

Sec. 7103. As used in this article:
(a) "Action", with respect to a trustee or a trust protector, includes an act or a failure to act.
(b) "Ascertaintable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.
(c) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).
(d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:
   (i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.
   (ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.
   (iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.
   (iv) Whether the distribution of trust property is from income or principal or both of the trust.
   (v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.
(e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.
(f) "Power of withdrawal" means a presently exercisable general power of appointment other than a power that is either of the following:
   (i) Exercisable by a trustee and limited by an ascertainable standard.
   (ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
(g) "Qualified trust beneficiary" means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:
   (i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.
   (ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.
   (iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
(h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

(j) "Spendthrift provision" means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary's interest.

(k) "Support provision" means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

(l) "Trust beneficiary" means a person to whom 1 or both of the following apply:

(i) The person has a present or future beneficial interest in a trust, vested or contingent.

(ii) The person holds a power of appointment over trust property in a capacity other than that of trustee or trust director.

(m) "Trust instrument" means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) "Trust protector or director" means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment that term as defined in section 7703a(1)(e).

700.7105 Duties and powers of trustee; provisions of law prevailing over terms of trust

Sec. 7105. (1) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

(2) The terms of a trust prevail over any provision of this article except the following:

(a) The requirements under sections 7401 and 7402(1)(e) for creating a trust.

(b) The duty of a trustee to administer a trust in accordance with section 7801.

(c) The requirement under section 7404 that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(d) The power of the court to modify or terminate a trust under sections 7410, 7412(1) to (3), 7414(2), 7415, and 7416.

(e) The effect of a spendthrift provision, a support provision, and a discretionary trust provision on the rights of certain creditors and assignees to reach a trust as provided in part 5.

(f) The power of the court under section 7702 to require, dispense with, or modify or terminate a bond.

(g) The power of the court under section 7708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.

(h) Except as permitted under section 7809(2), The obligations imposed on a trust protector or director in section 7703a(5) and (6) 7809(1).
(i) The duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.

(j) The power of the court to order the trustee to provide statements of account and other information pursuant to section 7814(4).

(k) The effect of an exculpatory term under section 7809(a)7703a(6)(b) or 7908.

(l) The effect of a release of a trustee or trust director from liability for breach of trust under section 7703a(9).

( lm) The rights under sections 7910 to 7913 of a person other than a trustee or beneficiary.

( mn) Except as permitted by section 7703a(9), Periods of limitation under this article for commencing a judicial proceeding.

(no) The power of the court to take action and exercise jurisdiction.

(ep) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 7203 and 7204.

(pq) The requirement under section 7113 that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

(r) The requirement under section 7703b(3)(d) regarding the eligibility of a trust’s sole beneficiary to be a “separate trustee” within the meaning of section 7703b.

700.7108  Principal place of administration

Sec. 7108. (1) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if either of the following applies:

(a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction.

(b) A trust director’s principal place of business is located in, or a trust director is a resident of, the designated jurisdiction.

(c) All or part of the administration occurs in the designated jurisdiction.

(2) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the qualified trust beneficiaries.

(3) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (2), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(4) The trustee shall notify the qualified trust beneficiaries in writing of a proposed transfer of a trust's principal place of administration not less than 63 days before initiating the transfer. The notice of proposed transfer shall include all of the following:

(a) The name of the jurisdiction to which the principal place of administration is to be transferred.

(b) The address and telephone number at the new location at which the trustee can be contacted.

(c) An explanation of the reasons for the proposed transfer.

(d) The date on which the proposed transfer is anticipated to occur.

(e) In a conspicuous manner, the date, not less than 63 days after the giving of the notice, by which a qualified trust beneficiary must notify the trustee in writing of an objection to the proposed transfer.
(5) The authority of a trustee under this section to transfer a trust's principal place of administration without the approval of the court terminates if a qualified trust beneficiary notifies the trustee in writing of an objection to the proposed transfer on or before the date specified in the notice.

(6) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 7704.

(7) The view of an adult beneficiary shall be given weight in determining the suitability of the trustee and the place of administration.

### 700.7411 Modification or termination of noncharitable trust; consent; "settlor's representative" defined

Sec. 7411. (1) Subject to subsection (2), a noncharitable irrevocable trust may be modified or terminated in any of the following ways:

(a) By the court upon the consent of the trustee and the qualified trust beneficiaries, if the court concludes that the modification or termination of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust.

(b) Upon the consent of the qualified trust beneficiaries and a trust protector, person or committee who is given the power under the terms of the trust to grant, veto, or withhold approval of termination or modification of the trust.

(c) By a trustee or trust protector, other person or committee given to whom a power by the terms of the trust to direct the termination or modification of the trust has been given by the terms of a trust.

(2) Subsection (1) does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before April 1, 2010.

(3) Notice of any proceeding to terminate or modify a trust shall be given to the settlor, the settlor's representative if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, the trust protector, director, if any, a powerholder described in paragraph (b) or (c) of subsection (1), if any, the trustee, and any other person named in the terms of the trust to receive notice of such a proceeding.

(4) Upon termination of a trust under subsection (1), the trustee shall distribute the trust property as agreed by the qualified trust beneficiaries.

(5) If the trustee fails or refuses to consent, or fewer than all of the qualified trust beneficiaries consent, to a proposed modification or termination of the trust under subsection (1), the modification or termination may be approved by the court if the court is satisfied that both of the following apply:

(a) If the trustee and all of the qualified trust beneficiaries had consented, the trust could have been modified or terminated under this section.

(b) The interests of a qualified trust beneficiary who does not consent will be adequately protected.

(6) As used in this section, "settlor's representative" means the settlor's agent under a durable power of attorney, if the agent is known to the petitioner, or, if an agent has not been appointed, the settlor's conservator, plenary guardian, or partial guardian.

### 700.7703 Cotrustees; powers and duties

Sec. 7703. (1) Except as otherwise provided in this section, cotrustees shall act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustee or cotrustees may act for the trust.
(3) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(43) If prompt action is necessary to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust if either of the following applies:
   (a) A cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity.
   (b) A cotrustee who is available fails or refuses to participate in the administration of the trust following notice from the remaining cotrustee or cotrustees.

(54) By agreement of the trustees, a trustee may delegate to a cotrustee 1 or both of the following:
   (a) Any power that is permitted to be delegated pursuant to section 7817(v) to an agent who is not a trustee.
   (b) Any power that can only be performed by a trustee, if notice of the delegation is provided to the qualified trust beneficiaries within 28 days.

(65) Unless a delegation under subsection (5) was irrevocable, a trustee may revoke the delegation previously made. A revocation under this subsection shall be in writing and shall be given to all of the remaining cotrustees. If notice of the delegation was required to be provided to the qualified trust beneficiaries, notice of the revocation shall be given to the qualified trust beneficiaries within 28 days after the revocation.

(76) If 2 or more trustees own securities, their acts with respect to voting have 1 of the following effects:
   (a) If only 1 trustee votes, in person or by proxy, that trustee's act binds all of the trustees.
   (b) If more than 1 trustee votes, in person or by proxy, the act of the majority so voting binds all of the trustees.
   (c) If more than 1 trustee votes, in person or by proxy, but the vote is evenly split on a particular matter, each faction is entitled to vote the securities proportionately.

(87) A trustee is not liable for the action or omission of a cotrustee if all of the following apply:
   (a) The trustee is not unavailable to perform a trustee's function because of absence, illness, disqualification under other law, or other incapacity or has not properly delegated the performance of the function to a cotrustee.
   (b) The trustee is aware of but does not join in the action or omission of the cotrustee.
   (c) The trustee dissents in writing to each cotrustee at or before the time of the action or omission.

(98) A trustee who is not aware of an action by a cotrustee is not liable for that action unless the trustee should have known that the action would be taken and, if the trustee had known, would have had an affirmative duty to take action to prevent the action.

(10) The other subsections of this section notwithstanding, the terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee’s exercise or nonexercise of a power of the other cotrustee to the same extent that a directed trustee described in section 7703a may be relieved from duty and liability with respect to a trust director’s power of direction under that section.

700.7703a Directed Trusteeship

7703a. (1) In this section:
(a) “Breach of trust” includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust or by this article.

(b) “Directed trustee” means a trustee that is subject to a power of direction.

(c) “Power of appointment” means that term as defined in section 2(c) of the powers of appointment act of 1967.

(d) “Power of direction” means a power over a trust granted by the terms of the trust to the extent the power is exercisable while the [grantee] [person to whom it is granted] is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in subsection (2).

(e) “Trust director” means a person that is granted a power of direction. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

(2) This section does not apply to:

(a) A power of appointment that is intended to be held by the donee in a nonfiduciary capacity.

(b) A power that is intended to be held by the donee in a nonfiduciary capacity that enables the donee to create a power of appointment, regardless of whether the created power is intended to be held by the donee of the created power in a fiduciary or a nonfiduciary capacity.

(c) A power to appoint or remove a trustee or trust director.

(d) A power of a settlor over a trust to the extent the settlor has a power to revoke the trust.

(e) A power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects either of the following:

(i) The beneficial interest of the beneficiary.

(ii) The beneficial interest of another beneficiary represented by the beneficiary under part 3 of this article with respect to the exercise or nonexercise of the power.

(f) A power over a trust if both of the following apply:

(i) The terms of the trust provide that the power is held in a nonfiduciary capacity.

(ii) The power must be held in a nonfiduciary capacity to achieve the settlor’s tax objectives under the internal revenue code.

(3) Unless the terms of the trust indicate a contrary intention, both of the following powers are presumed to be nonfiduciary powers excluded from this section’s application by subsection (2):

(a) A power of appointment granted to a person other than a trustee of the trust.

(b) A power granted to a person other than a trustee of the trust that enables that person to create a power of appointment.

(4) Subject to subsection (5), the terms of a trust may grant a power of direction to a trust director.

(a) A power of direction includes only those powers granted by the terms of the trust.

(b) Unless the terms of the trust indicate a contrary intention, both of the following apply:

(i) A trust director may exercise any further power appropriate to the exercise or nonexercise of the director’s power of direction.

(ii) Trust directors with joint powers must act by majority decision.

(5) A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or a further power under subsection (4)(b)(i) regarding both of the following:

(a) A payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of medicaid law in section 1917 of the social security act, 42 U.S.C. 1396p(d)(4)(A).

(b) A charitable interest in the trust, including required notices regarding the interest to the Attorney General.

(6) Subject to subsection (7), both of the following apply with respect to a power of direction or a further power under subsection (4)(b)(i):
(a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power as a sole trustee in a like position and under similar circumstances if the power is held individually or, if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.

(b) A term of a trust that relieves a trust director from liability for breach of fiduciary duty is unenforceable to the extent that either of the following applies:
   (i) The term relieves the trust director of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
   (ii) The term was inserted as the result of an abuse by the trust director of a fiduciary or confidential relationship to the settlor.

(7) If a trust director is licensed, certified, or otherwise authorized or permitted by law other than this section to provide health care in the ordinary course of the director’s business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this section.

(8) A directed trustee shall take action to comply with the exercise or nonexercise of a power of direction or further power of a trust director under subsection (4)(b)(i) and is not liable for so acting provided, however, that a directed trustee must not comply with the exercise or nonexercise of any such power if the exercise or nonexercise was obtained with the directed trustee’s collusion or by the directed trustee’s fraud and compliance would be in pursuance of that collusion or fraud.

(9) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if any of the following applies:
   (a) The breach involved the trustee’s or other director’s bad faith or reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
   (b) The release was induced by improper conduct of the trustee or other director in procuring the release.
   (c) at the time of the release, the directed did not know the material facts relating to the breach.

(10) Subject to subsection (11):
   (a) A trustee shall provide information to a trust director to the extent the information is reasonably related both to the powers or duties of the trustee and the powers or duties of the director.
   (b) A trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to the powers or duties of the director and the powers or duties of the trustee or other director.

(11) Subsection (10) notwithstanding:
   (a) A trustee does not have a duty to monitor a trust director; or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director.
   (b) By taking an action described in paragraph (a) of this subsection, a trustee does not assume the duty excluded by paragraph (a).
   (c) A trust director does not have a duty to monitor a trustee or another trust director or inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director.
   (d) By taking an action described in paragraph (c) of this subsection, a trust director does not assume the duty excluded by paragraph (c).

(12) Provided its reliance is not in bad faith:
   (a) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.
   (b) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.
13. An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances as under section 7905.

14. A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have in an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

15. In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

16. By accepting appointment as a trust director, the director submits personally to jurisdiction in this state regarding any matter related to a power or duty of the director. This section does not preclude use of another method to obtain jurisdiction over a trust director.

17. The rules applicable to a trusteeship apply to a trust directorship regarding all of the following matters:
   (a) Acceptance under section 7701(1).
   (b) Giving of bond to secure performance under section 7702.
   (c) Reasonable compensation under section 7708.
   (d) Resignation under section 7705.
   (e) Removal under section 7706.
   (f) Vacancy and appointment of successors under section 7704, treating any instance in which two or more trust directors have the same power of direction as analogous to a cotrusteeship for purposes of section 7704(2).

18. The application of this section with respect to a given trust is subject to both of the following:
   (a) If the trust was created before the effective date of the amendatory act that added this section, the section applies only to decisions or actions taken on or after that date.
   (b) If the trust’s principal place of administration is changed to this state on or after the effective date of the amendatory act that added this section, this section applies only to decisions or actions taken on or after the date of the change.

19. In applying and construing the provisions of this section that are based on the Uniform Directed Trust Act, some weight should be given to the goal of promoting uniformity in the law on directed trusteeships among the states that have enacted the uniform act.

700.7703b Divided Trusteeship

7703b. (1) In this section:
   (a) “Affirmative action,” or action taken “affirmatively,” by a separate trustee does not include a failure to act.
   (b) A “separate distributions trustee” means a person, or a cotrusteeship described in section 7703, that is designated by a separate trustees provision to exercise discretion under a discretionary trust provision.
   (c) A “separate investment trustee” means a person, or a cotrusteeship described in section 7703, that is designated by a separate trustees provision to perform the trustee investment function.
   (d) A “separate resultant trustee” means a person, or a cotrusteeship described in section 7703, that is designated to perform all trustee functions not allocated by the separate trustees provision to a separate investment trustee or to any separate distributions trustee.
   (e) A “separate trustee” means any separate resultant trustee, separate investment trustee, or separate distributions trustee.
(f) A “separate trustees provision” means a trust provision that designates, or provides a method of designating both of the following:

(i) A separate resultant trustee.

(ii) A separate investment trustee or 1 or more separate distributions trustees.

(g) A “separate trusteeship” means the office of any separate trustee.

(h) “The trust” means the inclusive set of separate relations of trust to be separately accepted by the separate trustees under a given separate trustees provision.

(i) The “trustee investment function” means the trustee function(s) expressly allocated by the separate trustees provision to a separate investment trustee. The trustee investment function may be broadly or narrowly defined by the separate trustees provision and may include determining for trust investment purposes the retention, purchase, sale, assignment, exchange, tender, or encumbrance of trust property and the investment and reinvestment of undistributed income and principal of the trust; management, control, and exercise of voting powers related directly or indirectly to any trust asset; and for nonpublicly traded investments or property for which there is no readily available market value, determining the methodology for valuing such property and the frequency of valuations.

2. A trust instrument may include a separate trustees provisions.

3. While a separate trustees provision applies, the whole trusteeship of the trust is divided, along the lines created by the designation of separate trustees, into discrete sets of separately accepted fiduciary responsibilities, each set separately allocated to 1 or another of the trust’s separate trustees.

(a) Except as provided in paragraph (c) of this subsection, the trust’s separate trustees shall not be treated as cotrustees in their relations to 1 another. Thus:

(i) A separate investment trustee accepts the common title to the trust property described in paragraph (c)(i) only for purposes of performing the trustee investment function described by the governing separate trustees provision for the benefit of the beneficiaries of the trust.

(ii) A separate distributions trustee accepts the common title to the trust property described in paragraph (c)(i) only for purposes of administering the discretionary trust provision(s) indicated in the governing separate trustees provision for the benefit of those beneficiaries affected by the indicated discretionary trust provision(s).

(iii) A separate resultant trustee accepts the common title to the trust property described in paragraph (c)(i) only for purposes of performing all trustee functions not allocated by the governing separate trustees provision either to the separate investment trustee (if any) or to any separate distributions trustee.

(b) Each separate trustee shall act as to its separate trustee function(s) upon its own authority without need of approval from any other separate trustee of the trust. The trust’s separate trustees are not cotrustees for purposes of joinder of necessary parties in a proceeding for breach of trust, or for any other purpose not specifically described in paragraph (c) of this subsection.

(c) The trust’s separate trustees are treated as cotrustees in their relations to 1 another only for purposes of the following:

(i) Taking, holding, transferring, and defending title to trust property.

(ii) Determining venue and interested persons in proceedings concerning the trust.

(iii) Liability (if any) for income, property, or other taxes attributable to trust property.

(iv) The privileges and immunities of cotrustees to comment, to the trust’s beneficiaries or settlor(s) or others, on another’s performance of fiduciary duties, which privileges and immunities separate trustees shall enjoy notwithstanding that each separate trustee is expressly relieved, by subsection (9) of this section, of any duty whatsoever to make any such comment to the settlor(s) or any beneficiary of the trust.

(d) The trust’s separate trustees are not cotrustees for purposes of the requirement in section 7402 that the same person is not the sole trustee and sole beneficiary of a trust: if a trust has only 1 beneficiary, that beneficiary may not be a separate trustee of the trust unless the separate trustee in
question comprises a cotrusteeship of which the beneficiary is a cotrustee and the trust instrument prohibits the beneficiary from serving alone.

(e) A separate trustee shall not accept the trust associated with, nor, except as provided elsewhere in this subsection, participate in or provide advice regarding the performance of, the separate trustee function(s) of any other separate trustee of the trust. Ministerial acts performed by 1 separate trustee in connection with the separate trustee function(s) of another separate trustee of the trust (such as confirming that an investment or distribution directive of another separate trustee has been carried out, recording and reporting the actions of another separate trustee or conferring with another separate trustee for purposes of administrative coordination or efficiency) shall not be deemed to constitute an acceptance of the trust associated with the separate trustee function(s) of the other separate trustee. While a separate trustees provision applies, the prohibition of this subsection against the acceptance by 1 of the trust’s separate trustees of the trust associated with the separate trustee function(s) of any other of the trust’s separate trustees shall constitute a legal disability.

(f) A separate trustee has no duty to petition the court or to take other affirmative action to ensure that any vacancy in any separate trusteeship is filled. A separate trustee who elects, in spite of having no duty to do so, to petition the court or to take other affirmative action to ensure that a vacancy in a separate trusteeship is filled shall not be deemed to have accepted the trust associated with the vacant separate trusteeship, and a separate trustee who elects thus to petition the court or to take other affirmative action on a given occasion shall not thereby be obligated to do so on any other occasion.

(4) The separate trustees provision shall determine all of the following:

(a) That the trustee investment function shall be performed by the separate investment trustee (if there is one) or that 1 or more separate distributions trustees (if any) shall exercise discretion under 1 or more specified discretionary trust provisions.

(b) Which of the trust’s separate trustees shall perform, during any period in which the trust is not a unitrust, the function of allocating between principal and income, for fiduciary accounting purposes, receipts and disbursements or distributions affected by the separate trustees’ separate trustee functions.

(c) Which of the trust’s separate trustees shall be responsible for preparation and filing of tax and information returns for the trust and for responding on behalf of the trust to inquiries from governmental agencies.

(d) Which of the trust’s separate trustees shall be responsible for responding to attacks upon the trust’s validity or purpose(s).

(e) Which of the trust’s separate trustees shall be responsible for determining whether at any time cash or other property will be loaned by the trust to 1 or more beneficiaries of the trust, which shall be responsible for determining whether at any time cash or other property will be loaned by the trust to 1 or more business enterprises in which any beneficiary of the trust has an ownership interest, and which shall be responsible for determining whether at any time cash or other trust property will be loaned by the trust to 1 or more business enterprises in which the trust itself has an ownership interest.

(f) In the case of a separate investment trustee, whether the separate investment trustee or the separate resultant trustee shall determine the trust’s asset allocation for investment purposes.

(5) The separate resultant trustee shall be responsible for possession, custody, or control of the trust property within the meaning of section 7810.

(6) Within its separate trustee function(s), a separate trustee:

(a) Has all of the rights, privileges, powers, immunities, and duties of a trustee described in this part 7 and in part 8 of this code.

(b) Is subject to control by the settlor(s) of a revocable trust or by a holder of a power to direct a trustee (if any) in the same circumstances an ordinary trustee or cotrusteeship would be.

(c) Is bound to seek or consider the advice of a designated trust advisor (if any) in the same circumstances an ordinary trustee or cotrusteeship would be.
(7) If a separate trustee comprises a cotrusteeship, then within that separate trustee’s separate trustee function(s), those cotrustees have all of the rights, privileges, powers, immunities, and duties of cotrustees described in this part 7.

(8) Each separate trustee has the duty to inform and report on its separate trustee function(s) to:
   (a) Beneficiaries of the trust as described in section 7813, provided, however, that no separate trustee is required to provide any beneficiary any report that it knows will be duplicative of a report provided that beneficiary by another separate trustee of the trust.
   (b) Each other separate trustee of the trust as is reasonably necessary for the other separate trustee to perform its separate trustee function(s).

(9) A separate trustee has no duty whatsoever either to monitor or review the actions of any other separate trustee of the trust or to notify or warn any settlor or beneficiary of the trust of any breach or possible breach of trust on the part of any other separate trustee of the trust. A separate trustee who elects, in spite of having no duty to do so, to notify or warn a settlor or beneficiary of the trust of a possible breach of trust on the part of another separate trustee shall not be deemed to have accepted the trust associated with the separate trustee function(s) of that other separate trustee, and a separate trustee who elects thus to notify or warn a settlor or beneficiary on a given occasion shall not thereby be obligated to do so on any other occasion.

(10) Absent clear and convincing evidence of collusion in a breach of trust, all of the following apply:
   (a) A separate trustee is not liable for the act or omission of any other separate trustee of the trust.
   (b) A separate trustee in breach of a trustee duty of its separate trustee function(s) shall be the only separate trustee of the trust obligated to defend any action brought by a beneficiary of the trust regarding that breach.
   (c) Except as provided in paragraph (d) of this subsection, a separate trustee shall be liable to trust beneficiaries for breach of a trustee duty of its separate trustee function(s) as if the other separate trustee(s) of the trust were not in office and it were the sole trustee of the trust.
   (d) A separate trustee may be liable concerning a trustee function of another separate trustee of the trust only for its own actions in the performance of ministerial offices pursuant to that other separate trustee’s instruction(s) and then only to the extent it acts in bad faith.

700.7704 Vacancy in trusteeship; manner of filling; priority; appointment by court of additional trustee or fiduciary

Sec. 7704. (1) A vacancy in a trusteeship occurs if 1 or more of the following occur:
   (a) A person designated as trustee rejects the trusteeship.
   (b) A person designated as trustee cannot be identified or does not exist.
   (c) A trustee resigns.
   (d) A trustee is disqualified or removed.
   (e) A trustee dies.
   (f) A guardian or conservator is appointed for an individual serving as trustee.

(2) If 1 or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. Though any separate trustee described in section 7703b may comprise a cotrusteeship, the relation between respective separate trustees serving under a given separate trustees provision described in section 7703b is not itself a cotrusteeship. Thus, a vacancy in a trusteeship shall be filled if the:
   (a) it leaves a trust that is not subject to a separate trustees provision as of the time of the vacancy without any remaining trustee; or
   (b) it leaves any of the several separate trusteeships governed by an operative separate trustees provision without any remaining trustee.
(3) If a vacancy in a trusteeship of a noncharitable trust is to be filled, the vacancy shall be filled in
the following order of priority:
   (a) In the manner designated by the terms of the trust.
   (b) By a person appointed by the court.
(4) If a vacancy in a trusteeship of a charitable trust is to be filled, the vacancy shall be filled in the
following order of priority:
   (a) In the manner designated by the terms of the trust.
   (b) By a person selected by the charitable organizations expressly designated to receive
distributions under the terms of the trust if the attorney general concurs in the selection.
   (c) By a person appointed by the court.
(5) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint
an additional trustee or special fiduciary upon the showing of good cause.

700.7809  [Reserved] Trust protector; exercise of powers

Sec. 7809.  [Reserved] (1) A trust protector, other than a trust protector who is a beneficiary of the
trust, is subject to all of the following:
   (a) Except as provided in subsection (2), the trust protector is a fiduciary to the extent of the
powers, duties, and discretions granted to him or her under the terms of the trust.
   (b) In exercising or refraining from exercising any power, duty, or discretion, the trust protector
shall act in good faith and in accordance with the terms and purposes of the trust and the interests of
the beneficiaries.
   (c) The trust protector is liable for any loss that results from the breach of his or her fiduciary
duties.
(2) The terms of a trust may provide that a trust protector to whom powers of administration
described in section 675(4) of the internal revenue code, 26 USC 675, have been granted may exercise
those powers in a nonfiduciary capacity. However, the terms of the trust shall not relieve the trust
protector from the requirement under subsection (1)(b) that he or she exercise or refrain from exercising
any power, duty, or discretion in good faith and in accordance with the terms and purposes of the trust
and the interests of the beneficiaries.
(3) Except as otherwise provided in subsection (4), the trustee shall act in accordance with a trust
protector's exercise of the trust protector's specified powers and is not liable for so acting.
(4) If either of the following applies to a trust protector's attempted exercise of a specified power, the
trustee shall not act in accordance with the attempted exercise of the power unless the trustee receives
prior direction from the court:
   (a) The exercise is contrary to the terms of the trust.
   (b) The exercise would constitute a breach of any fiduciary duty that the trust protector owes to
the beneficiaries of the trust.
(5) A trustee is not liable for any loss that results from any of the following:
   (a) The trustee's compliance with a direction of a trust protector, unless the attempted exercise
was described in subsection (4).
   (b) The trustee's failure to take any action that requires a prior authorization of the trust protector
if the trustee timely sought but failed to receive the authorization.
   (c) Seeking a determination from the court regarding the trust protector's actions or directions.
   (d) The trustee's refraining from action pursuant to subsection (4).
(6) The terms of a trust may confer upon a trustee or other person a power to direct the modification
or termination of the trust.
(7) By accepting an appointment to serve as a trust protector of a trust registered in this state or
having its principal place of administration in this state, the trust protector submits to the jurisdiction of
the courts of this state even if investment advisory agreements or other related agreements provide
otherwise, and the trust protector may be made a party to any action or proceeding relating to a decision,
action, or inaction of the trust protector.

(8) A term of a trust that relieves a trust protector from liability for breach of his or her fiduciary
duties is unenforceable to the extent that either of the following applies:
(a) The term relieves the trust protector of liability for acts committed in bad faith or with
reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
(b) The term was inserted as the result of an abuse by the trust protector of a fiduciary or
confidential relationship to the settlor.
The points in the interior of the rectangle in the set diagram above represent all powers affecting any possible trust relation. The region of the green circle marked ‘TP’ (for “trust protector”) represents the proper subset of those powers the possession of which will bring the holder under fiduciary constraints imposed by Michigan trust code (MTC) section 7809. The region of the blue circle tagged ‘TD’ (for “trust director”) represents the proper subset of relevant powers the possession of which will bring the holder under fiduciary constraints imposed by section 7703a(6) of the Committee’s proposal (CP). So, region (a) represents powers currently triggering fiduciary constraints under the MTC that will not trigger such constraints under the CP; region (c) represents powers triggering fiduciary constraints under the CP that do not currently trigger such constraints under the MTC.

**Region (a) includes:**

1. A power to remove a trustee when the exercise of the power will create a vacancy that will have to be filled by the prospective action of someone other than the power holder

2. A power to appoint or remove a nontrustee who has a power to direct a trustee in the exercise of one or more of the trustee’s powers *qua* trustee (nontrustee trust actor)

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1. MTC section 7809 describes the duties and liabilities of what the MTC calls “trust protectors.” See MICH. COMP. LAWS §§ 700.7103(n), 700.7809. See also id. § 700.7105(2)(h) (obligations on of “trust protectors” described in section 7809 imposed regardless of terms of trust).

2. The set diagram is not area-proportional, i.e., it is not *scaled*.

3. CP section 7703a(6) describes the duties and liabilities of what the CP (following the Uniform Directed Trust Act) calls “trust directors.” See CP §§ 7703a(1)(e) (Unif. Directed Trust Act § 2(9) (2017)), 7703a(6) (Unif. Directed Trust Act § 8(a)).

4. The point of the special coinage ‘nontrustee trust actor’ is just to provide a term here that is not specially defined by either the current MTC or the CP. A nontrustee trust actor may be either a “trust...
3. A power to ascertain the happening of an event that affects the administration of the trust if the power holder is a health professional who acts in that capacity in ascertaining the happening of the event in question.

4. A power to determine the capacity of a trustee, settlor, director, or beneficiary of the trust if the power holder is a health professional who acts in that capacity in making the determination.

5. A power of administration described in IRC section 675(4), regardless of what the trust instrument says about the power’s being exercised in a nonfiduciary capacity, if the power does not amount to a power of appointment.

6. A power of a trust beneficiary who is not a settlor of the trust if the power does not amount to a power of appointment (see region (b) items below).

Region (b) includes:

1. A power to acquire, dispose of, exchange, or retain any trust investment.

2. A power to vote proxies for securities held in trust.

See CP § 7703a(7) (Unif. Directed Trust Act § 8(b)).

6 This power is included in region (a) because under the current MTC it must be exercised “in accordance with . . . the interests of the trust beneficiaries.” See Mich. Comp. Laws §§ 700.7809(1)(b) (trust protector must act “in accordance with . . . the interests of the trust beneficiaries”), 700.7809(2) (same even in exercise of IRC section 675(4) administrative power). See also id. § 700.7105(2)(h) (terms of current MTC currently prevail over terms of the trust on this point). The Internal Revenue Service is unlikely to accept that such a power is “exercisable in a nonfiduciary capacity” within the meaning of IRC section 675(4). See Treas. Reg. § 1.675-1(b)(4)(iii) (relevant inquiry is a factual one whether power is exercisable “primarily in the interests of the beneficiaries”). That seems especially so given that the minimum standard of care thus applicable to trust protectors under the MTC is the same minimum standard applicable to trustees. See Mich. Comp. Laws §§ 700.7105(2)(b), (k); 700.7801; 700.7908.

A “trust protector’s” inability under the current MTC to exercise an IRC section 675(4) administrative power in a nonfiduciary capacity is without practical effect to the extent a power to substitute assets is (1) given to or reserved by a settlor of the trust in question or (2) a power of appointment within the meaning of MTC section 7103(n). See Mich. Comp. Laws § 7103(n)(i)-(ii) (excluding settlors and holders of powers of appointment from the extension of the term ‘trust protector’). See also id. § 556.112(c) (defining ‘power of appointment’ for purposes of the Michigan powers of appointment act of 1967). But anyone who doubts either that a power to substitute assets is a power of appointment within the meaning of the MTC or that a power to substitute assets is the only IRC section 675(4) power worth giving a nonsettlor, nontrustee trust actor for tax-engineering purposes will be glad of a proposal that excludes IRC section 675(4) powers from the scope of nontrustee trust actors’ fiduciary obligations. The CP does that. See CP § 7703a(2)(f).
3. A power to make or take loans

4. A power to adopt a particular valuation of trust property or determine the frequency or methodology of valuations

5. A power to manage or select managers for a trust-owned business

6. A power to select a custodian for trust assets

7. A power to direct the delegation of a trustee’s or a nontrustee trust actor’s powers

8. A power to change the principal place of administration, situs, or law governing the meaning and effect of the terms of the trust

9. A power to ascertain the happening of an event that affects the administration of the trust if the power holder is not a health professional who acts in that capacity in ascertaining the happening of the event in question

10. A power to determine the capacity of a trustee, settlor, director, or beneficiary of the trust if the power holder is not a health professional who acts in that capacity in making the determination

11. A power to determine the compensation to be paid to a trustee or a nontrustee trust actor if the power does not constitute a nonfiduciary power of appointment

12. A power to prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust

13. A power to veto a trustee or nontrustee trust actor’s exercise of a power if the power does not constitute a nonfiduciary power of appointment

14. A power to release a trustee or nontrustee trust actor from liability for an action proposed or previously taken by the trustee or nontrustee trust actor if the power does not constitute a nonfiduciary power of appointment

**Region (c) includes:**

1. A power of appointment if the power is expressly a fiduciary power

2. A power to adjust between principal and income or convert to a unitrust if the power is expressly a fiduciary power

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7 See supra note 5.
3. A power to modify, reform, terminate, or decant a trust if the power is expressly a fiduciary power

4. A power to veto a trustee or nontrustee trust actor’s exercise of another power if the veto power constitutes a power of appointment and is expressly a fiduciary power

5. A power to release a trustee or nontrustee trust actor from liability for an action proposed or previously taken by the trustee or nontrustee trust actor if the power constitutes a power of appointment and is expressly a fiduciary power

6. A power to release a trustee or nontrustee trust actor from liability for an action proposed or previously taken by the trustee or nontrustee trust actor if the power constitutes an expressly fiduciary power of appointment
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1 ‘UDTA’ = Uniform Directed Trust Act.
2 ‘CP’ = Committee proposal.
3 Counterpart at MICH. COMP. LAWS § 700.7101.
4 Counterpart at id. § 700.1106(n).
5 Counterpart at id. § 700.7103(i).
6 Counterpart at id. § 700.1107(f).
7 Counterpart at id. § 700.1107(k).
8 Counterpart at id. § 700.1107(o).
9 Counterpart at id. § 700.1203(1).
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\(^{10}\) Counterpart at *id.* § 700.7105(1).

\(^{11}\) Omitted after Committee discussion.

\(^{12}\) See *supra* note 10.
On many occasions, it would be helpful to have a backup to a guardian appointed under EPIC. If authorized, standby guardians could prevent gaps in authority if the guardian falls ill, is absent, or dies. In our current environment, courts will sometimes appoint co-guardians to attempt to solve these problems. Having multiple current fiduciaries invites its own troubles. The Mental Health Code offers a longstanding, straightforward model for the designation of standby guardians:

(1) At a hearing convened pursuant to this chapter the court may designate 1 or more standby guardians whose appointment shall become effective without further proceedings immediately upon the death, incapacity, or resignation of the initially appointed guardian. The powers and duties of the standby guardian shall be the same as those of the initially appointed guardian.

(2) The standby guardian shall receive a copy of the court order establishing or modifying the initial guardianship, and the order designating the standby guardian. Upon assuming office, the standby guardian shall notify the court.

(3) In an emergency situation and in the absence and unavailability of the initially appointed guardian, the standby guardian may temporarily assume the powers and duties of the initially appointed guardian.


This provision’s history makes clear that it has been in effect for a long time, and not recently tinkered with. Given the established nature of this statutory tool, the Legislative Development and Drafting Committee used it as a leaping-off point. A few important distinctions matter, however.

**The MHC imposes a less structured order of priority for guardians.** This prompted the Committee to ask: is it appropriate to use the MHC’s looser approach for priority for appointment of a guardian under EPIC Article V? The current draft of our proposal adopts a more flexible approach, allowing the court to designate “any competent person who is suitable and willing to serve.”
MHC guardians are appointed for adult persons with developmental disabilities. This prompts the question: should we make standby guardians available for only ‘legally-incapacitated adults under EPIC Article V, Part 3, or should we also do so for minors under Article V, Part 2? The committee is inclined to do so for both. The current draft, however, only addresses standby guardians for legally-incapacitated adults.

The MHC does not lay out notice-related requirements. We suggest doing so:

- After the appointment, the standby will receive a copy of the order designating them as the standby.
- The standby must file an acceptance within 28 days of this notice.
- The guardian’s annual report would require the standby to sign off, and indicate her continued willingness to act.

The MHC does not address many of the mechanics of standby guardian action, and accession into the role of guardian. We suggest spelling it out:

- The standby may act in during an emergency when the guardian is unavailable. The current version does not define “emergency” or “unavailable,” relying on courts’ common sense.
- The standby’s duties do not arise unless she acts.
- There is a third-party reliance provision for when the standby does act. The protection accrues only after the third party has received a copy of the order designating the standby guardian, the standby’s acceptance, and the standby’s representation that she needs to act.
- The standby becomes the guardian without further proceedings upon the current guardian’s death, incapacity, or resignation. To obtain full letters, the standby need only notify the court, which can issue the letters without additional proceedings. The new guardian must then serve the order on the interested persons. None of the foregoing, however, would prohibit a court from requiring a hearing with good cause.

The MHC does not speak to how standby guardianship interacts with the nomination of guardians by parents and spouses in wills and nontestamentary instruments. Further, because they do not exist under the MHC, there is no provision for how delegations of authority by guardians by power of attorney would interact with standby guardians. Kathy Goetsch has kindly taken on the work of putting these companion proposals together. There are many moving pieces. We expect to introduce the companion proposals at our next CSP meeting.

Thank you for your consideration.
330.1640 Standby guardian.

(1) At a hearing convened pursuant to this chapter the court may designate 1 or more standby guardians whose appointment shall become effective without further proceedings immediately upon the death, incapacity, or resignation of the initially appointed guardian. The powers and duties of the standby guardian shall be the same as those of the initially appointed guardian.

(2) The standby guardian shall receive a copy of the court order establishing or modifying the initial guardianship, and the order designating the standby guardian. Upon assuming office, the standby guardian shall notify the court.

(3) In an emergency situation and in the absence and unavailability of the initially appointed guardian, the standby guardian may temporarily assume the powers and duties of the initially appointed guardian.

330.1631 Guardian; duties; filing, contents, and review of report.

* * *

(2) The guardian of the person, plenary or partial, shall file with the court at intervals indicated by the court, but not less often than annually, a report which shall contain statements indicating:

* * *

(g) A statement signed by the standby guardian, if any have been appointed, that the standby guardian continues to be willing to serve in the event of the death, incapacity, or resignation of the guardian.

* * *
The Proposal

700.5103 Delegation of powers by parent or guardian.

(1) By a properly executed power of attorney, a parent or guardian of a minor or a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release of a minor ward for adoption.

(2) A parent shall not knowingly and intentionally delegate his or her powers under this section regarding care and custody of the parent's minor child for longer than 180 days for the purpose of permanently transferring custody of the child in violation of section 136c(3) of the Michigan penal code, 1931 PA 328, MCL 750.136c.

(3) If a parent or guardian is serving in the armed forces of the United States and is deployed to a foreign nation, and if the power of attorney so provides, a delegation under this section is effective until the thirty-first day after the end of the deployment.

(4) If a guardian for a minor or legally incapacitated individual delegates any power under this section, the guardian shall notify the court AND STANDBY GUARDIAN within 7 days after execution of the power of attorney and provide the court AND STANDBY GUARDIAN the name, address, and telephone number of the attorney-in-fact.

700.5313a Standby Guardian; qualifications. [new section]

(1) AT A HEARING CONVENED UNDER THIS PART, THE COURT MAY DESIGNATE 1 OR MORE STANDBY GUARDIANS. THE COURT MAY DESIGNATE AS STANDBY GUARDIAN ANY COMPETENT PERSON WHO IS SUITABLE AND WILLING TO SERVE.

(2) THE STANDBY GUARDIAN SHALL RECEIVE A COPY OF THE COURT ORDER ESTABLISHING OR MODIFYING THE GUARDIANSHIP, AND THE ORDER DESIGNATING THE STANDBY GUARDIAN.

(3) A STANDBY GUARDIAN SHALL FILE AN ACCEPTANCE OF HER DESIGNATION UNDER SUBSECTION (2) WITHIN 28 DAYS OF RECEIVING NOTICE OF THE ORDER DESIGNATING THE STANDBY GUARDIAN.

(4) IF, FOR ANY REASON, THE STANDBY GUARDIAN IS UNABLE OR UNWILLING TO SERVE, THE STANDBY GUARDIAN SHALL PROMPTLY NOTIFY THE COURT AND INTERESTED PERSONS.

(5) A STANDBY GUARDIAN HAS NO AUTHORITY TO ACT UNLESS THE GUARDIAN BECOMES EITHER PERMANENTLY OR TEMPORARILY UNAVAILABLE.

(6) DURING AN EMERGENCY WHEN THE GUARDIAN IS UNAVAILABLE, THE STANDBY GUARDIAN MAY TEMPORARILY ASSUME THE POWERS AND DUTIES OF THE GUARDIAN. A PERSON MAY RELY ON THE STANDBY GUARDIAN'S REPRESENTATION THAT SHE HAS AUTHORITY TO ACT, IF GIVEN THE ORDER ISSUED UNDER SUBSECTION (2) AND ACCEPTANCE
FILED UNDER SUBSECTION (3). A PERSON WHO ACTS IN RELIANCE UPON THE REPRESENTATIONS AND DOCUMENTATION DESCRIBED IN THIS SUBSECTION WITHOUT KNOWLEDGE THAT THE REPRESENTATIONS ARE INCORRECT IS NOT LIABLE TO ANY PERSON FOR SO ACTING AND MAY ASSUME WITHOUT FURTHER INQUIRY THE EXISTENCE OF THE STANDBY GUARDIAN’S AUTHORITY.


(8) UPON ASSUMING OFFICE, THE STANDBY GUARDIAN SHALL PROMPTLY NOTIFY THE COURT AND INTERESTED PERSONS. UPON RECEIVING NOTICE, THE COURT MAY ENTER AN ORDER APPOINTING THE STANDBY GUARDIAN AS GUARDIAN WITHOUT THE NEED FOR ADDITIONAL PROCEEDINGS. THE GUARDIAN SHALL SERVE THIS ORDER ON THE INTERESTED PERSONS.

700.5314 Powers and duties of guardian.

* * *

(g) The guardian shall report the condition of the ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision shall contain all of the following:

* * *

(X) A STATEMENT SIGNED BY THE STANDBY GUARDIAN, IF ANY HAVE BEEN APPOINTED, THAT THE STANDBY GUARDIAN CONTINUES TO BE WILLING TO SERVE IN THE EVENT OF THE UNAVAILABILITY, DEATH, INCAPACITY, OR RESIGNATION OF THE GUARDIAN.

* * *
Comments

- Notably, subsection (1) allows the court to sidestep the normal order of priority. This reflects the reality of these arrangements (oftentimes, the next-best guardian isn’t inside of the family). And it creates a nice little opening for good advocacy in contested guardianship proceedings.

- Subsection (2) requires the provision of notice to a person that she is designated as standby guardian. This has never been an issue in practice in the MHC guardianships the drafter has handled, but notice in this scheme triggers the need for an acceptance...

- Subsection (3) requires that an acceptance be filed shortly after the court designates a person as standby guardian. This fills a somewhat troubling gap in the MHC. There, we give someone the authority to make weighty decisions on a legally disabled person’s behalf without requiring them to acknowledge the duties imposed upon them.

- The other somewhat-troubling gap in the MHC regime is that there is no mechanism for a standby guardian to resign, short of filing a petition to modify the guardianship. This is addressed in subsection (4).

- Subsection (5) states what should be obvious regarding the standby’s authority so long as the currently-acting guardian is available. This comes from Wisconsin’s standby guardian law.

- The committee recommends the “strong reliance” language in subsection (6). For whatever reason, there is not parallel language elsewhere in Article V. But under these circumstances—where the fiduciary is “unlettered”—the committee’s sentiment was that we should offer additional protection to third parties so that they feel comfortable to act. Unlike draft 4, the third party is relieved duty of “further inquiry” instead of “inquiry.”

- The mechanics of a standby’s transition to normal guardian are found in subsection (7). Notice that the provision states that the court “may” appoint the standby without a hearing. This leaves the door wide open to holding a hearing if the court suspects that it may be desirable to do so. Unlike draft 4, this paragraph refers to the “prior guardian” instead of the

- The new guardian must serve her order of appointment on the interested persons (in subsection (8)).

- The committee’s sentiment is that this statute gives ample notice and due process to the legally incapacitated person and any other interested persons. They receive notice on the front end (in the form of the petition nominating the standby guardian), notice of a person’s designation as a standby, notice of a standby’s resignation, and notice of the standby’s appointment. It is the last item that may cause some concern, but the door is certainly left open to a petition to modify the guardianship after the standby’s appointment as current guardian.

- As drafted, this proposal doesn’t tightly define the procedure for establishing the current guardian’s incapacity. Some other states handle this differently. Based on the drafter’s personal experience, the MHC works well without the
additional procedural robustness. The committee suggests that we could propose these later if their lack proves to be problematic.

- After considerable discussion, the committee is disinclined to add language regarding the standby’s fiduciary duties. Our read of the statute, as currently drafted, is that the standby has no fiduciary duties until she begins exercising the powers of the guardian.

- The committee has carefully considered the potential notice implications of this statute. As we read the statute (and its interplay with the definition of “guardian” in section 1104(l)), it would not require notice on a standby guardian.

- The committee has identified a potential interaction between standby guardians and agents receiving delegated powers from a guardian under MCL 700.5103. The standby has been added to the “notice list” for a guardian who avails herself of 5103. As an aside, this will entail modification of the notice of responsibilities on form PC 633.

- Kathy Goetsch has kindly agreed to review the interface between this proposal and the nominations of guardians in wills and other documents (sections 5202(1) and 5301). Her recommendations will be found in the next draft of this proposal.

- The committee believes that similar changes should be made in Article IV, Part 2 (guardians for minors). But, in the interest of moving the current proposal along, this will be handled as a separate project at a later date.
I. Undisclosed Trusts

The premise of this proposal is that Michigan law already countenances undisclosed trusts (which are sometimes confusingly referred to as “secret trusts” in the United States)¹ as a special case of the “purpose trusts”² currently permitted by Estates and Protected Individuals Code (EPIC) section 2722.³ That is because anyone who wishes to support the pursuit of a certain noncharitable endeavor without directly motivating the endeavor for certain potential adherents can articulate a purpose within the contemplation of EPIC section 2722(1) to which the concealment of means is integral.

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

The bow-cult concert violinist is just one interpretation of the relevant model, viz., the settlor who wants to support a noncharitable endeavor she regards as a “calling” without stimulating disingenuous or misguided attempts to heed “the call.” One can easily imagine analogous stories involving draft-horse farming, heritage livestock breeding, artisan

¹ Technically the term ‘secret trust’ refers to a testamentary trust that is not disclosed (or the terms of which are not specified) in the will that transfers the res to the trustee. See, e.g., J. E. Penner, The Law of Trusts ¶ 6.48 (8th ed. 2012); Simon Gardner, An Introduction to the Law of Trusts 93-94 (3d ed. 2011); Harold Greville Hanbury & Ronald Harling Maudsley, Modern Equity 147-55 (Jill E. Martin ed., 13th ed. 1989).


passementerie manufacture, etc. In each case, (it is submitted) the resultant trust is one that can be performed by the trustee for up to twenty-one years under EPIC section 2722(1). So, for the limited period permitted by section 2722, Michigan law permits undisclosed trusts when concealment of means is an integral part of the settlor’s pet project provided the settlor does not designate any “definite or definitely ascertainable beneficiary.”

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

This latter point emphasizes that section 2722 permits trusts whose terms cannot be enforced (for lack of notice) by people who would otherwise be, in certain circumstances at least, indistinguishable from ordinary trust beneficiaries. Yet that is the salient objection to nondisclosure of noncharitable trusts: “‘If the beneficiaries have no rights enforceable against the trustees, there are no trusts’ . . . [and] the beneficiaries cannot enforce [their] right[s] without information.” But why should a jurisdiction that allows a settlor to thwart these precepts (if only temporarily) for the benefit of a purpose prevent her from thwarting them (for the same duration) for the benefit—as she sees it—of particular persons? Shall we say the policy of our law is laissez faire (in the relevant interval) provided the settlor means to confer benefits only on persons whose identities are indifferent to her; but that when she aims to confer benefits on particular persons, our respect for her intent is so great that we feel constrained (even in that narrow interval) to ignore what she thinks best for the persons in question?

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

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4 See id.
5 See id. § 700.2722(3)(e).
6 Id. § 700.2722(1).
7 EPIC section 2722 purports to make purpose trusts “enforceable” regardless of whether the terms of the “trust” designate someone to enforce it. See id. § 700.2722(3)(d).
8 See supra note 5.
9 In that case, it would fall to a person described in id. § 700.2722(3)(d), if there is one, to protect the beneficiary’s interest.
10 PENNER, supra note 1, ¶¶ 10.60 (quoting Armitage v. Nurse, [1998] Ch. 241 at 253 (Eng.)).
11 See id. at ¶ 9.30. See generally Matthews, supra note 1.
II. Preferring the UTC Provisions for Pets and Other Purposes to Those of the UPC

Unfortunately, EPIC section 2722 needs work without regard to undisclosed trusts—it needs fixing up as a statutory home for the pet trusts and other purpose trusts it currently purports to authorize. That is largely due to the improvidence of section 2722(3)(h). Subsection (3)(h), which has no counterpart in the Uniform Probate Code (UPC) provision, UPC section 2-907, that section 2722 otherwise follows. It provides: “The trust is not subject to the uniform statutory rule against perpetuities.” That provision has two unwelcome effects: (1) it deprives the holder of a special power of appointment (over a Michigan trust for the care of a nonhuman animal or other purpose trust) of protection against the so-called Delaware tax trap that would otherwise be provided directly by the Michigan uniform statutory rule against perpetuities (USRAP) (with respect to real property) and indirectly through the Michigan personal property trust perpetuities act (PPTPA) (with respect to personal property); and (2) it arguably sanctions pet trusts of (potentially) infinite duration.

Both of those problems can be averted by simply repealing subsection (3)(h), but they and some other problems that are, perhaps, less significant can also be avoided by the wholesale repeal of section 2722 in favor of the more recently promulgated Uniform Trust Code (UTC) provisions on pet trusts and other purpose trusts, UTC sections 408 and 409. The Committee considers the confluence of these UTC provisions a more elegant formulation (and statutory positioning for a UTC state) of the policies currently expressed in Michigan by EPIC section 2722 apart from subsection (3)(h). Therefore, section 2722 is supplanted in the proposal below by two new Michigan trust code (MTC) provisions, sections 7408 and 7409, which import the UTC provisions for pet and other purpose trusts.

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12 I.e., MICH. COMP. LAWS § 700.2722(3)(h).
14 See supra note 12.
16 See MICH. COMP. LAWS §§ 556.124(1) (relation-back rule for special powers of appointment), 554.72(1) (specifying alternative finite perpetuities testing periods for property subject to USRAP), 554.93 (PPTPA’s exemption from USRAP applicable only to personal property held in trust).
17 See id. § 554.93 (PPTPA’s anti-Delaware-tax-trap provision invoking USRAP provisions for finite testing period).
18 “[A] trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust.” Id. § 700.2722(2) (emphasis added). The second sentence just quoted arguably rules out any interpretation of the first sentence that would prevent a breeder from creating a pet trust for several distinguished show animals and the progeny of each. Cf. UNIF. TRUST CODE § 408(1), 7C U.L.A. 490 (2006) (pet trust may be created to provide for care of an animal alive during the settlor’s lifetime).
19 E.g., that section 2722 implausibly posits the “existence of [a] fiduciary relationship of the trustee” of a pet or other purpose trust. It is difficult to see how there can be a “fiduciary relationship” in either case, given that neither a purpose (described in section 2722(1)) nor a nonhuman animal (described in section 2722(2)) is a legal person. For the proposition that fiduciary relations are strictly relations between legal persons, see, e.g., James P. Spica, Rights and Rites: Understanding the Fiduciary Obligations of Designated Funeral Representatives, 62 WAYNE L. REV. 185, 190-92, 194-95 (2017).
III. Measuring the Lives of Purposes

In substituting the UTC provisions on pet and other purpose trusts for those of the UPC (on which EPIC section 2722 is based), the Committee has accepted the Uniform Law Commission’s invitation—delivered in the form of brackets (“[ . . . ]”) in the texts of both UPC section 2-907 and UTC section 409—to consider whether twenty-one years is the appropriate tolerance for non-pet purpose trusts. EPIC section 2722’s twenty-one year tolerance is presumably a reference to the testing periods of the common-law rules against perpetuities and accumulation of income and of the former statutory rule against suspension of absolute ownership or the power of alienation. But excepting personal property previously held in certain trusts that were irrevocable on September 25, 1985 (which the statute tags “special appointee trusts”), PPTPA makes all of those rules irrelevant to the validity of interests in personal property held in trusts created after May 28, 2008. And for interests in special appointee trusts, in personal property in pre-May 28, 2008 trusts, in personal property not held in trust, and in real property, the USRAP provides a ninety-year wait-and-see period as an alternative to the common-law perpetuities testing period as such is unmeaning.

The Committee has therefore resisted complacency: in the proposal below, new MTC section 7409 provides that a non-pet purpose trust can be performed for up to twenty-five years; and, by the extension described in Part I of this memorandum, twenty-five years becomes the “maximum nondisclosure period” described in the proposal’s new section 7409a. Of course, the number twenty-five is no more magical in this context than the number twenty-one, but rounding down (to twenty years) would deprive enthusiasts of the trusts in question of a whole year of liberty to which they would be entitled by complacency—by continued observance, that is, of the arbitrary tradition of advertizing to the perpetuities period. We have therefore preferred to round up.

A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by deleting (and reserving the numerical designation of) section 2722, by amending sections 7105, 7110, and 7402 as amended by 2009 PA 46 and 2010 PA 325, and by adding new sections 7408, 7409, and 7409a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700. 2722 [Reserved] Honorary trusts; trusts for pets

See–2722–[Reserved] (1) Except as provided by another statute and subject to subsection (3), if a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee, and if there is no definite or definitely ascertainable beneficiary

21 See supra note 13 and accompanying text.
23 See Spica, supra note 15, at 1350, 1355-56.
24 See MICH. COMP. LAWS §§ 554.93, 554.94.
25 See id. § 554.72(1)-(3).
designated, the trust may be performed by the trustee for 21 years, but no longer, whether or not
the terms of the trust contemplate a longer duration.

(2) Subject to this subsection and subsection (3), a trust for the care of a designated domestic
or pet animal is valid. The trust terminates when no living animal is covered by the trust. A
governing instrument shall be liberally construed to bring the transfer within this subsection, to
presume against the merely precatory or honorary nature of the disposition, and to carry out the
general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's
intent.

(3) In addition to the provisions of subsection (1) or (2), a trust covered by either of those
subsections is subject to the following provisions:
   (a) Except as expressly provided otherwise in the terms of the trust, no portion of the
principal or income may be converted to the use of the trustee or to a use other than for the
trust's purposes or for the benefit of a covered animal.
   (b) Upon termination, the trustee shall transfer the unexpended trust property in the
following order:
      (i) As directed in the terms of the trust.
      (ii) To the settlor, if then living.
      (iii) If the trust was created in a nonresiduary clause in the transferor's will or in a
codicil to the transferor's will, under the residuary clause in the transferor's will.
      (iv) If no taker is produced by the application of subparagraph (i), (ii), or (iii), to the
transferor's heirs under section 2720.
   (c) For the purposes of sections 2714 to 2716, the residuary clause is treated as creating a
future interest under the terms of a trust.
   (d) The intended use of the principal or income may be enforced by an individual
designated for that purpose in the terms of the trust or, if none, by an individual appointed by
a court upon petition to it by an individual. A person having an interest in the welfare of the
animal may request the court to appoint a person to enforce the trust or remove a person
appointed.
   (e) Except as ordered by the court or required by the terms of the trust, no filing, report,
registration, periodic accounting, separate maintenance of funds, appointment, or fee is
required by reason of the existence of the fiduciary relationship of the trustee.
   (f) The court may reduce the amount of the property transferred if it determines that that
amount substantially exceeds the amount required for the intended use. The amount of the
reduction, if any, passes as unexpended trust property under subdivision (b).
   (g) If a trustee is not designated or no designated trustee is willing or able to serve, the
court shall name a trustee. The court may order the transfer of the property to another trustee
if the transfer is necessary to ensure that the intended use is carried out, and if a successor
trustee is not designated in the terms of the trust or if no designated successor trustee agrees
to serve or is able to serve. The court may also make other orders and determinations as are
advisable to carry out the intent of the transferor and the purpose of this section.
   (h) The trust is not subject to the uniform statutory rule against perpetuities, 1988 PA
418, MCL 554.71 to 554.78.
Sec. 7105. (1) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

(2) The terms of a trust prevail over any provision of this article except the following:
   (a) The requirements under section 7401 for creating a trust.
   (b) The duty of a trustee to administer a trust in accordance with section 7801.
   (c) The requirement under section 7404 that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.
   (d) The durational limits specified in section 7408 for trusts for the care of animals and in section 7409 for noncharitable purpose trusts.
   (de) The power of the court to modify or terminate a trust under sections 7410, 7412(1) to (3), 7414(2), 7415, and 7416.
   (ef) The effect of a spendthrift provision, a support provision, and a discretionary trust provision on the rights of certain creditors and assignees to reach a trust as provided in part 5.
   (fg) The power of the court under section 7702 to require, dispense with, or modify or terminate a bond.
   (gh) The power of the court under section 7708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.
   (hi) Except as permitted under section 7809(2), the obligations imposed on a trust protector in section 7809(1).
   (ij) Except as provided in section 7409a, the duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.
   (ik) The power of the court to order the trustee to provide statements of account and other information pursuant to section 7814(4).
   (il) The effect of an exculpatory term under section 7809(8) or 7908.
   (lm) The rights under sections 7910 to 7913 of a person other than a trustee or beneficiary.
   (mn) Periods of limitation under this article for commencing a judicial proceeding.
   (no) The power of the court to take action and exercise jurisdiction.
   (op) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 7203 and 7204.
   (pq) The requirement under section 7113 that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

Sec. 7110. (1) A charitable organization expressly named in the terms of a trust to receive distributions under the terms of a charitable trust has the rights of a qualified trust beneficiary
under this article if 1 or more of the following are applicable to the charitable organization on the
date the charitable organization's qualification is being determined:

(a) The charitable organization is a distributee or permissible distributee of trust income
or principal.
(b) The charitable organization would be a distributee or permissible distributee of trust
income or principal on the termination of the interests of other distributees or permissible
distributees then receiving or eligible to receive distributions.
(c) The charitable organization would be a distributee or permissible distributee of trust
income or principal if the trust terminated on that date.

(2) A person appointed to enforce a trust created for the care of an animal under section 7408
or another noncharitable purpose as provided in section 2722 trust under section 7409 has the
rights of a qualified trust beneficiary under this article.

(3) The attorney general of this state has the following rights with respect to a charitable trust
having its principal place of administration in this state:

(a) The rights provided in the supervision of trustees for charitable purposes act, 1961 PA
101, MCL 14.251 to 14.266.
(b) The right to notice of any judicial proceeding and any nonjudicial settlement
agreement under section 7111.

700.7402  Creating trust; requirements

Sec. 7402. (1) A trust is created only if all of the following apply:
(a) The settlor has capacity to create a trust.
(b) The settlor indicates an intention to create the trust.
(c) The trust has a definite beneficiary or is either of the following:
  (i) A charitable trust.
  (ii) A trust for a noncharitable purpose under section 7409 or a trust for the care of an
animal under section 7408, as provided in section 2722.
(d) The trustee has duties to perform.
(e) The same person is not the sole trustee and sole beneficiary.

(2) A trust beneficiary is definite if the trust beneficiary can be ascertained now or in the
future, subject to any applicable rule against perpetuities.

(3) A power in a trustee to select a trust beneficiary from an indefinite class is valid only in a
charitable trust.

700.7408  Trust for care of animal

Sec. 7408. (1) A trust may be created to provide for the care of an animal alive during the
settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to
provide for the care of more than 1 animal alive during the settlor’s lifetime, upon the death of
the last surviving animal.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of
the trust or, if no person is so appointed, by a person appointed by the court. A person having an
interest in the welfare of the animal may request the court to appoint a person to enforce the trust 
or to remove a person appointed.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.

700.7409  Noncharitable purpose trust without ascertainable beneficiary

Sec. 7409. Except as otherwise provided in section 7408 or by another statute, the following rules apply:

(a) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may be performed by the trustee according to the trust's terms for up to 25 years, but no longer, whether or not the terms of the trust contemplate a longer duration.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.

700.7409a  Undisclosed trust

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

(a) During the nondisclosure period:

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

(ii) The trustee may administer the trust in accordance with the settlor’s expressed intent regarding nondisclosure of primary disclosure information to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any reporting obligations imposed on the trustee by law other than this [estates and protected individuals] code.

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

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

(b) In no case shall either the trustee nor any nondisclosure correlative right holder be liable to any trust beneficiary on account of the trustee’s failure to follow the terms of the trust enjoining nondisclosure of prime disclosure information during the trust’s nondisclosure period. The trustee’s duty (if any) to follow the terms of the trust enjoining nondisclosure of prime disclosure information during the trust’s nondisclosure period is owed solely to the holders (if any) of nondisclosure correlative rights, and the sole remedy of a nondisclosure correlative right holder for the trustee’s breach of that duty is removal.

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

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

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

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

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

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

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

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

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

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

(e) “Protection power” means a power granted by the terms of a trust that allows the power holder to direct the trustee of the trust for the benefit of the trust beneficiaries during the trust’s nondisclosure period. A protection power may authorize the power holder to represent the trust beneficiaries in the sense described in section 7301(1).

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

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26 This is to Analogize the period during which the vesting of future interests in the assets of a trust can be postponed by the exercise of a power of appointment: that period begins when the trust in question can no longer be revoked by the settlor, not when the trust instrument begins to govern a res. See Mich. Comp. Laws § 556.125. See generally John C. Gray, The Rule Against Perpetuities § 524.1 (4th ed. 1942); Ronald H. Maudsley, The Modern Law of Perpetuities 38 (1979).
END OF CSP MATERIALS
I. Call to Order

II. Excused Absences

III. Introduction of Guests

IV. Minutes of June 24, 2017, Meeting of the Council

See Attachment 1

V. Treasurer's Report – David P. Lucas

VI. Chairperson's Report – James B. Steward

See Materials from Annual Section Meeting

VII. Report of the Committee on Special Projects – Geoffrey R. Vernon

See attached CSP Materials

VIII. Report of Standing Committees

A. Internal Governance

1. Budget – Christopher A. Ballard
2. Bylaws – Nancy H. Welber
3. Awards – Amy N. Morrissey
4. Planning – Marlaine C. Teahan
5. Nominating – Thomas F. Sweeney
6. Annual Meeting – Marlaine C. Teahan
B. **Legislation and Lobbying**

1. Legislative Analysis and Monitoring Committee – Ryan P. Bourjaily
2. Legislation Development & Drafting Committee – Nathan Piwowarski
3. Mardigian Case Review and Drafting Ad Hoc Committee – Sueann Mitchell
4. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon
5. Assisted Reproductive Technology Ad Hoc Committee – Nancy H. Welber
6. Community Property Trusts Ad Hoc Committee – Neal Nusholtz
7. Premarital Agreements Legislation Ad Hoc Committee Community Property Trusts Ad Hoc Committee – George Bearup
8. Divided and Directed Trusteeship Committee – James P. Spica

*See Attachment 2*

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

1. Amicus Curiae – David L. Skidmore

*See Attachment 3*

2. Probate Institute – Marguerite Munson Lentz
3. State Bar and Section Journals – Richard C. Mills
4. Citizens Outreach – Melisa M.W. Mysliwiec

*See attachment 4*

5. Electronic Communications – Michael G. Lichterman
6. Membership – Nicholas A. Reister

D. **Ethics and Professional Standards**

1. Ethics & Unauthorized Practice of Law – Katie Lynwood

E. **Administration of Justice**


F. **Areas of Practice**

1. Real Estate – Mark E. Kellogg
2. Tax Committee – Lorraine F. New
3. Charitable and Exempt Organization – Christopher J. Caldwell
4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

IX. Other Reports
   A. Liaisons
      1. Alternative Dispute Resolution Section Liaison – Milton J. Mack, Jr.
      2. Business Law Section Liaison – John R. Dresser
      3. Elder Law and Disability Rights Section Liaison – Amy Rombyer 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 – Nazneen H Syed
      9. Probate Registers Liaison – Rebecca A. Schnelz
     10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz
     11. Solutions on Self-Help Task Force Liaison – Kathleen M. Goetsch
     12. State Bar Liaison – Richard J. Siriani
     13. Taxation Section Liaison – George W. Gregory

     See Attachment 5

X. Other Business

XI. Hot Topics
    Tax Nugget from Lorraine New

     See Attachment 6

XII. Adjournment
Attachment 1
MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN

June 24, 2017
Lansing, Michigan

Minutes

I. Call to Order

The Chair of the Section, James Steward, called the meeting to order at 10:20 am.

II. Attendance

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

James B. Steward
Marlaine C. Teahan
Marguerite Munson Lentz
David P. Lucas
George F. Bearup
Christopher J. Caldwell
Kathleen M. Goetsch
Hon. Michael L. Jaconette
Mark E. Kellogg
Michael G. Lichterman
Katie Lynwood
Raj A. Malviya
Richard C. Mills
Melisa M.W. Mysliwiec
Lorraine F. New
Nathan R. Piwowarski
David L.J.M. Skidmore
Geoffrey R. Vernon
Nancy H. Welber

A total of 19 council members and officers were present, representing a quorum.

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

Christopher A. Ballard
Robert B. Labe
Nazneen H. Syed

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:

Robert D. Brower, Jr.
George W. Gregory
Amy N. Morrisey
Tom Sweeney

E. The following Liaisons to the Council were in attendance:

James P. Spica

F. Others in attendance:

Ryan Bourjaily
Neal Nusholtz
Susan Chalgian
Daniel S. Hilker
Aaron Bartell
Mike Shelton
Mark DeLuca
Christine Savage

III. Minutes of the April 22, 2017, Meeting of the Council

The minutes of the April 22, 2017, Meeting of the Council were attached to the combined Agenda for this meeting, posted on the Section’s web page prior to the meeting. Nathan Piwowarski 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’s Report – David P. Lucas

Mr. Lucas’ Treasurer’s Report was attached to the combined Agenda. Mr. Lucas encouraged the timely submission of requests for reimbursement.

V. Chairperson’s Report – James Steward

Mr. Steward delivered the report of the chair. Mr. Steward’s written Chair Report was attached to the combined Agenda.

1. Mr. Steward reported that registration for the State Bar of Michigan’s NEXT Conference is now open.

2. Mr. Steward reported on a notice from Michael J. McClory regarding filing and processing pleadings in Wayne County Probate Court.
3. Mr. Steward reported on *In re Estate of Marian I. Cary*, State of Michigan Court of Appeals No. 331287, unpublished, June 1, 2017. This case involved the reasonableness of fiduciary and attorney fees.

VI. Report of the Committee on Special Projects – Geoffrey R. Vernon

Mr. Vernon presented a summary of the committee report, and lead discussions regarding (i) *In re Estate of Jajuga*, regarding a testator’s right to exclude children from receiving the exempt property allowance; (ii) a memo to the Michigan Probate Judges Association regarding adjustments to the monetary thresholds in EPIC and related statutes, describing proposed increases in such thresholds; and (iii) electronic wills. Regarding electronic wills, the discussion focused on dealing proactively with any proposal for electronic will legislation, since other states have electronic wills statutes, and there is a need to assure protection for will makers, since there is likely to be pressure from electronic document services for recognition of electronic wills.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – Christopher A. Ballard – no report.

2. Bylaws – Nancy H. Welber – Ms. Welber informed the Council that the Section’s Bylaws had been amended to delete Bylaws section 8.4, and that, as required, the Bylaws Committee would take further steps, such as submit the amendment to the State Bar Board of Commissioners for final approval.

3. Awards – Amy N. Morrissey—no report.

4. Planning – Marlaine C. Teahan—Ms. Teahan reported that she went to the State Bar leadership conference at Mackinac, that it was a good meeting with many State Bar Sections leaders, and that Probate Section is viewed as a leader in the Sections, providing good advice to other Sections on operating and supporting Section members.

Ms. Teahan informed the Council that there are several features of the State Bar website that can be useful for the Council and its committees, such as discussion boards and committee materials.

Ms. Teahan reported that she had attended a State of Michigan bill signing, and, at the bill signing, was told that there were certain lawmakers who were looking for legislation to sponsor, and she reported that the Council was encouraged to submit legislation. Mr. Steward stated that the procedure for submitting legislation has become much better, since it now involves electronic submissions.

Mr. Steward encouraged Council committees to review the Council’s Biennial Plan of Work in this regard.
5. Nominating — Thomas W. Sweeney—Mr. Sweeney reported that the Nominating Committee, composed of Amy Morrissey, Shaheen Imami, and Thomas W. Sweeney (the preceding three chairs of the Council), held various meetings. Mr. Sweeney reported that, pursuant to the Council’s Bylaws, the Chair Elect, Marlaine Teahan, will take office as Chair, without further action by the Council. Other Council officers will take their seats after their election at the Section’s annual meeting, commencing the immediately following meeting of the Council.

Mr. Sweeney stated the Nominating Committee’s report, dated June 24, 2017, had been distributed to the Council. The Nominating Committee nominates the following individuals for the positions shown opposite their name:

As officers of the Council:
Chairperson Elect: Marguerite Munson Lentz
Vice Chairperson: Christopher A. Ballard
Secretary: David P. Lucas
Treasurer: David L.J.M. Skidmore

For the Council for a second three-year term:
Hon. Michael L. Jaconette
Mark E. Kellogg
Raj A. Malviya

For the Council for an initial three-year term:
Michael G. Lichterman
Kurt A. Olson
Christine M. Savage

If David L.J.M. Skidmore is elected as Treasurer, the Committee nominates Angela M. Hentkowski to serve the balance of Mr. Skidmore’s term as a member of the Council, which ends with the annual meeting in 2018. Ms. Hentkowski will thereafter be eligible for election to two three-year terms as a member of the Council.

Mr. Steward stated that he had provided Council members with Ms. Hentkowski’s resume, and that the Council typically made an effort to have at least one Council member from the Upper Peninsula.

Mr. Steward asked for questions about the candidates, and there were no questions. Mr. Steward asked for nominations from the floor, and no nominations were made from the floor; Mr. Steward declared the nominations closed, and stated that the nominees are those individuals as stated in the Committee’s report. The Section will vote on the nominees at the annual meeting of the Section in September.

6. Annual Meeting — Marlaine C. Teahan -- Ms. Teahan reported that the annual meeting of the Section will be held at MSU University Club in September,
2017, and that Ms. Teahan was working with the State Bar to have a presentation on the resources now available from the State Bar.

B. Legislation and Lobbying

1. Legislative Analysis and Monitoring Committee – Ryan P. Bourjaily

Mr. Bourjaily reported that the Legislative Analysis and Monitoring Committee’s primary efforts focused on HR 4684, relating to the visitation of a ward under guardianship, which was introduced by Rep. Lucido, which would amend EPIC 5306 to provide that the Court may appoint a limited guardian to supervise access by a relative. Mr. Bourjaily reported that the Uniform Law Commission has a uniform act, and the LAM Committee recommends that the Chair appoint someone from Council to make Rep. Lucido aware of the uniform act, and request that Rep. Lucido delay action on HR 4684. Ms. Lentz moved that Mr. Steward or his designee is authorized to contact Rep. Lucido on behalf of the Council, and request that action on HR 4684 be delayed. The motion was seconded, and approved on a voice vote with no nays and no abstentions. Mr. Steward designated Mr. Vernon to discuss the matter with Rep. Lucido (Mr. Vernon is a constituent of Rep. Lucido). Mr. Steward requested that the Council’s Legislation Development and Drafting Committee help develop a proposal for this type of legislation. Mr. Gregory recommended that the LAM Committee discuss this legislation with the Council’s lobbyist. Ms. Teahan reported that one of the members of the House Judiciary Committee is a former member of the Uniform Law Commission, and so is likely to be supportive of uniform acts.

Mr. Bourjaily reported that Enrolled House Bill 4613 related to establishing a commission to review funding for trial courts, and the Committee was reviewing this legislation to see how it would affect the Probate Courts, since there is no member of the Michigan Probate Judges Association to be appointed to such Commission. The LAM Committee recommends comment on the legislation, but otherwise determine the effect on the Probate Courts. Judge Jaconette stated that, since the basis for this legislation is the Cunningham case, a criminal law case relating to what may be charged in a criminal matter, it is not likely to have much effect on the Probate Courts, and that, while the legislation is on the agenda for the MPJA meeting, it is likely that the MPJA will not be interested in the legislation, since it appears to have little effect on the Probate Courts. Mr. Spica stated that the Council should support the MPJA. Mr. Gregory moved that the Council supports the MPJA if the MPJA determines that an MPJA member should be appointed to such Commission. The motion was seconded. Since this motion involved a policy position of the Council, Mr. Steward called for a show-of-hands vote. The motion was approved on a vote of 19 in favor, none opposed, and no abstentions.

Mr. Bourjaily reported that another matter that the LMA Committee considered was House Bill 4312, relating to authorization to sit for the Bar Examination for graduates of certain law schools and admission to the Michigan Bar on reciprocity. Mr. Bourjaily reported that the State Board of Bar Examiners and
SCAO had taken a position opposed to the legislation. Mr. Bourjaily reported that the legislation had been pulled from the House agenda for lack of votes. LMA Committee recommends to the Council that if 4312-type legislation be proposed again, that the Council oppose it. Mr. Piwowarski moved that the Council take no policy position on this matter, and that the Council does not request a written report from LMA Committee at this time. The motion was seconded. Mr. Spica spoke against the motion, stating that, since the legal profession is a particularly learned profession, it is essential that the Bar assure that its members are properly educated, and that the Bar should not give the impression that legal advice is fungible. Ms. Teahan stated that, with all of the changes in the manner in which the profession is practiced, for example, on the internet, it is sometimes difficult to determine whether someone is practicing law in Michigan. Ms. Goetsch moved to table Mr. Piwowarski’s motion; the motion to table was seconded. The motion to table was approved on a vote of 13 in favor, 6 opposed, and no abstentions. Mr. Steward referred the matter back to the LMA Committee, and requested that the Committee confer with the Council’

2. Legislation Development & Drafting Committee – Nathan R. Piwowarski

Mr. Piwowarski reported that the LDD Committee is focusing on 7 topics:

a. Adjustments to statutory exemptions and bonds. The Council discussed such adjustments, including whether there is a need for additional legislation regarding the Court’s discretion on bonds, and the involvement of lawyers in bonding matters unduly increasing the costs to estates. Mr. Piwowarski moved that the Chair or the Chair’s designee submit a memo to MPJA describing the LDD Committee’s rationale for adjusting statutory exemptions and bonds. The motion was seconded. The motion was approved on a voice vote with no nays and no abstentions.
b. Exempt property and the Jajuga case.
c. Quiet trusts
d. Interests rates on general bequests
e. Standby guardians
f. Limiting access to elders
g. Revocation and termination of trusts

3. Ad Hoc Committee on Legislative Drafting and Legal Ethics – Sueann Mitchell – no report.

4. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon – Mr. Vernon reported that the ILAH Committee was still looking for a sponsor for recommended legislation.
5. Assisted Reproductive Technology Ad Hoc Committee – Nancy H. Welber -- Ms. Welber reported that there are 2 sponsors for the recommended ART legislation, and that the ART Committee hoped that the recommended legislation would be introduced at the start of the next session. Ms. Welber expects that the proposed legislation will be referred to the Committee on family and children, and hoped that the legislation would be enacted by next December. Ms. Welber stated that, although her term on the Council was ending, she is willing to continue as Chair of the ART Committee.

6. Divided and Directed Trusteeship – James P. Spica -- Mr. Spica referred the Council to Attachment 4 to the Council agenda, and noted that an outline of the uniform act was included with the materials.

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L.J.M. Skidmore -- Mr. Skidmore reported that the Amicus Curiae Committee is making no recommendations for funding, although there are parties seeking support from the Council. Ms. Teahan reported that, in the Vansach matter (which purports to limit the Probate Court’s jurisdiction, following the amicus funded by Council, the State filed a motion to respond to amicus; Ms. Teahan said that she was informed that such a filing is very rare.

Mr. Skidmore reported that the Amicus Curiae Committee is making no recommendations for funding, although there are parties seeking support from the Council.

Ms. Teahan reported that, in the Vansach matter (which purports to limit the Probate Court’s jurisdiction, following the amicus funded by Council, the State filed a motion to respond to amicus; Ms. Teahan said that she was informed that such a filing is very rare.

2. Probate Institute – Marguerite Munson Lentz -- Ms. Lentz reported excellent attendance at the Plymouth-site Institute, and that the exhibit area at the Institute was the largest ever. Ms. Lentz thanked all of their work on this matter.

State Bar and Section Journals – Richard C. Mills – Mr. Mills reported that the Spring, 2017 Probate Journal had been published. Mr. Mills encouraged the submission of articles for future issues. Mr. Mills reported that probate is scheduled as the theme issue for the December 2018 Bar Journal, but, to date, there are no proposed topics or authors scheduled.

3. Citizens Outreach – Melisa M.W. Mysliwiec -- Ms. Mysliwiec reported that the Citizens Outreach Committee is working on preparing a policy and procedure for accepting materials from outside groups for citizens outreach matters, and reported that there are still some brochures available.

4. Electronic Communications – Michael G. Lichterman—Mr. Lichterman reported that, in follow-up to the discussion at the April Council meeting, the Electronic Communications Committee has prepared a proposed Section Mailing
List Policy and a proposed Probate Section Mailing List Code of Conduct, which are included as Attachment 5 to the Agenda. Mr. Steward inquired regarding the use of “form” or “forum” in the third sentence of the third section of the Section Mailing List Policy. Mr. Steward stated that the phrase “suspension or termination” should replace the phrase “suspended or terminated in in the fourth line of the first paragraph of the Mailing List Code of Conduct. The EC Committee moved the adoption of the Policies, with the modification recommended by Mr. Steward. The motion was approved on a voice vote, with no nays and no abstentions.

5. Membership – Nicholas A. Reister – for Mr. Reister, Dan Hilker gave a report that the Membership Committee has a table in the exhibit hall of the Institute, and intends to have a table at the next Institute.

D. Ethics and Professional Standards

1. Ethics & Unauthorized Practice of Law– Katie Lynwood – Ms. Lynwood reported that she is on the State Bar’s Who Should You Trust Committee. The date of the Who Should You Trust presentations is October 11, and that Committee is asking for volunteers. To participate, lawyers sign up and present; all of the materials are already prepared, and presenters must follow the prepared program. Sites are selected after requests for community centers to volunteer space and time. Ms. Lynwood will provide Who Should You Trust communications examples to Mr. Steward. Ms. Teahan inquired about more venues, since her sense is that lawyers are willing to present, but there are no venues in which to present; Ms. Lynwood will check into that matter.

Ms. Lynwood had no update on the “first responders” presentation matter, but will provide information as she obtains it.

E. Administration of Justice


Ms. Teahan reported that she is the Chair of the subcommittee on probate court rules, which issued a report on June 21. She reported that a hearing was held, and that several individuals from out-of-state attended the hearing; those individuals expressed complaints about the lack of procedures for Probate Court appeals, so they did not understand the new legislation regarding probate appeals.

Ms. Teahan reported that most forms changes are developed by the committee, then are presented to the Court of Appeals. Priority is being given to appeals regarding guardianship and mental health matters, and Ms. Teahan requested feedback from the Council and Section members. Ms. Teahan noted that changes can be made, and that it appears that the Court of Appeals is willing to make additional changes. Ms. Teahan reported that the proposed forms changes have been posted to the State Bar Section website. Ms. Teahan expressed appreciation that Judge Murkowski started the process of sending appeals of Probate Court matters directly to the Court of Appeals.
F. **Areas of Practice**

1. **Real Estate – Mark E. Kellogg** – Mr. Kellogg reported that the Committee is working on modifying the uncapping statute, and that Sen. Schuitmaker has agreed to sponsor legislation. Mr. Kellogg intends to have a draft of a bill for Council review in September. Mr. Gregory noted that such legislation could affect a number of areas of the law, and encouraged Mr. Kellogg to reach out to other Sections, including, for example, real estate and tax.

2. **Tax Committee – Lorraine F. New** -- Ms. New’s Tax Nugget, regarding payment of user fees at pay.gov and a new portability Revenue Procedure.

3. **Charitable and Exempt Organization – Christopher J. Caldwell** – Mr. Caldwell reported that the Charitable and Exempt Organization Committee intends to work on the Supervisor of Trustees for Charitable Purposes Act, and that a member of the Attorney General’s office, Will Broomfield, is acting as liaison to the Attorney General.

4. **Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer** – for Ms. Clark-Kruer, Ms. Lynwood reported that an email was sent to Judge Murkowski regarding the guardianship matter discussed previously by the Council. Judge Jaconette reported that the matter was on the agenda for MPJA.

VIII. **Other Reports**

A. **Liaisons**

1. **Alternative Dispute Resolution Section Liaison – Milton J. Mack, Jr.** —no report.


3. **Elder Law and Disability Rights Section Liaison – Amy Rombyer 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 – Nazneen H. Syed**—no report

8. **Michigan Probate Judges Association Liaisons – Hon. Judge David M. Murkowski, Hon. Judge Michael L. Jaconette**—no report. Judge Jaconette reported that he would not be able to attend the Council’s September 9 meeting because of the MPJA meeting. Judge Jaconette will report back to Council, and thanks all for memos regarding positions.

9. **Probate Registers Liaison – Rebecca A. Schnelz**—no report
10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz—no report. For the liaisons, Ms. Teahan reported that June 30 is the cutoff date for comments to proposed amendments to the Court rules; SCAO will accept emails as comments. Ms. Teahan and Mr. Steward will talk to the 3 liaisons regarding continuing as Council liaisons to SCAO; Ms. Schnelz has indicated a desire to continue participating, but she will drop off, if needed, since she will still attend meetings; if she ceases to be a Council liaison, the Council can have 3 individuals as liaisons to SCAO. There is only one meeting per year, and Ms. Teahan encourages active participation from the Council.


13. Taxation Section Liaison – George W. Gregory – Mr. Gregory reported that the Taxation Section is working on its “Tax Bootcamp.” The Section is active in social media matters. The Section is sponsoring a Tax Court lunch in September, at which a Tax Court Judge will be the guest speaker. The Section has held its annual tax conference.

14. ULC Liaison – James P. Spica – Mr. Spica referred to his written report included as Attachment 7 to the Agenda. Mr. Spica reported that the name of the Uniform Principal and Income Act has been changed to the Fiduciary Income and Principal Act, and that the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act has now been posted to the Commission’s website.

IX. Other Business – Ms. Teahan thanked all who helped write the Vansach amicus brief.

X. Hot Topics Nancy Welber reported that the Court of Appeals has addressed assisted reproductive technology in one case.

Ms. Welber stated that she would not be able to attend the Council’s September meeting, so this would be her last meeting as a Council member. She thanked all for her opportunity to be on the Council, said that it has been a terrific experience for her, and that she has very much enjoyed the collegiality at the Council. Mr. Steward thanked her for her work.

It was reported that Geoff Vernon and Rob Labe were admitted as ACTEC fellows, and they were congratulated.

Dan Hilker reported on behalf of the Council’s ad hoc pre-nuptial committee that HB 4751, regarding pre-nuptial agreements, has been introduced, and that the Committee would monitor that legislation.

XI. Adjournment

The meeting was adjourned by Chair James Steward at 12:02 pm.
Attachment 2
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Divided and Directed Trusteeships ad Hoc Committee Chair’s Report
Date: September 1, 2017

The Committee met seven times over the summer. Minutes of those meetings are attached. The upshot is a legislative proposal that is on the agenda for the September 9, 2017 CSP meeting.

JPS
DETROIT 40411-1 1416471v3 - 8/31/2017 3:27:34 PM
Divided & Directed Trusteeships Committee  
Meeting Minutes 6-28-17

The meeting commenced at 1:03 PM

Members Present:
- Judy Grace
- David Kerr
- Raj Malviya
- Meg Lentz
- Gabrielle McKee (Secretary)
- Rick Mills
- Jim Spica (Chair)
- Rob Tiplady (Vice Chair)
- Geoff Vernon

Excused Absences: none

Missing and Missed: none

Review of Meeting Minutes 6-7-17

Future Meetings (with locations for those who wish to attend in person):

- July 12: Dickinson Wright PLLC, Troy Office  
  o 2600 W. Big Beaver Road, Suite 300, Troy
- July 26: Dickinson Wright PLLC, Grand Rapids Office  
  o 200 Ottawa Ave, N.W., Suite 1000, Grand Rapids
- August 9: Dickinson Wright PLLC, Lansing Office
- August 23: Dickinson Wright PLLC, Ann Arbor Office  
  o 350 S. Main Street, Suite 300, Ann Arbor
- September 6: Dickinson Wright PLLC, Troy Office
- September 27: Dickinson Wright PLLC, Lansing Office

Discussion: The Committee’s deliberations of the Uniform Directed Trust Act (June 2, 2017 draft) begins (as planned at the last meeting) with Section 9.

Section 9 was read aloud and set up for discussion by the Chair, who focused attention on Section 9(b)’s willful-misconduct standard, Section 9(a)’s suggestion of a negligence standard for a directed trustee’s compliance with direction, and the ways in which these features motivate the two strategic questions discussed at the Committee’s first meeting: (1) whether the provisions of the UDTA (assuming they are to be adapted and proposed for adoption in Michigan) should be integrated into the MTC or enacted as a stand-alone statute and (2) whether (on the same assumption) divided trusteeship as well as the UDTA should be proposed.
Following some general discussion, the Chair polled each Committee member regarding his or her tentative disposition or leaning (if any) on each of the two strategic questions. The results of the poll were:

<table>
<thead>
<tr>
<th>Committee Member</th>
<th>Question 1</th>
<th>Question 2</th>
</tr>
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<tbody>
<tr>
<td>Judy Grace</td>
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<td>David Kerr</td>
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<td>divided trusteeship</td>
</tr>
<tr>
<td>Raj Malviya</td>
<td>could go either way</td>
<td>divided trusteeship</td>
</tr>
<tr>
<td>Meg Lentz</td>
<td>integration in MTC</td>
<td>divided trusteeship</td>
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The Chair indicated that next meeting, the Committee would continue its section-by-section review of the UDTA (beginning with Section 10), but that the Committee would first revisit two questions re Section 9 about which Committee members might consider in the meantime:

(1) Rather than referring to “reasonable action to comply . . .” in Section 9(a), should the Section state that a directed trustee will be subject in her attempts to comply with directions to the same standard of care to which she is subject when acting on her own initiative as trustee under the terms of the trust?

(2) Rather than referring to “willful misconduct,” Section 9(b) should be made to read (something like):

(b) A directed trustee must not comply with the exercise or nonexercise of a power of direction . . . if the exercise or nonexercise was obtained with the directed trustee’s collusion or by the directed trustee’s fraud and compliance would be in pursuance of that collusion or fraud.

Next Meeting: 7-12-17

The meeting adjourned at 2:30 PM

Gabrielle M. McKee, Secretary

Troy 99998-2776 1859149v2
Divided & Directed Trusteeships Committee
Meeting Minutes 7-12-17

The meeting commenced at 1:02 PM

Members Present:
• Judy Grace
• David Kerr
• Raj Malviya
• Meg Lentz
• Gabrielle McKee (Secretary)
• Rick Mills
• Jim Spica (Chair)
• Rob Tipplady (Vice Chair)
• Geoff Vernon

Excused Absences: none

Missing and Missed: none

Review of Meeting Minutes 6-28-17: two corrections to the tentative-inclinations chart (corrections highlighted below)

<table>
<thead>
<tr>
<th>Committee Member</th>
<th>Question 1</th>
<th>Question 2</th>
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Future Meetings (with locations for those who wish to attend in person):

• July 26: Dickinson Wright PLLC, Grand Rapids Office
  o 200 Ottawa Ave, N.W., Suite 1000, Grand Rapids
• August 9: Dickinson Wright PLLC, Lansing Office
• August 23: Dickinson Wright PLLC, Ann Arbor Office
  o 350 S. Main Street, Suite 300, Ann Arbor
• September 6: Dickinson Wright PLLC, Troy Office
  o 2600 W. Big Beaver Road, Suite 300, Troy
• September 27: Dickinson Wright PLLC, Lansing Office
Discussion:

- Chair outlines a near-term plan of action: (1) consideration of proposed alternative language for section 9(b), (2) finish the Committee's section-by-section review of the UDTA by reading and discussing UDTA sections 10 through 17, and (3) next examine the UDTA (despite the corrections above to the tentative-inclinations chart) in a form that casts the UDTA as a proposed addition (or set of additions) to the MTC.

- Discussion re substitution of collusion-or-fraud for the willful-misconduct standard of residual directed-trustee liability in UDTA section 9(b).

- UDTA sections 10 through 17 were then each read aloud by a Committee member, commented on briefly by the Chair, and discussed by the Committee.

The meeting adjourned at 2:30 PM

Gabrielle M. McKee, Secretary
Divided & Directed Trusteeships ad Hoc Committee
Meeting Minutes 7-26-17

The meeting commenced at 1:03 PM

Members Present:
- David Kerr
- Raj Malviya
- Meg Lentz
- Rick Mills
- Jim Spica (Chair)

Excused Absences:
- Judy Grace
- Gabrielle McKee
- Rob Tiplady
- Geoff Vernon

Missing and Missed: none

Future Meetings (with locations for those who wish to attend in person):
- August 9: Dickinson Wright PLLC, Lansing Office
- August 23: Dickinson Wright PLLC, Ann Arbor Office
  - 350 S. Main Street, Suite 300, Ann Arbor
- September 6: Dickinson Wright PLLC, Troy Office
  - 2600 W. Big Beaver Road, Suite 300, Troy
- September 27: Dickinson Wright PLLC, Lansing Office

Discussion:

- The Chair outlined various features of the articulated legislative proposal comprised by the "divided and directed trusteeships proposal drawing board" circulated to Committee members, including the allocation (as indicated in the "parallel table" also circulated to the members) of the provisions of the UDTA primarily to section 7703a of the proposal and the allocation of divided (as opposed to directed) trusteeship provisions primarily to section 7703b.

- The Committee discussed sections 7103, 7105, 7108, 7411, 7703, and subsections (1) and (2) of section 7703a at length.

The meeting adjourned at 2:25 PM

James P. Spica, Chair
Divided & Directed Trusteeships Committee
Meeting Minutes 8-9-17

The meeting commenced at 1:02 PM

Members Present:
• Judy Grace
• David Kerr
• Meg Lentz
• Gabrielle McKee (Secretary)
• Rick Mills
• Jim Spica (Chair)
• Geoff Vernon
• Rob Tiplady (Vice Chair)

Excused Absences:
• Raj Malviya

Missing and Missed: none

Future scheduled meetings and additional meetings to prepare a proposal (highlighted):

• August 16: By phone only
• August 23: Dickinson Wright PLLC, Ann Arbor Office  
  o 350 S. Main Street, Suite 300, Ann Arbor
• August 30: By phone only
• September 6: Dickinson Wright PLLC, Troy Office  
  o 2600 W. Big Beaver Road, Suite 300, Troy
• September 27: Dickinson Wright PLLC, Lansing Office  
  o 215 S. Washington Square, Suite 200, Lansing

Discussion:

• Apropos of section 7703a(1)-(3), the Chair introduced the Venn diagram  
  (previously distributed to Committee Members) comparing the scope of fiduciary  
  duties imposed by the UDTA and MTC respectively on holders of powers to  
  direct.

• The Committee discussed sections subsections (4) through (18) of section 7703a  
  at length.

The meeting adjourned at 2:30 PM

[Signature]
Gabrielle M. McKee, Secretary

Troy 99998-2776 1883675v2
Divided & Directed Trusteeships Committee
Meeting Minutes 8-16-17

The meeting commenced at 1:03 PM

Members Present:
- David Kerr
- Meg Lentz
- Raj Malviya
- Gabrielle McKee (Secretary)
- Rick Mills
- Jim Spica (Chair)
- Geoff Vernon

Excused Absences:
- Judy Grace
- Rob Tiplady (Vice Chair)

Future scheduled meetings:
- August 23: Dickinson Wright PLLC, Ann Arbor Office
  - 350 S. Main Street, Suite 300, Ann Arbor
- August 30: By phone only
- September 6: Dickinson Wright PLLC, Troy Office
  - 2600 W. Big Beaver Road, Suite 300, Troy
- September 27: Dickinson Wright PLLC, Lansing Office
  - 215 S. Washington Square, Suite 200, Lansing

Discussion:

- Committee discussed the inclusion in section 7703a of the UDTA section 3(a) effective-date provision, focusing especially on note 6 in the Venn diagram comparing the scope of fiduciary duties imposed by the UDTA and MTC respectively on individuals who hold powers to direct. The Chair will add a new subsection to section 7703a governing the section's effect on previously created and subsequently moved trusts for review at the next Committee meeting, and the Committee will return at that time to the question of whether some part of the section's effect should be retroactive.

- Following remarks by the Chair re the relation of section 7703b to section 7105(2) and sections 7703 and 7703a, the Committee read and discussed sections subsections (1) through (4) of section 7703b in detail.

The meeting adjourned at 2:36 PM

/Gabrielle M. McKee, Secretary

Troy 99998-2778 1888154v2
Divided & Directed Trusteeships Committee
Meeting Minutes 8-23-17

The meeting commenced at 1:05 PM

Members Present:
- Judy Grace
- Raj Malviya
- Gabrielle McKee (Secretary)
- Rick Mills
- Jim Spica (Chair)

Excused Absences:
- Meg Lentz
- Geoff Vernon

Missed and Missing:
- David Kerr
- Rob Tiplady (Vice Chair)

Future scheduled meetings:
- August 30: By phone only
- September 6: Dickinson Wright PLLC, Troy Office
  - 2600 W. Big Beaver Road, Suite 300, Troy
- September 27: Dickinson Wright PLLC, Lansing Office
  - 215 S. Washington Square, Suite 200, Lansing

Discussion:
- The Committee reviewed 7703a(18) (re: effective-date). The Committee will return to the question of whether some part of the proposal's repeal of section 7809 should be retroactive.
- The Committee reviewed 7703b(3)(f) (the section 7703b counterpart of existing section 7703(4)). The Committee will return to the questions: (1) whether a provision of this kind should be included in section 7703(b) at all, and if so, (2) whether it should permit any separate trustee (as opposed to just the separate resultant trustee) to act for "the trust" in exigent circumstances.
- Following remarks by the Chair recapping the relation of section 7703b to section 7105(2) and sections 7703 and 7703a, the Committee read and discussed all of the remaining subsections of section 7703b (beginning with subsection (4)).
- Following remarks by the Chair re the relation of section 7703a(17)(f) and section 7704, the Committee read and discussed the proposal's amendment of section 7704.

The meeting adjourned at 2:33 PM

Gabrielle M. McKee, Secretary
Divided & Directed Trusteeships Committee
Meeting Minutes 8-30-17

The meeting commenced at 1:05 PM

Members Present:
- Judy Grace
- Meg Lenz
- Raj Malviya
- Gabrielle McKee (Secretary)
- Rick Mills
- Jim Spica (Chair)
- Rob Tiplady (Vice Chair)
- Geoff Vernon

Excused Absences: none

Missed and Missing:
- David Kerr

Future scheduled meetings:
- September 6: Dickinson Wright PLLC, Troy Office
  - 2600 W. Big Beaver Road, Suite 300, Troy
- September 27: Dickinson Wright PLLC, Lansing Office
  - 215 S. Washington Square, Suite 200, Lansing

Discussion:
- Apropos of section 7703a(18) (re UDTA effective date), the Committee returned to the question whether some part of the proposal’s repeal of MTC section 7809 should be made retroactive. The consensus was that it should not.
- Apropos of section 7703b(3)(f) (the section 7703b counterpart of existing section 7703(4)), the Committee returned to the questions (1) whether a provision of this kind should be included in section 7703b at all and (2) whether if so, it should apply to any separate trustee (as opposed to just the separate resultant trustee). The consensus was that section 7703b(3)(f) should be confined to the statement that no separate trustee has any duty to petition the court or otherwise take affirmative action to ensure that a vacancy in a separate trusteeship is filled.
- Following remarks by the Chair about the absence of any reference to MTC section 7402 in the current form of section 7105(2), the Committee discussed whether section 7703b(3)(d) should be referenced in section 7105(2). The consensus was that the proposal should amend section 7105(2) by adding a reference to section 7402(1)(e) to paragraph (a) and by adding a separate paragraph referring to section 7703b(3)(d).
- The Chair asked whether the Committee thought that, with the changes indicated above, the proposal was ready for presentation to the Council’s Committee on Special Projects (CSP). The consensus of the Committee was that the proposal was ready.
- The Chair was authorized to present the amended proposal for inclusion in the September 9, 2017 CSP addenda.

The meeting adjourned at 1:57 PM

Gabrielle M. McKee, Secretary
Attachment 3
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  July 13, 2017

Name  Gail A. Anderson  P Number  P38396

Firm Name  McClelland & Anderson, LLP

Address  1305 S. Washington Ave., Ste. 102

City  Lansing  State  MI  Zip Code  48910

Phone Number  517-482-4890  Fax Number  517-482-4875

E-mail address  ganderson@malansing.com

Attach Additional Sheets as Required

Name of Case  Breakey v Michigan Department of Treasury

Parties Involved  Ann Breakey, widow living in Bath Township, Clinton County, responding to Treasury’s denial of her PRE status on her home in Bath, Michigan

Current Status:  Decision of Michigan Tax Tribunal is on appeal to Michigan Court of Appeals

Deadlines:  November 13, 2017 (if everyone else files their brief on the last day permitted.)

Issue(s) Presented:  Whether Mrs. Breakey’s rights in her home as a beneficiary under the trust of her deceased husband entitles her to PRE status.
Michigan Statute(s) or Court Rule(s) at Issue:  
MCL 211.7dd(a)(ii) and (iii)

Common Law Issues/Cases at Issue:  

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section?  
Treasury’s position, adopted by the MTT, that a trust beneficiary who has rights in a home akin to a life estate is not an owner within the meaning of MCL 211.7dd(a)(ii) and (iii) is contrary to Treasury’s published Guidelines as well as existing case law.

Do you believe that a decision in this case will substantially impact this Section’s attorneys and their clients?  If so, how?  
For decades, Treasury’s Guidelines for the Michigan Principal Exemption Program, question #3, provides:

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

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

We believe that there may be any number of trusts in place around the state set up under the assumption that the surviving spouse is entitled to the PRE upon the death of the grantor so long as he/she occupies the home.  We are aware of one prior decision of the MTT on this issue decided against the taxpayer in October of 2015, Diane E. Johnson v Michigan Department of Treasury; MTT No. 14-007849.  We have attached both decisions of the Tax Tribunal as well as the brief that we filed with the Tax Tribunal on behalf of Mrs. Breakey. We have also attached the trust instrument.
FIRST RESTATEMENT
OF THE WILLIAM E. BREAKEY TRUST NO. 1
DATED NOVEMBER 11, 1994

I originally created a Trust, known as the "William E. Breakey Trust No. 1" on November 11, 1994. Pursuant to the power to make amendments which I reserved in the Trust, I am now completely restating the Trust on this 24th day of February, 2011, to read as follows:

Trust Agreement of William E. Breakey

I, William E. Breakey establish the William E. Breakey Trust No. 1 ("Agreement") with myself and Ann M. Breakey as trustees, both of whom, the survivor, and any successor trustee, will be called "Trustee" in this Agreement and referred to in singular neuter pronouns. The trust created by the Agreement is referred to as the "Trust." Trustee shall hold all property delivered to it, in trust, as follows:

1. Rights Reserved

1.1 Revocable Trust. I reserve the right to amend or revoke this Agreement, wholly or partly, by a writing signed by me or on my behalf and delivered to Trustee during my life. However, I cannot change materially the duties or compensation of Trustee without its written approval. This Agreement shall become irrevocable at my death.

1.2 Additions and Withdrawals. I reserve the right to add property to, and withdraw property from, the trust.

1.3 Actions on My Behalf. My agent under a power of attorney or a conservator appointed for me shall have the right to take the actions specified in ¶1.1 and 1.2; provided my power of attorney gives my agent or the court gives the conservator, as applicable, the powers specified in ¶1.1 or 1.2.

2. Family

2.1 Spouse. I am married to Ann M. Breakey ("Spouse"). If our marriage terminates other than by reason of the death of one of us, then this Agreement shall be interpreted as if my Spouse died as of the date of termination of our marriage.

3. Distribution During Lifetime

3.1 During My Lifetime. During my life, Trustee shall pay all the net income to me or for my benefit, or as I otherwise direct orally or in writing, and Trustee shall pay any part of trust principal as I direct orally or in writing. During any period in which, in Trustee's opinion, I am incapable of managing my own affairs, Trustee shall pay to or use for the benefit of me or my
Spouse, the net income and principal that Trustee (1) determines is required for our support, comfort and welfare, in our accustomed manner of living, or for any other purposes Trustee believes to be for our best interests, or (2) as directed by my agent under a power of attorney or my conservator.

4. Distribution After Death

4.1 Claims and Taxes. At my death:

(a) Payment of Taxes. Subject to ¶4.1(e), to the extent the property of my estate (other than tangible personal property and any property which in Trustee's judgment does not have a readily realizable market value) is insufficient, Trustee may pay taxes and assessments with respect to the trust property and any estate taxes assessed by reason of my death. Estate taxes will include all federal, state and foreign estate, inheritance and succession taxes, but exclude any generation-skipping transfer taxes and any additional estate taxes under IRC Section 2057, each of which will be paid from the property giving rise to such taxes, which are either the legal obligation of the trust or as requested by the personal representative of my estate and approved by Trustee. Notwithstanding any contrary provision of the Estates and Protected Individuals Code, estate taxes will be apportioned and paid as follows except as otherwise specifically provided in this Agreement or my Will:

(1) The estate taxes, if any, which are attributable to property not transferred under this Agreement, will be paid by the person(s) entitled to that property.

(2) The estate taxes, if any, which are attributable to property transferred under this Agreement will be paid proportionately from the distributions under this Agreement.

(3) Any estate taxes chargeable under subparagraph (1) or (2) above will be equitably apportioned by applying any available deduction, credit or rate differential attributable to such transfer.

(4) Any estate taxes excluded from apportionment by this Agreement will be paid from the residue of the trust property after payment of all debts, last illness, funeral and administration expenses and non-residuary distributions.

(5) Any estate taxes attributable to any property distributed under a qualified disclaimer will be paid from such disclaimed property, unless otherwise specifically provided in this Agreement.

(b) Payment of Claims and Expenses. Subject to ¶4.1(e), if a personal representative of my estate is appointed in Michigan, Trustee shall pay to the personal
representative, upon written notice from the personal representative of the amounts required, but only to the extent that the property subject to probate administration in my estate is insufficient to satisfy the following: (1) administration expenses of my probate estate; (2) enforceable and timely presented claims of my creditors, including funeral and burial expenses; and (3) homestead, family, and exempt property allowances.

(c) **Claims Publication and Payment of Claims.** If no personal representative of my estate has been appointed so that the publication and notice requirements with respect to creditors have not been discharged, then Trustee shall publish and serve notice to all creditors in the same manner as required by Michigan law. Trustee shall pay all claims allowed by Trustee or a court having jurisdiction, in the manner and as provided in ¶4 of my will.

(d) **Gifts by Will.** Trustee may pay all or any part of gifts provided for by my will.

(e) **Retirement Plans.** Notwithstanding any other provision, except as provided in this paragraph, the Trustee may not, on or after September 30 of the year following the year of my death (Designation Date), distribute to or for the benefit of my estate, any charity, or any other nonindividual beneficiary any qualified retirement plan, individual retirement account or other retirement arrangement subject to the minimum distribution rules of IRC 401(a)(9), or other comparable provisions of law (Retirement Benefit). It is my intent that all such retirement benefits held by or payable to this Trust or after the Designation Date be distributed to or held in trust for only individual beneficiaries, within the meaning of IRC 401(a)(9). Accordingly, I direct that such benefits may not be used or applied on or after the Designation Date for payment of my debts, taxes, expenses of administration, or other claims against my estate nor for payment of estate, inheritance, or similar transfer taxes due on account of my death. This paragraph shall not apply to any bequest that is specifically directed to be funded with Retirement Benefits by other provisions of this instrument.

4.2 **Tangible Personal Property.** I have prepared, or may prepare a written statement or list, signed by me, to dispose of items of Tangible Personal Property. If I already have not given each item to the person or persons identified in the written statement or list, Trustee shall deliver those items at my death. At my death, Trustee shall deliver free from trust all remaining Tangible Personal Property, to my Spouse, and if he is not surviving then to my grandchild Rutger W. Breakey; and if he is not surviving, then to Maralee Albrecht.

The term "Tangible personal property" means personal (not used primarily in a business) boats, books, china, clothing, furnishings, furniture, glass, household items, jewelry, lawn and garden equipment, motor vehicles, personal effects, pictures, recreational items, rug, silver, works of art, frequent flyer miles, and any other similar items, and includes any insurance on that
property. Trustee shall determine which items are within this definition, and the determination shall bind all persons.

(a) **Expenses.** I direct that all expenses of packing, insuring, shipping, and delivering items of Tangible Personal Property to the residence of each beneficiary be paid from my trust as an expense of administration.

4.3 **Marital Trust.** Trustee shall hold all of the remaining trust property in a Marital Trust for the following purposes:

(a) **Income.** Trustee shall pay the net income to or for the benefit of my Spouse until death, at least quarter-annually.

(b) **Principal.** If net income is insufficient to maintain the standard of living my Spouse enjoyed prior to my death, Trustee shall use that portion of principal necessary to enable my Spouse to maintain that standard of living. Trustee may distribute principal only to my Spouse. Trustee shall permit my Spouse to use any real estate held in the Marital Trust rent free. I intend this portion of the Marital Trust to be a "Support Trust" as defined in Michigan Trust Code ("MTC") at MCL 700.7101 et seq.

(c) **Residue.** At my Spouse's death, Trustee shall pay the approximate amount of estate, inheritance, and other taxes payable as a result of inclusion of any portion of the Marital Trust in my Spouse's Taxable Estate, and any taxes then imposed on generation-skipping transfer of property in Trust A, and Trustee shall distribute the remaining property in accordance with the provisions of ¶4.4.

(d) **Disclaimer.** My Spouse, my Spouse's agent under a power of attorney, my Spouse's conservator, or the personal representative of my Spouse's estate (each a "Designated Party"), shall have the right to disclaim all or any part of my Spouse's benefits under this ¶4.3. Any part of the Marital Trust which is disclaimed shall pass to the beneficiaries described in ¶4.4, as applicable, and as if my Spouse had died. All disclaimers of an interest in the Marital Trust must be "Qualified Disclaimers" as defined in the IRC. All disclaimers shall be delivered in writing to Trustee and shall be effective on the date received by Trustee.

4.4 **Distribution to Friends and Family.** When my Spouse dies or when I die, whichever is later, Trustee shall divide the remaining trust property, including additions from any sources, to be held and disposed as follows:

(a) **Distribution to Carrie Blaisdell.** Trustee shall distribute all of the assets in the Scottrade Investment Account to Carrie Blaisdell, and if she does not survive me, to her surviving children, in portions of equal value. Any share that would be distributed to a beneficiary under the age of 25, shall be held, administered and disposed of as follows:
(1) **Trust for Beneficiaries Under Age 25.** Trustee shall hold, administer and dispose of the share of a beneficiary under age 25, as follows:

(i) **Income.** Trustee, in its discretion, shall pay to or for the benefit of the beneficiary all or any part of net income. In exercising its discretion, Trustee shall consult with and be guided by the guardian of the beneficiary, if any, but Trustee shall make the final decision. Trustee shall add income to principal, at Trustee's discretion.

(ii) **Principal.** Trustee shall pay to or for the benefit of the beneficiary those portions of principal which Trustee determines necessary for the reasonable health care, education, support and maintenance of the beneficiary and the beneficiary's immediate family. Reasonable support and maintenance includes, but is not limited to, obtaining a residence, or becoming established or remaining in a business or profession.

(iii) **Residue.** When the beneficiary attains the age of 25 years, Trustee shall distribute all remaining assets to the beneficiary, free from trust.

(iv) **Death of Beneficiary.** If the beneficiary dies before being entitled to distribution of the remaining trust property, Trustee shall distribute the remaining trust property to, or in trust for the benefit of, a person or persons among the beneficiary's descendants, upon such conditions and estates, with the powers, in the manner and at the time or times, as the deceased beneficiary appoints by will which specifically refers to this power of appointment. To the extent this power of appointment is not exercised effectively, Trustee shall distribute the then remaining trust property to the beneficiary's then living descendants, by right of representation, or if there are none, then pursuant to the provisions of §4.4(c). The share of any ultimate beneficiary in default of appointment for whose primary benefit another trust then is held or is to be held under this Agreement shall be added to and commingled with the other trust and held, or partly held and partly distributed, as if it had been an original part of the other trust.
(b) **Distribution to Rachel Walters.** Trustee shall distribute $10,000.00 to Rachel Walters; and if she does not survive me, to her surviving children, in portions of equal value.

(c) **Distribution to Susan Breakey.** Trustee shall distribute $30,000.00 to Susan Breakey; and if she does not survive me, this gift shall lapse.

(d) **Distribution to Thomas W. Breakey.** Trustee shall distribute all of my interest in all investments that I have in all real estate ventures associated with Farmer’s Home Administration to Thomas W. Breakey; and if he is not surviving, then pursuant to the provisions of ¶4.4(e).

(e) **Distribution to Rutger W. Breakey.** Trustee shall distribute the remaining trust property to Rutger W. Breakey; and if he is not surviving, then to his descendants, per stirpes. Any share that would be distributed to a beneficiary under the age of 25, shall be held, administered and disposed of as follows:

1. **Trust for Beneficiaries Under Age 25.** Trustee shall hold, administer and dispose of the share of a beneficiary under age 25, as follows:

   (i) **Income.** Trustee, in its discretion, shall pay to or for the benefit of the beneficiary all or any part of net income. In exercising its discretion, Trustee shall consult with and be guided by the guardian of the beneficiary, if any, but Trustee shall make the final decision. Trustee shall add income to principal, at Trustee’s discretion.

   (ii) **Principal.** Trustee shall pay to or for the benefit of the beneficiary those portions of principal which Trustee determines necessary for the reasonable health care, education, support and maintenance of the beneficiary and the beneficiary’s immediate family. Reasonable support and maintenance includes, but is not limited to, obtaining a residence, or becoming established or remaining in a business or profession.

   (iii) **Residue.** When the beneficiary attains the age of 25 years, Trustee shall distribute all remaining assets to the beneficiary, free from trust.

   (iv) **Death of Beneficiary.** If the beneficiary dies before being entitled to distribution of the remaining trust property, Trustee shall distribute the remaining trust property to, or in trust for the benefit of, a person or persons among the
beneficiary's descendants, upon such conditions and estates, with the powers, in the manner and at the time or times, as the deceased beneficiary appoints by will which specifically refers to this power of appointment. To the extent this power of appointment is not exercised effectively, Trustee shall distribute the then remaining trust property to the beneficiary's then living descendants, by right of representation, or if there are none, then pursuant to the provisions of ¶4.4(c). The share of any ultimate beneficiary in default of appointment for whose primary benefit another trust then is held or is to be held under this Agreement shall be added to and commingled with the other trust and held, or partly held and partly distributed, as if it had been an original part of the other trust.

(f) **Alternate Distribution.** If all my descendants, and I die before one or more of us is entitled to the distribution of all assets, Trustee shall distribute, or hold and dispose of, all remaining assets as follows:

1. $20,000 to Matthew Breakey, and if he is not surviving, to his descendants, per stirpes.
2. The balance to The Capital Area Salvation Army, a Michigan non-profit corporation, located in Lansing, Michigan, to be used in the area of greatest need.

4.5 **Retirement Plans.** With respect to any benefits of Retirement Plans payable to my trust, Trustee shall withdraw from such plans, in each year, the minimum required distribution under §401(a)(9) of the Code for such year computed based on the life expectancy of the oldest designated beneficiary under this Agreement. Trustee shall immediately distribute such amount to the beneficiaries hereunder living at the time of distribution; provided, such distribution shall be made only, and to the extent, necessary for the initial and continued qualification of the beneficiaries hereunder as designated beneficiaries of the Retirement Plan benefits. Any undistributed benefits received from a Retirement Plan shall be distributed pursuant to the provisions of ¶4.7. Trustee may, at any time, withdraw all or any part of the remaining benefits, or designate a beneficiary hereunder to receive the remaining benefits directly.

4.6 **Use of Other Information.** In determining whether a distribution is required by an ascertainable standard or should be made with respect to a discretionary trust under Section 4, Trustee shall consider all other income and liquid assets of the beneficiary known by Trustee. Trustee shall not be liable for distribution of income or principal, unless there is clear and
convincing evidence it failed to consider information reasonably available to it. A beneficiary need not deplete liquid or other assets below an amount Trustee deems reasonable. MCL 700.7815(1)(b) and (c) shall not apply to any discretionary trust created pursuant to this Agreement.

4.7 **Beneficiary Under Disability.** The following provisions apply to all trusts created and all distributions to be made pursuant to Section 4, but only to the extent that they would not affect adversely the federal estate tax marital deduction. If a beneficiary is under the age of 30 or legally disabled or, in Trustee's opinion, incapable of managing a trust distribution, Trustee either may expend directly any income or principal that it is authorized to use for the beneficiary, or may pay it to or for the benefit of the beneficiary, or to the beneficiary's conservator, if any, or any adult with whom the beneficiary is residing, without responsibility for its expenditure. If Trustee is directed to distribute any portion of trust principal to that beneficiary, the trust principal shall vest in the beneficiary indefeasibly, but Trustee, in its discretion, may distribute the portion to a custodian under a Uniform Gifts to Minors Act, Uniform Transfers to Minors Act, or similar act, or hold the portion as a separate trust for the period of time Trustee deems advisable but not after the time (a) the beneficiary reaches the age of 30 years, (b) after the removal of the legal disability, or (c) after the time Trustee deems the beneficiary is capable of managing a trust distribution, whichever is latest. If Trustee holds the portion as a separate trust, Trustee may pay to or for the benefit of the beneficiary so much of the income and principal as Trustee determines to be required for the beneficiary's reasonable health care, education, support, and maintenance.

5. **Trustee**

5.1 **Successor Trustee.** During my lifetime, when I am unable to serve as Trustee or as a trustee (as determined and certified in writing by any remaining, or if none, the next successor, Trustee), my Spouse shall serve alone. If my Spouse is unable to serve, Thomas W. Breakey shall serve as a successor trustee. If I fail to select in writing a successor Trustee within 30 days after receipt of knowledge of the then sole Trustee's resignation or refusal to act, the first of the successors named in the next sentence, able and willing to act, shall become successor Trustee. At my death, then Thomas W. Breakey shall become successor Trustee. If there are no other named trustees, then the then acting Trustee shall have the power, by a written instrument, to appoint a successor Trustee, together with the power to amend such appointment at any time for any reason. The acting Trustee shall notify the Qualified Trust Beneficiaries of the appointment of a successor trustee by first class mail within 10 days after the appointment. Each successor Trustee shall have the power to appoint his or her successor in a like manner. If there is no
individual appointed to serve as successor Trustee, a successor trustee shall be appointed by the
court in Clinton County that has jurisdiction over trusts and trust matters.

(a) **Exculpatory Provision.** My Spouse, while serving as Trustee, or as a trustee,
shall incur no liability for any acts, omissions or defaults as a trustee, except for such acts
committed in bad faith or with reckless indifference to the purposes of the trust or the interest of
the beneficiaries.

5.2 **Resignation by Trustee.** Trustee may resign as trustee of any or all trusts formed under
this Agreement at any time by giving written notice, specifying the effective date of resignation,
to me, or after my death to the beneficiaries, at the time of giving notice, of the current income.
If no successor is named, a remaining cotrustee may continue to serve as sole trustee.

5.3 **Removal of Trustee.**

(a) I may remove a Trustee, and I may appoint any successor, in writing at any time.

(b) At any times after my death, my Spouse, by a written instrument, may remove a
Trustee or a cotrustee, without cause, and may appoint a successor Trustee or trustees, located in
or out of the State of Michigan; provided, my Spouse may not remove or name a Trustee of a
trust which would be included in my Spouse's Taxable Estate solely by reason of this right of
removal or appointment.

(c) At any time after my death, the court may remove a trustee as provided in MCL
700.7706(2).

(d) The right of removal shall be exercised by serving the Trustee with written notice
of its removal, with such notice specifying the successor trustee. Within 90 days after receiving
such notice of removal, the Trustee so removed shall prepare and deliver to the successor trustee
a complete accounting indicating all receipts and disbursements and shall also deliver all trust
property to the successor trustee. A trustee that is removed shall not be entitled to charge an
additional fee based upon the fact that such trustee is being removed.

5.4 **Action by Trustee.** When more than one person is serving as Trustee the vote or consent
of the majority of the trustees shall be required for valid action by Trustee. The trustees may
authorize one or more trustees to exercise any power and authority of the Trustee.

5.5 **Miscellaneous Trustee Provisions.** The following apply to every trust created under this
Agreement:

(a) **Trustee's Fees.** Trustee shall be entitled to reasonable compensation for
services, and to reimbursement for reasonable expenses. MCL 700.7814(2)(d) shall not apply to
any trustee fee pursuant to this Agreement.
(b) **Qualifying as Trustee.** A successor Trustee shall qualify upon signing an acceptance of trust and mailing or delivering the acceptance to the Qualified Trust Beneficiaries of the Trust.

(c) **Trustee's Duty to Inform Beneficiaries.** After my death, a successor trustee shall:

1. Keep the Qualified Trust Beneficiaries reasonably informed about the administration of the Trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a Qualified Trust Beneficiary's request for information related to the administration of the Trust.

2. Upon the reasonable request of a Qualified Trust Beneficiary, promptly furnish to such beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relevant information about the trust property.

3. Within 63 days of accepting a trusteeship, mail or deliver the acceptance of trust to the Qualified Trust Beneficiaries, together with a notice that contains the name of the court in which the trust is registered, if the trust is registered, and the Trustee's name, address, and telephone number.

(d) **Title and Powers.** Any successor Trustee shall have all the title, powers and discretion of the Trustee succeeded, without the necessity of any conveyance or transfer.

(e) **Corporate Successor.** Any corporate successor to the trust business of any corporate Trustee acting under this Agreement shall become Trustee in place of its predecessor, without the necessity of any conveyance or transfer.

(f) **Notice.** Unless otherwise specifically provided in this Agreement, Trustee may rely upon any document believed by it to be genuine, or upon any evidence deemed by it to be sufficient, in making any trust payment or distribution without any liability to any trust beneficiary or another party. Trustee shall incur no liability for any payment or distribution made in good faith without actual knowledge of a changed condition affecting any person's interest in the trust.

(g) **Disclaimer by Trustee.** Trustee may disclaim any disclaimable interest, in whole or in part, and any fiduciary power to the maximum extent permitted by law. However, Trustee may not disclaim a disclaimable interest if the right of disclaimer would affect adversely a marital deduction.

(h) **Trustee Action.**

1. Any action required or permitted by this Agreement or the MTC to be taken by Trustee may be taken without a meeting, without prior notice
and without a vote, if written consents, setting forth the action taken, are signed by a majority of the Trustees. The written consents shall bear the date of signature of each trustee who signs the consent. Written consent may be given by electronic transmission.

(2) Prompt notice of any action without a meeting by less than unanimous written consent of the trustees shall be given to other trustees who would have been entitled to notice of the trustee meeting if the action had been taken at a meeting and who have not consented in writing.

(3) An electronic transmission consenting to an action transmitted by a trustee is written, signed and dated for purposes of this section if it is delivered with information from which the trustees can determine that it was transmitted by the trustee and the date on which it was transmitted. The date on which an electronic transmission is transmitted is the date on which the consent is signed for purposes of this section.

(i) Appointment of Trustee by Court. A court shall not appoint an additional or special fiduciary except under extraordinary circumstances upon the showing of clear and convincing evidence.

(j) Power of Trustee to Amend Administrative Provisions. Trustee may amend the administrative provisions of any trust at such times as it deems appropriate for the proper administration of a trust. Trustee will bear in mind the purposes for which I established a trust, and it shall not exercise this authority in any manner that would substantially alter the beneficial interest in any trust that would disqualify any trust for an income or transfer tax deduction or exclusion for which it would otherwise qualify.

(k) Power to Amend. A trustee who has no interest in a trust (other than as trustee) may amend a trust at any times to change the trust from a “Discretionary Trust” (as defined in the MTC) to a Support Trust or from a Support Trust to a Discretionary Trust; provided Trustee shall have no authority to amend a trust that would affect adversely a marital or charitable deduction and Trustee shall have no power to amend a Support Trust if the power to do so would cause the Support Trust to no longer be a Support Trust.

(l) Power to Establish a Discretionary Trust, and to Amend or Reform a Trust. If an individual beneficiary has applied for or is receiving government assistance that is based on financial eligibility requirements, or if Trustee reasonably anticipates that a beneficiary may need such government assistance in the foreseeable future, Trustee may in its sole, absolute and uncontrolled discretion withhold the trust property otherwise distributable to such beneficiary and establish a third-party created and funded discretionary non-support
spendthrift trust; or if that is not possible or practicable, establish by court order a first party (i.e. a self-settled) discretionary non-support spendthrift special needs trust (such as self-settled special needs trust permitted under 42 U.S.C. 1396(d)(4)(A) pr 42 U.S.C. 1396p(d)(4)). Trustee shall then fund the discretionary trust with the property that would otherwise be distributed to the beneficiary. In establishing a discretionary trust, Trustee may select a trustee and successor trustee (other than the beneficiary or the beneficiary’s spouse), establish accounting requirements, and shall include all provisions determined to be reasonable and necessary by Trustee after consultation with a qualified attorney. It is my intent that any discretionary trust established pursuant to this provision be drafted and administered so as to provide the maximum benefit to the beneficiary and that the assets of the discretionary trust not be available to beneficiary for determining the beneficiary’s income or assets under rules by which any government agency determines eligibility for need-based services (such as SSI and Medicaid). To the extent required by law, the discretionary trust shall be for the sole benefit of the beneficiary during his or her lifetime. To the extent not prohibited by law, distributions from the discretionary trust shall be made in the sole, absolute, and uncontrolled discretion of the discretionary trustee to or for the benefit of the beneficiary. In making such distributions, the discretionary trustee shall consider the effect such distributions may have on the beneficiary’s government assistance benefits. The discretionary trust (or joinder agreement as concerns a discretionary trust established pursuant to 42 U.S.C. 1396p(d)(4)(C)) shall provide (to the extent possible) that upon the beneficiary’s death and after all proper reimbursements and payment of expense have been made (to the extent such reimbursements and payment of expense are required by law), the discretionary trustee shall distribute the remaining trust property (if any) to such of my descendants (other than the beneficiary, the beneficiary’s estate or the creditors of either) as the beneficiary shall appoint by the beneficiary’s last will and testament that makes specific reference to this testamentary limited power of appointment. Any unappointed trust property shall be distributed to the then living descendants of the beneficiary, by right of representation, or if there are no then living descendants of the beneficiary, the unappointed trust property shall instead be distributed: (i) to my descendants by right of representation, or (ii) to such remainder beneficiaries as may be determined by the court of competent jurisdiction at the time of Trustee’s establishment of the discretionary trust. Trustee shall neither possess nor exercise its authority hereunder in a manner that would impair or prevent a beneficiary’s unexercised right of withdrawal that has not yet lapsed, or prevent an existing bequest from qualifying for the marital or charitable deduction, or impair the status or qualification of a
trust that holds shares of stock in a Subchapter S corporation, or prevent a trust from qualifying as a Look-Through Trust with a Designated Beneficiary (or Beneficiaries).

After my death, Trustee may obtain an order from a court of competent jurisdiction to amend or reform any trust (or any trust created or to be created) under this Agreement to the minimum extent necessary to comply with my intent and to comply with applicable federal and state laws or regulations, including those pertaining to discretionary trusts. Trustee’s authority hereunder is to be exercised only in its fiduciary capacity and may not be used to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of fiduciary duties and in no event shall any amendment or reformation increase the class of beneficiaries. No Trustee (or court) shall have the power to amend or reform this Agreement in a manner that would thwart my intent, impair or prevent a beneficiary’s unexercised right of withdrawal that has not yet lapsed, or prevent an existing bequest from qualifying for the marital or charitable deduction or impair the status or qualification of a trust that holds shares of stock in a Subchapter S corporation, or prevent a trust from qualifying as a Look-Through Trust with a Designated Beneficiary (or Beneficiaries). In no event shall this power of amendment or reformation be construed or exercised in a manner so as to bestow upon Trustee a general power of appointment (as that term is defined under the Internal Revenue Code).

6. Trust Administration

6.1 Powers of Trustee. Subject to §6.1(b), every Trustee may exercise any of the following powers, and any others which are granted by law, without court order.

(a) Supplemental Powers.

(1) Retain assets of the trust at the time of my death pending distribution or liquidation, including those in which a fiduciary is personally interested or that are otherwise improper for trust investment.

(2) Invest in any property.

(3) Borrow money for any purpose from an individual or entity serving as Trustee (including a related party of a corporate trustee) or from others; and mortgage or pledge any Trust property, including purchasing securities on margin.

(4) Guaranty the indebtedness of grantor or any other person or entity, pledge, mortgage or otherwise encumber trust property to secure any such
guaranty, and negotiate, execute and deliver documents to effectuate such guaranty.

(5) Charge expenses, including but not limited to Trustee and attorney fees, against the interest, share or trust of a beneficiary arising out of Trustee (i) seeking court approval or direction; (ii) defending claims; or (iii) spending a disproportionate amount of time addressing or conferring with advisors, with respect to one or more beneficiaries.

(6) Satisfy my written charitable pledges irrespective of whether the pledges constitute binding obligations or were properly presented as claims if in the judgment of Trustee, I would want the pledges completed under the circumstances.

(b) **Limitation on Power.**

(1) When more than one person is serving as Trustee, and at least one of them is not beneficially interested in the exercise or nonexercise of a power or election, the beneficially interested Trustee shall not participate in the exercise or nonexercise of the power or election.

(2) Trustee shall exercise no power in a way that would affect adversely a marital or charitable tax deduction unless it clearly would benefit the beneficiaries. Thus, as to property allocated to a trust qualifying for the marital deduction, other than personal residences, Trustee must cause that property to produce reasonable income within a reasonable time or convert the property within a reasonable time if so requested by my Spouse.

(3) No Trustee (either alone or in conjunction with other Trustees) other than me, may possess or exercise any power, discretion or incidents of ownership with respect to any insurance owned by the trust on his or her life, nor shall such Trustee hold or possess any power of appointment over such life insurance. If a Trustee holds any such policy or policies as part of the trust property, the powers conferred on the owner of such policy shall be exercised only by the other then acting Trustee. If the insured Trustee is the only then acting Trustee, then such powers shall be exercised by a substitute Trustee designated pursuant to the provisions of this Agreement dealing with the trusteeship. If any rule of law or court decision construes the ability of the insured Trustee to name a substitute Trustee as an incident of ownership, the substitution process shall be implemented by a majority of the then Qualify Trust Beneficiaries, excluding the insured Trustee if the insured Trustee is a beneficiary.
(4) No Trustee, other than me, shall have the power to use or apply trust property (i) for the support and maintenance of anyone the Trustee is obligated to support and maintain, or (ii) for the purpose of directly or indirectly discharging the personal legal obligations of the Trustee. At any time during a period where there is more than one Trustee, no Trustee, other than me, who is also a beneficiary of any trust created under this Agreement shall exercise any power solely by itself as would cause such beneficiary-Trustee to be treated as an owner of any portion of the trust under IRC section 678(a). No Trustee, other than me, who is also a beneficiary of any trust created under this Agreement shall have the power, as then acting Trustee of such trust, to make discretionary distributions to itself except to the extent necessary for such Trustee's health, education, support and maintenance as described in IRC sections 2041 and 2514 (concerning powers of appointment and ascertainable standards) and such beneficiary-Trustee shall exercise its Trustee powers solely in a fiduciary capacity and shall not possess or exercise any powers that would otherwise permit that beneficiary-Trustee to enlarge or shift any of the beneficial interests under that trust (except as an incidental consequences of the discharge of such fiduciary duties); and to the extent such beneficiary-Trustee, other than me, has the authority to make discretionary distributions of income and principal to another beneficiary from a trust that such beneficiary-Trustee is then also a then current trust beneficiary thereof, the discretionary distributions shall be limited by an ascertainable standard related to the distributee beneficiary's health, education, support and maintenance in the manner of living to which the distributee beneficiary has been accustomed, considering the resources otherwise available to the distributee beneficiary. Furthermore, no beneficiary-Trustee, other than me, who is a beneficiary of the trust in question shall possess any power or discretion that is "conclusive," "sole," "absolute" or "uncontrolled" with respect to the exercise or non-exercise of such power or discretion under that trust; and such beneficiary-Trustee's power or discretion in that regard shall at all times be exercised or not exercised in a reasonable manner, be limited by a reasonably definite standard, and shall be subject to review and judicial scrutiny.

6.2 Principal Place of Administration.

(a) If at least one Trustee is an individual, the principal place of administration will be determined as follows:

(1) Subject to ¶¶6.2(a)(2) and 6.2(a)(3), the Trust shall be administered in the county in which the grantor resided at the time of death.

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(2) If there is one or more Trustees and only one Trustee resides in Michigan, the Trust shall be administered in the Michigan county in which the Trustee resides.

(3) If there is more than one Trustee that resides in Michigan the Trust shall be administered in the county in which one of the Trustees resides as they mutually agree. If the Trustees do not agree within 30 days of the date of grantor's death, the Trust shall be administered in the county as determined pursuant to §6.2(a)(1).

(b) If Trustee is a corporate fiduciary, the principal place of administration will be as determined pursuant to MCL 700.7209.

6.3 Trust Registration. Unless in conflict with local law, this Agreement shall not be required to be registered and shall be administered free from supervision of any court. If the Trust is required to be registered with the court, it shall be registered in the court at the principal place of administration as determined pursuant to §6.2.

6.4 Trustee's Duty to Account. Prior to my death, if I am not serving as Trustee, and after my death, Trustee shall keep a true account of the affairs of the Trust. The statement of account is a report by the Trustee of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, their respective market values. No particular format or formality is required for a report unless a court specifies its content and presentation.

6.5 Trustee's Duty to Inform and Report to Beneficiaries. Trustee's duty to inform and report to the beneficiaries shall be governed by the following rules:

(a) As long as I or my Spouse is serving as Trustee or as a trustee, Trustee shall have no obligation to inform and report to anyone regarding the trust and its administration.

(b) Prior to my death, if I am not serving as Trustee or as a trustee, Trustee shall inform and report to me regarding administration of the Trust and the material facts necessary for me to protect my interests. However, during any period in which, in Trustee's opinion, I am incapable of managing my own affairs, Trustee shall inform and report to the following persons regarding the administration of the Trust and the material facts necessary for them to protect their interests:

(1) The agent designated under my durable power of attorney then in effect, or if I have no durable power of attorney then in effect;

(2) The then living Qualified Trust Beneficiaries who are 21 years of age or older.
(c) After my death, Trustee shall inform and report to the then living Qualified Trust Beneficiaries, who are 21 years of age or older regarding the trust and its administration.

(d) **Inspection of Records.** The books and records of Trustee relating to this Agreement shall be open at all reasonable times to inspection only by a Qualified Trust Beneficiary, as defined in the MTC, or the Qualified Trust Beneficiary's accredited representatives, unless otherwise ordered by a court having jurisdiction; provided however, during my lifetime and my Spouse's lifetime, only I and my Spouse (or my or my Spouse's designated agent) shall have this right of inspection.

(e) **Settlement of Interim Reports.** Unless a Qualified Trust Beneficiary acting individually or through a parent, the conservator of his or her estate, his or her nearest of kin, or an adult with whom he or she is living files with Trustee, within three hundred sixty-five (365) days after the receipt by him or her of an interim report, written objection to an item contained in a report, to a fee claimed by Trustee, or to reimbursable expenses, the report shall be deemed approved for all purposes, and the amount of such fee or expenses shall be deemed reasonable.

(f) **Settlement of the Final Report.** In the case of a final report, a receipt in full or a release by the beneficiaries or by the conservator or other legal representatives of those beneficiaries who are disabled shall be binding as to those beneficiaries and as to all matters and transactions stated in the account or shown by it.

(g) **Court Approval of Report.** Trustee is entitled at any time to have a judicial settlement of its report, attorney fees, expenses, and other charges incident to the judicial proceeding may be charged against the trust fund.

(h) **Delivery of Report.** If a Qualified Trust Beneficiary is another trust, the report shall be delivered to the trustee of the other trust. If any Qualified Trust Beneficiary is a minor or otherwise disabled, delivery shall be made to the conservator of his or her estate or, if none, then to his or her parent, legal guardian, or nearest of kin or an adult with whom he or she is living. Trustee may deliver a report to other trust beneficiaries in its discretion.

6.6 **Spendthrift Trust.** Except as otherwise provided by law, no interest under this Agreement may be transferred or assigned, voluntarily or involuntarily by any beneficiary, or be subject during the beneficiary's life to claims by or for the beneficiary's creditors, spouse or spouse's creditors. However, this provision shall not restrict exercise of a power of appointment granted by this Agreement. I intend trusts created by this Agreement to be spendthrift trusts.

6.7 **Miscellaneous Administration Provisions.** The following apply to every trust created under this Agreement:
(a) **Combining Trusts.** If at any time Trustee is holding any trust under this Agreement for the primary benefit of any person or persons for whose primary benefit Trustee is holding any other trust, upon substantially the same terms, created by me, under this or any other instrument, or created by any other member of my family, Trustee may in its discretion consolidate and commingle them and hold them as a single trust.

(b) **Minimum Trust Value.** If at any time a trust created under this Agreement, in Trustee's judgment, shall become uneconomical or impractical to administer or shall have an aggregate principal value of $100,000 or less, Trustee may, but need not, terminate the Trust and distribute the property to my Spouse, or if none, to the beneficiary or beneficiaries, at that time, of the current trust income, and if there is more than one beneficiary, in the proportions in which they are beneficiaries. However, if there is more than one beneficiary to whom current income could be paid but the interests are indefinite, Trustee shall distribute the trust property to the beneficiaries who are my Descendants, by right of representation, or if no Descendant of mine is a beneficiary, to all income and then living residuary beneficiaries of the trust equally. A spendthrift provision does prevent termination under this paragraph.

(c) **Accrued Income.** Upon the death of a beneficiary, other than a beneficiary to whom Trustee is directed to pay all net income until death, any accrued or undistributed income shall be held and accounted for, or distributed, in the same manner as if it had been received and accrued after the beneficiary's death.

6.8 **Certificate of Trust Existence and Authority.** In addition to any certificate authorized by law, Trustee may, at any time, record, file, or deliver a certificate with or to any clerk, register of deeds, transfer agent, or other similar agency or officer or to any person dealing with Trustee. The Certificate shall contain a verbatim synopsis of certain provisions of this Agreement and shall be signed and acknowledged by Trustee or Trustee's attorney. Any purchaser or person dealing with Trustee shall be entitled to rely on the certificate as a full statement of the provisions of this Agreement that are pertinent to the particular transaction. Copies of the executed certificate shall have the same effect and authority as the executed certificate.

6.9 **Trust Provisions Govern MTC.** The term of this Agreement shall govern the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary over any provisions of the MTC, except as otherwise provided under MCL 700.7105(2).

6.10 **Waiver by Beneficiary.** MCL 700.7821(3)(b) shall not apply to this Agreement.

7. **Retirement Benefits**

7.1 **Accounting for Retirement Plan Benefits.**
**General Principles.** This paragraph shall govern Trustee’s accounting for Retirement Plan Benefits. In general, a Retirement Plan Benefit shall be deemed an asset of the Trust, increases or decreases in its value shall be allocated to income or principal of the Trust as provided herein, and distributions from the Retirement Plan shall be accounted for as provided herein.

(a) **Certain Individual Account Plans.** With respect to any Retirement Plan Benefit which is an individual account plan, for which the Trustee receives such reporting of the investment activity in the account that the Trustee can readily determine the “income” and “principal” of the Trust’s interest in the plan in accordance with traditional principles of income and principal, the Trustee shall account for the Trust’s interest in the Retirement Plan as if the applicable plan assets were owned by the Trust directly.

(b) **All Other Retirement Benefits.** With respect to any other Retirement Plan Benefit, the Trustee shall treat the inventory value of the trust’s interest in the Retirement Benefit as principal, and allocate any subsequent increases in value (or charge decreases in value) in such interest to income or principal in accordance with any reasonable method selected by the Trustee that is consistent with traditional principles of income and principal and is consistently applied to the Trust’s interest in such plan, including:

1. A method specified in any Uniform Principal and Income Act (UPIA) or other state law governing trust accounting for retirement benefits or deferred compensation, but only if such law provides for a reasonable apportionment, each year, between the income and remainder beneficiaries of the total return of the trust for such year. The “10 percent rule” of UPIA Section 409(c), or any other state law that determines income with respect to a Retirement Plan Benefit by reference to the amount of the retirement plan’s required distributions rather than by reference to the return on the applicable investments or other traditional principles of income and principal, or that otherwise departs fundamentally from traditional principles of income and principal, may not be used to determine “income” for any purpose of this Trust.

2. In the case of a plan similar to the type of plan specified in ¶7.1(a) above, the method specified in said ¶7.1(a) adapted as necessary.

3. Any method used in the Code or Treasury regulations to distinguish between “ordinary income” and “return of principal” (or corpus) with respect to similar assets.
(c) Treatment of Distributions. When a distribution is received from or under a Retirement Plan, and, at the time of such distribution, under the foregoing rules, the trust's interest in the Retirement Plan is composed of both income and principal, such distributions shall be deemed withdrawn first from the income portion.

(d) Definition of Inventory Value. In the interpretation of this Section 7, the "inventory value" of an interest in a Retirement Plan Benefit shall mean:

(1) In the case of an interest that becomes payable to (or is owned by) this Trust as of the date of my death, its "fair market value" determined in accordance with the rules applicable for valuing such interests for purposes of the federal estate tax (as in effect at my death, or, if such tax does not then exist, as last in effect); or

(2) In the case of an interest that becomes payable to this Trust as of a date after the date of my death (for example, by transfer from another fiduciary), its "fair market value" shall be its value as of my death determined as provided in the preceding subparagraph, adjusted as necessary for distributions, expenditures, and receipts that occurred between the date of my death and the date of transfer to this Trust; or, if Trustee cannot determine its value in that manner, its "fair market value" shall be its value as of the date it becomes an asset of this Trust, determined as provided in the preceding subparagraph, provided, in the case of an interest transferred to this Trust from another fiduciary (such as my Personal Representative) accrued income so transferred shall be treated as income and shall not be included in "inventory value."

7.2 Excluding Older Adopted "Descendants". Notwithstanding any other provision of this Agreement or of state law, if any benefits of any Retirement Plans are payable to this Trust, the class of my (or any other person's) "descendants" shall not include an individual who is my (or such person's) "descendant" by virtue of legal adoption if such individual (i) was adopted after my Required Beginning Date or my death, whichever occurs first and (ii) is older than the oldest beneficiary of this Agreement who was a living member of said class on the earlier of said dates. My "Required Beginning Date," for purposes of this paragraph, means August 1 of the year following the year in which age 70½, or, if later, the date on which this Agreement is first named as a beneficiary of any Retirement Plans.

7.3 Retirement Plan. The term Retirement Plan means any qualified retirement plan, individual retirement account, §403(b) annuity, or other retirement arrangement subject to the "minimum distribution rules" of §401(a)(9) of the Internal Revenue Code ("Code"), or other comparable provisions of the law.

8.1 Rule Against Perpetuities. Notwithstanding any provision to the contrary, all trusts under this Agreement shall terminate not later than 21 years after the latest of my death or the death of the last survivor of my Descendants living on the date of my death, or a longer period (e.g. 90 years from the date the trusts become irrevocable) if permitted by Michigan law. At the end of that period Trustee shall distribute each remaining portion of the trust property to the beneficiary or beneficiaries, at that time, of the current trust income, and if there are more than one beneficiary, in the proportions in which they are beneficiaries. However, if there is more than one beneficiary to whom current income could be paid but the interests are indefinite, Trustee shall distribute the trust property to the beneficiaries who are my Descendants, by right of representation, or if no Descendant of mine is a beneficiary, to all income and then living residuary beneficiaries of the trust equally.

8.2 Power of Appointment Exercise. In determining whether, in what manner and to what extent a power of appointment has been exercised by will, Trustee may act in reliance upon a court order in any jurisdiction admitting an instrument to probate as the will of the holder of the power or finding that the holder died intestate, and unless within three months after the holder’s death Trustee has actual notice of the existence of a will or of probate proceedings, Trustee may assume that the holder died intestate. However, this provision shall not affect any right which an appointee or beneficiary in default of appointment may have against any distributee.

8.3 Miscellaneous General Provisions. The following apply to this Agreement.

(a) Governing Law. This Agreement and the trusts shall be construed and regulated and their validity and effect shall be determined by the law of Michigan.

(b) Pronouns. Whenever necessary in this Agreement and where the context permits the singular term and the related pronoun shall include the plural, and the masculine and the feminine, and, as to Trustee, the neuter.

(c) Captions. Captions in this Agreement are used for convenience and shall not limit, broaden or qualify the text.

(d) Provisions Severable. The provisions of this Agreement are severable. If any provision is held invalid by final judgment of a court, all other provisions shall remain valid.

(e) Descendants. The terms "Descendant" and "Descendants" mean all descendants and shall include any descendants born or legally adopted prior to age 18 after the date of this Agreement.
(f) **Notice by E-Mail.** Prior to sending any notice by e-mail Trustee shall obtain from any recipient written approval for Trustee to send a notice by e-mail, and the recipient’s correct e-mail address.

8.4 **No Contest Clause.** If any beneficiary under this Agreement or any heir of mine, or any person acting, with or without court approval, on behalf of a beneficiary or heir, directly or indirectly: (1) contests in any court the validity of this Agreement or, in any manner, attacks or seeks to impair or invalidate any if its provisions; (2) contests in any court the validity of my will, or in any manner attacks, or seeks to obtain an adjudication in any proceeding in any court that this Agreement or any of its provisions, or that my will or any of its provisions, is void; (3) claims entitlement by way of any written or oral contract to any portion of my estate, whether in probate or under this Agreement; or (4) attacks or seeks to invalidate any of the following: any designation of beneficiaries for any life insurance policies on my life, any designation of beneficiaries for any Retirement Plans of mine, any trust which I have created or may create during my lifetime, or any provision thereof; any gift which I have made or will make during my lifetime, whether before or after the date of this Agreement, or any other transaction by which I sold any assets (whether to a relative of mine or otherwise); then that person's right to take any interest or benefits given to him or her by this Agreement shall be determined as it would have been determined if the person had predeceased the execution of this Agreement without leaving Descendants. The provisions of this paragraph shall not apply to any disclaimer by any person of any benefit under this Agreement or under my will.

However, it will not be a “challenge or a contest” if a beneficiary has probable cause for such challenge or contest. “Probable cause” exists when the contesting party’s retained legal representative has: (1) conducted a reasonable investigation; (2) determined that there is admissible evidence that would cause a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest would be successful; and (3) delivered a written certified report to the contesting party; which report specifies the factual evidence that the legal representative relies on to conclude that “probable cause” exists.

Trustee is authorized to defend, at the expense of the Trust, any contest or other attack of any nature on this Agreement or any of its provisions, my will, or any other documents or transactions specified above.

In the event that any provision of this §8.4 is held to be invalid, void or illegal, the same shall be deemed severable from the remainder of the provisions in this §8.4, and shall, in no way, affect, impair or invalidate any other provision in this §8.4. If such provision shall be deemed
invalid due to its scope and breadth, such provision shall be deemed valid to the extent of the scope and breadth permitted by law.

8.5 Survival Presumption.

(a) General Rule. Except as provided in ¶8.5(b), for purposes of this Agreement only, a person has survived me or is living at a particular date only if he or she lives more than 30 days after my death or after the particular date. A gift fails if a beneficiary does not satisfy a condition of survival and there is no substitute beneficiary indicated in this Agreement who satisfies the condition for taking. The provisions of the antilapse statute shall not apply to preserve a gift for a person or persons who are not identified as a substitute or substitutes in this Agreement.

(b) Exceptions. As to any gift, other than a gift of tangible personal property, which will qualify for the marital deduction, my Spouse shall be deemed to have survived me if we die under circumstances where it is not clear who survived.

Executed in multiple original counterparts, delivered, and the trust accepted, as of the date first written above.

I sign my name to this Agreement on the date that is first written above. I declare under penalty of perjury under the laws of the State of Michigan that the statements in this Agreement are true; that this document is my Trust Agreement; that I sign it willingly or willingly direct another to sign for me; that I execute it as my voluntary act for the purposes expressed in this Agreement; and that I am 18 years of age or older, of sufficient mental capacity, and under no constraint or undue influence.

William E. Breaux

We, the witnesses, sign our names to this Agreement on the date that is first written above and declare under penalty of perjury under the laws of the State of Michigan that all of the following statements are true: the individual signing this Agreement executes it as a voluntary act for the purposes expressed in this Agreement; each of us, in the individual's presence, signs this Agreement as a witness to the individual's signing; and, to the best of our knowledge, the individual is 18 years of age or older, of sufficient mental capacity, and under no constraint or undue influence.

Patricia M. McArthur

Teresa L. DeFew
STATE OF MICHIGAN

COUNTY OF INGHAM

Acknowledged before me in Ingham County, Michigan on February 24, 2011, by
William E. Breakey.

Teresa L. DePew, Notary Public
Ingham County, Michigan
Acting in Ingham County, Michigan
My Commission Expires: 3/23/2013

We sign this Agreement on the date that is first written above and accept appointment as
a Trustee.

William E. Breakey

Ann M. Breakey

Prepared by:
John E. Bos (P11027)
Chalgian & Tripp Law Offices, PLLC
1019 Trowbridge Road
East Lansing, Michigan 48823
(517) 332-3800
STATE OF MICHIGAN  
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
MICHIGAN TAX TRIBUNAL  
SMALL CLAIMS DIVISION

Ann Breakey,  
Petitioner,  

v  

Michigan Department of Treasury,  
Respondent.  

MTT Docket No. 17-000218  
Tribunal Judge Presiding  
Steven H. L usher

ORDER DENYING PETITIONER’S MOTION FOR PARTIAL SUMMARY DISPOSITION

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT

FINAL OPINION AND JUDGMENT

On June 2, 2017, Petitioner filed a motion seeking partial summary disposition on the legal question of whether she qualifies as an owner within the meaning of MCL 211.7dd(a). Petitioner contests Respondent’s position that Petitioner is not an owner because the trust does not grant Petitioner any ownership or partial ownership rights in the property. Petitioner cites to the Michigan Department of Treasury’s Principal Residence Exemption (“PRE”) Guidelines which states a beneficiary of a trust can be eligible for a PRE “provided you occupy the property as your principal residence.” Petitioner also argues Respondent “mischaracterizes the holding in Flowers,” and states she “respectfully disagrees with the Tribunal’s characterization of the Flowers decision expressed in Diana E Johnson v Dep’t of Treasury.” Petitioner states that she “does have rights in the Bath Home equivalent to the owner in the Flowers case,” because she “has the right to possess and enjoy the Bath Home which is sufficient to satisfy the definition in Barnes, as relied upon in Flowers.”

On June 22, 2017, Respondent filed a response to the Motion arguing that “questions of fact exist that would preclude summary disposition,” and that “Petitioner is not an ‘owner’ as defined by statute and therefore summary disposition of the appeal in Respondent’s favor is appropriate . . . .” Respondent states that Petitioner does not identify “how she qualifies as a partial owner of the property,” but, focuses her Motion on the fact “that she is an owner under MCL 211.7dd(a)(iii).” Respondent explains that the PRE Guidelines “do not state that a trust beneficiary would absolutely be entitled to receive the PRE,” and “case law, such as the decision in Flowers, would be controlling.” Further, Respondent “respectfully disagrees with Petitioner’s assertion,” that the holding in Flowers was mischaracterized. Respondent specifies that the Tribunal applied the

1 Petitioner failed to identify the grounds on which her Motion for Summary Disposition was filed, as required by MCR 2.116(C).
3 Diana E Johnson v Dep’t of Treasury, MTT Docket No. 14-007849 (Issued October 15, 2015).
MTT Docket No. 17-000218
Order, Page 2 of 4

Flowers reasoning in the Johnson case and held that the Trust only provided the petitioner with rent-free occupancy and did not provide the petitioner with any actual control, as in this case. Finally, Respondent argues that: (i) "Petitioner only has the right to use the property without paying rent," (ii) even though Petitioner has the right to remove the Trustee and appoint a successor Trustee, this does not equate to control over the subject property," and (iii) Petitioner does "not meet the eligibility requirements necessary to receive a" PRE.

After considering the Motion, response, and the casefile, the Tribunal concludes that Petitioner is not entitled to summary disposition on the issue of whether Petitioner is an owner under MCL 211.7dd(a). The Tribunal finds that the application of the Flowers decision by the Tribunal in the Johnson case is directly applicable to this case. Petitioner argues she has the right to possess and enjoy the subject property and is, therefore, an owner of the property. In Johnson, the Tribunal differentiated a "record owner" and an owner as separately defined for PRE purposes. It is clear that Petitioner is not a "record owner" of the subject property as the deed shows the subject property as quit-claimed to William E. Breakey and Ann M. Breakey as Trustee of the William E. Breakey Trust No. 1. Thus, Petitioner has no individual interest in the subject property as of the November 11, 1994 quit-claim deed. For PRE purposes, "owner" is separately defined, in relevant part, as:

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

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

In Johnson, the petitioner was a beneficiary of the Diana Schumacher Johnson Trust and held a right to occupy the subject property rent-free as her own. The Tribunal, in analyzing Flowers, determined that the trust document did not provide Petitioner with actual control over the subject property; thus, Petitioner was not a partial owner of the property, under MCL 211.7dd(a)(ii). The Tribunal also concluded the petitioner did not own the property as a result of being a beneficiary of the trust because the trust did not grant Petitioner rights as an owner, under MCL 211.7dd(a)(iii). The Tribunal finds that the facts in Johnson mirror the facts of this case. The Tribunal applies the analysis from the Johnson case regarding the Tribunal's interpretation of "possession" to mean the dictionary definition of "[t]o have in one's actual control," and control means "[t]o exercise power or influence over."

Petitioner argues reliance on Flowers and Johnson is misplaced and that because she has the right to possess and enjoy the subject property she satisfies the "ownership" test set forth in Barnes v Detroit, cited by the Court of Appeals in Flowers. Petitioner rejects the aspect of control as a necessary element of ownership but does not cite any relevant authority for her

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4 "Record owner" is defined as a "property owner in whose name the title appears in the public records." Black's Law Dictionary (10th ed).
5 MCL 211.7dd(a)(ii) and (a)(iii).
6 Black's Law Dictionary (10th ed).
7 Id.
8 Barnes v Detroit, 379 Mich 169, 177; 150 NW2d 740 (1967).
MTT Docket No. 17-000218
Order, Page 3 of 4

stance. Petitioner's alternative argument, that if control is a factor she has control via the right to remove a Trustee, is not compelling. The relevant control is control over the subject property and not control over the trust administration.

Petitioner also argues Respondent's own PRE Guidelines indicate a beneficiary must only occupy the property as a principal residence to be eligible for the exemption. However, even though "agency interpretations are granted 'respectful consideration,'" and if persuasive, should not be overruled without 'cogent reasons,'" [t]he Guidelines issued by the Michigan Department of Treasury do not have the force of law. The Tribunal agrees with Respondent that the Flowers case is controlling and must be followed.

In light of the above, Petitioner is not an owner or partial owner of the subject property and cannot qualify for the PRE. Therefore, Respondent is entitled to judgment in its favor and the PRE denial shall be upheld. Summary disposition under MCR 2.116(I)(2) is appropriate "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ," and as such, the court may render judgment in favor of the opposing party. Therefore,

IT IS ORDERED that Petitioner's Motion for Partial Summary Disposition is DENIED.

IT IS FURTHER ORDERED that summary disposition is rendered in favor of Respondent, under MCR 2.116(I)(2).

IT IS FURTHER ORDERED that Parcel No. 010-014-300-040-00 is not entitled to a PRE under MCL 211.7cc. As a result, the property has a PRE of 0% for the 2012, 2013, 2014 and 2015 tax years.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's PRE for the tax years at issue within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of the entry of this Final Opinion and Judgment. If a refund is warranted, it shall be without interest, as provided by MCL 211.7cc. It shall, however, include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

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9 CMS Energy Corp v Dep't of Treasury, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2013 (Docket No. 309172) at 4. See also In re Complaint of Rovas Against SBC Mich, 482 Mich 90, 117-118; 754 NW2d 259 (2008).
10 See also Washburn v Michaeloff, 240 Mich App 669; 613 NW2d 405 (2000).
APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.11 Because the final decision closes the case, the motion cannot be filed through the Tribunal’s web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.12 A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.13 Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.14

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an “appeal by right.” If the claim is filed more than 21 days after the entry of the final decision, it is an “appeal by leave.”15 A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.16 The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.17

Date Entered: JUL 03 2017

By [Signature]

11 See TTR 261 and 257.
12 See TTR 217 and 267.
13 See TTR 261 and 225.
14 See TTR 261 and 257.
15 See MCL 205.753 and MCR 7.204.
16 See TTR 213.
17 See TTR 217 and 267.
STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL
SMALL CLAIMS DIVISION

Diana E. Johnson,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MTT Docket No. 14-007849

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment ("POJ") on August 7, 2015. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

On August 27, 2015, Respondent filed exceptions to the POJ. In the exceptions, Respondent states that the Tribunal’s “determination is erroneous and is not supported by,” Flowers v Bedford Twp,¹ because “the facts in Flowers are distinguishable from the facts in this matter.” Respondent argues that “[t]he Trust provisions unambiguously indicate that ownership of the subject property was vested in the Diana Schumacher Johnson Trust and not in Diana E. Johnson;” thus, Petitioner is not an owner. Respondent distinguishes Flowers from this case by contending that “the petitioner held a life estate in the property [in Flowers], while in this case, Petitioner did not hold a life estate in the subject property” and “the petitioner in Flowers owned the property as a result of a distribution from a will, unlike in this case, where there was no distribution from either a will or a trust.” Finally, Respondent argues that “the Tribunal’s conclusion that Petitioner’s arguments are supported by the Department’s PRE Guidelines is erroneous,” because they “[do] not have the force of law because it is not a properly promulgated administrative rule.”²

On September 8, 2015, Petitioner filed a response to the exceptions. In the response, Petitioner states that the Tribunal’s “decision that Petitioner is an ‘owner’ is firmly grounded in [Flowers and Barnes].” Petitioner also argues that “[n]othing appears in the record to support [Respondent’s position that an actual distribution of the real estate from a trust is required for the beneficiary to become an ‘owner’] other than Respondent’s self-serving statements that a distribution is needed.” Petitioner “strongly disagrees with” Respondent dismissing “the importance of its own Guidelines,” and states that the guidelines “are exactly on point and identical to Petitioner’s facts.”

¹ Flowers v Bedford Twp, 304 Mich App 661; 849 NW2d 51 (2014).
² Citing Danse Corp v Madison Hts, 466 Mich 175, 181; 644 NW2d 721 (2002).
MTT Docket No. 14-007849
Final Opinion and Judgment, Page 2 of 5

The Tribunal has considered the exceptions, response, and the case file and finds that the Administrative Law Judge ("ALJ") erred in the rendering of the POJ. More specifically, the Tribunal finds that although the ALJ properly applied the principles outlined in Flowers, he erred in concluding that Petitioner is an owner for purposes of qualifying for a Principal Residence Exemption ("PRE").

In this case, the relevant issue is whether Petitioner is an owner of the subject property. It is undisputed that the record owner of the subject property is the Diana Schumacher Johnson Trust; however, for PRE purposes, "owner" is separately defined, in relevant part, as:

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

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

In Flowers, the Court was asked to determine whether a widow was an owner of the property, and thus entitled to a PRE, as a result of her late-husband’s will granting her a life estate. As cited by the ALJ, the Court held that:

MCL 211.7dd(a)(ii) defines owner as a “person who is a partial owner of property.” This definition is ambiguous because it is circular, i.e., the term to be defined—“owner”—is included as part of the definition. Thus, we can consult dictionary definitions to provide meaning. Johnson v Pastoria, 491 Mich 417, 436; 818 NW2d 279 (2012). “Owner” is the derived, undefined noun form of “own.” Random House Webster's College Dictionary (1997), p 933; see id. at xvi. “Own” is defined, in part, as “something that belongs to oneself” or “to have or hold as one's own; possess.” Id. at 933. And “ownership” is defined as “the state or fact of being an owner” or “legal right of possession; proprietorship.” Id.

And, looking to caselaw, in Barnes v Detroit, 379 Mich 169, 171; 150 NW2d 740 (1967), a case involving an exemption with respect to real estate owned and used as a homestead by a disabled veteran, the Court stated:

This Court has many times held that a person does not have to own property in fee simple to claim a homestead. The word "owner" as used in the law has generally been treated as including all parties who had a claim or interest in the property, although the same might be an undivided one or fall short of an absolute ownership, and possession alone has frequently been held, in reference to personal property, as prima facie evidence of ownership.\(^5\)

\(^2\)”Record owner” is defined as a “property owner in whose name the title appears in the public records.” Black’s Law Dictionary (10th ed).

\(^4\)MCL 211.7dd(a)(ii) and (a)(iii).

MTT Docket No. 14-007849
Final Opinion and Judgment, Page 3 of 5

Respondent argues that *Flowers* is not applicable because the facts are distinct from the facts of this case. Although the Tribunal agrees that the facts are distinguishable, the holding in *Flowers* is not limited to situations involving beneficiaries of a will who are deeded life estates in property. Rather, *Flowers* broadens the definition of the term "owner" as defined in section 7(dd) of the General Property Tax Act. Thus, this Tribunal shall apply the Court of Appeals' precedential decision accordingly.

The ALJ, in applying *Flowers*, concluded that "it is clear that Petitioner possesses and holds the subject property as her own and also has the 'legal right of possession' of the subject property." However, the ALJ interprets possession to merely mean "to occupy," as Petitioner did during the tax years at issue. The definition of possess is "[t]o have in one's actual control," and control means "[t]o exercise power or influence over." Here, the trust document shows that Petitioner "shall occupy such residence rent-free . . . ." However, it does not provide Petitioner with any actual control over the subject property; it only provides for her rent-free occupancy. As such, the Tribunal finds that Petitioner is not an owner, or partial owner of the property, as defined by *Flowers*.

As a result, the Tribunal finds that Petitioner is also not a person who owns property as a result of being a beneficiary of a will or trust or as a result of intestate succession. Since it is concluded that the trust does not grant Petitioner rights as an owner, she cannot be an owner under MCL 211.7dd(a)(iii).

Finally, the Tribunal finds that reliance on the Michigan Department of Treasury's Guidelines for the Michigan Principal Residence Program is misplaced. The ALJ references the guideline enumerated in number nine of chapter seven. The ALJ stated that "the guidelines demonstrate the reasonableness of the interpretation advanced by Petitioner in this case;" however, in arriving at this conclusion, the ALJ did not consider whether the claimant-beneficiary in the guideline had any control of the subject property. Rather, the claimant-beneficiary enjoyed the right to occupy the property, but had no true right to possess it. As such, even though "agency interpretations are granted 'respectful consideration,' and if persuasive, should not be overruled without 'cogent reasons,'" [] the Guidelines issued by the Michigan Department of Treasury do not have the force of law.

Given the above, although Respondent has failed to show good cause to justify the modifying of the Proposed Opinion and Judgment or the granting of a rehearing, the Tribunal finds the ALJ erred in the rendering of the POJ. As such, the Tribunal modifies the Proposed Opinion and

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6 *Black's Law Dictionary* (10th ed).
7 *Id*.
8 First Amendment to Amended Trust Agreement, executed September 16, 1994.
9 Proposed Opinion and Judgment.
10 *CMS Energy Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2013 (Docket No. 309172) at 4. See also *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).
11 See MCL 205.762.
MTT Docket No. 14-007849  
Final Opinion and Judgment, Page 4 of 5

Judgment, as indicated herein, and adopts the modified Proposed Opinion and Judgment as the Tribunal’s final decision in this case. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the POJ in this Final Opinion and Judgment.

As a result, Parcel No. 411829152025 is not entitled to a principal residence exemption under MCL 211.7cc for the 2009, 2010, 2011, and 2012 tax years.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property’s principal residence exemption for the tax years at issue as provided in this Final Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by the Final Opinion and Judgment within 28 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall be without interest, as provided by MCL 211.7cc. It shall, however, include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

APPEAL RIGHTS

If you disagree with the Tribunal’s final decision in this case, you may either file a motion for reconsideration with the Tribunal or a claim of appeal directly to the Michigan Court of Appeals ("MCOA").

A motion for reconsideration with the Tribunal must be filed, by mail or personal service, with the $25.00 filing fee, if applicable, within 21 days from the date of entry of this final decision. A copy of a party’s motion for reconsideration must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the motion for reconsideration was served on the opposing party. However, unless otherwise provided by the Tribunal, no response to the motion may be filed, and there is no oral argument.

12 See MCL 205.726.  
13 See TTR 257 and TTR 267.  
14 See TTR 225.  
15 See TTR 257.
MTT Docket No. 14-007849  
Final Opinion and Judgment, Page 5 of 5

A claim of appeal to the MCOA must be filed, with the appropriate entry fee, unless waived, within 21 days from the date of entry of this final decision. If a claim of appeal is filed with the MCOA, the party filing such claim must also file a copy of that claim, or application for leave to appeal, with the Tribunal, along with the $100.00 fee, if applicable, for the certification of the record on appeal.

Entered: OCT 13 2015

By

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\(^{16}\) See MCR 7.204.

\(^{17}\) See TTR 213 and TTR 267.
STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL
SMALL CLAIMS DIVISION

Ann Breakey, MTT Docket No. 17-000218

Petitioner,

v

Michigan Department of Treasury,

Respondent.

PETITIONER’S COMBINED MOTION
AND BRIEF FOR PARTIAL SUMMARY
DISPOSITION

Gail A. Anderson (P38396)
Jared A. Roberts (P55182)
McClelland & Anderson, LLP
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1305 S. Washington Ave, Suite 102
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INTRODUCTION AND STATEMENT OF FACTS

Petitioner, Ann Breakey, is 81 years of age and has lived at 8355 Clark Road in Bath, Michigan (the “Bath Home”) for over 40 years. In 1994, William Breakey and Ann Breakey, husband and wife, conveyed the Bath Home to “William E. Breakey and Ann M. Breakey as Trustees of the William Breakey Trust No. 1 dated November 11, 1994” (Ex A, Deed; Ex B, Trust Agreement). William Breakey died on July 28, 2012. Upon William Breakey’s death, his son, Thomas Breakey, became successor Trustee under the Trust Agreement.

In late 2015, Ann Breakey received a form letter from the Department of Treasury (“Department”) notifying her that she did not qualify for the principal residence exemption (“PRE”) for years 2012, 2013, 2014 and 2015. Since the letter cited no basis for the denial, Ann Breakey could only guess as to what had triggered this determination. Ann Breakey
guessed that the determination was based upon the fact that she was using the real estate office of her stepson, Thomas Breakey, as her mailing address.

In her written response and at the informal hearing conference, Ann Breakey explained that she had experienced difficulty with her rural mail service in the past and so had decided to have all of her mail sent to her stepson’s office. She produced her voter registration card showing the Bath Home address. She also produced documents showing that the building at 321 Woodland Pass was an office building and that there was no PRE in place for that office building.

It was not until Ann Breakey received the Decision and Order of Determination that she learned that Treasury was taking the position that even if she did, in fact, use the Bath Home as her principal residence, she was not entitled to the PRE because she did not qualify as an “owner” within the meaning of MCL 211.7dd(a).

Whether Ann Breakey uses the Bath Home as her principal residence is a factual question which will be established at trial. However, whether Ann Breakey qualifies as an “owner” within the meaning of MCL 211.7dd(a) is a legal question that Petitioner would request be decided on motion in advance of trial.

**STANDARD OF REVIEW**

Tax exemptions are strictly construed and the burden to meet them is admittedly on the taxpayer. However, “‘ambiguities in the language of a tax statute are resolved in favor of the taxpayer.’” *Marie DeLamielleure Trust v Dept of Treasury*, 305 Mich App 282, 284; 853 NW2d 708 (2014) (quoting *Mich. Milk Producers Ass’n v Dep’t of Treasury*, 242 Mich App 486, 493; 618 NW2d 917 (2000)). Further, tax-exemption statutes “are to be interpreted according to ordinary rules of statutory construction,” *Inter Cooperative Council v Dep’t of*
Treasury, 257 Mich App 219, 223; 668 NW2d 181 (2003), and statutory construction rules as applied to tax exemptions “do not permit a strained construction that is adverse to the intent of the Legislature.” VanderWerp v Plainfield Twp, 278 Mich App 624, 628; 752 NW2d 479 (2008). This Tribunal has further held that Treasury cannot impose “an additional burden on the taxpayer that is not imposed by the statute with regard to an issue that is affirmatively addressed by the statute.” Williams v Detroit, MTT Docket No 322275; 2008 WL 1765522 at *1 (2008) (attached at Ex C).

DISCUSSION

Ann Breakey is an “owner” of the Property for PRE purposes pursuant to MCL 211.7dd(a) which provides, in relevant part, that an “owner” includes:

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

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

In its Answer to the Petition, the Department argues that Ann Breakey does not qualify as an “owner” within the meaning of MCL 211.7dd(a)(ii) or (iii) because “while Petitioner was the beneficiary of the Trust, the Trust did not grant Petitioner any ownership or partial ownership rights in the property [but only] the mere right to occupy the residence rent free.” The Department cites Flowers v Bedford Twp, 304 Mich App 661; 849 NW2d 51 (2014) for the principle that in order to qualify as an “owner” within the meaning of MCL 211.7dd(a), a person must be given the right to “possess, control and enjoy the property.”

First of all, the Department’s position conflicts with its own “Guidelines for the Michigan Principal Residence Exemption Program,” which states:
3. As the beneficiary of a trust, when are you considered eligible for a principal residence exemption?

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

Thus, for years, the Department has advised estate planning attorneys that the only requirement is that the beneficiary occupy the property.

Second, the Department mischaracterizes the holding in Flowers. In Flowers, the Court of Appeals cited Barnes v Detroit, 379 Mich 169; 150 NW2d 740 (1967), for the following rule of law.

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

The Flowers court went on to hold that because a life estate gives the holder the right to possess, control and enjoy the property, the holder of a life estate clearly qualifies as an “owner” within the above-quoted language from Barnes. The Court of Appeals did not hold that in order to qualify as an “owner,” a person must have the right to possess, control and enjoy the property.¹

All that is required under the test announced in Barnes is that a person has the right to possess

¹For the reasons stated above, Petitioner respectfully disagrees with the Tribunal’s characterization of the Flowers decision expressed in Diana E Johnson v Dept of Treasury; MTT Docket No. 14-007849. The Tribunal’s recitation of “to have in one’s actual control” as the definition of “possession” and “to exercise power and domain over” as the definition of “control” is very selective. Black’s Law Dictionary’s definition of “actual possession” is “physical occupancy or control over property.” Black’s Law Dictionary also defines “control” in the context of “possession” as the right to exclude others. Applying these definitions, a person with the exclusive right to possess real property has “control” over that property. The exclusive right to live in a home rent free for life is the practical equivalent of a life estate. There is no conceivable policy reason for treating these two situations differently from a property tax standpoint.
the property. (In fact, the “owner” in Barnes was a veteran who lived in a home that he held only a two-fifths undivided interest as a tenant in common.)

Third, Ann Breakey does have rights in the Bath Home equivalent to the owner in the Flowers case. Here, Ann Breakey has the right to possess and enjoy the Bath Home which is sufficient to satisfy the definition in Barnes, as relied upon in Flowers. Moreover, assuming for purposes of argument only that “control” is an additional necessary element, Ann Breakey has sufficient “control” in the sense of having the right to exclude others from the Bath Home for the remainder of her life. Additionally, even if “control” did require that one be in a position to “exercise power or influence over,” Ann Breakey has such “control” pursuant to Section 5.3(b) of the Trust Agreement which gives her the right to remove any Trustee without cause and to appoint a successor Trustee. There is no one with more “power or influence” over trust assets than the person holding the power to select the Trustee for those assets.

In its Answer to the Petition, the Department also takes the position that the record owner of the Bath Home is “William Breakey Trust No. 1.” Since the PRE is only available to individuals, the Department argues, and the Trust is not an individual, the Bath Home does not qualify for the PRE. By “record owner,” it appears that the Department means “fee title holder.” Yet, the holdings in Barnes and Flowers make clear that a person in possession of a home is not required to hold fee simple title in order to qualify as an “owner” for purposes of the PRE. Moreover, “trust owned” property is a misnomer. The estate is actually vested in trustees for the benefit of the beneficiaries. MCL 555.16; Nash v Duncan Park Comm’n, 304 Mich App 599, 624; 848 NW2d 435 (2014).

Finally, in its Decision and Order of Determination, the Department took the position that because the Trust Agreement did not explicitly refer to Ann Breakey as a “beneficiary,” she does
not qualify for the PRE under MCL 211.7dd(a)(ii). In its Answer to the Petition, the Department appears to concede that Ann Breakey is a beneficiary under the Trust Agreement. However, if and to the extent that the Department still takes this position, the law is clear that a "beneficiary" is simply a "person" that has a present or future benefit in a trust, vested or contingent. MCL 700.7103(i). It does not matter whether the Trust Agreement explicitly refers to Ann Breakey as a beneficiary. The right to use and reside at the Bath Home is unmistakably a present, vested beneficiary interest which qualifies Ann Breakey as a "beneficiary."

CONCLUSION

For the reasons stated above, Petitioner, Ann Breakey, requests that the Tribunal declare that her rights in the Bath Home pursuant to the William Breakey Trust No. 1 Trust Agreement qualifies her as an “owner” under MCL 211.7dd(a).

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Date: June 1, 2017

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Attachment 4
To: Probate and Estate Planning Council Members  
From: Melisa M. W. Mysliwiec, Citizens Outreach Committee  
RE: Recommendation with respect to third party publications and materials  
Date: August 2, 2017

The committee was asked to consider whether the Section should allow third party publications to be posted on our Section's page within the SBM website, and if so, to create a policy as to what steps must be taken to determine whether something is posted or not. The committee advises against allowing third party "content driven" publications and materials or links to such information to be posted on our Section's page. The committee's primary concern was that the Council would not have control over the content. Currently, our brochures are drafted by the committee, given a seal of approval by the Council, and will constantly be updated as needed so that the information being provided to the public is accurate and up to date. We could not say the same for other third party's publications or educational materials. Additionally, if we allow links to third party information, we have no control at all over content of those third party sites, comments that may be made or posted to that site, etc. We believe that to allow these items on our page within the SBM website would be to take a step backward from what the committee has accomplished and also risks providing the public with incorrect or out of date information, which would violate our mission.

The committee recommends that the Council prohibit posting of third party publications, educational materials, and links to similar information on the Section's page within the SBM website.

Respectfully submitted,

Melisa M. W. Mysliwiec
Attachment 5
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Uniform Law Commission Liaison Report
Date: September 1, 2017

NEW ACTS APPROVED

At its 126th Annual Meeting in July, the Uniform Law Commission approved the Uniform Directed Trust Act and the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act. The current forms of these Uniform Acts are subject to final Style Committee review; they should be released in final form for enactment by the states sometime this fall (probably in October).

1. Uniform Directed Trust Act (UDTA)

The current form of the Uniform Directed Trust Act (UDTA) is available at:

http://www.uniformlaws.org/shared/docs/divided%20trusteeship/2017AM_DirectedTrust_AsApproved.pdf

The UDTA is embodied (with minor alterations) in section 7703a of the legislative proposal scheduled to be introduced by the Council’s Divided and Directed Trusteeships ad Hoc Committee to the Committee on Special Projects at the September 9, 2017 CSP meeting.

2. Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act

The current form of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act is available at:


ONGOING DRAFTING COMMITTEE WORK

1. Electronic Wills—Nothing to report
2. Uniform Fiduciary Income and Principal Act (UFIPA)

The then-current draft of UFIPA was given a first reading at the ULC Annual Meeting in July. Our drafting committee has since had two conference calls (both in August). We are scheduled to meet face to face for two days in November.

The current form of the Uniform Directed Trust Act (UDTA) is available at:

TAX NUGGET

Two cases of interest…

September 2017

In the Matter of the Estate of Vose (P3d 238), the Oklahoma Supreme Court affirmed a trial court’s order forcing the executor of a deceased spouse’s estate to file a federal estate tax return and make a portability election. The executor, a son of the decedent’s first marriage, refused to make the election required to preserve the DSUE and transfer it to the surviving spouse even though the surviving spouse agreed to pay the cost to prepare and file the federal estate tax return. The surviving spouse and decedent had waived the right to each other’s estates. The courts decided that failure to elect portability is a wasting of estate assets. Could this have been avoided by addressing the election in a document?

Also of interest is the Estate of Powell, 148 TC #18. In this case, the son used a power of attorney to set up a limited partnership and have his mother invest 10 million dollars in return for a 99% limited partnership interest. Her two sons contributed unsecured notes in return for the 1% general partnership interest. The same day, the son who was the agent under the power of attorney transferred the decedent’s 99% LP interest to a charitable lead annuity trust paying an annuity to charity for the decedent’s life with the remainder passing to the decedent’s two sons. The remainder was valued by assuming a 25% discount for lack of control and marketability of the 99% LP interest. Mother died a week later. The court found that the poa was misused, because it only authorized gifts to the principal issue up to the federal gift tax exclusion amount, that there was no business purpose for the family limited partnership, and it ran afoul of IRC section 2036, sale for full and adequate consideration. The taxpayer conceded that as General Partner, the decedent could, along with other partners, compel liquidation so she could control enjoyment, and she could control the amount and timing of distributions through her son as the GP and as her agent. This threw the gift back into her estate. Again, this is a case with bad facts, aggressive deathbed planning and the tax court interpreted the right to control broadly. What scares commentators is that assets were included in the estate under Code section 2036(a)(2), (retained right in conjunction with any person to designate who could enjoy the property or its income) the first time 2036(a)(2) has been used when the decedent merely owned a limited partnership interest; and the possibility that double inclusion could occur under sections 2036 and the partnership interest under section 2033. This is an issue if the assets have increased in value between the gift and death.

I recently heard Howard Zaritsky discuss estate tax reform. He believes that it could happen that the estate tax and generation skipping tax could be eliminated in a budget reconciliation package with a 10 year self-destruction. Basis step up may be retained, along with gift tax, but the basis section 2014 would need to be clarified.

Lorraine F. New
George W. Gregory PLLC