

MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

TABLE OF CONTENTS

Vol. 36 • Winter 2016 • No. 1

Featured Articles:

From the Probate Litigation Desk: Observations on Undue Influence
David L.J.M. Skidmore..... 3

New Year's Resolutions for Trustees and Beneficiaries: Ten Fiduciary Income Tax Planning Considerations
Raj A. Malviya and Jonathan K. Beer.. 13

Two Matters Improperly Decided By the Michigan Court of Appeals: *In Re Estate of Sabry Mohammad Attia* and *In Re Estate of James V Ward*
Alan A. May..... 27

Conflicts of Interest in Estate Planning and Litigation (Or "How Many Hats Are Too Many?")
Robert S. Zawideh 31

Long-Awaited Probate Appeals Legislation Brings Uniformity and Efficiency
Liisa R. Speaker..... 36

Pets Put Their Trust in Us—Put Them in the Trust: Default Provisions That Protect Pets
Rebecca Wrock 41

Why Would You Worry About Proposed Regulations to Section 2704?
Lorraine F. New 45



Subscription Information

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Editorial Policy

The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria. Manuscripts and letters should be sent to Nancy L. Little, Managing Editor, *Michigan Probate and Estate Planning Journal*, Buhl, Little, Lynwood & Harris, PLC, East Lansing, MI 48823, (517) 859-6900, fax (517) 859-6902, e-mail nlittle@BLLHlaw.com.

Opinions expressed in the *Journal* are those of the authors and do not necessarily reflect the views of the editorial board or of the Probate and Estate Planning Council. It is the responsibility of the individual lawyer to determine if advice or comments in an article are appropriate or relevant in a given situation. The editorial board, the Probate and Estate Planning Council, and the State Bar of Michigan disclaim all liability resulting from comments and opinions in the *Journal*.

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Nancy L. Little, Managing Editor
Buhl, Little, Lynwood & Harris, PLC
271 Woodland Pass, Ste. 115, East Lansing, MI 48823
(517) 859-6900, fax (517) 859-6902
E-mail nlittle@BLLHlaw.com

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Vol. 36 • Winter 2016 • No. 1

TABLE OF CONTENTS

From the Desk of the Chairperson

James B. Steward 1

Feature Articles

From the Probate Litigation Desk: Observations on Undue Influence
David L.J.M. Skidmore 3

New Year's Resolutions for Trustees and Beneficiaries: Ten Fiduciary Income Tax Planning Considerations
Raj A. Malviya and Jonathan K. Beer 13

Two Matters Improperly Decided By the Michigan Court of Appeals:
In Re Estate of Sabry Mohammad Attia and In Re Estate of James V Ward
Alan A. May..... 27

Conflicts of Interest in Estate Planning and Litigation
(Or "How Many Hats Are Too Many?")
Robert S. Zawideh 31

Long-Awaited Probate Appeals Legislation Brings Uniformity and Efficiency
Liisa R. Speaker 36

Pets Put Their Trust in Us—Put Them in the Trust: Default Provisions That Protect Pets
Rebecca Wrock..... 41

Why Would You Worry About Proposed Regulations to Section 2704?
Lorraine F. New 45

Departments

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law
Hon. Phillip E. Harter 47

The Landscape in Lansing and Recent Legislation
Harold G. Schuitmaker 51

Michael W. Irish Award..... 54

Miscellaneous

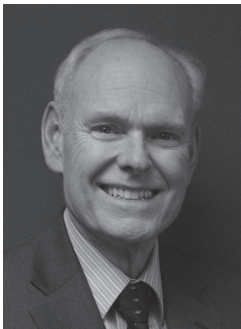
Section Council and Committees 56

Editorial Board

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From the Desk of the Chairperson

By James B. Steward



I am honored to serve as the Chair for the Probate & Estate Planning Section, and I thank our Section members for their confidence in electing me to that position.

As the current Chair of the Probate & Estate Planning Section, I am tasked with the job of overseeing the work of the Section Council and hope to serve our members as well as those who preceded me. Although I have previously served on the Section Council for ten years before becoming the Chair (two three-year terms as a member and four years as an officer), I find that I am still learning the details of how best to keep the Council work running smoothly, and staying on top of the issues that affect our members.

Although Michigan attorneys have been preparing wills and other estate planning documents for clients and handling decedent's estates for more than 100 years, as our society has changed, so has our estate planning and probate practice. In addition, the probate, trust, and tax laws that affect living or deceased clients have changed dramatically over the years and continue to evolve. These societal and statutory changes necessitate changes in the way we work in this area of the law.

As many of you know, the Probate & Estate Planning Section is one of the State Bar's largest and most active Sections and for many years has taken a "proactive" approach when reviewing and commenting on proposed legislation that affects our members and their clients. In some cases, this includes supporting proposed legislation that we believe presents a positive step, and in other cases, opposing proposed legislation we believe is ill-advised. But, in either situation, the position that we ultimately adopt is the

product of open review and debate conducted during our monthly meetings, and our goal is for our legislature to adopt legislation that presents a step forward.

This past legislative session, which ended on December 31, 2016, includes several legislative proposals which this Council either drafted or assisted with revisions that were ultimately adopted. Those proposals, which were passed, can be summarized as follows: the Probate Appeals statute (SB 632, PA 186 of 2016; HB 5503, PA 287 of 2016) [all appeals from probate court will now go to the court of appeals]; Qualified Distributions in Trust (SB 597, PA 330 of 2016; HB 5504, PA 331 of 2016) [limits creditor claims against certain "qualified dispositions in trust"]; Dower Repeal (SB 558, PA 489 of 2016; SB 560, PA 490 of 2016; [eliminates right by a surviving widow to claim dower]; Right to Appoint Funeral Representative (SB 551; PA 57 of 2016) [permits an individual to authorize (in writing) another person to make decisions about the individual's funeral & burial (and/or cremation) arrangements]; Fiduciary Access to Digital Assets (HB 5034, PA 59 of 2016) [provides a structure to allow a fiduciary to have access to certain "digital assets" of a ward, trust grantor, decedent etc. – however, the bill as passed is considerably different than what we originally proposed]. Also passed into law was SB 270 as PA 498 of 2016, which modifies probate court jurisdiction over non-residents; we did not prepare or assist with the preparation of that bill and did not support the wording of the bill as passed.

There were several additional legislative proposals that we actively supported, but which "died" at the end of this past legislative session and will need to be reintroduced this year. The topics of those bills include: clarifying the exceptions for uncapping of taxable value of real property; expanding or clarifying the types of property

that can be held as tenants by the entireties; allowing a testator to exclude a child from the statutory exempt property allowance; and relieving the trustee of an irrevocable life insurance trust (that holds no other assets) from the standard trustee duties that apply to other types of trusts.

One major project that we recently completed is a series of proposed revisions to Michigan's Estates and Protected Individuals Code (EPIC) to deal with various issues presented by assisted reproduction technology, including the inheritance rights of the children produced as a result of that technology. We expect that bill to be introduced this year.

One of our major ongoing projects is an extensive review of EPIC to identify and propose revisions to better address issues that our members have noted with the current wording and otherwise update that code to better serve the citizens of Michigan.

To assist us with planning our various projects, as well as the other work of the Council, each year we adopt a "Biennial Plan of Work" that lists many of the ongoing projects we are working on and divides that work into five primary categories: Statutory/Legislative; Court Rules, Procedures and Forms; Council Organization & Internal Procedures; Professional Responsibility; and Education & Service to the Public & Members. This "Biennial Plan of Work" is revised during the course of the year as needed and is published each month with the agenda for our monthly meetings. That monthly meeting agenda is posted under the "Events" drop-down box on our Section web page (<http://connect.michbar.org/probate/events/schedule>), about a week before the date of the meeting, and includes a listing of the Section officers and Council members, a listing of our committees and committee members, along with many of the documents and other materials that will be discussed at that meeting. Past agenda materials and minutes are also available for review as well on that same page. Our Section's main web page is located at <http://connect.michbar.org/probate/home>.

I encourage all Section members to regularly review the Council's current monthly meeting agenda, as well as minutes and agendas for past meetings, so you have a better idea of what we are working on. If you would like to become more actively involved with the Section's activities and projects, consider attending one or more of the meetings of the Council that are held each month from now through June at the University Club in East Lansing (but there is no Council meeting in May, due to the annual Probate & Estate Planning Institute in Acme, which we cosponsor with ICLE). You can even ask to become a committee member or submit comments or suggestions to a committee chair or the officers, and of course, read the *Michigan Probate & Estate Planning Journal* and attend the annual Probate & Estate Planning Institute.

From the Probate Litigation Desk: Observations on Undue Influence

By David L.J.M. Skidmore

Introduction

According to Michigan's Attorney General Bill Schuette, "Financial exploitation of Michigan's most vulnerable, our seniors, is one of the fastest growing crimes."¹ Undue influence is one way in which a vulnerable person may be financially exploited. Undue influence is one person (the influencer) manipulating another person (the victim) to make him or her do something that is not the victim's free will; rather, the victim is doing the will of the influencer. Undue influence is a unique and challenging legal concept that is sometimes not well understood, and the goal of this article is to improve understanding of the concept for those who do not regularly handle undue influence cases. (My thanks to my partner and fellow probate litigator Laura Morris who contributed to this article.)

Legal Definition of Undue Influence in Michigan

As a starting point, let us begin with the legal definition of undue influence under Michigan law. "Undue influence is the overpowering of the volition of the testator by another person whereby what purports to be the testator's [instrument or transaction] is in reality the [instrument or transaction] of the other person."² "To be actionable, the unreasonable and improper pressure must result in [the making of an instrument or the performance of a transaction] which the testator would not otherwise have made."³ "Such [an instrument or transaction] does not represent the testator's true will at all, but, in reality, represents the will of the person who influenced him."⁴

Notwithstanding this definition, the Michigan Supreme Court has historically recognized the difficulty of defining undue influence, because of the variety of forms that it may take. "It is not possible to formulate a single definition embracing all forms of undue influence. The law is set-

tled that we view each case largely upon its own circumstances. Particularly in search of undue influence we look at the whole spectrum of circumstances, not at one facet. The ultimate question is whether the disposition was voluntary."⁵ "Undue influence is a species of fraud and, like fraud, must remain undefined by the courts."⁶

The overpowering pressure may be physical, mental, emotional or psychological. "While there need be no violence or threat of physical force, there must be unreasonable pressure upon the mind of the testator, amounting to psychological or moral coercion, compulsion, or constraint, so great that his free agency is destroyed and the volition of the person applying the pressure is substituted."⁷ "[U]ndue influence ... need not be by physical force, constraint, or coercion, but it must be an influence, either of fraud, artifice, or some other art of human ingenuity and cunning with an overmastering will, such as subordinated the will of the [alleged victim] to the will of another, so that the [instrument or transaction] does not show the free will of [the alleged victim], but the will and purpose of another."⁸

Varieties of Undue Influence

Undue influence may be a short-term or long-term phenomenon; it may be overt or covert; and it may be blatant or subtle. There are two movie scenes that make me think about the very different forms that undue influence can take.

In the 1991 film *True Colors*, John Cusack's character asks his father-in-law, a U.S. Senator, to support his run for Congress. The father-in-law refuses. John Cusack then threatens to publicize the fact that the Senator has been diagnosed with early onset Alzheimer's disease. Under this pressure, the Senator reluctantly agrees to support the younger man's political campaign. Using duress, John Cusack has committed undue influence over his father-in-law. There was

nothing subtle about this transaction: Do what I want you to do (even though you don't want to do it), or else I will hurt you.

In the 2002 film, *The Two Towers*, the second film in *The Lord of the Rings* series, we meet the character King Theoden. Over time, the king has fallen under the influence of his wicked counselor, Wormtongue. The bad counselor has turned Theoden against his family and friends, resulting in the king banishing his nephew/rightful heir. The manipulator has caused the king to ignore real threats to his kingdom and to dwell instead on imaginary threats within his palace. Remarkably, Theoden does not recognize that he has fallen under his counselor's mind-poisoning spell. The king believes that he is still making his own decisions, when in reality Wormtongue is controlling his every move. Fortunately, Gandalf releases Theoden from Wormtongue's spell, and the king returns to his senses. Using subtle manipulation and mind-poisoning, Wormtongue committed undue influence over Theoden.

Note the difference in the perspectives of the victims in the two scenarios. The Senator recognized that he was the victim of undue influence as it was happening. He was the victim of overt, even blatant, coercion. He knew that he was being coerced into doing something against his will. In contrast, Theoden did not recognize that he was the victim of undue influence as it was happening, because he was manipulated so subtly over a long time period. He was the victim of covert coercion. But for Gandalf's intervention, Theoden probably would never have recognized—or admitted—that he had been the victim of undue influence.

Undue Influence Is Not Limited to Wills and Trusts

It is probably well-known that a finding of undue influence invalidates a will⁹ and/or a trust agreement.¹⁰ Actually, the validity of almost any legal instrument or property transfer by the alleged victim can be challenged based on undue influence. Undue influence will invalidate a

deed¹¹ or an *inter vivos* gift.¹² Undue influence will invalidate a contract,¹³ including a beneficiary designation made under a life insurance contract.¹⁴ Undue influence will invalidate the creation of joint ownership to a bank account with right of survivorship,¹⁵ or the transfer of funds into a joint account with right of survivorship.¹⁶

Covert Undue Influence Tends to Follow a Pattern

From my experience, covert coercion seems to be much more common than overt coercion. Relatively few potential clients consult me about an elderly loved one believed to have signed a will or made a deed under duress.

More often, a potential client describes the following situation: "I had a longtime, even life-long, relationship with victim, as a family member or a close friend; historically, I was in the victim's innermost circle of affection and confidence; then the influencer began spending time alone with victim; the victim became isolated from me and others; the victim's mind and personality changed; I found myself estranged from the victim; the victim seemed to believe that only the influencer was to be trusted and relied on, and that all others were not to be trusted or relied on; I found myself ejected from the victim's affection and confidence, replaced by the influencer; and the influencer wound up with most or all of victim's property." Those who believe that they have witnessed covert coercion/undue influence describe remarkably similar circumstances, suggesting that the phenomenon follows a distinct pattern.

Psychological Aspects of Undue Influence

Undue influence is not merely a legal doctrine. It is a social, relational, interpersonal, and psychological phenomenon, as well as a form of elder abuse. Those who have studied undue influence have confirmed that it tends to follow a pattern.

The late Margaret Thaler Singer was a clinical psychologist who studied undue influence in

both family and cult settings. She studied and wrote about the process by which undue influence is used to obtain a person's signature on a legal document.¹⁷ According to Singer, the varieties of undue influence "range from blatant and overt to prolonged, subtle, and covert."¹⁸ She focused on the latter type of undue influence: "organized, planned influence programs which have been exerted by the stronger party on the signer of legal documents," in which "the stronger party elicit[ed] the compliance of the weaker party[.]"¹⁹

Singer identified three means by which a person might be induced to sign a legal document: by a successful appeal to his or her reason; by coercion; or by subterfuge. "Each [of these methods] and combinations of these methods can be involved in the obtaining of signatures on documents."²⁰ An appeal to reason would not be undue influence. Use of coercion or subterfuge would be undue influence. However, Singer suggested that undue influencers would typically prefer to avoid coercion, because "most coercive methods can be more easily noted by the intended victim and detected by investigators."²¹ Consequently, most undue influencers "resort to subterfuge and deception," seeking to accomplish undue influence of the victim—without the victim realizing what is happening.²² "The exploitative persuader tries to keep the pawn unaware of his intention to elicit compliance and keeps the person less than fully aware that he or she is being moved along a preplanned course of action designed to benefit the persuader and to bilk or to gain control over the person, funds, and property of the other."²³

Vulnerability to undue influence varies from person to person. Yet certain circumstances tend to make anyone more vulnerable to influence. "The ability to fend off persuaders is reduced when one is exhausted, rushed, stressed, uncertain, lonely, indifferent, uninformed, aged, very young, unsophisticated, ill, brain-damaged, drugged, drunk, distracted, fatigued, frightened, or very dependent."²⁴ According to Singer, the

vulnerability of the victim to influence under normal circumstances is only the starting point of the inquiry. The inquiry must also consider whether the alleged influencer employed any "methods to increase vulnerability to persuasion ... at the point of signing[.]"²⁵ "Were conditions 'constructed' to increase vulnerability to persuasion?"²⁶ The reality is that a skillful undue influencer has the ability to cause the victim to be exhausted, rushed, stressed, uncertain, lonely, uninformed or misinformed, fatigued, frightened, or very dependent—thereby increasing vulnerability to influence.

Singer identified six factors that are common and prominent in undue influence situations. These factors are really tactics that an influencer may likely employ to obtain the victim's compliance. The first factor is causing the victim to become isolated. "Isolation is set into motion by the manipulator by controlling as closely as possible all avenues of communication to and from the intended victim."²⁷ Friends, family and neighbors are sent away; mail is censored; phone calls are controlled. Those outside the zone of manipulation cannot access the victim, and the victim cannot access those outside the zone of manipulation. The second factor is "the creation of a siege mentality."²⁸ The manipulator leads the victim to believe that anyone other than the manipulator represents a threat and a menace to the victim's well-being.²⁹ For example, the manipulator may persuade the victim that a loving niece is actually "a greedy person trying to put [the victim] in a nursing home and take her money."³⁰

The third factor is fostering dependency. "A sense of dependency on the [manipulator] and her cohorts [is] fostered."³¹ The victim feels alone and cut off from everyone except the manipulator and her cohorts, who have become "the only trustworthy persons" in the victim's life.³² The fourth factor is the creation of powerlessness. "A sense of powerlessness [is] created by the engineered isolation, the fostered dependency, and the siege mentality. The [victim] is led to see that only the influencer...has the power to do any-

thing.”³³ The influencer’s power continues to increase, and the victim’s power continues to diminish.

The fifth factor is the use of fear and vulnerability. The manipulator instills false fears in the victim by describing imaginary menaces and threats from others. The victim comes to believe that only the influencer and her cohorts can “preserve her life, property, and money.”³⁴ The sixth factor is keeping the victim unaware. The victim has “to be kept unaware and uninformed about the construction of this false reality” created by the manipulator.³⁵ The victim does not recognize that her view of her world and of other people has been dramatically reshaped by the lies, exaggerations, deceptions, and manipulations of the manipulator. The victim does not recognize that she has been manipulated into believing that the influencer is “her only support and protection in the seemingly menacing world produced by the [influencer’s] tales and behavior.”³⁶ “These six factors serve as a pattern and as a starting point for the attorney ... to proceed with an investigation.”³⁷

Importance of Circumstantial Evidence

Undue influence typically occurs behind closed doors with nobody present except for the influencer and the victim. The questionable transaction is often discovered by others only after the death of the alleged victim. At that point, the alleged influencer is the only survivor who knows what happened behind those closed doors. And the alleged influencer is highly unlikely to confess to undue influence. Given the absence of eyewitnesses, the party alleging undue influence faces an evidentiary playing field that dramatically favors the alleged influencer.

As a result, Michigan law permits the contestant to prove undue influence by indirect or circumstantial evidence.³⁸ “Undue influence may be insidious and not in front of witnesses, but fair inferences can be drawn from the facts.”³⁹ “[U]ndue influence need not be proven by direct evidence, but can be established by indirect

and circumstantial evidence. This principle has been laid down in many Michigan cases. . . . But we are of opinion that the contestant must introduce evidence from which inferences may fairly be drawn that such influence was exercised.”⁴⁰ “While, as we have frequently held, direct and positive proof is not required, and the question must usually be determined upon circumstantial evidence, such evidence should be sufficient to reasonably justify the inference that the mind of the testator had been dominated and overcome by the mind of another or had been deceived and misled by fraud and craft.”⁴¹ “[U]ndue influence may be proved by other than direct testimony that it has been exerted, and circumstances disclosed by the will itself and the manner of procuring it to be made may raise the presumption that undue influence has been exerted.”⁴²

“The case must be determined generally upon circumstantial evidence. This is necessarily so by reason of the secret and insidious means by which such influence is usually exercised.”⁴³ “Undue influence is not exercised openly, but, like crime, seeks secrecy in which to accomplish its poisonous work. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition, as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control.”⁴⁴ “Undoubtedly, circumstantial evidence may be relied on by contestants to show undue influence... . However, to carry the question to the jury, such circumstantial evidence must be of considerable probative force and quite clearly, must do more than raise a mere suspicion.”⁴⁵ “Unquestionably undue influence may be shown by indirect and circumstantial evidence, but it must be evidence of probative force beyond mere suspicion... .”⁴⁶

Circumstantial evidence of undue influence may take many forms. The following are several common categories of circumstantial evidence offered by the party alleging undue influence:

- Whether alleged influencer was in caretaker relationship with alleged vic-

tim;⁴⁷

- Whether alleged victim suffered from physical health problems;⁴⁸
- Whether alleged victim was isolated and whether alleged influencer spent a lot of time with alleged victim;⁴⁹
- Whether alleged influencer was in a confidential or fiduciary relationship with alleged victim;⁵⁰
- Whether alleged victim's trusted advisor had a conflict of interest between alleged victim and alleged influencer;⁵¹
- Whether alleged influencer coordinated the execution of the challenged documents by alleged victim;⁵²
- Whether alleged influencer was present in the room when alleged victim signed the contested documents;⁵³
- Whether the challenged estate plan represented a change in the alleged victim's stated intentions;⁵⁴
- Whether there was "bad blood" between the alleged influencer and the disinherited contestants;⁵⁵
- Whether alleged influencer had done anything to cause alleged victim to turn against disinherited contestants;⁵⁶
- Whether alleged influencer exhibit improper sexuality towards the alleged victim;⁵⁷ and
- Whether contested documents reflected a shift away from alleged victim's natural heirs.⁵⁸

When Undue Influence Will Be Presumed

The presence of three particular circumstances in an undue influence case is considered so significant that the law presumes that undue influence occurred. "The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an

opportunity to influence the grantor's decision in that transaction."⁵⁹

"Although a broad term, 'confidential or fiduciary relationship' has a focused view toward relationships of inequality[,] situations in which dominion may be exercised by one person over another."⁶⁰ "[A] fiduciary relationship exists as fact when there is confidence reposed on one side, and the resulting superiority and influence on the other. Common examples ... include where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser. In these situations, complete trust has been placed by one party in the hands of another who has the relevant knowledge, resources, power, or moral authority to control the subject matter at issue."⁶¹

The presumption of undue influence is not absolute or mandatory, but it provides certain benefits to the contestant. The clearest benefit is that the existence of the presumption forces the alleged manipulator to come forward with evidence that undue influence did not occur. "[T]he function of a presumption is solely to place the burden of producing evidence on the opposing party."⁶² If the opposing party produces evidence that the instrument or transaction was the product of the alleged victim's free will, then the factfinder (judge or jury) decides whether the party alleging undue influence carried its burden of proof. If the opposing party fails to produce such evidence, however, then the party alleging undue influence is entitled to a directed verdict.⁶³

A less clear benefit has to do with the evidentiary value of the presumption. The Michigan Supreme Court's leading decision on this matter indicates that the presumption creates a *prima facie* case of undue influence. "It is a procedural device which allows a person relying on the presumption to avoid a directed verdict[.]"⁶⁴ However, trial court rulings and unreported decisions by the Michigan Court of Appeals reflect that undue influence cases are sometimes dismissed on summary disposition under Michigan Court Rule 2.116(C)(10) (no genuine issue as to any

material fact), notwithstanding the existence of the three factors giving rise to the presumption. If the presumption is sufficient “to avoid a directed verdict” at trial, in the words of the Michigan Supreme Court, it is unclear why the creation of the presumption is insufficient to avoid summary disposition before trial. This matter begs for clarification.

Criminal Implications

There is no Michigan statute criminalizing undue influence *per se*. However, undue influence may be prosecuted under MCL 750.174a, which makes it a crime to commit financial exploitation of a vulnerable adult. “A person shall not through fraud, deceit, misrepresentation, coercion, or unjust enrichment obtain or use or attempt to obtain or use a vulnerable adult’s money or property to directly or indirectly benefit that person knowing or having reason to know the vulnerable adult is a vulnerable adult.” MCL 750.174a(1). If the prosecutor considers an instance of alleged undue influence to constitute “fraud” (technically, undue influence is a type of fraud⁶⁵) or “coercion,” then undue influence may be prosecuted under this statute. However, the omission of undue influence from MCL 750.174a(1) seems to be an oversight.

Conclusion

As we have seen, undue influence is difficult to define; it occurs in secret; it is a form of elder abuse and a type of financial exploitation; it may manifest itself through long-term, subtle, psychological manipulation; it may occur without the knowledge of the victim; it presents difficult evidentiary and procedural issues; and it may have either civil or criminal legal implications. Hopefully, this article will improve understanding of this challenging legal doctrine.

Notes

1. Michigan Office of the Attorney General, *Schuetz Charges Redford Woman with Embezzlement from Vulnerable Adult* (<http://www.michigan.gov/ag/0,4534,7-164-46849-290923--,00.html>) (accessed July 13, 2016).
2. *In re Estate of Willey*, 9 Mich App 245, 254–55 156 NW2d 631 (1967), citing *Estate of Spillette*, 352 Mich 12, 17, 18, 88 NW2d 300 (1958).
3. *Estate of Willey*, 9 Mich App at 254–55, citing *In re Hannan’s Estate*, 315 Mich 102, 123, 23 NW2d 222 (1946).
4. *Estate of Willey*, 9 Mich App at 254–55, citing *Estate of Anderson*, 353 Mich 169, 172, 173, 91 NW2d 356 (1958).
5. *Kouri v Fassone*, 370 Mich 223, 233, 121 NW2d 432 (1963).
6. *In re Johnson’s Estate*, 326 Mich 310, 319, 40 NW2d 163 (1949)(internal quotation omitted).
7. *Estate of Willey*, 9 Mich App at 254–55, citing *In re Estate of Langlois*, 361 Mich 646, 106 NW2d 132 (1960), and *In re Sprenger’s Estate*, 337 Mich 514, 522, 60 NW2d 436 (1953).
8. *Soule v Henry*, 197 Mich 473, 478, 163 NW 944 (1917).
9. *Estate of Anderson*, 353 Mich at 172 (“Undue influence exercised upon one who makes a will may become the basis for finding the will invalid, if by reason of that influence the right of the testator to freely exercise his discretion in disposing of his property has been taken away from him.”).
10. *Pollack v Barron (In re Gerald L. Pollack Trust)*, 309 Mich App 125, 867 NW2d 884 (2015) (recognizing claim to invalidate trust agreement on grounds of undue influence, but affirming finding of no undue influence).
11. *Kouri*, 370 Mich 223.
12. *Thon v Stiles*, 259 Mich 145, 242 NW 869 (1932).
13. *Beattie v Bower*, 290 Mich 517, 287 NW 900 (1939).
14. *McPeak v McPeak*, 233 Mich App 483, 593 NW2d 180 (1999).
15. MCL 487.703 (“The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors”).
16. *Senaut v Barr*, 53 Mich App 525, 220 NW2d 81 (1974).
17. Singer, Undue Influence and Written Documents: Psychological Aspects, 10 Cultic Stud J 19 (1993).
18. *Id.* at 21.
19. *Id.*
20. *Id.*

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 22.
26. *Id.*
27. *Id.* at 26.
28. *Id.*
29. *Id.* at 26-27.
30. *Id.* at 27.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 28.
36. *Id.*
37. *Id.* at 30.
38. See *In re Paquin's Estate*, 328 Mich 293, 303, 43 NW2d 858 (1950).
39. *In re Persons' Estate*, 346 Mich 517, 78 NW2d 235 (1956).
40. *In re McKeand*, 185 Mich 97, 117, 151 NW 731 (1915) (internal citations omitted).
41. *In re McIntyre's Estate*, 193 Mich 257, 159 NW 517 (1916); *Shepard v Shepard*, 161 Mich 441, 463, 126 NW 640 (1910).
42. *In re Du Bois*, 164 Mich 8, 15, 128 NW 1092 (1910).
43. *In re Loree's Estate*, 158 Mich 372, 378-79, 122 NW 623 (1909).
44. *Walts v Walts*, 127 Mich 607, 611, 86 NW 1030 (internal quotation omitted).
45. *Estate of Willey*, 9 Mich App at 257.
46. *In re Fay's Estate*, 197 Mich 675, 686-87, 164 NW 523, 527 (1917).
47. See *In re Estate of Kanable*, 47 Mich App 299, 301, 209 NW2d 452 (1973) (appellate court upheld trial court's refusal to set aside jury verdict finding undue influence regarding testatrix's will, where evidence proponents lived with the testatrix and "doctor advised her not to live alone due to failing health"); *In re Estate of Brown*, No 242910, 2003 Mich App LEXIS 3239 at *1 (Dec 11, 2003) (unpublished) (in case where jury held contested wills were the product of undue influence, decedent was living with and being cared for by proponent who was dependent on others); *In re Estate of Cox*, 383 Mich 108, 112, 174 NW2d 558 (1970) (in case where challenged will found to be product of undue influence, testatrix was being cared for by influencer); *In re Estate of Mahaffy*, No 268566, 2007 Mich App LEXIS 1911 at *2 (Aug 9, 2007) (unpublished) (in case where jury found quitclaim deed to defendant was product of undue influence, defendant assisted decedent with household chores, spent a great deal of time with decedent, ran errands for decedent, and traveled with decedent to pick up prescriptions and visit the doctor); *Persons*,

346 Mich at 518 (in case in which jury found undue influence, will left most of estate to woman who provided testator's care); *In re Rosa's Estate*, 210 Mich 628, 631, 178 NW 23 (1920) (in case where jury found will to be product of undue influence, elderly testatrix lived with influencer who had been "caring for and assisting her"); *In re Estate of Haynes*, No 235232, 2003 Mich App LEXIS 2895 at *1 (Nov 18, 2003) (unpublished) (trial court, affirmed on appeal, held that will and other documents were the product of undue influence, where the primary beneficiaries were the decedent's ex-spouse and her son and ex-spouse was decedent's caregiver); *In re Zaborski*, No 209055, 2000 Mich App LEXIS 1291 at *2 (June 30, 2000) (unpublished) (in case where probate court set aside trust and deeds as product of undue influence and was affirmed on appeal, primary beneficiary was settlor's caregiver); *In re Leone Estate*, 168 Mich App 321, 325, 423 NW2d 652 (1988) (jury's verdict finding will was the product of undue influence was upheld on appeal where son who benefited from the will lived with the testatrix and "took care of her needs and ran errands for her").

48. See *Kanable*, 47 Mich App at 301 (appellate court upheld trial court's refusal to set aside jury verdict finding undue influence regarding testatrix's will, where evidence "doctor advised [testatrix] not to live alone due to failing health"); *Brown*, 2003 Mich App LEXIS 3239 at *1 (in case where jury held challenged wills were the product of undue influence, and affirmed on appeal, grantor had stroke and became dependent on others for care prior to drafting of two contested wills); *In re Hillman's Estate*, 217 Mich 142, 144, 146, 185 NW2d 684 (1921) (will held to be product of undue influence where testatrix was weakened by Bright's disease and thus more susceptible to influence); *In re Niemschack's Estate*, 244 Mich 469, 470-471, 221 NW 659 (1928) (where case was submitted to jury on undue influence claim alone, the jury found undue influence, where the testator "had dropsy and heart disease"); *Persons*, 346 Mich at 532-533 (in case in which jury found undue influence, the decedent was not mentally impaired but dying of cancer); *Haynes*, 2003 Mich App LEXIS 2895 at *1 (trial court, affirmed on appeal, held that will and other documents were the product of undue influence, where the decedent had cancer); *Leone*, 168 Mich App at 325 (jury's verdict finding will was the product of undue influence was upheld on appeal where the decedent's eyesight was very poor).

49. *Kanable*, 47 Mich App at 301 (appellate court upheld trial court's refusal to set aside jury verdict finding undue influence regarding testatrix's will, where in the week leading up to the will's execution, the "[testatrix] spent nearly all of her time with [proponent]"); *Mahaffy*, 2007 Mich App LEXIS 1911 at *8 (in case where jury found quitclaim deed to defendant was product of undue influence, "defendant spent a substantial amount of time with

the decedent"); *Niemschack*, 244 Mich at 470-471 (in case where jury found will was product of undue influence, in affirming, court of appeals noted that son lived with testator/father and "was with his father every day during his last sickness"); *Waters v Reed*, 129 Mich 131, 133, 88 NW 394 (1901) (in case where jury found will to be product of undue influence, the decedent was alone in the house with the proponent/primary beneficiary for seven weeks); *Brown*, 2003 Mich App LEXIS 3239 at *14 (in case where jury held contested wills were the product of undue influence, appellate court affirmed and stated "evidence of conduct aimed at isolating a grantor from his or her family and influencing the grantor's decisions is relevant to the question of undue influence"); *Persons*, 346 Mich at 529 (in case in which jury found undue influence, evidence presented the influencer isolated decedent from his children).

50. *Mahaffy*, 2007 Mich App LEXIS 1911 at *2 (appellate court determined that reasonable juror could conclude confidential/fiduciary relationship between decedent and defendant where defendant assisted decedent with household chores, spent a great deal of time with decedent, ran errands for decedent, and traveled with him to pick up prescriptions and visit the doctor); *Haynes*, 2003 Mich App LEXIS 2895 at *1-2 (trial court, affirmed on appeal, held that will and other documents were the product of undue influence, where the primary beneficiaries were the decedent's ex-spouse and caregiver); *Zaborski*, 2000 Mich App LEXIS 1291 at *4 (in case where probate court set aside trust and deeds as product of undue influence and affirmed on appeal, court held that "as [decedent's] son and caregiver, respondent was in a fiduciary relationship with [decedent]"); *Leone*, 168 Mich App at 325 (in case where jury's verdict finding will was the product of undue influence was upheld, appellate court noted that contestant made prima facie case of a fiduciary relationship where son that benefited from the will lived with the testatrix and "took care of her needs and ran errands for her").

51. *In re Estate of Cox*, 383 Mich 108, 112, 174 NW2d 558 (1970) (in case where challenged will found to be product of undue influence, testatrix left sizeable residue to her church and Will was drafted by attorney who also belonged to church); *Paquin*, 328 Mich at 297 (jury held will invalid in part on undue influence claim where attorney that drafted will was also the attorney for the primary will beneficiary); *In re Estate of Searchill*, 9 Mich App 614, 618, 157 NW2d 799 (1968) (in case where jury found will to be product of undue influence, the drafting attorney had done other legal work for the influencer); *Zaborski*, 2000 Mich App LEXIS 1291 at *2 (in case where probate court set aside trust and deeds as product of undue influence and affirmed on appeal, primary beneficiary's attorney drafted trust agreement and deeds); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 273-274, 289 NW 898 (1980) (the

absence of independent counsel at the time of execution of the trust is a primary factor in determining whether the grantor was subjected to undue influence).

52. *Hillman*, 217 Mich at 145 (in case where will determined to be product of undue influence, proponent "requested and procured an attorney to visit his mother's home and prepare the will"); *Mahaffy*, 2007 Mich App LEXIS 1911 at *8 (in case where jury found quitclaim deed to defendant was product of undue influence, the deed "was prepared by defendant's friend and accountant"); *Niemschack*, 244 Mich at 472 (in case where jury found will was product of undue influence, influencer son's friend drafted the will); *Persons*, 346 Mich at 526 (in case in which jury found undue influence, influencer coordinated attorney coming to home to prepare will); *Rosa*, 210 Mich at 631 (in case where jury found will to be product of undue influence, drafting attorney was retained by influencer); *Searchill*, 9 Mich App at 617 (in case where jury found will to be product of undue influence, the influencer secured counsel to draft will); *Haynes*, 2003 Mich App LEXIS 2895 at *1 (trial court, affirmed on appeal, held that will and other documents were the product of undue influence, where the primary beneficiaries were the decedent's ex-spouse and her son and ex-spouse's son drafted will); *Zaborski*, 2000 Mich App LEXIS 1291 at *2 (in case where probate court set aside trust and deeds as product of undue influence and affirmed on appeal, primary beneficiary's attorney drafted trust agreement and deeds).

53. *Kanable*, 47 Mich App at 302-303 (appellate court upheld trial court's refusal to set aside jury verdict finding undue influence regarding testatrix's will, where evidence proponent was present during signing of draft will); *Hillman*, 217 Mich at 145 (in case where will held product of undue influence, proponent "was present during the preparation of a memoranda for a formal draft of the will"); *In re Lawler*, No 263238, 2005 Mich App 3281 at *2 (Dec 27, 2005) (unpublished) (in reversing the trial court's summary disposition ruling on contestants' undue influence claim, court noted "[r]ecord evidence further indicates that petitioner was present at the time the will was signed."); *Niemschack*, 244 Mich at 471 (in case where jury found will was product of undue influence, influencer son was present when will signed); *Searchill*, 9 Mich App at 617 (in case where jury found will to be product of undue influence, the influencer was present when the will was signed); *In re Teller's Estate*, 190 Mich 547, 551, 157 NW 27 (1916) (in case where jury found will was product of undue influence, influencer/son was witness to will's signing).

54. *Kanable*, 47 Mich App at 301 (appellate court upheld trial court's refusal to set aside jury verdict finding undue influence regarding testatrix's will, where evidence that will naming proponents voided a will benefitting a family member and friends); *Brown*, 2003 Mich App LEXIS 3239 at *1 (prior to decedent executing challenged wills

that jury determined where product of undue influence, decedent had treated her children equally); *Cox*, 383 Mich at 114 (in case where challenged will found to be product of undue influence, there were significant changes between challenged will and prior will); *Niemschack*, 244 Mich at 470-71 (in case where jury found will was product of undue influence, in affirming, court of appeals noted that testator had expressed intent to divide his property equally between children – rather than favoring one); *Teller*, 190 Mich at 548 (in case where jury found will was product of undue influence, the testator disinherited one of her sons in subsequent will).

55. *Loree*, 158 Mich at 375, 380 (after verdict sustaining will at trial level, appellate court ordered a new trial because there was circumstantial evidence that testator's wife unduly influenced husband to detriment of contestants as revenge against contestants for testifying against family member in divorce action); *Rosa*, 210 Mich at 631 (in case where jury found will to be product of undue influence, primary beneficiary was the ex-spouse of decedent's niece); *Leone*, 168 Mich App at 325 (jury's verdict finding will was the product of undue influence was upheld on appeal where there was evidence that there was bad blood between the parties over a prior family issue).

56. *Hillman*, 217 Mich at 146 (will held to be product of undue influence where proponent "had made statements to [the testatrix] calculated to cause ill will toward certain of the other children"); *Mahaffy*, 2007 Mich App LEXIS 1911 at *7 (in case where jury found quitclaim deed to defendant was product of undue influence, the "defendant was overheard by the decedent's nephew tell[ing] the decedent on several occasions that the decedent's son was going to place him in a nursing home and take all of his money"); *Persons*, 346 Mich at 526 (in case in which jury found undue influence, influencer told the decedent his children did not care for him and wanted him to die to get his money); *Rosa*, 210 Mich at 633, 637 (in case where jury found will to be product of undue influence, the testatrix was very close with her niece until she came to live with her niece's ex-husband at which time testator became "so attracted to [the influencer] that she believe[d] what he [told] her about [her] niece" and "conceived a violent dislike for her niece."); *Teller*, 190 Mich at 550 (in case where jury found will was product of undue influence, contestant claimed "lies about him told to his mother by his brother Ed and the pressure of the other children brought to bear upon her" resulted in his mother disinheriting him); *Waters*, 129 Mich at 136 (in case where jury found will to be product of undue influence, "there was testimony tending to show statements depreciating the character of [decedent's] son...and a declaration that [decedent's] son would not assist him in extremity, but that she, [proponent], was the only one who would care for him."); *Bean v Bean*, 144 Mich 599, 615, 108 NW 369 (1906) (approving trial court's jury instruc-

tion that "where a testator's mind has been prejudiced or poisoned against those who would be the natural objects of his bounty, by means of misrepresentations conveyed to him by an interested person so he makes a disposition of his property by will in favor of the one conveying such misrepresentations, which he would not make were it not for such misrepresentations and fraud, then such a will is procured by undue influence and ought to be set aside."); *Leone*, 168 Mich App at 325 (jury's verdict finding will was the product of undue influence was upheld on appeal where testatrix was dependent on son who benefitted from will for transportation, testatrix feared being alone, and there was testimony son threatened to leave her if she allowed contestant into the family home).

57. *Persons*, 346 Mich at 520, 522, 530 (in case in which jury found undue influence, the influencer was married to another man yet referred to the decedent as her husband and kissed him); *Rosa*, 210 Mich at 634-635 (in case where testatrix was an 80-year old woman, and the primary beneficiary was a 52-year old man who would "appear before her nude" and "kiss and fondle her," jury found will to be product of undue influence); *Waters*, 129 Mich at 133, 136 (in case where jury found will to be product of undue influence, proponent/primary beneficiary was woman in which decedent had an illicit relationship and was 30 years his junior).

58. *Kanable*, 47 Mich App at 301 (appellate court upheld trial court's refusal to set aside jury verdict finding undue influence regarding testatrix's will, where proponents of will were the testatrix's niece's ex-spouse and new wife); *Cox*, 383 Mich at 110-113 (in case where challenged will found to be product of undue influence, will left only very modest amount to contestants/family members and remainder to church to be used for church purposes at discretion of influencers); *Mahaffy*, 2007 Mich App LEXIS 1911 at *2 (where decedent quit claimed his property to defendant/non-family caretaker rather than family, jury determined that decedent was unduly influenced by defendant); *Paquin*, 328 Mich at 295-296 (jury held will invalid on undue influence claim where decedent left sizeable residue to non-relative rather than contestants/nieces and nephews); *Persons*, 346 Mich at 518 (in case in which jury found undue influence, will left nominal gifts to children and major portion to unrelated woman he was living with); *Rosa*, 210 Mich at 631 (in case where jury found will to be product of undue influence, testatrix essentially disinherited her only family in favor of niece's ex-husband); *Searchill*, 9 Mich App at 617 (in case where jury found will to be product of undue influence, the testator disinherited his siblings); *Wilson v Parker*, 130 Mich 638, 640-641, 90 NW 682 (1902) (in case where jury found will was product of undue influence, the will left a significant portion to friend and friend's family despite decedent having relatives of his own); *Haynes*, 2003 Mich App LEXIS 2895 at

*1 (trial court, affirmed on appeal, held that will and other documents were the product of undue influence where the decedent left a nominal amount of his estate to his children and the lion's share to his ex-spouse and her son); *Zaborski*, 2000 Mich App LEXIS 1291 at *9 (in case where probate court set aside trust and deeds as product of undue influence and affirmed on appeal, trust transferred all grantor's prime real estate to one son to the exclusion of grantor's other children); *Leone*, 168 Mich App at 323-325 (jury's verdict finding will was the product of undue influence was upheld on appeal where the decedent disinherited one of her sons to the benefit of another son).

59. *Kar v Hogan*, 399 Mich 529, 537, 251 NW2d 77 (1976).

60. *In re Estate of Karmey*, 468 Mich 68, 75, 658 NW2d 796 (2003) (internal citation omitted).

61. *Id.* (internal quotation and citation omitted).

62.

63. *Id.*

64. *Id.*

65. *Widmayer v Leonard*, 422 Mich 280, 288-89, 373 NW2d 538 (1985).

66. *In re Johnson's Estate*, 326 Mich at 319 ("Undue influence is a species of fraud...") (internal quotation omitted).



David L.J.M. Skidmore is a partner in Warner Norcross & Judd LLP. A member of the firm's Litigation Practice Group, his practice is centered on trust, estate, fiduciary and real property disputes and litigation. He is a member of the governing council for the Pro-

bate & Estate Planning Section of the State Bar of Michigan and is the chair of the council's amicus committee. He is a regular speaker at seminars on topics related to trust and estate law. He presents annual trust and estate caselaw updates to the Michigan Bankers Association, the West Michigan Estate Planning Council, and other groups. He is a regular contributing author for the Michigan Probate and Estate Planning Journal, Michigan Real Property Review, and the American Bar Association's Probate and Property.

New Year's Resolutions for Trustees and Beneficiaries: Ten Fiduciary Income Tax Planning Considerations

By Raj A. Malviya and Jonathan K. Beer

As we reflect on this past year, much has happened in the estate planning arena. With the current Federal transfer tax exemption at over \$5 million, adjusted each year for inflation, and the repeal of the federal estate tax a priority under President Trump's administration, practitioners may be wondering what will occupy their time in 2017. But transfer tax planning is only one component the Trusts & Estates practice; income tax planning of non-grantor trusts should continue to be a source of ongoing work for practitioners. This article will highlight several income tax planning considerations for these trusts that are often overlooked and can provide a source of reoccurring an important planning work for fiduciaries. The ultimate goal: Bringing good cheer to Trustees and beneficiaries (and practitioners).

Primer on Fiduciary Income Taxation of Trusts

Before understanding income tax management techniques that are available in the administration of a non-grantor trust, a refresher on the fiduciary income tax rules under Chapter 1, Subchapter J, Subparts A, B and C of the Internal Revenue Code¹ (IRC 641 et. seq.) is warranted. In general, Subchapter J taxes trust income once—either to the trust that receives it, or to the beneficiary to whom such income is distributed. Distributions of income from a trust to its beneficiaries qualify the trust for an income tax deduction known as the “distribution deduction”).² Effectively, Subchapter J treats a trust as a conduit to the extent income is distributed, and as an entity to the extent income is accumulated. Many of the planning considerations addressed in this article involve the interplay between the conduit vs. entity regimes of fiduciary income taxation.³

Trusts and Estates as Taxable Entities

In general, trusts and estates are separate taxable entities and must file a U.S. Income Tax Return for Estate and Trusts (Form 1041) and have a separate taxpayer identification number.⁴ (There are some exceptions for certain grantor trusts.⁵) The taxable income of an estate or trust is computed the same way as individual income taxes, but with some modifications.⁶ In effect, the fiduciary income tax rules bifurcate tax liability. For taxable income retained by the trust or estate, the entity calculates and pays the income tax under an entity regime of taxation.⁷ However, when distributions of income are not accumulated and are made to beneficiaries, the trust or estate is treated as a conduit and the income distributed is taxed to the beneficiaries rather than the entity.⁸

Fiduciary Income Tax Terminology

Some of the common terms used in the fiduciary income tax rules are as follows:

- a. **Simple Trust.** A trust is a simple trust if it requires that all of the trust accounting income be distributed currently, it does not provide for any payment to or set aside for charitable purposes, *and* it does not actually distribute any trust principal during the year.⁹
- b. **Complex Trust.** Any trust that is not simple is a complex trust.¹⁰ Trusts that do not require distribution of all income annually or provide for charities will always be complex.¹¹ Estates are also treated as complex.¹²
- c. **Trust Accounting Income.** Trust accounting income, also known as fiduciary accounting income, is governed by the trust instrument and applicable local law, such as the Michigan Uniform Principal and Income

Act.¹³ Although it is not a tax concept, trust accounting income is important in determining whether the fiduciary or the beneficiaries pay tax on the trust's income. When the Code refers to "income" in connection with trusts and estates, the reference is to the definition of trust accounting income.¹⁴

- d. **Distribution Deduction.** A trust or estate may either retain income or distribute it to beneficiaries, or both, according to the terms of the trust agreement or Will and applicable state law. The trust is taxed only on the income it retains,¹⁵ while the beneficiaries are taxed on the income distributed or required to be distributed.¹⁶ The trust receives a deduction for the net income distributable to the beneficiaries.¹⁷
- e. **Distributable Net Income.** The concept of distributable net income ("DNI") is unique to fiduciary income taxation. Logically, the distribution deduction should be limited to the taxable income of the trust. However, the deduction is based on DNI, which is derived under the rules of IRC 643. To oversimplify, DNI is the taxable income of a trust, but after a series of adjustments are made.¹⁸ DNI serves as the overall limitation on the amount of distribution deduction available to an estate or trust, as well as a limitation of the amount taxable to beneficiaries.¹⁹

Fiduciary Income Tax Brackets

Compared to individual income tax brackets, the fiduciary income tax brackets are compressed. The rate schedule that applies to taxable income for estate and trusts for 2016 is as follows:²⁰

Not over \$2,550	15%
Over \$2,550 up to \$5,950	\$382.50 plus 25% of the excess

Over \$5,950 up to \$9,050 \$1,232.50 plus 28% of the excess

Over \$9,050 up to \$12,400 \$2,100.50 plus 33% of the excess

Over \$12,400 \$3,206 plus 39.6% of the excess

In addition, at \$12,400 in income, trusts are subject to the higher 20% capital gains rate and may also be subject to the additional 3.8% net investment income tax.²¹

Calculation of Tax

Form 1041 is constructed similarly to Form 1040; income minus deductions equals taxable income. The steps for the calculation are the same; however, the rules are different depending on whether the trust is simple or complex.²² The instructions to Form 1041 are also extremely helpful in calculating the tax. The preparation and analysis of these tax forms, while critical in engaging in fiduciary income tax planning, are beyond the scope of this article.

Determine Trust Accounting Income

Trust accounting income must first be determined by referring to the governing instrument and then by referring to the Michigan Uniform Income and Principal Act or any other applicable state law.²³ Trust accounting income is focused principally on whether funds coming into the trust and expenses being paid from the trust are allocated to principal (corpus) or income.²⁴ Interest, dividends on investments, and short-term capital gains/losses are allocated to income whereas long-term capital gains/losses and return of principal are allocated to principal.²⁵ The same is also true for expenses.²⁶ Attorney and accounting fees, for example, are typically allocated 50% to income and 50% to principal.²⁷ Estate and income taxes are allocable to principal, but real estate taxes are allocable to income.²⁸ It is important to be familiar with the principal and income rules for each state, as they are not always intuitive.

Net income is determined by totaling trust

accounting income minus expenses allocable to income.²⁹ After determining net income, the trustee then looks to the document to determine whether income is required to be distributed. When the income is required to be distributed, the beneficiary holds a mandatory income interest.³⁰ The most common example is a Qualified Terminable Interest Property Trust (“QTIP”), which requires all net income be distributed to the surviving spouse.³¹ Alternately, the trust may contain provisions which allow the trustee to exercise its discretion to accumulate or distribute income and principal according to the standards set forth in the document. These are referred to as discretionary distributions.³² A trust that is required to distribute net income and makes no principal distributions will be a simple trust.³³ For such trusts, the mandatory income interest will be the trust accounting income.³⁴ If a trustee exercises discretion to accumulate or distribute income or principal, it will be a complex trust.³⁵

Determine Trust Taxable Income

Once trust accounting income is determined, taxable income is determined. A trust’s taxable income is calculated in the same manner as the individual income tax rules unless there is an express provision to the contrary.³⁶ The general modifications to the individual income tax rules are set forth below.

Exemption

Estates and trusts are not permitted to take the standard deduction permitted by individuals. The exemption varies depending upon the type of trust.³⁷

- Estates are permitted a \$600 personal exemption.³⁸
- Trusts required to distribute all of their income currently are permitted a \$300 personal exemption.³⁹
- All other trusts are permitted a \$100 personal exemption.⁴⁰ (However, certain complex trusts may be permitted a \$300

personal exemption.⁴¹)

Determine DNI

DNI is essential to the calculation of taxable income because it limits the amount of the distribution deduction.⁴² IRC 643 defines DNI as “the taxable income of the trust or estate computed with the following modifications.”⁴³

Extraordinary Dividends and Taxable Stock Dividends

Extraordinary dividends and taxable stock dividends are excluded from DNI if they are received by a simple trust and not distributed because they are allocated to corpus by the fiduciary in good faith and in accordance with the instrument and local law.⁴⁴

Tax-Exempt Interest and Income from Foreign Trusts

Tax exempt interest and income from foreign trusts are included in DNI, but are reduced by any amounts disallowed by IRC 265 and by the share of the charitable deduction allowed by the trust or estate.⁴⁵ When tax-exempt income is included in DNI, a proportionate share of the expenses of the trust not allocable to particular items of income must be allocated to tax-exempt income and are not deductible.⁴⁶ The net tax-exempt income must be allocated to the beneficiaries if distributions are made.⁴⁷

Capital Gains (Losses)

Capital gains (losses) are generally excluded from DNI to the extent they are allocated to corpus and are not paid, credited or required to be distributed to a beneficiary or paid to or set aside for charity.⁴⁸ Several exceptions to this rule apply. Capital gains are included in DNI for the final tax year for a trust or estate.⁴⁹ Prior to the final tax year, the trustee has the ability to manage capital gain income and potentially include such income in DNI if one of the two following prerequisites is first satisfied: (i) pursuant to the terms of the trust and Michigan law (the “first

prerequisite”) or (ii) pursuant to the trustee’s reasonable and impartial exercise of discretion (the “second prerequisite”),⁵⁰ and pursuant to one of the three available methods provided under the Treasury Regulations. The first method generally encompasses what practitioners refer to as a “power to adjust” between fiduciary income accounting and principal under Michigan law.⁵¹ Finally, in recognition that modern portfolio theory focuses on total return, many states have adopted laws that permit a trustee to convert to a unitrust.⁵²

Exclusions from DNI

Certain specific distributions cannot carry out DNI. Any amount which, under the terms of the governing instrument, is properly paid or credited as a gift or bequest of a specific sum of money or of specific property which is paid or credited all at once or in not more than three installments shall be considered a gift or bequest of money or specific property.⁵³

Determine Distribution Deduction

Once DNI has been calculated, the distribution deduction and taxable income can be calculated. For simple trusts, the trust receives a distribution deduction for the amount of income that is required to be distributed currently, limited to the amount of DNI.⁵⁴ For complex trusts, the trust receives a distribution deduction for the amount of income required to be distributed currently and for any other amounts of income or corpus properly paid, credited or required to be distributed limited to DNI.⁵⁵ No deductions are allowed for an item of DNI that is not part of the trust’s gross income; therefore, the trust must subtract from its distribution deduction that portion of any distributions considered to be tax-exempt.⁵⁶

Tax Year Reporting

In general, a trust uses a calendar year for its tax year, but can elect to be treated as the estate by making a certain election (discussed later).⁵⁷

An estate may report on calendar or fiscal year basis. A fiscal year may end on the last day of any month but can extend no longer than 12 months.

Taxation to Beneficiary

Distributed income retains the same character in the hands of the beneficiary as it had when earned by the trust or estate.⁵⁸

- a) Simple Trusts. The beneficiary must include in his or her gross income the amount of income required to be distributed, up to DNI, even if the income is not in fact distributed.⁵⁹ The amount is allocated among the beneficiaries according to the amounts they actually received from the trust, or ratably if the income was not distributed.⁶⁰ The beneficiaries are usually treated as receiving a proportionate share of each type of income included in DNI.⁶¹
- b) Complex Trusts. The beneficiaries are treated as if they received the DNI distributed by the trust on the last day of the trust’s taxable year and must include the taxable portions of DNI in their income for the tax year in which the trust’s tax year ends.⁶²
- c) Tier System. DNI is allocated among beneficiaries according to a tier system.⁶³ The purpose of the tier system is to expose mandatory income beneficiaries to the maximum amount of DNI based on the income they receive. The remaining DNI is allocated among the remaining beneficiaries.⁶⁴ A detailed explanation of the tier system is beyond the scope of this article.

Separate Share Rule

A separate and independent share of a trust or estate for a beneficiary is treated as a separate entity for the purpose of determining distributable net income.⁶⁵ A distribution to that beneficiary will carry out only income attributable to that separate

share and not the greater amount attributable to the trust or estate.⁶⁶ The separate share rule will also apply for purposes of allocating income in an estate that creates a marital and a credit shelter trust.⁶⁷

Ten Planning Considerations⁶⁸

Calendar Year vs. Fiscal Year Planning

For an estate plan that incorporates a revocable living trust which becomes irrevocable at Settlor's death, the Trustee can elect to combine the trust with the estate for all tax years of the estate ending after the date of the decedent's death and before the "applicable date."⁶⁹ This is known as a 645 election and effectively treats the trust administration as part of the estate administration for income tax purposes. The election is only available for a "qualified revocable trust" (QRT).⁷⁰ A QRT is a trust that was revocable during Settlor's lifetime and treated as owned by the Settlor under a grantor power to revoke.⁷¹ The applicable date (duration of the 645 election) depends on whether an estate tax return is filed. If no estate tax return is required to be filed, the 645 election lasts for two years after the date of the decedent's death.⁷² If an estate tax return is required to be filed, the election ends upon the later of (i) six months after the date of the final determination of estate tax liability or (ii) two years after the date of the decedent's death.⁷³

The 645 election allows for deferral of recognition of taxable income and tax planning by strategically "bunching" income and deductions in a time period.⁷⁴ The fiscal year is beneficial because the beneficiary is not taxed on income received until the fiscal year ends.⁷⁵ The benefit of this election can best be illustrated with the following example:

Example: Decedent died June 1, 2016. Estate owns shares of family business taxed as C corp. Company expected to declare dividends in fall of 2016. Estate receives dividend of \$50,000 in the third quarter. Executor immediately distributes

dividends to Estate beneficiaries as part of DNI. If planning in advance, Executor can elect fiscal year end (June 2, 2016 through May 31, 2017) and won't file tax return until fall of 2017. Beneficiary will receive a Schedule K-1 from Estate at that time reflecting items of taxable income received. Result is tax deferral: that beneficiary will enjoy income in 2016, but won't report until 2017 Form 1040, which isn't due until April 15, 2018.

A 645 election is made on Form 8855, "Election to Treat a Qualified Revocable Trust as Part of an Estate."⁷⁶ No probate estate needs to be opened for the election to be made.⁷⁷ If no probate estate has commenced, the Trustee of the QRT signs the election.⁷⁸ Form 8855 is attached to Form 1041 for first taxable year of decedent's estate or if no probate estate, for first taxable year of the QRT.⁷⁹ The Trustee of QRT signs Form 8855 and agrees to various conditions on form.⁸⁰ The election must be filed no later than the time prescribed for filing of Form 1041 for first tax year of Estate, including extensions.⁸¹

Distributions within 65 Days of Close of Tax Year

Tax planning can involve deemed retroactive distribution opportunities. Such an opportunity is in form of election known as "663(b) election" or "65-day rule" and allows a fiduciary to make distributions that were accumulated in a trust within first 65 days after close of the tax year, and attribute those distributions to the last day of the preceding tax year for income tax purposes.⁸² This flexibility gives the fiduciary the ability to gather tax year-end financial results after the close of a tax year, assess each beneficiary's personal tax attributes and determine the optimal income tax result. While this assessment is being made, the taxable income is accumulated into the next tax year. After the assessment is made, the fiduciary can distribute the taxable income to the beneficiaries and attribute it as part of the preceding tax year, as long as the distribution occurs within 65 days after the close of the trust's tax year.⁸³ The benefit of this election can best

be illustrated with the following example:

Example: In 2016, complex trust (on calendar year filing) received \$18,000 of passive income from Partnership X. The trust's sole income beneficiary is uncertain on his personal tax bracket until end of calendar year. Additional income from other accounts is expected to be earned by the trust. The trustee exercises discretionary authority to accumulate all 2016 income. The trustee receives resource documents from various financial institutions in February 2017 reflecting sufficient taxable income for 2016. The trustee concludes the beneficiary will not be in highest tax bracket and has capital loss carry forwards to use for 2016. Within 65 days after close of calendar year, the trustee distributes all income of the trust to beneficiary and makes 65-day election on the trust's 2016 income tax return, to effectively treat 2017 distributions as if been made by December year end. This allows 2016 DNI to be carried out to beneficiaries on Schedule K-1. Tax savings are achieved because the income is taxed at the beneficiary's lower rate, is not subject to 3.8% NIIT and the beneficiary's capital loss carry forwards can be utilized.

A 663(b) election is made on the Form 1041 itself, page 2 of the return under "Other Information" at line 6.⁸⁴ The election is only applicable to complex trusts (non-simple trusts).⁸⁵ The amount to which election applies cannot exceed greater of (i) trust fiduciary accounting income for tax year election is made or (ii) DNI for that tax year.⁸⁶ The election governs the applicable tax year in which distributions within 65 days following such year are deemed to be made.⁸⁷ The election is effective only for tax year election is made.⁸⁸ The election becomes irrevocable after last day prescribed for making election.⁸⁹

Timing of Deductions

A fiduciary should always be looking for applicable deductions to reduce adjusted gross income. Some of the most common deductions

related to ordinary and necessary expenses of a trust administration include costs attributed to:⁹⁰ (i) carrying on a trade or business;⁹¹ (ii) the production of income and management/conservation of income producing property;⁹² (iii) the determination, collection or refund of tax;⁹³ (iv) reasonable expenses of administration (fiduciary, legal, accounting);⁹⁴ (v) investment advisory fees;⁹⁵ and, (vi) theft/casualty losses.⁹⁶

The timing of applying the deductions is equally important. If deductions that exceed income are not otherwise used, they are wasted unless the excess deductions are generated in the final year of the trust administration.⁹⁷ Powerful tax planning can be achieved if trustees are cognizant of this critical timing. The tax rules allow a trustee to pass out excess deductions to beneficiaries as miscellaneous itemized deductions.⁹⁸ Excess deductions can only be passed out in the final year of the trust.⁹⁹ Because the beneficiaries of a trust may be able to use the deductions, it is important for a trustee to understand a beneficiary's personal tax situation and delay payment of expenses until the final year if the facts and circumstances allow.

Every beneficiary on Form 1041 receives a Schedule K-1 from the trust. Schedule K-1 allocates the beneficiary's financial information from Form 1041. Each beneficiary includes the numbers from Schedule K-1 on their Form 1040.¹⁰⁰ The excess deductions from Form 1041 that pass to the beneficiaries are reflected on Schedule K-1, Part III, Line 11 "Final Year Deductions."¹⁰¹ The excess deductions are then picked up by the beneficiaries on their federal income tax return, Form 1040, at line 23 of Schedule A, as miscellaneous itemized deductions for that same tax year.¹⁰²

Choosing Where to Use Deductions

In addition to being cognizant on the timing of taking deductions, a fiduciary also has to assess the best place to utilize the deductions. If the deductions are going to be taken on the Form 1041, a critical election, known as a

“642(g) election,” is required to be filed with the tax return, otherwise the deductions may be disallowed.¹⁰³ The rules governing the election require a statement to be filed providing that deductions on Form 1041 have not already been allowed as estate tax deduction.¹⁰⁴ The purpose of the election is so the fiduciary does not “double dip” on deductions for fiduciary income tax and estate tax filings. Since the election must be made with the Form 1041, the fiduciary must be mindful that it affirmatively waives any rights to take deductions on estate tax return.¹⁰⁵ As such, it is imperative that the fiduciary knows that no estate tax return will need to be filed or, if one is required, that taking the deductions on the Form 1041 will produce an overall better economic result. If the estate tax is repealed, the election statement would still need to be filed since it is affirmatively required to take deductions on the Form 1041.¹⁰⁶

The election statement is designed to only require affirmative election for the Form 1041. Tax preparation software will typically generate an election statement. Otherwise, a statement outlining the requirements of the Treasury Regulation should be made.¹⁰⁷ The election statement should be filed in duplicate, with the Form 1041 for the applicable tax year the items are being claimed as deductions.¹⁰⁸ The election statement can also be filed with the IRS Service Center in Cincinnati.¹⁰⁹

Managing Capital Gains: Including in DNI

Generally, capital gains are excluded from DNI.¹¹⁰ They also constitute principal under Michigan’s Uniform Principal and Income Act.¹¹¹ Thus, regardless of whether a Trustee distributes income, capital gains are accumulated and taxed at the trust level, unless the Trustee can find a way to distribute them to the beneficiary.

Federal income tax brackets for trusts are much more compressed than those of individuals, exposing trusts to the highest federal tax rates more quickly than individuals.¹¹² Trusts’ compressed tax brackets, coupled with the Net

Investment Income Tax (“NIIT”),¹¹³ increases the likelihood that there will be a significant income tax rate differential between trusts and beneficiaries. A trust with undistributed capital gain income may not only be exposed to the highest capital gain income tax rate, but also incur the NIIT on undistributed net investment income and Michigan state income tax. This triple threat tax exposure provides the Trustee with much incentive to distribute the capital gain as part of DNI, if possible. This method of managing capital gain has become an important part of fiduciary tax planning, but is far from straightforward or easy to apply. The Trustee will need to work through multiple layers of authority, including the governing instrument, the Michigan Principal and Income Act, the Michigan Trust Code, and federal tax law to determine whether the gain can be distributed to the beneficiaries as part of DNI, rather than paying tax on that taxable income at the trust level.¹¹⁴

The Regulations provide that these kinds of adjustments will be recognized and respected by the IRS if they are done pursuant to the terms of the trust and Michigan law (the “first prerequisite”) or pursuant to the trustee’s reasonable and impartial exercise of discretion (in accordance with Michigan law (such as a power to adjust) or by the governing instrument if not prohibited by Michigan law (the “second prerequisite”).¹¹⁵ The trustee’s exercise of any such power must be reasonable and generally consistent.¹¹⁶ Only after one of the above prerequisites is met can the Trustee then proceed to include capital gain in DNI under one of the three methods outlined under the Treasury Regulations.¹¹⁷

Using a Partnership to Carry Out Income and Capital Gain

In the same vein of managing capital gains, if the Trustee is not comfortable relying on one of the two prerequisites and three methods under the Treasury Regulations for including capital gain in DNI or does not want to take a risk that the IRS will not respect deviations

from general rules of the Uniform Principal and Income Act,¹¹⁸ the Trustee can utilize a Michigan partnership or LLC (taxed as a partnership) to pass out capital gain as part of DNI. This works because generally, Schedule K-1 income from a pass-through business entity will carry out any income (including capital gain) distributed to the trust and then to the trust's beneficiaries.¹¹⁹ With some exceptions, capital gain earned through a partnership in the normal course of business (not through a liquidation) generally constitutes trust accounting income.¹²⁰ Therefore, the distribution from the trust to the beneficiaries would be includable in DNI and avoid being taxed at the trust level.¹²¹

Distribution in Kind of Appreciated Property

A trust will recognize income when it distributes appreciated property in satisfaction of a pecuniary bequest to a trust beneficiary who is entitled to a specific dollar amount or to specific property other than what was distributed.¹²² The trust is treated as if it sold the property to the beneficiary at its fair market value.¹²³ This principle is often called the Kenan rule, after an early case that held that an estate recognized a gain when it distributed property in kind to satisfy a fixed dollar legacy.¹²⁴

Knowing this is the general rule, a Trustee can avoid income tax recognition by making specific devises of property pursuant to the governing document. This is because a specific bequest that is in satisfaction of a specific bequest or devise under the terms of a trust is not considered a taxable distribution.¹²⁵ The beneficiary in this case takes over the adjusted basis of the asset in the fiduciary's hands.¹²⁶ These distributions do not carry out income to the beneficiary and they generate no income distribution deduction to the estate or trust.¹²⁷

Income Tax Deduction for Estate Tax Attributed to IRD

Not all assets get a step-up in basis. A category of assets known as income in respect of a

decedent (IRD)¹²⁸ does not.¹²⁹ Remember, items that would have been income to a decedent, but were not recognized before death, retain their character and are income when received by the estate or beneficiary of the item.¹³⁰ The beneficiary of such an asset or its income will "step into the shoes" of the decedent and report the income in the same way the decedent would have if he or she had lived to collect it.¹³¹ Common examples include wages earned but not yet paid when death occurs, installment notes receivable, dividends declared before death but paid later, traditional IRA accounts, and investments in annuities.

Like other assets that a decedent controlled at death, IRD assets are no different, and their value is included in a decedent's gross estate for federal estate tax purposes.¹³² If Federal estate tax is attributed to the IRD being included in the gross estate, the IRD is in essence double taxed when the money is collected and reported for income tax.

To help allay double taxation, there is relief under IRC 691 that is often overlooked. This section provides that a taxpayer who includes in gross income any amount of IRD may deduct for the same taxable year that portion of the federal estate tax imposed on the decedent's estate which is attributable to the inclusion in the decedent's estate of the right to receive that amount.¹³³

If a trust is the recipient of IRD and makes no distribution of the income in respect of the decedent in the year in which it is received, the estate tax deduction belongs entirely to the trust.¹³⁴ If the trust distributes all or part of the income in respect of a decedent in the same year that it is received, an allocable portion of the estate tax deduction is passed through to the beneficiary receiving the distribution.¹³⁵ The IRD deduction for estate tax attributable to income in respect of a decedent available to a trust is computed by excluding from gross income of the trust so much of the decedent's post-mortem income as is properly paid, credited, or to be

distributed to the beneficiaries during the tax year, and such income shall be considered IRD to such beneficiary for purposes of allowing the deduction.¹³⁶

Unlimited Charitable Deduction

Just like individuals, trusts are eligible for an income tax deduction for certain payments made to or for the benefit of charitable organizations.¹³⁷ Unlike individual taxpayers, however, a trust is allowed to deduct any amount of gross income, without limitation, which, pursuant to the terms of the governing instrument is, during the taxable year in question, paid for a charitable purpose specified in IRC 170(c).¹³⁸

The charitable deduction rules are more favorable to trusts than individuals for several reasons. First, the deduction for trusts is unlimited, whereas an individual's deduction is subject to a 50% of AGI ceiling.¹³⁹ Second, an election can be made to treat charitable contributions made in a subsequent tax year as being paid in previous taxable year.¹⁴⁰ This flexibility allows a trustee to conduct the necessary due diligence and determine whether a charitable deduction will provide the most economic impact to the trust and beneficiaries if claimed in the year it is actually paid or in the preceding year. Finally, trusts are permitted to make charitable contributions for a charitable purpose specified in IRC 170(c)(2) even if such contribution is to a foreign organization.¹⁴¹

This flexible charitable deduction rule is not without complication, however. For a charitable contribution by a trust to qualify for the income tax charitable deduction, the payment must be made "pursuant to the terms of the governing instrument."¹⁴² Flexibility in the trust agreement may also help achieve the charitable deduction. The Supreme Court has held that it is not necessary that a trust instrument direct the charitable contribution claimed as a deduction; rather, it is sufficient that the charitable use is authorized in the trust instrument, and that the amount is actually distributed.¹⁴³ There are many

favorable PLRs cited on this subject. One in particular ruled that a trust was entitled to an income tax charitable deduction for a charitable contribution where the trust agreement gave the beneficiary a lifetime limited power of appointment that could be exercised only in favor of charitable organizations, and the beneficiary exercised the power to cause the Trustee of the trust to distribute income to the charities.¹⁴⁴

Manage State Income Tax

A nongrantor trust that accumulates ordinary income and capital gains is taxed at the entity level. Just like individual taxpayers, the trust is subject to federal income tax and, potentially, but certainly not always, income tax in one or more states. Michigan's income tax is a direct flat-rate tax that applies to all taxpayers regardless of level of income. The tax rate in Michigan is 4.25% for 2016.¹⁴⁵

The multiple layers of taxation warrant carefully analyzing the applicability of the income tax laws of Michigan and other states that have or could have a connection or nexus to the trust. Logically, virtually every state that imposes income tax will tax income sourced within the state.¹⁴⁶ Notably, however, many state legislatures have enacted one or more additional bases of state income taxation, which serve as "triggers" for imposing income tax on the trust. Some examples of states to which the authors have dealt with in practice on analyzing nexus tests include California, the District of Columbia, Maryland, Missouri, New Jersey, New York, Pennsylvania, Virginia, and Wisconsin, and impose state-level income tax under the following nexus tests:

- (i) The trust is a testamentary trust and the testator of the trust was living in the state at his or her death;¹⁴⁷
- (ii) The trust is an inter vivos trust and the settlor is living in the state as a resident as of the date of creation of the trust, date of funding of the trust, during the current taxable year in question and/or the date on which the trust became irrevocable;¹⁴⁸

(iii) The trust has at least one trustee or beneficiary who is a resident of the state;¹⁴⁹ and, (iv) The trust is considered to be administered in the state (which may be determined by facts and circumstances or by a statute that, if a certain set of circumstances exists, finds the trust to be a resident of such state for state income tax purposes).¹⁵⁰

Although trusts typically contain a provision that designates which state's laws govern administration, such a provision is not necessarily dispositive in the determination of the trust's state tax residency. Sometimes, courts are called upon to decide whether a state taxing authority has pushed the constitutional limits too far in asserting its ability to tax a trust based on the contacts existing between the subject trust and the state.¹⁵¹

States that tax trusts based on the tax residence of the trustee, tax residence of the beneficiary or any other factor besides the tax residence of the individual who created the trust, provide much more flexibility in managing the tax residence of the trust.¹⁵² Specifically, Michigan taxes trusts created by the Will of a resident decedent (a testamentary trust) and inter vivos trusts created by an individual who was a Michigan resident at the time the trust became irrevocable.¹⁵³ Michigan may not, however, tax an inter vivos trust created by a Michigan resident if trustees, beneficiaries and the administration of the trust are all outside of Michigan, even if the trust holds Michigan real property (non-income producing).¹⁵⁴

Knowing Michigan's general stance on what constitutes sufficient nexus is a good starting point to better understand potential strategies for managing (and perhaps shifting) state income tax residency. But state income tax management is not without complexity. Before a trustee can effectively shift a trust's state tax residency, the trustee must first identify the aspects of the trust which expose it to state tax liability currently and which create nexus in the prospective jurisdiction of residency. This requires a thorough analysis

of the rules and procedures regarding trust tax residency in each jurisdiction, the terms of the trust instrument and the characteristics, including the location of the trustee, the trust assets and the beneficiaries. This due diligence process can be involved and as a practical matter, the trustee needs to consider whether the desired benefits are significant enough to justify the costs and risks that will be incurred in connection with a change of tax residency.

After preliminary due diligence is conducted, below are some strategies for the practitioner and trustee to consider when trying to manage state income tax liability:¹⁵⁵

- (i) Drafting flexibility in the trust for the appointment and resignation/removal of successor Trustees, initial place of administration and change of administration, and selection and change of governing law;¹⁵⁶
- (ii) Paying careful attention to Trustee distribution standards and ability of the Trustee to "bifurcate" the trust assets by asset class for more flexibility in management;
- (iii) Creating sub trusts so that separate shares of beneficiaries who are nonresidents of Michigan can be administered as a separate trust and possibly be subject to a more favorable income tax state;
- (iv) Given the mobility of beneficiaries and accounts, using financial institutions as custodian of marketable securities and liquid accounts that have places of business in multiple states with favorable income tax rates and close to where beneficiaries are located;
- (v) Creating entities in income tax favorable states to hold trust assets; and
- (vi) If permitted under the terms of the trust and Michigan law, decanting the trust or sub trusts to a new trust with more favorable provisions that allow for better state income tax management.

Finally, keep in mind that when a trust is subject to income tax in multiple states, it is necessary to conduct an analysis of the applicable state laws and sources of trust income to determine if a bifurcation of income is appropriate and if

some income items are subject to income tax in multiple states. Due to the lack of uniformity among the states, any state income tax credits may not offset in whole or in part, the income tax paid to the other state.

Conclusion

Income tax planning during the administration of an irrevocable non-grantor trust is, and will continue to be, an important component of the Trusts & Estates practice. Some of the planning strategies outlined above are routine while others can be more complicated to implement. But all are worth considering under the right circumstances to help minimize taxes and preserve more value for trust beneficiaries.

Notes

1. All references and citations to the Internal Revenue Code throughout this article shall be to the "Code" or "IRC."
2. IRC 651 and 661.
3. The planning considerations discussed in this article apply to non-grantor trusts taxed under IRC 641 et. seq. This article will not address planning involved with the special rules in subchapter J (known as the "grantor trust rules") that provide that if a grantor (or another person) of a trust holds an interest or a power described in IRC 671 through 679, then such grantor (or other person) is deemed to be the owner of the trust for federal income tax purposes.
4. IRC 6072(a).
5. See Treas. Reg. 1.671-4(b).
6. IRC 643(b). Estates and trusts are also subject to the same alternative minimum tax liability as individuals. IRC 55.
7. IRC 641(a).
8. IRC 651 and 661.
9. Treas. Reg. 1.661(a)-1.
10. *Id.*
11. *Id.*
12. *Id.*
13. MCL 555.501, et. seq.
14. IRC 643(b).
15. IRC 641 and Treas. Reg. 1.641(b)-1.
16. IRC 652(a) and 662(a); see also IRC 61(a)(15).
17. Treas. Reg. 1.641(b)-1.
18. IRC 643(a).
19. IRC 651(b) and 661(a) (limiting distribution deduc-

tion); IRC 662(a)(1) and (2) (limiting the taxable amount of a distribution).

20. Rev. Proc. 2015-53.

21. As will be discussed later in this article, under President-elect Donald Trump's tax plan, the capital gains rate may be reduced and the Net Investment Income Tax may be repealed. See <https://www.donaldjtrump.com/policies/taxplan> (last retrieved Dec 2, 2016); See also e.g., Robert W. Wood, *Trump Tax Plan Could Impact 2016 Year-End Planning*, Forbes, November 14, 2016 (retrieved December 2, 2016 from <http://www.forbes.com/sites/robertwood/2016/11/14/trump-tax-plan-could-impact-2016-year-end-planning/#69bd3949530d>).

22. E.g., compare IRC 651 with IRC 661 (specifying different deductions available to simple trusts and complex trusts).

23. MCL 555.503(1).

24. See Michigan Uniform Principal and Income Act, MCL 555.501 et. seq.

25. MCL 555.502(d) (income); MCL 555.804 (principal).

26. MCL 555.901(c)-(d) and MCL 555.902(1)(b)-(g) and (2).

27. MCL 555.901(a)-(b) and MCL 555.902(1)(a).

28. MCL 555.902(f) and MCL 555.901(c).

29. MCL 555.502(i).

30. MCL 555.502(g).

31. IRC 2056(b)(7)(B)(i)-(ii).

32. MCL 700.7103(d).

33. Treas. Reg. 1.661(a)-1.

34. MCL 555.502(g) and (h).

35. Treas. Reg. 1.661(a)-1.

36. IRC 641(b).

37. IRC 642(b).

38. IRC 642(b)(1).

39. IRC 642(b)(1)(B).

40. IRC 642(b)(1)(A).

41. *Id.*

42. IRC 651(b) and 661(a).

43. IRC 643(a)(1)-(6).

44. IRC 643(a)(6).

45. IRC 643(a)(4).

46. Treas. Reg. 1.643(a)-5(a).

47. *Id.*

48. IRC 643(a)(3). There are exceptions to this rule, which are mentioned later in this article. Also, the fiduciary income tax rules governing non-domestic (foreign) trusts generally include capital gains in DNI. This article only addresses domestic trusts.

49. Treas. Reg. 1.643(a)-3(b).

50. The three methods are outlined at Treas. Reg. 1.643(a)-3(b)(1) (the "first method"), Treas. Reg. 1.643(a)-3(b)(2) (the "second method"), and Treas. Reg. 1.643(a)-3(b)(3) (the "third method"). For an in depth discussion of

capital gain management and planning in connection with non-grantor trusts, see Malviya, Raj, (2014, June). "Fiduciary Income Tax Planning: Including Capital Gains in Distributable Net Income (DNI)." *The Michigan Tax Lawyer*, Vol. XL; See also Nicholas E. Christin & William A. Snyder, Minimize Capital Gains Tax of Estate, Trusts, and Beneficiaries, 41(4) *Est. Plan. J. (WG&L)*, 11-17, Apr, 2014. Issue 2, Summer 2014); See also Frederick M. Sembler, Including Capital Gains in Trust or Estate Distributions After ATRA, March 2013 *Trusts & Estates* 23-29 (Mar 7, 2013).); See also Jonathan G. Blattmachr & Mitchel M. Gans, The Final "Income" Regulations: Their Meaning and Importance, 2004 *Tax Notes Today* 96-35 (May 17, 2004); See also John Goldsburly, Practical Issues in Planning for the 3.8% Tax on Trusts/Estates (Focus Series), 48th Annual Philip E. Heckerling Institute on Estate Planning, Special Session III-C-1-32 (Jan 16, 2014).

51. MCL 555.504; Treas. Reg. 1.643(a)-3(b)(2).

52. See Reg. 1.643(a)-3(b)(1). While conversion to a unitrust income interest may be possible by petition to exercise the discretionary power to adjust under MCL 555.505(4), Michigan lacks a statute specifically permitting conversion to a unitrust as has been adopted in several states.

53. IRC 663(a)(1).

54. IRC 651 (a) and (b).

55. IRC 661(a). As explained above, this deduction is limited to distributable net income.

56. IRC 651(b) and 661(c).

57. IRC 644(a); IRC 645. In practice, the IRS automatically puts an Estate on a fiscal year (in determining the 1041 due date). An estate can essentially file on a calendar year end by filing a short year return.

58. IRC 652(b) and 662(b).

59. IRC 652(a).

60. *Id.*

61. MCL 555.602(2).

62. IRC 662(c).

63. See IRC 662(a)(1)-(2) and Treas. Reg. 1.661(a)-2 and 1.661(a)-3.

64. Treas. Reg. 1.661(a)-3.

65. IRC 663(c).

66. Treas. Reg. 1.663(c)-1(a).

67. Treas. Reg. 1.663(c)-3(a). The separate share rule does not apply, where, under applicable state law, separate trusts are created pursuant to the terms of the will or trust. *Id.*

68. Many of the planning considerations in this article apply to both estate and trusts. For ease in reference, the authors will generally refer only to trusts and trustees throughout the discussion, unless specifically stated otherwise.

69. IRC 645(a); Treas. Reg. 1.645-1.

70. IRC 645.

71. IRC 645(b)(1); 676.

72. IRC 645(b)(2)(A); Treas. Reg. 1.645-1(f)(2)(i).

73. IRC 645(b)(2)(B); Treas. Reg. 1.645-1(f)(2)(ii).

74. Additional benefits of 645 election include: (i) Material participation requirement as to threshold of real estate passive activity losses waived for 2 years following decedent's death (i.e. participation is treated as active) See IRC 469(i)(4); Treas. Reg. 1.645-1(e)(2)(i) and (3)(i); (ii) Ability to expense reforestation expenditures vs. only amortization. IRC 194; (iii) Charitable set-aside deduction allowed. IRC 642(c).

75. IRC 662(c).

76. Treas. Reg. 1.645-1(c)(2)(i).

77. *Id.*

78. *Id.*

79. *Id.*

80. Treas. Reg. 1.645-1(c)(2)(ii).

81. Treas. Reg. 1.645-1(c)(2)(i); IRC 6072.

82. IRC 663(b)(2).

83. *Id.*

84. See Form 1041 (last revised 2015).

85. IRC 663(b).

86. Treas. Reg. 1.663(b)-1(a)(2)(i).

87. IRC 663(b); Treas. Reg. 1.663(b)-1(a)(1).

88. IRC 663(b)(2); Treas. Reg. 1.663(b)-1(a)(1).

89. Treas. Reg. 1.663(b)-2(a).

90. These are expenses that are generally not subject to the 2% of AGI floor since they are costs that are not "commonly or customarily" incurred by individuals. See *Knight v Commissioner*, 552 US 181 (2008).

91. IRC 162; Treas. Reg. 1.162-1.

92. IRC 212; Treas. Reg. 1.212-1(d).

93. IRC 212(3).

94. IRC 212; Treas. Reg. 1.212-1(i).

95. Treas. Reg. 1.212-1(i); IRC 67(e); Treas. Reg. 1.67-4(b). These expenses are deductible to the extent they exceed 2% of the taxpayer's adjusted gross income. See *Knight v Commissioner*, 552 US 181 (2008).

96. IRC 165(c)(3).

97. IRC 642(h).

98. *Id.* These expenses are deductible to the extent they exceed 2% of the taxpayer's adjusted gross income.

99. IRC 642(h)(2).

100. IRC 652(a) and 662(a).

101. See IRS 2016 Form 1041 (Schedule K-1).

102. IRC 662.

103. IRC 642(g); Treas. Reg. 1.642(g)-1.

104. *Id.*

105. Treas. Reg. 1.642(g)-1.

106. *Id.*

107. *Id.*

108. Treas. Reg. 1.642(g)-1.

109. IRS Notice 2010-53.

110. IRC 643.

111. MCL 555.804(b).

112. See Rev. Proc. 2015-53 (providing inflation-adjusted tax rates). The 2016 highest income tax rate applies to married couples filing jointly on earnings over \$466,950, while the highest income tax rate applies to trusts on all earnings which exceed \$12,400.

113. Note that one of President-elect Trump's tax proposals is to repeal the NIIT. See FN No. 22, *supra*.

114. For a detailed discussion of capital gain management and avoiding the NIIT in connection with non-grantor trusts, see Malviya, Raj, (June 2014). "Fiduciary Income Tax Planning: Including Capital Gains in Distributable Net Income (DNI)." *The Michigan Tax Lawyer*, Vol. XL. See also Malviya, Raj and Gregory, George, (Jan 2015). *Drafting Trusts for the Net Investment Income Tax*. Presented for Michigan Institute of Continuing Legal Education Annual Estate Planning Drafting Seminar. See also Gadarian, Gregory V., Harris, T. Randolph H, Willms, Melissa J. "Treating Capital Gains as Trust Accounting Income: Essential Updates for Estate Planners." Sponsored by the American College of Trust and Estate Counsel (ACTEC).

115. Treas. Reg. 1.643(a)-3(b).

116. *Id.*

117. Treas. Reg. 1.643(a)-3(b)(1) – (3).

118. See Treas. Reg. 1.643(b)-1 (If it is determined that the provisions of the trust "depart fundamentally from traditional principles of income and principal", applicable state law will control). See also MCL 555.503(3) (requiring a fiduciary to use discretion impartially so that the result is fair and reasonable for all beneficiaries). This creates an opportunity for the IRS to take the position in audit that capital gains could not lawfully be re-allocated.

119. This strategy also works for S corporations; however, this article only focuses on partnerships because non-grantor trusts that hold S corporation stock will have other planning considerations that need to be addressed in order to be a qualified S shareholder.

120. MCL 555.801(2). Exemptions to this treatment are: 1) if the gains received are in a total or partial liquidation of the entity, 2) if the entity is a regulated investment company, real estate investment trust, or 3) if the funds distributed constitute a capital gain dividend. Some exceptions are liquidation of entity or partial liquidation. MCL 555.801(3). The Court of Claims has held that capital gain distributed in the ordinary course of a partnership's operations is includible in DNI. *Crisp v United States*, 34 Fed Cl 112 (1995). However, the facts of that case might not cause one to find comfort in all partnership situations, as the partnership was a relatively small investment relative to the trust's other assets.

121. See IRC 643(a) (definition of DNI).

122. Treas. Reg. 1.661(a)-2(f).

123. IRC 643(e)(2).

124. *Kenan v Commissioner*, 114 F2d 217 (2d Cir

1940).

125. IRC 643(e)(4). Treas. Reg. 1.651(a)-2(d) and Treas. Reg. 1.661(a)-2(f).

126. IRC 643(e)(1).

127. Treas. Reg. 1.661(a)-2(f); IRC 663(a).

128. Treas. Reg. 1.691(a)-1.

129. IRC 1014(c).

130. Treas. Reg. 1.691(a-b); IRC 691(a)(3); Treas. Reg. 1.691(a)-3(a).

131. IRC 691(a)(2).

132. For example, see IRC 2033, 2039.

133. IRC 691(c)(1)(A); Treas. Reg. 1.691(c)-1(a).

134. IRC 691(c)(1); Treas. Reg. 1.691(c)-2(a)(1).

135. *Id.*

136. Treas. Reg. 1.691(c)-2.

137. Under IRC 642(c), certain trusts (specifically, trusts established before October 8, 1969 that meet certain requirements outlined in that Code section) may deduct gross income "permanently set aside" for the benefit of a charitable organization, as well as income currently paid to such organizations.

138. IRC 642(c)(1).

139. IRC 642(c); 170(b)(1)(A). In some cases, an individual's charitable deductions are limited to 30% of AGI. See IRC 170(b)(1)(B).

140. IRC 642(c)(1) (permitting a trust to elect to treat a charitable contribution paid after the close of a taxable year (but before the last day of the following taxable year) as having been paid during such taxable year).

141. IRC 642(c)(1). Compare this rule to U.S. individual taxpayers, who are limited to making charitable contributions only to those charitable organizations created or organized within or under the laws of a state, the U.S., a U.S. possession or the District of Columbia. IRC 170(c)(2)(A).

142. IRC 642(c)(1).

143. *Old Colony Trust Co v Commissioner*, 301 US 379 (1937).

144. PLR 200906008.

145. MCL 206.51(1)(g).

146. The constitutionality of taxing income at its source was established almost 100 years ago. *Shaffer v Carter*, 252 US 37 (1920).

147. *E.g.* New Jersey, NJSA § 54A: 1-2(o); Pennsylvania, Pa Code 61 101.1 (trusts which are partially funded by a resident transferor are also taxable under this provision; *but see* FN 155 and associated text); District of Columbia, D.C. Code 47-1809.01; Illinois, 35 Ill. Comp. Stat. 5/1501(a)(20)(C)-(D); New York, N.Y. Tax law 605(b)(3)-(4) (Note: New York City also taxes trusts under the same regime. See Admin. Code City of N.Y. 11-1704.1.).

148. *E.g.* Missouri, Mo. Rev. Stat. 143.331.1.

149. *E.g.* California, Cal. Rev. & Tax Code 17041(a), (e), (h).

150. *E.g.*, Wisconsin, Wis. Stat. 71.14(3); Virginia, Va. Code Ann. 58.1-302 (Virginia and Wisconsin also tax trusts which are created by the Will of a resident decedent or an inter vivos trust created by a resident settlor. *Id.* and Wis. Stat. 71.14(2). Virginia also taxes trusts which are at least partially funded by a resident transferor under the same provision; *but see* FN 155 and associated text.).

151. For an in depth discussion of the constitutionality of state income taxation of trusts, *see* Gutierrez and Keydel, *State Taxation of Trusts with Multi-State Contacts*, ACTEC Studies, Study 6, 6-5 – 6-8 (September 2001).

152. *See* Michaels & Twomey, *State Income Tax Issues With Trusts*, 2011 Cannon Financial Institute, Inc. 7-153.

153. MCL 206.18(1)(c).

154. *Blue v Department of Treasury*, 185 Mich App 406, 462 NW2d 762 (1990).

155. This article does not address DINGs, but they should be considered for managing state income tax liability. The IRS recently issued a series of taxpayer-favorable private letter rulings regarding a trust structure referred to by practitioners as “Delaware Incomplete Gift Non-Grantor Trusts”, or “DING trusts.” By structuring a trust as a DING trust, a trust settlor may be able to mitigate overall income tax exposure by shifting assets and, potentially, state income tax liability from a high-income tax state to a state with more favorable income tax laws (or perhaps to a state that does not impose state-level income tax on trusts). PLR 201310002; PLR 201310003; PLR 201310004; PLR 201310005; and PLR 201310006.

156. Michaels & Twomey, *supra*. Be mindful of MCL 700.7108(1), which outlines the principal place of administration of a trust and effectively warns that the terms of a trust designating a principal place of administration do not necessarily control if the Trustee’s place of business or place of the ongoing administration deviate too much from the place designated in the trust. *See also* MCL 700.7108(2), which provides the Trustee has a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the qualified trust beneficiaries. But then *see* MCL 700.7108(3), which gives the Trustee flexibility to change the place of administration if it will correlate with the objectives in (2). Finally, *see also* MCL 700.7401 et. seq. (Part 4 of the Michigan Trust Code, Creation, Validity, Modification, and Termination of Trust, does not require a court proceeding to replace a trustee, even if the effect of the trustee’s resignation and replacement affects the trust’s Michigan income tax liability).



Raj A. Malviya practices in the areas of domestic and foreign estate planning, fiduciary income taxation and fiduciary administration at Miller Johnson. Mr. Malviya holds an LL.M. in Taxation from Northwestern University Pritzker School of Law and practices in the firm’s Grand Rapids office.



Jonathan K. Beer practices in the areas of domestic and foreign estate planning, fiduciary income taxation and fiduciary administration at Miller Johnson. Mr. Beers holds an LL.M. in Taxation from Northwestern University Pritzker School of Law and practices in the firm’s Grand Rapids office.

Two Matters Improperly Decided By the Michigan Court of Appeals: *In Re Estate of Sabry Mohammad Attia* and *In Re Estate of James V Ward*

By Alan A. May

The Article's Purpose

This article will critique two recent opinions of the Michigan Court of Appeals which this author believes were wrongly decided. The purpose of making this critique is to improve the law and its practice. So too, to prevent unintended consequences, conflicts and absurdities.

Simplistically, a decision is wrongfully decided when it ignores precedent, misinterprets precedent, relies on dicta, takes theories or rulings out of context, misconstrues statutes or ignores rules of construction.

It is not relevant whether the matter was improperly argued by counsel, whether the issues were not presented properly or preserved properly for appeal.

The issue is—does the decision comport with other existing law and its purpose and what is its impact.

It is always helpful to look at our elders when analyzing the purpose of a law.

The one elder I have chosen as a segue to my critique is Oliver Wendell Holmes and his “bad man” theory. Holmes said, “The bad man cares little about the purpose of the law; just how to stay out of jail and avoid penalties and damages.”¹ Holmes concluded that the law is at best a prediction of what the courts will do. Decisions by a court of appeals should help preserve that prediction and guard against the bad man.

I chose this quote because in my fifty years of litigating probate matters, I see a lot of “bad men” (women too). Keep this in mind when reviewing my two critiques.

In Re Estate of Sabry Mohammed Attia

A statute should not be broadened to create law. Words should be given their natural meaning.

Attia is a published case.²

Facts: Decedent told scrivener to make a will

for him. He died before the document could be “executed.”

Law: MCL 700.2502 requires a will to be signed by testator or by another in his conscious presence.

MCL 700.2503 says, in part:

Although a document or writing added upon a document was not executed in compliance with [MCL 700.2502], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

- a. The decedent's will.
- b. A partial or complete revocation of the decedent's will.
- c. An addition to or an alteration of the decedent's will.

Judge Mack in the lower court decision said as follows:

Well the Michigan statute is based on the Uniform Probate Code, which relates to fixing harmless error and our statute is no different.

If the [L]egislature wanted to permit an unsigned Will to be permitted [sic], then I think the statute would say, although a document was not executed, or was not executed in compliance with the statute then that would have been more appropriate language.

I think that the language in 2503, relates to a document which is executed but is flawed in its execution.

The only case that we have, which is cited in the Federer's notes, is the case out of, I believe it was Australia, where a husband and wife signed Wills, but they signed the wrong Wills and Australia accepted that as a [sic\ execution of some sort, but faulty execution.

So, I think it's a bright line rule in Michigan and I certainly welcome the Court of Appeals to

address it. So I am going to grant Summary Disposition.

The language of the lower court, in the author's opinion, was a correct reading of MCL 700.2502 and MCL 700.2503. The Court of Appeals held that because MCL 700.2503 was violated when an unsigned Will was tendered, MCL 700.2503 kicks in and there is an "execution not in compliance with MCL 700.2502." The lack of a signature was therefore described as a flaw in the execution rather than the lack of execution.

This is a broad interpretation of "not executed in compliance with MCL 700.2502." The statute does not say an unsigned document is one that is not executed in compliance. The Court of Appeals seems to be ignoring the words "not executed" which is within "not executed in compliance". Simple English leads the author to believe that there must be an "execution" in a strict sense and that the execution itself must not be in compliance for MCL 700.2503 to kick in. For instance, Paragraph 1(b) of MCL 700.2502 can be flawed if the signature was not done in the testator's conscious presence.

Why This Author's Interpretation Is the Correct One

Unintended Result

If non-execution is non-compliance under MCL 700.2502 resulting in the application of MCL 700.2503, then the Court of Appeals is recognizing oral wills and gifts *causa mortis*, both long barred by Michigan courts. Judge Mack is correct in stating that if such a draconian effect was intended it would have been clearly stated.³ Execution Has a General Well-Accepted Meaning

The most specific meaning is "signed" (also completed—nothing left to be done).⁴ *Black's Law Dictionary* goes further to say that an "executed oral agreement" is one which has been fully performed.⁵

Statutes in Derogation If Common Law Must Be Strictly Construed and Not Strained to Give an Assumed Intent of the Legislature

The courts must use the strictest and narrowest meaning.⁶ To define "unsigned" as "executed not in compliance" is about as broad as you can get.

People Change Minds

People who come to an attorney for the drafting of testamentary documents or succession documents often change their minds. Some of this author's clients express a clear and convincing intent when at the initial meeting and then they do not come back. Should the law be left to these vagaries? Suppose the client died the same day as the office meeting, or the next day, or the next month, or the next year? Should the *Attia* rule apply in all these instances? Or will the application be up to the whim of the trial judge? Rules should either apply or not apply. They do not slide on a continuum.

*The New Jersey Case, In the Probative Will and Codicil of Macool*⁷

Macool, cited by the court in *Attia*, involved hand-written notes left by the decedent containing changes she wished to make to her will. The court held that the proponent of a will prepared from these notes but unsigned failed to establish that the decedent intended these notes to constitute her will. But the court stated that a will does not need to be signed by the testator for it to be admitted to probate. The fact pattern in *Macool* could have been assessed under Michigan law as either a holographic will or a document intended as a Will and the former was so referenced by the *Macool* Court.⁸ The *Macool* court admitted that its construction should not lead to an absurd result, and for that reason one would hope it would be limited to its facts. (One of the judges in the *Macool* majority changed his opinion in a later case).⁹ In the subsequent case, there was an unsigned document which was reviewed and acceded to in the presence of the scrivener.

A Ruling Should Not Lead to Absurdity

The decedent spits on a rock and declares that it is his present intent, clearly and convincingly, in front of a group of people that all his property

should go to a certain person. This action certainly does not comply with MCL 700.2502. But, under the ruling in *Attia*, since it was not executed in conformity with MCL 700.2502, you would apply MCL 700.2503. This would be an absurd result.

Holmes' Bad Man

There are a lot of those out there. This ruling is an invitation to them.

Where Is It Written That a Scrivener Must Be an Attorney?

Add this to the mix and the door to fraud is far from closing. What about a form that the testator downloads from an online source, fills out, and does not sign?

The Expanded Definition of Children Declared in the Case of *In Re Estate of James V Ward Was Improper*¹⁰

The Court of Appeals found that a step-son could inherit as a son, through intestacy, if there was a mutually acknowledged relationship established between decedent and the child before the eighteenth birthday of the child.

The court relied on MCL 700.214(1)(b)(iii), which said, in pertinent part, “ ‘... a man is considered to be the child’s natural father for purposes of intestate succession’ if the man and child ‘have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.’ ”

This decision was wrongly decided because:

1. The court employed the clearly erroneous standard of review which is the correct standard of review for a question of fact; however, the issue was one of law. To wit: Does this section apply to all stepsons or just those encompassed in the entire section of MCL 700.2114?

2. As with the *Attia* case, the court should have strictly construed the statute as the statute is in derogation of the common law. Intestate succession to a stepchild of any type is in derogation of the common law.

3. MCL 700.2114 prevents the disinheritance

of illegitimate children. The paragraph chosen by the instant court is a subsection of subparagraph (b) which states:

(b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child’s natural father for purposes of intestate succession if any of the following occur:

- (i) The man joins with the child’s mother and acknowledges that child as his child by completing an acknowledgement of parentage as prescribed in the acknowledgement of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.

- (ii) The man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child’s birth.

- (iii) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.

- (iv) The man is determined to be the child’s father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

- (v) Regardless of the child’s age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent’s estate determines that the man is the child’s father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

- (vi) The man is determined to be the father in an action under the revocation of paternity act.

(c) A child who is not conceived or born during a marriage is an individual born in wedlock if the child’s parents marry after the conception or birth of the child.

This subsection is one of six ways an illegitimate child can inherit from someone, not a stepson qua stepson.

4. The decision violates the rule of the Harmonious Whole¹¹—the court neglected to read the subsection as part of the whole section. Similar-

ly, the failure of the court to look at the subsection violates the rule looking at the words which accompany the cited section—“*Noscitur A. Sociis.*”¹²

Conclusion

Regarding *In re James v Ward*, the unpublished case, nothing can be done other than to alert the bar that it is perhaps flawed. Unpublished cases are not supposed to be cited anyway, but if the reasoning is cited, the author's opinion may be freely used. *In re Estate of Attia*, the published case, can lead to improper results in this author's opinion. If the reader agrees with the author, he or she should contact their legislator to make it clear that this was an unintended interpretation of the statute in question.

Notes

1. Holmes, *The Path of Law*, 10 Harvard Law Review, 4567 (1897).
2. *In re Estate of Sabry Mohammad Attia*, No 327925, 2016 Mich App LEXIS 2075 (Nov 10, 2016).
3. *Expressio Unius Est Exclusio Alterius*, *Van Etten v Manufacturers Nat'l Bank*, 119 Mich App 277, 287 (1982).
4. *Black's Law Dictionary*, Fifth Edition, p 509.
5. *Id.*
6. *Bohn v Brown*, 33 Mich. 257 (1876) – chosen to show how old this rule is.
7. *In the Probative Will and Codicil of Macool*, 416 NJ Super 298, 303-304 (2010).
8. *Id.* at 8.
9. *In the Matter of the Estate of Richard D Ehrlich*, 427 NJ Super 64, 426 (2012).
10. *In re Estate of James v Ward*, Nos 327991, 329132, 2016 Mich App LEXIS 1824 (Oct 6, 2016) (unpublished).
11. *Rehnquist Rules of Statutory Construction*, *Smith v United States*, ___US___, 113 S Ct 2050, 2057 (1993); see also *Alexander v Cosden Pipeline Co*, 290 US 484 (1934).
12. *Patton v United States*, 159 US 500 (1895).



Alan A. May practices in the areas of probate litigation, probate administration, and estate planning. Vice president of the firm, he specializes in guardianships and conservatorships. Until 2001, Mr. May practiced under the firm name of May & May, PC. He serves as a court-appointed referee in Wayne and Oakland County Probate Courts, a special assistant attorney general in Michigan, a Wayne County public administrator, and a mediator in Oakland County Circuit Court. Mr. May has chaired the Federal Judicial Evaluations Committee and the Michigan Civil Rights Commission and has served on the Michigan Civil Service Commission. He is a member of the State Bar of Michigan and the District of Columbia Bar. An avid author in the field of probate law, Mr. May also has been a lecturer and instructor for ICLE, the Michigan Trial Lawyers Association, Wayne State University, and Oakland University.

Conflicts of Interest in Estate Planning and Litigation (Or “How Many Hats Are Too Many?”)

By Robert S. Zawideh

At the risk of stating the obvious, the odds that an attorney will be subject to a grievance, a malpractice action, or another unpleasant experience rise in direct proportion to the number of hats worn by that attorney. Despite the clear and common sense nature of that statement, every law book in every American jurisdiction is filled with cases involving extremely capable attorneys and law firms who failed to recognize the warning signs that their representation of one client may be compromised by their duties to other clients or third persons. Indeed, conflicts of interest are in many ways the hidden landmines that can wreak havoc with an attorney’s representation of their client, their law license and their insurance premiums. While many conflicts are obvious and easily avoided, such as representing a husband and wife in a divorce, others are not, such as when two cooperative clients retain counsel but subsequently turn on one another when their interests collide. This article will examine potential conflicts in the area of estate and trust planning and litigation in an effort to guide the probate and trust practitioner through this dangerous minefield.

“It is a well-established ethical principle that ‘an attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute.’ *Barkley v Detroit*, 204 Mich App 194, 203, 514 NW2d 242 (1994). Further, ‘under no circumstances could a lawyer properly represent both the plaintiff and the defendant in contested litigation.’ *Friedman v Dozor*, 412 Mich 1, 24, n 10, 312 NW2d 585 (1981).” *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 197–98, 650 NW2d 364 (2002). Attorneys have a “duty of undivided loyalty which an attorney owes to each of his clients.” *El Camino Res, Ltd v Huntington Nat’l Bank*, 623 F Supp 2d 863, 879 (WD Mich 2007).

As a starting point, the first, but by no means

the last place for an attorney to look to ascertain their duties to a client is the Michigan Rules of Professional Conduct (“MRPC”). According to MRPC 1.16(a)(1), unless otherwise ordered by the Court, “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or other law”. As to conflicts between clients and other current clients and parties with whom the attorney has an existing relationship, MRPC 1.7(a) “A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.” (Emphasis added). MRPC 1.7(b) goes on to provide in pertinent part that “[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client *or to a third person, or by the lawyer’s own interests*, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.” (Emphasis added).

MRPC 1.9 governs the attorney’s relationship with the former client. Under MRPC 1.9(a), “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.”

Subsection (b) goes on to state that “[u]nless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was

associated has previously represented a client (1) whose interests are materially adverse to that person, and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.”

Lastly, MRPC 1.9(c) provides that “[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.”

Quoting the State Bar of Michigan Ethics Committee, the Court of Appeals in *Evans & Luptak* observed that the “conflict of interest rules are a frank recognition that, human nature being what it is, a dual relationship involving adverse or conflicting interests, constitutes enormous temptation to take advantage of one or both parties to such relationship and that *the purpose of [the conflict of interest rules] is to condemn the creation and existence of the dual relationship instead of merely scrutinizing the results that may flow therefrom.*” *Evans & Luptak*, at 198. [Emphasis in original, internal citations and quotation marks omitted.]

An attorney acting either as a fiduciary to a trust or an estate, or as an attorney for one, however, has obligations separate from, and in addition to those found in the MRPC. A fiduciary to an estate or a trust “stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary” and among his or her other obligations, “shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries.” MCL 700.1212(1); see also MCL 700.7802(1) “[a] trustee shall admin-

ister the trust solely in the interests of the trust beneficiaries.” (Emphasis in original).

An attorney in this situation must be mindful of how he or she arrived there. In other words, to whom does the attorney owe an undivided duty of loyalty: the client who retained him and asked him to serve as a trustee of a trust, to the beneficiaries of that trust, or both? The dangers to counsel are magnified in a situation where the attorney is acting as both attorney to a client and as fiduciary of an estate and trust.

First, as an attorney retained by a fiduciary of an estate or trust, knowing what your duties are and the identity of the persons to whom you owe them is critical. Unfortunately, the persons to whom the attorney may owe a duty are not entirely clear. According to MCR 5.117(a), “[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.” This court rule was cited with approval in *Ward v Knudsen, Wasiura & Assocs*, No 187604, 1997 Mich App LEXIS 2918, (Apr 22, 1997), where the Court of Appeals affirmed the dismissal of Plaintiff’s legal malpractice claim against the defendant law firm. Specifically, the Court rejected Plaintiff’s argument that the law firm, which represented the personal representative of his late father’s estate, essentially represented him as one of the beneficiaries of the estate. “Under current law, the law firm represents the personal representatives of decedent’s estate, defendants Ward and Smith, not the estate itself. MCR 5.117(A). *Because an attorney-client relationship does not exist between the estate and the law firm, we can find no attorney-client relationship between the law firm and plaintiff on the ground presented.* Consequently, no error can be found on this ground. *Ward v Knudsen, Wasiura & Assocs*, at *1. (Emphasis added)

Twelve years later, in the case of *Estate of Graves v Comerica Bank (In re Estate of Graves)*, No 286674, 2009 Mich App LEXIS 2523 at *12 (Dec 3, 2009), the Court of Appeals took the opposite position. In their opinion, the Court affirmed the probate court’s order surcharging

the attorney for the personal representative for issuing to the personal representative checks made out to her individually. “Ford was Preshus Graves’ attorney, MCR 5.117(A), but because Preshus Graves was a personal representative,¹ *Ford’s ‘client’ also effectively includes the estate, not just the fiduciary thereof* in her personal capacity. See MCL 700.3715; *Steinway v Bolden*, 185 Mich App 234, 237–238, 460 NW2d 306 (1990). As a consequence, the attorney would be subject to a proceeding to surcharge pursuant to MCR 8.122 by a replacement fiduciary. *Id.*, 236–238, 460 NW2d 306.” (Emphasis added).

No case better illustrates the problems of wearing too many hats than the case of *In re Green Charitable Trust*, 172 Mich App 298, 431 NW2d 492 (1988). To understand the conflicts that embroiled this case requires a review of the factual history of *Green*:

Leslie and Edith Green owned and maintained a residence on 315 acres in Bloomfield Township, Oakland County, known as Turtle Lake Farms. In 1969, Leslie and Edith Green created a charitable trust funded in part by a grant of an interest in Turtle Lake Farms... . *The named trustees were the Greens, Comerica and Miles Jaffe.*

Mr. Green died in 1973. His will gave Mrs. Green a life estate in the portion of Turtle Lake Farms including their residence and created a marital trust for the benefit of his wife during her lifetime. The charitable trust was made the residuary beneficiary of the marital trust and would receive the marital trust’s interest in Turtle Lake Farms upon Mrs. Green’s death. **Comerica was named sole trustee of the marital trust.**

Mrs. Green died in March, 1983. . . Mrs. Green’s estate consisted of cash and securities valued at \$1,340,000, plus her interest in Turtle Lake Farms. *Comerica was designated personal representative of the estate.*

Upon Mrs. Green’s death, Bishop McGehee and Dean Herlong of the Episcopal Church became co-trustees of the charitable trust as provided for under the trust. *Under the trust, only Comerica and Jaffe were empowered to make decisions*

regarding the disposition of the real property.

According to respondents, soon after Mrs. Green’s death they determined that the liquid assets of the estate were insufficient to satisfy the cash bequests, the funding of the \$1,000,000 trust fund for the granddaughter, the estate taxes and the administrative expenses. After reviewing the options, *Comerica and Jaffe concluded that the interests of the estate and its beneficiaries would best be served by the sale of the Turtle Lake property.*

At Mrs. Green’s death, three entities owned undivided interests in Turtle Lake: the Edith Green estate, the marital trust, and the charitable trust. *For the sale, Comerica acted in three capacities: as executor of the estate, as sole trustee of the marital trust, and as one of the trustees of the charitable trust. Jaffe also acted in several capacities. He was a trustee of the charitable trust. Also, Jaffe and his firm, Honigman, Miller, Schwartz & Cohn, were attorneys for the estate, for Comerica as executor, for Comerica as trustee of the marital trust, and for Comerica as trustee of the charitable trust.* The record also contains testimony of Dean Herlong to the effect that *Jaffe, at least on one occasion, provided legal advice to him in his role as trustee. Jaffe had been a personal friend of the Greens, as well as their attorney. He drafted their wills and the trust instruments.*

. . .

On September 15, 1983, Comerica accepted an offer from Maurice Cohen for the Homestead. The sale was closed on November 1, 1983, by execution of a land contract for \$3,250,000, with \$1,500,000 down payment and the balance over two years at twelve percent interest. *Maurice Cohen is a successful real estate developer and was represented by the Honigman firm.” In re Green Charitable Trust*, 172 Mich App at 302–305 (1988) (Emphasis added).

Not surprisingly, objections were filed by the charitable trust beneficiaries “to Jaffe’s and his law firm’s conflicts of interest in representing both buyer and seller, to Comerica’s manage-

ment of the sale of the property, and to the adequacy of the price received for the Homestead.” *Id.*, at 305. For purposes of this article, our focus is only on the *Green* Court’s analysis of the conflicts of interest found in this case. The Court began the analysis by stating,

It is a fundamental principle that the trustee must display complete loyalty to the interests of the beneficiary, to the exclusion of all selfish interests or consideration of the interests of third parties. This principle is based on the understanding that a person acting in two capacities or in behalf of two interests may consciously or unconsciously favor one side over the other. *It is not necessary that the trustee gain from the transaction to find disloyalty.* In its desire to guard the highly valuable fiduciary relationship against improper administration, *equity deems it better to forbid disloyalty and strike down all disloyal acts, rather than to attempt to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests.*

As an attorney, Jaffe also had an obligation to use his skills and judgment in representing his client, thereby assuming a position of the highest trust and confidence. *A lawyer who is also a fiduciary bears a doubly high degree of responsibility and accountability.* While the Code of Professional Responsibility is not directly in issue in this case, it is relevant as expressing a standard of professional conduct expected of lawyers by which Jaffe may be measured. At the very least, the Code puts the attorney on notice that he is to be sensitive to the potential problems accompanying the representation of multiple clients, Canon 5, *and that it is his duty to avoid even the appearance of impropriety. In re Green Charitable Trust*, at 323–24 (emphasis added, internal citations and quotation marks omitted).

The Court concluded that “[g]iven our earlier finding on the inadequacy of the sale efforts, we cannot say that Jaffe’s actions were the fair and adequate dealings of the loyal fiduciary. The court did not clearly err in finding a conflict or in finding that the conflict resulted in a breach

of Jaffe’s fiduciary duties.” *Id.*, at 326. In reaching that conclusion, the Court relied on the testimony of Mr. Jaffe himself, who opined that “[i]t’s very difficult in these kinds of situations, ... to differentiate the head that you’re using as trustee from the head that you’re using as counsel. After all, you only have one. *You have a lot of hats but you only have one head.*” *Id.*, at 325 (emphasis added).

Guiding Principles

The wise of words of Mr. Jaffe should guide all probate and trust practitioners. Even where counsel is retained to represent a fiduciary, given the conflicting unpublished rulings of the Court of Appeals, care should be taken by counsel, beginning with his or her retainer agreements, which are to be approved by the court that the scope of the representation is clearly limited only to representing the fiduciary, and not the estate or its heirs, devisees or beneficiaries. When determining whether to act as both counsel and trustee / personal representative / or other fiduciary, the first, best and safest response is to respectfully decline, and limit yourself to one hat in order to allow your one head to rest more easily at night.

If circumstances require otherwise (and assuming the absence of unwaivable conflicts under MRPC 1.7 and 1.9), remember that “a lawyer who is also a fiduciary bears a doubly high degree of responsibility and accountability.” Further, if as a fiduciary you have more than one hat (which this author does not recommend), then “wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.” See *Hughes Aircraft Co v Jacobson*, 525 US 432, 443–444 (1999); *Varity Corp v Howe*, 516 US 489, 497 (1996) (a case involving a fiduciary’s duties under ERISA law).

There are three practices that will offer the greatest protection to an attorney either acting as fiduciary, or representing one. The first is complete transparency for all actions taken as a fiduciary. The second is a detailed delineation of the scope of counsel’s duties and obligations

to clients, fiduciaries, heirs, devisees and beneficiaries, and with an explanation of the limits of counsel's powers and obligations with respect to each hat counsel plans to place on his head. The third practice is to file a petition for instructions with the probate court prior to proceeding down this path.

Proactively mitigating those conflicts at the outset, as well as regularly re-examining the potential for conflicts will go a long way toward eliminating any arguments of impropriety and hopefully ensure that probate and trust counsel, like Caesar's wife, remains above suspicion.



Robert S. Zawideh is an attorney with The Kemp Klein Law Firm in Troy, Michigan, practicing in the area of Probate and Trust law and litigation. He is a graduate of Wayne State University Law School, and of the James Madison College of Michigan State University.

Notes

1. This is an error in the opinion, as Preshus Graves was actually appointed as the Conservator for Calvin Graves, a minor. Nonetheless, for purposes of this discussion, the distinction is immaterial.

Long-Awaited Probate Appeals Legislation Brings Uniformity and Efficiency

By Liisa R. Speaker

A process that began in September 2010 with a committee of the Probate & Estate Planning Section exploring a proposed amendment to the court rules came to fruition in September 2016 with extensive legislative revisions. The process was long and the road was winding, but in the end, the legislation achieved the goals of the original proposal—to eliminate all circuit court appeals from the probate court and direct those—appeals to the Court of Appeals instead. Numerous stakeholders worked on the project – through the Probate Court Appeals Work Group—including representatives of the Probate & Estate Planning Section, Michigan Probate Judges Association, the Court of Appeals, Michigan Judges Association, and Appellate Practice Section.

This article summarizes the new legislation and related considerations, including effective dates and retroactivity.

No More Appeals from Probate Court to Circuit Court

The biggest change effected by the legislation is eliminating appeals from probate court to circuit court. The new probate appeals legislation began as a proposed court rule. However, the Supreme Court declined to adopt the proposal (embodied in Administrative Order 2011-30) because “[t]he Court was not persuaded that this type of amendment is appropriate for adoption as a court rule, and believes it would more properly be submitted to the Michigan Legislature for its review” since the Legislature has the authority to set the jurisdiction of the courts. MCL 600.863; Const 1963, art 6, § 10. The Legislature subsequently enacted SB 632 and HB 5503.

Under the new legislation, all orders of the probate court are appealable to the Court of Appeals. This changed the previous system where

some probate orders were appealable by right to the Court of Appeals, some were appealable by right to the Circuit Court, and some were only appealable by application to the Circuit Court. See Liisa R. Speaker, *How do you know when to file your Probate Appeal in the Court of Appeals or the Circuit Court?* Mich Prob & Estate Planning J, p. 36 (Summer 2013). The new legislation also remedies the problem created when a single hearing and a single order arose from two related case files. For example, a case with both a guardianship and a conservatorship case code would require an appeal from the conservatorship part of the case to be directed to the Court of Appeals, while an appeal from the guardianship part of the case would have to be directed to the Circuit Court. See Liisa R. Speaker, *The Trouble with Guardianship Appeals*, Mich Prob & Estate Planning J, p. 37 (Spring 2013). The new legislation means that an aggrieved party will no longer have to pursue simultaneously two appeals from the same order to two different courts.

Identifying the Orders Appealable by Right to the Court of Appeals

At the time of the writing of this article, the court rules are in the process of being updated to reflect the jurisdictional change for probate appeals. The proposed amendment to the court rules retains the “laundry list”—the lengthy list of probate orders that are appealable by right, as contained in MCR 5.801(B)(2). Supreme Court Proposed Amendment, ADM File No. 2016-32. The court rules will need to be amended to add the additional types of probate orders that are appealable by right. The proposed amendment adds the following types of appeals to the court rules as being appealable by right: guardianship orders, involuntary mental health treatment orders, a final order affecting the estate of a person

who has disappeared or is missing, a final order affecting the estate of an individual with development disabilities, and a final order affecting an inter vivos trust or a trust created under a will. Supreme Court Proposed Amendment, ADM File No. No 2016-32 (amending MCR 5.801(B) and MCR 7.202(6)(a)).

Major Changes to the Automatic Stay Pending Appeal Provision

Prior to the new legislation, an appeal from a probate court order would afford the litigant an automatic stay pending appeal. MCL 600.867. The former statute did not stay the entire probate matter but only the “proceedings in pursuance of the order” that were pending on appeal. *Comerica Bank v Adrian*, 179 Mich App 712, 446 NW2d 553 (1989). Determining what was and was not stayed pending appeal would sometimes create additional litigation and greater uncertainty. See Liisa R. Speaker, *The Mysterious World of Stays Pending Appeal in Probate Matters*, Mich Prob & Estate Planning J, p. 44 (Winter 2011). Appellate attorneys, however, enjoyed the prior version of the statute because it allowed them to avoid having to file a motion in the trial court or Court of Appeals to obtain a stay pending appeal. *Id.*

The new legislation eliminates the automatic stay pending appeal. Instead, it replaces the provision with a 21-day stay period. But unlike the standard 21-day stay period in a civil case that begins with the entry of the order under MCR 2.614, the new probate legislation creates a 21-day stay period that begins with the filing of an appeal by right. MCL 600.867(1). The purpose of the 21-day stay period is to give the litigants an opportunity to file a motion for stay in the trial court. MCL 600.867(1). The new legislation, however, exempts appeals from probate court orders under the mental health code (MCL 330.1000 to 330.2106) and guardianship appeals (MCL 700.5201 to 700.5319) from the 21-day stay period. MCL 600.867(2).

Certain Probate Appeals May Be Given Priority Status

As noted above, under the prior court rules, appeals from the mental health code and guardianship appeals were only appealable to the circuit court. MCR 5.801(C). There was a concern that moving the jurisdiction of those appeals from circuit court to the Court of Appeals would cause delays in those decisions. As a result, the proposed amendment to the court rules identifies mental health code appeals and guardianship appeals as priority cases at the Court of Appeals. Supreme Court Proposed Administrative, ADM File No. 2016-32 (amending MCR 7.213(C)). Specifically, the proposed court rules adds to the priority calendar “guardianship cases under the Estates and Protected Individuals Act and under the Mental Health Code, mental illness cases, and orders affecting rights or interests of a person in the estate of an individual with developmental disabilities.” Supreme Court Proposed Amendment, ADM File No. 2016-32 (amending MCR 7.213(C)). This proposal regarding priority, however, was not part of the package submitted by Probate Court Appeals Work Group or the Probate & Estate Planning Section.

Effective Date of the Legislation Is September 27, 2016

The effective date of the legislation is September 27, 2016. While it is typically easy to determine the effective date of new legislation, the new probate appeals legislation (contained in SB 632) was tie-barred to another piece of legislation (contained in HB 5503). SB 632 was signed into law on June 20, 2016, and normally would have gone into effect on September 20, 2016. However, SB 632 could not go into effect until the Governor signed HB 5503 into law, which did not occur until September 27, 2016. Therefore, there does not appear to be any dispute that the effective date of the new probate appeals legislation is September 27, 2016. And the effective date of HB 5503 is December 26, 2016.

Retroactivity Rules Should Not Impact the Revision to the Automatic Stay Provision

The question of whether the new probate appeals legislation will be retroactive is primarily relevant to the automatic stay pending appeal provision that formerly existed under MCL 600.867. The revision to the stay rule should be prospective only, since making it retroactive would wreak havoc in pending appeals. And honoring the automatic stay for those appeals pending on September 26, 2016 would not create administrative hassles; there were only approximately 70 cases pending at the Court of Appeals on September 27, 2016. That number continues to decline as those appeals are resolved (by decision or settlement).

As a general rule, statutes and amended statutes are applied prospectively unless the Legislature clearly, directly, and unequivocally expresses an intent to the contrary. *Davis v State Employees' Ret Bd*, 272 Mich App 151, 155-156, 725 NW2d 56 (2006). Even if the Legislature intended the statute to apply retroactively, however, "a statute may *not* be applied retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past." *Id.* at 158.

An exception to the general presumption of prospective effect is that remedial and procedural statutes are generally applied retroactively. *Id.* at 158-159. However, this exception is still subject to same restraint that prohibits a statute from being applied retroactively if it "abrogates or impairs vested rights." *Id.* at 158. A statute of limitations is an example of a procedural statute that is not applied retrospectively because it affects substantive rights. *Id.* at 160-162. "[T]he pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose." *Id.* at 163, quoting *Chase v Sabin*, 445 Mich 190, 192 n.2, 516 NW2d 60 (1994). Moreover, if the Legislature manifested an intent that the statute have only prospective effect, then it should be applied

only prospectively. *Id.* at 159-160.

The former version of MCL 600.867(1) was a substantive rule or, in the alternative, the new statute is a procedural rule that abrogates a vested right of a party. The former MCL 600.867(1) stated:

After an appeal is claimed and notice of the appeal is given at the probate court, all further proceedings in pursuance of the order, sentence, or judgment appealed from shall cease *until the appeal is determined*[.]

MCL 600.867(1), as amended by 1979 PA 69 (emphasis added). The statute provided an automatic, guaranteed stay of proceedings in pursuance of the order appealed for all probate cases. This was a stay that litigants could rely upon and was not subject to the discretion of the Probate Court or the Court of Appeals.

The new, amended statute provides:

After an appeal of right from a judgment or order of the probate court is filed with the court of appeals and notice of the appeal is filed with the probate court, all further proceedings in pursuance of the judgment, order, or sentence, appealed from are stayed *for a period of 21 days or, if a motion for stay pending appeal is granted, until the appeal is determined*[.]

MCL 600.867(1), as amended by 2016 PA 186 (emphasis added). It automatically stays the case for only 21 days after the claim of appeal is filed. Any stay for the entire pendency of the appeal must be by motion and is at the discretion of the Probate Court or the Court of Appeals. MCR 7.209.

Under the former statute, the stay is essentially "of right." Under the newly enacted statute, the stay is at the discretion of the Probate Court or Court of Appeals. For those appellants who filed an appeal by right prior to September 27, 2016, the right to a stay of proceedings became vested, because a stay automatically went into place under the then-controlling statute. Moreover, under the former statute, that stay was to last "until the appeal is determined." MCL 600.867(1), as amended by 1979 PA 69. To abruptly end that

stay now—while an appellant’s appeal is still pending—would deprive the litigant of a vested right in an automatic stay. Thus, it is the author’s position that the new legislation is substantive in nature or a procedural statute impairing a vested right, both of which prevent the statute from applying retroactively.

In addition, it is questionable whether the amended statute could, by its own terms, retroactively apply to cases where an appeal has already been filed. Both versions of the statute use language indicating that the provision applies at the time the claim of appeal is filed. *Compare* MCL 600.867(1), as amended by 1979 PA 69 (“After an appeal is claimed and notice of the appeal is given at the probate court...”), *with* MCL 600.867(1), as amended by 2016 PA 186 (“After an appeal of right from a judgment or order of the probate court is filed with the court of appeals and notice of the appeal is filed with the probate court...”). Under the prior version of the statute, a stay is automatically entered at the time the appellant files a claim of appeal and continues until the conclusion of the appeal. There is nothing in the new legislation that states that stays already in place under the former statute are now dissolved. It simply states that when a claim of appeal is filed (presumably a *new* claim of appeal), there is a stay for only 21 days. MCL 600.867(1), as amended by 2016 PA 186. This seems indicative of a Legislative intent that the statute applies only to new claims of appeal filed after the statute became effective.

Transitioning the Courts to the New Legislation

Undoubtedly the appellate courts have a lot of work to do to implement the new probate appeals legislation. First, the Supreme Court will need to adopt amended court rules. Although there are still many unknowns, it is anticipated that the Supreme Court will adopt a set of modified rules on an interim basis and then publish the proposed amendments for public comment and public hearing. This way, the Court of Ap-

peals will have some court rules to follow pending the adoption of final rules. Meanwhile, interested groups and individuals will still have an opportunity to comment on the proposed court rules, and the Supreme Court will have an opportunity to consider the public comments and revise the proposed court rules as it deems necessary.

Second, the Court of Appeals will need to do some internal planning to accommodate the new appeals that were previously only allowed in the circuit court. It is not clear at this point how many circuit court appeals of probate court orders were filed statewide that would now be impacted by the new probate appeals legislation.

Third, the Circuit Court will also need to adjudicate those probate appeals (both by right and by application) which were filed in the Circuit Court prior to September 27, 2016. To that end, the Supreme Court has encouraged the circuit courts to finalize those appeals as quickly as possible. Supreme Court Administrative Order No 2016-04. In addition, the Supreme Court has required the circuit courts to report on the number of appeals currently pending in circuit court. Supreme Court Administrative Order No 2016-04.



Liisa R. Speaker is an appellate attorney in Lansing. She began to work on the probate appeals project while serving as Chair of the Appellate Practice Section in 2012, when she joined the Probate Court Appeals Work Group as a representative for the Appellate

Practice Section. She testified before the Michigan Supreme Court on May 16, 2012, in favor of the proposed court rule amendment, alongside other members of the Probate Court Appeals Work Group, and she continued to collaborate with the team on the legislative front after the Supreme Court declined to effectuate the change via court rules. The Probate Court Appeals Work Group consisted of Marlaine C. Teahan, Judge David M. Murkowski, Shaheen I. Imami, Gary L. Chambon, and Liisa R. Speaker.

Pets Put Their Trust in Us—Put Them in the Trust: Default Provisions That Protect Pets

By Rebecca Wrock

Editor's Note: An earlier version of this article was published as the lead article for the Spring 2016 issue of the Newsletter of the Animal Law Section of the State Bar of Michigan. The Spring 2016 issue as well as other issues can be found at <http://connect.michbar.org/animallaw/newsletter/newsletters>.

Estate planning attorneys have the opportunity to ensure that pets are protected when their owners pass away or become incapacitated.

Some clients go to an attorney specifically with this objective or enthusiastically climb on board when it is suggested. There are many options available to these clients, including pet trusts, powers of attorney for pet care, and pet care wallet cards. Other clients may not consider planning for their pet to be a priority, may not have any pets at the time of executing their estate plan, or may not believe that there is anyone who can care for their pet in the event that they are not able to do so themselves. This article will discuss what the estate planning attorney can do to protect pets in these situations.

Default Provisions

For clients who love their pets but don't consider planning to be a priority, or for clients who do not have pets at the time of executing their estate plan but who could have pets subsequently, default provisions can offer extra protections for pets. These provisions may be added to trustee powers in the clients' trust, personal representative powers in the clients' wills, and agent powers in the clients' durable power of attorney for both finances and healthcare.

The provisions relating to trusts and wills, examples of which are included in the boxes within this article, are designed to give basic protections to pets who haven't otherwise been expressly provided for. These protections include the power of the trustee or personal represen-

tative to arrange for temporary care of any pets until they can be placed with a permanent caretaker, to arrange for a veterinary exam in order to assess health and return any pets to a healthy condition at the expense of the trust or residuary estate, to pay for the cost of food and other necessities at the expense of the trust or residuary estate, to ensure that multiple pets stay together whenever possible, and to ensure that the only instance in which a pet is euthanized is upon a determination by the pet's regular veterinarian that continuation of life would only result in suffering for the pet.

Similarly, the provision relating to financial durable powers of attorney is designed to allow the agent to ensure that pets are cared for during periods of the client's incapacity, or, if the power of attorney is immediately effective, upon the client's unavailability.

The provision relating to healthcare powers of attorney is not as obviously related to pets, though it is easily applied for their benefit. Imagine a client taken to a hospital or similar care facility for an extended period, and a pet at home who is clueless as to where the client has gone and why he or she has been gone for so long. If the client uses the provided space to state his or her preference that the pet be allowed to visit the care facility, the care facility may be more likely to allow the pet to visit and spend time with the client. In writing such instructions, clients should understand that they are bound by the rules of their care facility, and such instructions are not determinative. However, knowing the express preferences of the client may tip the scales in the client's favor if a decision maker at a care facility is on the fence about allowing such a request.

Of course, these provisions may be modified to provide extra protection, for example, to require a determination by two independent veterinarians, instead of one, before a pet may be

euthanized. The modifications that can be made are endless, and you may want to increase the protections within your default provisions as you get a sense of what most of your clients with pets need, because after all, default provisions are meant to provide the most favorable outcome to the greatest number of people. Including these provisions for all clients, and not just those with pets, will provide a good foundation of protection for after-acquired pets, as well as then-existing pets who haven't been planned for.

While the foregoing is not as favorable as defined provisions specifically set out by the client, either as a sub trust or as a completely separate pet trust, incorporating these provisions will protect all of your clients' pets and will add to the completeness of your clients' estate plans. Most clients who don't take the time and expense of a separate pet trust will appreciate their attorney's thoroughness and will appreciate that their attorney thought to offer their pet(s) minimum protections at no extra charge. After all, it only takes the time of adding these provisions into a form bank once to offer these protections to every pet of every client. In some cases, clients may be so taken with the default provisions that they decide to personalize the provisions, or provide additional pet trust style protections after all.

Counseling Clients

Separate pet trusts, default provisions, or a combination of the two, will cover almost every client you could encounter who has a pet. Yet, we've all seen stories in the news about the elderly widow who passes away and directs that her beloved dog be euthanized and buried with her. While this scenario is rare, which is perhaps why it makes the news when it happens, one has to wonder whether an attorney drafted that provision, whether the attorney tried to counsel the client as to other options, and why, ultimately, the attorney would include such a wish.

Fortunately, when such provisions do show up, judges consistently strike them out of estate plans as running afoul of public policy. This begs

the question, why are these clauses still being drafted? After all, for most clients, estate planning is undertaken in the first instance to avoid probate court – so why draft a clause that is almost certain to wind up there? Instead, attorneys should counsel clients as to the reality of such a proposed plan and offer as solutions the endless alternatives that are available that allow a decedent's pet to live out his or her full natural lifespan. Truly, while the relationship between the pet and a new caretaker can never be the same as the relationship with the deceased caretaker, it is still possible for the pet to find happiness and be well cared for in a new home. In most cases, impressing upon the client that the best route is to name at least one suitable caretaker followed by a rescue or shelter—that is both chosen by the client and willing to rehome the pet—as the “last stop” in the succession, will achieve a positive outcome for the pet.

In rare cases, our values as animal advocates may require us to refuse to draft a provision that puts a healthy pet's life in jeopardy. We are able to refuse to draft such clauses based upon our values pursuant to the Michigan Rules of Professional Conduct (MRPC) 1.16(3), which states that a lawyer may withdraw from representation if “the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.” Certainly, sentencing healthy pets to death falls within this category, for those of us concerned for their welfare. While we should always try to counsel the client as to the many alternatives first, we do have MRPC 1.16(3) in the toolbox if the client is insistent upon such a course.

Conclusion

In sum, pet trusts, powers of attorney for pet care, and other pet-specific documents should be used whenever possible to ensure maximum protection and the most complete estate plan. Such documents provide the greatest protection for pets and greatest peace of mind for clients. However, at the minimum, default provisions like

those set forth in this article provide certain protections for all of your clients' pets whether they have been otherwise provided for or not. These minimum protections are not only a great service to your client as an attorney, but a great act of kindness to your clients' pets as an advocate for animals.

Finally, we have a responsibility not only to refuse to draft clauses that would sentence healthy animals to death, but to educate our colleagues as to why they should refuse, too.



Rebecca Wrock concentrates her practice in estate planning and taxation at Couzens Lansky. She holds a B.S. from the University of Michigan, a J.D. from Wayne State University Law School, and an LL.M. in tax from the University of Alabama School of Law. Couzens

Lansky is a full service business, tax, estate planning, litigation, real estate, employment and commercial law firm serving the needs of individual, corporate and business clients of all sizes.

Provisions to Add to Your Documents

(Add to Trustee Powers in Trusts)

“Pets. In the event that the last surviving settlor owns one or more pets at his or her death, to arrange for the following:

- (a) Temporary Care. Arrange for care of Settlor’s pet(s) until permanent arrangements can be made;
- (b) Veterinary Care. Seek veterinary care for Settlor’s pet(s) to assess their health and return any unhealthy pet(s) to a healthy condition;
- (c) Expenses. Charge against the trust the reasonable cost of food, veterinary care, and other necessities for the pet(s) during the time period prior to when the pet(s) are placed with their permanent Care-taker;
- (d) Multiple Pets. Ensure that, in the event that the last surviving settlor owns two or more pets at his or her death, all pets remain together whenever possible;
- (e) End of Life. A pet shall only be euthanized upon the determination of the pet’s regular veterinarian that because of an incurable health condition, continuation of life would only result in suffering for the pet. Under no circumstances shall a pet be euthanized by reason of the last surviving settlor’s death.”

(Add to Agent Powers in Financial Durable Powers of Attorney)

“Pets. To arrange for temporary care of my pet(s) in my home, including the reasonable cost of food, veterinary care, and other necessities for the pet(s).”

(Add to Personal Representative Powers in Wills)

“To arrange for the following for any pets I may own at my death:

- (a) Temporary care of my pet(s) until permanent arrangements can be made;
- (b) Veterinary care for my pet(s) to assess their health and return any unhealthy pet(s) to a healthy condition;
- (c) Payment of expenses from my residuary estate for the reasonable cost of food, veterinary care, and other necessities for the pet(s) during the time period prior to when the pet(s) are placed with their permanent Caretaker;
- (d) For all pets to remain together whenever possible, in the event that I own two or more pets on the date of my death;
- (e) Only upon the determination of the pet’s regular veterinarian that because of an incurable health condition, continuation of life would only be sufferable for the pet, may my personal representative arrange for euthanasia of my pet. Under no circumstances shall a pet be euthanized by reason of my death.”

(Add to “Instructions to Agent” clauses in Healthcare Powers of Attorney)

“Without limiting subsequent instructions, oral or written, the following shall be considered instructions and provisions of this instrument:”

Why Would You Worry About Proposed Regulations to Section 2704?

By Lorraine F. New

New Regulations for Section 2704 were recently proposed. Why should you be concerned? After all, proposed regulations issued in August do not become effective until after comments and testimony are received and 30 days after final regulations are issued. It might change! The truth is that estate planning professionals have called these proposals “a game changer.” There are things you should be aware of, and may be able to act on, before the regulations become effective, perhaps as early as January 2017.

The proposed regulations target valuation discounts for family related entities, even those holding operating businesses, and of course the family limited partnerships, LLCs, etc., that can hold land, securities, and even cash, which are currently being gifted or inherited with discounts that range from 30%-50% of the assets' value. The basis for the discounts is that because when interest in the entity is gifted, the value drops because control is dispersed and the interest is harder to sell.

The courts have applied various ways to allow discounts even when the family clearly controls the distribution of the assets. The IRS lost a series of cases and had to agree not to apply family attribution to valuation of entities owned primarily by family members (Rev. Rul. 93-12, 1993-1 C. B. 202). In the announcement of the proposed regulations, Mark Mazur, Treasury Assistant Secretary for Tax Policy, noted that “[b]y taking advantage of these tactics, certain taxpayers or their estates owning closely held businesses or other entities can end up paying less than they should in estate or gift taxes.”

The new rules provide for a three-year test back from the date of the transferor's death. It appears to recapture the discount in the transferor's estate, similar to the transfer of life insurance policies for someone who dies within three years. (Proposed Reg. Sec. 25-2704-1)

The proposed regulations address what constitutes control of an entity, redefine “applicable restriction” as relates to state law, and change the effect of giving interest to nonfamily members. The proposed regulations discuss “disregarded restrictions.” These new concepts are controversial, and clearly they will elicit comments from estate planning practitioners who feel that family members will be treated less fairly.

While these changes, as proposed, primarily affect the 250,000 U.S. households that have over \$10 million in assets, it may affect those with assets of less value. Appraisals will have to change to accommodate these rules. Basis step up to family members will change, and IRS forms 709 (gift tax return), 706 (estate tax return) and 8971 (basis reporting) will be changed. What has commonly been used to value assets for planning techniques will give way (discounted gifts of family interests, GRATS) to new ones, and estate planning for those that have family entity assets may need to be revisited. Some clients may want to do estate planning, or finish a gifting plan, before any new regulations are final.

So give those proposed regulations a read!



Lorraine F. New practices in the area of estate and gift tax returns, preparation and audits, estate planning, and tax controversies. Ms. New, formerly of the IRS Estate and Gift Tax Division, Detroit, has worked in estate tax since 1988 and was the division manager from

2002 to January 2007. She serves as an expert witness and uses her expertise to assist taxpayers and their representatives through the intricacies of the IRS with estate planning, return preparation or review, appeals, drafting of legal opinions or private letter ruling requests, and representation for controversies at every level at any place in the country. Ms. New is also of counsel for George W. Gregory PLLC.

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law

By Hon. Phillip E. Harter

Wills—Failure of Testator to Sign Document—Writings Intended As Wills

***Attia v Hassan (In re Estate of Attia)*, No 327925, 2016 Mich App LEXIS 2075 (Oct 10, 2016)**

The decedent executed a will on July 8, 1986, and executed codicils to the will on February 17, 2009, and February 1, 2013. The decedent died on September 11, 2014. Appellee, Mayssa Attia, was appointed personal representative of the decedent's estate following his death. She filed a petition to probate the July 1986 will and subsequent codicils. Appellant, Mervat Hassan, filed an objection to the probate of the 1986 will and subsequent codicils. He also filed a petition to admit an unsigned will to probate. Appellant contended that the decedent changed his estate plan during a meeting with his attorney before his death by directing his attorney to draft a new will. The attorney drafted a new will and arranged for the execution of the will on September 11, 2014, the same day the decedent died.

The probate court decided that it would first determine whether an unsigned will may be admitted to probate. Appellant argued that although MCL 700.2502 requires that a will be signed, MCL 700.2503 provides an exception to the signature requirement if the proponent of the will establishes by clear and convincing evidence that the decedent intended for the document to constitute his or her will.

Appellee filed a motion for summary disposition pursuant to MCR 2.116(C)(8), which tests the legal sufficiency of the claim as pled, contending that the July 1986 will and corresponding codicils should be admitted to probate and that the court should dismiss the petition to admit

the unsigned September 2014 will to probate. The probate court held that the language of MCL 700.2503 relates to a document that is executed (meaning signed) but flawed in its execution. Accordingly, the court further held that in Michigan a will may not be admitted to probate when it is unsigned. The probate court therefore granted the motion for summary disposition. This appeal resulted from that ruling.

The court of appeals stated that the sole issue presented on appeal is whether a decedent must sign a will in order for that will to be admitted to probate. The court then cited the relevant statutes controlling this case.

MCL 700.2502 outlines the requirements for a valid will and provides:

(1) Except as provided in subsection (2) and in [MCL 700.2503, MCL 700.2506, and MCL 700.2513], a will is valid only if it is all of the following:

(a) In writing.

(b) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.

(c) Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator's acknowledgment of that signature or acknowledgment of the will.

(2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting.

(3) Intent that the document constitutes a testator's will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator's handwriting.

MCL 700.2503 provides the following exception to the execution requirements described in MCL 700.2502:

Although a document or writing added upon a

document was not executed in compliance with MCL 700.2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

- (a) The decedent's will.
- (b) A partial or complete revocation of the decedent's will.
- (c) An addition to or an alteration of the decedent's will.
- (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.

The court of appeals held the plain language of MCL 700.2503 establishes that it permits the probate of a will that does not meet the requirements of MCL 700.2502. One of the requirements of MCL 700.2502 is that the document must be signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction. Accordingly, a will does not need to be signed in order to be admitted to probate under MCL 700.2503, as long as the proponent of the will establishes by clear and convincing evidence that the decedent intended the document to be a will. Therefore the probate court was reversed.

What may we take from this case? A probate court may not grant summary disposition pursuant to MCR 2.116(C)(8) for the sole reason that a will offered under MCL 700.2503 is not signed by the testator.

My problem with this case is that it leaves the impression that unsigned wills in draft form may now be admitted to probate by simply providing proof that the unsigned document was what the testator would have intended his or her will to be. The danger is that this case may take on a life of its own and go far beyond the intent of MCL 700.2503. That intent is spelled out in the Reporter's Comment to MCL 700.2503, which extensively cites the Official Comment to the UPC. The UPC Official Comment provides in part:

The measure reduces the tension between holographic wills and the two-witness requirement for attested wills under Section 2-502(a). Ordinarily, the testator who attempts to make an attested will but blunders will still have achieved a level of formality that compares favorably with that permitted for holographic wills under the Code.

Therefore, this unique section is not intended to dispense with the formalities of executing a will, but rather to mitigate an overly harsh result when a technicality is overlooked by the testator. Again, UPC official comment states "Section 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in cases of harmless error." The UPC official comment urges that "[t]he larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent." Therefore MCL 700.2503 should not be interpreted as ushering in a Wild West of probate that ignores formality that has for ages been a requirement for making wills to dispose of one's property.

Perhaps the court of appeals should have also spent equal time examining and addressing the plain language of MCL 700.2503 that requires "clear and convincing evidence that the decedent intended the document or writing to constitute" a will. By doing so it could have found that an unsigned will could not be admitted as a matter of fact in accordance with MCR 2.116(C)(10).

As estate planners know, a testator may change his or her mind after talking with an attorney or believe that the attorney's rendition of what was said to the attorney is not correct. It is not rare for a testator to come to a signing conference with a substantive change to the draft he or she received from the attorney for review. In fact, the unsigned draft sent to the client for review is an invitation for the client to make changes. How then may a court find that the unsigned draft was intended as the will? It clearly may not do so even though the draft may reflect perfectly

what was imparted to the attorney. The client may have changed his or her mind as often happens. I seriously doubt that clients consider a draft of a will to be their will. They consider it a draft. So what makes a document the decedent's will in the mind of the testator? The answer, I believe, is the formality of the signature of the testator. Of course, there are always exceptions. Perhaps, at the signing conference the attorney asks the testator if the document presented the testator is his or her last will. The testator says yes, takes the pen, and falls over dead from a heart attack. The court must under the plain language of MCL 700.2503 grant summary disposition under MCR 2.116(C)(10) unless the most unlikely of circumstance may be shown. Those situations are so unlikely that the better result of this case may have been a bright-line rule that there must be a signature. Perhaps the probate court judge got it right.

Inventory Fee—Waiver or Suspension of Fee—Indigent

***In re Estate of DeCoste*, Nos 327990, 327993, 2016 Mich App LEXIS 1746 (Sept 20, 2016)**

The facts of this case are simple. The sole issue presented is whether the probate court must waive or suspend the inventory fee assessed during probate of an estate when the personal representative is indigent or receives public assistance. The inventory for each estate at issue in this case reflects that the estate contained only one asset, the decedent's home. Each personal representative filed a waiver request pursuant to MCR 2.002(C). In each case the probate court denied the request, reasoning that the inventory fee is not chargeable to any particular party but is instead chargeable to the estate, which has assets. The inventory fee is an expense of administration of the decedent's estate, and the issue of whether a personal representative is indigent or receiving public assistance is not material to the inventory fee. Inexplicably, both indigent personal representatives found the

money to bring this weighty issue to the court of appeals. The court of appeals affirmed the probate court.

The court of appeals began by indicating that it must consider the plain language of a statute and enforce the clear and unambiguous language as written. It pointed out that the requirement that a personal representative submit an inventory and the payment of the inventory fee is governed by both statute and court rule. See MCL 700.3706; MCR 5.307(A). Further, MCL 600.871, the statute dealing with the inventory fee, specifically characterizes the inventory fee as an expense of administration. Since it is an expense of administration of the estate rather than an expense that the personal representative is required to pay from his or her own funds, a waiver or suspension of the inventory fee was not appropriate because the estate contained sufficient assets to pay the inventory fee.

The court of appeals also pointed out that the statute and court rule establishing the waiver procedure do not require a different result. MCL 600.880d does not specify which person or entity is responsible for payment of the inventory fee. Therefore the statute does not require waiver or suspension since the fee is an obligation of the estate rather than the personal representative. Also, MCR 2.002 applies only to filing fees required by law. The inventory fee is not a filing fee but an expense of administration and therefore cannot be waived under this court rule. The court of appeals further pointed out that the personal representative of an estate has the authority and the fiduciary responsibility to liquidate assets in the estate in order to pay the costs and expenses of administration. Since the estates in question had assets that could be used to satisfy the inventory fee, waiver or suspension of the fee was not appropriate.

What may we take from this case? First, an inventory fee may not be waived or suspended by a probate court due to a personal representative's indigence or receipt of public assistance. Second, never assume that any matter is too insignificant to be appealed.



Hon. Phillip E. Harter, formerly a judge with the Calhoun County Probate Court, Battle Creek, joined Chalgian & Tripp Law Offices, Battle Creek as “of counsel” in January 2011. He was chairperson of the Michigan Supreme Court Task Force on Guardianships and Conservatorships and a member

of the Michigan Supreme Court bar examination staff (1976-1991). He is currently a member of the Calhoun County Bar Association, a fellow of the Michigan Bar Foundation, and a member of the Bar of the U.S. Supreme Court. Judge Harter is a past chairperson of the State Bar of Michigan Probate and Estate Planning Section, a former chairperson of the Probate Law Committee, and a former chairperson of the Probate Rules Committee of the Michigan Probate Judges Association. He reviews cases for the *Michigan Probate and Estate Planning Journal* and has lectured at ICLE’s Annual Probate and Estate Planning Institute for many years.

The Landscape in Lansing and Recent Legislation

By Harold G. Schuitmaker

Just a reminder that the Funeral Representative Act which allows and appoints a person to make funeral, embalment and cremation decisions, became effective June 27, 2016 and provides a good way to avoid family fights after death.

New Public Acts

Public Act 287 of 2016 House Bill 5503 Amendment to EPIC 700.1303(2) Effective December 26, 2016

In keeping with Probate Appeals to the Court of Appeals this act removes the following language in MCL 700.1303(2):

...except by appeal or review as provided by law or supreme court rule, and the action or proceeding shall be prosecuted in the probate court as a probate court proceeding.

Public Act 330 of 2016 Senate Bill 0597 and Senate Bill 0598 Effective December 13, 2016

This creates an entirely new law entitled "Qualified Dispositions in Trust Act." This provides for the creation of irrevocable trusts where assets cannot be attached by creditors. The purpose of this act is to establish and protect the rights of a grantor and trustee as opposed to creditor's rights. The definition of a qualified disposition is defined as "property owned by one or more trustees if at least one trustee is a qualified trustee and the subject property is governed by a trust instrument and the transfer is not fraudulent. MCL 700.1104 et seq. I suggest anyone who is involved in trust administration read the entire Act.

This Act would also amend the Uniform Fraudulent Transfers Act. The amendment would state that a qualified disposition is fraudulent as to a

creditor whose claim arose after the qualified disposition only if the qualified disposition was made with actual intent to hinder, delay, or defraud any creditor of the debtor. This is a modification of the Fraudulent Transfer Act (MCL 566.31).

Public Act 489 of 2016 Senate Bill 0558 (Tie Bar with Senate Bill 0559 and Senate Bill 0560) Effective March 2017

This is an amendment to MCL 558.1 to 558.29 adding a new section 558.30.

Section 2 of MCL 558.30 abolishes a wife's dower right and dower is unenforceable either through statute or common law. The only exclusion is a widow's dower or election under MCL 700.2202 if the husband dies prior to the effective date of this Act. This Act is tie barred with Senate Bill 0560 of 2015 which removes the dower right of an incapacitated individual or a minor wife under MCL 700.1303(k). MCL 700.2205 is amended to remove "dower" the same is true in MCL 700.3807. Another major change is the elimination of the provisions in a divorce judgment that required a provision in lieu of dower in MCL 552.101.

The deleted language is as follows:

~~Sec. 1 (1) When any judgment of divorce or judgment of separate maintenance is granted in any of the courts of this state, the court granting the judgment shall include in it a provision in lieu of the dower of the wife in the property of the husband, which shall be in full satisfaction of all claims that the wife may have in any property that the husband owns or may own in the future or in which he may have any interest.~~

Proposed Legislation

LLC Property Tax Exemption House Bill 4645 (2015)

House Bill 4645 would exempt a property

transfer from an LLC to a closely related party from uncapping taxable value (property cap) on real estate as follows:

(X) Beginning on the effective date of the Amending Act that added this subdivision, a transfer of residential real property if the transferor or transferee is a limited liability company whose members are all closely related for the duration of the limited liability company, the other party to the transfer is closely related to all of the members of the limited liability company, and the residential real property is not used for any commercial purpose after the transfer. For purposes of this subdivision, an individual is closely related to a member of the limited liability company if that individual and the member are spouses or if that individual is the member's or the member's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter. As used in this subdivision, "member" means that term as defined in Section 102 of the Michigan Limited Liability Company Act, 1993 PA 23, MCL 450.4102. Upon request by the Department of Treasury or the Assessor, the transferee shall furnish proof within 30 days that the transferee meets the requirements of this subdivision. If a transferee fails to comply with a request by the Department of Treasury or assessor under this subdivision, that transferee is subject to a fine of \$500.00 if the residential real property had a true cash value of less than \$200,000.00 at the time of the transfer, \$750.00 if the residential real property had a true cash value greater than or equal to \$200,000.00 and less than or equal to \$500,000.00 at the time of the transfer, or \$1,000.00 if the residential real property had a true cash value greater than \$500,000.00 at the time of the transfer. The transferee shall annually verify to the Assessor of the local tax collecting unit on or before December 31 that the property meets the requirements of this subdivision on a form prescribed by the State Tax Commission. Failure to file the required annual verification form shall result in the property being adjusted

under subsection (3).

Disinherited Persons House Bill 5638 and 5704

In light of the decision in *Chelenyak v Veith (In Re Estate of Jajuga)*, 312 Mich App 706, 881 NW2d 487 (2015), House Bill 5638 and House Bill 5704 were introduced in May of 2016 and would negate the court's ruling that a disinherited person would still be able to claim statutory allowances. The language to be added is as follows:

A decedent by Will or other signed writing may expressly exclude or limit the right of a child who is not a minor or dependent child to make a claim that the child is otherwise entitled to under this Section. The exclusion or limitation described in this Subsection must be expressly stated by the Decedent, and must specifically reference the allowance described in this Section in a manner sufficient to express the decedent's intent. An exclusion or limitation stated by a decedent by Will under Section 2101, without additional language specifically stating an intent to exclude or limit a right provided under this Section, is not considered sufficient language to exclude or limit a right provided in this Section.

The Probate Section has rewritten this to amend Section 1 as follows:

A decedent by Will or Trust may expressly exclude or limit the right of an individual or class to succeed to property of the decedent in accordance with Section 2101(2) of the Estates and Protected Individuals Code, being Section 700.2101(2) of the Michigan Compiled Laws.

Miscellaneous

Gender Specific

Obergefell v Hodges, __US__, 135 S Ct 2584 (2015)

In response to *Obergefell v Hodges*, __US__, 135 S Ct 2584 (2015), the Michigan Law Revision Commission has made a report on what present laws with Gender Specific terms need to be amended to gender neutral terms. The report

is 68 pages and addresses specific statutes and proposed changes to those statutes.

Gathering Information to Assess Capacity

There is a very informative article by Caroline M. Dellenbusch on pages 10-11 in the ICLE “myPartnership” brochure dated November/December 2016 about gathering information on capacity. As seen in my own practice, allegations concerning capacity are on the rise. Caroline M. Dellenbusch wrote Top Tips in Ten Minutes. She covers the following important points:

1. Prepare for each client meeting by reaffirming your goal to maximize autonomy;
2. Resist making assumptions about your client based on the client’s diagnosis;
3. Seek input from family members, but use caution;
4. Match your questions to the reason the elderly person hired you;
5. Be sure to assess both the client’s verbal responses to your questions and his or her behavior during the interview;
6. When assessing cognitive emotional and behavioral functioning, note any mitigating factors that might affect your assessment;
7. Document your assessment;
8. If appropriate, review the information provided by your client with the client’s family members; and,
9. Avoid attempting to make any medical diagnosis.



Harold G. Schuitmaker, of Schuitmaker, Cooper, Schuitmaker, Cypher, & Knotek, P.C., Paw Paw, is admitted to the Michigan and Florida bars, practices in the areas of estate planning and probate, municipal law, corporations, and real estate. Mr. Schuitmaker

is a Fellow of the Michigan State Bar Foundation, and has a Martindale-Hubbell AV Peer Rating and an ICLE Certificate of Completion in the Probate and Estate Planning Program. He is a past-president of the Probate and Estate Planning Section of the State Bar of Michigan. He is a “Michigan Super Lawyer,” named “Best Lawyers in America” by U.S. News and World Report and “Best Lawyers in Michigan.” He was also named a “Leader in the Law” by *Lawyers Weekly*. Mr. Schuitmaker is a member of the Kalamazoo County Bar Association and the Van Buren County Bar Association. He is a past-president of the Rotary District Foundation. Mr. Schuitmaker is a regular contributor to the *Michigan Probate and Estate Planning Journal*.

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ICLE Products of Interest to Probate Practitioners

Books

Michigan Revocable Grantor Trusts, Third Edition

Edited by Christine M. Savage and Richard C. Lowe

Anchored by an excellent, clearly written standard revocable trust, this book is designed for the trust drafter. It includes a pourover will, powers of attorney, certificate of trust existence, acceptance of trust, and many sample assignments. These documents, combined with discussion of the substantive trust law and planning issues, result in "worry-free" drafting whatever your level of practice.

*Prices:		Firm Size		
		0-4 Attorneys	5-29 Attorneys	
Print Book	\$145.00	Online Book	\$135.00	\$225.00
				Product #: 2010556520

Trust Administration Under the Michigan Trust Code

Edited by Daniel E. Cogan and Marlaine C. Teahan

Whether you advise trustees or serve as trustee yourself, this comprehensive guide gets you on the right track. It shows how to start the administration, prepare accounts, invest assets, make distributions and divisions, and wind up the trust. Sample letters, petitions, assignments, fee agreements, checklists, and SCAO forms make this book truly "how-to."

*Prices:		Firm Size		
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Print Book	\$145.00	Online Book	\$135.00	\$225.00
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Upcoming ICLE Seminars

Drafting Estate Planning Documents, 26th Annual

Cosponsored by the Probate and Estate Planning Section of the State Bar of Michigan

From new funeral representative designations to proposed regulations on valuation discounts, estate planning continues to evolve in profound ways. This valuable program informs you of changes in the law and gives you model forms that you can put to use today.

Dates: January 19, 2017 February 16, 2017	Locations: Grand Rapids The Inn at St. John's, Plymouth	
		Seminar #: 2017CR6535
General fee: \$195	Section members: \$175	
ICLE Premium Partners: \$0	New Lawyers: \$95	
ICLE Basic Partners: \$175		

Drafting an Estate Plan for an Estate Under \$5 Million

Cosponsored by the Probate and Estate Planning Section of the State Bar of Michigan

In this hands-on seminar, participants work in groups to plan and present their solutions to a hypothetical case study. A leading probate law practitioner guides discussion, critiques each group, and lectures on selected topics. Everyone receives a complete set of faculty-drafted sample documents.

Date: February 2, 2017	Location: The Inn at St. John's Plymouth	
		Seminar #: 2017CL6592
General fee: \$395		
ICLE Premium Partners: \$365	New Lawyers: \$365	
ICLE Basic Partners: \$365		

SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

Date	Place
February 18, 2017	University Club, Lansing
March 18, 2017	University Club, Lansing
April 22, 2017	University Club, Lansing
June 24, 2017	University Club, Lansing
September 9, 2017*	University Club, Lansing

Meeting of the Committee on Special Projects (CSP) begins at 9:00 a.m. with the Council meeting to follow.

All members of the Section are welcome to attend meetings of the CSP and the Council.

*Annual Meeting