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

April 13, 2013
Lansing, Michigan

Minutes

I. Call to Order

The Chair of the Section, Mark K. Harder, called the meeting to order at 10:20 a.m.

II. Attendance

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

Harder, Mark K.          Lentz, Marguerite M.
Imami, Shaheen I.        O'Brien, Hon. Darlene
Morrissey, Amy N.        Ouellette, Patricia M.
Sweeney, Thomas F.       Schnelz, Rebecca A.
Allen, Susan M.          Skidmore, David L.
Ard, W. Josh             Spica, James P.
Bearup, George F.        Taylor, Robert M.
Brigman, Constance L.    Teahan, Marlaine C.
Kerr, J. David           Welber, Nancy H.
Lucas, David P.

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

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

Ballard, Christopher A.       Murkowski, Hon. David M.
Clark-Kreuer, Rhonda M.       Steward, James B.
Lentz, Marguerite M. (partial)

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

None.

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

Gregory, George W.          Westerman, Susan S.
Harter, Phillip E.
E. **Others in attendance:**

John Dresser  
Kurt Olson  
Carol M. Hogan  
Stephen L. Elkins  
Geoffrey Vernon  
Robert Tiplady  
Melisa Mysliwiec  
Loukas P. Kalliantasis  
Keven DuComb  
Neal Nusholtz  
Kathleen Goetsch  
Joe Viviano  
Rick Mills  
Julie Paquette  
Mark E. Kellogg  
Jeanne Murphy  
Michael Lichterman  
Lorraine F. New  
Nazneen H. Syed  
Katie Lynwood

III. **Minutes of the March 16, 2013, Meeting of the Council**

Shaheen I. Imami presented the minutes of the March 16, 2013, Council meeting. Shaheen I. Imami moved for approval with support from Hon. Darlene O’Brien. The motion was approved on a voice-vote with no nays or abstentions.

IV. **Treasurer’s Report**

Mark K. Harder presented the Treasurer's report. Receipts and expenditures remain on track with the budget.

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

Mark K. Harder presented the Chairperson’s report:

- Referenced letter to Carl Ver Beek declining request for funding for Making Choices Michigan, Inc.

- Discussed the Section’s final letter to Michael Gadola regarding Project Wildcat, as well as letter from Health Care Association of Michigan (“HCAM”) and a related legal memorandum on HCAM’s behalf.

- Nazneen H. Syed will be attending the Diversity Summit on the Section’s behalf.

- Discussed issue raised by Henry Woloson related to the power and authority to make funeral/burial arrangements. It was noted that the Section has attempted to pursue the issue in the past, but with little success because of the funeral directors’ lobby.

VI. **Report of the Committee on Special Projects – Marlaine C. Teahan**
Marlaine C. Teahan reported that CSP heard from DAPT committee and discussed changes to Sections 3(c) and 5 through 9. It was noted that the proposed legislation is intended to be prospective. The goal is to move forward with approval of proposed legislation at the June 2013 meeting.

VII. **Standing Committee Reports**

A. **Internal Governance**

1. **Budget** – Shaheen I. Imami

   No report.

2. **Bylaws** – Nancy H. Welber

   Nancy H. Welber reported that some changes are in the works.

3. **Awards** – Douglas A. Mielock

   No report.

4. **Planning** – Thomas F. Sweeney

   Thomas F. Sweeney reported that he is still working on meeting schedule for 2013-2014 year. The October meeting will be October 12, 2013, at the Townsend Hotel in Birmingham, Michigan.

5. **Nominating** – Harold G. Schuitmaker

   George W. Gregory reported that an e-blast would go out to the Section members regarding the nominating procedure and notice. Some concerns were raised about the usefulness of posting a notice in the Journal giving the timing of the upcoming issue.

6. **Annual Meeting** – Thomas F. Sweeney

   No report.

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

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

   Patricia M. Ouellette noted that an amicus request was denied primarily based on the fact that the issue rested on an exercise of discretion by the judge. Additionally, some concerns were raised about what position should be adopted by the Section if the request were accepted.

2. **Probate Institute** – Amy N. Morrissey

   Amy N. Morrissey reported that invitations to the speakers’ dinner went out, so responses would be appreciated. She reminded everyone of the dates for the sessions in Acme and
Plymouth. Finally, she noted that some spaces were still open for the Jonathon Blattmacher presentation.

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

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

5. Electronic Communications – William J. Ard
No report.

C. Legislation and Lobbying

1. Legislation – Christopher A. Ballard
No report.

2. Updating Michigan Law – Marguerite Munson Lentz
Marguerite Munson Lentz reported that the committee is looking at something more substantive than the recently introduced digital assets bill sponsored by Senator Bieda. Mark K. Harder noted that he relayed to Rebecca Bechler that the proposed legislation is deficient as presently drafted and the Section would like some time to provide thoughtful input. Ms. Bechler will notify the chair of judiciary. There was some discussion of the sources for the Section’s proposed legislation and the existence of a discussion draft of Fiduciary Access to Digital Assets Act by NCCUSL.

3. Insurance Committee – Thomas F. Sweeney
Thomas F. Sweeney reported that the insurable interest legislation has not made it to the House yet, but he expects some movement by spring.

4. Artificial Reproductive Technology – Nancy H. Welber
Nancy H. Welber reported the perceived mission of the committee.

D. Ethics and Professional Standards

1. Ethics – J. David Kerr
No report.

2. Unauthorized Practice of Law & Multidisciplinary Practice – Robert M. Taylor
No report.

3. Specialization and Certification – James B. Steward

No report.

E. Administration of Justice

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

Marlaine C. Teahan reported regarding:

- Proposed changes to MCR 5.125(C)(6) and (27) to clarify IPs for examination of accounts. There was some discussion questioning the effect of the removal of “claimant.” The committee will re-work the proposed changes based on such concerns.

- Proposed changes to MCR 5.108 regarding time of service by mail for transfers of guardianship or conservatorship. Constance L. Brigman proposed that 14-day period should commence after the application is filed.

- Proposed change to MCR 5.403 to add “guardian serving in another state.”

- Proposed changes to MCR 5.125(C)(19), (22), & (24):
  - (19) to reflect changes in transfer of foreign guardianships;
  - (22) same issues as (19); and
  - (24) same issues, but for foreign conservatorships.

- ADM 2011-31 related to appellate procedures. Ms. Teahan recommended that the Section not take a position.

- The proposed changes to MCR 5.801 and appeals are ready to be presented to the Michigan Supreme Court as all of the interested groups have signed-off.

- Ms. Teahan recommended that the Section withdraw its request for additional meetings because of SCAO indicated that issues can be addressed on an ad hoc basis.

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

No report.

F. Areas of Practice

1. Real Estate – George F. Bearup

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

George W. Gregory discussed the new “tax nugget” and the shifting of taxation among jurisdictions based on a PLR regarding Delaware Incomplete Non-Grantor Trust.

Nancy H. Welber discussed federal budget items that may affect planning and taxation.

3. Charitable and Exempt Organization – Christopher A. Ballard

No report.

4. Guardianship, Conservatorship, and End of Life Committee – Constance L. Brigman

Constance L. Brigman reported regarding:

- The role of the guardian ad litem and whose interests are represented;
- The termination of the guardian ad litem; and
- Do-Not-Resuscitate (“DNR”) legislation was passed unanimously by House committee. She noted that some issues may exist regarding the interpretation by courts and handling by hospitals.

G. Liaisons

1. Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips

No report.

2. Business Law Section Liaison – John R. Dresser

No report.

3. Elder Law Section Liaison – Amy R. Tripp

No report.

4. Family Law Section Liaison – Patricia M. Ouellette

No report.

5. ICLE Liaison – Jeanne Murphy

No report.

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

7. Michigan Bankers Association Liaison – Susan Allan

No report.


No report.

9. Probate Registers Liaison – Rebecca A. Schnelz

No report.

10. SCAO Liaisons – Marlaine C. Teahan

No report.

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

No report.

12. State Bar Liaison – David R. Brake

No report.

13. Taxation Section Liaison – Frederick H. Hoops, III

No report.

VIII. Other Business

None.

IX. Hot Topics

Recent appellate decisions addressing real parties in interest, standing, and conservatorship PIP benefits were discussed.

X. Adjournment

Meeting adjourned by Mark K. Harder at 11:40 a.m.
Probate and Estate Planning Council
Treasurer’s Report
for 4-13-2013

Income/Expense Report

Attached is the income and expense report for February 2013 (unaudited). The dues revenue at the end of February 2013 is almost $400 higher than through February 2012, and almost $300 over the total revenue budgeted for this year. Therefore, we are very much on target with the projected revenue as shown in the budget.

Travel expenses are only about $340 higher than through February 2012, so we continue to be approximately within budget at present. I will continue to watch that expense item.

The “Other” expense category is $125 over budget, but everything else is either right on or under budget. I will need to check to see if some items allocated to “Other” belong in a different category.

As mentioned in last month’s report, I’ve included a note on the report about our new “Amicus fund” item which is now allocated from our fund balance to cover extra amicus brief expenses that could arise in excess of the regular budgeted amicus brief line item due to expected litigation over interpretation questions involving the new Michigan Trust Code.

Expense Reimbursement Requests

Please keep in mind that the State Bar prefers that all expenses submitted to the State Bar of Michigan within 30 days of when the expense was incurred.

Also, as previously noted, the Bar has revised the expense reimbursement form to include the new mileage rate on some of the lines. This is available on the State Bar website at: http://www.michbar.org/generalinfo/pdfs/sectexp.pdf

I’ve also attached a blank (non fillable) pdf copy of the expense reimbursement form at the end of this report which can be printed off directly and filled out manually.

Jim Steward
Council Treasurer
### Probate and Estate Planning Section

**Treasurer's Report as of February 28, 2013**

<table>
<thead>
<tr>
<th></th>
<th>December</th>
<th>January</th>
<th>February</th>
<th>FY to Date Actual</th>
<th>Budget 2012-13</th>
<th>Variance</th>
<th>Year to Date Percentage</th>
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<tbody>
<tr>
<td><strong>Revenue</strong></td>
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<tr>
<td>Membership Dues</td>
<td>$ 6,580</td>
<td>$ 3,220</td>
<td>$ 840</td>
<td>$ 115,990</td>
<td>$115,000</td>
<td>$ 990</td>
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<td>Publishing Agreements</td>
<td>$</td>
<td>-</td>
<td>$ 350</td>
<td>$(350)</td>
<td>$350</td>
<td>$(0)</td>
<td>0%</td>
</tr>
<tr>
<td>Other</td>
<td>$</td>
<td>-</td>
<td>$ 350</td>
<td>$(350)</td>
<td>$350</td>
<td>$(0)</td>
<td>0%</td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>$6,580</td>
<td>$3,220</td>
<td>$840</td>
<td>$115,990</td>
<td>$115,700</td>
<td>$290</td>
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<tr>
<td><strong>Disbursements</strong></td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td>Journal</td>
<td>$ 3,750</td>
<td>$ 6,389</td>
<td>$10,139</td>
<td>$27,500</td>
<td>$(17,361)</td>
<td>37%</td>
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</tr>
<tr>
<td>Chairperson's Dinner</td>
<td>$ 4,406</td>
<td>$ 6,500</td>
<td>$(2,094)</td>
<td>68%</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Travel</td>
<td>$ 1,083</td>
<td>$ 2,143</td>
<td>$ 2,258</td>
<td>$18,000</td>
<td>$(9,248)</td>
<td>49%</td>
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<tr>
<td>Lobbying</td>
<td>$ 2,500</td>
<td>$ 7,500</td>
<td>$12,500</td>
<td>$30,000</td>
<td>$(17,500)</td>
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<tr>
<td>Meetings</td>
<td>$ 2,414</td>
<td>$12,000</td>
<td>$(9,586)</td>
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<tr>
<td>Long-range Planning</td>
<td>$</td>
<td>$ 1,000</td>
<td>$(1,000)</td>
<td>0%</td>
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<td>Publishing Agreements</td>
<td>$</td>
<td>-</td>
<td>$ 0</td>
<td>-</td>
<td></td>
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</tr>
<tr>
<td>Support for Annual Institute</td>
<td>$ 250</td>
<td>$ 5,126</td>
<td>$ 5,376</td>
<td>$13,000</td>
<td>$(7,624)</td>
<td>41%</td>
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<tr>
<td>Amicus Briefs</td>
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<td>-</td>
<td>$10,000</td>
<td>$(10,000)</td>
<td>0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Electronic Communications*</td>
<td>$ 75</td>
<td>$ 75</td>
<td>$ 300</td>
<td>$1,400</td>
<td>$(1,100)</td>
<td>21%</td>
<td></td>
</tr>
<tr>
<td>Postage</td>
<td>$</td>
<td>-</td>
<td>$ 100</td>
<td>$(100)</td>
<td>0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telephone</td>
<td>$ 49</td>
<td>$ 75</td>
<td>$ 225</td>
<td>$250</td>
<td>$(171)</td>
<td>32%</td>
<td></td>
</tr>
<tr>
<td>Other**</td>
<td>$</td>
<td>$ 75</td>
<td>$ 125</td>
<td>$100</td>
<td>$(125)</td>
<td>225%</td>
<td></td>
</tr>
<tr>
<td><strong>Total Disbursements</strong></td>
<td>$3,632</td>
<td>$13,793</td>
<td>$13,952</td>
<td>$44,190</td>
<td>$(75,660)</td>
<td>37%</td>
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</tr>
</tbody>
</table>

Increase

|                      |          |         |          |                   |                |          |                         |
|----------------------|----------|---------|----------|                   |                |          |                         |
| Fund Balance***      | $ 272,805|         |          |                   |                |          |                         |

*includes e-blast & other electronic communications to members

**includes copying costs

***includes $25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount
### Expense Reimbursement Form

**Payee Name**

**Street**

**City**

**State** Michigan  **Zip Code**

**E-mail**

**Phone**

**Select a Section**

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

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

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

<table>
<thead>
<tr>
<th><strong>Date</strong></th>
<th><strong>Title</strong></th>
<th><strong>Signature</strong></th>
</tr>
</thead>
</table>

Grand Total $0.00

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

General Policies

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

2. All out of pocket expenses must be itemized.

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

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

5. Spouse expenses are generally not reimbursable.

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

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

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

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

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

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

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

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

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

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

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

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

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

Specific Policies

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

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

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.
Respectfully submits the following position on:

* Long Term Care Ombudsman *

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

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

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

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

The position was adopted after discussion and electronic vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 20. The number who voted opposed to this position was 0.
Report on Public Policy Position

Name of section:
Probate & Estate Planning Section

Contact person:
Shaheen I. Imami

E-Mail:
sii@probateprince.com

Regarding:
Proposed Letter to Legal Division of Governor's Office re: Long Term Care Ombudsman

Date position was adopted:
March 6, 2013

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

Number of members in the decision-making body:
23

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

Explanation of the position, including any recommended amendments:
The Probate & Estate Planning Section has concerns regarding the adoption and dissemination of certain "policy" statements from the office of the Michigan State Long Term Care Ombudsman. Specifically, the Probate & Estate Planning Section is concerned with the manner in which policy statements are being adopted and the legal interpretations contained in such statements. The position of the Probate & Estate Planning Section is shared by the Michigan Probate Judges' Association.
March 15, 2013

Mr. Michael F. Gadola
Office of the Governor - Legal Division
111 S. Capitol Ave.
PO Box 30013
Lansing, MI 48909

Dear Mr. Gadola:

On behalf of the Probate & Estate Planning Section of the State Bar of Michigan and the Michigan Probate Judges Association (MPJA), we are writing to you to express the concerns of our organizations related to information being disseminated by Mr. Bradley Geller in his role as Assistant State Long Term Care Ombudsman in Michigan.

In January 2013, Mr. Geller published and disseminated a Policy Statement of the Michigan State Long Term Care Ombudsman’s Program entitled “Health Care Decision-Making for a Resident in a Nursing Home.” Mr. Geller refers to this publication as Project Wildcat (the “Policy Statement”). Although Project Wildcat was disseminated as a Policy Statement of the State Long Term Care Ombudsman (“Ombudsman”), it is our understanding that such Policy Statement was not promulgated pursuant to the Administrative Procedures Act of 1969, which includes “policy” in its definition of a “rule” subject to the requirements of the Act.

Our concern is not only the failure of Mr. Geller and the Ombudsman to follow the procedures necessary to promulgate a Policy Statement, but also the content of the Policy Statement. Mr. Geller attempts to interpret Michigan law in the Policy Statement, particularly in areas of the law in which clear authority is absent. Mr. Geller may express his personal views of the law in many forums, but to express his opinions in an Ombudsman’s Policy Statement as the proper interpretation of Michigan law is not within his authority and puts the executive branch of our government at risk. For Mr. Geller to share his opinions in a Policy Statement being relied upon by nursing homes across the State of Michigan is inappropriate and alarming to members of our organizations.

In an email recently posted by Mr. Geller on the listserv of the Elder Law Section of the State Bar of Michigan, in conjunction with the completion of Project Wildcat, Mr. Geller expresses the following:

“The purpose of this endeavor is to offer Michigan nursing homes a comprehensive, understandable presentation of the (not always logical) law of surrogate decision-making in healthcare.”
Of the Policy Statement, Mr. Geller also writes to certain interested persons:

“I recently mailed you a copy of Project Wildcat, a policy paper of the Michigan State Long Term Care Ombudsman Program. The policy paper discusses the STCO's view of the state of the law in surrogate decision-making for health care care [sic].

The information is directed primarily at nursing home administrators and nursing home social workers.

The policy paper was not promulgated by the Michigan Department of Community Health, the Michigan Department of Licensing and Regulatory Affairs or the Michigan Office of Services to the Aging, and these agencies are not responsible for its content.

The Michigan Long Term Care Ombudsman Program, while part of state government, has a role defined in large part by the federal Older Americans Act. Under the Act, the ombudsman program independently advocates for and with residents in long term care facilities, with the aim of improving residents' quality of care and quality of life.”

Mr. Geller suggests that the Policy Statement, Project Wildcat, was created as part of the Ombudsman's role under the Older American's Act, but he acknowledges that the Policy Statement addresses the Ombudsman's view of the “state of the law in surrogate decision-making for health care.” This is a matter of State law, not Federal law.

Other initiatives in Michigan are relying upon Mr. Geller's Policy Statement as authority. For example, the Michigan Physician's Orders for Scope of Treatment (MI-POST) program, which was initiated by the Michigan Coalition for Honoring Healthcare Choices, has relied upon Mr. Geller's Policy Statement as authority for its position that a “surrogate” may refuse life sustaining care for an incompetent person in a nursing home. In this context, a surrogate would be a person other than a patient, patient advocate or guardian.

A quote from the recently published Guidelines of the Michigan Coalition for Honoring Healthcare Choices is as follows:

“Family Consent
Michigan does not have a Family Consent law; however the position of the State Long Term Care Ombudsman Program is that there are two relevant laws, The Michigan Social Welfare Act and the Dignified Death Act.4

4 Gellar [sic], Brad. Project Wildcat”

And as you know, the POST form allows a surrogate to withdraw life-sustaining treatment from a person who may or may not be terminally ill.

Our goal in writing you is two-fold. We seek a full retraction of the Policy Statement disseminated by Mr. Geller on behalf of the Ombudsman’s office; we do not believe it accurately interprets Michigan law, nor
should Mr. Geller be interpreting State law and giving the weight of law to his personal positions. Furthermore, we do not believe the Policy Statement was properly promulgated. The applicable sections of the Administrative Procedures Act are appended to this correspondence. We also request future oversight of the activities of Mr. Geller, the Ombudsman's office, and materials being disseminated by the Ombudsman and its representatives.

We believe that there are others who share these serious concerns. Thank you for your attention to this important matter.

Very truly yours,

Mark K. Harder
Chair
Probate & Estate Planning Section

Hon. Elwood L. Brown
President
Michigan Probate Judges Association

Attachment

cc:  Mr. James K. Haveman, Director, Department of Community Health
ADMINISTRATIVE PROCEDURES ACT OF 1969 (EXCERPT)
Act 306 of 1969

24.203 Definitions; A to G.
Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302, or other association or facility formed under that act as a nonprofit organization of insurer members.

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency.

(4) "Committee" means the joint committee on administrative rules.

(5) "Court" means the circuit court.

(6) "Decision record" means, in regard to a request for rule-making where an agency receives recommendations or comments by an advisory committee or other advisory entity created by statute, both of the following:
   (a) The minutes of all meetings related to the request for rule-making.
   (b) The votes of members.

(7) "Guideline" means an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person.


Compiler's note: Section 2 of Act 277 of 1988 provides:

The amendment to section 3 of Act No. 306 of the Public Acts of 1969, being section 24.203 of the Michigan Compiled Laws, pursuant to this amendatory act is intended to codify, approve, and validate the actions and long-standing practices taken by the associations and facilities mentioned in this amendatory act retroactively to the time of their original creation. It is the intent of this amendatory act to rectify the misconstruction of the applicability of the administrative procedures act of 1969 by the court of appeals in League General Insurance Company v Catastrophic Claims Association, Case No. 93744, December 21, 1987, with respect to the imposition of rule promulgation requirements on the catastrophic claims association as a state agency, and to further assure that the associations and facilities mentioned in this amendatory act, and their respective boards of directors, shall not hereafter be treated as a state agency.”

Popular name: Act 306
Popular name: APA
ADMINISTRATIVE PROCEDURES ACT OF 1969 (EXCERPT)
Act 366 of 1969

24.207 "Rule" defined.
Sec. 7. "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following:
(a) A resolution or order of the state administrative board.
(b) A formal opinion of the attorney general.
(c) A rule or order establishing or fixing rates or tariffs.
(d) A rule or order pertaining to game and fish and promulgated under parts 401, 411, and 487 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.40101 to 324.40120, 324.41101 to 324.41105, and 324.48701 to 324.48740.
(e) A rule relating to the use of streets or highways, the substance of which is indicated to the public by means of signs or signals.
(f) A determination, decision, or order in a contested case.
(g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.
(h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.
(i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.
(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.
(k) Unless another statute requires a rule to be promulgated under this act, a rule or policy that only concerns the inmates of a state correctional facility and does not directly affect other members of the public, except that a rule that only concerns inmates which was promulgated before December 4, 1986, is a rule and remains in effect until rescinded but shall not be amended. As used in this subdivision, "state correctional facility" means a facility or institution that houses an inmate population under the jurisdiction of the department of corrections.
(l) A rule establishing special local watercraft controls promulgated under former 1967 PA 303. A rule described in this subdivision may be rescinded as provided in section 80113(2) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.80113.
(m) All of the following, after final approval by the certificate of need commission under section 22215 of the public health code, 1978 PA 368, MCL 333.22215, or the statewide health coordinating council under former section 22217 of the public health code, 1978 PA 368:
(i) The designation, deletion, or revision of covered medical equipment and covered clinical services.
(ii) Certificate of need review standards.
(iii) Data reporting requirements and criteria for determining health facility viability.
(iv) Standards used by the department of community health in designating a regional certificate of need review agency.
(v) The modification of the 100 licensed bed limitation for extended care services programs set forth in section 22210 of the public health code, 1978 PA 368, MCL 333.22210.
(n) A policy developed by the family independence agency under section 6(3) of the social welfare act, 1939 PA 280, MCL 400.6, setting income and asset limits, types of income and assets to be considered for eligibility, and payment standards for administration of assistance programs under that act.
(o) A policy developed by the family independence agency under section 6(4) of the social welfare act, 1939 PA 280, MCL 400.6, to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds.
(p) The provisions of an agency's contract with a public or private entity including, but not limited to, the provisions of an agency's standard form contract.
(q) A policy developed by the department of community health under the authority granted in section 111a of the social welfare act, 1939 PA 280, MCL 400.111a, to implement policies and procedures necessary to operate its health care programs in accordance with an approved state plan or in compliance with state statute.


Popular name: Act 306

Popular name: APA
ADMINISTRATIVE PROCEDURES ACT OF 1969 (EXCERPT)
Act 306 of 1969

24.224 Adoption of guideline; notice.
Sec. 24. (1) Before the adoption of a guideline, an agency shall give electronic notice of the proposed guideline to the committee, the office of regulatory reform, and each person who requested the agency in writing or electronically for advance notice of proposed action that may affect the person. The committee shall electronically provide the notice of the proposed guideline not later than the next business day after receipt of the notice from the agency to members of the committee and to members of the standing committees of the senate and house of representatives that deal with the subject matter of the proposed guideline. The notice shall be given by mail, in writing, or electronically transmitted to the last address specified by the person requesting the agency for advanced notice of proposed action that may affect that person. A request for notice is renewable each December. Any notice under this section to any member or agency of the legislative and executive branches shall be given electronically.

(2) The notice required by subsection (1) shall include all of the following:
(a) A statement of the terms or substance of the proposed guideline, a description of the subjects and issues involved, and the proposed effective date of the guideline.
(b) A statement that the addressee may express any views or arguments regarding the proposed guideline or the guideline's effect on a person.
(c) The address to which written comments may be sent and the date by which comments shall be mailed or electronically transmitted, which date shall not be less than 35 days from the date of the mailing or electronic transmittal of the notice.
(d) A reference to the specific statutory provision about which the proposed guideline states a policy.

Compiler's note: Enacting section 2 of Act 491 of 2004 provides:
Enacting section 2. This amendatory act applies to rules transmitted to the joint committee on administrative rules on or after January 12, 2005. Rules transmitted to the joint committee on administrative rules before January 12, 2005, shall be processed according to the act as it existed before January 12, 2005.4

Popular name: Act 306
Popular name: APA
24.226 Adoption of guidelines in lieu of rules prohibited.

Sec. 26. An agency shall not adopt a guideline in lieu of a rule.


Popular name: Act 306

Popular name: APA
ADMINISTRATIVE PROCEDURES ACT OF 1969 (EXCERPT)
Act 306 of 1969

24.241 Notice of public hearing before adoption of rule; opportunity to present data, views, questions, and arguments; time, contents, and transmittal of notice; renewal of requests for notices; provisions governing public hearing; presence and participation of certain persons at public hearing required.

Sec. 41. (1) Except as provided in section 44, before the adoption of a rule, an agency, or the office of regulatory reform, shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments. The notice shall be given within the time prescribed by any applicable statute, or if none, in the manner prescribed in section 42(1).

(2) The notice described in subsection (1) shall include all of the following:
(a) A reference to the statutory authority under which the action is proposed.
(b) The time and place of the public hearing and a statement of the manner in which data, views, questions, and arguments may be submitted by a person to the agency at other times.
(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.

(3) The agency, or the office of regulatory reform acting on behalf of an agency, shall transmit copies of the notice to each person who requested the agency in writing or electronically for advance notice of proposed action that may affect the person. If requested, the notice shall be by mail, in writing, or electronically to the last address specified by the person.

(4) The public hearing shall comply with any applicable statute, but is not subject to the provisions governing a contested case.

(5) The head of the promulgating agency or 1 or more persons designated by the head of the agency who have knowledge of the subject matter of the proposed rule shall be present at the public hearing and shall participate in the discussion of the proposed rule.


Compiler's note: Enacting section 2 of Act 491 of 2004 provides:
"Enacting section 2. This amendatory act applies to rules transmitted to the joint committee on administrative rules on or after January 12, 2005, shall be processed according to the act as it existed before January 12, 2005."
Attachment 3
Dear Mr. Ver Beek:

In our last communication, you asked whether the Probate and Estate Planning Section could provide any financial assistance to Making Choices Michigan. The Council of the Section discussed this at its March 16, 2013, meeting and declined to do so.

Michigan does not have a family consent law. This puts us in marked contrast with the law in a number of other states with POLST or POST programs. Until Michigan law is changed to permit family consent, the only persons with authority to sign a POLST or POST are the patient, a properly appointed patient advocate with authority to withhold or withdraw life support, or a court appointed guardian. Based on past experiences and your assurances notwithstanding, the Council remains very concerned that individuals who are promoting the POLST or POST agenda are overlooking, fail to appreciate, or are ignoring the current state of Michigan’s law. The Council is concerned that some of those individuals are involved in Making Choices Michigan. Under those circumstances, I am sure you can understand why the Council is unwilling to support funding Making Choices Michigan.

Very truly yours,

Mark K. Harder
Chair

Janet Welch
ATTACHMENT 4
March 26, 2013

Sarah Slocum
Michigan State Long Term Care Ombudsman
Office of Services to the Aging
300 W. Michigan Avenue, 3rd Floor
Lansing, MI 48933

Dear Ms. Slocum:

In January 2013 the Michigan State Long Term Care Ombudsman issued a policy statement called “Health Care Decision-Making for a Resident In a Nursing Home.” The Health Care Association of Michigan objects to the content and tone of this document which is specifically directed at nursing home administrators, social workers, directors of nursing, admissions personnel and to state nursing home surveyors in the Department of Licensing and Regulatory Affairs.

The document is apparently intended to provide clarifying information and assistance in navigating the complex subject of surrogate decision-making. Unfortunately, it creates confusion in a number of areas:

- It provides questionable interpretations of existing state law.
- It references family consent laws which have not been enacted in Michigan.
- It cites two existing state statutes neither of which gives surrogates the right to make decisions for incapacitated nursing facility residents.
- It raises issues not pertinent to surrogate decision making.
- It suggests implications in state law which are not supported.
- It presents inaccurate information regarding appointment of professional guardians.
- It opines on risk management issues facing nursing facilities.
- It makes statements that are not supported in fact such as “Historically, some nursing homes have pushed for guardianship for the convenience of the nursing home rather than the needs of the residents.”
The Ombudsman has announced the publication of the document through the American Bar Association and claims that it represents state agency policy. The Ombudsman is apparently seeking a national audience implying that the document may be adopted throughout the U.S.

Page 2 of the document claims copyright protection. It is our understanding that the state cannot copyright its documents. Everything it issues is public domain. This is another example of the confusion generated by this document.

The document has been sent to every nursing facility administrator as well as to the state survey agency. So far, it has created much more confusion than clarity surrounding surrogate decision making. HCAM requests that this document be recalled immediately. We further request that if the State Long Term Care Ombudsman wishes to provide useful clarification of Michigan law regarding surrogate decision making that it convene all involved stakeholders and state agencies in a collaborative effort.

HCAM supports the letter and position of the Probate and Estate Planning Section of the State Bar of Michigan and the Michigan Probate Judges Association regarding this document.

Attached is a memorandum from HCAM legal counsel, Andrew R. Rothman, Lebenbom and Rothman, P.C., which provides a detailed overview of our concerns with this policy statement.

Sincerely,

David A. LaLumia
President and CEO

CC  James Haveman, Department of Community Health
     Steve Arwood, Department of Licensing and Regulatory Affairs
     Kari Sederburg, Office of Services to the Aging
     Michael Gadola, Office of the Governor, Legal Division
     Carole Engle, Bureau of Health Care Services, LARA
     Renee Beniak, Michigan County Medical Care Facilities Council
     Ben Bodkin, Michigan Association of Counties
David Herbel, Leading Age/Michigan
Carolyn Stramecki, Honoring Health Care Choices
Elwood Brown, Michigan Probate Judges Association
Mark Harder, Probate & Estate Planning Section of the State Bar of MI
Reginald Carter, LTC Supports and Services Advisory Commission
Lisa Ashley, Hospice and Palliative Care Association of Michigan
Mary Ablan, Area Agency on Aging Association
Sara Dzuirman, Michigan Guardianship Association
Robert Yellen, Michigan Peer Review Organization
Honorable Randy Richardville, Senate Majority Leader
Honorable Gretchen Whitmer, Senate Minority Leader
Honorable Jase Bolger, Speaker of the House
Honorable Tim Greimel, House Minority Leader
MEMORANDUM

TO: Dave Lalamia, HCAM
FROM: Andrew R. Rothman
DATE: February 25, 2013
RE: "Wildcat Project"

Introduction

This Memorandum discusses the recent publication of a policy statement by the Michigan State Long Term Care Ombudsman Program entitled “Health Care Decision-Making for a Resident in a Nursing Home”. The Ombudsman's office has nicknamed the document the “Wildcat Project”.

There are numerous concerns regarding this document. It contains many erroneous statements of law. It also is written in a question-and-answer format that takes many issues out of context; thus, even where the author acknowledges that the answer to an issue is unknown or debatable, it appears that the intent of the document is to have the reader take the answer as an accurate description of the current law.

Most importantly, the Ombudsman’s office has disseminated this document to every nursing home administrator in Michigan, as well as to other individuals critical to the provision of long term care in Michigan. The author states at page 6:

"The statement is directed toward nursing home administrators, social workers, directors of nursing, and admissions personnel; and to nursing home surveyors in the Bureau of Health Systems, Michigan Department of Licensing and Regulation." ¹

and:

"These materials or others can be used by nursing homes to help fulfill federally mandated responsibilities to educate staff; to provide community education; and to assist willing residents to complete an advance directive."

Clearly, the intent of the author is that this document should be considered a comprehensive, factual text to be relied upon by operators, regulators, and residents and their families. The document in reality severely confuses the facts and law.

¹ It should be noted that the correct reference to surveyors should be the Bureau of Health Care Services, Department of Licensing and Regulatory Affairs.
Discussion

The primary concerns, next to the issues mentioned above, is that this document will spark inconsistencies in its application, result in improper application and implementation of the law and regulations, cause legal risk to facilities, and cause confusion, mistrust and anger in residents and their loved ones. I will discuss many of the specific concerns with the document below.

In the Introduction section on page 5, the author has stated:

"Historically, some nursing homes have pushed for guardianship for the convenience of the nursing home rather than the needs of the residents."

This assertion has no basis in fact. The author provides no supporting evidence or research. In fact, it is merely an opinion that seems intended to inflame the reader and suggest that facilities should be blamed for everything that the author may consider to be wrong with guardianship. Such a statement has no place in a document issued by a state-supported agency.

There are numerous inconsistencies in the document. For example, at page 10, the author quotes 42 CFR §489.102(c)\(^2\), which provides that the nursing home may give information regarding the right to make advance directives, to family members or surrogates empowered under state law to receive the information, when the resident is incapacitated at the time of admission. Yet, despite the recognition that state law controls, the author makes numerous statements later in the document which claim that family members have the power to receive information or make decisions, when the law clearly does not authorize it. Many of these instances are found in Part 2 of the document, entitled “Family Decision-Making”. I will discuss these statements later in this Memorandum.

The document contains numerous statements regarding Michigan’s Patient Advocate statute, found at MCL §700.5506-5520. At page 14, the following question and answer is posed:

“What if an individual does choose two or more patient advocates to serve at the same time?
   – The document is not invalid. You may request the designated patient advocates inform you who will serve as the primary contact person.”

This is directly contrary to the statute. MCL §700.5506 states:

“(1) An individual 18 years of age or older who is of sound mind at the time a patient advocate designation is made may designate in writing another

\(^2\) Actually, the author incorrectly cites the section as 489.102(c); it is in reality 483.102(g).
individual who is 18 years of age or older to exercise powers concerning care, custody, and medical or mental health treatment decisions for the individual making the patient advocate designation...." (Emphasis added).

The statute clearly states that "an individual" may be designated, not "individuals" (i.e. plural). MCL §700.5507(2) next states:

"(2) A patient may designate in the patient advocate designation a successor individual as a patient advocate who may exercise the powers described in subsection (1) for the patient if the first individual named as patient advocate does not accept, is incapacitated, resigns, or is removed." (Emphasis added).

Again, the law clearly limits the patient advocate to one individual.

Compounding the confusion is that the author later in the document acknowledges that only one patient advocate may be appointed. In Appendix A, at page 62, the author states: "There is no provision in law to allow more than one person to serve at the same time."

At page 20, the author states that after revoking a patient advocate designation, the resident can sign a new one, if the resident is of "sound mind". This is true, in the general sense. But the author then asserts that: "An individual might be unable to participate in treatment decisions, but still be able to understand giving another person authority to make those decisions." This statement is illogical. A person's inability to make treatment decisions is the trigger for effectuating the patient advocate designation. How, then, can someone unable to understand his condition or participate in decision-making, give authority for someone else to do so?

At page 21, under the heading "How will a surveyor evaluate compliance with this obligation", reference is made to the "CMS Guidance to Surveyors". I cannot find the quoted language on the CMS web site under Appendix PP to the State Operations Manual. It is possible it was included in an update recently and not placed in the Manual, but it would be helpful if the author cited his authority in more detail.

Part 2 of the document, which begins at page 25, will undoubtedly create confusion among facilities and families (not to mention surveyors). It begins by asking "What is a general family consent law?" yet, it then acknowledges that Michigan has no such law. Why discuss this, given that federal law and regulations consistently make the advance directives requirements subject to each state's particular law?

The author next discusses two other Michigan statutes, neither of which gives surrogates the right to make decisions for incapacitated nursing home
residents. The first one is a provision of the Michigan Social Welfare Act, at MCL §400.66h. It states:

"Sec. 66h.

Nothing in this act shall be construed as empowering any physician or surgeon, or any officer or representative of the state or county departments of social welfare, in carrying out the provisions of this act, to compel any person, either child or adult, to undergo a surgical operation, or to accept any form of medical treatment contrary to the wishes of said person. If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person’s nearest relative, or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given. This provision is not intended to prevent temporary first aid from being given in case of an accident or sudden acute illness where the consent of those concerned cannot be immediately obtained."

This statute, enacted in 1957 (years before Medicaid and the Estates and Protected Individuals Code), is inapplicable here. It relates solely to hospitalization of individuals in the university hospital. The first section of the applicable provisions states:

"Sec. 66a.

The county social welfare boards shall make provision for hospitalization which is necessary and not more advantageously provided to the recipient under other law or provided under other sections of this act for every person found in their respective counties under rules of financial eligibility established by the boards and shall be reimbursed 100% by the state for the monthly net cost of the hospitalization for nonresidents of the state. The county department, in its discretion, may direct that the patient be conveyed to the university hospital at Ann Arbor or any other hospital for hospitalization. As used in this act, "hospitalization" means medical, surgical, or obstetrical care in the university hospital or in a hospital licensed under article 17 of Act No. 368 of the Public Acts of 1978, as amended, being sections 333.20101 to 333.22190 of the Michigan Compiled Laws, together with necessary drugs, x-rays, physical therapy, prosthesis, transportation, and nursing care incidental to the medical, surgical, or obstetrical care, but shall not include medical care as defined in section 55. Before a patient shall be admitted except in an emergency, to any hospital other than the university hospital, a definite agreement, statement, or schedule of charges, expenses, and fees to be received by the hospital and physicians or surgeons performing necessary services under this act shall be filed with the county department of the county in
which the hospital is located and approved by the county department, except as provided for in section 66i. The hospital shall, at the conclusion of the treatment, make a report of the treatment and an itemized statement of the expenses of the treatment to the county department which issued the order, but charges for special nurses shall not be made without the consent of the county social welfare director. The expenses for sending the patient home or to other institutions after being discharged from the hospital may be paid by the hospital and charged in the regular bill for maintenance unless different instructions have been received from the county department which issued the order for admission." (Emphasis added).

The Ombudsman’s office has taken Section 66h out of context to suit its own agenda here. That section of the law must be read in pari materia with the sections preceding it. Moreover, the Estates and Protected Individuals Code ("EPIC") contains specific provisions regarding guardians and patient advocates. It takes precedence over the inapplicable Social Welfare Act provisions in this area of the law.

The second statute quoted by the Ombudsman is the Michigan Dignified Death Act, MCL §333.5652. It is also inapplicable. The Michigan Dignified Death Act (hereinafter the "Dignified Death Act") is a licensure act within the Public Health Code, mandating that physicians provide information to their patients concerning end of life issues. It does not in any way expand the rights of guardians or other surrogate decision makers under EPIC.

In the "Legislative findings and intent" section of the Dignified Death Act, the legislature made clear that the act was designed to address the concern that "...patients with reduced life expectancy due to advanced illnesses are often unaware of their legal rights, particularly with regard to controlling end-of-life decisions" and "This act is intended to increase awareness of the right of a patient who has a reduced life expectancy due to advanced illness to make decisions to receive, continue, discontinue, or refuse medical treatment. It is hoped that by doing so, the legislature will encourage better communication between patients with reduced life expectancy due to advanced illnesses and health care providers to ensure that the patient's final days are meaningful and dignified." The legislature was careful to point out that the Dignified Death Act did not change the common law:

"MCL 333.5652 (1) The legislature finds all of the following:

3 "Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other." Dingeman Advertising, Inc. v. Saginaw, 92 Mich. App. 735, 739 (1979).
...(d) That the free flow of information among health care providers, patients, and patients' families can give patients and their families a sense of control over their lives, ease the stress involved in coping with a reduced life expectancy due to advanced illness, and provide needed guidance to all involved in determining the appropriate variety and degree of medical intervention to be used.

(e) That health care providers should be encouraged to initiate discussions with their patients regarding advance medical directives during initial consultations, annual examinations, and hospitalizations, at diagnosis of a chronic illness, and when a patient transfers from 1 health care setting to another.

(2) In affirmation of the tradition in this state recognizing the integrity of patients and their desire for a humane and dignified death, the Michigan legislature enacts the "Michigan dignified death act". In doing so, the legislature recognizes that a well-considered body of common law exists detailing the relationship between health care providers and their patients. This act is not intended to abrogate any part of that common law."

The intent of the legislature was clearly to require the flow of information to patients. There is nothing in the stated purpose of the Act that is to give guardians or other surrogates the power to generally refuse life-sustaining treatment on behalf of their wards. Once again, the Ombudsman's office has twisted the words of a statute beyond all recognition.

In fact, the Death With Dignity Act states at MCL §333.5660:

"Sec. 5660. This part does not do the following:

(a) Impair or supersede a legal right a parent, patient, patient advocate, legal guardian, or other individual may have to consent to or refuse medical treatment on behalf of another.

(b) Create a presumption about the desire of a patient who has reduced life expectancy due to advanced illness to receive or refuse medical treatment, regardless of the ability of the patient to participate in medical treatment decisions.

(c) Limit the ability of a court making a determination about a decision of a patient who has reduced life expectancy due to advanced illness to take into consideration all of the following state interests:
(i) The preservation of life.

(ii) The prevention of suicide.

(iii) The protection of innocent third parties.

(iv) The preservation of the integrity of the medical profession.

(d) Condone, authorize, or approve suicide, assisted suicide, mercy killing, or euthanasia.” (Emphasis added).

Again, the statute gives a surrogate no new powers. In fact, it stresses that a court still has the authority to take the state’s parens patriae concern regarding preservation of life into account in making decisions regarding patients with reduced life expectancy.

The importance of this discussion is that the common law in Michigan is established in the Supreme Court’s decision in In Re: Martin, 538 N.W. 2d 399, 450 Mich. 204, 538 N.W.2d 399 (1995). The Supreme Court in that case held that in the absence of “clear and convincing evidence” of a patient’s end-of-life wishes, made while the patient was still competent, no surrogate could make the decision to terminate life support or other life-sustaining measures. The right of the individual to make his or her own treatment decisions is paramount and will not be disturbed. Thus, where the patient has not expressed those concerns in a clear and convincing manner (which is an incredibly high burden of proof), the default position is to give the patient life-sustaining treatment. Since this is the common law in Michigan, and further since the only statute which clearly permits a surrogate to make life-ending decisions is the Patient Advocate law, the Ombudsman’s assertions regarding the Dignified Death Act ring hollow.

At page 29 of the document, the author makes two additional statements that will only lead to confusion among providers, residents, families, and the state. At the top of the page, the author states that:

“There is certainly implication in this law that if an individual is terminally ill and unable to give informed consent, and does not have a guardian or patient advocate, that a family member can make those decisions.”

An “implication” is not law. The common law in Michigan, as expressed in the In Re: Martin decision, overrides any perceived implication that the law is otherwise.
other than a probate court authorize a surrogate to make medical decisions in the absence of a patient advocate designation, it is contrary to law. This is all the more concerning since state surveyors must inspect facilities to determine their compliance with the federal laws and regulations regarding a resident's right to make advance directives. Every one of those federal provisions defers to state law to determine those rights.

At page 30 of the document, the author continues the irrelevant discussion of the Dignified Death Act by suggesting that if family members disagree on a course of treatment for the patient, they should resort to mediation. Not only is this irrelevant, it is impracticable. There is usually no time to resort to a mediator before making a decision. The author next states that if a resident is not terminally ill and not enrolled in the Medicaid program, the resident is out of luck and cannot have a family member make medical decisions for him. While it is true that no surrogate can make decisions absent a showing to a probate court of clear and convincing evidence of the resident's wishes, this portion of the document merely exacerbates confusion about the issue. Furthermore, why should the ability to have a surrogate make medical care decisions be dependent upon whether the resident is enrolled in Medicaid? This illustrates the absurdity of the statement.

At the bottom of page 30, the author discusses potential risks to allowing family members to act as surrogate decision makers in the absence of an advance directive. He first acknowledges that facilities may face lawsuits from other family members and citations from LARA surveyors. Yet he then states: "The risk of lawsuit is minimal if immediate family members agree on a course of treatment." There is absolutely no evidence or research cited to support this bald assertion. In a day and age where lawsuits proliferate, it seems obvious that persons besides immediate family members may try to take advantage of such a situation by filing a lawsuit. There is also a grave concern that family members may make end of life decisions based not on the resident's wishes, but rather on wanting to profit by inheriting assets after a resident expires. This represents a clear conflict of interest that militates against permitting family members and potential heirs to make medical care decisions in the absence of a patient advocate designation or court order.

Part 3 of the document discusses guardianship. Once again, the author misstates the law in several respects. At page 34, the author states:

"Can a judge appoint a guardian before a court hearing is held and the respondent receives?"

--No, never."

This is not an accurate statement of the law. Under EPIC, MCL §700.5312, the court may appoint a temporary guardian pending the full hearing on whether a permanent or full guardian should be appointed. This may occur only in
circumstances where the incapacitated person does not already have a guardian, an emergency exists requiring someone to make a decision, and no other person appears to have authority to act. In some instances, the court itself may act as guardian to make the necessary decision.

At page 36 of the document, the author states that a professional guardian may be appointed:

"Only if the individual does not make a viable choice and there are no family members willing and able to serve is the judge permitted to appoint a professional guardian. MCL 700.5106(2)." (Emphasis in original).

This is a misstatement of MCL §700.5106(2), which provides:

"(2) The court shall only appoint a professional guardian or professional conservator as authorized under subsection (1) if the court finds on the record all of the following:

(a) The appointment of the professional guardian or professional conservator is in the ward's, developmentally disabled individual's, incapacitated individual's, or protected individual's best interests.

(b) There is no other person that is competent, suitable, and willing to serve in that fiduciary capacity in accordance with section 5212, 5313, or 5409." (Emphasis added).

The key word in the statute is "suitable". Courts routinely find that family members are not suitable to act as fiduciaries, for reasons ranging from their not being available or responsive to facility requests to participate in the resident's care, to failing to furnish the necessary records and information to qualify the resident for Medicaid, to outright stealing the resident's property and income. In these situations, the priority for guardianship under MCL § 700.5313 will not apply. In fact, §700.5313 states in relevant part:

"...(2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, in the following order of priority:

(a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.

(b) A person the individual subject to the petition chooses to serve as guardian.
(c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.

(d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

(3) If there is no person chosen, nominated, or named under subsection (2), or if none of the persons listed in subsection (2) are suitable or willing to serve, the court may appoint as a guardian an individual who is related to the individual who is the subject of the petition in the following order of preference:

(a) The legally incapacitated individual's spouse. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased spouse.

(b) An adult child of the legally incapacitated individual.

(c) A parent of the legally incapacitated individual. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased parent.

(d) A relative of the legally incapacitated individual with whom the individual has resided for more than 6 months before the filing of the petition.

(e) A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

(4) If none of the persons as designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106.' (Emphasis added).

Again, if the person nominated is not suitable, the court may appoint a professional guardian.

At page 43, the author again creates confusion in his discussion of whether a guardian may authorize a do-not-resuscitate order ("DNR") for the resident. The author states that judges differ in their view regarding this issue. In light of this, it serves no purpose to bring the matter up in the document. In every instance, a facility (or family member or other interested person) should file a petition with the probate court seeking a court order. This is the only protection the facility will have. To suggest that the law may permit guardians to authorize DNR orders, will only result in confusion and anger among facilities and family
members. We have steadfastly opined in the past that guardians do not have such authority under Michigan law, absent a specific court order. We also note that in light of this, there is proposed legislation to amend EPIC to permit guardians to authorize DNR orders under certain circumstances.

Conclusion

The Ombudsman's document is fraught with misstatements of law and fact. It also makes negative assertions regarding nursing facilities, without citation to evidence or research in support. Given that the document is intended to serve as a guide for facilities, surveyors and families, it should not be published or disseminated. It will only serve to create confusion, mistrust and anger among those intended readers.
Report of Guardianship and Conservatorship Committee

For April 2013 Council Meeting

In attendance – Becky Schnelz, Josh Ard, Michael Bartnik, Connie Brigman

Josh Ard asked for objections and feedback to the proposed changes to EPIC and MCR concerning the role of a GAL in a proceeding to appoint a guardian or conservator for an alleged incapacitated individual.

Becky Schnelz reported that the last sentence in section 5305 of Josh’s proposed changes would likely be an issue.

The issue is whether a GAL report should be submitted if the proposed ward has counsel appointed thus the GAL is dismissed.

In Oakland County, the court appoints counsel only after receiving the GAL report. Many counties keep the GAL after counsel is appointed, but the GAL becomes a visitor if counsel is appointed.

The probate courts have different practices, but it seems that many probate courts want an individual to report to the court even if the ward has appointed counsel.

The committee will remove the changes to the last sentence of section 5305 and report to Council that there is an issue to be resolved with the probate judges as to what role a GAL serves after counsel is appointed for the ward and whether the GAL report should still be filed.

Becky Schnelz also pointed out that some language in section 5305 ought to be cleaned up to synchronize with our goal of clarifying that a GAL is appointed with duties as provided in EPIC. The language of “to represent the ward” ought to be removed.

Connie asked if anyone had questions about the status of section 5433. The Council voted in January 2013 to have subsection (1) put back into section 5433 since it was not our intent to remove it when we proposed SB 539.

Connie also mentioned that the Court Rules subcommittee is moving forward with developing new forms for a guardian or conservator appointed in another state to use when transferring their guardianship or conservatorship to Michigan. Connie is working on one form to serve as both an application and as a notice to be sent out to interested persons.
1. **Foreign Guardianship Court Rules and Forms.** New court rules in response to the new foreign guardianship legislation was discussed at the March Council meeting. The rules were sent back to committee for further discussion. The revised rules are part of the CSP report and will be discussed today. The proposed forms are attached. The new forms are attached but will not be discussed at this month’s Council meeting. Instead, they will be reviewed at our June meeting. They are provided now for your review and comment, if any.

2. **Probate Appeals Project, ADM 2011-30.** All signatures have been obtained for our joint letter to the Supreme Court; it is attached. It was submitted to the Court and is tentatively scheduled to be discussed by the Court at their May administrative hearing. Note that while the letter was written in January, all signatures were not obtained until late March. Many thanks to Mike McClory for his help with this project!

3. **ADM 2011-31.** Mark Harder, Chair of the Section, was asked by the State Bar to consider ADM 2011-31 and get comments back by May 24, 2013. Mr. Harder referred this ADM to the Court Rules, Forms and Procedures committee for review. We reviewed the proposed rules in question along with the substantive changes proposed by the Appellate Practice Section (APS). We have no objections to the proposals; however, since the proposed rules deal with appellate issues, we do not see the need for Council to take a position on these proposals unless the APS asks for our support. In that case, we would support the proposed rule changes. ADM 2011-31 is attached for your review. In very basic terms, these proposed rule changes deal only with providing timelines for the filing of reply briefs relative to an application for leave to appeal in the Circuit Courts and the Court of Appeals, along with timing for the filing of reply briefs in the Circuit Court.

4. **SCAO – 2 meetings per year.** The Committee has discussed at length whether or not the SCAO forms workgroups should meet twice a year instead of one time per year. We have consulted on this issue with the Probate Judges and several Probate Administrators. In addition, with the assistance of Judge Murkowski, discussions have also been had with the SCAO Administrator, Chad Schmucker. At this time, the Committee suggests to Council that we end our efforts to change the workgroup meeting structure. We have discovered that efforts are made by SCAO to be immediately responsive to changes in the law and Michigan Court Rules in the updating of court forms. Further, our input is considered by the SCAO staff when provided, in addition to input given by various courts and their staff. Large projects involving revisions to numerous forms appear to be handled only at the annual form workgroup meetings. An example of a large project not being handled on an emergency basis is the foreign guardianship legislation and the attendant necessary changes. Overall, for now, we...
believe the current situation is adequate to satisfy Council’s desire for giving substantive support and assistance to SCAO in the creation of up-to-date court forms.

5. **SCAO Court form update.** The Committee is continuing review of proposed new forms for the foreign guardianship legislation. In addition, we will be reviewing and suggesting revisions to PC 577, the Inventory form. Our changes will be reviewed at June’s Council meeting in anticipation of SCAO's June 30, 2013 deadline for suggested changes.

Respectfully submitted,

Marline C. Teahan, Chair  
Court Rules, Forms and Procedures Committee
APPLICATION FOR APPOINTMENT OF CONSERVATOR BY A CONSERVATOR APPOINTED IN ANOTHER STATE

FILE NO.

1. Estate of ____________________________________________
   Individual in need of protection

   Last four digits of SSN XXX-XX-_______________________

2. Date of birth _____ Race _____ Sex _____

   Address where protected individual is presently located

   City/ Township __________________________ State __ Zip __

3. I, ____________________________________________, am interested in this matter and make this petition
   as conservator appointed in another state for the protected person.

4. An action within the jurisdiction of the family division of circuit court involving the family member
   or members of the person named above has been previously filed in _______ court, Case number
   ______________ was assigned to Judge ____________, and _____ remains _____ is no longer pending.

5. The protected individual is a resident of

   City, village, or township ____________ County __________ State ____________

   has a home address and telephone number of ____________

   Address ________________________________________ and property located in

   City ________ State __________ Zip __________ Telephone no. ____________

   ____________ County.

6. The individual has _____ a patient advocate/power of attorney for health care
   _____ a power of attorney

   Name and address of person or persons appointed to serve as agent

7. The name, address, and telephone number of the person/agency (if any) who currently has care
   and custody of the individual are

________________________________________________________________________

8. The individual has an estate valued at:

   $_________ $_________ $_________ $_________
   Real property  Personal property  Insurance  Monthly income

   The individual is receiving the following benefits from governmental agencies:

________________________________________________________________________
9. The individual has
   ___ a spouse whose name and address are listed below
   ___ adult child(ren) whose name(s) and address(es) are listed below
   ___ living parent(s) whose name(s) and address(es) are listed below
   ___ no spouse, child(ren), or parent(s). The names and addresses of presumptive heirs are listed below.
   ___ none of the above (must notify Attorney General – see instructions for the address of the Attorney General).

(Grid)

10. None of the adults named above is under any legal incapacity except
   __________________________________________________________________________________________
   Give name, legal incapacity, and representative of the person, if any

11. I REQUEST that the court appoint
   __________________________________________________________________________________________
   Name  Address  City  State  Zip  Telephone number
   who has priority as ___ conservator appointed in another state ___ as conservator.

12. No petition for conservatorship of this individual is pending in this state.

13. I am appointed, qualified and serving in good standing in the state that appointed me as conservator for this individual.

14. I declare under the penalties of perjury that this petition has been examined by me and its contents are true to the best of my information, knowledge, and belief.

   Attorney signature block  Date  Applicant signature block  Date

NOTICE TO APPLICANT: You must serve this application to interested persons and file a proof of service with the court within 14 days of your filing date.

NOTICE TO INTERESTED PERSONS: This application has been filed with the court. The court has issued a temporary conservatorship order for this individual. A conservator appointed in another state for an individual has priority to be appointed as conservator for that individual in Michigan. However, you may pay a filing fee and petition the Michigan court to have the Michigan conservatorship terminated or modified.

The court will not be able to provide you with any legal advice in completing or filing the forms.
APPLICATION FOR APPOINTMENT OF GUARDIAN BY A GUARDIAN APPOINTED IN ANOTHER STATE □ incapacitated individual □ minor

FILE NO.

1. IN THE MATTER OF ____________________________________________________________
   Incapacitated individual or Minor

   Last four digits of SSN XXX-XX-----------------------------------------------

2. Date of birth_____ Race ____ Sex _____

   Address where incapacitated individual or minor is presently located

   _______________________________________________________________________
   City/ Township          State                Zip

3. I, _____________________________________________, am interested in this matter and make this petition as
   ____ guardian appointed in another state for the incapacitated individual
   ____ guardian appointed in another state for the minor

4. An action within the jurisdiction of the family division of circuit court involving the family member or members of the person named above has been previously filed in ________ court, Case number ________________, was assigned to Judge ________________, and ___ remains ___ is no longer pending.

5. The individual is a resident of ____________________________________________
   City, village, or township   County    State

   and has a home address and telephone number of ____________________________
   Address

   _______________________________________________________________________
   City          State                Zip                Telephone no.

6. The individual has _____ a patient advocate/power of attorney for health care
   _____ a power of attorney

   ________________________________________________________________
   Name and address of person or persons appointed to serve as agent

7. The name, address, and telephone number of the person/agency (if any) who currently has care and custody of the individual are

   ________________________________________________________________

8. The individual ____ is ____ is not entitled to receive Veterans Administration benefits. The Veterans Administration claimant number is ____________________________

9. The individual has
   ____ a spouse whose name and address are listed below
   ____ adult child(ren) whose name(s) and address(es) are listed below
   ____ living parent(s) whose name(s) and address(es) are listed below
none of the above (must notify Attorney General – see instructions for the address of the Attorney General).

10. None of the adults named above is under any legal incapacity except

Give name, legal incapacity, and representative of the person, if any

11. I REQUEST that the court appoint

Name Address City State Zip Telephone number

who has priority as ___ guardian appointed in another state ___ as

___ full guardian with all powers provided by statute

___ limited guardian with the following powers

12. No petition for guardianship of this individual is pending in this state.

13. I am appointed, qualified and serving in good standing in the state that appointed me as
guardian for this individual.

I declare under the penalties of perjury that this petition has been examined by me and its contents
are true to the best of my information, knowledge, and belief.

Attorney signature block Date Applicant signature block Date

NOTICE TO APPLICANT: You must serve this application to interested persons and file a proof of
service with the court within 14 days of your filing date.

NOTICE TO INTERESTED PERSONS: This application has been filed with the court. The court has
issued a temporary guardianship order for this individual. A guardian appointed in another state for
an individual has priority to be appointed as guardian for that individual in Michigan. However, you
may pay a filing fee and petition the Michigan court to have the Michigan guardianship terminated or
modified.

The court will not be able to provide you with any legal advice in completing or filing the forms.
STATE OF MICHIGAN
PROBATE COURT
COUNTY OF

REGISTER'S STATEMENT REGARDING APPOINTMENT OF CONSERVATOR

1. An application has been filed requesting
   __ appointment of conservator
   __ appointment of guardian

2. Upon consideration of the application, I determine that all of the following are true:
   __ Venue is proper
   __ An authenticated copy of the guardian or conservator's appointment in another state accompanies
     the application.
   __ The guardian/conservator is in good standing in the state where he or she was appointed.

3. __________________________________________ whose address and telephone number are
   __ temporary guardian of an incapacitated individual
   __ temporary conservator of all assets of a minor
   __ temporary conservator of all assets of an adult
   __ limited conservator of the following assets:
   ___________________________. The individual retains title to all other assets in the estate.

4. Upon filing an acceptance, letters shall be issued to that person
   __ with bond in the amount of $___________________________
   __ without bond

5. After qualification, the temporary guardian/conservator shall comply with all relevant
   requirements under the law.

6. The application is denied because:
   __ a guardian/conservator has been appointed in this state
   __ a petition for guardianship/conservatorship is pending in this state
   __ the application is incomplete

7. Letters of authority expire in 28 days. After filing proof service with the court, the court shall issue
   full letters of authority accordingly.

Date____________________________ Register____________________________

________________________________________
Attorney name Bar no.

________________________________________
Address City, state, zip
The Michigan Constitution provides that the jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court. Const 1963, art 6, 10.

The Constitution also provides that the Circuit Court's jurisdiction is "of other cases and matters as provided by rules of the supreme court." Const 1963, art 6, § 13.

January 25, 2013

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
PO Box 30052
Lansing, Michigan 48909

Re: ADM File No. 2011-30; Probate Court Appeals

Dear Mr. Davis:

On behalf of the Court of Appeals, Michigan Judges Association, the Michigan Probate Judges Association, the Council of the Appellate Practice Section and the Council of the Probate & Estate Planning Section, please find below a summary of the Supreme Court's authority to make the rule changes proposed in ADM File No. 2011-30.

Question:

Does Michigan law allow the Supreme Court, by court rule, to change the jurisdiction of the Court of Appeals and the Circuit Court? Further, is an amendment of MCR 5.801 a proper exercise of the Supreme Court's authority if the amendment directs that all probate court appeals shall be heard by the Court of Appeals, including orders, sentences and judgments involving estates, trusts, guardianship matters under the Estates and Protected Individuals Code and the Mental Health Code, and other orders affecting the rights and interests of a person under the Mental Health Code?

Answer:

Yes, the Supreme Court has the authority to promulgate court rules that change the jurisdiction of both the Court of Appeals and the Circuit Court and can therefore amend MCR 5.801 to direct all of the probate court appeals enumerated above to the Court of Appeals.

Analysis:

The Michigan Constitution provides that the "jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court." Const 1963, art 6, § 10. The Constitution also provides that the Circuit Court's jurisdiction is "of other cases and matters as provided by rules of the supreme court." Const 1963, art 6, § 13.
January 25, 2013

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The Supreme Court's power to authorize appeals of right to the Court of Appeals from orders of the Probate Court (at least with respect to all matters falling within the scope of the Estates and Protected Individuals Code) has been specifically conferred by § 1305 of the Estates and Protected Individuals Code ("EPIC"). MCL 700.1305. This law is a specific grant of authority from the legislature to the Supreme Court to modify the power of the appellate court for probate court appeals by court rule. EPIC Section 1305 provides:

"Appellate review, including the right to appellate review or interlocutory appeal and provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments, and the power of the appellate court, is governed by the revised judicature act of 1961 and by supreme court rule."

The Revised Judicature Act ("RJA") grants rule-making power to the Supreme Court. MCL 600.223. MCR 7.203(A)(2) and MCR 7.203(B)(4) recognize and declare the Supreme Court's authority to supplement the jurisdiction of the Court of Appeals by Supreme Court rule. MCR 7.203(A)(2) provides that the Court of Appeals has jurisdiction of an appeal of right in any 'judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule.' MCR 7.203(B)(4) provides that the Court of Appeals may grant leave to appeal "any other judgment or order appealable to the Court of Appeals by law or rule."

The Supreme Court has defined the jurisdiction of the Court of Appeals and the Circuit Courts for purposes of all appeals from all orders and judgments of the probate court by its promulgation of MCR 5.801. MCR 5.801(A) currently provides that "An interested person aggrieved by an order of the probate court may appeal as provided by this rule." By amending MCR 5.801(B)(1), effective April 1, 2010, to include appeals from all final orders affecting the rights or interests of a party to a civil action commenced in the probate court, the Supreme Court did exactly what we are asking it to do now - make a rule change that expands the Court of Appeals' jurisdiction. The Supreme Court has this power, by law and by rule, and has exercised it repeatedly in this and in other Court rule changes.

In conclusion, a further amendment to MCR 5.801 to provide that appeals of all probate court matters, involving estates, trusts, guardianship matters under the Estates and Protected Individuals Code and the Mental Health Code, and other orders affecting the rights and interests of a person under the Mental Health Code, shall be appealable to the Court of Appeals is a proper exercise of the Supreme Court's power granted to it by the legislature.

Please contact any one of us with questions you may have. We appreciate the opportunity to participate in this process.

Very truly yours,

[Signatures]

Hon. Elizabeth L. Gleicher, Chair
Rules Committee
Court of Appeals

Hon. Lita Masini Popke, President
Michigan Judges Association
January 25, 2013
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Hon. Elwood L. Brown, President
Michigan Probate Judges Association

Lisa R. Speaker, Immediate Past Chair
Appellate Practice Section

Via email to: MSC.Clerk@courts.mi.gov

Marlaine C. Teahan, Chair
Court Rules, Procedures & Forms
Committee
Probate & Estate Planning Council
Order

March 20, 2013

ADM File No. 2011-31

Proposed Amendment of Rules 7.105, 7.111, and 7.205 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rules 7.105, 7.111, and 7.205 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/public-administrative-hearings.aspx.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 7.105 Application for Leave to Appeal

(A)-(C) [Unchanged.]

(D) Reply. Within 7 days after service of the answer, the appellant may file a reply brief that conforms to MCR 7.212(G).

(D)(E)-(F)(G) [Former subsections (D)-(F) are relettered, but otherwise unchanged.]

Rule 7.111 Briefs

(A) Time for Filing and Service.
(1)-(2) [Unchanged.]

(3) Within 14 days after the appellee’s brief is served on appellant, the appellant may file a reply brief. The brief must conform to MCR 7.212(G) and must be served on all other parties to the appeal.

(4) Briefs in cross appeals. The filing and service of briefs by a cross appellant and a cross appellee are governed by subrules (A)(1) and (2)-(3).

(4)-(5)-(6) [Former subsections (4)-(5) renumbered, but otherwise unchanged.]

(B)-(D) [Unchanged.]

Rule 7.205 Application for Leave to Appeal

(A)-(C) [Unchanged.]

(D) Reply. A reply brief may be filed as provided by MCR 7.212(G).

(D)-(E)-(G)(H) [Former subsections (D)-(G) are relettered, but otherwise unchanged.]

Staff Comment: The proposed changes would permit the filing of a reply brief in support of an application for leave to appeal in the circuit court and the Court of Appeals. The proposed changes were submitted by the Appellate Practice Section of the State Bar of Michigan.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2013, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-31. Your comments and the comments of others will be posted under the chapter affected by this proposal at http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/chapter-7-appellate-rules.aspx.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 20, 2013

Clerk
Warning: The DING Trust May Not Work as Expected for Michigan Clients

A recent PLR outlined an acceptable way to shift taxation of certain types of income to another state which may not tax certain trusts and thus avoid state income taxation. This technique may work for some states, but probably not for Michigan.

A Delaware Incomplete Non-Grantor ("DING") Trust is designed to eliminate state income taxes on passive income by having the Settlor transfer passive, typically investment, assets to a Delaware trust for income tax purposes without having a complete gift for gift tax purposes (another variation on a familiar theme). The cost is not to the Federal government but to the state government.

In PLR 201310002, the IRS ruled that Settlor (who with his four sons constitute the Distribution Committee) would not be deemed the owner of any portion of the trust under IRC §§ 673, 674, 675, 676 and 677; (ii) no other members of the Distribution Committee would be deemed an owner of any portion of the trust under IRC §678; (iii) the transfer of property by the Grantor to the trust would not be a completed gift; (iv) a distribution of property by the Distribution Committee to the Grantor would not be a completed gift by any member of the Distribution Committee; and (v) a distribution of property by the Distribution Committee to any beneficiary of the trust other than the Grantor would not be a completed gift by any member of the Distribution Committee other than the Grantor. In other words, the Grantor made an incomplete gift, the trust is not a grantor trust and no member of the Distribution Committee, excluding the Grantor, has a general power of appointment for gift or estate tax purposes. The rationale and mechanics are spelled out in PLR 20131002.

States differ widely in determining the tax situs of a trust. Some states look to the location of the trustees, some look to the location of the beneficiaries, some look to the location of the Settlor at the time the trust is created.¹

Michigan primarily looks to the domicile of the person who created the trust at the time the trust became irrevocable.² In Blue v. Dept. of Treasury, 185 Mich. App. 406, 462 N.W. 2d 762 (1990), the Settlor of a revocable trust died in Michigan in 1982, but for some time, all of the assets except for one non-income producing parcel of real estate in Detroit, were held and administered in Florida by a Florida trustee. The Michigan Court of Appeals relied heavily upon a similar Missouri case that had found insufficient connections with that state to be constitutionally taxed by Missouri.³ Except for the Blue exception, or untested concepts

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¹ This is often a topic at national presentations, see State Income Tax Issues with Trusts, C. A. Redd (Cannon Financial Institute, January 11, 2011) www.naepc.org/journal/issue08d.pdf. It seems to resurface at the Heckerling and Notre Dame Institutes once every three to five years. Richard Nennen of Wilmington Trust published a study through March 2011.

² MCL 260.18(1)(c) provides, "any trust created by, or consisting of property of, a person domiciled in this state at the time the trust becomes irrevocable," is a resident of this state.

³ The Connecticut Supreme Court reached a contrary result in Chase Manhattan Bank v. Gavin, 733 A.2d 782 (Conn. 1999). The New Jersey Tax Court held that the accumulated income of a resident trust administered outside of New Jersey by a New York trustee was not subject to tax in New Jersey (Residuary Trust A v. Director,
involving decanting, PLR 201310002 is an illusory trap for Michigan taxpayers and their advisors which may lead them to think they have avoided Michigan income tax by following it.

Authored by George W. Gregory on behalf of the Transfer Tax Committee

Nancy H. Welber, Chair

George W. Gregory
Marguerite Munson Lentz
Thomas F. Sweeney

Division of Taxation, No. 000364-2010 (N.J. Tax Ct. 1/3/13) relying on Pennoyer v. Taxation Division Director, 5 N.J. Tax 386 (1983). In your author’s opinion, fresh looks at this issue such as Connecticut and the District of Columbia have resulted in local taxing jurisdictions upholding the constitutionality of such taxing nexus. The Michigan Department of Treasury used to carve out situations like Blue in the MI-1041 instructions and no longer do so. Decanting might give Michigan taxpayers another choice in picking another state for tax nexus. See "New Decanting Statutes Offer Road Map for Escaping Fiduciary Tax and Updating Trust Terms" by A.Y. Young, The Tax Advisor (AICPA) published April 1, 2013, http://www.aicpa.org/Publications/TaxAdviser/2013/April/Pages/clinic-story-03.aspx.