

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

**December 12, 2009
University Club
Lansing, Michigan**

Minutes

I. Call to Order

The Chair of the Section, Harold Schuitmaker, called the meeting to order at 10:15 a.m.

II. Excused Absences

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

Harold Schuitmaker, Chair	Rob Tiplady
Doug Chalgian, Chair-Elect	Marlaine Teahan
Mark Harder, Secretary	Patricia Ouellette
Marilyn Lankfer, Treasurer	Ellen Sugrue Hyman
Hon. David Murkowski	Susan Allan
David Kerr	Josh Ard
James Steward	Rebecca Schnelz
Amy Morrissey	Tom Sweeney
Hon. Darlene O'Brien	Shaheen Imami
James P. Spica	Robin Ferriby

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

Hon. Phil Harter
Doug Mielock
Nancy Little
Bob Brower
Michael S. McClory

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

George Gregory, Vice Chair
Bob Taylor
Richard Siriani

III. **Introduction of Guests**

Members of the Council, officers, and guests introduced themselves. The following guests were in attendance:

Constance Brigman
Dan Cogan
Dan Marsh
Kathleen Goetsch
Valerie Lafferty
John Dresser
Kate White
Mark Kellogg

Tess Sullivan
Carol Sewell
Jill Goodell
Stephen Rohr
Kristin Vanpraet
Michael A. Mestelle
Rebecca Bechler

IV. **Minutes of November 21, 2009 Meeting of the Council**

Minutes of the November 21, 2009, meeting of the Council had been previously distributed with the Agenda for the meeting. Upon motion by Ms. Lankfer, with support from Ms. Morrissey, the minutes were unanimously approved.

V. **Treasurer Report – Marilyn Lankfer**

Ms. Lankfer distributed a financial report for October and November 2009 (**Attachment 1**). The State Bar has moved its financial and accounting personnel, which has prevented them from finalizing the Section's 2009 annual financial statement and from issuing final October and November 2010 financial statements. This report should therefore be considered preliminary only. Ms. Lankfer noted, however, that the annual Chairperson's dinner was well under budget. She also reminded members of the Council that the rate for mileage reimbursement will change from \$.55 to \$.50 on January 1, 2010.

VI. **Chairperson's Report**

Mr. Schuitmaker communicated to the Council Ms. Little's letter of thanks for the gifts she received in recognition of her year as Chair of the Section.

VII. **Report of the Committee on Special Projects – Amy M. Morrissey**

Ms. Morrissey reported on the meeting of the Committee on Special Projects that preceded the Council meeting. The Committee used its meeting time to discuss proposed technical amendments to the Michigan Trust Code.

Mr. Harder had advised the Committee that his Commentary will confirm that the drafters of the Michigan Trust Code did not intend to make any changes concerning the ability of agents to create trusts. The Michigan Trust Code Committee will continue to

work on a proposed technical amendment to eliminate any doubt about the ability of agents to establish trusts on behalf of principals.

Ms. Morrissey offered a motion to extend to Mr. Harder the authority to make and approve on behalf of the Section such nonsubstantive, clerical changes to the Michigan Trust Code as he may deem necessary. Ms. Lankfer supported the motion. It was unanimously approved.

Ms. Morrissey, with support from Mr. Kerr, offered a motion to approve the technical amendments to EPIC sections 1209 and 2519, to add headings to the parts that comprise Article VII of EPIC, to divide Article VIII of EPIC into parts 1 and 2 and to add headings for them, and to approve technical amendments to MTC sections 7411, 7414, 7817, 7821, and 7910, all in the form approved by the Committee on Special Projects (see **Attachment 2**). The motion was unanimously approved.

Ms. Morrissey, with support from Judge Murkowski, also offered a motion to approve a technical amendment to add a subsection (p) to MTC 7105 in the form shown on **Attachment 2**). The motion was approved by show of hands on a vote of 15-5, with no abstentions.

The Council departed from its Agenda to receive a presentation from Kate Birnbryer White, Executive Director of Elder Law of Michigan, a nonprofit organization providing information, advocacy, legal advice, and professional services to the elderly community in order to promote and protect the rights, health, and economic wellbeing of disabled and elderly individuals. More information on its services and contact information for Ms. White can be obtained at www.elderlawofmi.org.

VIII. **Standing Committee Reports**

A. **Internal Governance**

1. Budget – George Gregory

No report.

2. Bylaws – Marilyn Lankfer

Ms. Lankfer reported that the Bylaws Committee had looked at three issues since the last Council meeting. The Committee has consulted with members of the Nominations Committee regarding the nomination process. The Bylaws Committee also has reviewed the issue of membership of law students in the Section. Noting that law students can join the Bar and the Section, the Committee observed that the Council can set dues. The Committee has recommended setting law student dues at \$0. Doing so avoids an amendment to the Section's Bylaws. The Committee also considered whether to eliminate references in the Bylaws to years that have since concluded. Because the Committee has determined that this

issue is not something that must be addressed at this time, the Committee has not recommended any change. Finally, the Committee has reviewed the lack of notice requirements in the Bylaws. In recognition of the comments made at the November meeting of the Council the Committee has not recommended the addition of any notice provisions. The Committee has recommended to the Nominations Committee that it be attentive to ensuring that nominations to the Council and to officer positions be adequately communicated to members of the Section.

Ms. Lankfer offered a motion to accept the Committee's recommendation that no changes be made to the Bylaws at this time and to establish dues for law student members of the Section at \$0 for the duration of their studies. Mr. Harder offered support for the motion, which was unanimously approved. Mr. Ard will make sure the law schools in Michigan are aware that their students who join the Bar may join the Section free of charge.

3. Michael Irish Award – Brian Howe

No report.

4. Long Range Planning – Doug Chalgian/Nancy Little

No report.

5. Nominations – Doug Mielock

No report.

6. Relations with the State Bar – Thomas F. Sweeney

Mr. Sweeney reported that Judge Harter had arranged for the three articles on adult guardianship that had been published in community newspapers (which was only minimally successful) to be placed on the Calhoun County website. Ms. Schnelz has circulated the articles to interested groups in Oakland County. Mr. Sweeney will approach other probate courts, initially on a selective basis, about either placing the articles on their websites or providing a link to the Calhoun County site.

7. Annual Meeting – George Gregory

No report.

B. Education and Advocacy Services for Section Members

1. *Amicus Curiae* – Ellen Sugrue Hyman

Ms. Sugrue Hyman reported that the *Amicus Curiae* Committee had considered the request from Ms. Ouellette that the Section file an *amicus* brief in *Tkachik v Mandeville*, a court of appeals domestic relations case now before the Supreme Court. Ms. Sugrue Hyman distributed a memorandum concerning the case (**Attachment 3**) and reviewed the circumstances of the case. The Committee has recommended no action be taken because this is a family law and property law case and it does not appear to have a direct impact on the practice of law by members of the section. The Council discussed the Committee's recommendation. Ms. Sugrue Hyman offered a motion, with support from Mr. Chalgian, to accept the Committee's recommendation that no brief be filed. The motion was approved on a vote of 19-1.

Ms. Sugrue Hyman also reported on the *Graves* case. The Court of Appeals vacated its original opinion and replaced it with a new one on December 3. In the Committee's opinion the new opinion is not significantly different from the previous opinion and did not satisfactorily address the problem in the original opinion. The Council discussed the Committee's report. Judge Harter observed that he had chaired the Committee that wrote the court rule that was overlooked by the Court of Appeals and feels the court's opinion conflicts with the rule and will be problematic. Mr. Ard distributed a short memorandum (**Attachment 4**) concerning the intersection of the issues presented in *Graves* with proposed changes to MRPC 3.3.

Mr. Chalgian offered a motion directing the *Amicus Curiae* Committee to send letter to the Court of Appeals on behalf of the Section expressing the Section's continuing concerns about the court's opinion and asking the court to either reconsider the matter or withdraw the opinion from publication. Mr. Steward supported the motion, was approved by a vote of 20-0, with no abstentions.

2. Continuing Education and Annual Probate Institute – George Gregory

Mr. Gregory was absent due to illness. Mr. Schuitmaker reported for Mr. Gregory that Greenleaf Trust has agreed to sponsor the speakers dinner at the Institute. The dinner will be held at the Opera House in Traverse City. Mr. Schuitmaker also stated that he is still accepting pictures from past institutes for use at the 50th Institute.

3. Section Journal – Nancy L. Little

Ms. Little reported that the current issue should be published and mailed by the end of the year. It focuses upon the Michigan Trust Code. The next issue will be published in August, with articles due May 1, 2010. The issue will focus on charitable matters. Topics have been selected in the following areas: The charitable trust provisions under MTC; UPMIFA; Michigan tax credits available for charitable gifts; the Michigan nonprofit corporations act; charitable lead trusts; charitable gift annuities and charitable remainder trusts; supporting organizations and operating foundations; and federal tax deductions, including gifts of qualified intellectual property. Except for the article on charitable lead trusts, authors are still needed and individuals interested in writing are encouraged to contact Ms. Little.

4. State Bar Journal – Amy M. Morrissey

Ms. Morrissey has reported that the Section's theme issue for the State Bar Journal will be published in May 2010, which was one month earlier than originally planned. The issue will focus on the Michigan Trust Code.

5. Pamphlets – Ellen Sugrue Hyman

In the interest of time Ms. Sugrue Hyman deferred her report to the January Council meeting.

6. Electronic Communications – Josh Ard

No report.

C. Legislation and Lobbying

1. Legislation – Harold G. Schuitmaker/John R. Dresser/George Gregory

No report.

2. Power of Attorney Act – Daniel P. Marsh

Mr. Marsh reported on behalf of the Committee and reviewed the materials that had been circulated as part of the Supplemental Materials for the meeting.

Mr. Harder offered a motion, with support from Mr. Steward, to have the Section oppose H.B. 5196. The motion was approved 19-0. Judge O'Brien abstained.

Mr. Harder then offered a motion directing the Power of Attorney Act Committee to draft a power of attorney statute using the Uniform Power of Attorney Act as its starting point, with such changes as the Committee determines are appropriate. The motion was supported by Mr. Steward. The motion was approved unanimously.

3. Michigan Trust Code – Mark K. Harder

No report.

D. Ethics and Professional Standards

1. Ethics – J. David Kerr

Mr. Kerr had circulated a report on behalf of the Ethics Committee (**Attachment 5**). In recognition of the hour, Mr. Kerr suggested it be discussed at a future meeting of the Committee on Special Projects.

2. Unauthorized Practice & Multidisciplinary Practice – Bob Taylor

No report.

3. Specialization and Certification – James B. Steward

No report.

4. Practice Management – Patricia Ouellette

No report.

E. Administration of Justice

1. Contested and Uncontested Probate Proceedings – Shaheen I. Imami/Douglas G. Chalgian

Mr. Imami reported that the Committee continues to look at issues related to the matters that are tried by jury. The Committee is consulting with Judge Murkowski on these issues.

2. Uniformity of Practice – Derek A. Walters

No report.

F. **Practice Issues, Related Areas & Liaisons**

1. Charitable Giving/Exempt Organizations – Robin D. Ferriby

Mr. Ferriby reminded the Council that the Uniform Prudent Management of Institutional Funds Act (UPMIFA) was passed into law, effective September 10. He encouraged Council members to make certain that nonprofit organizations they represent are aware of it, as many do not seem to know of its existence or its changes. He also noted that the Congress is considering a bill to extend various tax law affecting charitable organizations. The Council of Southeast Michigan Foundations has agreed to sponsor the Probate Institute in 2010.

2. Transfer Tax – Thomas F. Sweeney

Mr. Sweeney distributed a one page summary concerning legislation extending the Federal estate tax. See **Attachment 6**.

3. Guardianships and Conservatorships – Constance Brigman

Ms. Brigman reviewed a report on behalf of the Guardianships and Conservatorships Committee that had been included in the Supplemental Materials for the meeting. There were two items for consideration by the Council.

The first item concerned the definition in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (“UAGPPJA”) of “temporary absence”. This term is not defined in UAGPPJA. The Committee recommends the addition of a definition. Mr. Steward offered a motion to approve the Committee’s recommendation. Mr. Tiplady supported the motion, which was approved unanimously.

The Committee has also recommended approval of Section 203 of UAGPPJA. Mr. Steward offered a motion to approve the section as written, which was supported by Ms. Morrissey. The motion was approved unanimously.

4. Business Law/Liaison to Business Law Section – John R. Dresser

No report.

5. Elder Law/Liaison to Elder Law Section – Amy R. Tripp

No report.

6. Family Law/Family Law Section Liaison – Patricia M. Ouellette
No report.
7. Real Property Law/Real Property Section Liaison – Daniel P. Marsh
No report.
8. State Bar Section to Section Action Team Liaison – Robert Tiplady
No report.
9. Tax and Taxation Section Liaison – Lorraine F. New
No report.
10. State Bar Liaison – Richard J. Siriani
No report.
11. Court Rules and Forms Committee Liaison – Marlaine C. Teahan

Ms. Teahan reported for the Court Rules and Forms Committee that the Michigan Supreme Court held a hearing on December 10, 2009, to review the Council's recommended amendments to the Michigan Court Rules. Ms. Teahan and Judge Murkowski attended the hearing to answer any questions regarding the proposed rules. The Court is expected to publish the rules as ADM File No. 2009-26 for comment on December 15, 2009. An advance copy of the order was distributed (**Attachment 7**). The Court is expected to take final action to approve the Rules in January, although the Rules will continue to be subject to comment for a time thereafter. Barring a late received comment, Ms. Teahan expects the Rules will be in effect on April 1, 2010, when the Trust Code takes effect.

Ms. Teahan noted that a public policy position was not filed after the September Council meeting. She offered a motion directing the Secretary to file a position reporting the Council's September approval of the Rules. The motion was supported by Ms. Lankfer and approved by a vote of 20-0, with no abstentions.

Ms. Teahan also offered a motion expressing the Section's support of the Supreme Court's anticipated order in ADM File No 2009-26, contingent on the Order's expected issuance on December 15, 2009. Mr. Spica supported the motion, which was approved by a vote of 20-0, with no abstentions. The Chair of the Section will send the Supreme Court a letter of support for the Rules.

12. Trust Institutions and Liaison with Michigan Bankers Association – Susan Allan

No report.

13. Michigan Probate Judges Association Liaison – Hon. Phillip Harter/Hon. David M. Murkowski/Hon. Darlene O’Brien

No report.

14. Law School Liaison – Josh Ard

No report.

IX. Other Business

None.

X. Hot Topics

None.

XI. Adjournment

There being no further business, the Council meeting was adjourned at 12:20 p.m.

Respectfully submitted

Mark K. Harder
Secretary

HD94611-3

ATTACHMENT 1

December Financial Report
(Preliminary through November 30, 2009)

**Probate and Estate Planning Section
Treasurer's Report as of November 30, 2009***

	October Actual	November Actual	Year to Date Actual	2009-10 Budget	Variance
Revenue					
Membership Dues	\$63,595	\$25,410	\$89,005	\$111,510	(\$22,505)
Publishing Agreements				1,875	(1,875)
Other				1,350	(1,350)
Total Receipts	\$63,595	\$25,410	\$89,005	\$114,735	(\$25,730)
Disbursements					
Journal				37,500	(37,500)
Chairperson's Dinner				4,000	(4,000)
Travel	323	826	1,148	12,000	(10,852)
Lobbying	2,000	4,000	6,000	24,000	(18,000)
Meetings	857	246	1,104	9,000	(7,896)
Publishing Agreements				1,125	(1,125)
Support for Annual Institute				2,000	(2,000)
Amicus Briefs				5,000	(5,000)
Listserv	70	70	140	850	(710)
Postage				900	(900)
Telephone		12	12	500	(488)
Other				1,000	(1,000)
Total Disbursements	\$3,250	\$5,154	\$8,404	\$97,875	(\$89,471)
Increase	\$60,345	\$20,256	\$80,601	\$16,860	\$63,741

Additional Information

Fund Balance \$ 199,378

*These are numbers based on preliminary statements from the State Bar.

ATTACHMENT 2

Technical Amendments to the Michigan Trust Code

MICHIGAN TRUST CODE

Proposed Technical Amendments

As Approved December 12, 2009

§1209

Proposed change:

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative, including relief from liability or penalty for failure to post bond or to perform other duties, the sole holder or all coholders of a presently exercisable or testamentary general or special power of appointment, including 1 in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests, as permissible appointees, takers in default, or otherwise, are subject to the power ~~and to the extent there is no conflict of interest between the holder and the persons represented.~~

Reason:

Section 1209 is a representation provision. As it existed prior to enactment of 2009 PA 46 it did not include an exception making it inapplicable if a conflict of interest existed between the holder of a power of appointment and the persons whose interests were subject to the interest. No such exception exists in §1403(b)(i), which is similar.

UTC §302 contains a representation rule pursuant to which holders of powers of appointment represent those whose interests are subject to the power. However, it does not apply when a conflict of interest exists. Because §1209 and §1403(b)(i) did not include this exception, §7302 ultimately did not include the exception found in the UTC provision. An early draft of possible revisions to §1209 considered adding a conflict of interest exception, which was not removed when the representation rules were finalized. As a result §1209 was amended to add a requirement that had not previously existed, was not found in §1403(b)(i), and was not included in §7302. The inconsistency between §1209, on the one hand, and §1403(b)(i) and §7302, on the other, was not noted until the Commentary was being prepared this fall. The proposed change restores §1209 to its form prior to the enactment of 2009 PA 46 and makes it consistent with §1403(b)(i) and §7302.

§2519

Proposed change:

(b) All to be distributed to my heirs as if I did not have a will.

(Your signature)

ARTICLE 3. NOMINATIONS OF PERSONAL REPRESENTATIVE,
GUARDIAN, AND CONSERVATOR

Personal representatives, guardians, and conservators have a great deal of responsibility. The role of a personal representative is to collect your assets, pay debts and taxes from those assets, and distribute the remaining assets as directed in the will. A guardian is a person who will look after the physical well-being of a child. A conservator is a person who will manage a child's assets and make payments from those assets for the child's benefit. Select them carefully. Also, before you select them, ask them whether they are willing and able to serve.

3.1 PERSONAL REPRESENTATIVE.

Reason:

When the updated EPIC Commentary was being prepared, it was noted that the Michigan Statutory Will is missing a heading for Article 3, as it does for other articles of the Will. It has existed this way since EPIC was enacted in 1998. The change will correct this omission.

Headings

Proposed change:

Add headings to each part of Article VII that state as follows:

Part 1
General Provisions and Definitions

Part 2
Judicial Proceedings

Part 3
Representation

Part 4
Creation, Validity, Modification, and Termination of Trust

Part 5
Creditor's Claims; Spendthrift, Support and Discretionary Trusts

Part 6
Revocable Trusts

Part 7
Office of Trustee

Part 8
Duties and Powers of Trustee

Part 9
Liability of Trustees and Rights of Persons Dealing with Trustee

Divide Article VIII into Part 1 (encompassing §8101 through §8102) and Part 2 (encompassing §8201 through §8206) and include headings as follows:

Part 1
Miscellaneous Provisions

Part 2
Michigan Trust Code Miscellaneous Provisions; Effective Date

Reason:

The omission of headings for each Part of the Michigan Trust Code was the result of a misunderstanding with LSB during the bill drafting process. The Committee Chair was advised that the compiler would add catchlines after the passage of the legislation and understood this to mean that the compiler would add the headings to parts as well. After passage, when the catchlines were being inserted, we learned that the compiler could not add headings for parts, but that this must be included in the legislation. The rest of EPIC contains headings for each part, which are useful to the users, and headings for each part of Article VII are therefore being proposed for addition.

In addition, the designation of Parts 1 and 2 and their headings in Article VIII also were overlooked in the bill drafting process and are being recommended for addition.

§7105

Proposed change:

Add (p) to section 7105 stating:

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

exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

Reason:

Because the MTC is a default statute, provisions that are not described separately in §7105(2) can be overridden in the terms of the trust. Section 7113 parallels the provisions of §2518, but §7113 was not listed in §7105(2), although it was generally understood to be a so-called “nonmodifiable provision”. The addition of §7105(p) as proposed will ensure that §7113 is not subject to modification by drafting of the terms of the trust.

§7411(3), (6)

Proposed change:

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

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

Reason:

During the course of writing proposed MCR 5.125(C)(32)(b) it was observed that notice might not be required under the statute to a settlor who may have capacity because the person giving notice has a reasonable basis to believe the settlor is incapacitated, even though that belief is inaccurate or not correct. Although the proposed court rule requires giving notice to the settlor and the representative, the Committee felt it appropriate to add a requirement of notice to the settlor in all circumstances and not leave the matter to the proposed court rule.

In addition, it was observed that the Code generally uses the phrase “agent” rather than “attorney in fact”, including elsewhere in §7411(6). To avoid confusion, the Committee has recommended a change from “attorney in fact” to “agent”. This is the only place the term “attorney in fact” is used in the MTC.

§7414

Proposed change:

(3) Upon termination of a noncharitable trust under this section, the trustee shall distribute the trust property in the manner provided for in the terms of the trust, if any, and otherwise to the current income beneficiaries or, if there are no current income beneficiaries, in the manner directed by the court. Upon termination of a charitable trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

Reason:

Section 7414 currently requires trust property be distributed to the income beneficiaries upon termination of a trust pursuant to §7414, unless the terms of the trust provide otherwise. In the case of a charitable remainder trust, this would disqualify the trust. Although well drafted charitable remainder trusts should provide that upon termination the trust property passes to organizations qualified under IRC §170(c), this may not always be the case. To avoid possible disqualification of these trusts, the Committee has recommended a technical amendment.

§7817(w)

Proposed change:

(w) To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for ~~that~~ this or her employment.

Reason:

The drafting of §7817(2) was completed in the early fall of 2005 and was based largely upon §7401 as it then existed. 2005 PA 204 was passed and given immediate effect in November 2005 and changed §7401(w). The change was not noted until the summer of 2009 after enactment of the Michigan Trust Code. The proposed change will restore the language now found in §7401(w) that was inadvertently omitted.

§7821(3)(b)

Proposed change:

(3) A release by a trust beneficiary of a trustee from liability for breach of trust is invalid to the extent either of the following applies:

(a) The release was induced by improper conduct of the trustee.

(b) The trust beneficiary, at the time of the release, did not know of the ~~trust beneficiary's rights or of the~~ material facts relating to the breach.

Reason:

Sections 7821(3)(b) and 7909 each recognize consents, waivers, and releases by beneficiaries. Section 7909 is a general provision. Section 7821(3)(b) applies in the case of terminating or partially terminating distributions. The UTC antecedents to each provision create exceptions when the beneficiary did not know of material facts related to a breach of trust or the beneficiary's legal rights. Section 7909 removes the exception for lack of knowledge of legal rights, but it was not removed from §7821(3)(b). There is no good reason for treating the subset of terminating distributions differently from other circumstances and the Committee has recommended aligning §7821(3) with §7909.

§7910(1)

Proposed change:

(1) Unless otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust estate unless the trustee fails to reveal the trustee's representative capacity ~~and identify the trust estate in the contract.~~

Reason:

Section 7910 is based upon current §7306. There are two concerns with its terms: First, the statement that the trustee must reveal the "trust estate" could be construed to require disclosure of the *property* held in trust. See §7104(b) ("'Estate' includes the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration.")

Second, the requirement of disclosure of the trustee's fiduciary status *and* the trust estate or name of the trust in a contract potentially creates a trap for unwary trustees if the trust is not fully and accurately described. UTC §1009, on which §7909 is based, only requires disclosure of the trustee's representative capacity. Third parties who are advised by the trustee that s/he or it is

acting in a representative capacity puts the third party on notice to inquire further into the exact trust with which the third party is interacting and the nature and extent of its assets.

HD95247-~~43~~3

ATTACHMENT 3

Amicus Curiae Committee Report and Recommendation Concerning *In re Tkachik*

Memorandum

To: Probate and Estate Planning Council Members
From: Ellen Sugrue Hyman, Melisa Mysliwiec, and Derek Walters
Amicus Curiae Committee Members
Date: December 12, 2009
Re: In re Tkachik

The Amicus Curiae Committee ("Committee") reviewed an Application for Consideration submitted on behalf of the Family Law Section. Specifically, the Family Law Section inquired whether the Probate Council ("Council") intends to file an Amicus Curiae brief in the case of In re Tkachik, and if not, whether the Council would join with the Family Law Section on their brief.

The Committee recommends that the Council not file an Amicus Curiae brief in the case of In Re Tkachik. The Committee also recommends that the Council not join the Family Law Section on their brief.

Issue

Whether, when a husband has abandoned his wife for the year and a half preceding her death, and the wife alone has made mortgage, tax, and insurance payments on property held as tenants by the entirety, the wife (or her estate) may receive contribution for the husband's share of these payments.

Background

Husband and Wife purchased real property together, which was held as tenants by the entireties. Several years later, Husband and Wife separated, but neither sought a divorce. In 2002, Wife died. Prior to her death, Wife executed a will and trust, excluding Husband and naming her sister, Appellant, as personal representative. Husband filed a petition for probate and a complaint seeking to set aside Wife's will and trust. Appellant moved for summary disposition, arguing that Husband should not be considered a surviving spouse pursuant to MCL 700.2801(2)(e) because he had been absent from Wife for more than one year. *The probate court granted sister's motion and dismissed Husband's complaint.*

Subsequently, Appellant filed a complaint seeking a determination that the probate court's previous ruling that Husband was not a surviving spouse operated to destroy the tenancies by the entirety, meaning that the two properties were held by Husband and Wife as tenants in common. Husband countered that the tenancies by the entireties remained intact, despite the probate court's previous ruling, and that sole ownership of the property vested in him. *The probate court agreed with Husband, reasoning that MCL 700.2801(2)(e)(i) did not terminate the tenancies. The Order stated that the determination that Husband was not the surviving spouse is limited to MCL 700.2801,*

which is limited to intestate succession, spousal entitlements, and priority among persons seeking appointment as personal representative.

Appellant then filed an amended complaint seeking contribution from Husband for Wife's maintenance of the properties during Husband's absence, including maintenance, tax, and mortgage costs. Husband moved for summary disposition arguing that Appellant had failed to state a claim on which relief could be granted. *The probate court granted Husband's motion, ruling that a tenancy by the entirety "is held without regard to who provided a greater contribution."*

Procedure

Appellant sought leave to the Court of Appeals, which was denied "for lack of merit in the grounds presented." **The Supreme Court**, on reconsideration of the Appellant's application for leave to appeal, **directed the Court of Appeals to consider "whether a contribution claim against the husband, based on an unjust enrichment theory, is appropriate under the facts of this case."** The Court of Appeals rejected the Appellant's claim for contribution from Husband for the reasons set forth under "Court of Appeals' Decision," below. **The Supreme Court** then granted the Appellant's application for leave to appeal the February 5, 2009, judgment of the Court of Appeals and **ordered the parties to brief "whether, when a husband has abandoned his wife for the year and a half preceding her death, and the wife alone has made mortgage, tax, and insurance payments on property held as tenants by the entirety, the wife (or her estate) may receive contribution for the husband's share of these payments."**

The Court of Appeals' Decision

The Court of Appeals affirmed the Probate Court's decision, rejecting the invitation "to invent a claim by which a decedent spouse's estate can sue the surviving spouse for contribution for expenses related to an entireties property under a theory of unjust enrichment." The Court reasoned that this would be tantamount to a posthumous divorce. Appellant urged the Court to adopt other states' conclusions with respect to contribution for property-related expenses for entireties property, but the Court noted that these cases were factually distinct – they were each determined in the context of partitioning marital property between living spouses, not in the context of distributing a decedent spouse's estate after that spouse's death. The Court also noted that it is not bound by precedent from foreign jurisdictions.

Conclusion

While the Committee is concerned that the Supreme Court is evaluating the issue set forth above, the Committee recommends that the Council not file an Amicus Curiae brief because the Committee does not believe that the property/family law issue being evaluated will significantly affect the practice of law by the members of this Section. The Committee also recommends that the Council not join the Family Law Section on their brief.

ATTACHMENT 4

Memorandum from Josh Ard Concerning
Relationship between *In re Graves* and Proposed changes to MRPC 3.3

The Supreme Court is considering changes in the rules of professional conduct. One of them would modify 3.3 by adding the following:

(b) If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

The comment for this addition is

***Preserving Integrity of Adjudicative Process.** Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph(b) requires a lawyer to take reasonable remedial measures, including disclosure, if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding. See Rule 3.4.*

This seems to go well beyond what we have now. Now we have the option of reporting future crimes and an obligation to remedy harm we may have unwittingly facilitated. This would require attorneys to report any past crime or fraud related to an adjudicative proceeding. I'm not clear how broad the term adjudicative proceeding is. Does it include estate administration if there has been no hearing? Guardianship and conservatorship? Medicaid? Social Security? Other governmental benefits? If a client has engaged in some sort of wrongdoing a wise attorney would certainly withdraw. Would this put the next attorney on the hook? Would we have a duty to alert clients to the fact that if we discover any malfeasance BEFORE we came on board then we would have to rat them out to the court? Would that encourage people to hire incompetent attorneys who are unlikely to detect anything?

Presumably this does not include representing a fiduciary in his individual capacity after he has been charged with a crime.

By the way, this language is the national norm.

Please let me know if I am just being paranoid.

ATTACHMENT 5

Report of Ethics Committee

ETHICS REPORT
December 11, 2009

J. David Kerr

On November 24, 2009 in its Order ADM File 2009-06, the Michigan Supreme Court published for comment Proposed Amendment of Michigan Rules of Professional Conduct 1.5, 1.7, 1.8, 3.1, 3.3, 3.4, 3.5, 3.6, 5.4, 5.5, and 8.5, and the addition of Rules 2.4, 5.7, and 6.6.

Hearings will be held. The comment period closes March 1, 2010.

The following may be of interest to Probate and Estate Planning Practitioners. Some proposed rules are made in the alternative.

Rule 1.5 (Alternative A)

(a) “an unreasonable amount of expenses” is added to the prohibition of a clearly excessive fee.

(b) if there is a course of dealing between the attorney and a regularly represented client, the lawyer may charge on the same basis as the rate previously agreed upon.

(e) A lawyer and a client may agree that the client will pay the lawyer a fee at the time of engagement for the sole purpose of committing the lawyer to represent the client and not as payment for services, provided that the fee is reasonable and that the agreement is in writing, is signed by the client, and clearly states that the fee will not be returned to the client at any time or under any circumstance, and that it is not payment for services to be rendered.

This is the same concept as the non-refundable engagement fee approved in the Michigan Supreme Court Cooper case previously reported in ethics reports.

Rule 1.5 (Alternative B: Attorney Grievance Commission Proposal)

(b) Definitions

(1) “Advance fee” payments are payments for contemplated services that are made to a lawyer prior to the lawyer having earned the fee.

(2) “Advance expense” payments are payments for contemplated expenses in connection with the lawyer’s services.

(3) A “general retainer” is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not payment

for the actual performance of services, but only to engage the attorney's availability. A lawyer and client may agree that a general retainer is earned by the lawyer when paid by the client. Written notice must be promptly provided to the client that the general retainer is paid solely to commit the lawyer to represent the client and not as a fee to be earned by future services.

(4) A "flat fee" is one that embraces all services that a lawyer is to perform, whether the work is to be relatively simple or complex.

(5) The definitions of "advance fee," "advance expense," "general retainer," and "flat fee" guide the application of the later provisions of this rule, even if different terminology is employed by lawyer or client.

(c) Agreements for Legal Services

(1) The scope of the representation shall be agreed upon with the client pursuant to Rule 1.2(a).

(2) The basis or rate of the fee for which the client will be responsible must be disclosed and agreed upon with the client at the beginning of the representation and confirmed in a writing to the client within a reasonable time, except when the lawyer will charge a regularly represented client on the same basis or rate, or the fee is less than \$1,000.

(3) Any changes in the basis or rate of the fee or expenses must be agreed upon and confirmed in the manner described in paragraph (2) prior to the change being effected (4) A fee agreement shall not give sole discretion to an attorney to enhance a fee.

(d) Deposit and Withdrawal of Fees

* * *

(3) *Withdrawal of flat fees.* A lawyer and client may agree as to the timing, manner, and proportion of fees the lawyer may withdraw from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees. See Rule 1.15(d) for further requirements when there is a dispute over disbursement of fees.

Rule 1.7 Conflict of Interest: General Rules Involving Current Clients

(a) Except as provided in paragraph (2), A lawyer shall not represent a client if the representation involves a conflict of interest, which exists if ~~of that client will be directly adverse to another client, unless:~~

(1) the lawyer reasonably believes that the representation of one client will not be directly adversely ~~affect the relationship with the~~ to the lawyer's representation of another client; ~~and or~~

(2) there is a significant risk that ~~each client consents after consultation. (b) A lawyer shall not represent a client if the representation of that one or more clients will may be materially limited by the lawyer's responsibilities to another client, a former client, or to a third person, or by a personal interest of the lawyer. the lawyer's own interests, unless:~~

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ~~the representation will not be adversely affected; and~~

(2) the representation is not prohibited by law; ~~the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.~~

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding before a tribunal; and

(4) each affected client consents in writing after the lawyer discloses the material risks presented by the conflict of interest and explains any reasonably available alternatives, or the lawyer promptly affirms a client's oral consent in a writing sent to that client.

Ethics presenters have been focusing on unexpected conflicts. Husband and wife have always been an issue. What about the trustee who is also a beneficiary? What of the trustee who, as trustee, who individually is employed by a closely held corporation votes a controlling interest in the closely held corporation when beneficiaries of the trust are also employees of the corporation. What of assisting the child, clearly concerned about a former planning client who is failing mentally, who does not want to be relieved of trustee duties.

The Comment following the proposed rules contains the following paragraph:

Conflict questions may also arise in estate planning and estate administration. For

example, A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction a question of law. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, The lawyer should make clear the lawyer's relationship to the parties involved.

ATTACHMENT 6

Tax Notes

TAX NOTES

December, 2009

Will there be an Estate Tax Bill passed before January 1, 2010?

A. House of Representatives. As many of you know on December 3, 2009, by a vote of 225-200, the House passed a bare bones extension of the current \$3.5 million applicable credit and left intact the 45% tax rate for all future years (in other words there is no sunset on any provision). The lifetime portion of the applicable credit would remain at \$1 million as well as the current deduction for state death taxes. In addition the GST exemption of \$3.5 million for death and lifetime GST transfers is retained.

The bill also repealed the carryover basis provisions in the 2001 act (EGTRRA), continuing the present step-up or step down basis rules. The revenue loss to the government is estimated at \$233 million (over ten years). However, the bill did not reinstate the state death tax credit or the QFOBI deduction. The bill retains EGTRRA's modified rules regarding installment payments and qualified conservation easements.

The close vote including the opposition of five Democrats who sit on the Ways and Means Committee (among 26 Democrats who opposed the bill) reflects a strong division in the House on this issue.

B. Senate. The Democratic chair of the Finance Committee favors indexing the \$3.5 million applicable credit for inflation. Two members of the Finance Committee, Democrat Lincoln and Republican Kyl, have proposed a higher applicable credit (\$5 million) and a lower tax rate (35%).

C. Comments.

1. It is likely that action will be taken by the Senate since a failure to act may exempt wealthy decedents dying early in the year from any estate tax. However, it is also likely that the Senate will require greater tax relief which could be indexing, an increased applicable credit, or reduced or graduated rates. The Senate has the leverage right now. Within the Senate, the farm states have leverage. It is not likely that the Senate (or House) will support a return of the estate tax credit for state death taxes given the massive deficits. The "death tax" remains a hot issue even though its present impact only affects ten to twelve thousand estates this year.

2. It seems unlikely that the House or Senate will let the EGTRRA provisions sunset as of January 1, 2011 when the applicable credit and GST exemption will fall to \$1 million with a 55% top tax rate.

3. The failure of action creates a dilemma for estate planners and clients. There are many persons with assets between \$1 million and \$3.5 million. The amount of the applicable credit affects decisions on whether to have separate trusts or a joint trust.

4. There are now 23 states with either an estate or inheritance tax or both. Illinois now has an estate tax with a \$2 million exemption. This follows a pattern in some states, particularly in the East (e.g. Massachusetts and Maine), that have an exemption based on \$675,000. Most do have a marital deduction. Some special drafting is necessary in those states with respect to the applicable credit trusts.

ATTACHMENT 7

Preliminary Draft of
Michigan Supreme Court Order
ADM File No. 2009-26

Order

**Michigan Supreme Court
Lansing, Michigan**

December 15, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2009-26

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed Amendments of Rules 5.105, 5.125, 5.201,
5.501, 5.801, and 5.802 of the Michigan Court Rules
and Proposed Adoption of New Rule 5.208 of the
Michigan Court Rules (to Replace Rules 5.306 and 5.503)

On order of the Court, this is to advise that the Court is considering amendments of Rules 5.105, 5.125, 5.201, 5.501, 5.801, and 5.802 of the Michigan Court Rules and considering adoption of new Rule 5.208 (to replace Rules 5.306 and 5.503) 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 www.courts.michigan.gov/supremecourt.

Because the statutory changes that gave rise to many of these proposed rule amendments will take effect April 1, 2010, and because the Court desires whenever it is possible to coordinate the effective dates of new statutory language with corresponding court rule changes, the Court is deviating slightly from its typical publication and adoption schedule in this matter. The period for public comment remains three full months following the month in which the order is published for comment. Thus, the public comment period will expire April 1, 2010. However, the proposed rules will also be considered by the Court at its next scheduled public administrative hearing (set for January 27, 2010) so that it may consider whether to preliminarily adopt the rules to enable practitioners and judges to become familiar with them before the proposed effective date of April 1, 2010. The Court will then have the option to consider any changes that may be suggested during the public comment period at a subsequent administrative conference. This procedure maximizes the opportunity for commenters to submit comments, provides as much notice as possible to those who will be using the revised rules, and affords the Court sufficient flexibility to ensure that the final rules are adopted as timely as possible and with the full benefit of a standard public comment period.

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 are indicated by underlining and deletions are indicated by strikeover.]

Rule 5.105 Manner and Method of Service

(A) [Unchanged.]

(B) Method of Service.

(1)-(3)[Unchanged.]

(4) E-mail. Unless otherwise limited or provided by this court rule, parties to a civil action or interested persons to a proceeding may agree to service by e-mail in the manner provided in and governed by MCR 2.107(C)(4).

(C) Petitioner, Service Not Required. For service of notice of hearing on a petition, the petitioner, although otherwise an interested person, is presumed to have waived notice and consented to the petition, unless the petition expressly indicates that the petitioner does not waive notice and does not consent to the granting of the requested prayers without a hearing. Although a petitioner or a fiduciary may in fact be an interested person, the petitioner need not indicate, either by written waiver or proof of service, that the petitioner has received a copy of any paper required by these rules to be served on interested persons.

(D) Service on Persons Under Legal Disability or Otherwise Legally Represented. In a guardianship or conservatorship proceeding, a petition or notice of hearing asking for an order that affects the ward or protected individual must be served on that ward or protected individual if he or she is 14 years of age or older. In all other circumstances, service on an interested person under legal disability or otherwise legally represented must be made on the following:

(1) The guardian of an adult, conservator, or guardian ad litem of a minor or other legally incapacitated individual, except with respect to:

(a) a petition for commitment or

(b) a petition, account, inventory, or report made as the guardian, conservator, or guardian ad litem.

(2) The trustee of a trust with respect to a beneficiary of the trust, except that the trustee may not be served on behalf of the beneficiary on petitions,

accounts, or reports made by the trustee as trustee or as personal representative of the settlor's estate.

- (3) The guardian ad litem of any ~~unascertained or unborn~~ person, including an unascertained or unborn person, except as otherwise provided in subrule (D)(1).

(4)-(6)[Unchanged.]

For purposes of service, an emancipated minor without a guardian or conservator is not deemed to be under legal disability.

- (E) [Unchanged.]

Rule 5.125 Interested Persons Defined

- (A) [Unchanged.]

- (B) Special Conditions for Interested Persons.

(1)-(2)[Unchanged.]

- (3) Trust as Devisee. If either a trust or a trustee is a devisee, the trustee is the interested person. If no trustee has qualified, the interested persons are the ~~current-qualified~~ trust beneficiaries described in MCL 700.7103(g)(i) and the nominated trustee, if any.

(4)-(5)[Unchanged.]

- (C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

- (1) The persons interested in an application or a petition to probate a will are the
- (a) devisees,
 - (b) nominated trustee and ~~current-qualified~~ trust beneficiaries described in MCL 700.7103(g)(i) of a trust created under the will,

- (c) heirs,
 - (d) nominated personal representative, and
 - (e) trustee of a revocable trust described in MCL ~~700.7501(1)~~700.7605(1).
- (2) The persons interested in an application or a petition to appoint a personal representative, other than a special personal representative, of an intestate estate are the
 - (a) heirs,
 - (b) nominated personal representative, and
 - (c) trustee of a revocable trust described in MCL ~~700.7501(1)~~700.7605(1).
- (3) The persons interested in a petition to determine the heirs of a decedent are the presumptive heirs.
- (4) The persons interested in a petition of surety for discharge from further liability are the
 - (a) principal on the bond,
 - (b) co-surety,
 - (c) devisees of a testate estate,
 - (d) heirs of an intestate estate,
 - (e) qualified trust beneficiaries, as referred to in MCL 700.7103(g)(i),
 - ~~(e)~~(f) protected person and presumptive heirs of the protected person in a conservatorship, and
 - ~~(f)~~(g) claimants.
- (5) [Unchanged.]
- (6) The persons interested in a proceeding for examination of an account of a fiduciary are the:

- (a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),
- (b) heirs of an intestate estate,
- (c) protected person and presumptive heirs of the protected person in a conservatorship,
- (d) ward and presumptive heirs of the ward in a guardianship,
- (e) claimants,
- (f) settlor of a revocable trust,
- (g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2),
- (h) current trustee,
- ~~(f)~~(i) current—qualified trust beneficiaries described in MCL 700.7103(g)(i), for in a trust accounting, and
- ~~(g)~~(j) other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.

(7)-(31)[Unchanged.]

(32) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the persons interested in the modification or termination of a noncharitable irrevocable trust are:

- (a) the qualified trust beneficiaries affected by the relief requested,
- (b) the settlor,
- (c) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, the settlor's representative, as referred to in MCL 700.7411(6);

- (d) the trust protector, if any, as referred to in MCL 700.7103(n),
- (e) the current trustee, and
- (f) any other person named in the terms of the trust to receive notice of such a proceeding.

~~(32)~~(33) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the The persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6), ~~and (C)(28), and (C)(32)~~ are:

- (a) the qualified trust beneficiaries affected by the relief requested,
- (b) the holder of a power of appointment affected by the relief requested,
- ~~(b)~~(c) the current trustee,
- ~~(c)~~(d) in a proceeding to appoint a trustee, the proposed successor-trustee, if any, and
- ~~(d) other persons whose interests are affected by the relief requested.~~
- (e) the trust protector, if any, as referred to in MCL 700.7103(n),
- (f) the settlor of a revocable trust, and
- (g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2).

(D)-(E)[Unchanged.]

Rule 5.201 Applicability

Except for MCR 5.204 and MCR 5.208, which apply in part to trustees and trusts, ~~rules~~ Rules in this subchapter contain requirements applicable to all fiduciaries except trustees and apply to all estates except trusts.

Rule 5.208 Notice to Creditors, Presentment of Claims (this entire proposed rule is new).

- (A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:
- (1) The name, and, if known, last known address, date of death, and date of birth of the decedent;
 - (2) The name and address of the personal representative;
 - (3) The name and address of the court where proceedings are filed; and
 - (4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.
- (B) Notice to Known Creditors and Trustee. A personal representative who has published notice must cause a copy of the published notice or a similar notice to be served personally or by mail on each known creditor of the estate and to the trustee of a trust of which the decedent is settlor, as defined in MCL 700.7605(1). Notice need not be served on the trustee if the personal representative is the trustee.
- (1) Within the time limits prescribed by law, the personal representative must cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity at the time of publication or during the 4 months following publication is known to, or can be reasonably ascertained by, the personal representative.
 - (2) If, at the time of the publication, the address of a creditor is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.
- (C) Publication of Notice to Creditors and Known Creditors by Trustee. A notice that must be published under MCL 700.7608 must include:
- (1) The name, and, if known, last known address, date of death, and date of birth of the trust's deceased settlor;
 - (2) The trust's name or other designation;
 - (3) The date the trust was established;

- (4) The name and address of each trustee serving at the time of or as a result of the settlor's death;
 - (5) The name and address of the trustee's attorney, if any
and must be served on known creditors as provided in subrule (B) above.
- (D) No Notice to Creditors. No notice need be given to creditors in the following situations:
- (1) The decedent or settlor has been dead for more than 3 years;
 - (2) Notice need not be given to a creditor whose claim has been presented or paid;
 - (3) For a personal representative:
 - (a) The estate has no assets;
 - (b) The estate qualifies and is administered under MCL 700.3982, MCL 700.3983, or MCL 700.3987;
 - (c) Notice has previously been given under MCL 700.7608 in the county where the decedent was domiciled in Michigan.
 - (4) For a trustee, the costs of administration equal or exceed the value of the trust estate.
- (E) Presentment of Claims. A claim shall be presented to the personal representative or trustee by mailing or delivering the claim to the personal representative or trustee, or the attorney for the personal representative or trustee, or, in the case of an estate, by filing the claim with the court and mailing or delivering a copy of the claim to the personal representative.
- (F) A claim is considered presented
- (1) on mailing, if addressed to the personal representative or trustee, or the attorney for the personal representative or trustee, or
 - (2) in all other cases, when received by the personal representative, or trustee or the attorney for the personal representative or trustee or in the case of an estate when filed with the court.

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

~~Rule 5.306 Notice to Creditors, Presentment of Claims~~

~~(A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:~~

- ~~(1) The name, and, if known, last known address, date of death, and date of birth of the decedent;~~
- ~~(2) The name and address of the personal representative;~~
- ~~(3) The name and address of the court where proceedings are filed; and~~
- ~~(4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.~~

~~(B) Notice to Known Creditors and Trustee. A personal representative who has published notice must cause a copy of the published notice or a similar notice to be served personally or by mail on each known creditor of the estate and to the trustee of a trust of which the decedent is settlor, as defined in MCL 700.7501(1). Notice need not be served on the trustee if the personal representative is the trustee.~~

- ~~(1) Within the time limits prescribed by law, the personal representative must cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate whose identity at the time of publication or during the 4 months following publication is known to, or can be reasonably ascertained by, the personal representative.~~
- ~~(2) If, at the time of publication, the address of a creditor is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.~~

~~(C) No Notice to Creditors. No notice need be given to creditors in the following situations:~~

- ~~(1) The estate has no assets;~~

- ~~(2) The estate qualifies and is administered under MCL 700.3982, MCL 700.3983, or MCL 700.3987;~~
- ~~(3) The decedent has been dead for more than 3 years;~~
- ~~(4) Notice has previously been given under MCL 700.7504 in the county where the decedent was domiciled in Michigan.~~

~~Notice need not be given to a creditor whose claim has been presented or paid.~~

~~(D) Presentment of Claims. A claim shall be presented to the personal representative by mailing or delivering the claim to the personal representative, or the personal representative's attorney, or by filing the claim with the court and mailing or delivering a copy of the claim to the personal representative.~~

~~(E) A claim is considered presented~~

- ~~(1) on mailing, if addressed to the personal representative or the personal representative's attorney, or~~
- ~~(2) in all other cases, when received by the personal representative or the personal representative's attorney or when filed with the court.~~

~~For purposes of this subrule, personal representative includes a proposed personal representative.~~

Rule 5.501 Trust Proceedings in General

- (A) **Applicability.** This subchapter applies to all trusts as defined in MCL 700.1107(m)700.1107(n), including a trust established under a will and a trust created by court order or a separate document.
- (B) **Unsupervised Administration of Trusts.** Unless an interested person invokes court jurisdiction, the administration of a trust shall proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without court order, approval, or other court action. Neither registration nor a proceeding concerning a trust results in continued supervisory proceedings.
- (C) **Commencement of Trust Proceedings.** A proceeding concerning a trust is commenced by filing a petition in the court where the trust is or could be properly registered. Registration of the trust is not required for filing a petition.

- (D) Appointment of Trustee not Named in Creating Document. An interested person may petition the court for appointment of a trustee when there is a vacancy in a trusteeship. ~~the order, will, or other document creating a trust does not name a trustee or when the person named in the creating document is either not available or cannot be qualified as trustee.~~ The petitioner must give notice of hearing on the petition to the interested persons. The court may issue an order appointing as trustee the person nominated in the petition or another person. The order must state whether the trustee must file a bond or execute an acceptance.
- (E) Qualification of Trustee. A trustee appointed by an order of the court, or nominated as a trustee in a will that has been admitted to probate ~~or nominated as a successor in a document other than a will that created a trust~~ shall qualify by executing an acceptance indicating the nominee's willingness to serve. The trustee must serve the acceptance and order, if any, on the then known ~~current~~ qualified trust beneficiaries described in MCL 700.7103(g)(i) and, in the case of a testamentary trustee, on the personal representative of the decedent estate, if one has been appointed. No letters of trusteeship shall be issued by the court. The trustee or the attorney for the trustee may establish the trustee's incumbency by executing an affidavit to that effect, identifying the trustee and the trust ~~document~~ and indicating that any required bond has been filed with the court and is in force.
- (F) Transitional Rule. A trustee of a trust under the jurisdiction of the court before April 1, 2000, may request an order of the court closing court supervision and the file. On request by the trustee or on its own initiative, the court may order the closing of supervision of the trust and close the file. The trustee must give notice of the order to all current trust beneficiaries. Closing supervision does not preclude any interested trust beneficiary from later petitioning the court for supervision. Without regard to whether the court file is closed, all letters of authority for existing trusts are canceled as of April 1, 2000, and the trustee's incumbency may be established in the manner provided in subrule (E).

Rule 5.503 Notice to Creditors by Trustee of Revocable Inter Vivos Trust

- ~~(A) Place of Publication, Proof. A notice that must be published under MCL 700.7504 must be published in a newspaper as defined by MCR 2.106(F) in the county in which the settlor was domiciled at the time of death. No proof of publication need be filed in connection with unsupervised administration of a trust.~~
- ~~(B) When Notice is not Required. The trustee of a revocable inter vivos trust is not required to give notice to creditors in the following situations:~~
- ~~(1) The costs of trust administration equal or exceed the value of the trust estate, or~~

~~(2) — The settlor has been dead for more than 3 years.~~

Rule 5.801 Appeals to Other Courts

(A) Right to Appeal. An interested person aggrieved by an order of the probate court may appeal as provided by this rule.

(B) Orders Appealable to Court of Appeals. Orders appealable of right to the Court of Appeals are defined as and limited to the following:

(1) a final order affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C);

~~(4)~~(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a testamentary trust created under a will. These are defined as and limited to orders resolving the following matters:

(a) appointing or removing a personal representative, conservator, ~~or~~ trustee, or trust protector as referred to in MCL 700.7103(n), or denying such an appointment or removal;

(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;

(c) determining the validity of a governing instrument;

~~(e)~~(d) interpreting or construing a testamentary governing instrument or inter vivos trust;

~~(d)~~(e) approving or denying a settlement of a contest relating to an inter vivos trust or a testamentary governing instrument;

(f) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;

(g) granting or denying a petition to consolidate or divide trusts;

~~(e)~~(h) discharging or denying the discharge of a surety on a bond from further liability;

- (f)(i) ~~allowing, or rejecting~~ disallowing, or denying a claims;
- (g)(j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;
- (h)(k) authorizing or denying the continuation of a business;
- (i)(l) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance, ~~or right to remain in a dwelling~~;
- (j)(m) authorizing or denying rights of election;
- (k)(n) determining heirs, ~~or devisees~~, or beneficiaries;
- (l)(o) determining title to or claims to ~~rights or interests in~~ property;
- (m)(p) authorizing or denying partition of property;
- (n)(q) authorizing or denying specific performance;
- (o)(r) ascertaining survivorship of parties;
- (p)(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;
- (q)(t) granting or denying a petition to determine *cy pres*;
- (r)(u) directing or denying the making or repayment of distributions;
- (s)(v) determining or denying a constructive trust;
- (t)(w) determining or denying an oral contract relating to a will;
- (u)(x) allowing or disallowing an account, fees, or administration expenses;
- (v)(y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);
- (w)(z) determining or directing payment or ~~authorizing federal estate tax~~ apportionment of taxes;

~~(x)~~(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;

~~(y)~~ determining or directing payment of inheritance taxes;

~~(z)~~(bb) assigning residue;

~~(aacc)~~ granting or denying a petition for instructions;

~~(bbdd)~~ authorizing disclaimers;

~~(ee)~~ allowing or disallowing a trustee to change the principal place of a trust's administration;

~~(2)~~(3) other appeals as may be hereafter provided by statute.

(C)-(F)[Unchanged.]

Rule 5.802 Appellate Procedure; Stays Pending Appeal

(A) Procedure. Except as modified by this subchapter, chapter 7 of these rules governs appeals from the probate court.

(B) Record.

(1) An appeal from the probate court is on the papers filed and a written transcript of the proceedings in the probate court or on a record settled and agreed to by the parties and approved by the court. ~~The appeal is not de novo.~~

(2) The probate register may transmit certified copies of the necessary documents and papers in the file if the original papers are needed for further proceedings in the probate court. The parties shall not be required to pay for the copies as costs or otherwise.

(C) [Unchanged.]

Staff Comment: These proposed changes, submitted by the Probate and Estate Planning Council of the State Bar of Michigan and the Michigan Probate Judges Association, have been designed so that the rules would conform to recently-enacted statutory changes creating the Michigan Trust Code. The proposed amendments would correct and insert cross-references to the applicable statutory provisions, and make other technical changes. In addition, proposed new MCR 5.208 would incorporate the notice

requirements for both decedent estates and trusts currently contained in MCR 5.306 and MCR 5.503, and would replace those rules.

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 these proposals may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-26. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.



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.

December 15, 2009

Corbin R. Davis

Clerk