

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

**February 15, 2014
Lansing, Michigan**

Minutes

I. Call to Order

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

II. Attendance

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

Sweeney, Thomas F.	Kerr, J. David
Morrissey, Amy N.	Lentz, Marguerite M
Imami, Shaheen I.	Lucas, David P.
Steward, James B.	Marquardt, Michele C.
Teahan, Marlaine C.	New, Lorraine F.
Allan, Susan M.	Ouellette, Patricia M.
Ard, W. Josh	Skidmore, David L.J.M.
Ballard, Christopher A.	Vernon, Geoffrey R.
Bearup, George F.	Welber, Nancy H.
Brigman, Constance L.	

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:

Clark-Kreuer, Rhonda M.	Spica, James P.
Murkowski, Hon. David M.	Taylor, Robert M.

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.	McClory, Michael S.
Harder, Mark K.	Mielock, Douglas A.
Harter, Hon. Phillip E.	

E. Others in attendance:

Loukas P. Kalliantasis
Kathleen M. Goetsch
Paul Vaidya
Jeffrey B. Linden
Rick Mills
Katie Lynwood
Nazneen H. Syed

Robert M. O'Reilly
Jeanne Murphy
Carol M. Hogan
Neal Nusholtz
Jill Goodell
Belinda Fitzpatrick
Joe Viviano

III. **Minutes of the January 18, 2014, Meeting of the Council**

The minutes of the January 18, 2014, Meeting of the Council were included with the meeting materials posted on the Section's web page prior to the meeting. A few minor corrections were noted. Motion by Michele C. Marquardt, second by George F. Bearup, to approve the minutes as corrected. The motion was approved on a voice-vote with no nays or abstentions.

IV. **Treasurer's Report**

Marlaine C. Teahan presented the Treasurer's report as attached to the materials (see Attachment A attached hereto). Included with that report is a spreadsheet which reflects the budget approved by Council at the November, 2013 Council meeting. Also, new line items, at the top of the spreadsheet, reflect each month's beginning General Fund, Amicus Fund and Total Fund balance. The Amicus Fund balance (\$25,000 as of the beginning of our last fiscal year) is a sub-fund of our total fund balance, and was created to deal with the probability that we will need to submit more Amicus briefs than normal regarding cases interpreting the Michigan Trust Code, which in turn would cause us to incur more amicus brief expenses than our normal budgeted amount. The budget amount for amicus brief expenses for last year (and this year) was \$10,000. As of the end of the last fiscal year, we paid out all but \$785 of that budgeted amount; that \$785 has been added to the Amicus Fund balance, bringing the total Amicus Fund balance to \$25,785.00. However, there are a few expenses incurred for last year's amicus budget category that are being paid now; those remaining bills will be allocated to the Amicus Fund balance, instead of dipping into the 2013-14 budget of \$10,000 for Amicus briefs.

Ms. Teahan also noted the mileage rate change for 2014 to \$0.56 per mile, and her report included an overview of the information to be supplied when submitting expense reimbursement requests.

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

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

- Mr. Sweeney circulated an e-mail from Gregory P. Conyers, the State Bar Director of Diversity, regarding the Section leadership questionnaire that the Diversity and Inclusion Advisory Committee (DIAC) asks all Section leadership to complete. A copy of that e-mail is attached as Attachment B. The link to that questionnaire is <https://www.surveymonkey.com/s/sections2014> .

- Beginning in November 2014, ICLE is proposing to offer one "Experts" seminar each year in the fall. For fall of 2014, Natalie Choate would present at Plymouth on Nov. 18 for the first program. It will be called "Estate and Distribution Planning for Retirement Benefits" and will last for 3-3.5 hours. ICLE has requested that the Section serve as a financial sponsor and contribute \$4,000 to Natalie's honorarium (about one-third; her total fee is over \$12,000). The expected registration fee would be \$165 for section members; \$195 for others. This program would be web-cast, which would be available for viewing for up to 90 days, so it can be viewed by more section members; however, other speakers may not agree to a web cast. This proposal is for this year only and does not represent a continuing commitment to future "Experts" programs. The proposal was approved on a Council vote of 19-0, with no nays and no abstentions.
- The ADR section has requested permission to send an e-blast to the Probate section members about its ADR program to encourage greater attendance. ADR would pay the cost; Mr. Sweeney suggested that we grant such permission; no one raised any concerns or objections, so Mr. Sweeney will approve.
- The State Bar Unauthorized Practice of Law Committee has asked for assistance enlisting section members to volunteer for a series of one hour programs it is sponsoring for presentations on August 6 in different communities around Michigan to inform the public about "Who should I Trust" in estate planning. Presentation sites & speakers are needed, especially on the west side of state. Mr. Sweeney has appointed an ad hoc committee to solicit volunteers. The members of that committee are: Robert M. Taylor, Chair, J. David Kerr, and Rick Mills. If anyone can help with these presentations, please contact the committee.
- The Updating Michigan Law Committee is continuing work on the proposed domestic asset protection trust ("DAPT") legislation. However, the trust departments of the banks and the commercial departments of the banks are not in agreement on this proposal. As a result, the Chairperson of that Committee, Marguerite Munson Lentz, has found it necessary to recuse herself from further work on this project, because her firm represents several bank credit departments, and the committee with continue its work without her participation.

VI. Report of the Committee on Special Projects – Marguerite M. Lentz

Marguerite M. Lentz presented the following report for CSP:

- CSP reviewed and discussed SB 743, which proposes to make membership in the State Bar of Michigan purely voluntary. CSP recommends that Council oppose this proposal as being contrary to the interests of the people of the State of Michigan. Motion by Ms. Lentz to accept the recommendation of CSP to oppose SB 743. After discussion, the motion was approved on a Council vote of 19-0, with no nays and no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

- CSP reviewed and discussed the current draft of the proposed Patient's Guide to Health Care Decision Making which the Council's Guardianship, Conservatorship, and End of Life Committee has prepared. Chairperson Sweeney has asked that all those who have suggestions and comments send them to him and he will go over them with the committee members who are working on this phase of the project.
- CSP reviewed the almost final draft of proposed revisions to our current Bylaws as approved at the last Council meeting (see Attachment C-1 for the wording of the Proposed Bylaws as approved on January 18, 2014, and Attachment C-2 for the comparison to the wording of the current Bylaws). However, one issue remains, which is whether to modify the notice procedure for submitting proposed amendments to the section members to provide more flexibility in how the proposals are distributed. CSP discussed several examples of wording used by other sections, and recommends adoption of wording from the corresponding portion of Article X of the Master Lawyers Section Bylaws (see Attachment C-3). Motion by Ms. Lentz to accept the recommendation of CSP to incorporate into Article 9 of our proposed Bylaws, the wording corresponding to that portion of Article X of the Master Lawyers Section Bylaws which deals with distribution of the proposed Bylaw amendment to the members of the Section. The motion was approved on a Council vote of 19-0, with no nays and no abstentions, including authorizing Nancy H. Welber to finalize the exact wording to fit into our Bylaws structure.
- CSP reviewed the latest report from our Ad Hoc Committee on Undue Influence Jury Instructions regarding proposed revisions to Michigan Model Civil Jury Instructions relating to undue influence claims in Will and Trust contests: M Civ J1 170.44, 170.45, 179.10 and 179.25, as published by the Michigan Committee on Model Jury Instructions (the "MJI Committee"). See copy of that report attached hereto as Attachment D. CSP recommends that Council adopt the recommendation of our committee and oppose the proposed revisions to M Civ J1 170.44 & 179.10 in their current form. Motion by Ms. Lentz to accept the recommendation of CSP and oppose the proposed revisions to M Civ J1 170.44 & 179.10 in their current form. The motion was approved on a Council vote of 13 in favor; 1 nay; 5 abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.
- George F. Bearup reported to CSP that one of the members of his Committee, David Fry, met with Matt Blakely of Representative Pettalia's office regarding our proposed amendment to 2012 PA 497. See report attached hereto as Attachment E. Mr. Blakely feels that the amendment should clear up as much as possible regarding the questions that have arisen about the proper interpretation of the current statute, and submitted a revised version of the proposed amendment, which has been edited by the Committee as shown in Attachment E. Further discussions will be forthcoming.

VII. **Standing Committee Reports**

A. Internal Governance

1. Budget – James B. Steward

No report.

2. Bylaws – Nancy H. Welber

No report, other than the discussion reported above as part of the CSP report.

3. Awards – Douglas A. Mielock

No report.

4. Planning – Amy N. Morrissey

No report.

5. Nominating – Douglas G. Chalgian

No report.

6. Annual Meeting – Amy N. Morrissey

No report.

B. Education and Advocacy Services for Section Members

1. *Amicus Curiae* – David L. Skidmore

No report.

2. Probate Institute – Shaheen I. Imami

Mr. Imaami reported that the speakers slate for the Institute is complete; but marketing is slightly behind. There will be a registration fee discount for new lawyers.

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

No report.

4. Citizens Outreach – Constance L. Brigman

Ms. Brigman reported that the committee has met and started its review of our brochures to identify issues that need to be addressed. The Committee has noted that the style of the brochures is not consistent. The Committee has also noted that for some brochures, such as those explaining durable powers of attorney, some states have two versions: one from view point of person and other from view point of family, so the Committee will look into this concept.

5. Electronic Communications – William J. Ard

No report.

C. Legislation and Lobbying

1. Legislation – Christopher A. Ballard

Mr. Ballard reported that SB 4638, 4639, and 4640 (which relate to recording an affidavit and copy of original conveyance) have not seen much movement.

Rebecca Bechler of PAA commented that the legislature is occupied with various budget issues including how to handle the expected revenue “surplus” during this election year: as a result, the actual time to get legislation considered and passed will be much shorter than usual. She also mentioned that the proposed probate appeals legislation is in the drafting process. Also, the Michigan Supreme Court has decided to appoint a task force to look at the voluntary bar association issue.

2. Updating Michigan Law – Marguerite Munson Lentz

No report.

3. Insurance Committee – Geoffrey R. Vernon

Mr. Vernon reported that SB 31 and SB 32 have been signed into law.

SB 32 (now PA 8 of 2014), added a new section to the Michigan Trust Code, MCL 700.7114, which addresses the question of when the trustee of a trust has an insurable interest in the life of an insured. It resolves the lingering concerns that existed after the *Chawla* case in 2005. The statute closely follows Section 113 of the Uniform Trust Code, which was added to the UTC in 2010. The section focuses on the relationship between the settlor of the trust and the insured, and for whose benefit the policy proceeds have been received. Here’s a link to the legislation: <http://legislature.mi.gov/doc.aspx?2013-SB-0032>

SB 31 (now PA 7 of 2014) is the companion statute (MCL 500.2210a) amending the Insurance Code - <http://legislature.mi.gov/doc.aspx?2013-SB-0031>

However, additional issues remain. Bankers are looking for some liability protection from ILITs investment duties responsibilities, including who is responsible for selecting the policy? Perhaps a safe harbor could be drafted regarding what the Trustee is to review. These same issues can apply to the attorney who is drafting the trust or advising the trustee. Perhaps this concept could be packaged with the asset protection trust concept. The Committee is looking at existing statutes in other states.

4. Artificial Reproductive Technology – Nancy H. Welber

Ms. Welber reported that the Committee is meeting regularly and continuing work on a proposed bill.

D. Ethics and Professional Standards

1. Ethics – J. David Kerr

No report.

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

No report, other than as stated above under the Chairperson's report.

3. Specialization and Certification – James B. Steward

No report.

E. Administration of Justice

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

Ms. Marquardt reported that the Committee is working with Rebecca Schnelz on PC 666 to make it easier for lay persons to follow regarding options to consider before filing for guardianship. After this has been completed, the Committee will submit a proposal to Council.

Also, the Committee has received an e-mail from Mark Pasquali noting that the form for a petition for formal probate (PC 558) does not appear to exactly correspond to the statute, so the Committee will look at that.

The Committee has also looked at the recently proposed amendment to MCR 5.109 (Notice of Guardianship Proceedings Concerning Indian Child) and recommends no comment on the proposed changes.

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

No report.

F. Areas of Practice

1. Real Estate – George F. Bearup

No report, other than the discussion reported above as part of the CSP report.

2. Transfer Tax Committee – Lorraine F. New

Ms. New reported that the Internal Revenue Service has published Revenue Procedure 2014-18 which provides a method of obtaining an extension of time to make a portability

election for some estates if the decedent died before 2014. See tax nugget attached hereto as Attachment F.

3. Charitable and Exempt Organization – Christopher A. Ballard

Mr. Ballard reported that the Committee is looking at the court rules regarding notice to the attorney general and whether they mesh with statutory requirements of notice when a charitable trust is involved.

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

No report, other than as stated above under the Chairperson’s report. As stated under the CSP report, comments and suggestions regarding the currently proposed draft of the Patient’s Guide to Health Care Decision Making should be sent to Chairperson Sweeney.

G. Liaisons

1. Alternative Dispute Resolution Section Liaison –

Sharri L. Rolland Phillips has resigned as the Alternative Dispute Resolution Section Liaison. We do not have a liaison to that Section at present.

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

Ms. Ouellette reported that the Family Law Section remains concerned about the proposal to repeal dower. That Section is proposing that such a repeal be tie-barred to some sort of notice requirement to a spouse when real estate is being transferred.

5. ICLE Liaison – Jeanne Murphy

No report, other than the discussion about the fall “Experts” program shown above under the Chairperson’s report.

6. Law Schools Liaison – William J. Ard

No report.

7. Michigan Bankers Association Liaison – Susan Allan

No report.

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

No report.

9. Probate Registers Liaison – Rebecca A. Schnelz

No report.

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

No report.

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

No report.

12. State Bar Liaison – Richard Siriani

No report.

13. Taxation Section Liaison – George W. Gregory

Mr. Gregory reported that the Taxation Section has also discussed the issue of real estate tax uncapping in connection with transfers to family members. He also noted that the Taxation Section's annual conference will be held in May, as usual.

VIII. Other Business

None.

IX. Hot Topics

None.

X. Adjournment

Meeting adjourned by Thomas F. Sweeney at 11:20 a.m.

ATTACHMENT A

Probate and Estate Planning Council
Treasurer's Report
February 15, 2014

Income/Expense Reports

An unaudited report through December 31, 2013 is attached. The Budget 2013-14 has been corrected since last month's report. The bolded numbers in the budget column in the December 31, 2013 report are those that changed since last month's report. The attached spreadsheet reflects the budget approved by Council at the November, 2013 Council meeting. Note that the budget is 1.58% over last year's budget. We have received 95% of our expected revenue and expended 20% of our expected disbursements.

New line items, at the top of the spreadsheet, reflect each month's beginning General Fund, Amicus Fund and Total Fund balance. These items provide details for the Amicus Fund created to deal with the expected increase in Amicus briefs that we may wish to submit on cases interpreting the Michigan Trust Code. The Amicus Fund was originally funded with \$25,000 with the agreement that each year's unused amicus briefs' budget amount would be transferred to the Amicus Fund. Last year's carryover was \$785. As the final bills for the 2013 Ducharme amicus brief come in, those expenses will be taken from the carryover of the Amicus Fund instead of dipping into the 2013-14 budget of \$10,000 for Amicus briefs.

Remember -- New Mileage Reimbursement Rate Effective 1/1/2014

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

Expense Reimbursement Requests

Please keep in mind the following when submitting expense reports:

- All expense reimbursement forms are to be submitted to the State Bar of Michigan within 30 days of incurring reimbursable expenses.
- As of the date of this report, the expense reimbursement forms have not yet been modified to reflect the new mileage rate of \$0.56; therefore, please modify the mileage rate on the form until such time that it is updated.
- The purpose for reimbursement of mileage must be on the form.
- The beginning and ending points of travel must be included on the form.
- A proper description for mileage reimbursement for a Council Member living in Grand Rapids would be: P&EP Council meeting; Grand Rapids to Lansing and return trip.
- Sign your form, state your title (e.g., Council Member, Officer, or Ex Officio), and date it.
- Receipts are required for expenses over \$5.00. Credit card statements are not sufficient.
- Consider use of electronic signatures on the form. For more information, see the form's instructions at http://www.michbar.org/generalinfo/pdfs/sectexp_instruction.pdf.
- The reimbursement form can be found online at: <http://www.michbar.org/generalinfo/pdfs/sectexp.pdf>

- Please email expense reimbursement requests to the Treasurer, Marlaine Teahan at mteahan@fraserlawfirm.com.

Hearts & Flowers Fund

Council members are asked to contribute \$35.00 to the Hearts and Flowers Fund each year. We are very close to full participation this year. Thank you everyone for your contributions. This fund is used to purchase gifts for Council members, families and others that we wish to recognize with congratulatory or sympathy gifts. If you wish to contribute to the fund, please send a check made payable to Marlaine Teahan individually (not to the fund or her firm). These funds are held separately by the Treasurer and are accounted for on a quarterly basis to the Chair.

Marlaine C. Teahan, Treasurer
Probate and Estate Planning Section

**Probate and Estate Planning Section
Treasurer's Report as of December 31, 2013**

Beginning General Fund	\$ 180,511.60	\$ 230,087.39	\$ 264,980.12	\$ 180,511.60			
Beginning Amicus Fund	\$ 25,785.00	\$ 25,785.00	\$ 25,785.00	\$ 25,785.00			
Beginning Total Fund Balance	\$ 206,296.60	\$ 255,872.39	\$ 290,765.12	\$ 206,296.60			
				FY to Date	Budget		Year to Date
	October	November	December	Actual	2013-14	Variance	Percentage
Revenue							
Membership Dues	62,650.00	40,005.00	8,015.00	110,670.00	115,000.00	(4,330.00)	96%
Publishing Agreements	-	-	-	-	650.00	(650.00)	0%
Other	35.00	-	-	35.00	350.00	(315.00)	10%
Total Receipts	62,685.00	40,005.00	8,015.00	110,705.00	116,000.00	(5,295.00)	95%
Disbursements							
Journal	-	-	-	-	25,000.00	(25,000.00)	0%
Chairperson's Dinner*	5,457.20	-	-	5,457.20	6,500.00	(1,042.80)	84%
Travel	1,418.01	1,574.59	2,134.31	5,126.91	18,500.00	(13,373.09)	28%
Lobbying	5,000.00	2,500.00	2,500.00	10,000.00	30,000.00	(20,000.00)	33%
Meetings	1,159.00	1,037.68	972.72	3,169.40	14,000.00	(10,830.60)	23%
Long-range Planning	-	-	-	-	1,000.00	(1,000.00)	0%
Support for Annual Institute	-	-	-	-	14,000.00	(14,000.00)	0%
Amicus Briefs	-	-	-	-	10,000.00	(10,000.00)	0%
ListServ**	75.00	-	75.00	150.00	1,400.00	(1,250.00)	11%
Postage	-	-	-	-	100.00	(100.00)	0%
Telephone	-	-	-	-	250.00	(250.00)	0%
Other***	-	-	-	-	1,000.00	(1,000.00)	0%
Total Disbursements	13,109.21	5,112.27	5,682.03	23,903.51	121,750.00	(97,846.49)	20%
Net Increase (Decrease)	49,575.79	34,892.73	2,332.97	86,801.49	(5,750.00)	92,551.49	
Ending Fund Balance ****	255,872.39	290,765.12	293,098.09	293,098.09			
Additional Information							
*Includes plaques for outgoing Chair and 2 Council Members							
**includes ListServ, e-blast & other electronic communications to members							
***includes copying costs; budget for this line increased to \$1,000 & now includes \$750 for Young Lawyers' Summit							
****includes \$25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount							

ATTACHMENT B

Sweeney, Thomas F.

From: Michelle Erskine <MERSKINE@mail.michbar.org>
Sent: Monday, February 03, 2014 3:36 PM
To: RHammer@21stDistrictCourt.com; mfales@a2gov.org; mecb@acegroup.cc; petty@adbmich.org; lopilato.kathleen@aoin.com; brian@attorneywordsmith.com; pbond@bondelderlaw.com; hshovein@brookskushman.com; btg@bthomasgolden.com; piatkowski.law@chartermi.net; Van Winkle, Jeff; Voss, Joseph L.; Shoop, Terri A.; Sweeney, Thomas F.; guenther@cmplaw.com; jlore@comcast.net; neglawsection@comcast.net; carey@cooley.edu; gellm@cooley.edu; hrydziuszkol@courts.mi.gov; jwheaton@dykema.com; rboonin@dykema.com; stupper@dykema.com; tobinmiller@earthlink.net; steve@feigelsonlaw.com; mdonnelly@fraserlawfirm.com; erin@fw-pc.com; sgalbraith@galbraithpc.com; michael@gallo.us.com; andersma@gibf.com; andreairens@gmail.com; marinahaddad86@gmail.com; rplsks@gmail.com; tanishadavislawgroup@gmail.com; lnapiewocki@hallrender.com; jbenedict@honigman.com; LGandhi@honigman.com; sljohnson@honigman.com; fmulhauser@hotmail.com; dhoort@ioniacounty.org; dmcleod@jaffelaw.com; jjh@jjharringtonlaw.com; mike.watza@kitch.com; ron.nixon@kkue.com; rhbuhl@lawrhb.com; todd@legalpathworks.com; danil@lemonlawlawyers.com; ndembinski@lmdlaw.com; mfmatheson@loomislaw.com; rshiemke@lsscm.org; dpierson@malansing.com; jwhousefield@mcgintylaw.com; jpierce333@me.com; psmit@med.wayne.edu; dgg@mnsi.net; marrlaw@msn.com; alexanderj@oakgov.com; bhenry@orlans.com; mewland@plastipak.com; epohl@plunkettcooney.com; sii@probateprince.com; twanageshik@rosettela.com; jzimbelman@sado.org; arrlaw@sbcglobal.net; cpalmerpc@sbcglobal.net; lemonade1@sbcglobal.net; dswanson@sommerspc.com; lyoung@sommerspc.com; adam.strauss@stryker.com; mgunderson@trowbridgehouse.com; LAJ@TrustLynnmarie.com; john.wojcik@us.army.mil; kmcoutu@varnumlaw.com; jaaron@venjohnsonlaw.com; rreynolds@vmclaw.com; amorrissey@westermanpc.com; kbrauer@wnj.com; raaron@wnj.com; mweisman@wyrpc.com; hildingagservices@yahoo.com; kimberlya.lamb@yahoo.com
Cc: Gregory Conyers; Michelle Erskine
Subject: SBM Section Leadership Survey

Greetings Section leaders,

Below please find the link to the Section leadership questionnaire that Diversity and Inclusion Advisory Committee (DIAC) Co Chair Judge Stephens referenced in her recent letter to you. We ask you again here to encourage your entire leadership body to participate, as it will optimize the usefulness of the information. Please feel free to forward the link to them.

<https://www.surveymonkey.com/s/sections2014>

Many thanks to those of you who provided us feedback. Please take some time to answer the questions at your earliest convenience, so that we can compile and utilize the results for you. The link will only be open for a limited time. The answers will only be shared in the aggregate. Feel free to contact us with any questions or concerns.

Thank you in advance for your participation in this important effort.

Gregory P. Conyers
Director of Diversity,

ATTACHMENT C-1

Changes as of January, 2014 Meeting

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

**ARTICLE 1
NAME AND PURPOSE**

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

SECTION 1.2 PURPOSE. The purpose of this Section is to enhance and improve the practice and administration of law pertaining to probate; trust and estate planning, and administration; guardianships and conservatorships (including planning alternatives);and tax planning.

**ARTICLE 2
MEMBERSHIP**

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

SECTION 2.2 SECTION MEMBERSHIP BY PROBATE REGISTERS AND PROBATE COURT ADMINISTRATORS. All Probate Registers and Probate Court Administrators are entitled to membership in the Section and any requirement to pay Section dues is waived. Membership in the Section under this Section 2.2, including the waiver of dues, will continue until a member under this Section 2.2o longer serves as a Probate Register or Probate Court Administrator. If a Probate Register or Probate Court Administrator is a lawyer, then he or she will have the benefits of membership afforded to Section members who are lawyers. If a Probate Register or Probate Court Administrator is not a lawyer, then he or she have the benefits of membership afforded to non-lawyer members of the Section.

SECTION 2.3 ELIGIBILITY TO VOTE; COUNCIL PARTICIPATION. Only lawyers who

are active members of the State Bar of Michigan and who are members of the Section are eligible to vote on any matter before the Section or to be elected as members or officers of the Council.

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

ARTICLE 3 COUNCIL AND OFFICERS

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

SECTION 3.2 ELECTION OF OFFICERS. The Chairperson, Chairperson-Elect, Vice-Chairperson, Secretary and Treasurer will be nominated and elected in the manner provided in the following paragraphs at each annual meeting of the Section. Each officer, other than the Chairperson, will hold office for a term commencing at the beginning of the Section's fiscal year following the annual meeting of the Section at which the officers are elected, and ending at the close of the next succeeding fiscal year of the Section, and until their successors have been elected and qualified. The Chairperson's term will automatically commence after the close of the annual meeting of the Section at which the Chairperson is elected and qualified or automatically succeeds to the office of Chairperson, as provided in Paragraph 4.2.3.

SECTION 3.3 ELECTION OF COUNCIL MEMBERS. Six members of the Council will be elected at each annual meeting of the Section for terms of three years. "Year" as used in these Bylaws means a term beginning on the first day of the fiscal year of the Section and ending on the last day of the fiscal year of the Section.

SECTION 3.4 TERM LIMITS FOR COUNCIL MEMBERS. A person is not eligible for election other than as an officer if he or she has served without interruption for six consecutive years immediately preceding the term for which the election is held.

SECTION 3.5 TERM LIMITS FOR OFFICERS. A person who has served as Chairperson, Chairperson-Elect, Vice-Chairperson, Treasurer or Secretary without interruption for 2 consecutive terms is not eligible for election to that office.

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

ARTICLE 4 ELECTIONS

SECTION 4.1 NOMINATIONS.

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

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

SECTION 4.2 ELECTION PROCEDURE.

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

4.2.2 Annual Meeting of the Section. Except as provided in Paragraphs 4.1.2 and 4.2.1, the election for the offices of Chairperson (if the Chairperson-Elect has given notice as provided in Paragraph 4.2.3 that he or she will not serve as chair or there is otherwise a vacancy in the office of the Chairperson), Chairperson-Elect, Vice Chairperson, Secretary, Treasurer and members of the Council, will be held at the annual meeting of the Section, where the Chairperson may conduct that election by voice vote, or may direct another method of conducting the election, such as a show of hands, paper ballot or other method.

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

Chairperson after the close of the Annual Meeting of the Section.

ARTICLE 5 DUTIES OF OFFICERS

SECTION 5.1 CHAIRPERSON. The Chairperson presides at all meetings of the Section and of the Council. The Chairperson will formulate and present at each Annual Meeting of the State Bar of Michigan a report of the work of the Section for the past year. The Chairperson will perform other duties and acts as usually pertain to the Chairperson's office.

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

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

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

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

will be an expense of the Section and paid from the funds of the Section.

ARTICLE 6 DUTIES AND POWERS OF THE COUNCIL

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

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

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

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

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

SECTION 6.6 PRESENCE AT A MEETING. A member will be deemed “present” at a meeting if the member is physically in attendance at the meeting or participates in the meeting by electronic communication. For purposes of this Article 6, “electronic communication” means any form of communication designed to allow a person to attend a meeting from a remote location, as long as the member’s presence is identified, all participants are advised of the communications equipment, and all in-person attendees and attendees at any remote location are able to communicate effectively with each other.

SECTION 6.7 WRITTEN VOTE. The Chairperson of the Section at any time may, and upon the request of any member of the Council will, submit or cause to be submitted in writing, to each of the members of the Council, any proposition upon which the Council may be authorized to

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

SECTION 6.8 MEETINGS. The Council will designate the time and place of its regular meetings. Special meetings may be called upon notice by the Chairperson or upon written request to the Secretary of any 5 members of the Council. Council and committee meetings may be held by electronic communication. A regular meeting will not take place during the annual meeting of the State Bar of Michigan, unless it is held in conjunction with the annual meeting of the State Bar.

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

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

ARTICLE 7 SECTION MEETINGS

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

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

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

ARTICLE 8 MISCELLANEOUS PROVISIONS

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

SECTION 8.2 COMPENSATION. No salary or compensation will be paid to any officer, council member, or member of a committee for fulfilling his or her duties to the Section and the Council. Authorization to compensate an officer or Council member for a service to the Section by the officer or Council member or his or her law firm or other organization that is not defined by the Section's bylaws as a duty of an officer, Council member, or Section member requires a two-thirds vote of the Council. The person to be compensated, or the person whose firm or other organization is to be compensated, may not participate in the vote. The vote must be recorded in the minutes of the meeting, and the minutes must be made available on the Section's website.

SECTION 8.3 WHEN EFFECTIVE. These Bylaws become effective upon their approval by the Commissioners of the State Bar of Michigan and by the Section in the same manner provided in Article 9 for their amendment.

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

ARTICLE 9 AMENDMENTS

SECTION 9.1 PROCEDURE. These Bylaws may be amended at any annual meeting of the Section or special meeting of the members of the Section by a majority vote of the members of the Section present and voting, provided the proposed amendment is first submitted to the Council for its recommendation and the amendment, once adopted, is not effective until approved by the Commissioners of the State Bar of Michigan.

SECTION 9.2 PROPOSED AMENDMENTS. Any proposed amendment must be submitted in writing to the Council in the form of a motion by an officer or member of the Council or by a petition by at least 10 other members of the Section. The Council will consider the proposed amendment and prepare recommendations that, together with a complete and accurate text of the proposed amendment, will be published in the Michigan Bar Journal at least 15 days prior to the meeting of the Section when the amendment is to be voted upon.

Adopted September 14, 1955

Amended 10/14/94

Amended 9/22/00

Amended 9/27/02

Amended 9/15/03

Amended 7/23/04 Effective 9/11/04 Amended 1/21/05

Dues increase effective 6/9/06

Dues increase effective 6/19/07

Amended 9/__/2014

ATTACHMENT C-2

Changes as of January, 2014 Meeting

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

ARTICLE I

1

NAME AND PURPOSE

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

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

**ARTICLE II
MEMBERSHIP**

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

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

SECTION 2.2 SECTION MEMBERSHIP BY PROBATE REGISTERS AND PROBATE COURT ADMINISTRATORS. All Probate Registers and Probate Court Administrators are entitled to membership in the Section and any requirement to pay Section dues is waived. Membership in the Section under this Section 2.2, including the waiver of dues, will continue until a member under this Section 2.2o longer serves as a Probate

Register or Probate Court Administrator. If a Probate Register or Probate Court Administrator is a lawyer, then he or she will have the benefits of membership afforded to Section members who are lawyers. If a Probate Register or Probate Court Administrator is not a lawyer, then he or she have the benefits of membership afforded to non-lawyer members of the Section.

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

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

ARTICLE ~~II~~3 **COUNCIL AND OFFICERS**

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

SECTION 3.2. ELECTION OF OFFICERS. The Chairperson, Chairperson-Elect, Vice-Chairperson, Secretary and Treasurer ~~shall~~will be nominated and elected in the manner ~~hereinafter~~ provided ~~in the following paragraphs~~ at each annual meeting of the Section ~~to~~. ~~Each officer, other than the Chairperson, will~~ hold office for a term commencing at the beginning at of the close of Section's fiscal year following the annual meeting of the Section at which ~~they have been the officers are~~ elected, and ending at the close of the next succeeding ~~annual meeting~~fiscal year of the Section, and until their successors ~~shall~~ have been elected and qualified. The Chairperson's term will automatically commence after the close of the annual meeting of the Section at which the Chairperson is elected and qualified or automatically succeeds to the office of Chairperson, as provided in Paragraph 4.2.3.

SECTION 3. ~~Subject to the provisions of the next sentence, six~~3 ELECTION OF COUNCIL MEMBERS. ~~Six~~ members of the Council ~~shall~~will be elected at each annual meeting of the Section for terms of three years. ~~At the annual meeting in 2004 only, eight member of the council shall be elected, six of whom shall serve terms of three years, one of whom shall serve a term of two years, and one of whom shall serve a term of one year. ("Year" as herein used in these Bylaws means a term beginning at on the close first day of the annual meeting at which fiscal year of the Council member shall have been elected~~Section and ending ~~at on the close last day of the succeeding annual meeting~~fiscal year of the Section~~).~~

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

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

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

**ARTICLE ~~IV~~4
ELECTIONS**

SECTION ~~4.1.~~4.1. NOMINATIONS.

4.1.1 Nominating Committee. The Nominating Committee ~~shall~~will submit nominations to the Section for the offices of Chairperson, ~~if needed~~, Chairperson-Elect, Vice-Chairperson, Secretary, Treasurer and members of the Council, to succeed those whose terms will expire at the close of the ~~forthcoming~~fiscal year following the annual meeting of the Section at the regular meeting of the Council prior to the annual meeting of the Section, and to fill vacancies for unexpired terms existing at the time of such report at any other regular meeting of the Council~~.~~. The Nominating Committee ~~shall~~will continue to function as needed and report nominations to

the Council to fill vacancies in the office of an officer or member of the Council in accordance with ~~Article VI, Section Paragraph 6.3~~. The Nominating Committee ~~shall~~will consist of the three immediately past Chairpersons of the Section, unless ~~such~~the committee ~~shall be~~is otherwise appointed by the Chairperson and the Chairperson-Elect.

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

SECTION 2. ~~ELECTIONS~~4.2 ELECTION PROCEDURE.

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

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

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

ARTICLE ~~V~~5 DUTIES OF OFFICERS

SECTION 5.1. CHAIRPERSON. The Chairperson ~~shall preside~~presides at all meetings of the Section and of the Council. The Chairperson ~~shall~~will formulate and present at each Annual Meeting of the State Bar of Michigan a report of the work of the Section for the ~~then~~ past year. The Chairperson ~~shall~~ will perform ~~such~~ other duties and acts as usually pertain to ~~such officer's~~the Chairperson's office.

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

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

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

~~Commissioners of the State Bar of Michigan. Such officer, in conjunction with the Chairperson, as authorized by the Council, shall attend generally to the business of the Section.~~

SECTION 5.5 TREASURER. The Treasurer reports regularly on the finances of the Section to the Council and to the State Bar of Michigan. The Treasurer is not responsible for the Section funds but will transmit a financial report for presentation to the membership of the Section annually. The officer of the State Bar of Michigan designated for such purpose will be the custodian of all funds and will keep a record of all monies received and disbursed and report thereon on the status of the funds to the Council or Treasurer of the Section whenever requested. The Treasurer Payment of expenses by the Section shall not, before being paid, must be responsible for such funds but shall transmit a financial report for presentation to the membership approved by the Treasurer, except those of the Section annually.

~~**SECTION 6. TREASURER.** The Treasurer shall, which must be approved by the Chairperson or the Chairperson elect, or otherwise as the Council directs, and checks for all disbursements will be signed by the officer of the State Bar of Michigan designated for such purpose. The Treasurer will sign any application for, and execute, any bond as may be requested by any officer of the Section and/or member of the Council pursuant to any resolution duly adopted for any bond for the purpose of protecting the monies of the Section. Any cost or premium for such the bond, however, shall will not be borne by the Treasurer, but shall will be an expense of the Section and paid from the funds of the Section. The Treasurer shall submit a financial report regularly.~~

ARTICLE VI

DUTIES AND POWERS OF THE COUNCIL

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

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

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

conducted concurrently with the regular elections as provided in Article ~~IV herein~~4.

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

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

SECTION 6.6 PRESENCE AT A MEETING. A member will be deemed “present” at a meeting if the member is physically in attendance at the meeting or participates in the meeting by electronic communication. For purposes of this Article 6, “electronic communication” means any form of communication designed to allow a person to attend a meeting from a remote location, as long as the member’s presence is identified, all participants are advised of the communications equipment, and all in-person attendees and attendees at any remote location are able to communicate effectively with each other.

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

SECTION 7.8 MEETINGS. The Council ~~shall will~~ designate the time and place of its regular meetings. Special meetings may be called upon notice by the Chairperson or upon written request to the Secretary of any 5 members of the Council. Council and committee meetings may be held by ~~a telephone conference or by other similar communications equipment through which all persons participating in the meeting may communicate with the other participants. All participants will be advised of the communications equipment, and the names of the participants in the conference will be divulged to all participants. Such participation will constitute presence in person at the meeting~~ electronic communication. A regular meeting will not take place during the annual meeting of the State Bar of Michigan, unless it is held in conjunction with the annual meeting of the State Bar.

SECTION 8.6.9 ABSENCES Any member of the Council (except Past Chairpersons) who ~~shall be~~ is absent without having been excused by the Chairperson at three ~~consecutive~~ meetings of the Council ~~shall be deemed to have resigned during a year may be removed at the discretion of the Chairperson~~ and the vacancy ~~thereby created shall by the member’s removal will~~ be filled by the Council. The “year” for this purpose begins on the first day of the fiscal year of the Section and

SECTION 2. Special meetings of the Section may be called by the Chairperson upon approval of the Council at such time and place as the Council may determine.

ends on the last day of the fiscal year of the Section.

SECTION 9.6.10 POWERS OF THE COUNCIL. The powers of the Council ~~will~~ include the power to act to further the purposes of the Section, including the power to consider, draft, and actively support or oppose proposed legislation through committees or agents consistent with the Bylaws of the State Bar of Michigan. The Council has the additional powers to consider, draft, and actively support or oppose proposed court rules; to further Section efforts to provide advice to courts during the course of pending litigation and sponsor meetings and institutes (together with publishing and disseminating information in print or online) as a means of educating the Bar and the public concerning the role of estate planning, guardianships and conservatorships (including planning alternatives), tax planning, trust planning and administration, and probate.

ARTICLE ~~VII~~7
SECTION MEETINGS

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

SECTION 3.

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

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

ARTICLE VIII
MISCELLANEOUS PROVISIONS

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

~~SECTION 2. All bills incurred by the Section before being paid shall be approved by the Treasurer, except those of the Treasurer, which shall be approved by the Chairperson or the Chairperson elect, or otherwise as the Council shall direct, and checks for all disbursements shall be signed by an officer of the State Bar of Michigan, or someone designated by the State Bar Commissioners.~~

SECTION 8.2 COMPENSATION. No salary or compensation will be paid to any officer, council member, or member of a committee for fulfilling his or her duties to the Section and the Council. Authorization to compensate an officer or Council member for a service to the Section by the officer or Council member or his or her law firm or other organization that is not defined by the Section's bylaws as a duty of an officer, Council member, or Section member requires a two-thirds vote of the Council. The person to be compensated, or the person whose firm or other organization is to be compensated, may not participate in the vote. The vote must be recorded in the minutes of the meeting, and the minutes must be made available on the Section's website.

SECTION 8.3 WHEN EFFECTIVE.

~~SECTION 3. No salary or compensation shall be paid to any officer, councilor or member of a committee.~~

~~SECTION 4. These Bylaws shall become effective upon ~~the~~their approval ~~thereof~~ by the Commissioners of the State Bar of Michigan and by the Section in the same manner provided in Article ~~IX~~9 for their amendment.~~

SECTION 58.4 PRINTING. All printing for the Section or for the Council or any committee of the Section ~~shall be~~ done under the supervision of the Executive Secretary of the State Bar of Michigan.

ARTICLE IX
AMENDMENTS

SECTION 9.1 PROCEDURE. These Bylaws may be amended at any annual meeting of the
Created prior to 1948

Section ~~or special meeting of the members of the Section~~ by a majority vote of the members of the Section present and voting, provided ~~such~~the proposed amendment ~~shall~~is first ~~have been~~ submitted to the Council for its recommendation; ~~further, that no and the~~ amendment ~~so, once~~ adopted ~~shall become, is not~~ effective until approved by the Commissioners of the State Bar of Michigan.

SECTION 9.2. PROPOSED AMENDMENTS. Any proposed amendment ~~shall~~must be submitted in writing to the Council in the form of a motion by an officer or member of the Council or by a petition by at least 10 other members of the Section. The Council ~~shall~~will consider the proposed amendment and ~~shall~~—prepare recommendations ~~thereon—~~which recommendations~~that~~, together with a complete and accurate text of ~~said~~the proposed amendment, ~~shall~~will be published in the Michigan Bar Journal ~~or the Journal of the Section~~ at least 15 days prior to the ~~annual~~ meeting of the Section ~~at which it~~when the amendment is to be voted upon.

Adopted September 14, 1955

Amended 10/14/94

Amended 9/22/00

Amended 9/27/02

Amended 9/15/03

Amended 7/23/04 Effective 9/11/04 Amended 1/21/05

Dues increase effective 6/9/06

Dues increase effective 6/19/07

Amended 9/ /2014

ATTACHMENT C-3

Master Lawyers Section

ARTICLE X AMENDMENTS

SECTION 1. Vote. These Bylaws may be amended at any meeting of the Section at which a quorum is present, by a two-thirds (2/3) vote of the members of the Section present and voting, provided such proposed amendment has first been submitted to the Council for its recommendation. No amendment so adopted shall become effective until approved by the Board of Commissioners.

SECTION 2. Form of Amendment. Any proposed amendment shall be submitted in writing to the Council by at least three (3) members of the Section. The Council shall consider the proposed amendment and if it is approved by Council, the Council shall prepare recommendations, and provide to members of the Section a complete and accurate text of the proposed amendment at least thirty (30) days prior to the meeting of the Section at which it is to be considered. Notice of the proposed amended may be communicated in writing by in-person delivery, first-class mail, electronic mail, facsimile, or by any other means reasonably likely to provide adequate written notice.

ATTACHMENT D

MEMORANDUM

TO: Thomas F. Sweeney, Chair, Probate & Estate Planning Council
FROM: David L.J.M. Skidmore, Chair, Ad Hoc Committee on Undue Influence Jury Instructions
DATE: February 14, 2014
RE: **Proposed Revisions to Michigan Model Civil Jury Instructions Regarding Undue Influence**

INTRODUCTION

The Committee on Model Jury Instructions (the “**MJI Committee**”) has published proposed revisions to the Michigan Model Civil Jury Instructions related to undue influence claims, soliciting comment on the proposed revisions. The Probate & Estate Planning Council (the “**Council**”) has formed an ad hoc committee to advise the Council regarding comment on the proposed revisions (the “**Ad Hoc Committee**”). The Ad Hoc Committee recommends that the Council should formally comment on the proposed revisions as outlined in this memorandum.

MICHIGAN LAW REGARDING PRESUMPTION OF UNDUE INFLUENCE

By way of background, undue influence in will and trust contests can be difficult to establish because direct evidence rarely exists. Accordingly, the “English rule that undue influence was never presumed was softened to allow circumstantial evidence, such as the existence of a fiduciary relationship[,] [t]o raise the presumption of undue influence.” Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 Duke J Comp & Int’l L 41, 53 (2008).

As the Michigan Supreme Court explained in *In re Hartlerode’s Will*, “there are certain cases in which the law indulges in the presumption that undue influence has been used, as where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser.” 183 Mich 51, 60; 148 NW 774 (1914). In those circumstances, “experience has taught that if certain evidentiary facts [can] be established, there is such a strong practical likelihood that another stated fact will be true that that fact may be presumed.” *Id.*

Therefore, under Michigan law, “[t]he presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to

influence the grantor's decision in that transaction." *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).

A presumption has a dual nature. On the one hand, there is an evidentiary aspect to a presumption, because a presumption is an "assumed fact created by operation of law." Benson, *Michigan Rule of Evidence 301, I Presume*, 87 Mich B J 34, 35 (2008). On the other hand, there is a procedural aspect to a presumption, such that the presumption of undue influence has been described as a "procedural mechanism" that "regulates the burden of proceeding with the evidence." *Id.*

The contestant (the party contesting the validity of the will/trust) may seek to establish the presumption of undue influence in order to invalidate the instrument. In that case, the proponent (the party propounding the validity of the will/trust) will seek to defeat the presumption of undue influence in order to uphold the validity of the instrument.

The contestant who is alleging undue influence has the burden of proof in the sense of the burden of persuasion. "The ultimate burden of proof in undue influence cases does not shift; it remains with the plaintiff throughout trial." *Kar*, 399 Mich at 538 (rejecting argument "that, once established, the presumption shifts the burden of proof to the defendant to show an absence of undue influence."). "[A] presumption . . . does not shift to [the party against whom it is directed] the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." MRE 301.

The burden of persuasion is one aspect of the burden of proof. "Generally the burden of persuasion is allocated between the parties on the basis of the pleadings. The party alleging a fact to be true should suffer the consequences of a failure to prove the truth of that allegation. A plaintiff has the burden of proof (risk of nonpersuasion) for all elements necessary to establish the case." *Kar*, 399 Mich at 539. "This burden never shifts during trial. Therefor[e], plaintiffs, who alleged the existence of undue influence, bore the ultimate burden of persuading the trier of fact that undue influence was used to procure the deed." *Id.*

The burden of production is another aspect of the burden of proof; it determines which party has the current duty to go forward with production of evidence in order to avoid a directed verdict. "[T]he burden of production always rests with the party in danger of losing a motion for a directed verdict." Benson, 87 Mich B J 34. This burden can shift during trial. "Initially, the burden of going forward with evidence (the risk of nonproduction) is upon the party charged with the burden of persuasion. However, the burden of going forward may be shifted to the opposing party." *Kar*, 399 Mich at 540.

If the contestant offers proof of the underlying elements required to establish the presumption of undue influence, then the contestant will avoid entry of an unfavorable directed verdict. "It [i.e., the presumption] is a procedural device which allows a person relying on the presumption to avoid a directed verdict[.]" *Widmayer*, 422 Mich at 289.

MRE 301 provides that the establishment of the presumption by the contestant imposes a burden on the proponent of producing evidence to rebut or meet the presumption: "In

all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption[.]” Accord *Widmayer*, 422 Mich at 289 (“[T]he function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device...”).

The trial court decides whether the contestant’s proofs are sufficient to establish the presumption of undue influence, for purposes of regulating the burden of production. “Under *Thayer*/MRE 301, the judge makes all determinations as to the existence, or nonexistence, of the presumption.” *Widmayer*, 422 Mich at 288. The Court need not, and should not, discuss its procedural determination regarding the presumption with the finder of fact, in order to avoid influencing its verdict.

After the burden of production shifts, the opposing party must introduce evidence that rebuts the presumption of undue influence. “[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption...” MRE 301. “At a minimum, a presumption shifts to the opponent of the presumed fact the burden of going forward with evidence to rebut the fact presumed.” *Benson*, 87 Mich B J 34. “The immediate legal effect of a presumption is procedural[;] it shifts the burden of going forward with the evidence relating to the presumed fact. Once there is a presumption that fact C is true, the opposing party must produce evidence tending to disprove either facts A and B or presumed fact C[.]” *Kar*, 399 Mich at 540-41, quoting *In re Wood Estate*, 374 Mich 278, 288-289; 132 NW2d 35 (1965).

How much proof must the opposing party offer in order to rebut the presumption? “[I]t is clear that, under the ‘Thayer bursting bubble’ theory of presumptions, which theory is embodied in MRE 301, substantial evidence is required [to meet the burden of producing evidence sufficient to rebut a presumption]. ... Michigan courts have repeatedly held that substantial evidence consists of more than a mere scintilla of evidence but may amount to substantially less than a preponderance.” *Jozwiak v N Michigan Hosps, Inc*, 231 Mich App 230, 238; 586 NW2d 90 (1998), citing *Widmayer*, 422 Mich at 286.

If the proponent offers sufficient rebuttal evidence, then the case goes to the jury. “[I]f the plaintiff has produced so much evidence that the burden of production has shifted to the defendant, and if the defendant has met that burden with enough evidence to rebut the plaintiff’s evidence, the trial court will simply submit the issue to the jury. In other words, the burden of persuasion comes into play only after the proofs at trial are closed and the case is presented to the jury.” *Benson*, 87 Mich B J 34.

If the opposing party fails to produce evidence rebutting the presumption, then the court should grant a directed verdict to the contestant. “[I]t [the presumption] permits that person [relying on the presumption] a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.” *Widmayer*, 422 Mich at 289. Accord *Kar*, 399 Mich at 542 (“[T]he plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.”).

If and when the case goes to the jury, the jury instructions should not discuss the presumption. "[I]nsofar as *Wood* appears to hold that the trier of fact must be instructed as to the existence of the presumption . . . it is no longer controlling precedent. We are persuaded that instructions should be phrased entirely in terms of underlying facts and burden of proof." *Widmayer*, 422 Mich at 288-89.

Where the contestant has invoked the presumption, the jury will make factual findings as to the existence of each of the underlying elements. If the jury finds that the elements of the presumption are established, then it must also find that the presumed fact (will/trust as product of undue influence) is also established, unless the evidence shows that the nonexistence of the presumed fact (undue influence) is more probable than the existence of the presumed fact. "That is, if the jury finds a basic fact, they must also find the presumed fact, unless persuaded by the evidence that its nonexistence is more probable than its existence." *Widmayer*, 422 Mich at 290-291. "Again, even though the presumptions were overcome, permissible inferences remained. These inferences might have been sufficient to satisfy the trier of fact even in the face of the rebutting evidence." *Id.*

The finder of fact weighs the contestant's evidence (including the potential inference of undue influence, arising from the presumption elements) against the proponent's evidence. "Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence." *Widmayer*, 422 Mich at 289.

DESCRIPTION OF PROPOSED REVISIONS

The MJI Committee has proposed revisions to the following Michigan Model Civil Jury Instructions relating to undue influence claims: M Civ JI 170.44, 170.45, 179.10 and 179.25. The proposed revisions to the instructions at issue are attached as **Exhibit A**.

A. M Civ JI 170.44 ("Will Contests: Undue Influence")

The MJI Committee has proposed making seven revisions to M Civ JI 170.44. First, the title of the instruction would be changed to: "Will Contests: Undue Influence and Confidential or Fiduciary Relationship." Second, in the sentence where the current instruction provides that the contestant has the burden of proof, the "by a preponderance of the evidence" standard would be inserted. Third, the following provision would be added to the instruction: "Undue influence may be proven by indirect or circumstantial evidence."

Fourth, the following provision would be added to the instruction, only to be used where the contestant seeks to establish a presumption of undue influence (the "**Proposed Presumption Provision**"):

If you find:

- a. That [name] had a confidential or fiduciary relationship with the decedent; and
- b. That [name] (or a person or interest he represented) benefited from the will; and
- c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence.

Fifth, the following definition would be added to the instruction, only to be used in conjunction with the Proposed Presumption Provision:

A 'confidential or fiduciary relationship' is a relationship where one person places confidence, reliance and trust in another person, such that the second person has authority or power over some aspect of the first person's affairs, and the first person expects that the second person will act with integrity and fidelity towards the first person's affairs. The relationship may be formal, informal, professional and/or personal.

(This definition is actually part of the Proposed Presumption Provision, but the definition has been separated for purposes of the discussion below.)

Sixth, the following note on use, corresponding to the new Proposed Presumption Provision, would be added:

Only give the instruction regarding a confidential or fiduciary relationship if the contestant seeks to establish a presumption of undue influence and has offered evidence of each of the three elements of the presumption into evidence. Whether the contestant has introduced evidence of the three elements of the presumption is a procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant. MRE 301. The court need not, and should not, discuss its procedural determination as to the

presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant. *Widmayer*, 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *id.*

Seventh, several additional cases would be cited in the comment to this instruction.

B. M Civ JI 170.45 (“Will Contests: Existence of Presumption of Undue Influence – Burden of Proof”)

The MJI Committee has proposed deleting M Civ JI 170.45, for the reason that “the proposed amendment to M Civ JI 170.44” would make “M Civ JI 170.45 no longer necessary.”

C. M Civ JI 179.10 (“Trust Contests: Undue Influence”)

The MJI Committee has proposed making seven revisions to M Civ JI 179.10, which are identical to the proposed revisions to M Civ JI 170.44.

D. M Civ JI 179.25 (“Trust Contests: Existence of Presumption of Undue Influence – Burden of Proof”)

The MJI Committee has proposed deleting M Civ JI 179.25, for the reason that “the proposed amendment to M Civ JI 179.10” would make “M Civ JI 179.25 no longer necessary.”

COMMENT ON PROPOSED REVISIONS

The Ad Hoc Committee believes that the Proposed Presumption Provision in M Civ JI 170.44 and 179.10 is inconsistent with, and contrary to, Michigan law and should not be adopted. Otherwise, the Ad Hoc Committee approves of the proposed revisions. (Two typographical errors were noted: in M Civ JI 170.44, the omission of an asterisk at the beginning of subparagraph b, following the clause that begins “It is not improper...”; and in M Civ JI 179.10, “trust” should replace “will” in the sentence that reads “If you find ... That [name] ... benefited from the will...”)

Under M Civ JI 170.44 and 179.10, the Proposed Presumption Provision would be used in will or trust contests where (1) the contestant meets its burden of production by introducing evidence of three factors that give rise to the presumption of undue influence; (2) the proponent meets its burden of production by introducing evidence that rebuts the presumption of undue influence; and (3) the trial court sends the case to the jury as finder of fact. Under that scenario, the Proposed Presumption Provision would instruct the jury that, if it finds the

existence of the three undue influence presumption factors (i.e., relationship, opportunity and benefit), then it "should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence." Such an instruction would be inconsistent with, and contrary to, Michigan law.

The Michigan Supreme Court has ruled that, under such circumstances, the trial court should instruct the jury that, if it finds the facts that establish the presumed fact (without mentioning the presumption), then it must find the presumed fact, unless it finds – based on all the evidence – that the nonexistence of the presumed fact is more likely than the existence of the presumed fact. "We are persuaded that instructions should be phrased entirely in terms of underlying facts and burden of proof. That is, if the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence." *Widmayer*, 422 Mich at 288-89. The Proposed Presumption Provision, by merely instructing the jury that it "should consider" the basic facts, fails to comport with *Widmayer*.

Professor Benson employs virtually identical wording in his discussion of the relevance of the presumption to the jury's findings. "When a presumption applies, if a jury accepts as true the basic facts, it is instructed that it must, by law, accept the presumed facts unless the presumed facts have been rebutted by contrary evidence." Benson, 87 Mich B J 34.

It should be emphasized that, in the scenarios under consideration by both the Michigan Supreme Court and Professor Benson, the undue influence case has gone to the jury, meaning that the contestant offered sufficient evidence to establish a presumption of undue influence, the burden of production passed to the opposing party, and the opposing party met its burden of producing evidence to rebut the presumption. Despite the fact that the presumption of undue influence has been "rebutted" in this scenario, both the Michigan Supreme Court and Professor Benson agree that the jury is to be instructed that it must find undue influence if it finds the underlying three factors, unless it is persuaded by all the evidence that the nonexistence of undue influence is more likely than the existence of undue influence.

Hence, the term "rebuttal" in the presumption of undue influence arena appears to be given two slightly different meanings. During the trial, the presumption of undue influence may be rebutted by the proponent/defendant meeting its burden of producing evidence sufficient to avoid a directed verdict. "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption..." MRE 301 (emphasis added). This type of rebuttal might be thought of as rebuttal for purposes of evaluating whether the trial court should enter a directed verdict.

After the close of the proofs, when the case is sent to the jury, the presumption of undue influence may be "rebutted" by the jury finding that the nonexistence of the presumed fact is more likely than the existence of the presumed fact, based on all the evidence. "[I]f a jury accepts as true the basic facts, ... it must, by law, accept the presumed facts unless the presumed facts have been rebutted by contrary evidence." Benson, 87 Mich B J 34. This type of rebuttal might be thought of as rebuttal for purposes of a jury verdict.

Moreover, the Proposed Presumption Provision does not fit into any recognized inference format. Again, evidence of the three foundational factors (relationship, opportunity, benefit) supports an inference of undue influence. An inference may be mandatory ("If you find A, B and C, then you must find D"), conditionally mandatory ("If you find A, B and C, then you must find D, unless you find that all the evidence makes it more likely that D did not exist"), or permissive ("If you find A, B and C, then you may find D").

The template of the Proposed Presumption Provision is: "If you find A, B and C, then you should consider A, B and C, and all other evidence, in determining whether D existed." This language reflects that the jury is to draw no type of inference whatsoever from the underlying factors. The proposed language thereby fails to impress upon the jury that there is a significant link between the existence of A, B and C, and the likelihood that D occurred. "Experience has taught that if certain evidentiary facts be established, there is such a strong practical likelihood that another stated fact will be true that that fact may be presumed." *In re Wood's Estate*, 374 Mich at 289.

The Proposed Presumption Provision essentially says: "You can consider all the evidence, including A, B and C, in determining whether D existed." That seems to be little more than the basic charge to the jury: "Decide the case based on the evidence you've heard." In contrast, both *Widmayer* and Professor Benson require that the jury instructions employ a conditional mandatory inference under these circumstances (i.e., "If you find A, B and C, then you must find D, unless you find that all the evidence makes it more likely that D did not exist").

The Ad Hoc Committee believes that, as presently worded, the Proposed Presumption Provision would serve to vitiate the operation of the undue influence presumption in every case that goes to the jury. The Ad Hoc Committee strongly recommends that the Proposed Presumption Provision be revised to read as follows:

If you find:

- a. That [name] had a confidential or fiduciary relationship with the decedent;
- b. That [name] (or a person or interest he represented) benefited from the [will/trust]; and
- c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you must find that the [will/trust] is the product of undue influence, unless you are persuaded by all of the evidence that the existence of undue influence is less probable than the nonexistence of undue influence.

This alternative language would instruct the jury on the inferential relationship between A, B and C, on the one hand, and undue influence, on the other hand, and direct the jury

to weigh that important relationship against all of the countervailing evidence. It would also clarify that the burden of proof rests with the contestant and not the proponent, by replacing "the nonexistence of undue influence is more probable than the existence of undue influence" with "the existence of undue influence is less probable than the nonexistence of undue influence."

DLJMS

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EXHIBIT A

**FROM THE COMMITTEE ON
MODEL CIVIL JURY INSTRUCTIONS**

The Committee solicits comment on the following proposals by April 1, 2014. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Committee on Model Civil Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

PROPOSED

The Committee is considering the adoption of amended instructions for use in cases where a will or trust is being contested and the deletion of two instructions previously used in those cases.

[AMENDED] M CIV JI 170.44

M CIV JI 170.44 WILL CONTESTS: UNDUE INFLUENCE AND CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

The contestant has the burden of proving by a preponderance of the evidence that there was undue influence exerted on the decedent in the making of the will.

Undue influence is influence which is so great that it overpowers the decedent's free will and prevents [him / her] from doing as [he / she] pleases with [his / her] property.

To be "undue," the influence exerted upon the decedent must be of such a degree that it overpowered the decedent's free choice and caused [him / her] to act against [his / her] own free will and to act in accordance with the will of the [person / persons] who influenced [him / her].

The influence exerted may be by [force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / (other)]. A will which results from undue influence is a will which the decedent would not otherwise have made. It disposes of the decedent's property in a manner different from the disposition the decedent would have made had [he / she] been free of such influence.

The word "undue" must be emphasized, because the decedent may be influenced in the disposition of [his / her] property by specific and direct influences without such influences becoming undue. This is true even though the will would not have been made but for such influence. It is not improper for a [spouse / child / parent / relative / friend / housekeeper / (other)] to—

- a. *([advise / persuade / argue / flatter / solicit / entreat / implore],)
- b. (appeal to the decedent's [hopes / fears / prejudices / sense of justice / sense of duty / sense of gratitude / sense of pity],)
- c. *(appeal to ties of [friendship / affection / kinship],)
- d. *([other],)

provided the decedent's power to resist such influence is not overcome and [his / her] capacity to finally act in accordance with [his / her] own free will is not overpowered. A will which results must be the free will and purpose of the decedent and not that of [another person / other persons].

Mere existence of the opportunity, motive or even the ability to control the free will of the decedent is not sufficient to establish that the decedent's will is the result of undue influence.

Undue influence may be proven by indirect or circumstantial evidence.

**If you find:

- a. That [name] had a confidential or fiduciary relationship with the decedent; and
- b. That [name] (or a person or interest he represented) benefited from the will; and
- c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence.

A "confidential or fiduciary relationship" is a relationship where one person places confidence, reliance and trust in another person, such that the second person has authority or power over some aspect of the first person's affairs, and the first person expects that the second person will act with integrity and fidelity towards the first person's affairs. The relationship may be formal, informal, professional and/or personal.

Note on Use

*The Court should choose among subsections a-d those which are applicable to the case.

This instruction should be accompanied by MCivJI 8.01, Meaning of Burden of Proof.

**Only give the instruction regarding a confidential or fiduciary relationship if the contestant seeks to establish a presumption of undue influence and has offered evidence of each of the three elements of the presumption into evidence. Whether the contestant has introduced evidence of the three elements of the presumption is a

procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant. MRE 301. The court need not, and should not, discuss its procedural determination as to the presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant. *Widmayer*, 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *Id.*

Comment

In re Estate of Karmey, 468 Mich 68; 658 NW2d 796 (2003); *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985); *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1950); *In re Balk's Estate*, 298 Mich 303; 298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 170.44 was added January 1984.
Amended December 8, 2003.

[DELETED] M CIV JI 170.45

M CIV JI 170.45 WILL CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

~~To establish that the decedent made the will as a result of undue influence, the contestant has the burden of proving all three of the following propositions:~~

- ~~a. That [name] had a fiduciary relationship with the decedent.~~
- ~~b. That [name] (or a person or interest he represented) benefited from the will, and~~
- ~~c. That by reason of the fiduciary relationship [name] had an opportunity to influence the decedent in giving that benefit.~~

~~—Your verdict will be against the will if you find that all three propositions have been proven. Otherwise, your verdict will be in favor of the will.~~

~~—A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.~~

Note on Use

The committee recommends that this instruction be deleted in light of the proposed amendment to M Civ JI 170.44, making M Civ JI 170.45 no longer necessary.

~~In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e., the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists. MRE 301; *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 638 (1985).~~

~~Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ JI 170.44—Will Contexts: Undue Influence—Burden of Proof.~~

~~A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; *Widmayer*, supra. If there is no genuine dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301; *Widmayer*, supra.~~

~~Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, *In re Kanable Estate*, 47 Mich App 290; 209 NW2d 452 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, *In re Estate of Karmey*, 468 Mich 68,74 fn 2,3; 658 NW2d 796 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. *In re Estate of Karmey*.~~

~~The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or~~

fiduciary relationship" have identical meanings. See, *In re Estate of Karmey*.

This instruction should be accompanied by M Civ JI 8.01, Meaning of Burden of Proof.

Comment

In re Estate of Karmey, Widmayer, Kar v Hogan, 399 Mich 529; 251 NW2d 77 (1976). See also *In re Cox Estate*, 383 Mich 108; 174 NW2d 558 (1970) (fiduciary relationship of attorney and clergyman); *In re Vollbrecht Estate*, 26 Mich App 430; 182 NW2d 609 (1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney and her accountant were also trustees of foundation); *In re Spillette Estate*, 352 Mich 12; 88 NW2d 300 (1958); *In re Haskell's Estate*, 283 Mich 513; 278 NW 668 (1938) (will in favor of attorney upheld where testatrix obtained independent advice; presumption of undue influence rebutted); *In re Eldred's Estate*, 234 Mich 131; 203 NW 870 (1926) (doctor); *In re Hartlerode's Estate*, 183 Mich 51; 148 NW 774 (1914) (clergyman).

History

M Civ JI 170.45 was added January 1984.
Amended March 1990, December 8, 2003.

[AMENDED] M CIV JI 179.10

M CIV JI 179.10 TRUST CONTESTS: UNDUE INFLUENCE AND CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

The contestant has the burden of proving by a preponderance of the evidence that there was undue influence exerted on the settlor in the [creation / amendment / revocation] of the trust.

Undue influence is influence that is so great that it overpowers the settlor's free will and prevents [him / her] from doing as [he / she] pleases with [his / her] property.

To be "undue," the influence exerted upon the settlor must be of such a degree that it overpowered the settlor's free choice and caused [him / her] to act against [his / her] own free will and to act in accordance with the will of the [person / persons] who influenced [him / her].

The influence exerted may be by [force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / other]. Action that results from undue influence is action that the settlor would not otherwise have taken. It disposes of the trust property in a manner different from the disposition the settlor would have made had [he / she] been free of such influence.

The word "undue" must be emphasized, because the settlor may be influenced in the disposition of the trust property by specific and direct influences without such influences

becoming undue. This is true even though the trust would not have been made but for such influence. It is not improper for a [spouse / child / parent / relative / friend / housekeeper / other] to—

- a. *([advise / persuade / argue / flatter / solicit / entreat / implore],)
- b. *(appeal to the decedent's [hopes / fears / prejudices / sense of justice / sense of duty / sense of gratitude / sense of pity],
- c. *(appeal to ties of [friendship / affection / kinship],)
- d. *([other],)

provided the settlor's power to resist such influence is not overcome and [his / her] capacity to finally act in accordance with [his / her] own free will is not overpowered. A trust that results must be the free will and purpose of the settlor and not that of [another person / other persons].

Mere existence of the opportunity, motive or even the ability to control the free will of the settlor is not sufficient to establish that [creation / amendment / revocation] of the trust is the result of undue influence.

Undue influence may be proven by indirect or circumstantial evidence.

**If you find:

- a. That [name] had a confidential or fiduciary relationship with the decedent; and
- b. That [name] (or a person or interest he represented) benefited from the will; and
- c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence.

A "confidential or fiduciary relationship" is a relationship where one person places confidence, reliance and trust in another person, such that the second person has authority or power over some aspect of the first person's affairs, and the first person expects that the second person will act with integrity and fidelity towards the first person's affairs. The relationship may be formal, informal, professional and/or personal.

Note on Use

*The Court should choose among subsections a-d those which are applicable to the case.

This instruction should be accompanied by M Civ JI 8.01, Definition of Burden of Proof.

**Only give the instruction regarding a confidential or fiduciary relationship if the contestant seeks to establish a presumption of undue influence and has offered evidence of each of the 3 elements of the presumption into evidence. Whether the

contestant has introduced evidence of the 3 elements of the presumption is a procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant. MRE 301. The court need not, and should not, discuss its procedural determination as to the presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant. *Widmayer*, 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *Id.*

Comment

This instruction is virtually identical to M Civ JI 170.44

In re Estate of Karmey, 468 Mich 68; 658 NW2d 796 (2003); *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985); *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1950); *In re Balk's Estate*, 298 Mich 303; 298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 179.10 was added June 2011.

[DELETED] M CIV JI 179.25

M CIV JI 179.25 TRUST CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

~~To establish that the settlor [created / amended / revoked] the trust as a result of undue influence, the contestant has the burden of proving all three of the following propositions:~~

- ~~1. that [name] had a fiduciary relationship with the settlor,~~
- ~~2. that [name] (or a person or interest he represented) benefited from the [creation / amendment / revocation] of the trust, and~~
- ~~3. that by reason of the fiduciary relationship [name] had an opportunity to influence the settlor in giving that benefit.~~

~~If you find that all three propositions have been proven, then the settlor's action is~~

invalid as a result of undue influence. Otherwise, the settlor's action is not invalid as a result of undue influence.

—A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.

Note on Use

The committee recommends that this instruction be deleted in light of the proposed amendment to M Civ JI 179.10, making M Civ JI 179.25 no longer necessary.

In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e., the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; *Widmayer v Leonard*, 422 Mich 280 (1985).

Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ JI 179.10 Trust Contests: Undue Influence—Definition.

A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; *Widmayer*, supra. If there is no genuine dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301; *Widmayer*, supra.

Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, *In re Kanable Estate*, 47 Mich App 299 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, *In re Estate of Karmoy*, 468 Mich 68, 74 fn 2, 3 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. *In re Estate of Karmoy*.

The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or fiduciary relationship" have identical meanings. See, *In re Estate of Karmey*.

This instruction should be accompanied by M-Civ-JI 8.01, Definition of Burden of Proof.

Comment

This instruction is substantially similar to M-Civ-JI 170.45.

~~*In re Estate of Karmey, Widmayer, Kar v Hogan*, 399 Mich 529 (1976). See also *In re Cox Estate*, 383 Mich 108 (1970) (fiduciary relationship of attorney and clergyman); *In re Vollbrecht Estate*, 26 Mich App 430 (1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney and her accountant were also trustees of foundation); *In re Spillotte Estate*, 352 Mich 12 (1958); *In re Haskell's Estate*, 283 Mich 513 (1938) (will in favor of attorney upheld where testatrix obtained independent advice; presumption of undue influence rebutted); *In re Eldred's Estate*, 234 Mich 131 (1926) (doctor); *In re Hartlerode's Estate*, 183 Mich 51 (1914) (clergyman).~~

History

M Civ JI 179.25 was added June 2011.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

Chair: Alfred M. Butzbaugh
Reporter: Timothy J. Raubinger
Members: Benjamin J. Aloia; Hon. Jane M. Beckering; Mark R. Bendure; Hon. Mark T. Boonstra; W. Mack Faison; Donald J. Gasiorek; Gary P. Gordon; Elizabeth Phelps Hardy; Helen K. Joyner; Daniel J. McCarthy; Hon. Elizabeth M. Pezzetti; Hon. James R. Redford; Hon. Douglas B. Shapiro; Noreen L. Slank; Hon. Michael R. Smith; Paul C. Smith; Hon. Donald A. Teeple; Thomas Van Dusen; Hon. Michael D. Warren, Jr.; Thomas W. Waun.

ATTACHMENT E



SMITH HAUGHEY

RICE & ROEGGE

ATTORNEYS AT LAW

MEMORANDUM

TO: Probate and Estate Planning Council

FROM: George F. Bearup, Real Estate Committee Chair

RE: Clarification of MCL 211.27(a)(7)(s): Intra-Family Residential “Uncapping” Exemption.

STATUS “UNCAPPING” EXEMPTION AMENDMENT

David Fry of the Subcommittee (David Fry, James Ramer, Jeff Ammon and George Bearup) met with Representative Peter Pettalia’s legislative aide on Monday of this week. A summary of that meeting is David’s email that follows. Due to the optimism of Representative Pettalia’s office we expanded upon our earlier proposal to add sections that clarify what relationships are intended “by the first degree” and also address transfers to and from legal entities.

David Fry’s Report dated February 11, 2014:

My meeting with Matt Blakely of Representative Pettalia’s office yesterday went even better than I had hoped. In contrast to the last meeting, Matt was very positive about the change for amended PA 497, perhaps even as soon as before year end. I am attaching a version of the amending language that Matt gave me yesterday so you can see what he is suggesting. Some of the new language he attributed to Mark Harder of Warner, Norcross & Judd. Matt said that Mark was going to attend yesterday’s meeting, but he didn’t show up. I told Matt that the language looked good at first blush, but I wanted to have a day or so to review it more carefully and give him any feedback. Please get back to me quickly if you have comments on his proposed language.

I also gave Matt some language that covers transfers of property into an LLC, corporation, partnership, etc. Given the State Tax Commission’s new Guidelines which omit the specific example of such a transfer not being an uncapping event, I said that there is some concern that the STC is backing away from their position that such transfers are exempt from uncapping. The language I gave Matt is also attached. Since we are amending the statute to make clear that transfers of ownership in an entity are not uncapping transfers, it only makes sense to include transfer into the entity in the exemption from uncapping. Your thoughts on this language are also welcome.

All in all, Matt and I spent more time talking about the mechanics of passing this proposed legislation than the substance of the language itself. He was much more positive about the likelihood of passage than at any other time he and I have spoken. Matt wants to get language to the Legislative Service Bureau (the arm of the Legislature that actually drafts language for legislators) yet this week, then hopes to introduce a bill before the end of the month, hold hearings sometime this summer and he hopes for passage before year end. I asked him about the Senate and he said he will start working on them as soon as a bill is introduced in the House. Given the support that PA 497 had (the House vote was about 90% in favor), he does not anticipate much opposition to the amendment. He also said that having a budget surplus this year works in our favor.

Please get back to me as soon as possible with your thoughts on the language attached. I want to get back to Matt within the next day or so if possible.

Let me know if you have questions in the meantime.

Matt Blakely's Proposed amendment to MCL 2.11.27a(6)(d), as further edited by the Subcommittee:

(d) EXCEPT AS PROVIDED IN SUBDIVISION (7)(s), a conveyance by distribution from a trust, except if the distribute is the sole present beneficiary or the spouse of the sole present beneficiary, or both.

Proposed amendment to MCL 211.27a(7)(s):

(s) Beginning December 31, 2013, a transfer of residential real property if the transferee OR THE TRANSFEREE'S SPOUSE is related to the transferor OR THE TRANSFEROR'S SPOUSE by blood or affinity to the first degree and the use of the residential real property does not change following the transfer. As used in this subdivision, (i) "residential real property" means real property classified as residential real property under section 34c; AND (ii) "TRANSFEROR" SHALL INCLUDE (A) A PERSON FOR WHOM ANOTHER IS ACTING IN A FIDUCIARY CAPACITY, INCLUDING A CONSERVATOR, AS DEFINED IN MCL 700.1103(h), A GUARDIAN AS DEFINED IN MCL 700.1104(l), A PERSONAL REPRESENTATIVE AS DEFINED IN MCL 700.1106(o), AND A TRUSTEE OF A TRUST, AS DEFINED IN MCL 700.1107(o); AND (b) SHALL INCLUDE A TESTATOR AS DEFINED IN MCL 700.1107(m) OF A WILL AS DEFINED IN MCL 700.1108(b), AN INTESTATE DECEDENT AS DEFINED IN MCL 700.2101, AND A SETTLOR OF A TRUST, AS DEFINED IN MCL 700.7103(i); AND (iii) "TRANSFEREE" SHALL INCLUDE A BENEFICIARY AS DEFINED IN MCL 700.1103(d). NOTWITHSTANDING ANY PROVISION IN SECTION 27a TO THE CONTRARY, A CHANGE IN TRUST BENEFICIARIES THAT ADDS OR SUBSTITUTES A PERSON OR PERSONS RELATED TO THE PRESENT BENEFICIARY OR BENEFICIARIES BY BLOOD OR AFFINITY TO THE FIRST DEGREE IS NOT A TRANSFER WITH RESPECT TO RESIDENTIAL REAL PROPERTY HELD IN THE TRUST; FURTHER, A TRANSFER OF AN OWNERSHIP INTEREST IN A CORPORATION, LIMITED LIABILITY COMPANY, LIMITED PARTNERSHIP OR OTHER LEGAL ENTITY OWNING RESIDENTIAL REAL PROPERTY

BETWEEN PERSONS RELATED BY BLOOD OR AFFINITY TO THE FIRST DEGREE IS NOT A TRANSFER OF OWNERSHIP WITH RESPECT TO RESIDENTIAL REAL PROPERTY HELD IN THE ENTITY.

(t) THE TRANSFER OF AN OWNERSHIP INTEREST IN REAL PROPERTY EITHER:

(i) TO A CORPORATION, LIMITED LIABILITY COMPANY, PARTNERSHIP, LIMITED PARTNERSHIP, LIMITED LIABILITY PARTNERSHIP OR OTHER LEGAL ENTITY, IF THE OWNERSHIP OF THE ENTITY AFTER THE TRANSFER IS IDENTICAL TO THE OWNERSHIP OF THE REAL PROPERTY BEFORE THE TRANSFER, BOTH IN THE IDENTITY OF THE OWNER(S) AND THE PERCENTAGE OF THE ENTITY OWNED IF OWNED BY MORE THAN ONE PERSON; OR

(ii) FROM A CORPORATION, PARTNERSHIP, SOLE PROPRIETORSHIP, LIMITED LIABILITY COMPANY, LIMITED LIABILITY PARTNERSHIP, OR OTHER LEGAL ENTITY, IF THE TRANSFEREE IS AN OWNER OF THE ENTITY AND THE PERCENTAGE OF OWNERSHIP TRANSFERRED IS EQUAL TO THE PERCENTAGE OF THE TRANSFEREE'S OWNERSHIP IN THE ENTITY.

(u) AS USED IN THIS SECTION, THE FOLLOWING RELATIONSHIP SHALL CONSTITUTE PERSONS RELATED BY THE FIRST DEGREE OR BLOOD OR AFFINITY, REGARDLESS OF WHETHER THE RELATIONSHIP IS BIOLOGICAL OR THE RESULT OF ADOPTION OR MARRIAGE:

- (i) SPOUSE
- (ii) FATHER OR MOTHER
- (iii) FATHER OR MOTHER OF SPOUSE
- (iv) SON OR DAUGHTER
- (v) SON OR DAUGHTER OF SPOUSE
- (vi) SIBLINGS

ATTACHMENT F

Tax Nugget

February, 2014

The Internal Revenue Service published Revenue Procedure 2014-18 which provides a method of obtaining an extension of time to make a portability election for some estates if the decedent died before 2014. Although this was predicted to happen at Heckerling, prior to this, the Service's position was that portability elections had to be made timely and was not routinely entertaining requests for relief. No user fee is required for this procedure.

IRS indicated that a due date for an estate tax return that must be filed is statutory, but when a return is filed only for portability, it is prescribed by Regulation Section 20.2010-2T(a) and not by statute, so extensions can be granted.

In order for relief to be granted, the taxpayer must show that she acted reasonably and in good faith and that relief will not prejudice the interests of the government.

Requirements are :

Taxpayer is the executor of an estate where the decedent:

Has a surviving spouse

Died after 12/31/2010 and on or before 12/31/2013

Was a citizen or resident of the U.S. on the date of death,

Was not required to file an estate tax return under Code section 6018

No estate tax return was timely filed for portability.

Taxpayers wanting this relief must file a complete and properly prepared Form 706 on or before 12/31/2014, and indicate on the top of the 706 that the return is "FILED PURSUANT TO REV. PROC. 2014-18 TO ELECT PORTABILITY UNDER SECTION 2010(c)(5)(A)."

Estates that do not meet all of the above requirements can request a letter ruling under the provisions of Treas. Reg. Section 301.9100-3, following the procedures in Rev. Proc 2014-1. If an estate following this procedure is found to have been required to file a Form 706, the relief will not be applicable. If an executor has filed for a Letter Ruling on this issue and paid the fee, he can rely on the Rev. Proc., withdraw the request and ask for a refund of the user fee.

The Rev. Proc. gives an example where portability was not claimed in the first estate when the surviving spouse dies and a return is filed for her. A return for the first spouse to die is subsequently filed using this procedure. It points out that the statute requires that the executor for the second to die must file a claim for credit or refund of tax by the three year nine month statute determined by the date of the first to die, and can be considered as a "protective claim" on the 706 of the second to die if the return for the first to die has not been filed by that date. The Rev. Proc. also provides guidance in consideration of United States v. Windsor and indicates that if a taxpayer files an original return, adjusted return, or claim for credit or refund in reliance of Rev. Ruling 2013-17, all items required to be reported on the return or claim that are affected by the marital status of the taxpayer must be adjusted to be consistent with the marital status reported on the return or claim.

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