I. Call to Order

The Chair of the Section, Thomas F. Sweeney, called the meeting to order at 10:15 a.m.

II. Attendance

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

Thomas F. Sweeney  
Susan M. Allan  
Josh A. Ard  
Christopher A. Ballard  
George F. Bearup  
Marguerite Munson Lentz  
David P. Lucas  
Lorraine F. New  
Patricia M. Ouellette  
Robert M. Taylor  
Geoffrey R. Vernon  
Nancy H. Welber

A total of 12 council members and officers were present, representing a quorum.

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

Constance L. Brigman  
Rhonda M. Clark-Kreuer  
Shaheen I. Imami  
David J. Kerr  
Michelle C. Marquardt  
Amy M. Morrissey  
Hon. David M. Murkowski  
David Skidmore  
James P. Spica  
James B. Steward
C. The following officers and members of Council were absent without excuse:
None.

D. The following ex-officio members of the Council were in attendance:
Douglas G. Chalgian
George W. Gregory
Hon. Philip E. Harter
Nancy L. Little

E. Others in attendance:
Raymond Harris
Hon. Michael L. Jaconette
Katie Lynwood
Marta Manildi
Rick Mills
Neal Nusholtz
Robert O’Reilly
Nick Reisler
Scott Robbins
Nazneen Syed
Robert Tiplady
Joe Viviano

III. Minutes of April 19, 2014, Meeting of the Council

The minutes of the April 19, 2014, Meeting of the Council were included in the meeting materials posted on the Section’s web page prior to the meeting. Ms. Lentz moved that the minutes be approved. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions.

IV. Treasurer Report – Marlaine C. Teahan

No report.

V. Reports Taken Out of Order

Because some council members had to leave early, which would mean that the Council would no longer have a quorum, certain matters were taken out of order.
A. Report of the Committee on Special Projects – Marguerite Munson Lentz

The Council had previously approved the draft Domestic Asset Protection Legislation. Robert Tiplady presented to the Committee on Special Projects two proposed changes to the legislation that were negotiated with the Michigan Bankers Association. The two changes were the addition of subsections (j) and (k) to section 5 of the proposed legislation. (Black-lined copy of the proposed legislation showing those additions is attached hereto as Attachment A.) With these changes, the Michigan Bankers General Counsel would not oppose the legislation. The Committee on Special Projects voted in favor of recommending to Probate Council that Probate Council approve this legislation. If approved, the next step would be finding a legislative sponsor. Ms. Lentz moved that Probate Council approve these changes to the Domestic Asset Protection Legislation. The motion was approved on a Council vote of 12-0, with no nays and no abstentions.

B. Nominating Committee – Douglas G. Chalgian

A report was submitted by the Nominating Committee, which consisted of Douglas G. Chalgian, George W. Gregory, and Mark K. Harder. That report is attached hereto as Attachment B. The nominating committee submitted the following nominations for officers and members of the Council of the Section:

**Officers**

- Chairperson: Amy N. Morrissey
- Chairperson Elect: Shaheen I. Imami
- Vice Chairperson: James B. Steward
- Secretary: Marlaine C. Teahan
- Treasurer: Marguerite Munson Lentz

**Members**

For a second full three-year term, concluding with the elections at the 2017 annual meeting of the Section:

- Christopher A. Ballard
- George F. Bearup
- Nancy H. Welber

For a first full three-year term, concluding with the elections at the 2017 annual meeting of the Section:

- Honorable Michael L. Jaconette
- Mark E. Kellogg
- Raj A. Malviya
Contingent upon the election of Marguerite Munson Lentz as Treasurer of the Section, to fill the unexpired term of Marguerite Munson Lentz, which concludes with the elections at the 2016 annual meeting of the Section:

Richard C. Mills

Mr. Sweeney reported that he had received no other nominations. Susan Allen moved that the Probate Council approve these nominations and forward these nominations to the Section for a vote at the annual meeting of the Section on September 6, 2014. The motion was seconded. The motion was approved by a vote of the Council, 12-0, with no nays and no abstentions.

C. Amicus Curiae – David L. Skidmore

Patricia Oulette made the report. The amicus committee received a request for an amicus brief in Carter et al v Woodwyk and Wilson, Allegan County Probate Court. That application is attached hereto as Attachment C. The issue is whether, in a wrongful death case, the decedent’s step-children are potential claimants. The facts: the decedent had no children. When he married his wife, she had six young boys. The decedent’s wife predeceased him. The decedent died and a wrongful death action was filed with respect to the decedent’s death. The decedent had no will, and his heirs are his sisters. The wrongful death statute includes among the potential claimants of a wrongful death claim the children of the decedent’s spouse. In a prior case, In re Combs, the Michigan Court of Appeals reasoned that if the biological parent died before the decedent, there was no “spouse” and therefore, no children of the decedent’s spouse; the Court held that the decedent’s step-children could not be potential beneficiaries of the wrongful death claim since the biological parent had predeceased the decedent. The trial court in Carter followed the holding of Combs. The appellate court is bound by Combs because of stare decisis, but appellants are asking the Michigan appellate court to rule that, but for Combs, the step-children could be potential claimants. Then the Michigan appellate court can convene a special panel to determine the issue.

After discussion, a motion was made and seconded to prepare and file the amicus brief, which passed by a majority of the Council members present and voting (6 yays, 5 nays, 1 abstention). After further discussion, Robert Taylor moved to reconsider the motion, which was seconded by George Gregory. The motion for reconsideration was approved by a vote of the Council 12-0, with no nays and no abstentions. Mr. Taylor then moved to prepare and file the amicus brief. This motion was defeated by a vote of the Council 0-12, with no ayes and no abstentions.

The Honorable Philip E. Harder moved that a letter be sent that could accompany the appellants’ brief. This letter would state that, in the Council’s opinion, the holding in Combs was too restrictive of a reading of the wrongful death statute. The legislature did not intend to treat step-children differently depending on the fortuity of whether the biological parent dies before the decedent. Such a restrictive reading could exclude step-children who have a close personal relationship with the decedent and have suffered a great loss due to the decedent’s death. The Council supports complete appellate review of the issue and overruling the holding in Combs. This motion was seconded by Ms. Lentz. This motion was approved by a vote of the Council, 12-0, with no nays and no abstentions.
VI. **Chairperson’s Report – Thomas F. Sweeney**

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

- Mr. Sweeney received a request to send members of the Council to a presentation about a website called Zeekbeek. The Council members who attended the presentation were David Lucas, Richard Mills, Hon. Philip C. Harder, Marlaine C. Teahan, and Katie Lynwood. A description of this program was presented to the Council for their individual consideration.

- Mr. Sweeney received the report of the Recommendations of the Task Force of the Michigan State Bar on the issue of a voluntary bar. Several recommendations concern the advocacy activities of the Sections, which are funded with voluntary dues (copy of the Task Force Report recommendations pertaining to Section advocacy is attached as Attachment D). The officers of the Council will have a conference to consider possible responses.

VII. **Standing Committee Reports**

A. **Internal Governance**

1. **Budget – James B. Steward**

   No report.

2. **Bylaws – Nancy H. Welber**

   The bylaws were published in June State Bar Journal. The bylaws will be voted on at the Section’s annual meeting in September. Then, the by-laws, if approved, will be sent to the State Bar’s Board of Commissioners for approval.

3. **Awards – Douglas A. Mielock**

   No report.

4. **Planning – Amy N. Morrissey**

   No report.

5. **Nominating – Douglas G. Chalgian**

   Report given above.

6. **Annual Meeting – Amy N. Morrissey**

   Mr. Sweeney reported that the annual meeting of the Section will be Sept 6th and will be held at the University Club.
B. **Education and Advocacy Services for Section Members**

1. *Amicus Curiae* – David L. Skidmore

   See above for the report by Ms. Ouellette.

2. **Probate Institute** – Shaheen I. Imami

   No report.

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

   No report.

4. **Citizens Outreach** – Constance L. Brigman

   No report.

5. **Electronic Communications** – William J. Ard

   No report.

C. **Legislation and Lobbying**

1. **Legislation** – Christopher A. Ballard

   Mr. Ballard reported that SB 425, which would allow the principal residence exemption (PRE) to be claimed for trust owned property (if the property is the principal residence of a beneficiary of the trust), passed in the Senate and is pending in the House.

   Mr. Ballard further reported that HB 5552, which would change the rules for uncapping for transfers into and out of trusts, passed the House and is pending in the Senate.

   Mr. Ballard also reported that a three-bill package (HB 4638, 4639, and 4640), which permits recording of photocopies with an affidavit, passed in the House and is now pending in the Senate.

2. **Updating Michigan Law** – Marguerite Munson Lentz

   Ms. Lentz gave an update on the fiduciary access to digital assets legislation. According to our lobbyist, Becky Bechler, Representative Cotter’s office will be working on the bill over the summer with the intention of taking it up in the fall legislative session.

3. **Insurance Committee** – Geoffrey R. Vernon
Mr. Vernon reported that the committee is working on an exoneration statute in connection with irrevocable life insurance trust. The committee hopes to bring a proposal to the Council in the fall.

4. Artificial Reproductive Technology – Nancy H. Welber

Ms. Welber reported that the committee is continuing its work and hopes to bring a proposal to the Council in the fall.

D. Ethics and Professional Standards

1. Ethics – J. David Kerr

No report.

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

Mr. Taylor reported that the plans for the community outreach on August 6, 2014 for seniors entitled, “Who Do You Trust,” are proceeding. There are presently 106 confirmed centers. The committee is matching presenters with centers.

3. Specialization and Certification – James B. Steward

No report.

E. Administration of Justice

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

No report.

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

No report.

F. Areas of Practice

1. Real Estate – George F. Bearup

Mr. Bearup was informed that Representative Pettalia will be working on legislation which will avoid uncapping in transactions involving LLC’s, corporations and partnerships.

2. Transfer Tax Committee – Lorraine F. New

No report.

3. Charitable and Exempt Organization – Christopher A. Ballard
Mr. Ballard reported that SB 623, SB 623, and SB 929, which would make changes to the nonprofit corporation act, passed in the Senate and are pending in the House.

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer
No report.

G. Liaisons

1. Alternative Dispute Resolution Section Liaison – No report.

2. Business Law Section Liaison – John R. Dresser
No report.

3. Elder Law Section Liaison – Amy R. Tripp
No report.

4. Family Law Section Liaison – Patricia M. Ouellette
No report.

5. ICLE Liaison – Jeanne Murphy
No report.

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

7. Michigan Bankers Association Liaison – Susan Allan
No report.

Hon. Michael L. Jaconette gave the report. Earlier in the meeting, a question was raised whether the MPJA was a committee of the State Bar. Judge Jaconette checked during the meeting and reported that MPJA is not a committee of the State Bar. The MPJA may be an association through the Supreme Court. Judge Jaconette will research the question.

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 held a conference in Plymouth, which was well attended.

VIII. Other Business

Lorraine New reported that the IRS issued final regulations regarding the 2% floor for deduction of certain expenses on the 1041’s of estates and trusts. If the fiduciary has bundled fees, the fiduciary will need to determine how much of the bundled fees are investment fees (subject to 2% floor) or how much are fees which are unique to estates or trusts (not subject to 2% floor). The standard for deduction for estate tax purposes is broader than the standard for deduction for income tax purposes. See Tax Nugget attached hereto as Attachment E for further details.


IX. Hot Topics

None.

X. Adjournment

Meeting adjourned by Mr. Sweeney at 11:15 a.m.

MINUTES SUPPLEMENT

Report of e-mail Voting

Taken during July, 2014

A committee of the officers of the Probate & Estate Planning Section Council met to discuss the Report and subsequently developed a draft letter to respond and comment on the Report (hereinafter referred to as the “Probate Council Letter”), which was submitted to the Council members for voting electronically on July 10, 2014; that vote was completed on July 17, 2014. That Probate Council Letter, with revisions, was approved by that electronic vote of the Council: 12 in favor, none against, no abstentions and 11 absent.

Due to the number of Council members who were unavailable to vote regarding the Probate Council Letter during the earlier part of July 2014, the final form of the Probate Council Letter was again submitted electronically to all of the Council members for a vote on July 27, 2014, and that vote was completed on July 28, 2014. The Probate Council Letter was approved by that vote of the Council as follows: 21 in favor, none against, no abstentions and 2 absent. This Council action was incorporated into a Public Policy Position Statement and submitted to the State Bar as per the usual procedure for public policy position statements adopted by sections. The entirety of that the Probate Council Letter is attached as Attachment F.

James B. Steward
Council Secretary
ATTACHMENT A
§ 1. Short Title

This act shall be known and may be cited as the “qualified dispositions in trust act.”

§ 2. Definitions

As used in this act:

(1) “Advisor” means a person who is given authority by the terms of a trust instrument to remove and/or to appoint one or more trustees or to direct, consent to, approve or veto a trustee’s actual or proposed investment or distribution decisions. A person shall be considered an advisor even if that person is denominated by another title, such as trust protector. Any person may serve as an advisor except that a transferor and any person who is related or subordinate to that transferor within the meaning of Section 672(c) of the Internal Revenue Code, 26 USC 672(c), may act as an advisor only in connection with investment decisions.

(2) “Claim” means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

(3) “Creditor” means, with respect to a transferor, a person who has a claim.

(4) “Debt” means liability on a claim.

(5) “Disposition” means a transfer of property that either creates a new fiduciary relation between at least 1 trustee and a trust beneficiary or newly subjects property to a preexisting fiduciary relation between at least 1 trustee and a trust beneficiary. The transfer may be by conveyance or assignment, by exercise of a power of appointment (including a power to substitute 1 trustee for another or to add 1 or more new trustees) or a power of revocation or amendment or (except as provided below) by disclaimer, release or relinquishment. A disposition, however, shall not include a disclaimer, release or relinquishment of property that was previously the subject of a qualified disposition. For this purpose, as between a given trustee and a given beneficiary, a new fiduciary relation is created whenever the terms of the governing trust instrument are materially altered (including alteration by an election described in section 5(f)) with respect to the trust beneficiary in question.

(6) “Distribution decision” means any decision regarding the distribution of trust property to or for the benefit of a trust beneficiary. Distribution decision also includes a decision regarding whether to make or guaranty a loan to or for the benefit of any trust beneficiary.

(7) “Fiduciary disposition” means a disposition made by a trustee acting in a fiduciary capacity.

(8) “Fiduciary qualified disposition” means a qualified disposition made by a trustee acting in a fiduciary capacity.

(9) “General power of appointment” means a general power as defined in section 2(h) of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112(h), provided that a power
exercisable in favor of the donee, his estate, his creditors or the creditors of his estate that is limited by an ascertainable standard, as that term is defined in section 7103(b) of the Michigan trust code, 2009 PA 46, MCL 700.7103(b), shall not be considered a general power of appointment.

(10) "Investment decision" means any decision regarding whether or not to purchase, sell, exchange, tender or pledge any trust property. Investment decision also includes decisions regarding other transactions affecting the ownership of or rights in any trust property, other than distribution decisions. Unless otherwise provided in the trust instrument, investment decision shall include a decision regarding whether to make or guaranty a loan to or on behalf of any entity in which the trust owns an interest, directly or indirectly, in the entity's debt or equity.

(11) "Organization" means that term as defined in section 1106(h) of the estates and protected individuals code, 1998 PA 386, MCL 700.1106(h).

(12) "Person" means that term as defined in section 1106(n) of the estates and protected individuals code, 1998 PA 386, MCL 700.1106(p).

(13) "Property" means that term as defined in section 1106(u) of the estates and protected individuals code, 1998 PA 386, MCL 700.1106(u).

(14) "Qualified disposition" means a disposition after which the subject property is:

(a) Owned by 1 or more trustees at least 1 of whom is a qualified trustee; and

(b) Governed by a trust instrument (including a trust instrument as modified by an election described in section 5(f)) under which the transferor only has rights, powers and interests which are permitted by section 4(2) of this act.

However, a disposition is not a qualified disposition to the extent that, at the time of the disposition, the transferor is in arrears on a child support obligation by more than 30 days.

(15) "Qualified trust beneficiary" means that term as defined in section 7103(g) of the Michigan trust code, 2009 PA 46, MCL 700.7103(g).

(16) "Qualified trustee" means a person other than the transferor:

(a) Who in the case of a natural person, is a resident of this state or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the Office of Financial and Insurance Regulation, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision or any successor thereto;

(b) Who maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in this state; and
(c) Whose usual place of business where some of the records pertaining to the trust are kept is located in this state or, if the person does not have such a place of business, the person's residence is in this state. For a corporate trustee, the usual place of business is the business location of the primary trust officer.

(17) "Retirement benefit" means an interest in one of the following types of assets if payable to the trust as a beneficiary or owned by the trust: a qualified or nonqualified annuity; a benefit under a qualified or nonqualified plan of deferred compensation; any account in, or benefit payable under, any pension, profit-sharing, stock bonus or other qualified retirement plan; any individual retirement account or trust; and any and all benefits under any plan or arrangement that is established under sections 401, 403, 408, 408A, 457, or similar provision of the Internal Revenue Code, 26 USC 401, 403, 408, 408A, 457.

(18) "Special power of appointment" means a special power as defined in section 2(i) of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112(i).

(19) "Spouse" and "former spouse" means only a person to whom the transferor was married at, or before, the time the qualified disposition is made.

(20) "Transferor" means:

(a) A person (and in the case of several owners of undivided interests, each of several persons) who, as a beneficial owner of certain property, or as the holder of a general power of appointment over certain property, directly or indirectly, makes a disposition of the property or causes a disposition to be made; or

(b) In the case of a fiduciary disposition, the person or persons who, as of the time of the fiduciary disposition, most recently fit the description in paragraph (a) of this subsection with respect to the property subject to the fiduciary disposition.

(21) "Trust beneficiary" means that term as defined in section 7103(1) of the Michigan trust code, 2009 PA 46, MCL 700.7103(1).

(22) "Trust instrument" means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition that:

(a) Expressly incorporates the law of this state to govern the validity, construction and administration of the trust;

(b) Is irrevocable; and

(c) Provides that the interest of the transferor or other trust beneficiary in the trust property may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute trust property to the trust beneficiary, and that provision of the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of section 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision.
§3. Jurisdiction; Venue.

(a) The probate court shall have exclusive jurisdiction over any action regarding the validity of the trust, whether a transfer is a qualified disposition, the extent of the transferor’s interest in, or the income from, a qualified disposition, or the appointment of a trustee. The probate court shall have concurrent jurisdiction over any action brought pursuant to section 5(b) of this act.

(b) Venue for a proceeding under section 3(a) is in the place of registration, if the trust is registered, or any place where the trust properly could be registered, if the trust is not registered.

(c) If a trust has no qualified trustee, has not been registered and there is no place in this state where the trust properly could be registered, venue for a proceeding under section 3(a) is in the following order of priority, except to the extent otherwise provided by court rule:

i. In a county in this state in which the immediately prior qualified trustee had its usual place of business or residence.

ii. In a county in this state in which a trust beneficiary resides.

iii. In a county in this state in which any trust property is located.

iv. In any county in this state.

§4. Interests of transferor

(1) The transferor shall have only the powers and rights that are conferred by the trust instrument. Except as permitted by subsection 2, a transferor shall have no powers or rights with respect to the property that is the subject of a qualified disposition or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater powers or authority shall be void.

(2) A trust instrument may allow or provide for any or all of the following rights, powers or interests, none of which grants or shall be deemed to be, either alone or in any combination, a power to revoke a trust:

(a) The transferor’s power to direct the investment decisions of the trust;

(b) The transferor’s power to veto a distribution from the trust;

(c) A special power of appointment exercisable by will or other written instrument of the transferor effective only upon the transferor’s death;

(d) The transferor’s potential or actual receipt of income, including rights to the income retained in the trust instrument;
(e) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in section 664 of the internal revenue code, 26 USC 664, and any successor provision thereto; and the transferor's right, at any time and from time to time by written instrument delivered to the trustee, to release the transferor's interest in that trust, in whole or in part, in favor of a charitable organization that has or charitable organizations that have a succeeding beneficial interest in the trust;

(f) The transferor's potential or actual receipt of income or principal from a grantor-retained annuity trust or grantor-retained unitrust as those terms are defined in section 2702 of the internal revenue code, 26 USC 2702, and any successor provision thereto or the transferor's receipt each year of a percentage (not to exceed 5 percent) specified in the governing instrument of the initial value of the trust property (which may be described either as a percentage or a fixed amount) or their value determined from time to time pursuant to the governing instrument.

(g) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a trustee's acting:

A. Pursuant to a discretionary trust provision within the meaning of section 7103(d) of the Michigan trust code, 2009 PA 46, MCL 700.7103(d);

B. Pursuant to a support provision within the meaning of section 7103(k) of the Michigan trust code, 2009 PA 46, MCL 700.7103(k); or

C. At the direction of an advisor acting: (i) Pursuant to a discretionary trust provision within the meaning of section 7103(d) of the Michigan trust code, 2009 PA 46, MCL 700.7103(d); or (ii) Pursuant to a support provision within the meaning of section 7103(k) of the Michigan trust code, 2009 PA 46, MCL 700.7103(k).

(h) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor;

(i) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of that term as described in section 2702(c) of the internal revenue code, 26 USC 2702(c), and any successor provision thereto, or the transferor's possession and enjoyment of a qualified annuity interest within the meaning of that term as described in United States Treasury Regulation Section 25.2702-5(c)(8), 26 CFR 25.2702-5(c)(8), and any successor provision thereto;

(j) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if the potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly provides for the payment of those taxes and if the potential or actual receipt of income or principal would be the result of a qualified trustee's or qualified trustees' acting:

A. In the qualified trustee's or qualified trustees' discretion or pursuant to a mandatory direction in the trust instrument; or
B. At the direction of an advisor who is acting in the advisor’s discretion; and

(k) After the transferor’s death, the ability of a qualified trustee to pay the transferor’s debts, the expenses of administering the transferor’s estate, or any estate or inheritance tax imposed on or with respect to the transferor’s estate, no matter the source of the qualified trustee’s ability.

(l) The transferor’s actual or potential receipt of any minimum required distributions as defined in 26 USC 4974(b) with respect to any retirement benefit.

§ 5. Avoidance of qualified dispositions

(a) Notwithstanding any other provision of this act or any other law to the contrary, with respect to any qualified disposition, a creditor or other person shall have only the rights provided in section 5 and section 7 of this act.

(b) Any action brought at law or in equity by a creditor or other person for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition shall:

i. only be brought pursuant to sections 4 and 5 of the Michigan uniform fraudulent transfers act, 1998 PA 434, MCL 566.34 and 566.35; 

ii. in the case of a creditor whose claim arose after a qualified disposition, involve a qualified disposition that was made with actual intent to defraud the creditor; and

iii. be proved by clear and convincing evidence.

(c) Notwithstanding any law to the contrary, no creditor or other person shall bring or maintain an action under subsection (b) of this section unless the action is commenced within the periods prescribed in this subsection (c):

i. If the claim arose before the qualified disposition was made, upon the later of:

   1. 2 years after the qualified disposition was made or the obligation was incurred; or,

   2. 1 year after the qualified disposition or obligation was or could reasonably have been discovered by the claimant, if the person who is or may be liable for any claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, although the action would otherwise be barred by the period of limitations; or
ii. If the claim arose concurrent with or subsequent to the qualified disposition, 2 years after the qualified disposition is made.

(d) If a trust beneficiary who has an interest in a qualified disposition or in property that is subject to a qualified disposition is a party to an action for annulment of a marriage, divorce, or separate maintenance:

i. If the trust beneficiary is not the transferor of the qualified disposition, then the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition shall not be considered marital property, shall not be considered (directly or indirectly) part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.

ii. If the trust beneficiary is the transferor of the qualified disposition, and if either (A) the trust beneficiary transferred the property that is the subject of the qualified disposition more than 30 days before the trust beneficiary's marriage which is the subject of the action, or (B) the parties to the marriage agree that this paragraph shall apply to the qualified disposition, then the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition shall not be considered marital property, shall not be considered (directly or indirectly) part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.

iii. If neither of the two previous paragraphs apply, then subsections (b) and (c) shall not be interpreted as limiting the transferor's spouse's property division claims.

(e) For purposes of this Act, a fiduciary qualified disposition is deemed made as of the time the property that is subject to that disposition was first transferred to the trustee who is making the fiduciary qualified disposition (or any predecessor of that trustee in an unbroken succession of fiduciary ownership of the property) in a form that either (i) meets the requirements of a qualified disposition, or (ii) meets the requirements of section 2(14)(b) of this act and meets the requirements to be considered a qualified disposition or its equivalent under the laws of another state, provided that if the property that is subject to the qualified disposition was originally transferred to the trustee making that disposition (or a predecessor trustee described above) prior to the effective date of this act in a form that would otherwise meet the requirements of a qualified disposition, the qualified disposition shall be deemed to have been made as of the effective date of this act.

(f) If a trustee of an existing trust proposes to make a disposition that, but for the exercise of authority granted in this subsection, would not conform to the
requirements of a qualified disposition due to the transferor’s nonconforming power(s) of appointment, the trustee may modify the trust instrument by delivering to the qualified trustee an irrevocable written election to modify the transferor’s nonconforming power(s) to conform to the requirements of section 4(2)(c) or section 4(2)(k) of this Act.

For purposes of this Act, the irrevocable written election must include:

i. a description of the transferor’s modified powers of appointment, and

ii. the transferor’s written consent to the modification.

The transferor’s consent is not a disposition within the meaning of section 2(5) of this Act.

(g) With respect to any qualified disposition, no creditor or other person shall have any claim or cause of action at law or in equity against any of the following:

i. the trustee of a trust that is the subject of a qualified disposition,

ii. an advisor of a trust that is the subject of a qualified disposition, or

iii. any person involved in the counseling, drafting, preparation, execution or funding of a trust that is the subject of a qualified disposition.

(h) In circumstances where more than 1 qualified disposition is made by means of the same trust instrument, then with respect to a prior qualified disposition:

i. The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor’s claim is extinguished as provided in subsection (c) of this section.

ii. The making of a subsequent qualified disposition shall be disregarded in determining, as provided in subsection (d) of this section, whether a trust beneficiary’s interest in a qualified disposition or in property that is the subject of a qualified disposition (1) is considered marital property, (2) is considered part of a trust beneficiary’s real or personal estate, or (3) may be awarded to the trust beneficiary’s spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.

Any distribution to a trust beneficiary is deemed to have been made from the most recent qualified disposition.

(i) In any action against a trustee that received property in a qualified disposition, if a court takes any action declining to apply the law of this state in determining the validity, construction or administration of the trust, or the effect of a spendthrift provision in the trust instrument, the trustee shall immediately upon the court’s
action and without the further order of any court, cease in all respects to be trustee of the trust. That former trustee shall have no power or authority other than to convey the trust property to the successor trustee and, at the former trustee’s election, to petition the court for appointment of a successor trustee and collect its attorney fees, costs and expenses as provided below.

If the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, the probate court, upon the request of any qualified trust beneficiary of the trust, shall appoint a successor trustee upon the terms and conditions it determines to be consistent with the purposes of the trust and this statute.

If the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, a former trustee may, but has no duty to, petition the probate court to appoint a successor trustee if a petition for appointment of a successor trustee is not brought by a qualified trust beneficiary within 30 days of the date on which the former trustee ceases to be a trustee of the trust. In that case, if the former trustee elects to petition for the appointment of a successor trustee, the former trustee shall be entitled to reimbursement for all attorney fees, costs and expenses associated with the petition, which shall be a lien against the trust’s property.

(j) Any valid lien attaching to property prior to a qualified disposition of that property shall survive the disposition, and the trustee shall take title to the property subject to the valid lien and the trustee shall be subject to any agreements that created or perfected the valid lien.

(k) A transferor may agree in writing with a creditor as follows:

(i) The transferor will have a continuing or periodic obligation to disclose any qualified dispositions to the creditor;

(ii) Any qualified disposition will require the prior written approval of the creditor; or

(ii) that the transferor shall be under those other obligations as the creditor may require with respect to qualified dispositions.

If a transfer which would otherwise be a qualified disposition is made in violation of an agreement with a creditor, then with respect to that creditor only the transfer shall not be a qualified disposition and the provisions of this Act shall not affect or diminish the rights of that creditor.

§ 6. Affidavit Requirement

(1) Except as provided in subsection (7), for purposes of this section 6, a “qualified affidavit” shall mean a written statement authenticated by verification under oath by the transferor in which the transferor states that at the time of the transfer of the property to the trust:
(a) The transferor has full right, title, and authority to transfer the property to the trust;

(b) The transfer of the property to the trust will not render the transferor insolvent;

(c) The transferor does not intend to defraud a creditor by transferring the property to the trust;

(d) The transferor does not know of or have reason to know of any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;

(e) The transferor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit;

(f) The transferor is not currently in arrears on a child support obligation by more than 30 days;

(g) The transferor does not contemplate filing for relief under the bankruptcy provisions of Title 11 of the United States Code; and

(h) The property being transferred to the trust was not derived from unlawful activities.

(2) The transferor shall sign a qualified affidavit before a qualified disposition is made.

(3) The qualified affidavit is defective if it materially fails to meet the criteria set forth in subsection (1), provided that a qualified affidavit is not defective due to any of the following:

(a) Nonsubstantive variances from the language set forth in subsection (1);

(b) Statements or representations in addition to those set forth in subsection (1) if the statements or representations do not contradict those required by subsection (1); or

(c) Technical errors in administering an oath if the errors were not the fault of the transferor and the transferor reasonably relied upon another person to prepare or administer the oath.

(4) Notwithstanding any other provision of this section 6, a qualified affidavit shall not be required:

(a) From the settlor in the case of a fiduciary qualified disposition;

(b) From a transferor who is not the settlor of the qualified disposition, except to the extent the transferor is a beneficiary of the qualified disposition and the property subject to the qualified disposition was not previously subject to a qualified disposition with respect to which the transferor signed a qualified affidavit; or

(c) In connection with dispositions that are part of, required by, or the direct result of a prior qualified disposition supported by a qualified affidavit that otherwise complies with the requirements of subsection (1).
(5) If a qualified affidavit is required by this section 6, and a transferor fails to timely sign a
qualified affidavit or signs a defective affidavit, then the failure or defect may be considered
as evidence in any proceeding commenced pursuant to section 5(b) to the extent permitted by
the Michigan Rules of Evidence, but the validity of the qualified disposition shall not be
affected in any other way due to the failure or defect.

(6) For the purposes of this section 6, “settlor” means that term as defined in section 7103(i) of
the Michigan trust code, 2009 PA 46, MCL 700.7103(i).

(7) If a qualified affidavit is required by this section 6 because of the exception in subsection
(4)(b), then the required affidavit shall omit the statements described in paragraphs (a) and
(c) of subsection (1), and include a statement that the qualified disposition is not intended to
defraud any creditor.
§ 7. Effect of avoidance of qualified dispositions

(1) A qualified disposition shall be avoided only to the extent necessary to satisfy or provide for the present value, taking into consideration any uncertainty, of the transferor’s debt to the creditor at whose instance the disposition had been avoided.

(2) If all or any portion of a qualified disposition is avoided as provided in subsection (1), then:

(a) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition, both of the following apply:

(i) The trustee shall have a lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney fees, incurred by the trustee in the defense of any action to avoid the qualified disposition. The lien shall have priority over all other liens against the property, whether or not the other liens accrued or were recorded before the accrual of the lien created by this Act.

(ii) The qualified disposition shall be avoided subject to the fees, costs, preexisting rights, claims and interests of the trustee (and of any predecessor trustee that has not acted in bad faith).

(b) If the court is satisfied that a trust beneficiary has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of the trust beneficiary to retain any distribution received prior to the creditor’s commencement of an action to avoid the qualified disposition. For purposes of this Act, it shall be presumed that the trust beneficiary, including a trust beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) For purposes of this subsection (2), it shall be presumed that a trustee did not act in bad faith merely by accepting the property, with or without a qualified affidavit, or by making any distribution in accordance with the terms of the trust.

(3) A creditor shall have the burden of proving by clear and convincing evidence that a trustee or trust beneficiary acted in bad faith as required under subsection (2), except that, in the case of a trust beneficiary who is also the transferor, the burden on the creditor shall be to prove that the transferor-beneficiary acted in bad faith by a preponderance of the evidence. The preceding sentence provides substantive not procedural rights under Michigan law.

(4) With respect to a qualified disposition, levy, attachment, garnishment, notice of lien, sequestration or other legal or equitable process shall be permitted only in those circumstances permitted by the express terms of this act.

(5) Notwithstanding any other provision of this act or MCL 556.123, a creditor shall have no right against the interest of a trust beneficiary in a trust (or portion of a trust) that was a qualified disposition solely because the trust beneficiary has the right to authorize or direct the trustee to pay all or part of the trust property in satisfaction of estate or inheritance taxes imposed
upon or with respect to the trust beneficiary’s post-death estate, or the debts of the trust beneficiary’s post-death estate, or the expenses of administering the trust beneficiary’s post-death estate, unless the trust beneficiary actually directs the payment of the taxes, debts or expenses, and then only to the extent of the direction.

(6) Where a husband and wife make a qualified disposition of property and, immediately before the qualified disposition, the property, any part of the property, or any accumulation to the property was, pursuant to applicable law, owned by them as tenants by the entireties, then notwithstanding the qualified disposition and except where the provisions of the trust instrument may expressly provide to the contrary, that property, any part of that property, and any accumulation to that property shall, while held in trust during the lifetime of both spouses, be treated as though it were tenancy by the entireties property and be dealt with in a manner consistent with that applicable law but in every other respect shall be dealt with in accordance with the terms of the trust instrument. Furthermore, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the qualified disposition, the sole remedy available to the creditor with respect to trust property treated as though it were tenancy by the entireties property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.

(7) Subject to all of the foregoing provisions of this section, and except as otherwise provided in subsection (6), upon avoidance of a qualified disposition to the extent permitted under subsection (1), the sole remedy available to the creditor shall be an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor’s debt to the creditor at whose instance the disposition has been avoided.

§ 8. Qualified Trustees

a. In the event that a person serving as qualified trustee ceases to meet the requirements of a qualified trustee and there remains no trustee that meets the requirements of a qualified trustee, the person serving as qualified trustee shall be deemed to have resigned as of the time of the cessation, and thereupon the successor qualified trustee provided for in the trust instrument shall become a qualified trustee of the trust upon the successor qualified trustee’s acceptance of trusteeship, or in the absence of any successor qualified trustee provided for in the trust instrument, the probate court shall, upon petition of a qualified trust beneficiary, appoint a successor qualified trustee.

b. A disposition that was a qualified disposition shall not cease to be treated as a qualified disposition as a result of a subsequent vacancy in the position of qualified trustee, provided that a successor qualified trustee is appointed (or a proceeding for the appointment of a successor qualified trustee is commenced) within a reasonable time after the person(s) with authority to appoint a qualified trustee or commence a proceeding to appoint a qualified trustee know of the vacancy.

§ 9. Restraint on Alienation

a. A trust beneficiary shall have no power or capacity to make any transfer whatsoever of any of the income from a trust (or portion of a trust) that is a qualified disposition by his or her
order, voluntary or involuntary, and whether made upon the order or direction of any court or
courts, whether of bankruptcy or otherwise.

b. Except as otherwise provided in this act, the interest of a beneficiary in a trust (or
portion of a trust) that is a qualified disposition shall not be subject to any process of attachment
issued against the beneficiary, and shall not be taken in execution under any form of legal
process directed against the beneficiary or against the trustee, or the trust estate, or any part of
the income thereof, but the whole of the trust estate and the income of the trust estate shall go to
and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged
of and from any and all obligations of the beneficiary whatsoever and of all responsibility
therefor.

c. The trustee of a qualified disposition shall disregard and oppose every assignment or
other act, voluntary or involuntary, that is attempted contrary to the provisions of this section.
The trustee is entitled to reimbursement for all attorney fees, costs and expenses associated with
carrying out this duty which shall be a lien against the property that is the subject of the qualified
disposition. No trustee shall be liable for, and no trust beneficiary or any successor thereto shall
have any claim or cause of action at law or in equity against a trustee, for any breach of this duty
unless the trustee's breach was in bad faith or the result of reckless indifference to the purposes
of the trust or the interests of the trust beneficiaries.

d. This section does not prohibit a beneficiary from disclaiming any interest in a trust (or
portion of a trust) that is a qualified disposition or from exercising a power of appointment.

§ 10. Application of act

(1) This act shall apply to qualified dispositions made on or after the effective date of
this act.

(2) If any provision of this act conflicts with any provision of the statute of uses and
trusts, 1846 RS 63, the estates and protected individuals code, 1998 PA 386, or the Michigan
trust code, 2009 PA 46, the provision of this act prevails.
ATTACHMENT B
MEMORANDUM

TO: Thomas F. Sweeney
FROM: Douglas G. Chalgian
       George W. Gregory
       Mark K. Harder
DATE: May 21, 2014
RE: Nominating Committee Report

As the members of the 2013-14 Nominating Committee of the Probate and Estate Planning Section of the State Bar of Michigan, we are pleased to submit this Report to you as Chair of the Section. Pursuant to Article IV, Section 1 of the Bylaws of the Probate and Estate Planning Section, the Nominating Committee is charged with submitting nominations for Council officers and members of the Council at the meeting of the Council prior to the Section’s Annual Meeting. This Report is submitted in satisfaction of this requirement for delivery to the full Council at the June 7, 2014, meeting.

The Nominating Committee met several times by telephone or in person. Names of several well-qualified candidates were considered following receipt of nominations from several members of the Section, as well as on the Committee’s own initiative. In completing its work the Committee considered the criteria that have been historically considered by the Committee.

We submit the following nominations for officers and members of the Council of the Section:

Officers

Chairperson
Chairperson Elect
Vice Chairperson
Secretary
Treasurer

Amy N. Morrissey
Shaheen I. Imanii
James B. Steward
Marlaine C. Teahan
Marguerite M. Lentz
Members

For a second full three year term, concluding with the elections at the 2017 annual meeting of the Section:

Christopher A. Ballard  
George F. Bearup  
Nancy H. Welber

For a first full three year term, concluding with the elections at the 2017 annual meeting of the Section:

Honorable Michael L. Jaconette  
Mark E. Kellogg  
Raj A. Malviya

Contingent upon the election of Marguerite M. Lentz as Treasurer of the Section, to fill the unexpired term of Marguerite M. Lentz, which concludes with the elections at the 2016 annual meeting of the Section:

Richard C. Mills
Amicus Curiae Committee  
Probate and Estate Planning Section of the State Bar of Michigan

Application for Consideration

If you believe that you have a case that warrants involvement of the Probate and Estate Planning Section of the State Bar of Michigan (“Section”), based upon the Section’s Policy Regarding Consideration of Amicus Curiae Matters, please complete this form and submit it to the Chair of the Amicus Curiae Committee, along with all relevant pleadings of the parties involved in the case, and all court orders and opinions rendered.

Date __May 13, 2014__

Name __Kenneth A. Puzycki__  
P Number __P45404__

Firm Name __Law Office of Kenneth A. Puzycki, PLLC__

Address __380 Garden Avenue__

City __Holland__  
State __MI__  
Zip Code __49424__

Phone Number __616.738.8800__  
Fax Number __616.738.8801__

E-mail address __kapuzycki@puzycki.com__

Attach Additional Sheets as Required

**Name of Case** __In re Cliffman Estate__  
Court of Appeals Case no: 321174

Parties Involved __Elmer Carter, Philip Carter, David Carter and Douglas Carter (step-sons of the decedent) v. Betty Woodwyk and Virginia Wilson (sisters of the decedent)__

**Current Status**  
Appeal and Cross-appeal have been filed, appellants’ brief (in chief) has been filed, awaiting Appellees’ briefs

**Deadlines**  
Appellees’ reply brief is due June 5, 2014. Appellees’ brief on their cross-appeal is due June 13, 2014, and Appellants’ reply brief will be due 28 days after Appellees have filed their brief.
**Issue(s) Presented**  Whether the Wrongful Death Act permits all step-children to file claims for a portion of the wrongful death proceeds arising out of a step-parent’s death, or whether such claims are limited only to those step-children whose biological parent is living at the time of the step-parent’s death.

**Michigan Statute(s) or Court Rule(s) at Issue**  MCL 600.2922 – Wrongful Death Act


**Why do you believe that this case requires the involvement of the Probate and Estate Planning Section?**  This case has very far-reaching effects for every family where a step-parent/step-child relationship exists. The current published case law (Combs) prohibits step-children from filling claims for wrongful death proceeds if their biological parent has pre-deceased the step-parent. This is exactly what the legislature wanted to avoid when it amended the Wrongful Death Act in 1985. The legislative history is unambiguous on this issue. The transcript of Joe Buttiglieri’s testimony at the legislative committee hearings bear this out. However, the only published case on the issue, In re Combs, 257 Mich App 622; 669 NW2d 313 (2003); cert denied 469 Mich 1021; 678 NW2d 440 (2004), holds that in order for a step-child to file a claim, the decedent’s spouse must be living. This is inconsistent with the legislative history, and should be overruled.

**Do you believe that a decision in this case will substantially impact this Section’s attorneys and their clients? If so, how?**  In today’s society, many, if not most, families involve at least one “re-marriage.” Sometimes those re-marriages are the results of death, divorce, etc. Some such re-marriages, such as in the case on appeal, occur early in life, when one spouse has minor children. Not surprisingly, many of those re-marriage situations create very close and lasting relationships between the step-parent and step-children. These types of relationships are exactly what the Wrongful Death Act was designed to provide relief for when step-children were added to that statute in 1985. In the event that a step-parent dies, ALL step-children should have the right to file a claim for the loss of a step-parent. Under Combs, a whole class of step-children is being left out. This does not mean that such step-children will receive a portion, but they should be allowed to file a claim, and to prove that they had a relationship with the step-parent sufficient to establish a compensable loss.
SECTION ADVOCACY RECOMMENDATIONS

As voluntarily-funded entities, Sections of the State Bar are not subject to the same constraints as the State Bar itself, but the Task Force nevertheless makes several recommendations concerning Section advocacy.

Recommendations:

1. Sections should be allowed to engage in ideological, but not partisan, activities using voluntary dues money.
2. Sections should be free to engage in legislative or executive branch advocacy, but must do so by creating a separate entity not identified in any way with State Bar.

3. Legislative advocacy done by the Section’s separate entity should not be subject to the current elaborate reporting requirements of AO 2004-1, but the separate entity must still report its positions to the State Bar, to ensure compliance with the requirements of the Supreme Court rules and orders and the State Bar bylaws.
4. The State Bar should not subsidize any non-Keller-permissible activities of Sections.
5. The State Bar may collect voluntary dues for Sections’ legislative or executive branch activities as long as the Sections pay the cost of collection activities.
6. Section advocacy information hosted on Section webpages on the State Bar website should be accessible only to Section members.
7. Sections should be allowed to use the State Bar building and facilities on the same terms as all other lawyer groups, but should reimburse the State Bar for special services that may support non-Keller-permissible activities provided by the State Bar.
8. The State Bar should conduct annual mandatory training for Section officers on compliance with these requirements.

Rationale: Sections of the State Bar enhance the quality of legal services in Michigan by providing members with educational and networking opportunities in specific practice areas. The State Bar provides the administrative infrastructure for all Sections – collecting dues and maintaining membership databases – and offers other support services at cost. Three sections – the Young Lawyers Section, the Judicial Section, and the Master Lawyers Section – are supported by mandatory State Bar dues. The operations of all other Sections are funded through voluntary member dues. There are approximately 35,000 voluntary paid Section memberships. If their membership is voluntary, Sections are not subject to the restrictions of Keller in the use of their members’ dues. But because of the risk that Sections’ advocacy will be mistaken for the advocacy of the State Bar itself, Michigan and other mandatory bar states subject sections to requirements intended to distinguish the Sections’ activities from those of the State Bar itself. These requirements have not been sufficiently successful in eliminating confusion or preventing the misidentification of Section advocacy with the advocacy of the State Bar. We believe the approach we recommend can overcome the problem of misidentification.
ATTACHMENT E
TAX NUGGET
June, 2014

Treasury has issued final regulations (Regulation Section 1.67-4, 5/8/2014) on the trust/estate expenses that escape the 2% AGI floor for miscellaneous itemized deductions. Proposed regulations were issued in 2007 indicating that costs were not deductible unless they were unique to the estate or trust. Questions subsequently arose about the deduction of investment fees, particularly bundled fees, and IRS issued new proposed regulations in 2011 (Prop Reg section 1.67-4).

The final regulations do not change those proposed regulations but indicate that some expenses may be fully deductible under code sections 62(a)(4), 162, and 164(a) and add some clarification.

Certain tax return fees are not subject to the 2% floor: estate and generation skipping transfer tax returns, fiduciary income tax returns, and the decedent’s final income tax return.

Investment fees are subject to the 2% floor unless the extra amount of the fee that is generally charged to an individual investor is attributable to an unusual investment objective of the trust or estate or specialized balancing of the interest of various parties. If so the extra fee would not be subject to the 2% floor.

Appraisal fees used by an estate or trust to determine the fair market value of assets as of the decedent’s date of death, to determine the value for the purpose of making distributions or as required to properly prepare estate, generating skipping or trust tax returns are not subject to the 2% floor.

The regulations list fiduciary expenses such as probate court fees and costs, fiduciary bond premiums, legal publication costs of notices, certified copies of decedent’s death certificates cost, and costs related to fiduciary accounts which are not subject to the 2% floor.

The regulations are effective for tax years that begin on or after May 9, 2014. Calendar year trusts and estates who make payments of bundled costs by December 31, 2014 can take advantage of the “safe harbor” provided by Notice 2011-37.

Lorraine New
George W. Gregory PLLC
Troy, MI
(248) 647-5700
ATTACHMENT F
July 18, 2014

Honorable Robert P. Young, Jr., Chief Justice
And Justices of the Michigan Supreme Court
Office of Administrative Counsel
P.O. Box 30052
Lansing, MI 48915

Submitted by email to ADMcomment@courts.mi.gov

Re: Response of the Council of the Probate and Estate Planning Section of the State Bar of Michigan to the Supreme Court Task Force Report on the Role of the State Bar of Michigan ("Report")

Dear Chief Justice and Justices of the Michigan Supreme Court:

As the current chair and chair-elect, and on behalf of the elected Council of the Probate & Estate Planning Section ("Section") of the State Bar of Michigan ("SBM"), we appreciate the opportunity to respond with respect to two of the five major recommendations in the Report including:

Recommendation 1: Continue the State Bar as a Mandatory Bar,¹ and

Recommendation 2: Section Advocacy recommendations 1 through 8.²

With respect to Recommendation 1, our Council supports the continuation of the mandatory bar. On February 15, 2014, the Council approved a public policy statement opposing SB 0743 that would eliminate the mandatory bar.

With respect to the Section Advocacy recommendations numbered 1 through 8 under Recommendation 2, we believe the premise underlying recommendations 1 and 2 is faulty. While the Task Force acknowledges that the sections are "...voluntarily-funded entities..." and "...are not subject to the same constraints as the State Bar itself...",³ it expresses a concern about section

¹ Report, pp. 5-7.
advocacy "...because of the risk that sections' advocacy will be mistaken for the advocacy of the State Bar itself..." First, the public policy statements reflecting the majority opinion of the 23-member Council are published on the Section's website and clearly identified as Section statements only. Second, one of the two principal functions of this Section is to analyze and comment on issues unique to the Section's expertise. There are less intrusive ways to make it abundantly clear that any published statement is not that of the SBM membership as a whole. Unfortunately, there are no recitations in the Report of occasions when section statements were misconstrued as SBM statements. It is difficult to address a speculative problem.

Also, the assumption that section advocacy abridges a section member's First Amendment right is flawed. As the Task Force acknowledges, sections are voluntary organizations under the umbrella of the State Bar. State Bar members are not compelled to join any particular section. Every section member receives notice and an opportunity to be heard at monthly Council meetings.

Clearly, the Council performs a valuable public service that is not available otherwise. The Section's mission statement is clear that the Section's purpose "...is to enhance and improve the practice and administration of law pertaining to probate and estate planning...." Therefore, in the last two years, the Section through its Council and its committees actively involved itself in the drafting, introduction and passage of nine separate bills. The Section retains a lobbyist to communicate with the Legislature. Five years ago, the Legislature approved a massive codification of Michigan trust law following six years of drafting by the Section involving thousands of hours of volunteer time. In addition to the foregoing efforts, each year the Council reviews numerous other bills related to probate and estate planning and often offers suggestions to the bill sponsors. The Council is also asked from time to time to file amicus curiae briefs by counsel or the appellate courts on important legal issues before the judiciary. The Council also regularly reviews and suggests changes to court rules and court forms to improve the administration of probate and estate planning law. Our advocacy puts our words into observable actions that enhance and improve the practice and administration of Michigan law. The voluntary dues of the Section members support our Section's mission statement that we will advocate for

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5 Probate and Estate Planning Mission Statement contained in its Bylaws.
improvements in the laws, court rules and court forms that impact probate and estate planning in Michigan.

The Michigan Legislature does not have the time, expertise or focus to benefit Michigan probate and estate planning in the manner that we do. The Council calls upon attorneys in the Section, many of whom are highly experienced and have specialized knowledge to assist in its drafting and advocacy functions. These efforts serve a critical function for legislators who lack our specialized knowledge or experience. Our work is credible, reliable and informed. It is a valuable service to the public good.

Turning to Section Advocacy recommendation 2 under Recommendation 2, the Task Force proposes that sections create "...a separate entity not identified in any way with the State Bar." In fact, a separate entity would create greater confusion and misunderstanding about what such an entity is and whom it represents.

Under recommendation 3 of Recommendation 2, the Task Force suggests treating such a separate entity as a quasi-SBM entity to ensure compliance with SBM rules and bylaws. However, compliance with SBM rules and regulations is the same role now filled by the sections. It is confusing as to what type of legal entity this quasi-SBM entity would be. What are the tax and regulatory reporting requirements of such an organization? The current identification of a public policy statement of a section is actually more transparent and less confusing than the proposed solution of using a quasi-SBM entity to make public policy statements for a section. For clarity reasons alone, we believe sections should retain the ability to advocate public policy positions as is presently done.

With respect to recommendations 3 through 8 of Recommendation 2 regarding Section Advocacy, we have the following comments:

We do not find the reporting requirement of AO 2004-1 burdensome, but do not oppose efforts to improve them as long as the sections can continue their legislative advocacy. (3)

We do not oppose any efforts to eliminate any subsidy for non-Keller permissible activities of sections. (4)
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Farmington Hills, MI 48334
Attorneys for Elizabeth Ludwig
We do not oppose having the State Bar collect voluntary section dues and the charging of the sections for the cost of collecting such dues. (5)

We do not believe that access to advocacy-related information on section websites should be restricted to section members as long as there is a disclaimer that the advocacy is by the section and not the State Bar. (6)

We do not oppose reimbursing the State Bar for special services while using the State Bar building and facilities that may support non-Keller permissible activities. (7)

We do not oppose annual mandatory training for section officers on compliance with reasonable requirements implementing the concerns expressed in recommendations 3 through 8 above. (8)

We believe that the present advocacy practices of this Section are compliant with Keller, since our membership is voluntary, all members are free to attend our monthly meetings, our public policy statements are published on our website, are identified as issued by this Section, and are available to all Section members. We are supportive of public disclosure of our public policy statements and a disclaimer that those statements are not the position of the State Bar. Our efforts to improve the laws and administration of justice of probate and estate planning matters are an important public service and should be permitted to continue.

Respectfully submitted,

Thomas F. Sweeney, Chair

Amy N. Morrissey, Chair-Elect

“A problem well put is half solved.”

-- John Dewey

cc: Brian D. Einhorn, President, State Bar of Michigan
Council Members of the Probate and Estate Planning Section