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

March 15, 2014
Lansing, Michigan

Minutes

I. Call to Order

The Chair of the Section, Thomas F. Sweeney, called the meeting to order at 10:29 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
Steward, James B.  Lucas, David P.
Teahan, Marlaine C.  Marquardt, Michele C.
Allan, Susan M.  Murkowski, Hon. David M.
Ard, W. Josh  New, Lorraine F.
Ballard, Christopher A.  Spica, James P.
Bearup, George F.  Taylor, Robert M.
Clark-Kreuer, Rhonda M.  Vernon, Geoffrey R.

A total of 18 council members and officers were present representing a quorum.

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

Imami, Shaheen I.  Skidmore, David L.
Brigman, Constance L.  Welber, Nancy H.
Ouellette, Patricia 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.  Little, Nancy L.
Harder, Mark K.  McClory, Michael S.
Harter, Hon. Phillip E.  Mielock, Douglas A.
E. Others in attendance:

Rick Mills
Katie Lynwood
Michael L. Jacouette
Robert M. O’Reilly
Kurt A. Olson
Mark R. Pasquali
Christine Steimetz

Nazneen H. Syed
Raymond A. Harris
Michael Lichterman
Jeanne Murphy
Kathleen M. Goetsch
Neal Nusholtz

III. Minutes of the February 15, 2014, Meeting of the Council

The minutes of the February 15, 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 Marlaine C. Teahan, second by Amy N. Morrissey 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 (see Attachment A). Ms. Teahan noted that the spreadsheet included with this month's Treasurer’s report covers December to February, because both January's and February's State Bar reports arrived this month and are included in that report. Therefore, there will be no report titled, "Treasurer's Report as of January 31, 2014". The February meeting expense item is slightly overstated because it includes an expense payment for plaques given to outgoing Council members at the annual chairperson’s dinner; those expenses will be moved to the chairperson’s meeting expense line item on the next Treasurer’s report.

Ms. Teahan also mentioned that she sends the reimbursement request forms to the State Bar on Wednesday morning of each week. Forms that are received at the State Bar by 2:00 pm on that day are usually processed on that day, and then the check will normally be issued on Friday of that week.

V. Chairperson’s Report – Thomas F. Sweeney

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

- Mr. Sweeney reported that he has received communications from several other State Bar Sections about SB 743, which proposes to make membership in the State Bar of Michigan purely voluntary. Several Sections have gone on record as opposed, 3 have decided to take no position, and 6 sections are still considering the question or have not yet met. March 28, 2014, is the deadline for submitting comments.

- Mr. Sweeney has received some estimated figures from E.P. Horak Company, who prints the Journal and does final set up, regarding cost reduction if we move the Journal to all
electronic. It looks like the cost savings would amount to about $2,500 per issue (based on current expenses). ICLE sets up the articles and the basic format for the Journal, and then Horak puts everything into final form for printing, prints and mails out the “hard” copies. We still need some clarification of what Horak will need if it is to be electronic only.

- Mr. Sweeney circulated a memo regarding the final unresolved wording issue outstanding for the latest draft of the proposed Patient’s Guide to Health Care Decision Making. After discussion, motion by Hon. David M Murkowski, second by James P. Spica, to approve the proposed wording which reads as follows:

**May a family member serve as a patient advocate or guardian?**

A family member may serve as a patient advocate or guardian for a patient when designated as the patient advocate or appointed as the guardian. Many patients do not have a guardian and they never executed a patient advocate designation. In these cases, healthcare providers often allow family members to provide consent to ordinary and routine medical procedures to help the patient receive low risk, medically necessary medical treatment. *Michigan law is not clear when and the extent to which a family member may consent on behalf of a patient for medical treatment, when there is no patient advocate or guardian.*

After further discussion, the motion was approved on a Council vote of 13-5, with 13 voting in favor, 5 nays and no abstentions. A motion was then made by Marguerite M Lentz, seconded by Michele C. Marquardt, to authorize the Council's Guardianship, Conservatorship, and End of Life Committee to decide on the appropriate location for placement of the last sentence of that paragraph (shown in italics above) within the document. After discussion, the motion was approved on a Council vote of 18-0, with no nays and no abstentions.

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

Marguerite M. Lentz presented the following report for CSP:

- CSP reviewed and discussed the Fiduciary Access to Digital Assets Act which our Updating Michigan Law Committee has developed, and also HB 5366-5370, which are currently pending in the Michigan House and which have been referred to the Michigan House Judiciary Committee (chaired by Representative Cotter), as well as SB 293, and also the Fiduciary Access to Digital Assets Act prepared by the Uniform Law Commission (“ULC”; also known as the National Conference of Commissioners on Uniform State Laws; “NCCUSL”. The proposal from our Committee was developed substantially from the version prepared by ULC and is structured as a separate “stand alone” Act, rather than primarily as a series of amendments to our existing laws. Our Committee felt that the unique nature of “digital assets” can be better addressed in one comprehensive Act (although some amendments to related existing laws may also be necessary). Several revisions to the Committee proposal were discussed and approved by
CSP (see Meg Lentz memo summarizing those changes attached as Attachment B-1, and Attachment B-2 for the complete proposal as approved by CSP, with the 3-15-2014 changes included). CSP recommends that Council approve our Committee’s proposed Fiduciary Access to Digital Assets Act, with the several revisions discussed and approved by CSP, and submit that proposed legislation to Representative Cotter. Motion by Ms. Lentz that Council accept the recommendation of CSP, including authorizing our Committee to agree to non-substantive changes to the proposed legislation. After discussion, the motion was approved on a Council vote of 18-0, with no nays and no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

• Jim Spica continued with his explanation and overview of the “separate trustees” (also sometimes called “directed trustees”) proposal. That proposed legislation would amend the Michigan Trust Code to provide a statutory structure permitting separation of fiduciary responsibility between separate trustees for specified duties and obligations. (See Mr. Spica’s memo and the proposal as attached to the meeting materials). The proposal permits separation of responsibilities between the separate trustees, but such trustees would not be co-trustees as that concept currently appears in the Michigan Trust Code. This proposal will be reviewed and discussed further at future CSP meetings.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – James B. Steward

James B. Steward presented the Budget Committee’s report and discussed the Budget Committee’s recommendation that the budget be amended to reflect the additional expense of $4,000 which was approved at the February 15, 2014 meeting as the Section’s support for the fall 2014 ICLE “Experts” program. The change in the budget would include that added expenditure by the addition of a new line item titled “seminars” with a budgeted amount of $4,000 (see Budget Committee Report and spreadsheet attached hereto as Attachment C). Motion by Mr. Steward to amend the budget as recommended by the Budget Committee. The motion was approved on a Council vote of 17-0, with no nays and one abstention.

2. Bylaws – Nancy H. Welber

No 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

In the absence of Mr. Imami, Amy N. Morrissey reported that ICLE has received 260 registrations so far, which is slightly behind last year, with 20 registered for the pre session. Motion by Michael S. McClory that we donate $250.00 from the Hearts and Flowers fund to Cherry Capital Cycling Club for the cycling event that is held during the Institute, second by George F. Bearup. The motion was approved on a Council vote of 17-0, with no nays and one abstention.

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 as follows:

- House Bill 4640 (H-4) has passed the house. The bill would amend Public Act 123 of 1915, which provides for the recording of affidavits affecting real property (MCL 565.451a). The bill would add to the list of "matters" which can be addressed in such affidavits to include "knowledge of a person with respect to an unrecorded mortgage instrument, if the affidavit recites the names of the parties to the unrecorded mortgage instrument and is accompanied by a copy of the unrecorded mortgage instrument."

- HB 4810 has passed and will become Public Act 40 of 2014 when signed. That Act amended the General Property Tax Act (Section 211.7cc) to eliminate the prior requirement that a home not be for sale, in order for the owner to continue to claim the
principal residence exemption (PRE) while living in a nursing home or assisted living facility. The Act is retroactive and effective for taxes levied after December 31, 2012. The other requirements contained in the law were not changed.

- SB 831 introduced: would permit the personal residence exemption to continue in effect for up to 3 years after the death of the owner if certain conditions are satisfied. Amends sec. 7cc of 1893 PA 206 (MCL 211.7cc). No action.

- SB 866 introduced: will increase penalties for certain crimes against a person over 65 years of age. Amends 1931 PA 328 (MCL 750.1 - 750.568) by amending the heading of ch. XXA & by adding sec. 145s. No action.

- SB 843 introduced which would:
  -- Authorize the Director of the Department of Human Services (DHS) to appoint agents of the Department's Office of Inspector General.
  -- Specify that the agents would have the powers of peace officers for the purpose of enforcing the Act.
  -- Authorize the agents to make felony arrests **without a warrant**, while they were on duty.

Rebecca Bechler of PAA mentioned that the legislature will be adjourned for 3 weeks. When it returns, the budget will be the primary focus. As a result, fewer bills likely to be considered this year. However, Representative Cotter would like to have a digital assets bill passed this year, and we should be able to work with his office regarding those proposals.

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

   No report.

3. ** Insurance Committee – Geoffrey R. Vernon**

   Geoffrey R. Vernon reported that the Insurance Committee is considering legislation to relieve ILIT trustees from certain fiduciary duties (or simply exculpating them from damages caused by a breach of certain fiduciary duties), but do not have a proposal yet. This will be discussed at future CSP meetings.

4. ** Artificial Reproductive Technology – Nancy H. Welber**

   Ms. Welber reported that the Committee is continuing to work on a proposed bill, but do not yet have it ready for review at Council.

D. **Ethics and Professional Standards**

1. **Ethics – J. David Kerr**
No report.

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

Robert M. Taylor again mentioned his request for volunteer presenters for the "Who should I Trust" program which will be presented August 6, 2014, at various locations around Michigan. Ideas for additional locations for these presentations are welcome. They expect to have around twice as many presentations as previously. Mr. Taylor asked whether they should include our pamphlets as handouts at the presentations (such as those pertaining to powers of attorney, patient advocated designations, living trusts, etc). The consensus was to include them.

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 as follows:

- The Committee has submitted proposed changes to Probate Court Form PC 558 to the State Court Administrative Office; these will likely be reviewed in the fall.

- Rebecca Schnelz has completed her work on the proposed revisions for PC 666 – “What You Need to Know Before Filing a Petition to Appoint a Guardian for an Incapacitated Adult”. This should ready for discussion at Council next month.

- The write-up of the Bill to revise the procedure for appeals from Probate Courts is not quite ready – may be waiting for some conforming statute changes to be included.

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

Mr. Bearup reported that the Michigan Bankers Association is working on a draft proposal to modify the attorney-client evidentiary privilege to permit a beneficiary of a trust or estate to have access, under certain circumstances, to communications between the fiduciary and the attorney who was retained to represent the fiduciary in connection with the trust or estate administration. As previously reported to Council, the majority rule is that the fiduciary is the client; the minority rule is that the fiduciary and the beneficiary are both clients if the communication is administrative. See Committee Report included with the February 2013 Council meeting materials. As also previously reported to Council, our Committee has reviewed and discussed this issue, and was not able to reach a consensus on what rule to adopt for Michigan.
F. Areas of Practice

1. Real Estate – George F. Bearup

Mr. Bearup reported as follows:

- The Committee has made a follow-up call to Representative Pettalia's office regarding our proposed amendment to 2012 PA 497, but no further update yet. Based on past contacts, that office is continuing to work on the definition for “1st degree relative” as used in the statute.

- The Committee has not received any update on the Bills that have been introduced to modify the Personal Residence Exemption provisions contained in MCL 211.7cc.

- It has come to the attention of the Committee that Attorney Robert Anderson of Marquette authored an article that appeared in the Real Estate Section newsletter which contains some inaccuracies regarding when a Mary Carter (a/k/a Lady Bird) deed will cause uncapping of real estate taxable value; the Committee is attempting to have Mr. Anderson issue a retraction or correction.

2. Transfer Tax Committee – Lorraine F. New

Ms. New reported that there are only 9 estate and gift tax division appeals officers, with none located in Michigan. The Appeals division considers itself an independent organization from IRS with a mission to resolve tax agreements. There are several alternative dispute resolution options including Fast Track Mediation (FTM), Fast Track Settlement (FTS), and Post-Appeals Mediation (PAM); however, it is not known how the mediation proposals will be handled with the reduced IRS staff. See the March 2014 Tax Nugget, Attachment D, for further details.

3. Charitable and Exempt Organization – Christopher A. Ballard

No report.

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

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

G. Liaisons

1. Alternative Dispute Resolution Section Liaison –

No report.

2. Business Law Section Liaison – John R. Dresser
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.


Judge Murkowski reported that the Michigan Probate Judges Association (MPJA) is wondering where we are on the proposals to change the inventory fee structure; the MPJA appears to favor a flat filing fee. Ms. Marquardt advised that our Court Rules, Procedures and Forms committee reviewed this issue in November 2013, but didn’t make a proposal, in part, because the Committee would like to receive some input from SCAO. Chairperson Sweeney noted that a simpler system is favored by the Courts, in part because it would be less expensive to administer; also, trust contest issues do not generate any extra fees, but still require a lot of court time. The judges would like to see some movement to deal with this question, which would at least be revenue neutral. Part of the overall problem is the mortgage reduction change to inventory fee calculations, and the computer software issues that it entails. Another approach would be to require an inventory fee for trust cases. Josh Ard noted that a flat filing fee is bad for the smaller estates and those that have no assets.

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 will hold its annual conference on May 22, 2014 at St Johns. There will be several presentations likely to be of interest to our Section. See conference schedule on the ICLE site.

VIII. Other Business

None.

IX. Hot Topics

Nancy Little mentioned that she has had a bit of difficulty with Bank of America recognizing the authority of a successor trustee, who was also personal representative of the decedent’s estate, as well as the guardian and conservator for the minor children – the Bank required additional documentation and also caused delay before it would allow access to the funds. She is wondering if others have had such encounters.

X. Adjournment

Meeting adjourned by Thomas F. Sweeney at 11:52 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**

<table>
<thead>
<tr>
<th>Beginning General Fund</th>
<th>$180,511.60</th>
<th>$230,087.39</th>
<th>$264,980.12</th>
<th>$180,511.60</th>
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<td>$25,785.00</td>
<td>$25,785.00</td>
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<td>Beginning Total Fund Balance</td>
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<td>$290,765.12</td>
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<tr>
<th>FY to Date</th>
<th>Budget</th>
<th>Year to Date</th>
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<tbody>
<tr>
<td>October</td>
<td>November</td>
<td>December</td>
</tr>
</tbody>
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#### Revenue

<table>
<thead>
<tr>
<th>Item</th>
<th>October</th>
<th>November</th>
<th>December</th>
<th>Actual</th>
<th>2013-14</th>
<th>Variance</th>
<th>Percentage</th>
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</thead>
<tbody>
<tr>
<td>Membership Dues</td>
<td>62,650.00</td>
<td>40,005.00</td>
<td>8,015.00</td>
<td>110,670.00</td>
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<td>-</td>
<td>-</td>
<td>650.00</td>
<td>(650.00)</td>
<td>0%</td>
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<tr>
<td>Other</td>
<td>35.00</td>
<td>-</td>
<td>-</td>
<td>35.00</td>
<td>350.00</td>
<td>(315.00)</td>
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<td><strong>Total Receipts</strong></td>
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<td>40,005.00</td>
<td>8,015.00</td>
<td>110,705.00</td>
<td>116,000.00</td>
<td>(5,295.00)</td>
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#### Disbursements

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<tr>
<th>Item</th>
<th>October</th>
<th>November</th>
<th>December</th>
<th>Actual</th>
<th>2013-14</th>
<th>Variance</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Journal</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>25,000.00</td>
<td>(25,000.00)</td>
<td>0%</td>
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<tr>
<td>Chairperson's Dinner*</td>
<td>5,457.20</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>6,500.00</td>
<td>(1,042.80)</td>
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<td>Travel</td>
<td>1,418.01</td>
<td>1,574.59</td>
<td>2,134.31</td>
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<td><strong>18,500.00</strong></td>
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<td>972.72</td>
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<td>Long-range Planning</td>
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<td>-</td>
<td>-</td>
<td>-</td>
<td>1,000.00</td>
<td>(1,000.00)</td>
<td>0%</td>
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<tr>
<td>Support for Annual Institute</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>14,000.00</td>
<td>(14,000.00)</td>
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<td>Amicus Briefs</td>
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<td>(100.00)</td>
<td>0%</td>
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<td>Other***</td>
<td>-</td>
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<td>1,000.00</td>
<td>(1,000.00)</td>
<td>0%</td>
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<tr>
<td><strong>Total Disbursements</strong></td>
<td>13,109.21</td>
<td>5,112.27</td>
<td>5,682.03</td>
<td>23,903.51</td>
<td>121,750.00</td>
<td>(97,846.49)</td>
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**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
Hello all:
Recap of this morning’s CSP for the benefit of those who were not there. (And those who were, feel free to chime in.)

There was considerable push back on the idea of opt out. What if the decedent had an electronic collection of porn? Or emails to the mistress? My answer was, then the decedent could appoint trusted friend as a special pr with the power to destroy/delete all accounts other than on-line banking, etc. Plus, no different that pr who cleans out the house and discovers the hard copies of the trove of porn, or letters to the mistress.

Bottom line: CSP recommended, and probate council approved, the draft with a few changes and a caveat.

The changes were to Section 9:

(1) For proof that a conservator gives to obtain access, it could be either a certified copy of the court order or the letters of authority. The letters may have the authority on them. We talked about potential form change to make this a check the box kind of thing.
(2) For a trust, the change was to take out a “certified copy of the trust agreement.” The trustee just needs to supply a certificate of trust.
(3) No one liked the requirement for a certified copy of a power of attorney. So now it says, a copy of the power of attorney with the affidavit signed by the agent in accordance with MCL 700.7913.
(4) More teeth in the provision that requires digital custodians to provide, like in 700.7913, meaning that the digital custodian could be liable for damages, attorney fees, etc.
(5) Section 8 provides that the fiduciary is deemed to have authority/consent under the federal statutes, but says nothing about deemed authority under Michigan statutes. Josh Ard helpfully gave me copies of two statutes in particular that he was worried about so I added language to deal with those.

Attached are clean and red-lined versions with these changes. I have also sent a copy to Josh to see if he had any additional statutes or ideas about protecting the fiduciary from criminal liability under Michigan statutes.

The caveat:
There were other issues raised, that we agreed we would deal with later. The approval was conditional because of the apparent time crunch due to Rep. Cotter’s desire to move on the bill. Whatever happens, there will be another change to make changes when it gets to the Senate.

The other issues raised were:

(1) Minors. The draft deals with minors for whom a guardian or conservator has been appointed, but does not deal with parents accessing their children’s digital assets (e.g., Facebook account). This statute deals with fiduciaries. I think there is some law that parents are the natural guardians for their children, but we need to think about whether we also want to deal with that, so that parents who check up on children’s Facebook accounts are not committing criminal acts or violating terms of service agreements.

(2) Immunity for the fiduciary who acts in accordance with the digital assets statute. We have immunity for the service provider.

Howard and I are meeting with Rep. Cotter on Tuesday. Howard, are members of Elder Law council also going to be there? Becky said she would try to be there. (I need her help with the legislative process!)
Let me know if you have changes or questions. Also let me know if you are ok with me sharing the latest draft with Rep. Cotter and our friends on the Elder Law council.

Thanks,

Meg
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This act may be cited as the Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this act:

(1) “Account holder” means a person who has entered into a terms-of-service agreement. The term includes a deceased individual who entered into the terms-of-service agreement during the individual’s lifetime.

(2) “Agent” means an attorney-in-fact granted authority under a power of attorney.

(3) “Catalogue of electronic communications” means the record of the name of each person with which an account holder communicated, the time and date of the communication, and the electronic address of each person in an electronic communication that is controlled by an electronic communication service or a remote computing service.

(4) “Conservator” means a person that is appointed by a court to manage all or part of the estate of a protected individual. The term includes a limited conservator.

(5) “Content of electronic communications” means information concerning the substance or meaning of an electronic communication that is controlled by an electronic communication service or a remote computing service that is not readily accessible to the public.

(6) “Court” means the probate court or, when applicable, the circuit court.

(7) “Digital asset” means an electronic record. The term includes the catalogue of electronic communications and the content of electronic communications.

(8) “Digital custodian” means a person that stores, or has control of, a digital asset or electronic communication of an account holder.

(9) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) “Electronic communication” means an electronic record while in electronic storage by an electronic communication service and an electronic record which is carried or maintained by a remote computing service.

(11) “Electronic communication service” means any service that provides to the public the ability to send or receive electronic communications.

(12) “Fiduciary” means each person who is an original, additional, or successor personal representative, conservator, agent, or trustee.
“Governing instrument” means a will, a trust, an instrument creating a power of attorney, or other dispositive or nominative instrument.

“Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or similar intelligence of any nature.

“Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

“Personal representative” has the meaning as stated in MCL 700.1106(o).

“Power of attorney” means a record that grants an agent authority to act in the place of a principal.

“Principal” means an individual who grants authority to an agent in a power of attorney.

“Protected individual” includes a protected individual as defined in MCL 700.1106(v); a legally incapacitated individual as defined in MCL 700.1105(i); a minor for whom a guardian has been appointed but no conservator has been appointed; and a developmentally disabled person as defined in MCL 330.110a(25).

“Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

“Remote computing service” means any service that provides to the public computer processing services or storage of electronic records by means of an electronic communication system.

“Terms-of-service agreement” means an agreement that controls the relationship between an account holder and a digital custodian.

“Trustee” has the meaning stated in MCL 700.1107(o).

“Will” has the meaning stated in MCL 700.1108(b).

SECTION 3. SCOPE. This act applies only to a grant of authority to a fiduciary who is acting lawfully in accordance with fiduciary obligations and duties.

SECTION 4. AUTHORITY OF PERSONAL REPRESENTATIVE OVER DIGITAL ASSETS OF A DECEDENT.

(a) Unless prohibited by the will of a decedent, a court, law of this state other than this act, or federal law, a personal representative of the decedent may access:

(1) any digital asset of the decedent, other than the content of an electronic communication;

(2) the catalogue of electronic communications sent or received by the decedent; and
(3) the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

(b) A person interested in an estate as defined in MCL 700.1105(c) may file a petition in the court for an order to limit, eliminate, or modify the personal representative’s power over the decedent’s digital assets. On receipt of a petition under this subsection, the court shall set a date for a hearing on the petition. The hearing date shall not be less than 14 days and not more than 56 days after the date the petition is filed.

SECTION 5. AUTHORITY OF CONSERVATOR OVER DIGITAL ASSETS OF A PROTECTED INDIVIDUAL.

(a) The court, after an opportunity for a hearing, may authorize a conservator to access:

(1) any digital asset of the protected individual, other than the content of electronic communications;

(2) the catalogue of electronic communications sent or received by the protected individual; and

(3) the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

(b) In granting authority to a conservator under subsection (a), the court shall consider:

(1) the intent of the protected individual with respect to the authority granted to the extent that intent can be ascertained; or

(2) whether granting authority to a conservator is in the protected individual’s best interest.

SECTION 6. CONTROL BY AGENT OF DIGITAL ASSETS.

(a) Unless prohibited by a power of attorney, an agent may access any digital assets of the principal, including the catalogue of electronic communications sent or received by the principal, but not including the content of those electronic communications.

(b) If a power of attorney grants authority to an agent over electronic communications of the principal, the agent may access the content of electronic communications sent or received by the principal, if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

SECTION 7. CONTROL BY TRUSTEE OF DIGITAL ASSETS.
(a) Unless prohibited by the settlor in the terms of a trust, the trustee that is an initial account holder may access each digital asset, including the catalogue of electronic communications sent or received by the account holder and the content of those electronic communications, held in the trust.

(b) Unless prohibited by the settlor in the terms of a trust, when the trustee is a successor account holder, the trustee may access:

(1) the digital assets, including the catalogue of electronic communications sent or received by the account holder (or any account holder who was a prior trustee of the trust), but not including the content of those electronic communications, held in the trust; and

(2) the content of electronic communications described in subsection (b)(1) if the electronic communication service or the remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

SECTION 8. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary that is an account holder or that has the right to access a digital asset of an account holder:

(1) may take actions concerning the digital asset to the extent of the account holder’s authority and the fiduciary’s powers under law of this state other than this act, subject to copyright and other law and the terms-of-service agreement;

(2) is deemed to have the lawful consent of the account holder for the digital custodian to divulge the content of an electronic communication to the fiduciary pursuant to state and federal electronic privacy law; and

(3) is an authorized user under the federal Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 et seq. and MCL 752.795;

(4) is deemed to have the consent of the device holder under MCL 750.157n to the extent that the digital asset is a financial transaction device within the meaning of MCL 750.157n;

(5) is deemed to have the authority to access the digital assets under MCL 752.795 to the extent that the digital asset is subject to MCL 752.795;

(b) Any provision in a terms-of-service agreement that limits a fiduciary’s access to the digital assets of the account holder under this act is void as against the strong public policy of this
state, unless the limitations of that provision are signed by the account holder separately from the other provisions of the terms-of-service agreement.

(c) Subject to Section 9(a), a fiduciary’s access to a digital asset is not a violation of a terms-of-service agreement, notwithstanding a provision in the terms-of-service agreement that bars third party access.

(d) A fiduciary with authority over the equipment of a decedent, protected individual, principal, or settlor that can receive, store, process, or send an electronic record may access that equipment and any electronic record stored on it.

SECTION 9. COMPLIANCE.

(a) If a fiduciary that has a right to access a digital asset of an account holder under this act and complies with subsection (b), the digital custodian shall comply with the fiduciary’s request in a record for:

(1) access to the digital asset;
(2) control of the digital asset; or
(3) a copy of the digital asset unless the digital asset is subject to the copyright of a third party.

(b) If a request under subsection (a) is made by:

(1) a personal representative with the right of access under Section 4, the request must be accompanied by a certified copy of the letters of the personal representative as defined in MCL 700.1105(j) or a small estate affidavit pursuant to MCL 700.3983;
(2) a conservator with the right to access under Section 5, the request must be accompanied by a certified copy of the court order that gives the conservator authority over the digital asset or by a certified copy of the letters of the conservator as defined in MCL 700.1105(j) that gives the conservator authority over the digital asset;
(3) an agent with the right of access under Section 6, the request must be accompanied by a certified copy of a currently-effective power of attorney that authorizes the agent to exercise authority over the digital asset and a sworn statement executed by the agent pursuant to MCL 700.5505; and
(4) a trustee with the right of access under Section 7, the request must be accompanied by a certified copy of the trust instrument or a certification of the trust under MCL 700.7913 that authorizes the trustee to exercise authority over the digital asset.

(c) A digital custodian shall comply with a request made under subsection (a) not later than 56 days after receipt of the request. If the digital custodian fails to comply, the fiduciary may
apply to petition the court for an order directing compliance. A digital custodian is liable for damages, costs, expenses, and legal fees if the court determines that the digital custodian was not acting pursuant to a legal requirement in failing to comply with a request made under subsection (a).

(d) So long as any payments under an applicable terms-of-service agreement are kept current or brought current within 56 days of any default, a digital custodian may not destroy, disable or dispose of any digital assets of the protected individual for 2 years after the custodian receives a request or order under subsections (b) and (c). If the digital custodian has obligations under other state or federal laws to preserve records, this act does not override those other obligations.

(e) A recipient of a certification of trust under subsection (b)(4) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(f) A digital custodian that acts in reliance on a certification of trust under subsection (b)(4) without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification.

(g) A person that in good faith enters a transaction in reliance on a certification of trust under subsection (b)(4) may enforce the transaction against the trust assets as if the representations contained in the certification were correct.

(h) A person that demands the trust instrument in addition to a certification of trust under subsection (b)(4) or excerpts under subsection (e) is liable for damages to the same extent the person would be liable under MCL 700.7913(8).

(i) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

SECTION 10. DIGITAL CUSTODIAN IMMUNITY. A digital custodian and its officers, employees, and agents are immune from liability for any action done in compliance with this act.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or
supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 13. SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 13. APPLICABILITY. This act applies to:

(1) A fiduciary acting under a will, trust, or power of attorney executed before, on, or after the effective date of this act, except as otherwise provided in this act.

(2) Each proceeding pending in court or commenced after the effective date of this act, unless the court determines that it is not feasible to apply the act or, in the interests of justice, the act should not apply.

(3) This act does not impair an accrued right or an action taken in a proceeding before the effective date of this act in a proceeding.

SECTION 15. EFFECTIVE DATE. This act takes effect immediately.
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ATTACHMENT C
Probate and Estate Planning Council
Budget Committee Report
for
March 15, 2014, Meeting
regarding
Proposed Amended Budget for 2013-2014

Overview:
During the week of February 24, 2014, the Budget Committee discussed whether or not to recommend amending the budget to reflect the additional expense of $4,000 which was approved as our support for the fall 2014 ICLE “Experts” program. The Committee has voted to recommend to Council that the current budget be amended to include that additional expenditure (see attached budget spreadsheet). The change is reflected on the attached budget spreadsheet by the addition of a new line item titled “seminars” to reflect that support.

Discussion:
The rationale for amending the budget is that we will then be able to better see where we stand from month to month regarding both proposed and actual expenditures, in relation to what we have predicted for those expenditures and also in relation to what we have predicted for receipts. The amended budget will also show what we predict for the draw from our fund balance. That way, as we evaluate future proposals for additional expenditures that are not currently included in the budget, we can more easily see the effect on our fund balance.

This recommendation was not unanimous. The argument against amending the budget includes the fact that this may be a one-time expenditure, and we should not be amending the budget for every extra expenditure that comes in. Also, the budget is just a prediction of the receipts and expenditures, and we don’t really know where we are until the end of the year – we can decide next year whether we want to include this in next year’s budget.

Summary:
Overall, as shown by our budget before the approval of the $4,000 support for the ICLE fall Experts program, our projected expenses will exceed projected revenue by $5,570, if all line items exactly follow this budget. With the approval of this additional $4,000 expenditure, our projected expenses will exceed projected revenue by $9,570. With our current fund balance and recent history of revenue exceeding actual expenses, we can manage this possible revenue shortfall for the coming year, but if we do not amend the budget, the budget will understate the projected shortfall of revenue versus expenses. We also need to keep in mind that our expenses continue to increase each year, but our projected, as well as actual, dues revenue really does not increase significantly unless we raise membership fees.

James B. Steward
Chair
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$5,750 was allocated to budget from fund balance, which is approx $206,296 at end of FY 2012-13

*New category which includes the listserve, e-blast, & other electronic communications to members.

Previously, $25,000 was allocated from our total fund balance to a separate "Amicus Fund". The unused portion of the Amicus Brief line-item ($785 from last year) was added to that Amicus Fund, bringing the total Amicus Fund portion of our Fund Balance to $25,785. The ultimate goal being to establish a buffer for anticipated appeals involving the Michigan Trust Code and other newly enacted legislation that may need judicial interpretation. The effect for 2013-2014 is to use book entries to create the following funds:

- General Fund: $180,511.00
- Amicus Fund: $25,785.00
- Total Fund Balance: $206,296.00

On 4/14/12, the Council approved an increase of the line-item for "Meetings" by $2,600.00 for registration fees, travel, meals and lodging for the Chair-elect and Vice Chair to attend the annual Leadership Conference on Mackinac Island. This amount is included in the Meetings budget total of $12,000.

On 3-16-2013 Council approved an increase in the "Other" line item to a total of $1,000, with up to $750 allocated to support for the Young Lawyer's conference.
ATTACHMENT D
A Whole New World

If you have occasion to take an estate and gift tax case to Appeals, you will notice a number of changes. There are two divisions, East and West, and only 9 estate and gift tax division appeals officers who are all experienced in these cases. They are located in New York (2), Philadelphia (1), Jacksonville (2), Houston (1), Dallas (1), Chicago (1) and Indianapolis (1). Some appeals conferences are conducted remotely by video-conference. While cases are typically assigned based on the location of the executor, they are also assigned based on inventory of the appeals officers.

Appeals considers itself an independent organization from IRS with a mission to resolve tax agreements. As a result, large estate cases have participated in preconferences similar to those of business cases. In these, the examining agent discloses his/her arguments, and the taxpayer is present. The taxpayer can respond in a separate conference with Appeals, without the examining agent.

There are a few alternative dispute resolution options which are gaining popularity. Many of these have been used in large business cases, but are now available for large estate and gift tax controversies. These include Fast Track Mediation (FTM), Fast Track Settlement (FTS) Post-Appeals Mediation (PAM).

FTM involves a trained mediator for Appeals to help both sides reach an agreement. You both have full control on every decision made, and no decision can be imposed on a party. If resolution is not reached, regular Appeals is still available. FTM promises to offer a quick acceptable resolution. There are certain requirements and procedures, you can review Publication 3605, Fast Track Mediation, Revenue Procedure 2003-41 and the Appeals Mediation Programs Self-Help Tool at irs.gov.

FTS is similar, and it also offers a speedy resolution with a trained Appeals Mediator, who can offer settlement proposals and use Appeals’ settlement authority to resolve the dispute. Either the taxpayer or IRS can agree or deny the Appeals mediator’s settlement proposal. You can then go the regular Appeals route with a different Appeals officer. For more information, see Publication 5022 and Announcement 2011-5.

The examining agent chooses whether a particular case goes to FTS or FTM, and most choose FTS. The process occurs before a 30 day letter is prepared if agreement is not reached with the examiner and before Appeals receives jurisdiction.

PAM also offers a quick solution, while the case is under Appeals jurisdiction, and an Appeals mediator helps parties resolve a disputed issue. See Revenue Procedure 2009-44 for details on how to apply. The Appeals Team Manager decides if a case is eligible and assigns a new Appeals officer, who reviews the settlement proposal.

Lorraine F. New
George W. Gregory PLLC
Troy, MI 48084