

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

**November 7, 2015  
Lansing, Michigan**

**Minutes**

**I. Call to Order**

The Chair of the Section, Shaheen I. Imami, called the meeting to order at 10:15 a.m.

**II. Attendance**

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

Shaheen I. Imami  
James B. Steward  
Marlaine C. Teahan  
Marguerite Munson Lentz  
Christopher A. Ballard  
Constance L. Brigman  
Rhonda M. Clark-Kreuer  
Kathleen M. Goetsch  
Michael G. Lichterman  
David P. Lucas  
Michaele Marquardt  
Lorraine F. New  
David L.J.M. Skidmore  
Geoffrey R. Vernon

A total of 14 council members and officers were present, representing a quorum.

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

Susan M. Allan  
George F. Bearup  
Christopher J. Caldwell  
Hon. Michael L. Jaconette  
Mark E. Kellogg  
Katie Lynwood  
Raj A. Malviya  
Richard C. Mills  
Nancy H. Welber

**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:**

George W. Gregory  
Phillip E. Harter  
Kenneth E. Konop  
Michael McClory  
Douglas A. Mielock

**E. Others in attendance:**

W. Josh Ard  
Jeanne Murphy  
Becky Bechler  
Ryan Bourjaily  
Robert Taylor  
Neal Nusholtz  
Robert O'Reilly  
Susan Chalgian  
Daniel Hilker  
Jonathan Nahhat  
John Giarmarco  
Michael D. Shelton  
Nazneen Syed  
Kurt A. Olson  
Carol A. Sewell  
Nick Reister  
Rob Labe  
Andrew Mayoras  
Jessica Schilling  
Sueann Mitchell  
James Spica  
John Roy Castillo

**III. Minutes of the October 10, 2015 Meeting of the Council**

The minutes of the October 10, 2015 Meeting of the Council were included with the Agenda for the November meeting, which were posted on the Section's web page prior to the meeting. Ms. Lentz moved that the minutes be approved. The motion was seconded. One change was noted. The motion to approve the minutes, as corrected, was approved on a voice-vote with no nays and no abstentions. The corrected minutes were subsequently posted to the Section's web page.

**IV. Treasurer's Report – Christopher Ballard**

Mr. Ballard presented the income/expense report through the end of the fiscal year, September 30, 2015. The Section ended the year with a surplus of approximately \$6500. The income/expense report for October is not yet available.

## V. **Chairperson's Report – Shaheen I. Imami**

- Mr. Imami reported on a request to slow our pace of legislative initiatives. Ms. Becky Bechler thanked the Section members who have been so responsive in dealing with issues arising with various bills. She reported that our Section has five pending requests (in addition to our section's responses to bills which were not initiated by our Section), and the legislators that we have asked to sponsor legislation have asked us to slow down the pace. In addition, Mr. Imami would like to keep the workloads manageable for Section members who are reviewing bills and proposing substitute language or are drafting proposed legislation.
- Ms. Bechler had referred a question to Mr. Imami concerning the elimination of dower bill, SB 560. Senator Robertson had received an inquiry from a Cooley law professor asking if MCL 700.2202(7)(a) could be eliminated. (The email exchange was attached to the November meeting agenda.) Mr. Konop remembers that when EPIC was being considered, the Family Law Section objected to the elimination of 2202(7)(a). Ms. Bechler was requested to ask the Senators how important this issue was before Council voted on it.
- Mr. Imami reported that Mr. Ard was given permission to use the Patient's Guide to Health Care Decision-Making. A copy of the Guide and the copyright registration were attached to the November agenda.
- Three court of appeals decisions, *In re Brown Estate*, *In re Duke Estate*, *In re Jajuga Estate*, were attached to the November agenda, for information.
- The public policy positions regarding votes taken at the October meeting (community property trust, filing an amicus brief in *Perry v Cotton*, supporting the dower repeal bills, and supporting the funeral representative bill in concept) were attached to the November agenda. Ms. Bechler report that she is exploring a possible sponsor for the community property trust.

## VI. **Report of the Committee on Special Projects – David P. Lucas**

Mr. Lucas reported that CSP discussed the proposed tenancy by entireties trust and the Legislative Development and Drafting Committee will be reviewing the language in light of the comments raised. Included as Attachment 1 of the supplemental materials posted on the Section's webpage for the November meeting was the Draft 1 substitute for the funeral representative bill. Mr. Lucas requested comments concerning the language of the funeral representative bill.

## VII. **Standing Committee Reports**

### A. **Internal Governance**

#### 1. **Budget – Marguerite Munson Lentz**

Ms. Lentz presented the proposed budget, which Ms. Marquardt seconded. A question was raised whether to increase the budget for amicus briefs, and whether that should be treated as an increase from the current budget or a reallocation from the General Fund balance as of the beginning of the year to the Amicus Fund. Mr. Gregory moved to reallocate \$40,000 from the Section's General Fund balance to the Amicus Fund. Ms. Brigman seconded the motion. The

motion passed. A motion to approve the budget, as amended to show the reallocation between the funds, was passed.

2. Bylaws – Nancy H. Welber -- No report.
3. Awards – Amy N. Morrissey -- No report.
4. Planning – James B. Steward -- No report.
5. Nominating – Mark K. Harder -- No report.
6. Annual Meeting – James B. Steward

The meeting has been scheduled. No further report.

## **B. Legislation and Lobbying**

1. Legislative Analysis and Monitoring Committee – Michele C. Marquardt

Ms. Marquardt reported that SB 225 and 226 were introduced to provide that the transfer of ownership of pistols to heirs/devisees would be permissible whether or not the pistol was registered. The heir or devisee would have to register the pistol within 30 days. No action was requested of Council. According to Ms. Bechler, these bills have been passed and are awaiting the governor's signature.

Ms. Teahan reported that additional changes were made to the draft bill concerning probate appeals. They are hoping this bill will be introduced in the Senate soon.

2. Legislation Development & Drafting Committee – Geoffrey R. Vernon

Mr. Vernon reported that the qualified dispositions in trust act was introduced as SB 597 and 598. Senator Schuitmaker sponsored the legislation. The proposed legislation for revising the definition of tenancy by the entireties property, as passed by the Council, has been given to the Legislative Service Bureau.

Ms. Lentz moved for the Council to support the Draft 1 substitute for HB 5034 (digital assets for fiduciaries). Mr. Steward supported the motion. The motion passed, 14 in favor, 0 opposed, 0 abstained.

Mr. Vernon requested any suggested changes to EPIC or MTC be sent to him.

3. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon

Mr. Vernon reported that the ILIT trustee exoneration proposal is still with the Legislative Service Bureau.

4. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber -- No report.

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

1. Amicus Curiae – David L. Skidmore

Mr. Skidmore reported on a request for an amicus brief to be filed in *In re Jacob*. This is an appeal from a probate court decision. (A copy of the amicus request was attached to the November agenda.) Mr. Skidmore recommended that no brief be filed at this point, and to reconsider when the court of appeals issues its opinion.

The next issue concerned whether to file an amicus brief in *In re Mardigian*. Ms. Lentz read a list of the law firms representing parties and named expert witnesses. All persons who are affiliated with any of the law firms or with one of the named expert witnesses (including Mr. Skidmore, Ms. Lentz, and others) left the room. Ms. Teahan took the minutes of this portion of the meeting.

As reported by Ms. Teahan:

After a spirited discussion, a motion was made by Mr. Gregory and seconded by Ms. Clark-Heuer to table a decision on whether or not council should direct the amicus committee to file an amicus in the *Mardigian* case. The motion was passed.

2. Probate Institute – Marlaine C. Teahan

Ms. Teahan reported that she is working with ICLE about the program and expects to have the program done within a month. There will be three out-of-state speakers. There was a discussion about the pros and cons of having out-of-state speakers.

3. State Bar and Section Journals – Richard C. Mills -- No report.

4. Citizens Outreach – Constance L. Brigman

Ms. Brigman reported that the committee is working with Clark Hill concerning issues with the publication of the brochures, such as how, and when, to give permission to use the brochures. Her written report is attached as Attachment A.

5. Electronic Communications – Michael G. Lichterman -- No report.

6. Membership – Raj A. Malviya -- No report.

**D. Ethics and Professional Standards**

1. Ethics & Unauthorized Practice of Law– Katie Lynwood -- No report.

**E. Administration of Justice**

1. Litigation, Proceedings, and Forms – David L. Skidmore -- No report.

**F. Areas of Practice**

1. Real Estate – Mark E. Kellogg

Mr. Steward gave the report for the committee. (A written report was attached to the

November agenda.) The report concerned HB 4645 and HB 4930, which proposed changes to the legislation involving uncapping. HB 4645 involves LLCs and HB 4930 involves life estates. The Treasury Department proposed changes to HB 4645, which were introduced as a substitute bill for HB 4645. Mr. Steward moved that the Council oppose the substitute bill for HB 4645. Ms. Lentz seconded. After discussion, the Council voted: 13 approved the motion to oppose the substitute for HB 4645, 0 opposed the motion, and 1 abstained.

Mr. Steward reported that the committee approved HB 4930 in concept, but was still working on more comprehensive language. He moved that the Council approve HB 4930 in concept. Ms. Lentz supported. The motion passed, 14 in favor, 0 opposed, 0 abstained.

2. Transfer Tax Committee – Lorraine F. New

Mr. Labe gave the report. The Tax Nugget was included with the November agenda. The Tax Nugget included information about Rev Proc 2015-53 (inflation adjustments) and Prop. Reg. 301.7701-18 (interpreting terms like “husband” and “wife” in gender neutral manner).

3. Charitable and Exempt Organization – Christopher J. Caldwell -- No report.

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

**VIII. Other Reports**

**G. Liaisons**

1. Alternative Dispute Resolution Section Liaison – Milton J. Mack, Jr. -- No report.

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

3. Elder Law and Disability Rights Section Liaison – Amy Rombyer 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 M. Allan -- No report.

8. Michigan Probate Judges Association Liaisons – Hon. Judge David M. Murkowski, Hon. Michael L. Jaconette -- No report.

9. Probate Registers Liaison – Rebecca A. Schnelz

Mr. McClory reported that Laurence Paolucci will replace Judge Mack on Wayne County Probate Court.

10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz -- No report.

11. Solutions on Self-Help Task Force Liaison – Kathleen M. Goetsch

Ms. Goetsch reported that forms for a small estate are now on the Solutions for Self-Help web site.

12. State Bar Liaison – Richard J. Siriani -- No report.

13. Taxation Section Liaison – George W. Gregory

Mr. Gregory provided a written report on the activities of the Taxation Section, which is attached as Attachment B.

**IX. Other Business**

Ms. Lentz reported that the Council received a nice thank you note from Ms. Brigman regarding the flowers sent to her from Hearts and Flowers Fund.

**X. Hot Topics**

**XI. Adjournment**

The meeting was adjourned by Chairperson Shaheen I. Imami at 12:12 pm.

# ATTACHMENT A

Brochure Committee Report for November 7, 2015 Council (by Connie Brigman)

**I. Healthcare Decision-making guide published June 1, 2014.**

- a. Author: Connie.
- b. Copyright Claimant: Connie.
- c. Rights and Permissions: SBM Probate and Estate Planning Section. Section has an exclusive license to use the brochure. This exclusive license is not transferable.

**II. Explanation of terms**

- a. **Copyright License.** If you grant someone a copyright license, you retain ownership of your copyright and you give the other party permission to use some or all of your copyright rights.
- b. **Exclusive license.** Nonexclusive license to use the work means that the author and anyone else the author grants permission can also use the work. Exclusive license to publish the work means that the author and copyright owner may still use the work but she may not give permission to anyone else to use the work. Only the exclusive license holder may do that.

**III. Fair use doctrine issue has been raised. Josh Ard requested to use the healthcare decision-making guide for a seminar that he is giving.**

- a. Josh Ard's seminar: The Mental Health & Aging Project will present GERO 169 Special Topics in Gerontology: Legal Rights of Older Adults, taught by Josh Ard, JD, from 8:00 AM - 5:00 PM at Lansing Community College. The registration fee is \$100. This course focuses on issues such as guardianship, conservatorship, power of attorney, the living will, joint tenancy, nursing home residency, and civil commitment, including actual and perceived choices a person has as aging and illness occur. ***Legal Rights of Older Adults*** is approved for:
  1. ● Social Work hours: 8.0
  2. ● Nursing contact hours: 7.75
  3. ● Nursing Home Administrator hours: 8.0
  - ii. Permission to use material granted?
- b. **When is permission required?** Copyright permission is the process of getting consent to use copyrighted materials. Unless the material is in the "public domain" or your use is considered a "fair use," you must seek permission to use it. If you do not seek permission, you may be infringing and may be subject to legal action.
  - i. *What is in public domain?* The following works are in the public domain (i) material published prior to 1923; (ii) material published between 1923 through

1963 without a copyright renewal; (iii) material published between 1923 through 1977 without a copyright notice; and (iv) material published from 1978 through March 1, 1989 without a copyright notice and without subsequent registration within 5 years. If the material is in the public domain permission is not required.

- ii. *What is fair use?* Fair use allows an educator to legally bypass copyrights in narrow circumstances. See <https://www.law.cornell.edu/uscode/text/17/107>. At the Judiciary Subcommittee hearings in June 1975, Chairman Kastenmeier and other members urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material. The full text of the agreement is as follows:

## **Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to books and periodicals**

### **Guidelines**

..

#### **II. Multiple Copies for Classroom Use**

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below;  
and,
- B. Meets the cumulative effect test as defined below; and
- C. Each copy includes a notice of copyright.

### **Definitions**

#### **Brevity**

- (i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
- (ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in “i” and “ii” above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph “ii” above notwithstanding such “special works” may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

#### Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

#### Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in “ii” and “iii” above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

### III.

Prohibitions as to I and II Above

...

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed March 19, 1976.

Ad Hoc Committee on Copyright Law Revision:

By Sheldon Elliott Steinbach.

Author-Publisher Group:

Authors League of America:

By Irwin Karp,

Counsel.

Association of American Publishers, Inc.:

By Alexander C. Hoffman.

Chairman, Copyright Committee.

**c. How to get permission to use copyrighted work.**

i. Contact the party in the copyright notice.

ii. Ask for permission and provide information:

1. One time use or ongoing use?

2. Describe format of how you will use it (print or online article?)

3. Expiration date of permission.

**IV. Copyright notice recommended for the healthcare decision-making guide:**

**PUBLICATION NOTICE**

Copyright 2014. Constance L. Brigman. Requests and permissions shall be exclusively directed to the State Bar of Michigan Probate and Estate Planning Section.

Permission to print or copy part or all of this work for classroom use is granted without fee provided that copies are not made or distributed for profit or

commercial advantage and that copies clearly display this verbatim notice.

Otherwise, permission must be obtained to copy all or part of this material in any manner. Abstracting with credit is permitted. To further copy, republish, post on servers, or redistribute to lists requires prior specific permission from the State Bar of Michigan Probate and Estate Planning Section.

Persons granted permission to copy this work must display the above Publication Notice followed by "Included here by permission."

**V. Hiring of Clark Hill PLLC to represent the section regarding publication of brochures both in print and online. Preparing a scope of representation.**

Scope of Representation

1. The State Bar of Michigan Probate and Estate Planning Council (hereinafter PEPC) seeks:
  - a. Preparation of two publication agreements (print publishing agreement and online publishing agreement)
  - b. Negotiation with the SBM General Counsel regarding the terms of the publication agreements
  - c. Assistance with review and approval of the finalized publication agreement and supervision of the execution of the same.
2. The subcommittee chairperson, Constance L. Brigman, will be the point person for discussion of the terms of the publication agreements; however, PEPC must approve and authorize the publication agreements in their final form.
3. This is anticipated to be a one-time representation; however, from time to time the PEPC may ask for assistance with amendments to the terms of the agreements. At such time, the parties must prepare and sign a new representation agreement.

4. Legal research may be required in the course of this representation. The cost of the legal research will be billed separately from the legal representation fee.
5. Legal representation begins with the signing of this Scope of Representation and it ends when the publication agreements have been approved and executed by the SBM and the PEPC chairperson.
6. Matters and issues to be negotiated in the publication agreements:
  - a. Publication notice to be displayed on first page of print and first screen of digital copies of the materials given to the SBM for publication.
  - b. License to publish granted to SBM and shall include Copyright [year] held by State Bar of Michigan Probate and Estate Planning Section. Publication Rights licensed to State Bar of Michigan.
  - c. In exchange for allowing SBM to collect fees for the brochures and profit from the web traffic generated by the brochures, SBM agrees to act as a single source for republication requests and for delivery of the material to the requesting party; to protect brochures from plagiarism and any other unauthorized uses; and, to sustain and develop publication of the brochures.
  - d. Final approval rights with the PEPC for material prior to publication.
  - e. Publication schedule for print and online brochures.
  - f. If finalized materials are submitted for publication but they are not in fact published by the SBM, then the copyright license expires within a term of days (90 days?) and all rights in the material revert back to the PEPC.
  - g. Informational reports to the PEPC each month detailing the web traffic and print orders for the brochures that the SBM publishes.
  - h. Expiration date of the licenses granted to SBM.
  - i. Approval and consultation with PEPC on title, cover, layout, artwork, including the placement of the Publication Notice.
  - j. If the SBM requests revisions, then PEPC has the exclusive right to provide a revision. Publication Notice shall add this statement: "This is a [current year] minor revision of the work published [original publication date]"
  - k. Any revision that contains 25% or more new material shall require a new license and Publication Agreement. It is no longer a minor revision of a previous work.

- I. Once a work is published, it shall be fixed and not altered except to revise or make corrections by mutual agreement of the PEPC and the SBM.

V. **Logging permissions.** The brochures committee is in full agreement that it is important to log permissions granted to lawyers and non-lawyers alike who use the brochures. It gives us important feedback about how the brochures are used and also a log of persons to whom corrections or revisions ought to go.

VI. **SBM as a publisher with a license to publish our materials versus SBM as a printing service.**

The brochures committee discussed the attractiveness of the section publishing print brochures using the SBM print services (which by the way any member can use). It would give us a great deal of control, but it would be an administrative burden. Ultimately, we did not foresee it being a workable solution.

# ATTACHMENT B

REPORT TO THE PROBATE SECTION OF THE STATE BAR OF MICHIGAN

FROM: George W. Gregory, Liaison from the Taxation Section

Date: November 7, 2015

The Taxation Section website lists a variety of things including upcoming events

The Annual Conference will be held on May 19, 2015 in Plymouth.

At the October 22, 2015 Council Meeting

Reports included information about road funding issues, both Michigan and Federal; concerns on getting younger lawyers involved; BEPS (an international report on Base Erosion and Profit Shifting on multinationals moving net income to lower tax jurisdictions); the Detroit Regional Chamber of Commerce made a presentation on what it sees as Tax Tribunal Reform that might be achievable (addresses quality of members, efficiency, ease of access, deadlines, fees, structure of hearings and fees).

The section has a Facebook page.

The Tax Law Series cosponsored by ICLE will consist of on demand webcasts

- 11/17/2015 State Tax Controversies in Michigan
- 12/15/15 Tax Aspects of Divorce
- 2/16/16 An Inside Look into the IRS Appeals Process
- 3/15/16 Estate Planning Tax Considerations for 2016