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

October 12, 2013
Birmingham, Michigan

Minutes

I. Call to Order

The Chair of the Section, Thomas F. Sweeney, called the meeting to order at 10:30 a.m.

II. Attendance

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

Sweeney, Thomas F.
Morrissey, Amy N.
Imami, Shaheen I.
Steward, James B.
Teahan, Marlaine C.
Allen, Susan M.
Ard, W. Josh
Ballard, Christopher A.
Clark-Kreuer, Rhonda M.
Lentz, Marguerite M.
Lucas, David P.
Marquardt, Michele C.
Murkowski, Hon. David M.
New, Lorraine F.
Ouellette, Patricia M.
Skidmore, David L.J.M.
Taylor, Robert M.
Vernon, Geoffrey R.
Welber, Nancy H.

A total of 19 council members and officers were present representing a quorum.

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

Bearup, George F.
Brigman, Constance L
Kerr, J. David
Spica, James P.

C. The following officers and members were absent without excuse:

None.

D. The following ex-officio members of the Council were in attendance:
Brower, Jr., Robert D.          Gregory, George W.
Grix, Henry M                Harder, Mark K.
Konop, Kenneth E.            McClory, Michael S.
Mielock, Douglas A.

E. Others in attendance:

Robert M. O’Reilly          Sharri L. Rolland Phillips  Serene K. Zeni
G. Grace Pete               Nazneen H. Syed              Jeanne Murphy
W. Jerry Byrd               Rebecca Schnelz              Rick Mills
Katie Branigan              Neal Nusholtz                Henry Lee
Kurt A. Olson               Julie Paquette                Raymond A. Harris
Katie Lynwood

III. Introduction of Guests

IV. Minutes of September 21, 2013, Meeting of the Council

Revised minutes were circulated at the meeting. Two additional corrections were noted. George Gregory moved for approval of the minutes as corrected with support from Shaheen Imami. The motion was approved on a voice-vote with no nays or abstentions.

V. Treasurer Report – James B. Steward & Marlaine C. Teahan

Marlaine C. Teahan presented the Treasurer's report and noted that expense reimbursement requests should be sent to her as the in-coming Treasurer. Ms. Teahan also requested personal contributions by council members to the Hearts and Flowers Fund of $35.00.

James B. Steward, the out-going Treasurer, presented an overview of the expenses for the past fiscal year, including estimates for the September expenses. Total expenses for the year, including the estimates for September, should be under budget.

VI. Chairperson’s Report – Thomas F. Sweeney

Thomas F. Sweeney thanked Mark K. Harder for his work as Chairperson for the past year, and his many years of service to the Council before that. (Mr. Sweeney presented Mr. Harder with a plaque from the State Bar during the dinner held the night before the Council meeting).

Mr. Sweeney also noted the years of service to the Council by out-going Council members Rebecca A. Schnelz and the Hon. Darlene A. O’Brien, and presented a plaque to Ms. Schnelz from the State Bar in recognition of such service. A similar plaque will be sent Judge O’Brien.
Mr. Sweeney noted the proposed change for the royalty agreement with ICLE pertaining to the on-going work by John Martin and Mark Harder for the EPIC and Michigan Trust Code commentary and updates. That proposal will change the royalty to a total flat fee payment of $6500, with 10% of that ($650) to be paid to the Section. Motion by Amy N. Morrissey, supported by Marlaine C. Teahan, to approve the change. The motion was approved on a voice-vote with no nays or abstentions.

Mr. Sweeney also noted that the rest of meetings for the Section Council will be at the University Club in Lansing.

VII. Report of the Committee on Special Projects – Marguerite C. Lentz

Marguerite C. Lentz presented the following report for CSP:

- As reflected in the minutes from last month’s meeting, Council approved proposed amendments to MCL 600.308 and the repeal of MCL 600.861 and MCL 600.863 as part of the court of appeals jurisdiction and procedural changes that would direct all appeals from the Probate Courts to the Court of Appeals, rather than the bifurcated appellate process that currently splits appeals between the Circuit Courts and the Michigan Court of Appeals based on the subject matter. (Specifically, MCL 600.308 would be amended to clarify that all appeals from the Probate Courts would go to the Michigan Court of Appeals, while maintaining that final orders would be appealable as a matter of right and interlocutory orders appealable by leave.) As the next part of this proposed change, the Committee on Special Projects discussed the recommendation from the Subcommittee of the Court Rules, Forms and Procedures Committee which proposes corresponding changes to the court rules to implement that change in appellate jurisdiction and procedure. This is a PUBLIC POLICY POSITION which was first approved at the September 21, 2013, meeting of the Council to be reported to the SBM.

- Following that discussion, CSP recommends that the Council support changes to the following Court Rules: MCR 5.801, MCR 7.102(9), MCR 7.103(A)(2), MCR 7.108(E)(1) and (2), MCR 7.109(B)(1)(b), MCR 7.210(A)(1) and MCR 7.210(B)(1)(b), as set forth in the sub-committees report (see Attachment 1), plus an additional revision to MCR 7.102 to delete “probate” from the definition of "trial court" in that rule. Motion by Marguerite M. Lentz as part of her committee report to approve those recommended changes, including authorizing the chair of the committee to approve non-substantive changes to deal with technical wording issues that may arise during the submission process, without further Council approval. The motion was approved on a Council vote of 19-0, with no nays and no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

- As noted in the report to the Committee on Special Projects, included with the materials attached to the October 12, 2013 meeting agenda (see Attachment 1), and as part of the changes that would direct all appeals from the Probate Courts to the Court of Appeals, last month Council approved proposed legislation and court rule changes that would
modify the automatic-stay provisions of MCL 600.867 and MCR 5.802 (and other affected court rules) after an appeal is claimed. As proposed and approved by Council, the goal is to more closely align the process related to stays in probate appeals to those in circuit court appeals. Specifically, MCL 600.867 would be amended to provide that an appeal of right would trigger a 21-day automatic stay to permit the appellant to then file a motion for stay with the probate court. The process is analogous to that in circuit courts under MCR 2.614. MCR 5.802(C) would be amended to clarify that the automatic-stay provision does not apply to an order that removes or appoints a fiduciary (current version omits “appoints” and some practitioners have taken this to mean that the portion of an order that appoints a fiduciary after removing a prior fiduciary is stayed), while MCR 7.208 would be amended to add new MCR 7.08(D), and MCR 7.209(A)(1), (B)(1), (F)(1); (G)(1) would be amended to be consistent with the other changes.

- The Committee on Special Projects also discussed the suggested policies included with the Electronics Communications Committee report (see full report attached as Exhibit B). CSP felt that further review and revision of the suggested Probate Web Page Policy was needed before a proposal is submitted to Council. CSP also discussed the proposed policy titled “Section Mailing List Policy Monthly Reminder”. CSP recommends that Council adopt the Section Mailing List Policy Monthly Reminder as included in the Electronics Communications Committee report (as part of Attachment 2), with the first sentence of Paragraph 4 of the policy revised to read as follows: “Decisions to limit participation may also be made by the State Bar of Michigan”. Motion by Marguerite M. Lentz as part of her committee report to approve adoption of the policy with the noted change. The motion was approved on a Council vote of 19-0, with no nays and no abstentions.

- The Guardianship, Conservatorship, and End of Life Committee advised CSP that Senator Schuitmaker has introduced Senate Bill 466 to have Michigan adopt the Uniform Adult Guardianship and Protective Proceedings Act (UAPPJA), (except the portion covered by replacement legislation we proposed last year and which was adopted). The Senator has also introduced companion SB 465 which will amend EPIC to make the UAPPJA the basis for determining Michigan probate court jurisdiction for guardianship and conservatorship proceedings. Michael McClory advised CSP that his understanding is that AARP’s goal is for all states to deal with jurisdiction issues presented by certain guardianship/conservatorship petitions “uniformly”; however, they apparently were not aware of our prior extensive review of this Act. CSP and Council previously reviewed the UAPPJA, and discussed at length how that act would affect the handling of Michigan guardianships & conservatorships, as well as possible wording revisions to deal with the various issues raised and discussed. CSP is opposed to these bills but does not feel that Council needs to adopt a formal public policy position at this time. However, CSP recommends that Council direct the Guardianship, Conservatorship, and End of Life Committee, or a representative of that Committee, to communicate Council’s concerns to the Bill’s sponsor and the various organizations who have expressed an interest in that Bill. Chairperson Thomas F. Sweeney agrees and instructed the Committee accordingly.

VIII. Standing Committee Reports
A. **Internal Governance**

1. **Budget** – James B. Steward

   James B. Steward discussed some suggestions outlined in the draft proposed budget for FY 2013-2014 (which was previously distributed with the Agenda for the meeting). Mr. Steward discussed several suggested line-item changes. The committee will be reviewing the last fiscal year figures after the final numbers are received from the State Bar and submit its recommendations to Council at the next meeting for approval.

2. **Bylaws** – Nancy H. Welber

   Nancy H. Welber reported that the Committee is continuing work on draft suggestions for Bylaws revisions. In this respect, Judge O’Brien made some suggestions to committee which they are reviewing now. The committee is also continuing work on the concept of “associate members.” Issues include what categories of persons to permit membership as an “associate member;” what dues; how those dues would be collected; how to keep the record of those members; access to ICLE web site; receipt of journal; access to list serve; etc. Discussion about permitting non-lawyer probate registers to become associate members.

   Other issues being reviewed by the Committee include:

   - Clarify that all memberships start at beginning of fiscal year—Oct 1st. So new members don’t vote until the Oct meeting.

   - Possibly change By-laws to allow a vote to amend the By-laws at any regular Council meeting (not just at the annual Section meeting) – this would likely need to be noticed as a special meeting of the Section members, but need to include provision stating where the notice is to be published and how much lead time (at least 15 days prior the meeting?).

3. **Awards** – Douglas A. Mielock

   Need to establish permanent place to locate the Michael Irish award.

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

   Shaheen I. Imami that he is continuing to work on content and is firming up speakers. Some topics being considered: planning for family businesses; fiduciary investment law and breaches; prudent investor rule etc. The Institute will likely utilize the different tracks again, including some topics for new lawyers. They are also looking at having materials available on mp3.

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

   See materials attached hereto as Attachment 2, and the CSP report shown above. Also, Josh reminds everyone that only members of the Section are permitted to be a member of the list serve. He tries to check this periodically, but if anyone notices that a non-section member is still listed, let Josh know so they can be removed as required by our policy.

C. **Legislation and Lobbying**

1. Legislation – Christopher A. Ballard

   Mr. Ballard reported on some new bills of interest to the Section:

   - **SB 565 - 567** would require written disclosure of rights of account holders for joint accounts.
   - **SB 465-466** would adopt the uniform adult guardianship and protective proceedings jurisdiction act.
   - **SB 524 & 525** would subject retirement accounts to garnishment for child support.

   There is also some talk of new right to work legislation to be introduced which could eliminate mandatory membership in the Michigan State Bar, but nothing introduced. The Committee will talk with Rebecca Bechler of Public Affairs Associates to find out more.
2. **Updating Michigan Law – Marguerite Munson Lentz**

Marguerite Munson Lentz reported that the Committee is working on proposed self-directed trust legislation, and the proposed domestic asset protection trust (“DAPT”) legislation is currently on hold.

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

Geoffrey R. Vernon reported that there is nothing new regarding the progress of SB 31-32 regarding insurable interests. The Committee has been in contact with Rebecca Bechler who will try to get some movement. No opposition noted.

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

Nancy H. Welber reported that the Committee is continuing to meet to develop suggestions.

D. **Ethics and Professional Standards**

1. **Ethics – J. David Kerr**

   No Report.

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

   No Report.

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**
Nancy H. Welber mentioned that one issue the committee may want to review relates to the transfer of farm real estate to a trust and possible environment issues – should an environmental assessment be done?

2. Transfer Tax Committee – Lorraine F. New

See tax nugget attached as Attachment 3 re same sex married couples tax returns. Note: State of Michigan rules are different.

3. Charitable and Exempt Organization – Christopher A. Ballard

No Report.

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

Rhonda M. Clark-Kreuer reported that the Committee will liaise with Senator Schuitemaker’s office to express Council’s concerns, as directed by Chairperson Thomas F. Sweeney. The Committee is working on a draft policy statement for Council’s consideration re the Project Wildcat matter.

Ms. Clark-Kreuer also reported that the proposed amendments to HB 4382-4384, regarding changes and clarifications of a guardian’s authority to issue a DNR, have reportedly been withdrawn. Last month, Council voted to oppose those amendments.

G. Liaisons

1. Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips

No Report at present.

2. Business Law Section Liaison – John R. Dresser

No Report.

3. Elder Law Section Liaison – Amy R. Tripp

No Report.

4. Family Law Section Liaison – Patricia M. Ouellette

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.

   No Report.

9. Probate Registers Liaison – Rebecca A. Schnelz
   No Report.

10. SCAO Liaisons – Marlaine C. Teahan, Constance L. Brigman, Rebecca A. Schnelz
    See CSP report to Council, above.

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
    George W. Gregory reported that Treasury is making some proposed changes to hearings procedures, and an “offer in compromise” system, which the Taxation Section is looking over.

IX. Other Business

None.

X. Hot Topics

None.

XI. Adjournment

Meeting adjourned by Thomas F. Sweeney at 11:40 a.m.
Attachment 1
OBJECTION: At the September 21, 2013 CSP meeting, MCR 5.801 was sent back to the subcommittee to consider issues in the bulleted list below. Attached helpful documents include current MCR 5.801; redline with proposed changes; clean copy of 5.801 with proposed changes.


- Should there be a wholesale review of the laundry list? Decided: No; better to retain as much of the original language as possible.

- Should various fiduciaries be added into the laundry list such as guardian, agent and patient advocate? Decided: Yes, but not by specific reference to the statutory definition of fiduciary and an addition of agent and patient advocate. Instead, we deleted the current listing of various fiduciaries and replaced it simply with the word fiduciary. This word, by common law and statute, incorporates the current list as in today's version of the rule and guardian, agent and patient advocate. As well put by Judge Murkowski - we aren't writing "Court rules for dummies." We assume certain things (such as the definition of a fiduciary) are understood by attorneys handling probate appeals.

- Should various subsections of the laundry list use the defined term "governing instrument" instead of the current terms? Decided: Yes and no. Review of subsections follow:
  - (b) no change - since only will, codicils and other testamentary instruments are admitted to probate, no change of these terms to governing instrument is appropriate.
  - (c) no change other than adding in the EPIC cite for definition of governing instrument.
  - (d) changed testamentary instrument or inter vivos trust to governing instrument and added in EPIC cite for definition of governing instrument (MCL 700.1104(k)).
  - (e) no change other than adding in the EPIC cite for what is a governing instrument.
  - (f) did not change reference to trust to governing instrument as this subsection deals with the reformation, termination or modification of a trust - these are direct references to trust code sections and, in our opinion, not appropriate for changing or broadening this subsection to include all governing instruments.

Other Court Rule changes to consider (redlines attached):
- 7.102(9) - no change
- 7.103(A)(2) - delete and renumber remaining subsections
- 7.108(E)(1) and (2) - delete here; (E)(1) moved to MCR 7.208(D); issues in (E)(2) covered by MCR 7.209 and modifications to MCL 600.867.
- 7.109(B)(1)(b) - delete; identical language found in MCR 7.210(B)(1)(b)
- 7.205(B)(5) - no change
- 7.210(A)(1) - delete reference to "in an estate or trust proceeding"
- 7.210(B)(1)(b) - delete reference to "in an estate or trust proceeding"

In our final proposal to the Supreme Court, we will include MCRs 5.802, 7.208 and 7.209 which are attached but which were approved at last month's Council meeting and need no further action now.
Rule 5.801 Appeals to Other Courts

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

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

(1) a final order affecting the rights or interests of a party to a civil action

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

(a) appointing or removing a personal representative, conservator, trustee, or trust protector as referred to in MCL 700.7103(n), or denying such an appointment or removal;
(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;
(c) determining the validity of a governing instrument;
(d) interpreting or construing a testamentary instrument or inter vivos trust;
(e) approving or denying a settlement relating to a governing instrument;
(f) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;
(g) granting or denying a petition to consolidate or divide trusts;
(h) discharging or denying the discharge of a surety on a bond from further liability;
(i) allowing, disallowing, or denying a claim;
(j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;
(k) authorizing or denying the continuation of a business;
(l) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;
(m) authorizing or denying rights of election;
(n) determining heirs, devisees, or beneficiaries;
(o) determining title to or rights or interests in property;
(p) authorizing or denying partition of property;
(q) authorizing or denying specific performance;
(r) ascertaining survivorship of parties;
(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;
(t) granting or denying a petition to determine cy pres;
(u) directing or denying the making or repayment of distributions;
(v) determining or denying a constructive trust;
(w) determining or denying an oral contract relating to a will;
(x) allowing or disallowing an account, fees, or administration expenses;
(y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);
(z) determining or directing payment or apportionment of taxes;
(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;
(bb) assigning residue;
(cc) granting or denying a petition for instructions;
(dd) authorizing disclaimers.

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

(C) Final Orders Appealable to Circuit Court. All final orders not enumerated in subrule (B) are appealable of right to the circuit court. These include, but are not limited to:

(1) a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding;

(2) a final order affecting the rights or interests of a person under the Mental Health Code, except for a final order affecting the rights or interests of a person in the estate of an individual with developmental disabilities.

(D) Interlocutory Orders. An interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the circuit court and only by leave of that court. The circuit court shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.

(E) Transfer of Appeals From Court of Appeals to Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the Court of Appeals, the Court of Appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court.

(F) Appeals to Court of Appeals on Certification by Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the Court of Appeals if the probate court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the Court of Appeals may materially advance the ultimate termination of the litigation. An appeal to the Court of Appeals under this subrule is by leave only under the provisions of MCR 7.205. In lieu of granting leave to appeal, the Court of Appeals may remand the appeal to the circuit court for consideration as on leave granted.
Rule 5.801 Appeals to Other Courts

(A) Right to Appeal. A final order affecting the rights or interests of either a party to a civil action in a probate court or a person in a proceeding aggrieved by an order of the probate court is may appeal as provided by this rule.

(B) Orders Appealable as a matter of right. Orders appealable as a matter of right to the Court of Appeals are defined as and A probate court order is "final" if it qualifies as a final order under MCR 7.202(6)(a), or if it affects with finality the rights or interests of a party or an interested person in the subject matter, including, but not limited to, orders the following:

1. a final order affecting the rights or interests of a party to a civil action
2. a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a trust created under a will. These are defined as and limited to orders resolving the following matters:
   a. appointing or removing a fiduciary personal representative, conservator, trustee, or trust protector as defined in MCL 700.7103(n), or denying such an appointment or removal;
   b. admitting or denying to probate of a will, codicil, or other testamentary instrument;
   c. determining the validity of a governing instrument as defined in MCL 700.1104(k);
   d. interpreting or construing a governing testamentary instrument or inter vivos trust as defined in MCL 700.1104(k);
   e. approving or denying a settlement relating to a governing instrument as defined in MCL 700.1104(k);
   f. reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;
   g. granting or denying a petition to consolidate or divide trusts;
   h. discharging or denying the discharge of a surety on a bond from further liability;
   i. allowing, disallowing, or denying a claim;
   j. assigning, selling, leasing, or encumbering any of the assets of an estate or trust;
   k. authorizing or denying the continuation of a business;
   l. determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;
   m. authorizing or denying rights of election;
   n. determining heirs, devisees, or beneficiaries;
   o. determining title to or rights or interests in property;
   p. authorizing or denying partition of property;
(q) authorizing or denying specific performance;
(r) ascertaining survivorship of parties;
(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;
(t) granting or denying a petition to determine cy pres;
(u) directing or denying the making or repayment of distributions;
(v) determining or denying a constructive trust;
(w) determining or denying an oral contract relating to a will;
(x) allowing or disallowing an account, fees, or administration expenses;
(y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);
(z) determining or directing payment or apportionment of taxes;
(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;
(bb) assigning residue;
(cc) granting or denying a petition for instructions;
(dd) authorizing disclaimers.

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

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

(C) Final Orders Appealable to Circuit Court. All final orders not enumerated in subrule (B) are appealable of right to the circuit court. These include, but are not limited to:

(1) a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding under MCL 700.1101 et seq., or the Mental Health Code, MCL 330.1600 et seq.;

(gg)

(2) a final order affecting the rights or interests of a person in a proceeding that may result in an individual receiving involuntary mental health treatment under the Mental Health Code, MCL 330.1400 et seq., or judicial admission of an individual with a developmental disability to a center under the Mental Health Code, MCL 330.1500 et seq., except for a final order affecting the rights or interests of a person in the estate of an individual with developmental disabilities.

(DB) Interlocutory Orders. An interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the circuit court of appeals and only by leave of that court. The circuit court of appeals shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.
(E) Transfer of Appeals From Court of Appeals to Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the Court of Appeals, the Court of Appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court.

(F) Appeals to Court of Appeals on Certification by Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the Court of Appeals if the probate court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the Court of Appeals may materially advance the ultimate termination of the litigation. An appeal to the Court of Appeals under this subrule is by leave only under the provisions of MCR 7.205. In lieu of granting leave to appeal, the Court of Appeals may remand the appeal to the circuit court for consideration as on leave granted.
Subchapter 5.800 Appeals CLEAN PROPOSED CHANGES
(Committee version 10-7-13)

Rule 5.801 Appeals to Other Courts

(A) Right to Appeal. A final order affecting the rights or interests of either a party to a civil action in a probate court or an interested person in a proceeding in the probate court is appealable as a matter of right to the Court of Appeals. A probate court order is "final" if it qualifies as a final order under MCR 7.202(6)(a), or if it affects with finality the rights or interests of a party or an interested person in the subject matter, including, but not limited to, orders:

(a) appointing or removing a fiduciary, or trust protector as defined in MCL 700.7103(n), or denying such an appointment or removal;
(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;
(c) determining the validity of a governing instrument as defined in MCL 700.1104(k);
(d) interpreting or construing a governing instrument as defined in MCL 700.1104(k);
(e) approving or denying a settlement relating to a governing instrument as defined in MCL 700.1104(k);
(f) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;
(g) granting or denying a petition to consolidate or divide trusts;
(h) discharging or denying the discharge of a surety on a bond from further liability;
(i) allowing, disallowing, or denying a claim;
(j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;
(k) authorizing or denying the continuation of a business;
(l) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;
(m) authorizing or denying rights of election;
(n) determining heirs, devisees, or beneficiaries;
(o) determining title to or rights or interests in property;
(p) authorizing or denying partition of property;
(q) authorizing or denying specific performance;
(r) ascertaining survivorship of parties;
(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;
(t) granting or denying a petition to determine cy pres;
(u) directing or denying the making or repayment of distributions;
(v) determining or denying a constructive trust;
(w) determining or denying an oral contract relating to a will;
(x) allowing or disallowing an account, fees, or administration expenses;
(y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);
(z) determining or directing payment or apportionment of taxes;
(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;
(bb) assigning residue;
(cc) granting or denying a petition for instructions;
(dd) authorizing disclaimers.
(ee) allowing or disallowing a trustee to change the principal place of a trust’s administration;
(ff) affecting the rights and interests of an adult or a minor in a guardianship proceeding under MCL 700.1101 et seq., or the Mental Health Code, MCL 330.1600 et seq.;
(gg) affecting the rights or interests of a person in a proceeding that may result in an individual receiving involuntary mental health treatment under the Mental Health Code, MCL 330.1400 et seq., or judicial admission of an individual with a developmental disability to a center under the Mental Health Code, MCL 330.1500 et seq.

(B) Interlocutory Orders. An interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the Court of Appeals and only by leave of that court. The Court of Appeals shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.
Action needed to approve these other Michigan Court Rule clean up changes needed for Chapter 7, Appellate Rules, to accommodate the goal of having all probate appeals heard by the Court of Appeals.

Rule 7.102 Definitions

For purposes of this subchapter:

(1-9) *Unchanged* but for review, see (9) that includes probate court.

(9) “trial court” means the district, probate, or municipal court from which the “appeal” is taken.

Rule 7.103 Appellate Jurisdiction of the Circuit Court

(A) Appeal of Right. The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

1. a final judgment or final order of a district or municipal court, except a judgment based on a plea of guilty or nolo contendere;
2. a final order of a probate court under MCR 5.801(C);
3. a final order or decision of an agency governed by the Administrative Procedures Act, MCL 24.201 et seq.; and
4. a final order or decision of an agency from which an appeal of right to the circuit court is provided by law.

(B) Unchanged.

Rule 7.108 Stay of Proceedings; Bond; Review

(A-D) Unchanged.

(E) Probate Actions:

1. The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.
2. A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).
Rule 7.109 Record on Appeal

(A) Unchanged.

(B) Transcript.

(1) Appellant’s Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Unless otherwise provided by circuit court order or this subrule, the appellant shall order the full transcript of testimony and other proceedings in the trial court or agency. Under MCR 7.104(D)(2), a party must serve a copy of any request for transcript preparation on the opposing party and file a copy with the circuit court.

(b) In an appeal from probate court, only that portion of the transcript concerning the order appealed need be filed. The appellee may file additional portions of the transcript.

(be) On the appellant’s motion, with notice to the appellee, the trial court or agency may order that no transcript or some portion less than the full transcript be included in the record on appeal. The motion must be filed within the time required for filing an appeal, and, if the motion is granted, the appellee may file any portions of the transcript omitted by the appellant.

(ce) The parties may stipulate that no transcript or some portion less than the full transcript be filed.

(de) The parties may agree on a statement of facts without procuring the transcript and the statement signed by the parties may be filed with the trial court or agency and sent as the record of testimony in the action.

Remainder of 7.109 unchanged.
Rule 7.205 Application for Leave to Appeal

Rule remains completely unchanged but note (B)(5), below.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(5) if the appeal is from a probate court order, 5 copies of the probate court’s certification of the issue, as required by law;

Rule 7.210 Record on Appeal

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. In an appeal from probate court in an estate or trust proceeding, only the order appealed from and those petitions, opinions, and other documents pertaining to it need be included.

(2) – (4) Unchanged.

(B) Transcript.

(1) Appellant’s Duties; Orders; Stipulations.

(a) Unchanged.

(b) In an appeal from probate court in an estate or trust proceeding, only that portion of the transcript concerning the order appealed from need be filed. The appellee may file additional portions of the transcript.

(c) – (e) Unchanged.

(C) – (I) Unchanged.
MCRs 5.802, 7.208 and 7.209 were approved at the Council meeting on September 21, 2013 but are listed below for convenience in reviewing all rules that will be changed.

MCR 5.802 Appellate Procedure; Stays Pending Appeal

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

(B) Record.

(1) An appeal from the probate court is on the papers filed and a written transcript of the proceedings in the probate court or on a record settled and agreed to by the parties and approved by the court.

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

(C) Stays Pending Appeals. An order removing or appointing a fiduciary; appointing a special personal representative or a special fiduciary; granting a new trial or rehearing; granting an allowance to the spouse or children of a decedent; granting permission to sue on a fiduciary’s bond; or suspending a fiduciary and appointing a special fiduciary, is not stayed pending appeal unless ordered by the court on motion for good cause.
MCR 7.208 Authority of Court or Tribunal Appealed From

(A) Limitations. After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

(1) by order of the Court of Appeals,

(2) by stipulation of the parties,

(3) after a decision on the merits in an action in which a preliminary injunction was granted, or

(4) as otherwise provided by law.

In a criminal case, the filing of the claim of appeal does not preclude the trial court from granting a timely motion under subrule (B).

(B) Postjudgment Motions in Criminal Cases.

(1) No later than 56 days after the commencement of the time for filing the defendant-appellant’s brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence.

(2) A copy of the motion must be filed with the Court of Appeals and served on the prosecuting attorney.

(3) The trial court shall hear and decide the motion within 28 days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment.

(4) Within 28 days of the trial court’s decision, the court reporter or recorder must file with the trial court clerk the transcript of any hearing held.

(5) If the motion is granted in whole or in part,

(a) the defendant must file the appellant’s brief or a notice of withdrawal of the appeal within 42 days after the trial court’s decision or after the filing of the transcript of any hearing held, whichever is later;

(b) the prosecuting attorney may file a cross appeal in the manner provided by MCR 7.207 within 21 days after the trial court’s decision. If the defendant has withdrawn the appeal before the prosecuting attorney has filed a cross appeal, the prosecuting attorney may file a claim of appeal or an application for leave to appeal within the 21-day period.

(6) If the motion is denied, defendant-appellant’s brief must be filed within 42 days after the decision by the trial court, or the filing of the transcript of any trial court hearing, whichever is later.

(C) Correction of Defects. Except as otherwise provided by rule and until the record is filed in the Court of Appeals, the trial court or tribunal has jurisdiction
(1) to grant further time to do, properly perform, or correct any act in the trial court or tribunal in connection with the appeal that was omitted or insufficiently done, other than to extend the time for filing a claim of appeal or for paying the entry fee or to allow delayed appeal;

(2) to correct any part of the record to be transmitted to the Court of Appeals, but only after notice to the parties and an opportunity for a hearing on the proposed correction.

After the record is filed in the Court of Appeals, the trial court may correct the record only with leave of the Court of Appeals.

(D) Probate Proceedings and Civil Actions. The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding or civil action from which an appeal was filed.

(ED) Supervision of Property. When an appeal is filed while property is being held for conservation or management under the order or judgment of the trial court, that court retains jurisdiction over the property pending the outcome of the appeal, except as the Court of Appeals otherwise orders.

(EE) Temporary Orders. A trial court order entered before final judgment concerning custody, control, and management of property; temporary alimony, support or custody of a minor child, or expenses in a domestic relations action; or a preliminary injunction, remains in effect and is enforceable in the trial court, pending interlocutory appeal, except as the trial court or the Court of Appeals may otherwise order.

(GF) Stays and Bonds. The trial court retains authority over stay and bond matters, except as the Court of Appeals otherwise orders.

(HG) Matters Pertaining to Appointment of Attorney. Throughout the pendency of an appeal involving an indigent person, the trial court retains authority to appoint, remove, or replace an attorney except as the Court of Appeals otherwise orders.

(II) Acts by Other Judges. Whenever the trial judge who has heard a case dies, resigns, or vacates office, or is unable to perform any act necessary to an appeal of a case within the time prescribed by law or these rules, another judge of the same court, or if another judge of that court is unavailable, another judge assigned by the state court administrator, may perform the acts necessary to the review process. Whenever a case is heard by a judge assigned from another court, the judicial acts necessary in the preparation of a record for appeal may be performed, with consent of the parties, by a judge of the court in which the case was heard.

(JI) Attorney Fees and Costs. The trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise.
MCR 7.209 Bond; Stay of Proceedings

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614(D) or MCL 600.867, an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a case in which a party has appealed a trial court’s denial of the party’s claim of governmental immunity.

(2) A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court.

(3) A motion for bond or a stay pending appeal filed in the Court of Appeals must include a copy of the trial court’s opinion and order, and a copy of the transcript of the hearing on the motion in the trial court.

(B) Responsibility for Setting Amount of Bond in Trial Court.

(1) Civil Actions and Probate Proceedings. Unless determined by law, the dollar amount of a stay or appeal bond in a civil action or probate proceeding must be set by the trial court in an amount adequate to protect the opposite party.

(2) Criminal Cases. In a criminal case the granting of bond pending appeal and the amount of it are within the discretion of the trial court, subject to applicable law and rules. Bond must be sufficient to guarantee the appearance of the defendant. Unless bond pending appeal is allowed and a bond is filed with the trial court, a criminal judgment may be executed immediately, even though the time for taking an appeal has not elapsed.

(C) Amendment of Bond. On motion, the trial court may order an additional or different bond, set the amount, and approve or require different sureties.

(D) Review by Court of Appeals. Except as otherwise provided by rule or law, on motion filed in a case pending before it, the Court of Appeals may amend the amount of bond set by the trial court, order an additional or different bond and set the amount, or require different or additional sureties. The Court of Appeals may also refer a bond or bail matter to the court from which the appeal is taken. The Court of Appeals may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just.

(E) Stay of Proceedings by Trial Court.

(1) Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires.
(a) When the stay is sought before an appeal is filed and a bond is required, the party seeking the stay shall file a bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to

(i) perform and satisfy the judgment or order stayed if it is not set aside or reversed; and

(ii) prosecute to completion any appeal subsequently taken from the judgment or order stayed and perform and satisfy the judgment or order entered by the Court of Appeals or Supreme Court.

(b) If a stay is sought after an appeal is filed, any bond must meet the requirements set forth in subrule 7.209(F).

(2) If a stay bond filed under this subrule substantially meets the requirements of subrule (F), it will be a sufficient bond to stay proceedings pending disposition of an appeal subsequently filed.

(3) The stay order must conform to any condition expressly required by the statute authorizing review.

(4) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings shall be stayed during the pendency of the appeal, unless the Court of Appeals directs otherwise.

(F) Conditions of Appeal Bond.

(1) Civil Actions and Probate Proceedings. In a bond filed for stay pending appeal in a civil action or probate proceeding, the appellant shall promise in writing:

(a) to prosecute the appeal to decision;

(b) to perform or satisfy a judgment or order of the Court of Appeals or the Supreme Court;

(c) to perform or satisfy the judgment or order appealed from, if the appeal is dismissed;

(d) in an action involving the possession of land or judgment for foreclosure of a mortgage or land contract, to pay the appellee the damages which may result from the stay of proceedings; and

(e) to do any other act which is expressly required in the statute authorizing appeal.

(2) Criminal Cases. A criminal defendant for whom bond pending appeal is allowed after conviction shall promise in writing:

(a) to prosecute the appeal to decision;

(b) if the sentence is one of incarceration, to surrender himself or herself to the sheriff of the county in which he or she was convicted or other custodial authority if the sentence is affirmed on appeal or if the appeal is dismissed;

(c) if the judgment or order appealed is other than a sentence of incarceration, to perform and comply with the order of the trial court if it is affirmed on appeal or if the appeal is dismissed;
(d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial is allowed;

(e) to remain in Michigan unless the court gives written approval to leave; and

(f) to notify the trial court clerk of a change of address.

(G) Sureties and Filing of Bond. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court which entered the order or judgment to be stayed.

(1) Civil Actions and Probate Proceedings. A bond in a civil action or probate proceeding need not be approved by a court or clerk before filing but is subject to the objection procedure provided in MCR 3.604.

(2) Criminal Cases. A criminal defendant filing a bond after conviction shall give notice to the county prosecuting attorney of the time and place the bond will be filed. The bond is subject to the objection procedure provided in MCR 3.604.

(H) Stay of Execution.

(1) If a bond is filed before execution issues, and notice is given to the officer having authority to issue execution, execution is stayed. If the bond is filed after the issuance but before execution, and notice is given to the officer holding it, execution is suspended.

(2) The Court of Appeals may stay or terminate a stay of any order or judgment of a lower court or tribunal on just terms.

(3) When the amount of the judgment is more than $1000 over the insurance policy coverage or surety obligation, then the policy or obligation does not qualify to stay execution under MCL 500.3036 on the portion of the judgment in excess of the policy or bond limits. Stay pending appeal may be achieved by complying with that statute and by filing a bond in an additional amount adequate to protect the opposite party or by obtaining a trial court or Court of Appeals order waiving the additional bond.

(4) A statute exempting a municipality or other governmental agency from filing a bond to stay execution supersedes the requirements of this rule.

(I) Ex Parte Stay. Whenever an ex parte stay of proceedings is necessary to allow a motion in either the trial court or the Court of Appeals, the court before which the motion will be heard may grant an ex parte stay for that purpose. Service of a copy of the order, with a copy of the motion, any affidavits on which the motion is based, and notice of hearing on the motion, shall operate as a stay of proceedings until the court rules on the motion unless the court supersedes or sets aside the order in the interim. Proceedings may not be stayed for longer than necessary to enable the party to make the motion according to the practice of the court, and if made, until the decision of the court.
ATTACHMENT 2
Electronics Communications Committee Report
Probate and Estate Planning Council
October 2013

We propose that the council adopt the webpage policy and mailing list policy that are attached to this report. We also believe that a description of good list behavior be disseminated, but it should not be confused with a description of events that might lead to sanctions.

We propose that the mailing list policy be disseminated monthly on the mailing list. New members may join at any time during the year.
1. Participation in the Probate and Estate Planning section mailing list is a normal perquisite of section membership. Anyone receiving these postings who is not a section member should unsubscribe.

2. Continued participating in the section mailing list constitutes implied consent to the conditions described in this policy.

3. Participation may be suspended for inappropriate conduct. The suspension may be for a definite period of time or indefinite. Indefinite suspensions continue until removed. In certain situations, rather than suspension, participation can be subjected to moderation. That means that any posting from the member in question must be approved by the administrator before it is released to the general membership on the mailing list. A member is not entitled to any refund of section dues if an action to limit participation is taken.

4. Decisions to limit participation may be made by the State Bar of Michigan. The Probate and Estate Planning section is governed by the State Bar itself. The Chair may appoint an individual or committee to make disciplinary decisions on behalf of the section council. The decision may be appealed to the section council.

5. There is no exhaustive list of what constitutes inappropriate conduct on the section mailing list. Postings which will result in actions include, but are not limited to:
   - Actions that violate state or federal laws or that violate court rules or other rules governing the State Bar
   - Personal attacks
   - Using the list as a form of marketing to members
   - Participation by someone other than a section member
   - Excessive religious, political, or off-topic remarks.

There is no requirement that members first be warned before an action to limit participation is made, but warnings before action will normally be expected for actions based on excessive religious, political, or off-topic remarks.
Probate Web Page Policy

The Electronic Communications Committee and the Secretary are charged with reviewing and maintaining the section web pages on the www.michbar.org/probate site. Obviously obsolete material should be regularly removed. Information intended to remain current, such as material listed under the Publications tab, should be reviewed regularly, generally at least once per year. Archival material, such as minutes of previous meetings and the Michigan Probate and Estate Planning Journal do not need such reviews.

All material on the web page should contain a date of last review, except for (1) archival material internally dated such as minutes, (2) the Michigan Probate and Estate Planning Journal, and (3) announcements of meetings and seminars.

All material that expresses opinions should contain a disclaimer that the opinions are not necessarily those of the Probate and Estate Planning Section or the State Bar of Michigan. Such a statement is already included in the Michigan Probate and Estate Planning Journal. There is no need for a disclaimer in the minutes because the minutes reflect which policies have been adopted by the section council.

The section seeks to maintain comity with other State Bar sections. To further this goal, if a publication on the web page is relevant for another section, the contents of the publication should be presented to the other section before initial publication and before each regular review.
ATTACHMENT 3
“Married” After Windsor: Federal and State

Shortly after the U.S. Supreme Court struck down Section 2 of the Defense of Marriage Act (DOMA), the IRS announced revised guidance (Revenue Ruling 2013-17 2013-38 IRB) to reflect the decision, which reflects the holdings in the Windsor [Edith Schlain Windsor v. United States, 833 F.Supp.2d 394 (S.D.N.Y. 2012), aff’d 699 F.3d 169 (2nd Cir. Oct. 18, 2012), aff’d 570 U.S. __ (June 26, 2013)] and Perry [ Hollingsworth v. Perry, (formerly Perry v. Schwarzenegger), 790 F. Supp.2d 1149 (N.D. Cal. 2010), 591 F.3d 114 (9th Cir. 2010 and 2012), aff’d 570 U.S. __ (June 26. 2013).] cases. This guidance includes:

1. For federal tax purposes, the IRS looks to state or foreign law to determine whether individuals are married. A marriage of same sex spouses is recognized if the state of marriage authorizes the marriage of two individuals of the same sex, even if the married couple resides in a jurisdiction not recognizing the validity of same-sex marriage.
2. For the 2013 tax year and thereafter, same-sex spouses must file as married filing separately or jointly.
3. For tax years 2012 and all prior years, same-sex spouses who filed an original tax return on or before 9/16/2013, the effective date of Revenue Ruling 2013-17, may choose, but are not required to amend their federal tax return to file a married filing separately or jointly, as long as the period of limitations for amending the return has not expired.
4. A taxpayer may generally file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. Claims for refund of income tax paid for health coverage for a same-sex spouse may be filed during the open period. Similarly, claims for refund may be made for social security taxes and Medicare taxes paid on the benefits.

The State of Michigan does not recognize same-sex marriage on legislative and constitutional grounds, and will not accept the numbers from a federal return filed as married from a same-sex couple. Instead, there will be a schedule reconciling Federal and Michigan returns.

Submitted by Lorraine F. New
Chair, Transfer Tax Committee