

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

**October 10, 2016
Mackinac Island, Michigan**

Minutes

I. Call to Order

The Chair of the Section, James Steward, called the meeting to order at 10:43 am.

II. Attendance

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

James B. Steward
Marlaine C. Teahan
Marguerite Munson Lentz
David P. Lucas
Kathleen M. Goetsch
Hon. Michael L. Jaconette
Mark E. Kellogg
Robert C. Labe
Michael G. Lichterman
Katie Lynwood
Raj A. Malviya
Richard C. Mills
Melisa M.W. Mysliwicz
Lorraine F. New
Nazeen H. Syed
Geoffrey R. Vernon
Nancy H. Welber

A total of 17 council members and officers were present, representing a quorum.

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

Christopher A. Ballard
George F. Bearup
Christopher J. Caldwell
Rhonda M. Clark-Kreuer
Nathan R. Piwowarski
David L.J.M. Skidmore

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

None.

D. **The following ex-officio members of the Council were in attendance:**

Douglas G. Chalgian
George W. Gregory
Shaheen I. Imami
Robert B. Joslyn
Nancy L. Little
Douglas A. Mielock
Harold Schuitmaker

E. **Others in attendance:**

Jeanne Murphy
Amy Rombyer Tripp
James P. Spica
Joe Viviano
David Lentz

III. **Minutes of the September 10, 2016 Meeting of the Council**

The minutes of the September 10, 2016, Meeting of the Council were attached to the combined Agenda for this meeting posted on the Section's web page prior to the meeting. One change was noted to the minutes. Ms. Lentz moved that the minutes be approved as changed. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions. The corrected minutes will be posted to the Section's web page.

IV. **Treasurer's Report – David P. Lucas**

Mr. Lucas' Treasurer's Report was attached to the combined Agenda. The Hearts and Flowers fund currently has \$600. Mr. Lucas requested that Council members make contributions of \$35. Mr. Lucas reminded Council members to submit their reimbursement forms to him as soon as possible, as they must be submitted to the State Bar within 45 days.

V. **Chairperson's Report – James Steward**

Mr. Steward's written Chair's report was attached to the Agenda for the meeting. Included was a proposed publishing agreement with ICLE to extend the present arrangement until March 31, 2019. A motion was made to approve the publishing agreement, which was seconded. The motion was approved with no nays and no abstentions.

Included with the Agenda was a tentative list of committee assignments. Please let Mr. Steward know of any changes.

George Gregory reported that Richard Siriani informed him that although he was not the State Bar liaison to the Section last year, he is now the State Bar liaison to the Section.

VI. Report of the Committee on Special Projects – Geoffrey R. Vernon

Mr. Vernon reported on recommendations made by CSP. CSP recommended that the Council approve proposals to amend MCL 700.2502, 700.2504, and 700.3406. Mr. Vernon made the motion. After discussion, the motion was approved with 13 in favor, 4 opposed, and no abstentions.

CSP also recommended that the Council approve the addition of proposed MCL 700.2810 and 700.2811. Mr. Vernon made the motion. After discussion, the motion was approved with 16 in favor, 0 opposed, and 1 abstention.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – Christopher A. Ballard

Mr. Lucas gave the report. A proposed budget was included with the Agenda for the meeting. A final budget will be presented for a vote at a future meeting.

2. Bylaws – Nancy H. Welber—no report.

3. Awards – Amy N. Morrissey—no report.

4. Planning – Marlaine C. Teahan—no report.

5. Nominating – Thomas W. Sweeney—no report.

6. Annual Meeting – Marlaine C. Teahan—no report.

B. Legislation and Lobbying

1. Legislative Analysis and Monitoring Committee –no report.

2. Legislation Development & Drafting Committee – Nathan R. Piwowarski

Mr. Vernon made the report. The Section's lobbyist thinks that the qualified dispositions in trusts act may be passed this year.

Mr. Vernon raised the issue of a legislative proposal to overrule the decision in the *Jajuga* case. The proposed legislative change would permit a testator to exclude a child from receiving any statutory allowances, including a minor child. Judge Jaconette will raise the proposal with the probate judges.

Since the Michigan Supreme Court refused to hear the *Perry v Cotton* case, Mr. Vernon will be

adding to the list of proposed EPIC/MTC changes a statutory change to overrule the case.

One of the proposed changes to EPIC/MTC was to define probable cause in connection with no-contest clauses or to provide a procedure for the court to determine if there is probable cause to contest a document (and therefore void the effect of a no-contest clause). After discussion, the consensus was not to draft proposed legislation to either define probable cause or change the provisions in EPIC/MTC dealing with no-contest clauses.

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

Mr. Vernon reported that he and his committee are continuing discussions with respect to SB 1010 (which would exonerate trustees of life insurance trusts). Representatives of the insurance industry have voiced objections.

4. Assisted Reproductive Technology Ad Hoc Committee – Nancy H. Welber

The committee's proposals presented to CSP were approved by the Council earlier in the meeting. Discussion of proposed changes to EPIC for definitions of "record" and "sign" has been tabled.

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L.J.M. Skidmore—no report.
2. Probate Institute – Marguerite Munson Lentz

Ms. Lentz reported that the dates for the 2017 Annual Probate Institute are May 18-20, 2017 and June 16-17, 2017.

3. State Bar and Section Journals – Richard C. Mills

Mr. Mills reported that the next issue of the Journal is on track. Mr. Spica requested that endnotes for articles be printed as footnotes instead. Ms. Little will discuss that change with the ICLE editor.

4. Citizens Outreach – Melisa M.W. Mysliwicz

Ms. Mysliwicz reported that the online versions of the pamphlets are complete and ready to go live when the publication agreement is finalized. Drafts of the print versions are complete, but the committee is waiting for the State Bar to send us final print drafts to review and approve. The committee is negotiating the terms of the publication agreement. Ms. Mysliwicz gave a brief report of the print brochures that were sold at the Annual Probate Institute and at the September probate council meeting. The committee is discussing ways of selling the remaining print brochures. It appears that a few checks for brochures sold at the Annual Probate Institute in Acme have been misplaced; the committee is investigating. A more detailed report will be presented at a later Council meeting.

5. Electronic Communications – Michael G. Lichterman—no report.
6. Membership – Joseph J. Viviano

Mr. Viviano reported that the committee will focus on recruitment of new members and retention of existing members. Mr. Viviano will give a detailed report of the Section membership at a later meeting.

D. Ethics and Professional Standards

1. Ethics & Unauthorized Practice of Law– Katie Lynwood

Ms. Lynwood reported on the proposed change to MCR 9.119. Ms. Lynwood led a discussion as to whether the Council wanted to comment on the rule change. No motion was made to comment on the rule.

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. Kellogg reported on continuing efforts to revise MCL 211.27a with respect to uncapping. It does not appear that any provision will be passed this legislative session. Next year, when the new legislative session starts, the committee would like to start over with a broader proposal.

2. Tax Committee – Lorraine F. New

Mr. Malviya gave the report summarizing his written report (see Attachment A).

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

A. 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

Ms. Tripp reported that the Special Needs Fairness Act, which was introduced in Congress in

2015, has been approved by the House, and has moved to the Senate. This bill, if enacted, would allow a special needs individual to create his or her own special needs trust.

Ms. Tripp also reported that Michigan should soon have its enabling legislation for ABLE accounts.

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

Judge Jaconette thanked Ms. Welber for preparing an outline regarding Assisted Reproductive Technology legislation.

9. Probate Registers Liaison – Rebecca A. Schnelz—no report.
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—no report.
12. State Bar Liaison – Richard J. Siriani—no report.
13. Taxation Section Liaison – George W. Gregory

Mr. Gregory reported that the Taxation Section is discussing their strategic plan. Mr. Gregory encouraged Probate & Estate Planning Section members to attend the meetings and events of the Trusts and Estates Committee of the Taxation Section.

The next Tax Conference will be May 25, 2017, at the Inn at St. John's.

IX. **Other Business**

X. **Hot Topics**

XI. **Adjournment**

The meeting was adjourned by Chairperson James Steward at 12:04 pm.

ATTACHMENT A

Tax Nuggets: Probate & Estate Planning Council: Transfer Tax Committee

October 10, 2016

By Raj A. Malviya

1. Estate of Heller, 147 T.C. 11 (2016) : Estate Tax Deduction for Losses in Madoff Ponzi Scheme

a. Facts:

- i. James Heller died on Jan. 31, 2008. His estate held 99% interest in James Heller Family, LLC, only asset of which was account with Bernard L. Madoff Investment Securities.
- ii. On 706, value of 99% interest reported was \$16,560,990. Distributions made to estate over 9 month administration period.
- iii. Following distributions, Madoff arrested and account became worthless.
- iv. Estate claimed theft loss deduction under Section 2054 for \$5,175,990.

b. Issue:

- i. IRS didn't dispute that a loss occurred. Victims of Madoff's actions constituted theft.
- ii. IRC 2054 is clear it allows deduction to estate for theft.
- iii. Proximity at issue; IRS disputed deduction on ground that LLC, not estate, was victim.

c. Ruling and Analysis:

- i. Court decided in favor of estate, holding IRS view of 2054 language was overly narrow.
- ii. Section 2054 states that the estate is entitled to a deduction for losses "arising from fires, storms, shipwrecks, or other casualties, or from theft...."
- iii. Court gave plain English reading of term "arise," citing Merriam-Webster's Collegiate Dictionary, in which word is "generally defined as 'to originate from a source'."
- iv. This led Court to set standard for proximity as follows: "Pursuant to the phrase 'arising from' in [S]ection 2054, **the estate is entitled to a deduction if there is a sufficient nexus between the theft and the estate's loss.**" Applying this standard to the facts, **Court found that because there was a "direct and indisputable" nexus between the theft and the loss, the estate was entitled to the deduction.**

d. Unanswered Questions:

- i. *Direct ownership required?* Must estate actually hold direct title to asset suffering the loss or is tracing a sufficient way to get to the result? (Court seemed to inject policy into decision, explaining that estate tax deductions designed to ensure 'that the tax is imposed on the net estate, which is really what of value passes from the dead to the living.'. The theft extinguished the value of the estate's JHF interest, thereby diminishing the value of property available to James Heller's heirs. Thus, the estate's entitlement to a [S]ection 2054 deduction is consistent with the overall statutory scheme of the estate tax.")
- ii. *Non-probate assets?* Does IRC 2054 theft deduction apply to non-probate assets? For example, if the Heller Family LLC was owned by Heller's revocable living trust, would the deduction still apply? (Both the IRC and the accompanying Treasury Regulation state that losses are only allowed for those incurred "during the settlement of the estate..."The term "during" references a duration concept and doesn't require loss be incurred as part of the probate estate. Further, the term "estate" is never limited to the probate estate under the IRC or accompanying Treasury Regulation.)
- iii. *Different treatment for income tax deduction.* IRS will give capital loss (not theft loss) if taxpayer suffered theft/fraud loss by investment through promoter. Heller decision is inconsistent with this position. Also, consider 642(g) where estate can take income tax deduction for 2053 and 2054 expenses instead of estate tax deduction. How will Heller decision impact this? And for revocable living trusts at death, a 645 election can be taken to treat trust property as part of probate estate for income tax purposes.

2. Revenue Procedure 2016-49: Guidance on Unnecessary QTIP Elections

- a. Overview:
 - i. Rev. Proc. 2016-49 was issued on September 27, 2016. Effective for QTIP elections covered in the Rev. Proc.
 - ii. IRS has confirmed that both QTIP election and portability election may be made on the same estate tax return, thereby maximizing exemption planning and flexibility.
 - iii. New guidance was issued to clarify gray area posed by Rev. Proc. 2001-38 whereby a QTIP election could possibly be void where the executor also makes a portability election.
- b. Rev. Proc. 2001-38:
 - i. Recall Rev. Proc. 2001-38 applied to situations where QTIP election was made but was unnecessary to eliminate the estate tax liability; the IRS would disregard QTIP election and treat the election as null and void.
 - ii. This Rev. Proc. was issued to help taxpayers and eliminate estate tax or other related tax consequences at surviving spouse's death when estate received no benefit from an unnecessary QTIP election.
- c. Evolution of Estate Planning:
 - i. With higher federal estate tax exemptions and availability of portability election (i.e., the ability for a surviving spouse to utilize the deceased spouse's unused exclusion amount (DSUE)), income tax planning has become an equally important focus in estate planning.
 - ii. Planning involves preserving estate tax exemption of first spouse to die, and making QTIP election to strategically shift assets that would normally be sheltered by federal estate tax exemption (in family or credit shelter trust) into surviving spouse's taxable estate for a second basis adjustment at that death.
 - iii. Some practitioners were concerned that IRS would apply Rev. Proc. 2001-38 to void a QTIP election that wasn't necessary to eliminate estate tax liability at first death.
- d. Takeaways of Rev. Proc. 2016-49 Guidance:
 - i. Modifies and supersedes Rev. Proc 2001-38 by confirming the procedures by which IRS will continue to disregard a QTIP election, but excluding from its scope "unnecessary" QTIP elections made by estates that also elected portability.
 - ii. Rev. Proc. 2016-49 treats as void QTIP elections that satisfy three requirements, one of which is that the executor of estate of first spouse to die didn't make (nor was considered to have made) portability election under IRC 2010(c)(5)(A) and corresponding regs.
 - iii. Provides clarity with respect to utilizing portability and QTIP trust to provide planning benefits to surviving spouse without fear that QTIP election may be disregarded by IRS.

3. Prop Regulations on IRC 2704: Update from Cathy Hughes @ABA Fall Joint RPTE/Tax Section Meeting

- a. Purpose of Proposed Regs project was to make 2701 and 2704 applicable again. Changes in state law now make it too easy to get around 2704b; narrowing regulatory exceptions to 2704b.
- b. Uproar to proposed Regs. has been "surprising" to the government. "We thought we were perfectly clear."
- c. There is no deemed put right per Hughes. She said this twice in panel discussions. "Nothing in the proposed regs is meant to completely do away with minority discounts".
- d. "Anyone who thinks you'll have final regulations on 2704 by year end has never worked at treasury!"
- e. Treasury going to take comments seriously/consider them fully. No way will issue them quickly.
- f. See Tax Notes (October 3, 2016) by Matthew R. Madara that addressed Hughes comments.