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

September 10, 2016
Lansing, Michigan

Minutes

I. Call to Order

The Chair of the Section, James Steward, called the meeting to order at 10:29 a.m.

II. Attendance

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

James B. Steward
Marlaine C. Teahan
Marguerite Munson Lentz
Christopher A. Ballard
George F. Bearup
Constance L. Brigman
Christopher J. Caldwell
Rhonda M. Clark-Kreuer
Mark E. Kellogg
Michael G. Lichterman
David P. Lucas
Raj A. Malviya
Richard C. Mills
Lorraine F. New
Geoffrey R. Vernon

A total of 15 council members and officers were present, representing a quorum.

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

Susan M. Allan
Kathleen M. Goetsch
Hon. Michael L. Jaconette
Katie Lynwood
Michele C. Marquardt
David L.J.M. Skidmore
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
Nancy L. Little
Douglas A. Mielock

E. **Others in attendance:**

W. Josh Ard
John R. Dresser
Jeanne Murphy
Patricia Ouellette
Ryan Bourjaily
Melisa Mysliwiec
Nathan Piwowarski
Kurt A. Olson
Rob Labe
Justine M. Sylvester
Christine Savage
Jessica Schilling Brigman
Neal Nusholtz
Rose Scheid
James P. Spica
Sueann T. Mitchell

III. Minutes of the June 4, 2016 Meeting of the Council

The minutes of the June 4, 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. Ms. Lentz moved that the minutes be approved. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions.

IV. Treasurer's Report – Christopher Ballard

Mr. Ballard's Treasurer's Report was attached to the combined Agenda. He reported that the Section currently has a surplus. The fund balance as of August 31, 2016, is approximately $235,000, of which $ 75,000 is held in the amicus fund.

V. Chairperson's Report – James Steward

- Mr. Steward submitted a written report, which was attached to the combined Agenda. He reported that the officers are in the process of revising the biennial plan. A draft of the biennial plan was attached to Mr. Steward's report. If anyone has suggested changes to the biennial plan, please let one of the officers know.

Mr. Steward hopes to have the revised biennial plan for the October meeting.

- Mr. Steward's report also included a list of proposed changes to EPIC/MTC. If anyone wants to help, please contact Geoffrey Vernon or any of the officers. If anyone has suggestions for changes to the list, please let Mr. Vernon or any of the officers know.

- Mr. Steward received a request from the Michigan Young Lawyers Section for the Probate Section to act as an additional sponsor for ABA Young Lawyers conference in Detroit. Raj Malviya explained that the Michigan Young Lawyers Section is helping with the ABA Young Lawyers Conference. The ABA Young Lawyers section have four conferences a year. Their conference in Detroit will be held October 20-26, 2016 at the Book Cadillac. After discussion, Mr. Malviya moved to have the Council approve an expenditure, from the Membership Committee's budget, of a minimum of $250 and up to a maximum of $1500, in the discretion of the committee, for the Probate and Estate Planning Section to be a sponsor of the ABA Young Lawyers Conference in Detroit. The motion was seconded. The motion was approved on a voice vote, with no nays or abstentions.

- Mr. Steward is restructuring the Council's committees. If anyone wants to be on a committee, or switch committees, please tell one of the officers.

- The October meeting will be held on Mackinac Island at the Grand Hotel. The Chair's Dinner will be Sunday Oct 9th, and the CSP and Council meetings will be held on Monday Oct 10th. A reminder email will be sent. All outgoing members of the Council are also invited to attend.

- Mr. Steward reminded everyone that the Section has a lobbyist. The lobbyist's report on lobbying activities was attached to the combined Agenda.

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

Mr. Lucas reported on two recommendations from CSP to the Council.

CSP recommended that the Council support HB 5638 and HB 5704 as modified by the Committee on Legislation Development and Drafting, with one additional language modification made at CSP (changing the phrase "less than $10" to "$10 or less"), and that the Council authorize the Committee make further non substantive changes. Mr. Lucas moved that the Council adopt CSP's recommendation. The motion was approved by the Council unanimously with 15 voting yes, and no nays and no abstentions.

CSP recommended that Council approve the changes to EPIC proposed by the Assisted Reproductive Technology Ad Hoc committee dealing with assisted reproductive technology, including the notice provisions. These provisions were in the CSP materials attached to the combined Agenda, except that this motion did not include proposed changes to conform Michigan law to Sections 1-201, 2-502, 2-504, 2-805, 2-806, and 3-406 of the 2008 version of

the UPC. The excluded provisions will be presented to the Council for approval at a later time. Mr. Lucas moved that the Council adopt CSP's recommendation. The motion was approved by the Council unanimously with 15 voting yes, and no nays and no abstentions.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – Marguerite Munson Lentz

Ms. Lentz reported that the Budget Committee will be meeting next week to begin work on the budget for the upcoming fiscal year.

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—no report.

Mr. Steward reported that the next annual meeting will be September 9th, 2017.

Ms. Teahan is investigating two different venues for the October 2017 Chair's Dinner: Broad Art Museum (on the MSU campus) and the Michigan Historical Museum. The caterer will be Copper Kettle Catering. The October 2017 Probate Council Meeting will be at the University Club.

B. Legislation and Lobbying

1. Legislative Analysis and Monitoring Committee – Michele C. Marquardt—no report.

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

Mr. Vernon requested that persons working on parts of the EPIC/MTC changes to send him their proposed language changes. He thanked Mr. George Bearup for submitting his portion.

Mr. Vernon gave a status report on the Committee's proposal to modernize the definition of tenancy by entirety property. There has been significant opposition from representatives of the bankers who are concerned about their ability to collect unsecured debts.

The tenancy by entireties trust proposed legislation has been on hold.

There will be another hearing on the proposal for qualified dispositions in trust act. Mr. Robert Tiplady will testify.

Representative Lucido asked Mr. Vernon whether the Committee or the Section would support his proposed substitute for HB 5310. The issue as described by Representative Lucido is this: elderly parent who is not yet incompetent lives with one child. That one child is restricting the other children's ability to see the parent. Representative Lucido wanted a procedure to require the host child to permit visitation by the other children without a guardianship proceeding being started, similar to grandparent visitation rights. Mr. Vernon asked whether the Council should review and possibly redraft this legislation. Nathan Piwowarski presented information to the Council about his analysis of case law which may already provide an adequate remedy. (See Attachment A to these minutes.) The Council discussed whether to pursue this. Suggestions were made to discuss the issue with Family Law Section, Elder Law Section, and the Probate Judges Association. Another suggestion was made to check other state's laws (Wisconsin or Minnesota may have a similar law.) Patricia Ouellette will raise this issue at the Family Law Section's meeting.

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

Mr. Vernon reported that representative of the insurance industry have raised objections to the ILIT exculpation proposal. The insurance industry representatives object to banks as trustees also being exculpated. There will be another meeting to discuss this issue.

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

No additional report.

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

1. Amicus Curiae – David L. Skidmore—no report.

2. Probate Institute – Marlaine C. Teahan

Ms. Teahan reported that the 2016 Annual Probate Institute was well attended. Ms. Lentz reported that the 2017 Annual Probate Institute will be held May 17-20, 2017 in Acme and June 16-17, 2017 in Plymouth. Ms. Lentz has met with Jeanne Murphy and Jeff Kirkey to begin the process of planning the speakers and schedule.

Ms. Teahan reported that the officers decided to have microphones and power strips at the monthly meetings. She thanked Mr. Bearup for the suggestion of the microphones. The University Club did not supply those for the September meeting, so she will pursue that for future meetings.

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

Nancy Little gave the report. The current issue of the Probate Journal was sent by eblast the day before the Council meeting. She thanked all of the contributors and encouraged all to read the issue. Ms. Little requested that an updated Committee list be sent to her for inclusion in an upcoming issue. She also suggested including a column in each Journal on what is being discussed at CSP. She will discuss this with the CSP chair.

4. Citizens Outreach – Constance L. Brigman

Ms. Brigman is organizing efforts to sell the remaining brochures. Brochures were sold at the Annual Probate Institute in Acme and in Plymouth, and she will be selling brochures at the Elder Law Institute. In addition, brochures were sold during the Council meeting. Mr. Steward reported that the Committee is still working on the publication agreement with the State Bar.

5. Electronic Communications – Michael G. Lichterman—no report.

6. Membership – Raj A. Malviya

Mr. Malvina's written report was attached to the combined Agenda. He congratulated his Committee for good year. The Committee was in charge of social events in Acme and Plymouth, which they intend to continue next year. Members of the Committee were also present at the Young Lawyers Summit that was held in Novi on June 3-4.

Mr. Malviya thanked Ms. Brigman and the Citizens Outreach Committee for their helpful collaboration at the Annual Probate Institute. Selling the brochures helped to increase interest in the Section's table.

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

Mr. Steward raised the issue about clarifying who the attorney for a fiduciary represents. Mr. Vernon will make sure that a legislative change is on the list of EPIC/MTC changes.

Ms. Teahan reported that the probate appeals project is almost completed. There were three bills, all tie-barred. Two have been enacted. The third bill (HB 5503) has passed both Houses and is waiting for submission to the Governor. She also reported that proposed conforming changes to court rules have been drafted, but the general counsel for the Supreme Court did not want to schedule a review until the third bill is enacted.

F. **Areas of Practice**

1. Real Estate – Mark E. Kellogg

Mr. Kellogg reported that the Committee suggested a counter proposal to the Treasury's proposal concerning HB 5141, but has not yet heard a response.

2. Transfer Tax Committee – Lorraine F. New

Mr. Malviya gave the report. He discussed aspects of the recently issued proposed Treasury Regulations dealing with Section 2704 of the Internal Revenue Code. His written report,

including his top ten take-aways, was included with the combined Agenda.

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

Mr. Steward reported that the Elder Law Section was meeting at the same time as the Council's meeting. He also reported that the legislature is moving forward with the POST legislation.

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—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 –

Ms. Teahan reported that Mr. Siriani informed her that he is not the Section's liaison to the State Bar.

13. Taxation Section Liaison – George W. Gregory

Mr. Gregory suggested that Section members with tax controversies might consider using the Michigan Court of Claims as an alternate venue from the Michigan Tax Tribunal.

IX. **Other Business**

Mr. Vernon requested that the Chair appoint a liaison to the Real Estate Section to coordinate some of our legislative projects.

X. **Hot Topics**

XI. **Adjournment**

The meeting was adjourned by Chairperson James Steward at 11:59.

ATTACHMENT A

From: **Nathan Piwowarski** nathan@mwplegal.com
Subject: Legislation Development & Drafting Committee - parental visitation legislation
Date: August 26, 2016 at 7:02 AM
To: Shaheen Imami SII@ProbatePrince.com, Marguerite Lentz MLentz@BODMANLAW.COM, Geoffrey R. Vernon gvernon@joslynvernon.com, Georgette David gdavid.law@gmail.com, Henry Lee hlee@howardandhoward.com, Howard Collens howard@gallowaycollens.com, James P. Spica jspica@dickinsonwright.com, Kurt A. Olson kaolson@tds.net, Michael Lichterman mikel@bolhouselaw.com, Robert Tiplady rtiplady@dykema.com, Sueann Mitchell sueann@ggtmlaw.com, Susan M. Allan sallan2@freer.com, Susan M. Allan susan_m_allan@comerica.com
Cc: James Steward jamessteward@stewardsheridan.com, David Lucas dlucas@vcflaw.com, Becky Bechler bechler@paaonline.com

All,

To follow up on my comments during this morning's conference call, I have attached the opinion from *Townsend v Townsend (In re Townsend)*, 293 Mich App 182; 809 NW2d 424; COA No. 296358 (2011). Although *Townsend* involved a conservatorship, the COA's analysis should translate into guardianship proceedings:

- The opinion hinges on the phrase, "for reasons such as," in MCL 700.5401(3)(a): "The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following: (a) The individual is unable to manage property and business affairs effectively **for reasons such as** mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance. (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money."
- Different (but functionally similar) language of enlargement can be found in MCL 700.1105(a), which offers the definition of "incapacitated individual" for guardianship purposes: "Incapacitated individual" means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, **or other cause**, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions."

Under *Townsend*, the probate court can establish jurisdiction over a person under EPIC Article V if that person meets the definition of "vulnerable adult" under the Social Welfare Act (the authorizing statute for the DHHS). In my reading of *Townsend* and the SWA, the SWA's definition of "vulnerable adult" expands on EPIC's list of reasons by identifying certain difficulties associated with advanced age as a basis for establishing jurisdiction:

- "Vulnerable" is defined as "a condition in which an adult is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment **or because of advanced age**." MCL 400.11(f).
- "Exploitation" is defined as "an action that involves the misuse of an adult's funds, property, or personal dignity by another person." MCL 400.11(c).

So *Townsend* already offers a means of establishing jurisdiction when there is elder exploitation like isolating the elder from family members. But there has to be a nexus between the adult's advanced age and the exploitation. Let's say, for example, that the elder has limited mobility and their old social circle has died or moved into nursing care. They are unable to travel, socially isolated, and depend on one local caregiver. I'd see that as a nexus: that adult's dignity interest in a meaningful family and social life is being impinged upon on account of age-related factors. A reasonably competent advocate can connect those dots.

It should not be easy to establish a guardianship. It strips away a person's civil rights. The process often is traumatic for the entire family. Given what's already available under Townsend and the existing statutes, I don't believe we should open the door any wider.

Cheers,

Nathan

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From: Shaheen Imami [mailto:SII@ProbatePrince.com]
Sent: Wednesday, August 24, 2016 11:03 AM

To: Lentz, Marguerite <MLentz@BODMANLAW.COM>; Geoffrey R. Vernon <gvernon@joslynvernon.com>; Georgette David <gdavid.law@gmail.com>; Henry Lee <hlee@howardandhoward.com>; Howard Collens <howard@gallowaycollens.com>; James P. Spica <jspica@dickinsonwright.com>; Kurt A. Olson <kaolson@tds.net>; Michael Lichterman <mikel@bolhouselaw.com>; Nathan Piwowarski <nathan@mwplegal.com>; Robert Tiplady <rtiplady@dykema.com>; Sueann Mitchell <sueann@ggtmlaw.com>; Susan M. Allan <sallan2@freer.com>; Susan M. Allan <susan_m_allan@comerica.com>
Cc: 'James Steward' <jamessteward@stewardsheridan.com>; David Lucas <dlucas@vcflaw.com>; 'Becky Bechler' <bechler@paaonline.com>
Subject: RE: Legislation Development & Drafting Committee - Jajuga legislation

All:

I tend to agree with Meg's comments – even though I won't be chair when this comes up. It's probably best to have a full discussion at CSP, followed by a vote by Council at the regular meeting for the *Jajuga* language.

Also, there already exists a procedure in EPIC for the situation described by Rep. Lucido. If there is a patient advocate designation, then a petition can be filed limited to issues regarding the patient advocate's failure to act appropriately with visitation and the probate court can enter the appropriate order. Also, the probate court can enter a protective order regarding visitation under the last sentence in MCL 700.5306(1). So, I believe that the issue more appropriately is making sure the probate court staff understand that these kinds of petitions already are authorized under EPIC – because they don't see them very often – rather than a gap in existing law.

Just my $.02.

Shaheen

From: Lentz, Marguerite [mailto:MLentz@BODMANLAW.COM]
Sent: Tuesday, August 23, 2016 4:43 PM
To: Geoffrey R. Vernon; Georgette David; Henry Lee; Howard Collens; James P. Spica; Kurt A. Olson; Michael Lichterman; Nathan Piwowarski; Robert Tiplady; Sueann Mitchell; Susan M. Allan; Susan M. Allan
Cc: Shaheen Imami; 'James Steward'; David Lucas; 'Becky Bechler'
Subject: RE: Legislation Development & Drafting Committee - Jajuga legislation

Hi all:

Re redraft of bill to deal with *Jajuga:* Our next probate council meeting will be September 10th.

The call for materials will go out this week, to have materials in for CSP by September 1. I don't remember discussing at CSP or probate council the proposed redraft of the Lucido bill. I think electronic votes work better if there has already been at least one discussion at a probate meeting. Did Becky say how many legislative days there are between now and September 10? If few or none, then maybe we schedule the *Jajuga* bill for discussion at CSP on September 10th, and hopefully get a vote in support from probate council that day. Anyone else have other thoughts?

Expanding probate court jurisdiction—hmmm. That could be tricky. Not sure the judges would agree. In the hypo, apparently Dad has limited mobility so Dad cannot just walk outside the house and get into son's car and go out to lunch with him. As you suggested, the concept of child visitation rights of elderly parents might fit better with vulnerable adult statutes (without expanding probate court jurisdiction). Are we having our call this Friday? If so, we could discuss then. Our Elder Law friends might have some thoughts also.

Meg

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Please consider the environment before printing this e-mail.

From: Geoffrey R. Vernon [mailto:gvernon@joslynvernon.com]
Sent: Tuesday, August 23, 2016 4:13 PM

To: Georgette David; Henry Lee; Howard Collens; James P. Spica; Kurt A. Olson; Lentz, Marguerite; Michael Lichterman; Nathan Piwowarski; Robert Tiplady; Sueann Mitchell; Susan M. Allan; Susan M. Allan
Cc: 'Shaheen Imami'; 'James Steward'; David Lucas; 'Becky Bechler'
Subject: Legislation Development & Drafting Committee - Jajuga legislation

Committee Members -

I met earlier today with Rep. Lucido and Becky's partner, Jim Ryan, regarding the proposed bills to remedy the *Jajuga* decision. Representative Lucido was agreeable to our rewrite of his proposed HB 5638 (which permits excluding minor children and drops the specific reference requirement). He was not aware of the competing bill by Rep. Hughes (HB 5704) but wanted to go forward with his bill as modified by our committee. I told him we would try and get council support for the bill as soon as possible so he could try and get something done this session. Meg, do you have thoughts on how to best accomplish this?

Another issue came up during the meeting. Rep. Lucido wants a bill (more likely a series of bills) that would expand probate court jurisdiction to allow the court to grant visitation rights to children to see an elderly parent who is not subject to a guardianship. His example situation is:

1. Dad lives with his daughter in daughter's home.
2. Dad is not incapacitated but needs some help with daily living due to some physical limitations.
3. There is no guardianship and dad would object if his children tried to initiate a guardianship action.
4. Daughter takes good care of her dad and there are no allegations of abuse or financial impropriety.
5. Daughter hates her brother and won't let him visit his dad.
6. Dad wants to see son.
7. Son wants to visit dad - he doesn't want to change his father's living arrangement or interfere with his sister's care giving.
8. Absent a guardianship proceeding (and there are no allegations of incapacity on which to base a petition), the court lacks jurisdiction to exercise authority over the daughter or dad.
9. The result being that the son and dad don't get to see each other and son has no recourse to remedy the situation (other than to make a false allegation of incapacity to petition the court for guardianship).

Representative Lucido gave me a copy of the attached Substitute for House Bill 5310 of which he is the sponsor. He is not satisfied with this bill as it only works within an existing guardianship proceeding.

My initial thought was that we could look at some "vulnerable adult" laws, criminal or otherwise, and

see if it is feasible to utilize that term to extend guardianship jurisdiction to include the above example situation. I have not researched the issue so am unable to form an opinion as to whether this concept is laughably flawed or there is some chance of making it work.

I told him I would run it by our committee and the council and see if such a bill is feasible. Maybe the guardianship committee should look at this. Thoughts?

Geoff

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