

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

**September 9, 2017
Lansing, Michigan**

Minutes

I. Call to Order

The Chair of the Section, Marlaine Teahan, called the meeting to order at 10:05 am and thanked James B. Steward for all his work as Chair, indicating he has made his work look easy, when in reality so much time is spent on Council matters.

II. Attendance

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

Marlaine C. Teahan
Marguerite Munson Lentz
Christopher A. Ballard
David P. Lucas
Rhonda M. Clark-Kreuer
Kathleen M. Goetsch
Mark E. Kellogg
Robert B. Labe
Michael G. Lichterman
Katie Lynwood
Raj A. Malviya
Richard C. Mills
Melisa M.W. Mysliwicz
Lorraine F. New
David L.J.M. Skidmore
Geoffrey R. Vernon

A total of 16 council members and officers were present, representing a quorum.

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

George F. Bearup
Christopher J. Caldwell
Hon. Michael L. Jaconette
Nathan R. Piwowarski
Nazneen H. Syed
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
Nancy L. Little
Douglas A. Mielock
James B. Steward

E. The following Liaisons to the Council were in attendance:

Hon. David M. Murkowski
Jeanne Murphy
Patricia Ouellette
James P. Spica

F. Others in attendance:

Aaron Bartell
Kimberly Browning
Susan Chalgian
Mark DeLuca
Daniel S. Hilker
Andrew Mayoras
Gabrielle McKee
Ryan Mills
Sueann T. Mitchell
Neal Nusholtz
Kurt Olson
Scott Robbins
Christine Savage
Joan Skrzyniarz
Paul Vaidya

III. Minutes of the June 24, 2017, Meeting of the Council

The minutes of the June 24, 2017, 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 – David P. Lucas

Mr. Lucas's Treasurer's Report was provided as a supplement to the combined Agenda. Mr. Lucas thanks the Council members for their contributions to the Hearts and Flowers Fund. Mr.

Lucas encouraged the timely submission of requests for reimbursement.

V. Chairperson's Report – Marlaine Teahan

Ms. Teahan delivered the report of the chair. She thanked the incoming Council members for agreeing to serve on the Council. The following items were noted:

- The October meeting will be at the Crowne Plaza in Lansing.
- A new committee list is being put together and will be published at the next meeting.
- The biennial plan is being reworked and will be sent out in October.
- The agenda will be changed starting October to streamline the flow of the meeting and to insure adequate time is given to items carrying over from prior meetings.
- The meeting structure may be changed starting in November, permitting more time for CSP, and eliminating the lunch after the meeting. There will be more time for mingling and more food during the break in the middle of the meeting.

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

Mr. Vernon presented a summary of the committee report. The Committee held an introductory discussion regarding a new proposal to create a Michigan Uniform Directed Trust Act. This proposal would entail changes to the Michigan Trust Code provisions that relate to trust protectors, in addition to the adoption of new provisions that relate to trust directors. The proposal would also permit the division of trustee duties within a trust instrument. The discussion will continue at future Council meetings.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – Christopher A. Ballard – the committee has worked out a preliminary budget that will be presented at the October 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 – Ryan P. Bourjaily

Mr. Hilker presented the report of the committee.

The bill that would have permitted graduates of non-accredited law schools becoming members of the bar is basically dead.

HB 4589 and SB 346 have been proposed by the Attorney General. They deal with financial exploitation and financially endangered adults. The bills permit brokers to have discussions with law enforcement and with other family members about suspicions regarding possible financial exploitation. The definition of “endangered adult” is much too broad (e.g., including all adults over age 65). The committee was instructed to contact the Section’s lobbyist and to come back to Council with a possible recommendation in October if it looks like the legislation might have traction. The section will also work through its liaison with the Elder Law section and Michigan Bankers Association.

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

Ms. Lynwood led a discussion regarding possible *Jajuga* legislation. Rep Lucido has proposed a new bill (HB 4410). The committee has some concern with the language in the new bill. The committee has not finalized its preparation of a *Jajuga* fix (Ms. Lynwood circulated a 6th draft of the legislation). Judge Murkowski reported that the Probate Judges Association hasn’t really seen a need for a fix and might have issues with any fix that is too broad. Mr. Vernon and Ms. Lynwood will meet with Rep. Lucido to discuss.

Ms. New moved that the Council’s public policy regarding the HB 5638 (from the 2015-2016 legislative session) permitting a testator to disinherit children should continue to be the public policy of the Council and further adopting a public policy position opposing HB 4410 in its current form. The motion was seconded. The motion passed on a vote of 16 in favor, 0 opposed, 0 abstentions.

The Council approved Mr. Vernon and Ms. Lynwood meeting with Rep. Lucido to see whether he would adopt the Council’s previous draft of the bill as a substitute.

3. Ad Hoc Committee on Legislative Drafting and Legal Ethics – Sueann T. Mitchell – discussion was postponed until the end of the meeting.

4. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon – no report.

5. Assisted Reproductive Technology Ad Hoc Committee – Nancy H. Welber – no report.

6. Community Property – Neal Nuscholtz

Mr. Nuscholtz led a discussion of the reasons that community property might be helpful from a tax perspective. The committee is looking at legislation that would permit electing community property status for some property. The Legislative Services Bureau is almost finished with processing the committee's draft and Mr. Nuscholtz will provide it to Council when completed.

7. Premarital agreements – regarding *Allard* legislation.

George Bearup prepared a report for his committee, but the committee has not finished working on the issue, so the report has not been presented to Council. There will be a House committee hearing on proposed legislation (HB 4751) on Sept 12. The committee's sense is that they don't have any objections to the bill, but that it doesn't really address the *Allard* issue. There is a separate proposed bill that does address the *Allard* case, but the bill has not been introduced yet. The sense of the Council is that we should focus our energies on the Uniform Premarital and Marital Agreements Act. Because of the short deadline before the committee hearing, the Council feels that Ms. Teahan should contact our lobbyist to contact Rep. Kesto's office and ask for him to hold off on considering the legislation until Council can formulate something more thorough.

6. Divided and Directed Trusteeship – James P. Spica – see the report in the CSP materials.

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L.J.M. Skidmore --

Dan Hilker and Susan Chalgian left the room because of a conflict in interest. Mr. Skidmore reported on a request in the *Breakey* case, which governs whether the personal residence exemption can be claimed on property where a surviving spouse inherits a life estate in real estate held in the other spouse's trust. Treasury has changed a previously established position, stating that the exemption should not apply. The Tax Tribunal has upheld Treasury's position. The case is being appealed to the Michigan Court of Appeals.

The committee recommends filing an amicus brief in this case. It is recommended that Foster Swift be retained to draft the brief and authorize up to \$15,000. The motion was adopted with 16 in favor, 0 opposed, and 0 abstentions. Brief is in favor of the appellants' position.

The real estate section will look at drafting legislation that would clarify the language of the statute.

Regarding funding allocated to amicus briefs. Ms. Little made a motion that Council allocate \$15,000 for the drafting of all future briefs. The motion was seconded. The motion passed on a unanimous vote.

2. Probate Institute – Mr. Ballard reported that the Probate Institute will be held in Acme this year Thursday to Saturday, May 17-19, 2018; and will be held at the Inn at St Johns, Plymouth, Thursday and Friday, June 14-15, 2018.

3. State Bar and Section Journals – Richard C. Mills –Michigan Bar Journal theme issue will be coming up in November 2018. A conference call between the committee and Ms. Teahan will take place before the next Council meeting. There will be further discussion at a future Council meeting.

4. Citizens Outreach – Melisa M.W. Mysliwicz –

Discussion of the committee’s report is deferred to October.

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

6. Membership – Nicholas A. Reister – no report.

D. Ethics and Professional Standards

1. Ethics & Unauthorized Practice of Law– Katie Lynwood –

Ms Lynwood reported on the Who Should You Trust seminar, which will be held October 11.

E. Administration of Justice

1. Litigation, Proceedings, and Forms – David L. Skidmore –

Ms. Teahan reported that she has been in contact with SCAO regarding probate court appeals changes; SCAO Form MC 55 will be amended. There are two new liaisons to SCAO, Ms. Mysliwicz and Ms. Chalgian. They will be preparing a report on possible changes for the October meeting.

F. Areas of Practice

1. Real Estate – Mark E. Kellogg –

Mr. Kellogg reported that SB 540 has been introduced. It deals with uncapping issues on real estate transfers.

2. Tax Committee – Lorraine F. New -- Ms. New’s Tax Nugget was attached to the meeting materials.

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—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 – Nazneen H. Syed—no report.
8. Michigan Probate Judges Association Liaisons – Hon. Judge David M. Murkowski, Hon. Judge Michael L. Jaconette—no report.
9. Probate Registers Liaison – Rebecca A. Schnelz—no report.
10. SCAO Liaisons – Melisa M.W. Mysliwicz and Susan Chalgian — 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 – no report.
14. ULC Liaison – James P. Spica – a report was included in the agenda materials.

IX. Other Business –

Several Council members and guests who are connected to the Mardigian case excused themselves.

The Council took up consideration of whether to submit an amicus brief in the Mardigian case.

The Supreme Court has asked for the Section’s input on three questions:

1. Whether the rebuttable presumption of undue influence set forth in *In re Powers Estate*, 375 Mich 150 (1965), when used as a means to determine the testator’s intent, is a workable rule that sufficiently protects the testator when the testator’s lawyer violates MRPC 1.8(c);

2. Whether the Court's adoption of MRPC 1.8(c) warrants overruling *In re Powers Estate*; and

3. If *In re Powers Estate* is overruled, whether a violation of MRPC 1.8(c) should bear on the validity of the gift provided to the testator's lawyer under the testamentary instrument; and if so, how?

Following a spirited discussion, the general consensus of the Council is that the rules of professional conduct should not create a cause of action, as is stated in the preamble to the Rules.

Mr. Mills moved that the Probate Section prepare an amicus brief, to be drafted by Mr. Olson and Mr. Mayoras, and in accord with the discussion and motion that up to \$15,000 be allocated to the preparation of the brief, to be allocated between the firms as they determine.

The motion was seconded. The motion passed, with 11 in favor, 0 opposed, 0 abstentions.

X. Hot Topics

None.

XI. Adjournment

The meeting was adjourned by Chair Marlaine Teahan at 1:07 pm.