

JAJUGA AND THE EXEMPT PROPERTY ALLOWANCE REMEDIAL STATUTE

Policy, Drafting, and Litigation Considerations

By Nathan R. Piwowarski

In *In re Jajuga Estate*, the Michigan Court of Appeals jarringly reminded us that sometimes the testator's intent does not control.¹ In *Jajuga*, the Court applied the "exempt property allowance" provision of the Estate and Protected Individuals Code (EPIC) to give \$14,000 of the decedent's estate to her children—even though her will expressly disinherited them.² This article explains the exempt property allowance, the post-*Jajuga* remedial legislation, and allowance-related drafting and litigation considerations.

Why does the exempt property allowance exist?

In many ways, the EPIC respects one's freedom to pass property according to his or her last will. In limited cases, however, it overrides that testamentary freedom. Most of these "statutory overrides" are designed to prevent the impoverishment of a decedent's spouse and children.³ *Jajuga* involved

one of these types of overrides—the exempt property allowance. The exempt property allowance under MCL 700.2404 sets aside \$10,000 (adjusted for inflation annually under MCL 700.1210, making the current allowance \$15,000) for the decedent's spouse or children even if they are excluded under the will. Subsections (1) and (2) of MCL 700.2404 state, respectively (bracketed information added by author):

The decedent's surviving spouse is also entitled to household furniture, automobiles, furnishings, appliances, and personal effects from the estate up to a value not to exceed [\$15,000] more than the amount of any security interests to which the property is subject. If there is no surviving spouse, the decedent's children who are not excluded [under MCL 700.2404(4)] are entitled jointly to the same value.

If encumbered assets are selected and the value in excess of security interests, plus that of other exempt property, is less



AT A GLANCE

- *In re Jajuga Estate* underscored that the exempt property allowance is a vested property right—one that can trump the disinheritance clause in a will.
- In response to the *Jajuga* decision, Michigan has enacted remedial legislation, 2018 PA 143. This law, effective August 8, 2018, allows a testator to exclude a child from receiving the exempt property allowance.
- The remedial legislation does not eliminate the need for nuanced consideration of the interplay between nontestamentary transfers and the exempt property allowance. An “exempt property exclusion clause” may be needed in nonobvious situations.

than [\$15,000], or if there is not [\$15,000] worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the [\$15,000] value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to assets to make up a deficiency of exempt property abates as necessary to permit payment of all of the following in the following order:

- Administration costs and expenses.
- Reasonable funeral and burial expenses.
- Homestead allowance.
- Family allowance.

Two public policies animate this provision. The first is that, even if an estate is insolvent, the deceased person’s spouse or children should not lose the modest property in their home to the deceased person’s unsecured creditors. This allowance is paid even if the estate has significant unsecured debts.

The second policy is that, even if the deceased person disinherits his or her spouse or children, the spouse or children would at least receive some modest property to support them. To further this second policy, the \$15,000 is payable to the surviving spouse—even if that spouse is disinherited. If there is no surviving spouse, this allowance is shared by the surviving children.

What trouble could the exempt property allowance cause?

This latter policy can cause mischief. Sometimes, there are good reasons to completely disinherit a child:

- The child may have severe creditor problems, meaning that any gift will be immediately lost to the child’s creditors.
- The child may suffer from mental illness or addiction. In this situation, the payment of a \$15,000 exempt property allowance could fund self-destructive behaviors.

- The decedent has provided for a child outside of his or her probate estate. This could be through beneficiary designations, trusts, or lifetime gifts. In this situation, the exempt property allowance gives the child an unfair windfall and unexpectedly reduces gifts to others.
- The child may have received significant lifetime gifts or loans that exceed his or her fair share in the probate estate.
- The child may have special needs or severe disabilities. Receiving this allowance might eliminate access to vitally important means-tested programs like Supplemental Security Income, Medicaid, and mental health services.

To add to the disruption, a resourceful child could open an empty estate solely for the purpose of obtaining the allowance—and asserting it against the trustee of a properly funded living trust.⁴

How does Public Act 143 of 2018 change the exempt property rule?

To counter these undesirable effects, the SBM Probate and Estate Planning Section promoted remedial legislation. The section’s proposal became 2018 PA 143. The act added one subsection to MCL 700.2404:

- (4) The decedent may exclude 1 or more of the decedent’s children from receiving exempt property or assets to make up a deficiency of exempt property under subsection (1) by either of the following means:
 - (a) The decedent by will expressly states either of the following:
 - (i) The child takes nothing.
 - (ii) The child takes an amount of \$10.00 or less from the estate.
 - (b) The decedent by will expressly states that the child is not to receive exempt property under this section.

[W]hile 2018 PA 143 fixed what was broken, it did not eliminate the need for nuance and close familiarity with the EPIC when preparing, administering, and litigating wills and trusts.

The act applies equally to minor and adult children. The section advocated for the ability to exclude minor children so that individuals could exclude them for special-needs planning purposes.

The act became effective August 8, 2018. The exempt property allowance is a property right that vests at the moment of the decedent's death.⁵ As such, the new subsection (4) likely only applies to the estates of decedents who died on or after the act's effective date.

What should drafters and litigators consider in the wake of *Jajuga* and the remedial legislation? What special considerations exist *despite* the enactment of the remedial legislation?

While MCL 700.2404(4)(a) is designed to implement even a comparatively unskilled drafter's likely intent, it is the best practice to expressly invoke MCL 700.2404(4)(b) when excluding one or more children from receiving the allowance. Further, a careful drafter should also consider the following:

- Many individuals' assets pass by nontestamentary means, especially in the form of beneficiary designations, trusts, and ladybird deeds. Planners should remind their estate planning clients of how important it is to coordinate the testamentary and nontestamentary elements of their plans. This should include considering whether to conditionally exclude children from receiving the allowance when the decedent's estate is smaller than expected. It may also entail a detailed review of beneficiary designations, joint ownership arrangements, ladybird deeds, etc.
- Any estate plan animated by beneficiary protection (whether in the face of predators, creditors, substance abuse, mental illness, or means-tested programs) should probably include a will containing an exclusion clause. A beneficiary in need of protection usually should have his or her gift held in trust rather than distributed outright per the exempt property allowance statute.

- Remain mindful that even the most impeccable trust funding does not eliminate the risk of the exempt property allowance being sought. All a spouse (or a child, if there is no surviving spouse) needs to do is open the empty decedent's estate. The personal representative will have to certify to the trustee that the allowance has not been satisfied. The remedial legislation does not eliminate this gambit. To prevent this disruption, a drafter should add an exclusion clause to his or her client's pour-over will.
- A testator still cannot exclude his spouse from receiving the allowance. If comprehensively disinheriting a spouse is a priority, the individual likely will have to rely on nontestamentary transfers or a properly funded trust that is exempt from the certification process laid out in MCL 700.7606(1).
- A testator can only exclude a child through a will. As such, the will (and the clause causing the exclusion) remains subject to all of the normal challenges to its validity, particularly undue influence.

In other words, while 2018 PA 143 fixed what was broken, it did not eliminate the need for nuance and close familiarity with the EPIC when preparing, administering, and litigating wills and trusts. ■



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ENDNOTES

1. *In re Jajuga Estate*, 312 Mich App 706; 881 NW2d 487 (2015).
2. *Id.* at 708.
3. These overrides include the spousal election, MCL 700.2201 through MCL 700.2206; pretermitted spouse rule, MCL 700.2301; omitted child rule, MCL 700.2302; homestead allowance, MCL 700.2402; family allowance, MCL 700.2403; and exempt property allowance, MCL 700.2404.
4. MCL 700.7606(1) ("A trustee of a trust described in section 7605(1) shall pay to the personal representative of the settlor's estate the amount that the personal representative certifies in writing to the trustee is required to pay the administration expenses of the settlor's estate; an enforceable and timely presented claim of a creditor of the settlor, including a claim for the settlor's funeral and burial expenses; and homestead, family, and exempt property allowances.").
5. MCL 700.3101 ("Upon an individual's death, the decedent's property devolves to the persons to whom the property is devised by the decedent's last will or to those indicated as substitutes for them . . . subject to homestead allowance, family allowance, and *exempt property*, to rights of creditors, to the surviving spouse's elective share, and to administration." (emphasis added)).