Statutory Interpretation in Probate Matters

By George M. Strander

Since the probate court is a tribunal of limited jurisdiction largely defined by codified law,[1] difficult probate cases often require an attorney to develop involved interpretations of statutory provisions. These interpretations might answer anything from a focused definitional question—e.g., "Is a conservator's hiring of an attorney to defend an appeal a 'necessary legal service'?"—to a broader contextual one—e.g., "Does the conservator's hiring of an attorney create an attorney-client relationship with the estate?"[2] This article discusses how an attorney might approach these tasks in a given case, and while examples from the Estates and Protected Individuals Code (EPIC) and the earlier Revised Probate Code it replaced are principally employed, the analysis is intended to apply to statutory interpretation in any area of the law.[3]

Initial steps

Interpreting any statute begins with discerning the past intent of the legislature in enacting the law, something most reliably found in the language of the statute itself.[4] All terms of a provision are to be given meaning, and in general they are to be provided their ordinary, nontechnical definition yielding a reasonable interpretation that does not lead to "absurd consequences."[5] Any statutory rules of construction are to be followed,[6] and "where a statute provides its own glossary, the terms must be applied as expressly defined."[7]

"Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent."[8] However, it must be recognized that ambiguity (like interpretation) is contextual, being dependent on the legal controversy at bar. It is therefore legitimate for an attorney to explore beyond the statutory text even in the face of a rule of construction or an official definition if those tools leave the relevant question about the meaning of the statute unanswered. By way of example, in *In re Turpening Estate*, the Michigan Court of Appeals condoned statutory interpretation of "openly treated the child as his" in relation to intestate succession,[9] and although the term "child" is statutorily defined, the Court found the definition unhelpful for understanding the phrase.[10]

Stare decisis and "good law"

Following stare decisis[11]—the policy that counsels a court to treat its past decisions on matters significantly similar to those in front of it as precedent and to a certain extent binding on the new decision to be made—an attorney can collect published opinions for review when faced with a need to interpret a statute.[12] Obviously, past opinions discussing language from that statute, where the statutory language has remained unchanged and those past opinions are neither overruled nor materially distinguished, are "good law." Importantly, though, other caselaw—either overruled or distinguished, or interpreting a past repealed statute—can at times also be an appropriate resource.

First, if an opinion interprets a statute but is subsequently vacated or distinguished by other caselaw, it remains binding precedent on that interpretive point if it was vacated or distinguished on grounds other than those upon which the statutory interpretation is based. For instance, in *In re Bartl Trust*, the Court of Appeals cited *In re Ferguson Estate* as authority for the proposition that appellate review in determining the intent of a settlor is limited to whether the probate court's determination was clearly erroneous.[13] The *Bartl* Court relied on *Ferguson* even though it had been reversed, noting that the reversal was "on other grounds."[14]

Second, caselaw interpreting statutory language remains precedent even if the interpreted statute has been repealed if the old statutory language has remained essentially unchanged in the new statute. In the 2010 opinion *Woodman v Kera LLC*, the Michigan Supreme Court relied on *Smith v YMCA of Benton Harbor/St. Joseph* as authority for reading the EPIC statute MCL 700.5102 as not authorizing a parent to settle his child's tort claims.[15] *Smith* actually interpreted MCL 700.403 in the earlier Revised Probate Code, but the *Woodman* Court saw it as "a predecessor of MCL 700.5102 with essentially the same provisions."[16]

Of course, old caselaw does not remain precedent if the new statute contains a

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material difference. By way of example, in the 2008 opinion *Braverman v Garden City Hospital*—a case in part turning on the statute of limitations for filing a medical malpractice claim—the Supreme Court indicated that the defendant's use of the 1997 decision in *Lindsey v Harper Hospital* interpreting a repealed statute was inapt.[17] The *Braverman* Court noted that the current relevant EPIC statute did not state (as did the now-repealed Revised Probate Code provision that *Lindsey* considered) that a temporary personal representative "shall be accountable *as though* he or she was the personal representative."[18]

Stare decisis with respect to any line of precedent is naturally justified on grounds of predictability and objectivity[19] but can be abandoned when its dictates in a particular case collide "with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience"[20]—in other words, when it conflicts with a more fundamental line of authority. An attorney in a case who offers a statutory interpretation contrary to a precedent has the burden of outlining what more basic element of the law counsels such a move. A probate example closely related to this theme is found in the 2009 case *In re Nestorovski Estate*,[21] where the Court of Appeals declined to follow long-established direction from the 1936 case *In re Meredith Estate*[22] that probate courts could not submit the question of testamentary capacity to arbitration. In essence, the *Nestorovski* Court saw the legal availability of arbitration as at least partly determined by the nature of the tribunal, and further concluded that specific changes in the statutory and court-rule-based nature of the probate court from the 1930s to the 2000s altered the Court's character enough to make *Meredith* an anachronism.[23]

Statutory abrogation and the contours of common law

The above reference to the enactment of new statutes raises another issue: given any particular statute, such as EPIC, and the language included (and *not* included), is the law relegated only to that new statutory language or is there an element of common law in addition to that language that is also preserved? Legal authority supports the latter.

While the probate court is a court of limited jurisdiction and thus must find its *power* to act in statute and not beyond in the common law, this does not preclude the common law from *informing* that statutory jurisdiction. Consider, for example, *In re Estate of Smith*,[24] which recognized "the common law presumption of revocation which states, 'that where a will cannot be found at the death of the testator upon proper search being made, and especially where the will is not traced out of the possession of the testator, it is to be presumed that it was destroyed by him *animo revocando*.'"[25] The authority for this presumption can eventually be traced back to the 1915 case *In re Keene's Estate*,[26] which states simply that the presumption was well-established (i.e., common) law.[27]

Statutory abrogation of the common law must be narrowly defined, and thus common law provisions not expressly rescinded by statute live on and can be appealed to in interpreting a statutory provision.[28] Thus, since the Revised Probate Code will revocation statute in effect under *Smith*—MCL 700.124—was silent on the common law presumption in favor of considering the will destroyed under certain circumstances, the *Smith* Court found the presumption still to be valid.[29] Reciprocally, as made clear in *In re Estate of Monahan*,[30] the legislature can "speak in no uncertain terms": the "additional policy determination" of MCL 700.2807 in EPIC revoking any will-based disposition or appointment of not only a divorced spouse *but also of any relative of a divorced spouse* clarified the status of certain individuals in relation to intestacy and divorce not addressed in the Revised Probate Code provision (MCL 700.124).

Other sources

As we have reviewed, an attorney's task in interpreting a statutory provision in a given case is to explicate the intent of the legislature in creating the provision. Reference should be made to the statutory language itself and any official definitions provided in the statute. If the attorney feels the statute is in some way ambiguous, recourse can be made to relevant judicial interpretations of the statutory provisions that are "good law" with an eye to being governed by stare decisis, understanding that in rare cases a conflict between two different lines of authority may need to be resolved. Last, sight should not be lost of relevant common law rules not otherwise abrogated by current statute.

If an ambiguity relevant to the attorney's case at hand persists, other sources can be appealed to in order to assist in interpreting the relevant statute.[31] These other aides should be considered persuasive as opposed to binding authority.

First, an attorney can review relevant unpublished opinions. Although an unpublished decision is not binding precedent and "should not be cited for propositions of law for which there is published authority,"[32] it can prove instructive if its relevant facts are on point.[33]

An attorney can also attempt to interpret a statutory provision based on its placement and purpose vis-à-vis the larger statutory context.[34] This was essentially the type of approach employed by the Court of Appeals both in 2001 in *In re Bem Estate*[35] and in 2017 in *In re Guardianship of Redd*.[36] In *Bem*, the Court applied reasoning on the fundamental nature of the will signature requirement to rule that a holographic will, which under the Revised Probate Code had to be signed "at the end of the will," needed

simply to be signed after its material provisions.[37] In *Redd*, the Court looked to various parts of EPIC to delineate the purpose of a guardian to determine under what conditions such a fiduciary is suitable.[38]

Other persuasive authority can be in the form of authoritative dictionaries[39] and relevant opinions from other states[40] or from the federal bench.[41] Uniform codes and legal restatements and encyclopedias are also legitimate resources.[42] Finally, a statute's official commentary and attorney general opinions have also been used as persuasive authority.[43] ■

George M. Strander is court administrator and probate register for the Ingham County Probate Court. A graduate of the University of Michigan Law School, he is a frequent presenter on legal and court issues and has several law-related publications to his credit. He serves on several statewide bodies in relation to probate, forms, civil procedure, mental health diversion, continuing legal education, and discovery.

ENDNOTES

1. Const 1963, art 6, § 15.
2. In relation to the interpretation of the statute allowing a conservator to hire an attorney pursuant to MCL 700.5423(2)(z), the first question is raised in *In re Grimm*, unpublished per curiam opinion of the Court of Appeals, issued July 14, 2016 (Docket Nos. 326240 and 327012) and the second in *Estate of Maki v Coen*, 318 Mich App 532, 540–541; 899 NW2d 111 (2017).
3. EPIC, which went into effect in 2000 and is promulgated through MCL 700.1101 to MCL 700.8206, most centrally concerns decedent estate administrations and the admission of wills, guardianships and conservatorships for minors and incapacitated adults, and trusts.
4. *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013).
5. *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937).
6. For EPIC, the rules of construction are stated through MCL 700.1201. See *In re Jajuga Estate*, 312 Mich App 706; 881 NW2d 487 (2015) for a discussion of the potential interpretive impact of EPIC.
7. *In re Turpening Estate*, 258 Mich App 464, 465; 671 NW2d 567 (2003).
8. *Whitman*, 493 Mich at 312.
9. *In re Turpening Estate*, 258 Mich App at 464.
10. *Id.* at 466. Conversely, even if there is caselaw discussing a statutory provision that is clear for the purposes of one's case, no reference to other sources is necessary or warranted. *Gries v Oakland Co Rd Comm*, unpublished per curiam opinion of the Court of Appeals, issued June 26, 2014 (Docket No. 314329).
11. "Stare decisis is short for *stare decisis et non quieta movere*, which means 'stand by the thing decided and do not disturb the calm.'" *Petersen v Magna Corp*, 484 Mich 300, 314; 773 NW2d 564 (2009).
12. In the context of statutory interpretation, "(w)here the language used has been subject to judicial interpretation, the Legislature is presumed to have used particular words in the sense in which they have been interpreted." *Powell*, 280 Mich at 703. Regarding the binding effect of published opinions, see *Riley v Northland Geriatric Ctr*, 425 Mich 668, 678; 391 NW2d 331 (1986) and MCR 7.215(C)(2).
13. *In re Bartl Trust*, unpublished per curiam opinion of the Court of Appeals, issued February 13, 2002 (Docket No. 199612), citing *In re Ferguson Estate*, 186 Mich App 409, 418; 465 NW2d 357 (1990).
14. See also *Lefeve v Lefeve*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2006 (Docket No. 257116), citing *Lesko v Lesko*, 184 Mich App 395; 457 NW2d 695 (1990).
15. *Woodman v Kera LLC*, 486 Mich 228, 241 n 27; 785 NW2d 1 (2010), citing *Smith v YMCA of Benton Harbor/St. Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996).
16. *Woodman*, 486 Mich at 254 n 62. See also *Frosh v Sportsman's Showcase, Inc*, 4 Mich App 408, 418; 145 NW2d 241 (1966), which held that an 1897 statute reviewed in *McKee v City Garbage Co*, 140 Mich 497; 103 NW 906 (1905) remained good law because the same statutory language was re-enacted "in virtually verbatim [statutory] language" in 1915 and 1943.
17. *Braverman v Garden City Hospital*, 480 Mich 1159, n 1; 746 NW2d 612 (2008), citing *Lindsey v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997).
18. *Id.* (Emphasis added). See also *Estate of Maki*, 318 Mich App at 542, concluding that the party's reliance on *Steinway v Bolden*, 185 Mich App 234; 460 NW2d 306 (1990), interpreting a Revised Probate Code statute that allows a fiduciary to employ an attorney for necessary legal services "in behalf of the estate," was misplaced since the operative EPIC statute lacks the same phrase.
19. "Stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), citing *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998).
20. *Helvering v Hallock*, 309 US 106, 119; 60 S Ct 444; 84 L Ed 604 (1940), quoted in *Robinson*, 462 Mich at 463. For a classic example of this point, see *Kelley ex rel MacMullan v Hallden*, 51 Mich App 176; 214 NW2d 856 (1974), which overruled the specific "log floating test" for navigability and instituted a "recreation test," essentially arguing that the overarching rule is to base navigability on *use* and when the specifics of that use change over time (e.g., from nineteenth-century commercial interests to later twentieth-century recreational interests) the specific test must also change.
21. *In re Nestorovski Estate*, 283 Mich App 177; 769 NW2d 720 (2009).
22. *In re Meredith Estate*, 275 Mich 278; 266 NW 351 (1936).
23. *In re Nestorovski Estate*, 283 Mich App at 195–196.
24. *In re Estate of Smith*, 145 Mich App 634; 378 NW2d 555 (1985).
25. *Id.* at 637.
26. *In re Keene's Estate*, 189 Mich 97, 102–103; 155 NW 514 (1915).
27. Other probate examples of common law being used to inform statute: *In re Estate of Benfer*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2006 (Docket No. 262895) ("attorney fees recoverable from the estate must be for services benefitting the estate," informing MCL 700.5413) and *In re Gustafson Trust*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2007 (Docket No. 268552) ("trustee must account to beneficiaries even if trust provides otherwise," informing MCL 700.7303).
28. *People v Moreno*, 491 Mich 38, 41; 814 NW2d 624 (2012): "While the Legislature has the authority to modify the common law, it must do so by speaking in 'no uncertain terms.'"
29. *In re Estate of Smith*, 145 Mich App at 637.
30. *In re Estate of Monahan*, unpublished per curiam opinion of the Court of Appeals, issued November 20, 2007 (Docket No. 271408).
31. *In re Swanson's Estate*, 98 Mich App 347, 350; 296 NW2d 256 (1980) condones added interpretation because "there is no *useful* Michigan caselaw precedent." (Emphasis added).
32. MCR 7.215(C)(1).
33. *Cox v Hartman*, 322 Mich App 292, 307–308; 911 NW2d 219 (2017) defends the usefulness of unpublished opinions.
34. *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010).
35. *In re Bem Estate*, 247 Mich App 427; 637 NW2d 506 (2001).
36. *In re Guardianship of Redd*, 321 Mich App 398; 909 NW2d 289 (2017).
37. *In re Bem Estate*, 247 Mich App at 438.
38. *In re Guardianship of Redd*, 321 Mich App at 407.
39. *McCormick*, 487 Mich at 192 and *In re Guardianship of Redd*, 321 Mich App at 407.
40. *In re Turpening Estate*, 258 Mich App at 466; *In re Jajuga Estate*, 312 Mich App at 733, n 7 (2015); *In re Estate of Attia*, 317 Mich App 705, 711–712; 895 NW2d 564 (2016).
41. *Robson v General Motors Corp*, 137 Mich App 650, 653; 357 NW2d 919 (1984).
42. *In re Estate of Seymour*, 258 Mich App 249, 257; 671 NW2d 109 (2003) and *In re White Estate*, 260 Mich App 416, 422; 677 NW2d 914 (2004).
43. *Ewing v City of Detroit*, 237 Mich App 696, 703; 604 NW2d 787 (1999) and *Williams v City of Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000).