

MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

TABLE OF CONTENTS

Vol. 23 • Fall 2003 • No. 1

Feature Articles

- Property Rights of Unmarried Cohabitants
Diane L. Bernick5
- Special Planning Considerations for Same-Sex Couples
Jay Kaplan9
- The Impact of Family Law Issues on Grandparents
Jane S. Radner14
- Nineteen Issues to Consider When Drafting Death Tax Apportionment Clauses Under Michigan's Estates and Protected Individuals Code
Sebastian V. Grassi, Jr.19
- Probate List Server
Josh Ard27



Subscription Information

The *Michigan Probate and Estate Planning Journal* is published quarterly by the Probate and Estate Planning Section of the State Bar of Michigan, with the cooperation of the Institute of Continuing Legal Education, and is sent to all members of the Section. Lawyers newly admitted to the State Bar automatically become members of the Section for two years following their date of admission. Members of the State Bar who are not yet 70 years old may become members of the Section by paying annual dues of \$20. Members 70 years of age or older and law school students may become members by paying annual dues of \$10. Institutions and individuals not eligible to become members of the State Bar may subscribe to the *Journal* by paying an annual \$25 subscription. The subscription year begins on October 1 and is not prorated for partial years. Subscription information is available from the State Bar of Michigan, Journal Subscription Service, 306 Townsend Street, Lansing, MI 48933-2083, (517) 372-9030. A limited number of copies of prior issues of the *Journal* are available beginning with Fall 1988, Volume 8, Number 1, for \$6 each, plus \$2 for postage and handling. Copies of articles from back issues cost \$7 per article. Prior issues and copies of articles from back issues may be obtained by contacting the Wayne State University Law Library, 468 Ferry Mall, Detroit, MI, (313) 577-3925.

Editorial Policy

The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria. Manuscripts and letters should be sent to Nancy L. Little, Managing Editor, *Michigan Probate and Estate Planning Journal*, 2125 University Park Drive #250, Okemos, MI 48864, (517) 706-5790, fax (517) 706-0500, e-mail nancy.little@fosterzacklowe.com.

Opinions expressed in the *Journal* are those of the authors and do not necessarily reflect the views of the editorial board or of the Probate and Estate Planning Council. It is the responsibility of the individual lawyer to determine if advice or comments in an article are appropriate or relevant in a given situation. The editorial board, the Probate and Estate Planning Council, and the State Bar of Michigan disclaim all liability resulting from comments and opinions in the *Journal*.

Citation Form

Issues through Volume 4, Number 3 may be cited [Vol.] Mich Prob & Tr LJ [Page] [Year]. Subsequent issues may be cited Michigan Prob & Est Plan J, [Issue], at [Page].

Section Web Sites

<http://www.icle.org/sections/probate/>
<http://www.michbar.org/sections/>

Michigan Probate and Estate Planning Journal

Vol. 23 • Fall 2003 • No 1

TABLE OF CONTENTS

From the Desk of the Chairperson

Henry M. Grix 1

Feature Articles

Property Rights of Unmarried Cohabitants

Diane L. Bernick 5

Special Planning Considerations for Same-Sex Couples

Jay Kaplan 9

The Impact of Family Law Issues on Grandparents

Jane S. Radner 14

Nineteen Issues to Consider When Drafting Death Tax Apportionment

Clauses Under Michigan's Estates and Protected Individuals Code

Sebastian V. Grassi, Jr. 19

Probate List Server

Josh Ard 27

Departments

Tax Nuggets

By Christopher L. Edgar & George W. Gregory 29

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law

By Hon. Phillip E. Harter 31

Legislative Report

By Harold G. Schuitmaker 37

Probate and Estate Planning Council Q & A

By Patricia Gormely Prince & Randall J. Soverinsky 38

Ethics, Unauthorized Practice of Law, and Multidisciplinary Practice—
Developments

By Jennifer R. Bailey 40

From Behind the Bench

By Hon. David J. Szymanski 42

Digest of Michigan Probate Opinions

By Carol Parker 44

Miscellaneous

ICLE Page 50

Section Council 52

Section Committees 53

Michigan Probate and Estate Planning Journal

Nancy L. Little, Managing Editor

2125 University Park Dr. #250, Okemos, MI 48864

(517) 706-5790, Fax (517) 706-0500

E-mail nancy.little@fosterzacklowe.com

Editorial Board

Nancy L. Little, Managing Editor

Foster, Zack & Lowe, PC, Okemos

Amy Nehs Morrissey

Westerman & Associates, Ann Arbor

Wendy M. Parr

Milller, Johnson, Snell & Cummiskey, PLC, Grand Rapids

Richard A. Shapack

Butzel Long, PC, Bloomfield Hills

Jennifer E. Stover, Copy and Production Editor

Institute of Continuing Legal Education, Ann Arbor

From the Desk of the Chairperson

By Henry M. Grix

Conservatorship Cases in the Spotlight



From April 2001 through February 2002, the Office of the Auditor General for the State of Michigan quietly conducted a performance audit of selected probate court conservatorship cases in Calhoun, Huron, Jackson, Washtenaw, and Wayne Counties. On October 24, 2003, probate courts throughout the state received copies of the performance audit, and, on that same morning, the *Detroit Free Press* published an exclusive story about the performance audit. Probate court personnel were chagrined that they had not received advance notice of the issuance of the report, which included the following highly critical findings:

- Annual accountings by conservators were found “generally not accurate or valid.”
- Procedures for administering and monitoring conservatorship cases “were generally not effective.”
- Probate courts lacked processes to “adequately review annual accountings for appropriateness and reasonableness.”
- Probate courts did not adequately inform or train conservators in their duties and responsibilities.
- Probate courts did not ensure that conservators maintained sufficient documentation to support items reported in annual accountings.

A complete copy of the audit report is available at <http://www.state.mi.us/audgen/> or by calling (517) 334-8050.

The audit report was released not only to the press but also, and more importantly, to

the Supreme Court of Michigan and to the State Court Administrative Office (SCAO), which oversees the operation of all of Michigan’s courts. The supreme court has expressed great consternation and concern about the alleged abuses of the financial affairs of Michigan’s most vulnerable citizens. In response, the supreme court has directed the SCAO to conduct its own audit of the five counties reviewed by the auditor general.

With over 38,300 conservatorship cases pending in Michigan during the time of the audit, there surely exist some lapses, failures, and room for improvement of existing systems and procedures. At the same time, conservatorship law and court rule recently have been reviewed and updated and most probate courts are implementing Michigan law and court rule in accordance with their terms and subject to their allocated resources. The members of the Probate and Estate Planning Section share with the supreme court and the SCAO a desire to remedy any actual abuses and to correct misperceptions about the current law and procedures to maintain public confidence in the probate courts. To that end, the Council wrote the Michigan Supreme Court on October 27 and requested the opportunity to become actively engaged in the resolution of any problems so that the system will operate optimally for the benefit of the public. Supreme Court Chief Justice Maura Corrigan immediately responded and encouraged the Council’s involvement even as the SCAO is undertaking its own performance audit over the next several months. The SCAO and the supreme court anticipate announcing their conclusions by January 2004. The Council hopes that the final, official response will be carefully considered and efficiently implemented, after taking account of the actual (rather than merely perceived)

problems and of the costs and benefits of proposed solutions.

The Probate and Estate Planning Council has appointed a committee to join in an examination of the alleged and perceived abuses and to suggest appropriate responses. Under the leadership of Hon. Phillip E. Harter, the committee is analyzing the conclusions of the auditor general as well as current probate procedures, particularly pursuant to current Michigan Court Rules. Judge Harter is well qualified to lead this effort as the probate judge for Calhoun County, a longstanding leader in guardianship and conservatorship matters, and as the chairperson-elect of the Probate and Estate Planning Council. His committee includes St. Clair County Probate Judge Hon. John R. Monaghan and experienced practitioners Everett R. Zack, John R. Dresser, Amy Morrissey, Michael J. McClory, Lynn L. Marine, Douglas G. Chalgian, Joan C. VonHandorf, and Harold G. Schuitmaker. On behalf of the SCAO, John D. Ferry, the state court administrator, and Jean Mahjoory have been participating in the deliberations of Judge Harter's committee. Judge Harter and his committee are reviewing existing court rules to determine how conservatorship procedures can be made more uniform and comprehensive while staying consistent with current law. The goal is to present measured and practical solutions to the supreme court and the SCAO.

As probate practitioners, we know that the probate courts have flaws, but we also recognize that the courts generally are administered by serious and committed personnel who are doing their best to carry out Michigan law as written using the resources available to them. Conservatorship proceedings are seldom tidy; undoubtedly incorrect results or even frauds sometimes occur. At the same time, the current system has been structured to serve Michigan's citizens at an acceptable cost and with the imposition of reasonable

administrative burdens on conservators. Michigan law, paralleling the path of conservatorship law nationally, generally gives priority of appointment to family members and does not require or provide for strict judicial audits of these family fiduciaries unless an interested person raises an objection. Although some lawyers or professionals serve as conservators, most court-appointed conservators are individuals who are unfamiliar with the law, who lack professional help, and who are doing their best to assist elderly, infirm, or disabled family members while holding their own lives together.

The Michigan Probate Judges Association already has answered the performance audit with a hard-hitting response of its own. The probate judges confirm their commitment to improve the conservatorship system in Michigan, but, at the same time, they repudiated of the findings of the auditor general as follows:

- Michigan law and court rule do not direct or even permit courts to train conservators or to audit conservator's accountings. Thus, in assessing and faulting the performance of conservators and the probate courts, the auditor general failed to understand and to apply the requirements established by Michigan law and court rule.
- No case was identified in the performance audit where a probate court failed to follow the monitoring requirements established by law and court rule.
- No case in the performance audit identified any financial loss to a conservatorship estate.
- Contrary to the assertion of the auditor general, Michigan law permits a conservator, *with court approval*, to engage in transactions with the estate under administration. The auditor general noted self-dealing transactions, but failed to

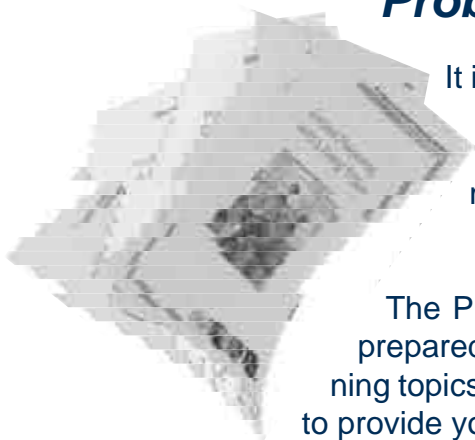
review transcripts of hearings at which such transactions were authorized.

Has the auditor general triggered a rush to expensive legislative or bureaucratic fixes for infrequent problems, or are there rampant abuses demanding radical solutions? Perhaps the only thing that all sides can agree upon at present is that there is room for improvement of a system that is so vital to the welfare of Michigan's vulnerable population and their loved ones.

In the meantime, conservatorships—and guardianships as well—remain in the spotlight. The original *Detroit Free Press* article was followed on Saturday October 25, 2003, by a second article describing a scathing three-year study conducted by Michigan Protection and Advocacy Services, Inc., and law students from Wayne State University who monitored guardianship hearings in Wayne, Oakland, Macomb, and Genesee Counties. The newspaper report alleges that “[e]lderly people are routinely stripped of basic rights in court hearings lasting just three to five minutes” when the protected individuals “usually aren’t present” and “almost never have attorneys.”

Given the continuing controversy, the Probate and Estate Planning Council encourages practitioners who have knowledge and experience in the areas of guardianships and conservatorships to monitor developments over the coming months. Please make your views known. Direct any comments to Judge Harter or the members of his committee listed above. Engage in discussions on our Section list server (and to join the list server, go to our Section's portion of the State Bar Web site). Attend Council meetings on the dates listed on the back of this *Journal*. Participate with and through your local bar association. We welcome and invite your involvement.

Probate and Estate Planning Pamphlets



It is often helpful to have informational estate planning material that a client can take home and read. Many of us are simply too busy with our everyday work to prepare and maintain informational handouts.

Help is on the way!

The Probate and Estate Planning Section of the State Bar has prepared a series of short pamphlets on a variety of estate planning topics. These are designed not only to be informational but also to provide you with a helpful marketing tool—you can affix a label with the name of your firm before you hand these out to clients.

Available pamphlets:

Acting for Adults who become Disabled

Price: \$.45 ea. (\$.40 ea 100 or more) *plus MI sales tax*

Durable Power of Attorney

Price: \$.45 ea. (\$.40 ea 100 or more) *plus MI sales tax*

Estate Planning with Living Trusts

Price: \$.45 ea. (\$.40 ea 100 or more) *plus MI sales tax*

Planning for Medicaid Qualification

Price: \$.45 ea. (\$.40 ea 100 or more) *plus MI sales tax*

Probate Administration of a Decedent's Estate

Price: \$.45 ea. (\$.40 ea 100 or more) *plus MI sales tax*

Pamphlets may be purchased individually or in bulk from the State Bar of Michigan, Finance Department, 306 Townsend Street, Lansing, Michigan 48933-2083. Pamphlets can also be downloaded in full from the State Bar's Web site at <http://www.michbar.org/probate/publications.html>.

For more pricing information, call 1-800-968-1422 ext. 6326 or obtain a complete list of State Bar Publications by downloading and printing the Publication Order Form from the State Bar's Web site, <http://www.michbar.org>.

Property Rights of Unmarried Cohabitants

By Diane L. Bernick*

Unmarried cohabitants (including same-sex couples) present a unique set of legal issues. Before 1957, such a relationship, except for same-sex couples, may have been recognized in Michigan as a common-law marriage. However, common-law marriage was abolished effective January 1, 1957, and is only recognized if the couple had a valid common-law marriage before January 1, 1957, or if the couple legally entered into a common-law marriage in a state in which it was or is valid.

The general rule in Michigan is that cohabiting adults do not acquire any interest in their partner's property absent an agreement that is either expressed or implied in fact. An expressed written agreement is strongly recommended and addresses issues such as the pooling of financial resources, the ownership of personal and real property, and child care. This article provides a survey of the Michigan law regarding cohabiting adults' property rights and further provides resources for drafting a binding nonmarital agreement.

Survey of the Law

Enforceable agreements between cohabitants must be expressed or implied in fact. A court will not allow recovery based upon contracts implied in law or quantum meruit.

In general, Michigan courts will grant relief when an agreement is expressed and based on independent consideration. The courts will also recognize a contract implied in fact provided that the plaintiff overcomes the presumption that services rendered during the relationship were gratuitous. The plaintiff must show, with regard to implied-in-fact agree-

ments, that the plaintiff expected compensation at the time the services were rendered and that the defendant expected to pay for such services. The following cases should be reviewed before drafting a nonmarital agreement or evaluating the claim of a cohabitant:

1. *Tyranski v Piggins*, 44 Mich App 570, 205 NW2d 595 (1973).

Claim Against Estate. In this action, the woman contributed \$10,000 toward the purchase of the home, did regular cleaning and household work, and cared for the man, especially in the last 1.5 years of life. The man promised the home to the woman. The woman sought to enforce the oral agreement while the estate of the deceased man sought to defeat the agreement because it was made within a meretricious relationship. The court found that where there is an agreement that is independent of a meretricious relationship, such an agreement will be enforced. The test to determine whether an agreement is independent of the relationship is whether (1) there is an express agreement to accumulate or transfer, (2) there is a relationship of some permanence, and (3) there is additional consideration in money or services. The court upheld the trial court's order that the home be transferred to the woman.

2. *Roznowski v Bozyk*, 73 Mich App 405, 251 NW2d 606 (1977).

Claim After Separation. In this case the couple cohabitated for seven years, during which time the woman assisted the man in the operation of his Alcona County resort, where she painted, cleaned, worked long hours in the bar, and performed most of

*Mark V. Gende was a contributing researcher on this project.

the couple's domestic chores. In return, he paid for all of their expenses, including cars, insurance, home, clothing, food, and medical. After their relationship ended, she sued him for wages due on an express contract for the value of her services rendered. The court of appeals found that it was not sufficient to merely show that the man benefited from the services of the woman. Instead, in a commercial setting, absent an express contract, it is necessary to show an implied-in-fact contract where it can be properly inferred that the woman expected payment for the services rendered.

3. *Carnes v Sheldon*, 109 Mich App 204, 311 NW2d 747 (1981).

Claim After Separation. After a cohabiting relationship of more than 10 years had ended, the woman filed suit seeking the division of property accumulated during the years the couple cohabited. The woman assisted in raising the man's daughter and was employed sporadically throughout the relationship. The man owned the home and controlled the finances. The man made promises to marry the woman but ultimately refused to do so. The trial court found no evidence of an express agreement to divide the property. The court further found that an implied-in-fact contract could not be based on domestic services, because it would essentially resurrect common-law marriage, which the legislature abolished in 1957.

4. *In re Lewis Estate*, 168 Mich App 70, 423 NW2d 600 (1988).

Claim Against Estate. A man and a woman engaged in unmarried cohabitation for four years. Just after the first year, the woman threatened to leave, and the man, who was in ill health, begged her to stay, say-

ing, "I will take care of you." The woman understood the statement to mean that the man would take care of her in his will. Upon his death, he left her nothing. The woman then commenced an action to recover for personal services rendered. The court of appeals found that contracts implied in law are not allowed in unmarried cohabitation cases. The appellate court held against the woman, citing the principle that the presumption concerning personal services in unmarried cohabitation is that they are gratuitous and that when a cohabitant renders personal services in hopes of a testamentary legacy, that person takes his or her chances. If the person receives no legacy, he or she may not recover.

5. *Featherstone v Steinhoff*, 226 Mich App 584, 575 NW2d 6 (1997).

Claim After Separation. Beginning six months after the birth of their son, the couple cohabited for eight years, but never married. During that time, the man promised he would take care of the woman and his child, along with her other children. The woman interpreted the promise to be for an indefinite period of time. Relying on the man's promise, the woman quit school, did household chores, and worked at the man's business. The court of appeals held that these actions did not support a contract implied in fact because the woman did not overcome the presumption that her services were gratuitous by demonstrating that she expected to be compensated and that he expected to pay for her services.

6. *Harper v Warju*, No 211650 (Mich App Dec 17, 1999) (unpublished).

Claim After Separation. During a period of six years of living together, the cohabitants in this case entered into a verbal agree-

ment under which they would purchase rental houses to provide for their retirement. During their cohabitation, two houses were acquired, one in their joint names and the other in only the man's name. Upon termination of the relationship, the woman sued for division of the partnership property, including the house purchased by the man in his name. The trial court found that a partnership existed and divided the property by giving the first house to the woman and the second house to the man. The man appealed, arguing that there was no partnership but only a cost-sharing arrangement between the couple. However, because of clear evidence of the couple's plans to purchase, repair, and earn income from rental houses, the appellate court affirmed the trial court's finding of a partnership and held that the trial court did have equitable jurisdiction to divide partnership property.

7. *Whitson v Kaltz*, No 229289 (Mich App Sept 20, 2002) (unpublished).

Claim After Separation. The man cohabitant in this case sought reimbursement from the woman for the increase in value to her lot realized through their mutual agreement to purchase and place a modular home on the lot. The Michigan Court of Appeals found (1) that there was an express and mutual agreement to purchase the modular home, (2) that there was a relationship of permanence because the couple had been together for five years, and (3) that there was consideration on both sides because she provided the lot and he provided the down payment on the modular home and construction cost. The court ordered reimbursement for the value of his contribution when the relationship terminated.

As the inconsistent results of the above

review of cases indicate, cohabiting adults are best served by entering into written express agreements outlining the financial details. Any contract should express the parties' agreements and intentions and should be based on legal consideration, independent of the meretricious relationship.

A sample nonmarital agreement can be found in the ICLE publication, *Michigan Family Law* at 3-F1 (Judith A. Curtis et al eds, ICLE 5th ed & Cum Supps). A sample nonmarital agreement may also be found on the ICLE Partnership Web site, www.icle.org/partners/forms (available to ICLE Partners only). This agreement was prepared by Henry Baskin in May 2000. These nonmarital agreements, if properly drafted, will provide protection in the event of separation of the parties.

Cohabiting adults should, in addition to a nonmarital agreement, be sure to finalize well-drafted and complete estate plans to protect each other against claims of family members in the event of the death or disability of a cohabitant. Cohabiting couples should also be very careful to name the other party as a beneficiary on life insurance policies and, if possible, as a beneficiary on retirement plans.

Naming the other as an agent under powers of attorney, both for medical and financial assistance in the event of disability, is essential if cohabiting adults wish to authorize the other party to make these decisions on their behalf.

Marriage After a Term of Cohabitation

Clients should be cautioned that marriage after a term of cohabitation may subject the property earned during the long-term relationship to a claim by the divorcing spouse. See *Starbuck v Starbuck*, No 235528 (Mich Ct App Feb 18, 2003) (unpublished); *Nielsen v Nielsen*, 179 Mich App 698, 446 NW2d 356 (1989).

When consulting with cohabiting adults, the

estate planner should discuss the advisability of entering into a written agreement that addresses both separation of the cohabitants and death. The planner should not only prepare clear estate planning documents, including wills, trusts, and medical and financial powers of attorney, but should also advise the client that unmarried cohabitants do not typically acquire the rights of married couples. This includes rights to continued medical coverage; survivorship interests in retirement plans; rights for loss of consortium in personal injury actions, see *Ford v Wagner*, 153 Mich App 466, 395 NW2d 72 (1986); or workers compensation benefits for the children of the cohabitants, see *McDonald v Kelly Coal Co*, 335 Mich 325, 55 NW2d 851 (1952).

Therefore, cohabitants who are relying on their partner for either their financial support or the support of their children may be devastated by the death of the working partner without proper agreements in place.

tion for Financial Planning. She is a frequent lecturer for ICLE and has contributed to several publications, including *Michigan Estate Planning Handbook* (ICLE rev ed 2000), the *Greater Lansing Business Monthly*, and Ingham Medical Center publications.



Diane L. Bernick, of Bernick Omer Radner & Ouellette, PC, Lansing, practices in the areas of estate planning, elder law, and domestic relations. She is a member of the Probate and Estate Planning Section of the State Bar of Michigan

and is a former member of the Probate and Estate Planning Council. Ms. Bernick is also a member of the Ingham County Bar Association and the National Academy of Elder Law Attorneys. She currently serves as a domestic relations mediator for Ingham County. Ms. Bernick has lectured for numerous organizations, including the Michigan Association of Certified Public Accountants, Michigan State University, the Greater Lansing Estate Planning Council, and the International Associa-

Special Planning Considerations for Same-Sex Couples

By Jay Kaplan

As this issue of the Journal goes to press, the Massachusetts Supreme Court has recently issued a decision striking down Massachusetts's law that limits civil marriage to partners of the opposite sex. *Goodridge v Dept of Public Health*, 2003 WL 22701313 (Nov 18, 2003). In this decision, the court found that the ban on same-sex marriages violated the equal protection and due process clauses of the Constitution. Whether or not there is an appeal, this case has attracted national attention and it may be only a matter of time before a challenge is mounted to the federal Defense of Marriage Act.

Currently, no other state currently permits same-sex couples to be legally married, although the State of Vermont provides for "civil unions" for same-sex couples and state benefits that are similar to those provided to legally married couples. Additionally, both California and Hawaii provide some comparable state benefits to same-sex couples that are registered as domestic partners.

Michigan does not recognize same-sex marriage. MCL 551.1. Further, it has a law that says it will not recognize legal marriages between same-sex couples performed in other states, MCL 551.271. The Defense of Marriage Act declares that all federal laws, policies, and regulations that refer to married persons apply only to opposite-sex couples. 28 USC 1738C. This includes immigration law regarding spouses of U.S. citizens being able to obtain permanent residency and Social Security survivor benefits. The federal law also says that states do not have to recognize same-sex marriages that lawfully occurred in other jurisdictions.

Civil legal marriage is important because it provides more than a thousand state and federal legal benefits, such as

- the right to child custody and visitation;
- equitable division of property during divorce;
- hospital visitation and contact with medical personnel limited to immediate family members, such as intensive care unit regulations;
- the right to make medical decisions for a spouse if the spouse is incapacitated;
- the right to adopt children;
- Social Security survivor benefits;
- pension benefits;
- inheritance of real and personal property in the absence of wills;
- the right to bring wrongful death suit on behalf of a spouse; and
- the right to make funeral and burial decisions.

Without the legal right to marry, a relationship between same-sex partners is not protected without having legal documents that declare personal choices and wishes.

Partners may enter into a variety of agreements that anticipate problems and solutions to protect each person's interests. These include cohabitation agreements, powers of attorney, patient advocate documents, and parenting agreements.

Wills

A will is one method of ensuring that your client's property will pass to her partner at her death. The right of your client to choose who inherits her property is not restricted by law because she is a gay, lesbian, bisexual, or transgender (GLBT) person. In Michigan, a legal parent may nominate her partner as a guardian for the child, provided there is no other legally recognized parent involved. This nomination of a guardian may be done in a

will or separate writing pursuant to MCL 700.5202.

Could your client's will be challenged if she leaves her estate to her partner? A challenge may always be raised regarding a will. However, if a will is properly drafted and executed; if your client is of sound mind; and if no fraud, duress, or undue influence has occurred on behalf of the beneficiaries of the will, such challenges are unlikely to succeed. Family members have attempted to raise challenges of undue influence based on the fact that the deceased was in a same-sex relationship. Michigan has no statutory law or published case law that considers homosexual relationships alone to constitute undue influence challenges to a will. It is a good idea to put a "no contest clause" in such a will specifically stating that the testator does not want anyone to challenge the provisions of the will and that if such challenges are made, the person making the challenge will be barred from receiving anything under the terms of the will.

The time to draft a will is when the client is healthy and can make choices regarding her property without someone challenging her mental capacity to do so. This is particularly important for a person living with HIV/AIDS, who may experience opportunistic infections, including dementia, that can impair one's capacity to make decisions.

As we know, wills do not cover certain types of property, such as a home jointly owned by a client with a partner with a right of survivorship, which would pass automatically outside of the client's estate upon death. Named beneficiaries of policies such as life insurance policies would also receive this property outside of a will. These are other methods of passing property on to a partner.

Adult Adoption Option

Another way to ensure that a client's partner will inherit from her estate should he die without a will is through adult adoption. Under

MCL 710.24, a person may adopt an adult with the intent to make the adoptee an heir to an estate with or without a change of name. The adoption petition may be filed with the court of the county in which the petitioner resides or the county in which the adoptee lives. Even if your client's partner's parents are still living, they are not required to give their consent to the adoption or to have their parental rights terminated. The court will consider, evaluate, and determine whether the adult adoption petition is based on the "best interests of the adoptee." MCL 710.22(f).

Living Together— Cohabitation Agreements

These agreements are contracts between partners or people who live together. They describe how finances will be managed and define the obligations and duties within the living arrangement.

A cohabitation agreement could include the following:

- *Home ownership*—before buying a home, your client and her partner need to decide if they will be joint tenants with right of survivorship. Tenancy by the entirety property is not available to a GLBT couple.
- *Joint savings and checking accounts*—whether or not both partners' names are on the bank account, allowing each to have access to the account.
- *Household expenses*—the expectation of how things are divided, e.g., evenly or based on percentage of income.
- *Property*—a description of property including property that is owned individually and collectively and, if owned jointly, in what shares.
- *Career sacrifices*—if one partner has given up all or part of his career to take care of the home and the relationship ends, leaving that person in a worse financial situation, an agreement about pay-

ment for the sacrifices he or she made.

- *Education*—the expectation of repayment if one partner contributes to the education of the other.
- *Dispute resolution*—In the event of a break-up, partners can agree ahead of time to go through a mediation or negotiation process if they are unable to resolve differences rather than go to court.

Cohabitation agreements are treated like contracts because each person is bargaining in exchange for something.¹ These contracts will be enforceable as long as

- the parties have the capacity to enter into the contract (age 18 years and older) and both parties are mentally competent;
- the purpose of the contract is legal (not to sell drugs or sexual favors) and the agreement has to be for something apart from the sexual relationship, *Tyranski v Piggins*, 44 Mich App 570, 205 NW2d 595 (1973); for example, the agreement may be about who gets the house that they purchased together, *Featherston v Steinhoff*, 226 Mich App 584, 575 NW2d 6 (1997); and
- no fraud, duress, or undue influence was involved in procuring the contract.

Since marriage is not an option for GLBT people in Michigan, courts are not prepared to handle the termination of same-sex relationships as they are with a divorce. Therefore, it is quite helpful to have matters clarified in writing beforehand. Like heterosexual marriages, relationships do not always last, and breakups can bring emotional tensions that make dividing property and settling other matters difficult. Having an agreement may help to eliminate some of that stress.

It is important to note that a court will treat this agreement as a contract, not as a marriage, for enforcement purposes. Even though Michigan courts have not addressed, through a published opinion, whether same-sex

cohabitation agreements are enforceable, it is important to consider same-sex cohabitation agreements as contracts. Contracts, provided they contain the proper legal elements, should be enforceable regardless of the parties' sexual orientations.

In the absence of some agreement, both owners are liable for mortgage payments if they own property as joint tenants, even if the relationship ends and one partner moves out of the house. However, the one who remains will still have to pay the full mortgage to prevent foreclosure or a tax sale in the absence of an agreement. Thus, it is best to put in writing what each partner expects to happen with the property. Will the residence be sold and the proceeds split between the two owners, or will there be a buy-sell agreement in which one partner agrees to buy the other out?

Power of Attorney

A power of attorney is a very useful life-planning document for GLBT people. What the named agent may do depends on how you write the power of attorney document. It can be written very broadly to allow the agent to act on the principal's behalf in almost any situation, or it can be written very specifically, limiting the agent's authority to a particular transaction or set of transactions, within the time frames and conditions established in the document.

For example, an agent may be given the power of attorney to handle all financial matters, including cashing checks, making deposits, paying bills, filing tax returns, purchasing stock, and selling property. Or an agent may be given the power of attorney regarding the sale of an automobile, limited to a period of three months.

People with chronic illnesses, such as HIV/AIDS, need to plan for situations in the event that they are unable to handle their financial affairs. The HIV virus, which is characterized by periodic episodes of oppor-

tunistic infections, can result in periods of disability.

The document should be enforceable regardless of the sexual orientations of the parties, as long as the document meets the legal requirements of a power of attorney document and there is no fraud, duress, or undue influence.

Designation of Patient Advocate

Through a designation of patient advocate or a medical power of attorney, your client may designate a person to make medical decisions for her. She may also indicate her choices regarding her medical care, including who may visit her in the hospital and the types and extent of medical treatment she wishes to receive. This document is recognized by statute, MCL 700.5506, and is legally enforceable in Michigan.

As mentioned previously, one of the benefits of legal marriage is that if one spouse becomes “medically incompetent,” the other has to be consulted regarding medical care and, absent a legal document or order to the contrary, is granted hospital visitation and access to the patient records. That is not true with same-sex relationships. Absent a written document, decisions regarding medical care will be made by your client’s next of kin (family members), her doctor, and if necessary, the courts. Without a written document, your client’s medical wishes could be ignored and her partner could be denied the ability to be with her.

Parenting Agreements

These are written agreements between a legally recognized parent (the adoptive or biological parent) and the nonlegally recognized adult (the same-sex partner) who is the child’s coparent. It pertains to situations when there is only one legally recognized parent.

For example, if two women decide to have a child together through artificial insemination

and one is impregnated with sperm from an anonymous donor, the other will not be legally recognized as a parent for this child under Michigan law.

Parenting agreements establish the fact that a GLBT family exists and is responsible for the care of children. In addition, drafting this kind of agreement provides an opportunity to talk through expectations regarding parenting in concrete terms.

There is no published case decision in Michigan that has looked at the issue of the enforceability of parenting contracts. A parent may not contract away his legal rights as a parent for consideration. Without a written agreement, GLBT coparents have a legitimate concern about their relationship with their children being terminated by the legal parent in the event of a break up.

Though Michigan courts have not recognized equitable or psychological parents outside of a legal marriage for the purposes of custody and parenting time issues, *Van v Zahorik*, 460 Mich 320, 597 NW2d 15 (1999), there is still value to having parenting agreements.

First, they document the coparent’s relationship with the child. Second, they provide for how the coparents will handle custody and visitation disputes, for example, through mediation or arbitration. Michigan courts have enforced provisions requiring that the parties in divorce cases go through arbitration to resolve child custody disputes. *Dick v Dick*, 210 Mich App 576, 534 NW2d 185 (1995).

While same-sex couples may not legally get married or divorced, an argument could be made that child custody issues in the termination of a relationship are similar to those in a divorce. Since there is no court procedure to handle the dissolution of same-sex relationships, the use of mediation and arbitration is even more compelling.

A parenting agreement should contain written documentation including

- the parents' mutual intent to raise their children together, sharing all rights and responsibilities;
- naming the responsible party for the payment of the insemination or adoption process, birth, and day-to-day financial care of the child;
- arrangements for day-to-day caregiving and decision making;
- custody, visitation, and financial arrangements should the couple end their relationship; and
- agreement on how disputes about parenting rights and responsibilities will be handled by binding arbitration or mediation.

Note: A legal parent recognized by the state may not contract away his child support obligations through a parenting agreement.

Are there any other documents that should be considered besides the parenting agreement?

Yes. As previously stated, in Michigan, a legal parent may nominate her partner as guardian for the child, provided there is no other legally recognized parent involved. She may also give a power of attorney to the partner. In Michigan, such documents are valid for six months and have to be renewed. A power of attorney may include medical care decisions and school or day care authorization, as well as day-to-day care for the child.

Notes

1. For example, one partner agrees to support the other while he is going to school with the expectation that, after he has completed school and is employed, the other partner will be paid back. Although each person must benefit from the trade, promises that are exchanged do not have to have similar value.

of legal practice in the area of public service, specializing in civil rights for persons with disabilities and gays and lesbians, housing issues, and domestic relations. He is currently the staff attorney for the ACLU's Gay Lesbian Bisexual Transgender Legal Project. Mr. Kaplan is responsible for bringing test cases and impact litigation on behalf of the Michigan GLBT community, educating the public about the status of GLBT civil rights law, providing support and technical assistance to attorneys handling GLBT issues, and preparing memoranda regarding legal theories and strategies. He was a founder of the HIV/AIDS Advocacy Program, which provides legal advocacy services to people living with HIV/AIDS, and developed the Human Rights Project, which provides legal information and referral services to gays and lesbians.

Jay Kaplan, of the American Civil Liberties Union of Michigan, Detroit, has over 15 years

The Impact of Family Law Issues on Grandparents

By Jane S. Radner*

The Michigan Supreme Court and the U.S. Supreme Court have recently noted that the traditional role of grandparents has changed to include more childrearing responsibilities.¹ As grandparents assume more responsibilities for raising their grandchildren, they are looking to their estate planners for guidance concerning the most effective ways to support, transfer assets, and assume responsibility for the children they are involved in raising.

There are many reasons why grandparents may desire to formalize a practical custody situation with legal custody, a guardianship order, or adoption proceedings. These include access to the grandchild's school and medical records, the right of the grandchild to attend school in the grandparent's school district, the ability of a grandparent to authorize medical treatment, and the desire to avoid the tax consequences of payments made to support the child.

The purpose of this article is to summarize the leading family law issues affecting Michigan grandparents, to consider the unique financial questions faced by grandparents who are custodians of minor grandchildren, and to warn of potential divorce issues when gifting to adult grandchildren.

Grandparent Visitation

The most emotionally charged issue facing Michigan grandparents concerns the validity of the state's grandparent visitation statute. The Michigan Supreme Court recently ruled the statute unconstitutional. *DeRose v DeRose*, 469 Mich 320, 666 NW2d 636 (2003).

The Michigan grandparent visitation statute allowed grandparents to seek court-ordered visitation of grandchildren when (1) a custody dispute concerning the child was pending before the court and (2) the court determined that visitation by the grandparent was in the best interests of the child. Based upon the U.S. Supreme Court's invalidation of a sweeping Washington State grandparent visitation statute that allowed any third party to petition at any time for visitation rights, *Troxel v Granville*, 530 US 57 (2000), the Michigan Supreme Court held in *DeRose* that the Michigan grandparent visitation statute was similarly unconstitutional. While not as sweeping as the Washington statute, the Michigan statute failed to afford any special deference or weight to the determination of a fit custodial parent. A parent's determination regarding whether grandparent visitation was in the child's best interests was found to be the paramount factor.

While the majority's decision in *DeRose* invalidates Michigan's grandparent visitation statute, Justice Weaver's concurring opinion is noteworthy. The concurrence gives the legislature ample guidance concerning the changes that must be made to enable the statute to pass constitutional muster. First, the statute must be reformed to operate on the assumption that fit parents act in the best interests of their children. Second, the statute must afford the decision of a fit parent special weight or deference. Third, the burden of proof in grandparent visitation petitions must be on the petitioners (i.e., the grandparents) and not the parents. *DeRose* (Justice Weaver's concurring opinion). It is likely that the legislature will act on Justice Weaver's recommendations and reform the now unconstitutional statute.

*Thanks to Mark Gende and Dustin Foster for assistance with research and writing and to Patricia Ouellette for assistance with taxation issues.

Powers of Attorney

On the other end of the spectrum are grandparents who are assuming, whether voluntarily or not, daily child care responsibilities for grandchildren. When should they seek to formalize this relationship?

Individuals who care for children on an informal basis are not able to authorize medical care or treatment for the children. This includes relatives, such as grandparents, even if they are the primary caregivers. The legal authority to do so must be granted by a parent. The simplest way to achieve this is through a parental delegation, or power of attorney. MCL 700.5103. All of the parental powers may be delegated except the power to consent to marriage of a minor or to release a minor for adoption. The delegation expires six months from the date of signing. The power does not limit the parents' power to act, since it may be revoked at any time.

It may be impossible to obtain a power of attorney if the parents are not available, are uncooperative, or are legally incapacitated. Moreover, the delegation may not be sufficient to cover all situations. Powers are more commonly used for temporary situations, such as vacations or school enrollment.

The question often arises whether a power of attorney is sufficient for the purposes of creating residency for a minor child in the school district of a grandparent. From a practical standpoint, school districts seem to differ in their approach to this question. Moreover, the recent increase in schools of choice may override other considerations. In the past, school residency was accomplished as long as the power of attorney was for the purpose of providing a suitable home for the child and not just for the purpose of establishing school residency.

Guardianship

Guardianship is the formal grant of power

to an individual to care for another. Such an arrangement may be desirable when the child's parents are not able to care for the child because of death, incapacity, abuse, mental incompetence, disappearance, or incarceration. If a minor child is living with grandparents but the parents have neglected to provide legal authority, a guardianship may be obtained. Unlike a power of attorney, the parental rights are superceded by the guardianship. MCL 700.5201 et seq. Parents may nominate in their will a grandparent or any other person to become the child's guardian in the event that both parents are deceased.

Guardianships are court-sanctioned arrangements established for the welfare of the child. Guardianships may be full, temporary, or limited, each granting different levels of rights to the guardian to act on behalf of the minor child.

Full guardians assume the role of custodial parents. They serve until the minor reaches the age of majority. A guardian has all of the rights and responsibilities of a parent with two exceptions: the guardian is not legally obligated to support the ward, and the guardian is not liable to third parties for acts of the minor. MCL 700.5201, .5204, .5215. A guardian may enroll a child in school, make medical decisions, accept child support, consent to the marriage of the minor, and consent to an abortion, among other powers.

Temporary guardians have all of the powers and responsibility of a full guardianship. However, the term of the temporary guardianship continues for no more than six months.

A limited guardianship is defined in duration and responsibility according to a specific court-approved plan. The guardianship plan often results from a consensual agreement between parents and guardians. Limited guardians may not consent to the adoption or marriage of the minor. MCL 700.5206.

Adoption

In some instances, such as the death of the child's parents, a grandparent may want to adopt a grandchild. An adoption requires the termination of the parental rights of both the birth mother and father. Once termination occurs and the child is placed for adoption with the grandparents, the new adoptive parents have all of the same rights and responsibilities as all parents. This includes all intestate succession and child support issues. For the past several years, Michigan has allowed relative adoptions and direct placement adoptions without intervening foster care.

Intestate Succession

If grandparents desire a grandchild in their care to inherit from their estate, this must be clearly designated in estate planning documents, even if the grandparent is the primary custodian of the grandchild. Only an adoption of the grandchild will allow the minor to inherit as a child for purposes of intestate succession. A guardianship will not accomplish this.

The laws of intestate succession consider a grandchild a descendent only if (1) the grandchild is a lineal descendant of the grandparent (excludes stepgrandchildren) or (2) if the grandparent has formally adopted the grandchild. In either event, if an irresponsible parent is still living and there is no surviving spouse of the grandparent, the estate will pass to the parent. This may be the same parent whose care for the minor child has been superseded by a guardianship.

Financial Considerations

There is no statutory or case law in Michigan obligating grandparents to support their grandchildren. A guardianship does not change this. Support for a grandchild is considered a gift whether it is incident to an informal custody arrangement or a guardianship. For the duty to support not to be deemed a

gift, there must be a legally enforceable obligation under state or local law, not simply a moral obligation. Rev Rul 82-98, 1982-1 CB 141.

Therefore, direct support payments for a grandchild in excess of \$11,000 annually may invoke unwanted tax consequences. Transfers to grandchildren may be a desirable way to decrease the grandparent's taxable estate and at the same time assist the parents financially through providing for the needs of the grandchildren. However, great care must be taken when arranging grandparent transfers to grandchildren to avoid triggering the generation-skipping transfer (GST) tax.

There are a number of tools at the estate planner's disposal to enable grandparents to make transfers to their grandchildren while minimizing or eliminating gift and GST tax consequences. These include outright gifts that conform to the annual exclusion amount, uniform transfers to minors, custodial accounts, *Crummey* trusts, educational savings accounts, direct payments to medical or educational institutions, and Section 529 plans. The scope of this article is not intended to detail each of these methods.

At the other end of the spectrum, the support of a grandchild can work a financial hardship on elder clients with limited finances. A minor child's parents continue to have the legal obligation to support their child after a guardianship is instituted. A grandparent with whom a grandchild is living may petition the court for child support payments. The amount of support will be determined by the Michigan Child Support Guidelines. The guidelines are based on each parent's income and the number of other children that each supports. Social Security benefits based on the grandparents' work records are available for grandchildren only under very limited criteria.

Whether a guardianship is sufficient to invoke health care coverage for a minor child under a grandparent's medical insurance

needs to be investigated with the particular provider. While guardians are not obligated to support a ward, they are obligated to facilitate obtaining necessary medical care. MCL 700.5215.

For Medicaid eligibility purposes, recent litigation has established that Michigan grandparents (nonparent relatives acting as caretakers) are able to exclude the expenses used in providing care for grandchildren who are in their care. The effect of this holding is to raise the protected income level available to the qualifying grandparent under Medicaid. *Markva v Haveman*, 317 F3d 547 (6th Cir 2003). Grandparents who were denied Medicaid on or after September 1, 1999, or who had a spenddown for Caretaker Relative Medicaid coverage may now be able to become eligible for Medicaid or receive a reduced spenddown back to February 2003. Applications for this relief must be made to the Family Independence Agency before December 30, 2003.

Gifts to Adult Grandchildren Who May Divorce

A significant issue in divorces today is whether inherited and gifted property is included in the marital estate. Often the gifted or inherited property is from grandparents. The estate planning lawyer may want to protect such gifts in the event of a divorcing grandchild.

Michigan courts have discretion to treat gifted and inherited property as excluded from the marital estate. The property may be allocated separately to the intended spouse in a divorce unless one of two exceptions is met. First, if the nongifted spouse contributed to the acquisition, appreciation, or growth of the property, it may be included in the marital estate. In other words, the nonfamily spouse will receive the value of the gift. Second, if the marital estate is not sufficient for the support and maintenance of both parties after a divorce, a court has the discretion to include

inherited and gifted property for division.

The increase in value during a marriage of gifted and inherited property may also be included in the marital estate, even if the original gift is excluded. Often the inclusion depends on whether the growth was active or passive. For example, the appreciation in the value of stock inherited by one spouse during a marriage may not be considered marital because the appreciation may only be due to market conditions. However, the increase in the equity in a home, when both parties live there, maintain it, and contribute to mortgage and tax payments, may be seen as active appreciation. In that instance, the increase in value may be included in the marital estate.

From a grandparent's perspective, donor intent can play a role, among other factors. Written evidence of that intent, for example that the gift is intended for one spouse only, can be persuasive. Similarly, loans to grandchildren should be accompanied by executed promissory notes. Without evidence of a loan intent and the obligation to repay, the family spouse can be left with the obligation to repay without contribution from the divorced spouse.

Gifted and inherited property that is transferred through a trust is also vulnerable to similar scrutiny by a divorce court. If the property is distributed to a grandchild only at the discretion of a third-party trustee, there is less likelihood that the property is subject to division in a divorce. Trust fund income is specifically included as a source of income for the purposes of calculating child support. Again, the less control a parent has over the distribution of that income, the less chance for its inclusion for child support or alimony purposes.

With gifts of a sizable amount from grandparents, a postnuptial agreement should be considered. This will protect the property and maintain it as a separate asset in the event of divorce or death.

Conclusion

Grandparents are becoming more involved in the lives of their grandchildren than ever before. Today's grandparents face legal issues ranging from the right to visitation to the status of grandchildren who are under their temporary or permanent care. As always, grandparents frequently desire to transfer assets to their grandchildren to assist with education, support, or other issues. These concerns need careful analysis of both family law and estate planning laws to accurately counsel elderly clients.

Notes

1. *DeRose v DeRose*, 469 Mich 320, 666 NW2d 636 (2003) (Justice Kelly dissenting, citing Justice O'Connor's polarity opinion in *Troxel v Granville*, 530 US 57 (2000)).



Jane S. Radner of Bernick Omer Radner & Ouellette, PC, Lansing, Michigan, practices in the areas of domestic relations, adoption, and elder law. She is a member of the Family Law Section of the State Bar of Michigan and currently serves as a domestic relations mediator.

Nineteen Issues to Consider When Drafting Death Tax Apportionment Clauses Under Michigan's Estates and Protected Individuals Code

© By Sebastian V. Grassi, Jr.

Introduction

This article is a companion to a previously published article, entitled "Understanding the Ten Rules of Death Tax Apportionment Under Michigan's Estates and Protected Individuals Code,"¹ This article provides 19 suggestions that a practitioner may want to consider when drafting a death tax apportionment clause under Michigan's Estate and Protected Individuals Code (EPIC),² which went into effect April 1, 2000, for a taxable estate.³ This article also includes sample drafting language for the practitioner's consideration and a table that summarizes the federal tax apportionment and right of reimbursement system, and the interests governed by state apportionment rules, such as EPIC. This article does not discuss the myriad issues attendant on drafting death tax apportionment clauses in general.⁴

Summary of Michigan Law

Death taxes covered by EPIC include

[a]n estate, inheritance, or other death tax levied or assessed under the laws of this or another state, political subdivision, or country or under a United States revenue act concerning property included in the gross estate under the law, but exclude taxes for which the sources of payment are provided within the sections 2206, 2207, 2207A, 2207B, and 2603 of the internal revenue code

MCL 700.3920(1).⁵ The phrase "or other death tax levied" includes the Canadian capital gains tax assessed against deemed dispositions occurring at an individual's death.⁶

EPIC death tax apportionment rules apply to three types of transfers: (1) property passing under a will, MCL 700.3920(1)(a); (2)

property passing under or held by an inter vivos trust, MCL 700.3920(1)(b); and (3) all other transfers including, without limitation, property passing by beneficiary designation, property passing by survivorship, property passing by intestacy, and annuities not created under a will or an inter vivos trust, MCL 700.3920(1)(c).

Unless the governing instrument⁷ specifies a different scheme for the apportionment of death taxes, the default rules of EPIC (concerning inside apportionment) generally require the residue of the decedent's estate to bear the burden of paying all death taxes (subject to the reimbursement rules of IRC §§ 2206 [life insurance], 2207 [property subject to a general power of appointment], 2207A [qualified terminable interest property (QTIP) property], 2207B [property subject to a retained interest], and 2603 [property subject to generation-skipping transfer (GST) taxes]⁸ and the special apportionment rules of MCL 700.3920(1)(c) [concerning outside apportionment], which provide for equitable apportionment by all other transfers, such as transfers by beneficiary designation, property passing by survivorship or intestacy, and to annuities not created under a will or trust). MCL 700.3920–.3923. Special rules apply to temporal interests and state inheritance taxes.

Nineteen Suggested Modifications to EPIC's Default Rules for Tax Apportionment

As discussed in "Understanding the Ten Rules of Death Tax Apportionment Under Michigan's Estates and Protected Individuals Code," EPIC's default rules concerning the apportionment of death taxes may have some unintended results, especially in large taxable

estates. Set forth below are 19 suggestions for practitioners to consider when using EPIC's death tax apportionment scheme. These suggestions can be incorporated in a decedent's will and act as modifiers or clarifications to the death tax apportionment rules of EPIC.

1. All rights of reimbursement provided for by EPIC concerning IRC §§ 2206 (pro rata), 2207 (pro rata), 2207A (incremental), and 2207B (pro rata) should occur at an incremental or marginal basis.
2. If possible, no death taxes should be paid from marital deduction bequests or against charitable deduction bequests; otherwise, the deduction will be reduced by the amount of death taxes paid from the marital or charitable bequest property. However, if the decedent has made significant adjusted taxable gifts, consideration should be given to who or what property is to be responsible for the death taxes attributable to the inclusion of the adjusted taxable gifts to the decedent's federal estate tax base.
3. Disclaimed property or property not qualified for the marital deduction (e.g., partial QTIP election property) should pay its own death taxes.
4. Death taxes attributable to a charitable remainder trust should be paid from the residue of the decedent's estate, subject to the special rules promulgated in Rev Rul 82-128, 1982-2 CB 71.
5. Death taxes attributable to a qualified domestic trust should be paid in the manner specified in IRC § 2056A(b). A "pay all taxes from the residue" clause might otherwise require the decedent's estate to remain open during the entirety of the surviving spouse's lifetime.
6. Generation-skipping transfer taxes should be paid from the property generating the tax (including direct skips), other than IRC § 2057 qualified family-owned business interest (QFOBI) property that is not redeemed pursuant to IRC § 303. Having the GST tax paid from the property generating the tax obviates the right of reimbursement under IRC § 2603(b) since the property itself is charged with the payment of the GST tax in the first instance. If GST taxes attributable to a taxable distribution are paid from the residue of the decedent's estate, the payment of the GST tax by the residue will constitute an additional taxable distribution. IRC § 2621(b). Furthermore, payment of GST taxes from the residue might otherwise require the decedent's estate to delay distribution of the residue where taxable distributions or taxable terminations may occur well after the decedent's death. In the case of property held in a trust arrangement less than \$250,000 in value (such as life insurance), Treas Reg 26.2662-1(c)(ii) and (v) require the executor to pay the GST tax and then seek reimbursement.
7. Death taxes (other than the recapture tax under IRC § 2057(f) and redemptions of QFOBI stock under IRC § 303) attributable to IRC § 2057 QFOBI property should be paid from the residue of the decedent's estate; otherwise, the QFOBI deduction will be reduced in the first instance by the amount of taxes paid from the QFOBI property.
8. IRC § 2032A(c) special use valuation recapture taxes and IRC § 2057(f) QFOBI recapture taxes should be paid from the property or by the recipient of the property; otherwise, the decedent's estate may have to remain open during the recapture period.
9. Death taxes attributable to a bequest that specifically apportions the tax to the bequest should be paid from the property comprising the bequest or by the recipient of that property.

10. Death taxes attributable to gift taxes paid within three years of the decedent's date of death should generally be paid out of the residue, if it is sufficient; and if the residue is insufficient, the death taxes should be paid by the gift recipients. IRC § 2035(b).
11. Death taxes attributable to IRC chapter 14 interests under §§ 2701(d) or 2704(a) should be paid out of the property generating the tax or by the recipient of that property. (IRC § 2701(d)(1)(A) imposes additional estate taxes on certain cumulative but unpaid partnership or corporate distributions. IRC § 2704(a)(1) imposes additional estate taxes on certain lapses of voting or liquidation rights in a partnership or corporation.)
12. Death taxes attributable to a qualified conservation easement under IRC § 2031(c)(5)(C) should be paid by the person who generates the tax (because of their not terminating the retained development right).
13. As previously mentioned, death taxes attributable to a general power of appointment should be recovered on an incremental or marginal basis, rather than a pro rata basis. With respect to a power of appointment given to the decedent by another person that is limited to a 5 x 5 withdrawal right or is a *Crummey* withdrawal right limited to the annual gift tax exclusion amount, death taxes attributable to these special withdrawal rights should be paid from the residue of the decedent's estate; otherwise, in the case of an irrevocable life insurance trust (ILIT) with a *Crummey* withdrawal right, there may not be enough money left in the ILIT for its intended purpose, such as the payment of life insurance premiums.
14. Death taxes on retirement benefits payable to the decedent's surviving spouse or descendants, whether outright or in trust (such as an IRA conduit trust or IRA accumulation trust), should be paid out of the residue of the decedent's estate. This will permit the IRA principal to remain intact and to be "stretched out" under the minimum distribution rules. Furthermore, the payment of the death taxes by the residue will avoid the double taxation normally inherent in retirement benefits, i.e., distribution of benefits to pay the death taxes results in an (accelerated) income tax liability to the beneficiary.
15. Nonresiduary bequests or property to which death taxes are paid from the residue should, at the request of the devisee, be paid from the property itself (rather than the residue) by permitting the devisee to disclaim the benefit of payment from the residue. *Estate of Boyd v Commissioner*, 819 F2d 170 (7th Cir 1987).
16. IRC §§ 2206, 2207, 2207A, and 2207B are rights of reimbursement, not rights of contribution or rules of apportionment. This also holds true when taxes are deferred under IRC § 6161, 6163, or 6166. The right to reimbursement does not occur until the tax has been paid. Furthermore, if the decedent's estate does not have sufficient liquid assets to pay the taxes attributable to such properties, it may be best to modify the rights of reimbursement under IRC §§ 2206, 2207, 2207A, and 2207B into rights of contribution or apportionment.
17. Death taxes attributable to reverse QTIP property under IRC § 2652(a)(3) that is includable in the decedent's estate under IRC § 2044, for which a right of reimbursement exists under IRC § 2207A should, if possible, be generally paid from the QTIP property that has an inclusion ratio greater than zero. This will preserve the value of the reverse QTIP property, thus maximizing the amount of the prior deceased spouse's GST tax exemption.

Such a strategy may not be appropriate in a second marriage situation if the reverse QTIP property will not benefit the deceased surviving spouse's heirs.

18. Death taxes attributable to other GST tax-exempt property, such as an ILIT (with a zero inclusion ratio) that is subject to the three-year inclusion rule of IRC § 2035, could be paid out of the residue of the decedent's estate, thus maximizing the amount the decedent can transfer free of GST taxes. Such a strategy may not be appropriate in a second-marriage situation, if the GST tax-exempt property will not benefit the decedent's heirs.
19. The probate court could be granted the authority to revise the decedent's death tax apportionment scheme when it appears necessary to preserve a marital or charitable deduction or because of an unusual asset that creates an unintended result. A sample clause is contained in Appendix B.

Notes

1. Michigan Prob & Est Plan J (Summer 2003), at 31.
2. MCL 700.1101 et seq.
3. Michigan's former Uniform Estate Tax Apportionment Act will continue to apply to governing instruments that referred to the act and were executed between September 6, 1969, and March 31, 2000. MCL 700.3921(3).
4. See Robert Danforth & Jeffrey Pennell, *Transfer Tax Payment and Apportionment*, Tax Mgmt Est, Gifts, Tr Portfolio (BNA) 838 (2001), for a discussion of death tax apportionment issues.
5. Michigan law generally embraces outside apportionment but not inside apportionment. Inside apportionment (which deals with how death taxes are paid by and among the probate properties) under EPIC is as follows: death taxes attributable to inter vivos trust property or probate property (other than intestate property) are generally apportioned against and paid out of the residue of the decedent's trust estate (in the case of inter vivos trust property) or out of the probate estate (in the case of probate property) without right of contribution. Outside apportionment (which deals

with how death taxes are paid by and among the non-probate properties) under EPIC is as follows: death taxes attributable to other types of transfers (i.e., attributable to other than inter vivos trust property or probate property [other than intestate property]) are subject to equitable apportionment, and bequests that generate a deduction receive the benefit of that deduction.

6. Per conversations with Robin D. Ferriby, who was a member of the EPIC Drafting Committee and assisted the EPIC Death Tax Apportionment Subcommittee in drafting the apportionment provisions. See also Robin Ferriby, *Tax Implications and Tax Drafting Under EPIC*, EPIC Drafting Before It's Too Late 6-7 (ICLE 1999).

7. If there is a conflict between a governing instrument and the provisions of the decedent's will, the terms of the will govern. MCL 700.3921(4).

8. Rights of reimbursement under these code provisions is pro rata with regard to IRC §§ 2206, 2207, and 2207B. Reimbursement under IRC § 2207A is on a marginal or incremental basis. A decedent may opt out of the reimbursement provisions of these code sections, as follows: IRC §§ 2206 and 2207 (by will), 2207A and 2207(B) (by will or revocable trust), and 2603 (by governing instrument).



Awarded the distinction of being listed in *The Best Lawyers in America*, Sebastian V. Grassi, Jr., is a founding partner in Grassi & Toering, PLC, of Troy. Sebastian is a graduate of the University of Detroit-Mercy Law School and is a member of the State Bar of Michigan, the American Bar Association, and the Christian Legal Society, where he served on its national board of directors. He is also a fellow of the American College of Trust and Estate Counsel, and is a member of the Michigan Probate and Estate Planning Council. Sebastian's practice emphasizes business law, estate planning, probate, and real estate. A prolific author, Sebastian has published over 50 articles on business law, estate planning, and tax

matters in the *ACTEC Journal*, *Estate Planning*, *The Journal of Taxation*, *The Journal of Taxation of Estates and Trusts*, *Michigan Bar Journal*, *Michigan Probate and Estate Planning Journal*, *Michigan Tax Lawyer*, *Probate Practice Reporter*, *Tax Management Estates, Gifts and Trusts Journal*, *Practical Tax Strategies*, *The Practical Lawyer*, *The Practical Tax Lawyer*, and *Tax Ideas*. Sebastian is a frequent lecturer for ICLE and serves on its Probate and Estate Planning Advisory Board. Sebastian is also the author of *A Practical Guide to Drafting Irrevocable Life Insurance Trusts* published by ALI/ABA (<http://www.aliaba.org/aliaba/BK28.htm>), and *Understanding Your Eternal Estate Plan* (<http://firms.find-law.com/GTPLC/>).

Sebastian can be reached at www.gras-siandtoering.com.

Are there topics you would like to read about in the *Journal*?

Topic: _____

Your name: _____

Please send your suggestions by mail or e-mail to
Nancy Little, Editor (nancy.little@fosterzacklowe.com)
Foster Zack & Lowe, PC
2125 University Park Drive, Suite 250
Okemos, MI 48864

Appendix A

IRC Death Tax Apportionment and Reimbursement Rules

This table summarizes the federal tax apportionment and right of reimbursement system and the interests governed by state apportionment rules, such as EPIC.

Type of Property or Interest in Gross Estate	Authority for Inclusion in Gross Estate	Right of Recovery or Apportionment Under Internal Revenue Code	If Right of Recovery, Right to Recover from Deductible Interests?	Specific Reference Required to Override IRC?	Application of EPIC to Apportion Tax
Probate estate (decedent's name alone or as tenant in common)	IRC § 2033	Yes, IRC § 2205 grants a person other than the executor right of recovery against decedent's estate.	No	N/A	EPIC governs how to apportion the tax and thus overrides IRC § 2205.
Transfer within 3 years of death	IRC § 2035	No. But see IRC §§ 2035(c)(1)(C) and 6324(a)(2).	N/A	N/A	EPIC governs how to apportion the tax.
Transfer with retained life estate or power to designate beneficiaries	IRC § 2036	Yes, IRC § 2207B grants executor the right of recovery on a pro rata basis unless the decedent waives the right. EPIC default rule.	No right of recovery from charitable remainder trusts. IRC § 2207B(d).	Yes, by a general reference to waive IRC § 2207B in a will or revocable trust.	EPIC will enforce any contrary direction in a will or revocable trust.
Transfer with retained reversionary interest	IRC § 2037	No. But see IRC § 6324 concerning estate tax lien provisions.	N/A	N/A	EPIC governs how to apportion the tax.
Revocable transfers	IRC § 2038	No. But see IRC § 6324 concerning estate tax lien provisions.	N/A	N/A	EPIC governs how to apportion the tax.
Annuities	IRC § 2039	No. But see IRC § 6324 concerning estate tax lien provisions.	N/A	N/A	EPIC governs how to apportion the tax.
Joint tenant with right of survivorship or tenant by the entirety	IRC § 2040	No. But see IRC § 6324 concerning estate tax lien provisions.	N/A	N/A	EPIC governs how to apportion the tax.

Type of Property or Interest in Gross Estate	Authority for Inclusion in Gross Estate	Right of Recovery or Apportionment Under Internal Revenue Code	If Right of Recovery, Right to Recover from Deductible Interests?	Specific Reference Required to Govern IRC?	Application of EPIC to Apportion Tax
General power of appointment	IRC § 2041	Yes, IRC § 2207 grants executor right of recovery on a pro rata basis unless the decedent directs otherwise in the will. EPIC default rule.	No right of recovery if property received by surviving spouse qualifies for the marital deduction. Full right of recovery against a charitable bequest, unless recovery is waived.	No. For example, a general provision to pay all taxes from the residue will override.	EPIC will enforce any contrary direction in a will.
Life insurance proceeds on life of decedent paid to executor	IRC § 2042(1)	See IRC § 2205 if a person other than the executor paid the tax.	N/A	N/A	EPIC governs how to apportion the tax.
Life insurance proceeds on life of decedent not paid to executor	IRC § 2042(2)	Yes, IRC § 2205 grants the executor the right of recovery on a pro rata basis unless the decedent directs otherwise in the will. EPIC default rule.	No right of recovery against the marital deduction property. Full right of recovery against a charitable bequest, unless recovery is waived.	No. For example, a general provision to pay all taxes from the residue will override.	EPIC will enforce any contrary direction in a will.
QTIP property	IRC § 2044	Yes, IRC § 2207 A grants the estate the right to recover on an incremental basis unless the decedent waives the right. EPIC default rule.	Computation of the tax on QTIP takes into account if the property qualifies for a marital, charitable, or other deduction.	Yes, by specific reference to IRC § 2207 A in a will or revocable trust.	EPIC will enforce any contrary direction in a will or an inter vivos trust.
Qualified domestic trust (QDOT) property	IRC § 2056 A(f)	N/A	N/A	N/A	N/A
GST property	IRC § 2803	Yes, IRC § 2803(b) grants the right of recovery unless the decedent waives the right. EPIC default rule.	Yes.	Yes, by specific reference to IRC § 2803(f).	EPIC will enforce any contrary direction in a will or an inter vivos trust.

Appendix B

Sample Clause for a Will Permitting the Probate Court to Modify the EPIC Death Tax Apportionment Scheme

Judicial Modification of Apportionment. If a court of competent jurisdiction finds it is inequitable or impracticable to apportion taxes, deductions, recovery, reimbursement, contribution, or credits in the manner provided under this will because of ambiguity; drafting errors or oversight; insufficient assets; unknown or unusual assets; generation skipping transfer tax matters; changed, special, or unusual circumstances; changes in the law (including the tax law); preservation of a marital or charitable deduction; etc., the court may modify the method of apportionment, recovery, reimbursement, contribution, and the application of credits or may direct apportionment, recovery, reimbursement, contribution, or the application of credits in an equitable manner. However, no modification or amendment may be made if it would impair or prevent an existing marital or charitable bequest so elected or deducted from qualifying for the marital or charitable deduction, would prevent an increase in basis (if applicable) under the Internal Revenue Code, would impair the status or qualification of a trust that holds share of stock in a Subchapter S corporation, would otherwise impair or prevent a qualified family-owned business interest deduction under IRC § 2057, or would otherwise impair or prevent special use valuation under IRC § 2032A.

Probate List Server

By Josh Ard

The Probate and Estate Planning Section of the State Bar of Michigan offers a relatively new service to its members—a list server. A list server is essentially an electronic version of a mailing list. When someone posts a message (usually a question) or gives a response to the list, probate@lists.michbar.org, it goes to the e-mail of all members of the list. Currently, about 600 section members participate. List members do not have to know a probate expert or introduce themselves to one to be able to get expert advice. If a question is posted, one or more knowledgeable people will typically respond quickly. This service alone is well worth the section membership dues. If you have not joined, you can submit a request to join on either the section Web page of the State Bar of Michigan, www.michbar.org/probate, or at the State Bar's list server page, <http://lists.michbar.org>.

The author of this article is the administrator of the list server, but he does not moderate the discussions. The list is basically self-correcting. If someone gives a “wrong” answer, others will almost assuredly give a correction. There are rules for correct behavior. For example, advertisements are forbidden. The only exceptions have been for conferences by State Bar–related groups. Participants are expected to communicate in a professional manner. Because messages are not monitored before they appear, the effective corrective action for anyone abusing the list server would be a warning and then a ban from further participation in the list.

The questions involve a wide number of topics. For example, in the few weeks before the publication of this article, the following topics have been discussed:

- referrals to experts and other attorneys
- probate court summaries by Judge Harter
- factors in whether a vehicle should be titled to a trust
- appraisals of a coin collection
- Medicaid issues
- setting up a private foundation
- homestead exemptions
- conservatorship for a minor
- spray trusts
- HIPAA language in estate planning documents
- priority of liens versus surviving spouse's exemptions and allowances
- liens on decedent's estates for child support
- may a trustee require drug testing of beneficiaries if the grantor provided for that
- power of a conservator to purchase an annuity
- what to do with a photocopy of a possibly revoked will
- incapacity

There is an archive of prior discussions organized by topics at <http://lists.michbar.org>. It is organized by threads by date, but a keyword search is also available.

In these days of spam, one might reasonably be wary of signing up for more e-mail. The fact that the default response is directly to the sender minimizes the volume. Thus, “thank you” and “me, too” usually just go to the sender. There are two options for receiving mail that further minimize an overload. A participant may choose to receive the digest version, in which all of the day's postings are combined into one e-mail, or the index version, also sent once a day, in which the user may select which postings to read. Participants who will be out of the office or otherwise away from computers may choose the “no

mail” option, so that no e-mail is delivered. Members can change all of these settings themselves at the site.

The list server provides yet another great resource for practitioners in the probate and estate planning field. Questions at any level—from beginning to advanced—can be raised and discussed. Whether you need an answer or can provide an answer, we hope you will enjoy and benefit from this new resource.



Josh Ard is the research attorney and staff attorney at the Sixty Plus Elderlaw Clinic at Thomas M. Cooley Law School. He is a former chairperson of the Elder Law and Advocacy Section of the State Bar of Michigan, a current mem-

ber of the Consumer Law and Administrative Law Section councils, the chairperson of the State Bar’s Legal Education and Professional Standards Committee, and a member of the Unauthorized Practice of Law Committee. He administers three list servers for the State Bar and participates in numerous elder law organizations.

Departments

Tax Nuggets

By Christopher L. Edgar &
George W. Gregory

IRS Acquiesces to *Walton* GRAT Case

A grantor-retained annuity trust (GRAT) is a legislatively described trust in IRC § 2702. The grantor retains the right to an annuity for a fixed period of years (with a variety of other conditions), and the remainder interest is treated as a gift of a future interest. Treas Reg 25.2702-3(e), example 5, takes the position that one must take into account the possibility that the grantor might die during the term of the annuity. As a result, no matter how high the payout rate of the annuity, it can never equal the value of the entire property. In *Walton v Commissioner*, 115 TC 589 (2000), if one ignored the actuarial probability of death, the value of the remainder was very small. In reality, it was zero. Ignoring reality (as did the tax court in its reasoning), the Internal Revenue Service (IRS) asserted a larger taxable gift. The tax court reasoned that one need not take into account the actuarial possibility of one dying in determining the gift. In IRS Notice 2003-72, 2003-44 IRB 964 (Nov 3, 2003), the IRS acquiesced in the tax court's reviewed decision in *Walton* and agreed to modify Treas Reg 25.2702-3(e), example 5, which the tax court declared invalid in *Walton*.

NOTE: The IRS still takes the position that if one dies during the term of the trust, the entire value of the GRAT is included in the grantor's estate for estate tax purposes.

Mileage Rates for 2004

The IRS has announced the optional standard mileage rates used in computing the deductible costs paid or incurred on or after January 1, 2004, for operating an automobile

for business, charitable, medical, or moving purposes. The new rates will be business—37.5 cents per mile; charitable—14 cents per mile; and medical and moving—14 cents per mile.

Draft RAB on Pass-Through Withholding

Public Acts 22, 45, 47, 48, 50, and 51 of 2003 amended the Michigan Income Tax Act to impose withholding and reporting requirements on "flow-through" entities. A draft Revenue Administrative Bulletin (RAB) released in October 2003 defines a "flow-through" entity to be "an S corporation, partnership, limited partnership, limited liability partnership, or limited liability company." It does not include publicly traded partnerships. *Conspicuous by their absence are estates and trusts.* The other Michigan entities must withhold tax based on distributable taxable income and must report both the amount of the distributable income and the amount withheld to both the Michigan Treasury and the taxpayer. The withholding is calculated and paid quarterly. Multistate taxation issues can be allocated using the property, payroll, and sales factors for the quarter. Provisions are made for multitiered entities, qualified subchapter S subsidiaries, and single-member LLCs.

Rice v Wal-Mart Stores, Inc

Many large corporations have bought company-owned life insurance (COLI) on employees as an income tax avoidance scheme. New Hampshire law protects individuals from "inclusion on seclusion." Based on that law and other theories, including unjust enrichment, survivors of deceased employees have sued on the grounds that they, not Wal-Mart, should get the proceeds when the employee died. In *Rice v Wal-Mart Stores*,

Inc., 2003 DNH 166 (DNH), the widows of Wal-Mart employees in New Hampshire sued Wal-Mart, the grantor trust that Wal-Mart established to hold COLI policy proceeds, and the two insurers who sold the policies.

The widows are seeking damages and have asked the court to

1. pay the life insurance proceeds to them rather than Wal-Mart;
2. return premiums paid to the insurance companies; and
3. pay them damages for breach of privacy because of Wal-Mart's use of the employees' confidential medical information without their consent to obtain the life insurance coverage.

A New Hampshire court held that the widows of the deceased Wal-Mart employees could proceed with their state law claims against that company and the two insurance companies that sold Wal-Mart over 36,000 COLI policies. The suit alleges violations of state privacy laws and breach of unjust enrichment statutes and claims civil conspiracy. Similar cases have met with mixed results in other jurisdictions.

After Hours Tax Law Series

On October 28, 2003, the Taxation Section and ICLE presented "After Hours Tax Law Series: Hot Topics in Estates and Gift Tax," at the MSU Troy Management Center. Presenters were Michael J. Mulcahy, of Raymond & Prokop, Southfield; Lorraine F. New, of the Detroit office of the IRS Estate and Gift Tax Division; and George W. Gregory, of George W. Gregory, PLLC, Birmingham. The presentation was sold out. However, both materials and audio tapes are available at www.icle.org or by calling (877) 229-4350.



Christopher L. Edgar, of Law Weathers & Richardson, Grand Rapids, Michigan, practices in the areas of business law and estate planning. He focuses his business practice on construction liens, risk and liability management, and tax management. He is general counsel for a number of small business corporations and has experience in mergers and acquisitions. He is experienced at handling probate-related litigation and serves as an arbitrator for the American Arbitration Association. He is a member of the Probate and Estate Planning, Real Property Law, and Business Law Sections of the State Bar of Michigan. A past president of the West Michigan Estate Planning Council, Mr. Edgar has served on the Committee on Judicial and Professional Ethics and as a grievance commission panelist for the State Bar of Michigan. He has attended yearly sessions at the Heckerling Institute of Estate Planning at the University of Miami in Miami, Florida, and is a fellow of the American College of Trust and Estate Counsel. Mr. Edgar is a frequent speaker on estate planning issues.



George W. Gregory, of George W. Gregory, PLLC, Birmingham, Michigan, practices in the areas of probate and estate planning, tax planning, and business planning. A former revenue agent of the IRS, Mr. Gregory is a frequent ICLE speaker and a former lecturer and assistant professor at Wayne State University School of Business Administration. He has served in all of the officer positions of the

State Bar of Michigan's Taxation Section and has chaired numerous committees and functions. He is a member of the Business Law, Probate and Estate Planning, and Taxation Sections of the State Bar; the American Institute of CPAs; and the Michigan Association of CPAs. Mr. Gregory has authored numerous articles on estate planning and tax law. He is a fellow of the American College of Trust and Estate Counsel and is listed in *The Best Lawyers in America*.

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law

By Hon. Phillip E. Harter

Summaries of new appellate cases, court rules, and statutes affecting the probate court may be found on the Calhoun County Web site at <http://courts.co.calhoun.mi.us>.

Trust—Trustee—Trustee Fees—Attorney Fees—Due Process

Bank One v Adams (In re Estate of Adams), 257 Mich App 230, 667 NW2d 904 (2003)

Petitioner, Bank One, became trustee of Adams trust on May 31, 1995. Respondent, a trust beneficiary, filed a motion to compel petitioner to provide a final account of the trust and to compel petitioner to begin distributing assets to the trust beneficiaries. The matter was sent to arbitration. The probate court entered an order August 8, 2000, which reflected the arbitrator's opinion that reduced administrative fees by \$118,510 and further provided as follows:

[Petitioner] ... shall take no further actions giving rise to additional fees or expenses to be charged against the beneficiaries [of] the Estate, Trust and Voting Trusts without first receiving written approval of the beneficiaries, with the

exception that within ten (10) days of the date of this Order and Judgment that [petitioner] file a final account as fiduciary for approval by the beneficiaries and the Court as to all matters involving the Estate, Trust and Voting Trusts.

The court set forth what subsequently took place as follows:

In November 2000, Mary Adams filed a petition and order to show cause as a result of petitioner's failure to comply with the time provisions of the August 8, 2000, order. On December 5, 2000, petitioner filed its "Second and Final Accounting." Jeff Adams filed objections to the accounting.

On February 8, 2001, the probate court held a hearing regarding petitioner's final accounting and respondents' objections thereto. Petitioner requested that the court receive the final accounting and permit petitioner to charge the beneficiaries fees for services rendered in preparing the final accounting. Respondent objected on the grounds that petitioner charged fees for services rendered without the approval of the beneficiaries and did not file the accounting in compliance with the court's order. At the conclusion of the hearing, the court permitted discovery and requested proposed orders from each of the parties. The parties filed proposed orders and briefs with supporting evidence in support of the proposed orders.

In a June 13, 2001, order, the probate court denied petitioner's final accounting and ordered petitioner to pay respondent's and Jeff Adams' "actual attorney fees and costs" incurred in litigating petitioner's final accounting. Petitioner filed a motion for reconsideration, and the court requested the parties to brief the issues raised in the motion. The motion for reconsideration was denied.

The first issue addressed was whether petitioner was denied due process because the "summary rulings" of the court deprived

petitioner of its rights without a hearing. The court of appeals stated that due process would require the court (1) to offer to hold a hearing before it deprives the litigant of a property interest and (2) to provide notice to the litigant of the hearing. A litigant must be given the opportunity to be heard at a meaningful time and in a meaningful manner. After discussing what took place in this case, the court of appeals held that the probate court complied with all due process rights by giving the petitioner full and ample opportunity to present its position to the court both by hearing and by briefs.

The second issue concerned whether the probate court erred by awarding the respondent's actual attorney fees and costs incurred in objecting to the second and final account. The court of appeals pointed out that attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides to the contrary. In this case, the court of appeals could find no such authority. In addition, they held that attorney fees may not be awarded on general equitable principles. The majority did not accept the dissent's position that the attorney fees were properly awarded as a sanction for overbilling the trust and failing to adhere to the court's order since they felt the trustee was already sanctioned by reduction of its fees. Therefore, they vacated the award of attorney fees and remanded for reconsideration and a statement of the reason for the award.

I take some exception to the majority opinion on the issue of attorney fees. As I believe the dissent pointed out, there is something very wrong when a fiduciary engages in a gross violation of fiduciary duty that requires the beneficiaries to expend large sums to straighten out the situation and the beneficiaries then cannot recover those expenditures. While the principle stated by the majority is established law, I believe an exception should be made where a gross violation of fiduciary

duty occurs and the beneficiaries must step in to protect the trust's interest. In such a situation, the beneficiaries step in and take action beneficial to the trust. Therefore, they could request that their attorney fees be billed to the trust. As such, the attorney fees would be damages to the trust caused by the fiduciary and such attorney fees could be included as a surcharge against the fiduciary. While I believe this to be a supportable approach, it is not the law as given by the majority in this case.

Claim—Disallowed—Motion for Extension to File

Thomason v Weber (In re Estate of Weber), 257 Mich App 558, 669 NW2d 288 (2003)

The decedent and petitioner lived together for 28 years as life partners. The decedent's estate was opened on September 25, 2000. On October 19, 2000, petitioner filed a statement of proof of claim alleging entitlement to all real and personal property in the estate. On March 22, 2001, petitioner was mailed a notice of disallowance of claim stating that his entire claim would be barred unless a complaint was filed within 63 days. Petitioner retained new counsel and filed an amended petition in August 2001, well beyond the statutory deadline. Counsel for petitioner then filed a motion for an extension of deadline under MCL 700.3804(2). The probate court denied the motion and petitioner appealed.

MCL 700.3804(2) states as follows:

Except as otherwise provided in this subsection, if a claim is presented under subsection (1)(a), a proceeding on the claim shall not be commenced more than 63 days after the personal representative delivers or mails a notice of disallowance to the claimant. For a claim that is not presently due or that is contingent or unliquidated, the personal representative may consent to an extension of the 63-day peri-

od or, to avoid injustice, the court, on petition, may order an extension of the 63-day period, but an extension shall not be consented to or ordered if the extension would run beyond the applicable statute of limitations.

The court of appeals affirmed the trial court. They pointed out that the statute indicates that a probate court “may” grant an extension in order to avoid injustice. The term “may” presupposes discretion and does not mandate an action. Therefore, the probate court would not be required to grant an extension on an untimely claim even if injustice would result. The decision is solely within the court’s discretion. Further, the court of appeals opined that the record supported the decision that an extension was unnecessary. Petitioner was represented by counsel. Petitioner was aware that his claim to the property was disputed. There was no written document evidencing an intent that the house be transferred to petitioner upon the decedent’s death. Monetary contributions by the petitioner toward the relationship would be presumed to be gratuitous. Other provisions were made for the petitioner by the decedent. Therefore, there was no evidence that the probate court abused its discretion in denying the petitioner’s motion.

The important principle of this case is that a motion to extend the deadline for filing a complaint is within the sole discretion of the probate court. Unfortunately, the decision does not deal with the issue of whether the petitioner’s purported claim was really a claim that would be controlled by this statutory deadline. It must be remembered that a claim is defined by MCL 700.1103(a), and this section states in part as follows: “Claim does not include an estate or inheritance tax, or a demand or dispute regarding a decedent’s or protected individual’s title to specific property alleged to be included in the estate.”

Wrongful Death—Claimant—Children of the Deceased’s Spouse

Hamilton v Elser (In re Estate of Combs), 257 Mich App 622, 669 NW2d 313 (2003)

The decedent died in an auto accident, and her estate commenced a wrongful death action. The decedent had four children. The decedent was predeceased by her husband, who had two children who were stepchildren of the deceased. The personal representative of the estate proposed to distribute the wrongful death proceeds equally to the decedent’s four children. The stepchildren objected, claiming a share of the proceeds. The probate court agreed with the personal representative, finding that MCL 600.2922 did not give children of a deceased spouse standing to make a claim on the decedent’s wrongful death action. The stepchildren appealed.

The court of appeals affirmed the decision of the probate court. MCL 600.2922(3) provides as follows:

(3) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(a) The deceased’s spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(b) The children of the deceased’s spouse.

(c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages

under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

The court of appeals found “children of the deceased’s spouse” to be clear and unambiguous. They concluded that the step children were not the “children of the deceased’s spouse” because the deceased had no spouse at the time of her death. They pointed out that a “spouse” is a married person. Therefore, appellants were not entitled to a portion of the proceeds of the wrongful death action.

Family Allowance—Factors Determining Reasonable Amount

Seymour v Sallan (In re Estate of Seymour), No 236616, 2003 Mich App LEXIS 2027 (Aug 26, 2003)

Petitioner is the surviving spouse of the decedent. Respondent is the sole beneficiary of the decedent’s estate. Petitioner and the decedent were married in 1989 and engaged in a business of raising and training Arabian horses. Petitioner filed for a divorce and allegedly was receiving between \$20,000 and \$30,000 per month during the divorce proceedings. The decedent died unexpectedly a few months after the divorce was filed. Petitioner did not contest the will but opted for her elective share. Petitioner sought \$15,000 as a homestead allowance, \$10,000 as an exempt property allowance, and a family allowance of \$20,000 per month.

Respondent objected to the family allowance in light of the extensive assets that petitioner received as the designated beneficiary on annuities, pension funds, and other accounts. Respondent contended that such assets were sufficient support resources and that there was no need to further deplete the estate and frustrate the decedent’s intent. The trial court concluded that it was required by statute to award a reasonable family

allowance for maintenance to petitioner. The trial court limited the information to be considered in awarding a family allowance. It excluded respondent’s discovery requests to determine petitioner’s other sources of income, support, and maintenance. It also excluded from consideration of the family allowance the cost of the business, which it characterized as a hobby rather than a necessary expense.

At trial, petitioner testified to numerous expenses, including the services of three employees, excluding any work performed by them for the business. She testified to expenses for basic necessities. She testified to the cost of support of her mother, gifts and entertainment expenses, restaurant charges, clothing, and travel fees. The trial court did not make any factual finding regarding necessary expenses or credibility determinations regarding the nature of the requested expenses. It concluded that \$8,000 per month constituted a reasonable family allowance. Respondent appealed the determination, alleging that the trial court erred in refusing to consider factors other than the petitioner’s expenses when determining the family allowance.

The court of appeals reversed the trial court’s determination and remanded for further proceedings. In reaching a decision, they discussed the issue of what factors may be considered in determining a “reasonable” family allowance. In discussing the reason and purposes of the family allowance, they cited the official comment to section 2-404 of the Uniform Probate Code, which states:

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the court to meet current living expenses until the estate can be administered and assets distributed. While the death of the principal income producer may necessitate some change in the standard of living,

there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as a capital may be considered. A living trust may provide the needed income without resorting to the probate estate.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note, however, that under the next section the personal representative may not determine an allowance of more than \$1,500 per month for one year; a Court order would be necessary if a greater allowance is reasonably necessary.

The court of appeals concluded that the court, in determining the reasonableness requirement of the family allowance, may examine multiple factors, including the decedent's intent and other resources available to the petitioner to meet expenses that could include other allowances. Reasonableness is to be based on all relevant facts and circumstances of each case. In the present case, the trial court erred by merely reviewing petitioner's requested expenses and by precluding consideration of whether petitioner was generating income from other marital property and other discovery regarding the "needs" of petitioner. Because the determination of a family allowance involves a consideration of all of the relevant facts and circumstances, the trial court abused its discretion in precluding discovery of petitioner's sources of income, support, and maintenance.

Durable Power of Attorney—Fiduciary Duty—Self Dealing

Murphy v Hegyi (In re Estate of Cummin),

No 235495, 2003 Mich App LEXIS 2141 (Sept 9, 2003)

In June 1992, the decedent executed a durable power of attorney that conferred on respondent, her daughter, authority to deal with the decedent's real estate. The decedent eventually moved into a residential care facility, and over the next two years her dementia worsened to the point that she would occasionally fail to recognize family members. She resided in the residential care facility until her death on April 28, 1998.

Respondent and her husband testified that over a period of several years, the decedent repeatedly instructed respondent to transfer the decedent's real estate to her. The decedent continued to instruct respondent to transfer the property after she moved into the residential care facility. On December 10, 1996, nearly two years after the decedent moved into the residential care facility, respondent, acting as the decedent's attorney in fact, transferred the decedent's real property to herself by quitclaim deed, reserving a life estate in the property for decedent. After respondent executed the quitclaim deed, respondent rented the property and received \$3,000 in rental payments. On April 14, 2000, she sold the property for \$180,000.

Petitioner, a son, commenced probate on February 25, 2000, and was appointed personal representative of the estate. The personal representative then filed a complaint against respondent (1) alleging that respondent converted the estate's assets, (2) demanding an accounting, and (3) requesting a constructive trust over the decedent's real and personal property, including the proceeds from the real property.

In its written opinion, the trial court determined that the decedent had not been unduly influenced when she executed the power of attorney. The trial court also found that although respondent and her husband credibly testified that the decedent wanted respon-

dent to have the property, respondent did not make the transfer until several months after the decedent became mentally unsound and engaged in behavior that was inconsistent with merely wanting to fulfill the decedent's wishes, such as misleading petitioner concerning the status of the property. Accordingly, the trial court concluded that respondent breached her fiduciary duty, arising from her status as decedent's attorney in fact, to refrain from self-dealing. The trial court held that respondent's transfer of the property to herself created a constructive trust in favor of the estate and that the estate was entitled to the money respondent received from renting and selling the property. The decision was appealed.

The court of appeals reversed the trial court, concluding that the trial court erred in its legal analysis and that the trial court findings of fact conflicted to the extent that they could not apply them to the governing law. The court first addressed the issue of what law should govern. The court pointed out that while the Estates and Protected Individuals Code was in effect at the time of the proceeding, it could not be applied because respondent's accrued right as owner of the property would be impaired by invalidating the transaction or imposing a constructive trust. MCL 700.8101(2)(d) would preclude applying MCL 200.1214 to invalidate respondent's transfer of the property. Further, the provisions of the former Revised Probate Code (RPC) dealing with prohibited actions of fiduciaries could not be applied since an attorney in fact was not defined as a fiduciary under the RPC. Therefore, the court applied common-law principles in reaching its decision.

The court of appeals held that respondent, as the decedent's agent, owed a common-law fiduciary duty to the decedent. Such a duty would permit an agent to personally engage in a transaction with the principal with the consent of the principal after a full disclosure of

the details of the transaction. In the instant case, the trial court erred as a matter of law in failing to acknowledge that an agent may engage in self-dealing if the principal consents and has knowledge of the details of the transaction. Additionally, the trial court erred as a matter of law by concluding that the passage of time and the change in the decedent's mental status affected respondent's authority to transfer the property. The power of attorney that the decedent executed was a durable power of attorney and therefore was still valid after the decedent became incompetent. MCL 700.5501–.5502. Accordingly, if the decedent consented to the transaction with knowledge of its details, the timing of the transaction does not prevent its enforcement.

We cannot take much from this case since the panel was split. One judge authored the opinion, one judge concurred in the result only, and one judge concurred in part and dissented in part. This would probably have been a good case not to publish.

Determination of Heirs—Putative Father

Turpening v Howard (In re Estate of Turpening), No 239614, 2003 Mich App LEXIS 2253 (Sept 16, 2003)

This case involves an attempt by a putative father to inherit from his daughter, the decedent. The probate court denied the father's petition to determine heirs pursuant to MCL 700.2114(4), which provides as follows:

Inheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers and has not refused to support the child.

The father appealed. The court of appeals affirmed the probate court's decision that the father could not inherit. In interpreting MCL 700.2114(4), they pointed out that it contains a two-prong test. To be considered a natural parent for intestate succession, the petitioner

had to show (1) that he openly treated the child as his and (2) that he had not refused to support the child. In discussing the first test, the court of appeals concluded that the term “child” as used in the test meant “a person under 18 years of age.” In discussing the second test, they distinguished “fail” and “refused” and concluded that “refused” involves an act of the will.

In this case, petitioner failed to openly treat the decedent as his own. For the first 30 years of her life, he denied that he knew of her existence despite evidence to the contrary. He first acknowledged her when she was 30 years old and then for only a few years of her life. Because petitioner never acknowledged or visited the decedent when she was a child, he could not meet the first test that he openly treated the child as his own. Correspondingly, the probate court in this case found that petitioner refused to support the decedent. The decedent’s grandmother testified at length that she asked petitioner on numerous occasions to help the decedent’s mother with support of the decedent. Each time, petitioner denied that the decedent was his child. Following the court’s definition of “refuse,” which is to deny, the probate court was correct in interpreting petitioner’s denial as a refusal on his part to support the decedent. Therefore, petitioner failed to meet the second test that he did not refuse to support his child.



Hon. Phillip E. Harter is chief probate judge with the Calhoun County Probate Court, Battle Creek, Michigan. He was chairperson of the Michigan Supreme Court Task Force on Guardianships and Conservatorships and of the Michigan Supreme Court bar examination staff (1976–1991). He is a member of the Calhoun County Bar Association, a fellow of the Michi-

gan Bar Foundation, and a member of the Bar of the U.S. Court of Appeals and of the Bar of the U.S. Supreme Court. Judge Harter is vice chairperson of the State Bar of Michigan Probate and Estate Planning Section Council, former chairperson of the Probate Law Committee, and former chairperson of the Probate Rules Committee of the Michigan Probate Judges Association. He has lectured at ICLE’s Annual Probate and Estate Planning Institute for many years.

Legislative Report

By Harold G. Schuitmaker

Privacy Act

The Federal District Court for the District of Columbia (Judge Reggie B. Walton, Aug 12, 2003) has given an opinion that the Gramm-Leach-Bliley Act does not apply to attorneys engaged in the practice of law—since attorneys are already regulated by existing state regulatory schemes.

Homestead Exemption

To avoid confusion between the “homestead exemption” from school operating taxes and the “homestead credit” against income taxes, “homestead exemption” has been replaced by the term “principal residence exemption” for school property taxes (2003 PA 126, 127, 128, 129, 130, 140, and 141), effective August 1, 2003.

Spouse Death Benefits

Effective May 20, 2003, the Fire Fighters and Police Officers Retirement Act has been amended to prohibit a municipality from denying duty death benefits to the remarried surviving spouse of a police officer or fire fighter (2003 PA 8).

Anatomical Gifts—Patient Advocate

Patient advocates are added to the list of those individuals authorized to make an anatomical gift for others. In addition, motor vehicle operator licenses or state identification cards are valid documents of gifts. 2003 PA 62 and 63.

Pending Bills

House Bill 4131 of 2003, if passed, would repeal dower.



Harold G. Schuitmaker of Schuitmaker Cooper & Schuitmaker PC, Paw Paw, Michigan, practices in the areas of estate planning and probate, municipal law, corporations, and real estate. Mr. Schuitmaker is a member of the Probate and

Estate Planning Section Council, the Probate Court Rules Committee, and the Probate Forms Committee and formerly served on the State Board of Medicine for 10 years. He is a member of the National Association of Elder Law Attorneys, the Kalamazoo County Bar Association, and the Van Buren County Bar Association. Mr. Schuitmaker also serves in numerous civic and charitable organizations. He is a past president of the Rotary District Foundation. He is a level II Certified Assessing Officer with the State Assessor Board.

Probate and Estate Planning Council Q & A

By Patricia Gormely Prince
& Randall J. Soverinsky

Question: Does the Estates and Protected Individuals Code (EPIC) allow beneficiar-

ies and heirs to enter into agreements to alter shares in testate or intestate estates?

Answer: MCL 700.3914(1) provides that subject to the rights of creditors and taxing authorities, competent successors (i.e., beneficiaries, heirs, or testamentary trustees) may agree among themselves to alter the interests, shares, or amounts that they are entitled to receive under a decedent's will or under the laws of intestacy in any way that they provide in a written agreement that is signed by all who are affected by its provisions. The personal representative of the estate must abide by the terms of such an agreement.

Question: What happens if an agreement to alter shares is contemplated in an estate where there are minors or incapacitated individuals ?

Answer: If there is or may be an interested person who is a minor or an incapacitated individual, or if there is an inalienable estate or future contingent interest, notice must be given to the representative of the individual or interest. Following the notice, the court may, if the agreement is made in good faith and appears just and reasonable for the individual or interest, direct the representative to sign the agreement. MCL 700.3914(1).

Question: Are trust beneficiaries allowed to enter into agreements to modify the terms of the trust?

Answer: Pursuant to MCL 700.7207(1), the court may approve an interpretation, construction, modification, or other settlement regarding a trust that is agreed on, in writing, by all presently identified and competent trust beneficiaries whose interests in the trust may be affected to resolve a contest, controversy, or question of construction or interpretation concerning the existence, administration, or termination of an irrevocable trust. If the agreement appears to have been reached in good faith and its effects are just and reason-

able under all of the relevant facts and circumstances, the court is required to give its approval. MCL 700.7207(3). After the court issues an order approving the agreement, the agreement shall then be considered part of the governing instrument of the trust.

Question: What happens if an agreement to modify a trust is contemplated in a trust where there are minors or incapacitated trust beneficiaries or unborn, unascertained, missing, or disappeared persons ?

Answer: If the present or future interest of (1) an unborn, unascertained, missing, or disappeared person; (2) a trustee or a trust beneficiary described in the trust document but not yet established; or (3) a minor or other person without legal capacity is not represented or is not represented adequately under MCL 700.1209 or MCL 700.1403, the court may appoint one or more guardians ad litem to represent the interest or interests. MCL 700.7207(2).

Question: How does a beneficiary or heir's ability to alter shares under EPIC differ from the Revised Probate Code (RPC)?

Answer: EPIC section 700.3914(1) is substantially identical to its RPC counterpart, MCL 700.191(1). Note, however, that there was no section in the RPC comparable to EPIC section 700.3914(2), which covers a testamentary trustee's continued duty to the trust beneficiaries.

Question: How does a trust beneficiary's ability to modify a trust under EPIC differ from the RPC?

Answer: The EPIC provisions regarding the ability of trust beneficiaries to modify a trust, MCL 700.7207, revise and replace the RPC's Settlement of Trust Disputes Act, which was found at MCL 555.81–.84. Although there are similarities between MCL 700.7207 and its RPC counterpart, the EPIC statute is extremely broad and provides trust beneficiar-

ies and trustees with great flexibility to settle disputes and make modifications to trusts.

Question: Is court approval required when entering into an agreement to alter shares or modify a trust?

Answer: There is no statutory requirement that an agreement to alter shares entered into pursuant to MCL 700.3914 must be approved by the court. On the other hand, an agreement to modify a trust becomes part of the governing instrument of the trust following the entry of a court order approving the agreement. Therefore, in the trust arena, it is urged that the agreement be approved by the court and an order be obtained. Failure to do so would leave the trustee open to attack for his or her failure to administer the trust pursuant to its terms. In addition, without court approval and an order, an agreement is not binding on those nonsigning parties whose interests may be affected by the agreement.



Patricia Gormely Prince of Patricia Gormely Prince, PC, Farmington Hills, Michigan, practices in the area of probate and estate planning. She is a member of the Probate and Estate Planning Council of the State Bar of Michigan and was formerly the council's chair. She is also a member of the Women Lawyers Association of Michigan and the Real Property and Probate Sections of the American Bar Association. Ms. Prince is past editor of the *Michigan Probate and Estate Planning Journal*, co-editor of *Taxation of Estates and Trusts* (ICLE 1994), coauthor of *How to Protect the Protected Person*, 75 Mich BJ 1296 (1996), and a supplement author for Lawyers Cooperative Publishing Company. Ms. Prince is also a consultant for the probate and estate sections of Callaghan's *Michigan Pleading and Prac-*

tice. She has taken the ICLE 40-hour mediation training and has been appointed to the court list in Wayne County Probate Court. She has served as a speaker at ICLE seminars in the areas of estate and tax planning.



Randall J. Soverinsky of Patricia Gormely Prince, PC, Farmington Hills, Michigan, practices in the areas of estate planning and estate administration. He is a member of the Probate and Estate Planning and Real Property Law Sections

of the State Bar of Michigan. Mr. Soverinsky is a contributor to *Trust Administration in Michigan* (ICLE 1999) and *Michigan Probate Litigation* (ICLE 2001). He has written articles for the *Michigan Bar Journal* and has also lectured for ICLE.

Ethics, Unauthorized Practice of Law, and Multidisciplinary Practice—Developments

By Jennifer R. Bailey

Professional Liability Issues Specific to the Estate Planning Attorney

[Editor's note: This is the second installment of a thorough and excellent article Ms. Bailey has written on professional liability issues. Because of its length, the Journal staff decided to publish the article as a series (if serialization was good enough for Dickens, it's good enough for us). Our regular columnist on ethics issues, Fred Rolf, read Ms. Bailey's article and recommended it for publication. For those of you who look forward to Fred's regular column, he will be back—no doubt refreshed from his brief respite—in future issues.]

Representing a Fiduciary

A large part of a probate attorney's practice is representing fiduciaries, whether they are personal representatives, guardians, conservators, or trustees. From a theoretical perspective, this type of representation would seem to be a relatively low-risk venture. After all, fiduciaries are bound by statute to act only in the best interests of the person to whom the fiduciary duty is owed.¹ The attorney's role is merely to assist the fiduciary in the management of his duties. In fact, in a probate case, unless the personal representative's position on an issue is frivolous, the attorney must advocate for the personal representative, even to the detriment of other estate beneficiaries and even if the attorney does not agree with the personal representative's position.²

In reality, practicing attorneys know that rarely is the representation of a fiduciary so black and white. Rather, fiduciaries bring with them situations that involve shades of gray. A common scenario for attorneys representing fiduciaries is the client fiduciary whose legal obligations conflict with his or her personal interests. As previously stated, an attorney may not represent the fiduciary in both capacities if the interests of the separate roles conflict.³ Another common problem is the client family that seeks to retain the attorney. When a family meets with the attorney at the initial consultation, the family may think that the attorney is representing all of them, and not just the family member named or appointed as the fiduciary. Experience suggests that it is the rare family that agrees completely with the actions taken by the family member appointed as the fiduciary.

To avoid potential problems in the future, the attorney should clarify with the fiduciary and the family exactly who the attorney is being retained to represent, be it the estate, protected person, or trust; the beneficiaries; or the fiduciary. This will allow the attorney to determine exactly whose rights he or she is

protecting, make any necessary disclosures of that representation, and protect himself or herself from any future charges of negligence by any other parties.

Serving as Fiduciary

What estate planner, at some point during his or her career, has not been asked to serve as the personal representative of a close friend's and client's estate, in addition to being named as trustee or personal representative in every family member's trust or estate? Because of the attorney's proficiency in probate and estate planning, he or she automatically becomes the front-runner on the list of possible candidates. While such a request may be flattering, the attorney should give thoughtful consideration before agreeing to take on such responsibilities. In addition to the potential conflicts that this appointment can create, the fiduciary appointment could exceed the scope of the duties covered by the attorney's malpractice insurance policy. The attorney should review his or her policy carefully to make sure that such activity is covered under the terms of the policy.

There are some responsibilities within the scope of a fiduciary's duties that the attorney may not feel comfortable undertaking or that his or her insurance policy does not cover. For example, trustees often have the sole discretion on investments and other areas of financial management. Some insurance policies may not cover acts that more closely fall under the duties of a financial planner. If the attorney agrees to take on the role of fiduciary for a client, the attorney should set forth, preferably before the estate planning documents are executed, exactly which of the responsibilities the attorney will oversee personally and which he or she will delegate to a more well-suited professional. If possible, specific brokers or bankers should be named. If the documents have already been execut-

ed, the attorney can address these issues with the beneficiaries at the commencement of the fiduciary appointment and have the beneficiaries sign off on the delegation of duties.

Next issue-Part III: Effecting the Client's Intent; Avoiding a Tax Trap; and the Attorney as Moral Counselor.

Notes

1. MCL 700.1212. Fiduciary Relationship

(1) A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary. A fiduciary shall observe the standard of care described in section 7302 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan prudent investor rule.

2. Michigan Informal Ethics Opinion RI-85 (May 20, 1991).

3. Michigan Formal Ethics Opinion R-10 (Apr 19, 1991); Michigan Informal Ethics Opinion RI-79 (Apr 19, 1991).

Jennifer R. Bailey is claim counsel for Professionals Direct Insurance Company in Grand Rapids, Michigan. Before relocating to Grand Rapids, Ms. Bailey was an associate at Pendleton, Friedberg, Wilson & Hennessey, PC, in Denver, Colorado, where she practiced estate planning, probate, and tax law. She is a graduate of Michigan State University, where she received her bachelor of sciences degree in psychology (with high honor) and Washington and Lee University School of Law, in Lexington, Virginia. After law school, Ms. Bailey clerked for the Honorable C. Jean Stewart of the Denver Probate Court. While in Colorado, Ms. Bailey was active in the Trust

and Estate Section of the Colorado Bar Association, taught CLE courses on estate planning, and authored articles on various estate planning issues.

From Behind the Bench

By Hon. David J. Szymanski

When It Just Doesn't Pay

Have you ever had the client who walks through the door with a legitimate complaint about a neighbor or friend that just isn't worth your time, the client's money, or the court's resources? What attorney hasn't been faced with such a case from time to time?

You know the case. The person's neighbor drove over their kid's skateboard pulling out of the driveway and won't pay for a new one because the kid keeps hitting balls into his backyard. Maybe it's the "sentimental case" where a sister borrowed a sweater and won't return it but the prospective client wants to sue for the "principle." Well, principle typically sounds good until you quote a retainer that is 10 times the value of the sweater. Or how about the case of who will serve as Mom's guardian (also known as "Mom always liked me best")?

Sometimes your reaction will be to counsel the client and send the person on his or her way hoping the dispute will simmer down before it boils over. Sometimes you take on the case and end up regretting it because you have no client control when emotions rule the day.

Here in the Wayne County Probate Court, we have come to utilize a procedure known as "Facilitative Mediation." Actually, our court is awash in methods of alternative dispute resolution since we also have panels of attorneys to conduct case evaluation (the procedure formerly known as mediation). With

facilitative mediation, we have the ability to send appropriate cases for in-depth mediation of disputes. In multimillion dollar estates, paying a mediator several hundred dollars an hour might be an option. In many of our cases, however, there is little money involved or available. In these cases, we have identified a source that is cost-effective and settlement-effective as well.

The Neighborhood Reconciliation Center (NRC) has mediators trained to help parties focus on the issues involved in a dispute and to seek a workable solution to resolve the problems. They have the time, patience, and training necessary to tackle difficult and deep-seated problems that might not come out in a formal court setting. They process disputes involving contested wills, parent-child problems such as curfews, landlord-tenant disputes, and neighbor problems. Attorneys can attend the sessions if appropriate.

If they fail to resolve the issue, court intervention is still available. As a court, we have sent cases to the service that don't seem capable of settlement, and yet the NRC settles 62 percent of the cases that we submit to them. Presently, the charge for these services is \$200 per mediation.

So for those cases where someone is trying to make a federal case out of a molehill, consider the NRC. They can be reached at (313) 417-9400 and have nifty pamphlets that you can have at hand for the appropriate times.

Judicial Pet Peeves

This column was conceived to present a view from the judicial perspective. The title, "From Behind the Bench," should not indicate that we judges are hiding behind the bench. However, I realize that the position of judge is somewhat insulating and isolating. Attorneys are often hesitant to speak their minds to judges, and judges, in the interest of decorum, are sometimes prevented

from “venting.” With this column I hope to address some of the problems seen by judges.

To present this column I sought and received input from judges across the state. However, as a Wayne County Probate Judge (big city fella), the views expressed are colored by my experiences here in Southeast Michigan. So let me give you the disclaimer that the views expressed are not necessarily the views of the judge you will face in probate. However, they might well be. Initially I was going to cover a list of pet peeves in one column, but upon reading it over I sounded extremely whiney. That just isn't me.

The vast majority of attorneys are excellent practitioners and do a great job for their clients and for the justice system. These pet peeves are brought to your attention to assist you in identifying behavior that you might not realize is negatively impacting your presentation of your case. Please do accept it as a general bit of constructive criticism.

As a practicing attorney years ago (I've been here 12 years now), I recall one of the partners of the firm asking me to check to make sure all the exhibits were attached to the pleadings to be filed. After checking to be certain they were properly marked and attached I was asked to double-check to make certain all was in order. I figured, this guy must think I'm an idiot, yet I checked them again. After filing the papers, he asked me again if I was sure the attachments were correctly filed.

As a judge I know why the question was asked and asked again. I'd have to say that about 80 percent of the time when a pleading says, “See attached as Exhibit A,” the exhibit is not attached. Let me say that again. In about 80 percent of the pleadings that are indicated to have exhibits, the exhibits are nowhere to be found.

Now, since I am the trier of fact, the judge on the case, attorneys and litigants should

want to make my job as easy as possible so that I will quickly see their point of view. It should not be necessary for me to wade through a seven-inch-thick file trying to locate the relevant document when the attorney has indicated that it is attached. Judges sometimes take pleadings home to prepare for court, not just to find reading material to lull them to sleep in lieu of counting sheep. To truly present your case in the most favorable light, present the court with all that is necessary to find in your favor.

A fellow jurist from up north tells me that it bothers her when attorneys speak too softly (I won't comment on her saying it is particularly annoying for judges over the age of 50). Last year, I had some hearing problems and several times explained that to attorneys in court, asking them to keep their voices up. Invariably, the attorney would speak louder for the next sentence and then slide right back to a voice that made it difficult to hear what was said. If it's not worth having the judge hear, it probably isn't worth saying in the first place.

That's enough complaining for this column. I hope to write more in a subsequent column. In the meantime, should you have any questions, feel free to drop me a line, anonymously or otherwise, and let me know if I can use your name.



Hon. David J. Szymanski is Chief Judge Pro Tempore for the Wayne County Probate Court. From 1976 to 1979, Judge Szymanski taught high school and coached swimming in rural Indiana, also working as a quality control inspector in the production of corn. He then returned to teach and coach at Detroit's Northeastern High School. Attending night sessions of

Wayne State Law School, Judge Szymanski served as a clerk/judicial assistant to District Court Judge Gus Cifelli. He served eight years as a general practice litigation attorney before his election to the Wayne County Probate Court in 1990. Judge Szymanski has been active in the Fellowship of Christian Athletes, the Big Brother program, The Polish American Congress, the Michigan Non-Partisan Alliance, and many other civic and charitable organizations. Judge Szymanski is a member of the State Bar of Michigan and the Florida Bar and has been admitted to practice in Federal courts.

Digest of Michigan Probate Opinions

By Carol Parker

Opinion Number: 2003-01

County: Wayne County

Judge: Judge Freddie G. Burton, Jr.

Name: In the Matter of the Estate of Anna Marie Montemayor, Deceased

Summary: The decedent died testate, in October 2000, and her 1999 will was admitted to probate. Petitioner, who is one of the decedent's five surviving children, sought to admit writings as holographic codicils dated May 2000, which gifted him real estate above and beyond the share he took under the will, including decedent's home. The will itself provided for an unequal distribution plan between the five surviving children. Other surviving children objected, arguing that the writings were mere letters and that petitioner had exerted undue influence on the decedent to cause her to make the writings. Respondents also argued that the decedent lacked testamentary capacity at the time she made the writings and that the writings were ambiguous because some of the referenced property had already been sold at the time of the writings.

Petitioner brought a motion for summary disposition. Petitioner denied undue influence but admitted that he lived with the decedent at the time of the writings and that he assisted her with her finances. Various respondent siblings argued that the writings merely gave petitioner a right of first refusal to the decedent's home. Another sibling responded, claiming that the decedent was taking medication at the time of the writings, and alleged that the English language translation of the Spanish language writings that were before the court did not accurately reflect the writings' content. The court subsequently found that the writings met the statutory requirements and were a valid holographic codicil and set the question of their construction for trial. The court considered the language outside the four corners of the codicil because the idiosyncrasies of the language translation obscured the meaning, while seeking to read the decedent's estate plan "as a whole" and to "harmonize all the provisions" to effect the decedent's intent. Where the effect of the codicil would be to significantly inflate the percentage that petitioner took under the will and where there was outside testimony that the decedent had previously offered to sell her home to other of her children but the offer was refused, the codicil was interpreted to provide petitioner with a right a first refusal. The court held that the codicil was patently ambiguous and ordered the decedent's home to be sold with petitioner having right of first refusal; the proceeds were to be divided pursuant to the will distribution plan.

Subjects: Codicil; Wills, holographic; Ambiguity; Evidence

Opinion Number: 2003-02

County: Wayne County

Judge: Judge Freddie G. Burton, Jr.

Name: In the Matter of the Estate of Edna Bohn Endicott, Deceased

Summary: The decedent died testate in Feb-

ruary 2000. At the time of her death, the decedent held a trust that owned 22 percent in a limited partnership. The decedent's estate plan divided this trust into three subtrusts, the beneficiaries of which serve as cotrustees together with a financial management company. The financial management company also serves as personal representative of the estate. Two of the three subtrust beneficiaries petitioned to compel production of documents that were arguably attorney work product and privileged. Petitioners also objected to the proposed final accounting. The third trust beneficiary, who did not petition, is married to the general partner of the limited partnership (the holdings of which are in the subtrusts). In March 2000, the two petitioning trust beneficiaries notified the general partner that they would be withdrawing their partnership interest from the trust. The general partner protested, claiming that the partnership would be adversely affected. An agreement was reached to remove one-third of the balance in June 2000 and another one-third in October 2000 and to leave one-third with the partnership indefinitely. The withdrawals resulted in capital gains. However, the withdrawal agreement was silent about any tax planning and possible "gain stuffing" of the capital gains. In 2001, the partnership issued a K-1 that "stuffed" a substantial amount of capital gain to the decedent and an even larger amount to decedent's trust. Petitioners alleged that the gain stuffing was not permitted under the partnership agreement and that the stuffing had spared the other partners, including the general partner, of the partnership's capital gains burden. Significant attorney and fiduciary fees were incurred by the trust and the estate as a result of the dispute between the trust and partnership over the gain stuffing, and petitioners argued that the work product of the law firm representing the respondent personal representative was necessary to assess the necessity of these attorney and fiduciary

fees. The documents were also arguably necessary to disclose whether the tax consequences of the withdrawal, including whether the withdrawal would result in gain stuffing to the estate, were discussed. Petitioners now sought an order compelling the production of all documents between the partnership and the personal representative's attorneys with respect to the withdrawal and gain-stuffing issues. The court found that the information requested constituted material fact affecting the petitioners' rights as trust beneficiaries and must be disclosed, consistent with the facts and reasoning in a Texas Supreme Court case that the court found persuasive. A material fact may not be cloaked with privilege merely by communicating it to an attorney. Petitioners were beneficiaries of the estate, and respondents owed petitioners a fiduciary duty as personal representative of the estate.
Subjects: Beneficiary; Fiduciaries; Attorney-client relationship; Attorney work product

Opinion Number: 2003-03

County: Marquette County

Judge: Judge Michael J. Anderegg

Name: In the Matter of Minor Child

Summary: The court terminated a putative father's parental rights after finding that the putative father never supported the minor child, that the child's mother had had no contract with the putative father for the last seven years, that service of process attempted via regular mail came backed marked "return to sender," that service was attempted via publication, and that the putative father failed to appear or contact the court. The foregoing constituted clear and convincing evidence of desertion of the minor child by the putative father, and the putative father had waived his rights to future notice. Termination of putative father's parental rights was in the best interests of the minor child.

Subjects: Parental rights, termination of; Notice; Best interests

Opinion Number: 2003-04

County: Wayne County

Judge: Judge Freddie G. Burton, Jr.

Name: In the Matter of the Estate of Olga Marie Siebert Trust

Summary: In October 1992, the decedent conveyed to herself and her respondent son, via quitclaim deed as joint tenants with rights of survivorship, her interest in real property. In February 1997, the decedent and her respondent son executed a quitclaim deed transferring the title to a trust for the decedent's benefit and delivered the deed to the decedent's attorney. On April 30, 1997, the decedent's attorney mailed the deed to the Wayne County register of deeds requesting that the instrument be recorded. The 1997 deed was never recorded and was apparently lost by the register of deeds. The decedent died on April 26, 2000. On May 1, 2000, the decedent's attorney wrote respondent and his two siblings to say that the deed had been submitted for recording and enclosing a copy of the April 30, 1997, cover letter and the deed. No objections were forthcoming from any of the interested parties. In December 2001, respondent purported to sell the subject property to his nephew. A title search at the time of the purported sale of the property revealed the earlier deed but not the 1997 instrument. Petitioner, a successor trustee of the decedent's trust, sought summary disposition on his petition to impose a constructive trust on the proceeds of the real property. The court held that the delivery of the deed conveying the property to the trust was completed by the act of giving the deed, which respondent had himself executed, to the decedent's attorney. It has long been the law in Michigan that transfer of physical possession is not necessary for delivery, and here the acts of the grantor signified intent. Petitioner's request for payment of attorney fees and costs by respondent was denied since respondent was not a fiduciary for purposes of EPIC and since he appeared

to have acted in error while attempting to follow the decedent's wishes for the division of her property.

Subjects: Trusts, constructive; Deeds

Related Opinion: 2003-05

Opinion Number: 2003-05

County: Wayne County

Judge: Judge Freddie G. Burton, Jr.

Name: In the Matter of the Estate of Olga Marie Siebert Trust

Summary: This case involves a petition for reconsideration of an earlier order imposing a constructive trust pursuant to the sale of real property. The mistake is a valid basis for imposing the equitable remedy of a constructive trust. In this case, there was evidence that petitioner was not the owner of the subject property when he sold it, and thus the sale proceeds must be turned over to the trust. The original order was modified, however, to permit a hearing on distribution credit issues to give petitioner an opportunity to show that the distributions he previously made to the trust beneficiaries came from the proceeds of the sale.

Subjects: Trusts, constructive

Related Opinion: 2003-04.

Opinion Number: 2003-06

County: Wayne County

Judge: Judge Freddie G. Burton, Jr.

Name: In the Matter of the Estate of Ray L. Hunter, Sr., Deceased, and Ray L. Hunter, Sr. Trusts

Summary: A trust established in 1993 became irrevocable upon the estate's decedent's death in 1999. The trust provided for the division of the corpus into two separate trusts, a nonbusiness living trust and a trust to hold substantial business assets. The court subsequently ordered removal of the original personal representative and cotrustees. The business administrator was also replaced. Petitioner law firm sought interim payment of

the attorney fees pertaining to the estate and trust and for the allowance of accountings filed by the original personal representative and cotrustees. Objections were filed by the decedent's granddaughter and by the successor personal representative and trustee, noting prior payments to the law firm in excess of \$53,000 that were not approved by the court and alleging insufficient progress with respect to the probate of the estate and administration of the trust. The successor personal representative and trustee noted that only two of the billing entries for which the law firm sought payment were performed before his appointment and that neither he nor the successor business administrator had retained the law firm petitioner. The law firm admitted that there was no written fee agreement but maintained that the successor personal representative and trustee repeatedly contacted it for information about the estate and trust. Discrepancies were found in the accountings that were filed with the court, including mathematical errors. Disbursements of estate proceeds were also mishandled, with various under- and overdisbursements being reported or otherwise going unidentified. A hearing was held and the court reviewed the record. Petitioners' request for payment of attorney fees was denied because the law firm had not been authorized to represent the fiduciary of the estate at the time in question and the services were not necessary, nor were they on behalf of the estate. The law firm had already received \$53,000 in fees, which were not authorized by the court. The proposed accountings for the estate were not allowed where they reflected numerous and unexplained errors, inconsistencies, and improper payments and disbursements made without the court's authorization. The proposed accountings for the living trust were not allowed where there were no explanations for the attorney fees paid out and the payments were made without the court's authorization.

The proposed accountings for the business trust were not allowed where there were improper payments made without the court's authorization. The integrity of the estate and trusts were compromised by the questionable disbursements, and amended accountings consistent with the court's opinion noting the numerous problems were to be filed within 30 days.

Subjects: Attorney fees; Accounting

Carol Parker currently serves as the assistant director of the Arthur Neef Law Library at Wayne State University, where she concentrates on law library services related to reference, research support, and instruction. She previously served as the head of faculty and public services at the Michigan State University–Detroit College of Law Library, where she also taught an advanced legal research class. For the past several years, Ms. Parker has served on the State Bar of Michigan Committee on Libraries, Legal Research and Publications, and served as committee chairperson during the 2000–2001 term. Ms. Parker regularly teaches a day-long workshop on free Internet legal resources for the Michigan Library Consortium and has presented at numerous librarian conferences.

Michigan Probate Opinions Index—2003

Counties

Marquette 2003-03
Wayne 2003-01, 2003-02, 2003-04, 2003-05,
2003-06,

Judges

Anderegg, Michael 2003-03
Burton, Jr., Freddie G. 2003-01, 2003-02,
2003-04, 2003-05, 2003-06, 2003-07

Subjects

Accounting 2003-06
Attorney-client
relationship 2003-02
Attorney fees 2003-06
Attorney work product 2003-02
Accounting 2003-06
Ambiguity 2003-01
Beneficiary 2003-02
Best interests 2003-03
Codicil 2003-01
Deeds 2003-04
Evidence 2003-01
Fiduciaries 2003-02
Notice 2003-03
Parental rights,
termination of 2003-03
Trusts, constructive 2003-04, 2003-05
Wills, holographic 2003-01

Michigan Supreme Court Cases

37 Mich 264 2003-04
325 Mich 115 2003-01
352 Mich 652 2003-04
417 Mich 237 2003-01

Michigan Appeals Court Cases

9 Mich App 245
16 Mich App 527 2003-01
31 Mich App 576 2003-04
70 Mich App 745 2003-04

83 Mich App 484 2003-04
117 Mich App 1 2003-04
128 Mich App 87 2003-04
128 Mich App 713 2003-01
141 Mich App 412 2003-05
144 Mich App 423 2003-01
147 Mich App 20 2003-04
148 Mich App 649 2003-02
151 Mich App 463 2003-04
152 Mich App 281 2003-04
163 Mich App 674 2003-04
164 Mich App 82 2003-05
166 Mich App 519 2003-01
168 Mich App 540 2003-05
172 Mich App 509 2003-04
178 Mich App 345 2003-01
179 Mich App 216 2003-01
196 Mich App 326 2003-01
209 Mich App 201 2003-01
209 Mich App 682 2003-01
210 Mich App 410 2003-01
212 Mich App 357 2003-05
215 Mich App 379 2003-04
247 Mich App 427 2003-01

Federal Case Law

56 BR 891 2003-04

Case Law—Other Jurisdictions

922 SW21d 920 (1996) 2003-02

Michigan Compiled Laws

700.1104(e) 2003-04
700.3715 2003-05
712A.19b(3)(a)(ii) 2003-03

Michigan Court Rules

2.116(C)(8) 2003-04, 2003-06
2.116(C)(10) 2003-01, 2003-04
2.116(G)(6) 2003-06
2.116(I)(2) 2003-04

2.119(F)	2003-06
2.302(B)	2003-02
2.602	2003-01, 2003-02
	2003-04, 2003-05
5.313(A) and (B)	2003-05
5.921	2003-02, 2003-03
8.303	2003-05

Are there topics you would like to read about in the *Journal*?

Topic: _____

Your name: _____

Please send your suggestions by mail or e-mail to
Nancy Little, Editor (nancy.little@fosterzacklowe.com)
Foster Zack & Lowe, PC
2125 University Park Drive, Suite 250
Okemos, MI 48864

ICLE Products of Interest to Probate Practitioners

Books

Michigan Probate Benchbook

The official judges' book, prepared by ICLE for the SCAO and distributed to Michigan probate judges and registers. Covers all proceedings heard in probate court, including estate, guardianship, and mental commitment proceedings, and civil actions.

Price: \$135.00

ICLE Partners: \$121.50

Published May 2003.

Product #: 2003556575

Trust Administration in Michigan—Just Supplemented

Edited by Catherine A. Jacobs, Robin D. Ferriby, and Elaine M. Cohen

Complete guide to administering trusts under the new Estates and Protected Individuals Code with citations to both EPIC and the RPC; includes helpful checklists, schedules, and sample letters, petitions and orders.

Price: \$125.00

ICLE Partners: \$112.50

Published November 1999, includes 2003 Supplement and CD-ROM.

Product #: 1999556560

Informal Estate Proceedings in Michigan—Just Supplemented

By Joe C. Foster, Jr. and Everett R. Zack

Concise guide to informal proceedings and unsupervised administration under EPIC. Walks you through the requirements and includes sample filled-in SCAO forms. All Michigan probate registers received a copy of this book.

Price: \$85.00

ICLE Partners: \$76.50

Published May 2000, includes 2003 Supplement.

Product #: 2000556510

Probate and Estate Planning Certificate Program

For more information, see http://www.icle.org/products/probate_certificate/

A systematic training program in Probate and Estate Planning leading to a Certificate of Completion developed in cooperation with the Probate and Estate Planning Section. Attend 10 required and elective ICLE seminars designated for the Probate and Estate Planning Certificate Program and complete all attendance requirements within three years from the date you sign up to earn your certificate of completion.

Upcoming Required Seminars

Annual Drafting Estate Planning Documents

Intermediate level, full day, offered annually in the winter.

Next offering: January 15, 2004 in Grand Rapids and January 29, 2004, in Troy

Fundamentals of Estate Administration

Basic level, full day, offered annually in the winter.

Next offering: February 13, 2004, in Troy

Estate and Financial Planning for the Elderly or Disabled Client

Basic/Intermediate level, half day, offered every other year in the spring.

Next offering: March 26, 2004, in Grand Rapids, and April 15, 2004, in Troy

Upcoming Elective Seminar

Annual Medicaid Health Care Planning Update

Basic/Intermediate level, half day, offered annually in March.

Next offering: March 26, 2004, in Grand Rapids, and April 15, 2004, in Troy

Browse and purchase online at www.icle.org

Call ICLE toll-free (877) 229-4350 or fax toll-free (877) 229-4351 for information.



44th ANNUAL
Probate and
Estate Planning
INSTITUTE

*Cosponsored by the Probate and Estate Planning
Section of the State Bar of Michigan
and the Michigan Judicial Institute*

May 13–15, 2004 • Traverse City, MI
Grand Traverse Resort & Spa

June 11–12, 2004 • Troy, MI
MSU Management Education Center

Past attendees say it best:

"Excellent as usual."

"Judge Harter leads the pack."

"Always extremely helpful."

Probate and Estate Planning Section members save on registration fees!

For more information, or to register, go to
www.icle.org/probate
or call ICLE toll-free (877) 229-4350

THE INSTITUTE OF CONTINUING LEGAL EDUCATION

The source Michigan lawyers trust

The State Bar of Michigan • The University of Michigan Law School • Wayne State University Law School •
The Thomas M. Cooley Law School • Michigan State University Detroit College of Law •
University of Detroit Mercy School of Law • Ave Maria School of Law

State Bar of Michigan Members of Section Council—2003–2004

Officers

Chairperson:

Henry M. Grix

 38525 Woodward Avenue, Ste. 2000
 Bloomfield Hills, MI 48304

Chairperson-Elect:

Hon. Phillip E. Harter

 Calhoun County Probate Court
 161 E. Michigan Ave.
 Battle Creek, MI 49014

Vice-Chairperson:

Michael J. McClory

 Wayne County Probate Court
 2 Woodward Ave., Rm. 1307
 Detroit, MI 48226

Secretary:

Douglas A. Mielock

 313 S. Washington Sq.
 Lansing, MI 48933

Treasurer:

Lauren M. Underwood

 32100 Telegraph, Ste. 200
 Bingham Farms, MI 48025

Council Members

Term Expires 2004:

George A. Cooney, Jr.

 43902 Woodward Ave., Ste.100
 Bloomfield Hills, MI 48302

Sebastian V. Grassi, Jr.

 888 W. Big Beaver Rd., Ste. 750
 Troy, MI 48084

Lynn L. Marine

 615 Griswold St., Ste. 1509
 Detroit, MI 48226

Hon. John R. Monaghan

 St. Clair County Probate Court
 201 McMorran Blvd., Rm. 2600
 Port Huron, MI 48060

Richard A. Shapack

 100 Bloomfield Hills Pkwy, Ste. 200
 Bloomfield Hills, MI 48304

Term Expires 2005:

Daniel E. Cogan

 2723 S. State St., Ste. 210
 PO Box 1127
 Ann Arbor, MI, 48106

John R. Dresser

 112 S. Monroe St.
 Sturgis, MI 49091

Mark K. Harder

 85 E. 8th St., Ste. 310
 Holland, MI 49423

Nancy L. Little

 2125 University Park Dr., Ste. 250
 Okemos, MI 48864

Ramon F. Rolf, Jr.

 6024 Eastman Ave.
 PO Box 2765
 Midland, MI 48641

Term Expires 2006

Douglas G. Chalgian

 1860 Abbott Rd.
 East Lansing, MI 48823

Christopher L. Edgar

 333 Bridge St., NW, Ste. 800
 Grand Rapids, MI 49504

George W. Gregory

 401 S. Old Woodward, Ste. 456
 Birmingham, MI 48009

Marilyn A. Lankfer

 333 Bridge St., NW
 Bridgewater Place
 Grand Rapids, MI 49501

Kenneth J. Seavoy

 128 W. Spring
 Marquette, MI 49855

Ex Officio

Darryl M. Coon

 2241 Oak St.
 Wyandotte, MI 48192

Julian E. Hughes

 176 Higman Park
 Benton Harbor, MI 49022

Raymond T. Huettelman, Jr.

 2698 Salisbury Ln.
 Ann Arbor, MI 48103

Joe C. Foster Jr.

 2125 University Park Dr., Ste. 250
 Okemos, MI 48864

Russell M. Paquette

 19701 Vernier Road, Ste. 290
 Harper Woods, MI 48225

James A. Kendall

 6024 Eastman Ave.
 PO Box 2765
 Midland, MI 48641

James H. LoPrete

 40700 N. Woodward Avenue, Ste. A
 PO Box 587
 Bloomfield Hills, MI 48304

Everett R. Zack

 2125 University Park Dr. #250
 Okemos, MI 48864
 PO Box 27337
 Lansing, MI 48909

Douglas J. Rasmussen

 500 Woodward Ave., Ste. 3500
 Detroit, MI 48226

Susan S. Westerman

 345 S. Division St.
 Ann Arbor, MI 48104

Fredric A. Sytsma

 333 Bridge St., NW
 PO Box 352
 Grand Rapids, MI 49501

Stephen W. Jones

 200 E. Long Lake Rd., Ste. 110
 Bloomfield Hills, MI 48304

John E. Bos

 2400 Lake Lansing Rd.
 Lansing, MI 48912

W. Michael VanHaren

 111 Lyon St., NW, #900
 Grand Rapids, MI 49503

Robert B. Joslyn

 200 Maple Park Blvd., Ste. 201
 St. Clair Shores, MI 48081

Robert D. Brower, Jr.

 250 Monroe Ave, NW, Ste. 800
 PO Box 306
 Grand Rapids, MI 49501

John D. Mabley

 31313 Northwestern Hwy., Ste. 215
 Farmington Hills, MI 48334

Raymond H. Dresser, Jr.

 112 S. Monroe St.
 Sturgis, MI 49091

John H. Martin

 400 Terrace Plaza
 PO Box 900

Muskegon, MI 49440

Patricia Gormely Prince

 31300 Northwestern Hwy.
 Farmington Hills, MI 48334

Brian V. Howe

 23409 Jefferson Ave., Ste. 104
 St. Clair Shores, MI 48080

Richard C. Lowe

 2125 University Park Dr., Ste. 250
 Okemos, MI 48864

Kenneth E. Konop

 840 W. Long Lake Rd., Ste. 200
 Troy, MI 48098

John A. Scott

 1000 S. Garfield, Ste. 3
 Traverse City, MI 49686

Dirk C. Hoffius

 333 Bridge St., NW
 PO Box 352
 Grand Rapids, MI 49501

Commissioner Liaison

Kimberly M. Cahill

 24735 Van Dyke Ave.
 Center Line, MI 48015

Probate and Estate Planning Section 2003-2004 Committee Assignments

Internal Governance

Henry Grix, Chair
Hon. Phillip E. Harter, Chair Elect

Budget

Douglas A. Mielock, Chair
Lauren M. Underwood

Bylaws

Marilyn A. Lankfer, Chair

Michael W. Irish Award

Brian V. Howe, Chair
John H. Martin
Patricia Gormely Prince
Fredric A. Sytsma

Long-Range Planning

Hon. Phillip E. Harter, Chair
Dirk C. Hoffius, Ex Officio

Nominations

Kenneth E. Konop, Chair
John A. Scott
Dirk C. Hoffius
Marilyn A. Lankfer
Lynn L. Marine
Kenneth J. Seavoy
Lauren M. Underwood

Relations with State Bar

John R. Dresser, Chair
Kimberly M. Cahill
Douglas G. Chalgian

Annual Meeting

Hon. Phillip E. Harter, Chair
Wendy M. Parr
Michael P. Witzke

Educational and Advocacy Services for Section Members

Michael J. McClory, Chair
Sebastian V. Grassi, Jr., Vice Chair

Amicus Curiae

Mark K. Harder, Chair

Continuing Education and Annual Probate Seminar

Michael J. McClory, Chair
Elaine M. Cohen
J. Thomas MacFarlane
Amy Nehs Morrissey
Sheldon J. Stark

Section Journal

Nancy L. Little, Editor
Amy Nehs Morrissey
Wendy A. Parr
Richard A. Shapack

State Bar Journal

Sebastian V. Grassi, Jr., Chair

Pamphlets

Kenneth J. Seavoy, Chair
George A. Cooney, Jr.
Robin D. Ferriby
Ellen Sugrue Hyman
Lynn L. Marine

Electronic Communication

John R. Dresser, Chair
Josh Ard
George W. Gregory
John D. Mabley

Legislation and Lobbying

Harold G. Schuitmaker, Chair

Principal and Income Act

John H. Martin, Chair
E. James Gamble
Ramon F. Rolf, Jr.

Uniform Trust Code

Mark K. Harder, Chair
Daniel E. Cogan
Marilyn A. Lankfer
Douglas A. Mielock

Professionalism and Standards

Lauren M. Underwood, Chair

Ethics

John E. Bos, Chair
Richard C. Lowe
Susan S. Westerman

Unauthorized Practice and Multidisciplinary Practice

Ramon F. Rolf, Jr., Chair
Catherine A. Jacobs
Ellen Sugrue Hyman
Teresa Sullivan

Specialization and Certification

Richard A. Shapack, Chair
John E. Bos
Sebastian V. Grassi, Jr.
George W. Gregory
Mark K. Harder

Practice Management

Marilyn A. Lankfer

Administration of Justice

Contested and Uncontested Probate Proceedings

Hon. Phillip E. Harter, Chair
Shaheen Imami
Lynn L. Marine
Michael J. McClory
Hon. John R. Monaghan
Ramon F. Rolf, Jr., Chair
Richard Siriani

Uniformity of Practice

Sebastian V. Grassi, Jr., and Joan Von
Handorf, Cochairs
John E. Bos
Lisa Langton
Jean A. Mahjoory
Richard Siriani

Practice Issues, Related Areas, and Liaisons

Charitable Giving/Exempt Organizations

Robin D. Ferriby, Chair
Andrew Payne
Tracy A. Sonneborn
Richard A. Shapack
Duane Tarnacki

Transfer Tax

George W. Gregory, Chair
Robin D. Ferriby
Sebastian V. Grassi, Jr.
Thomas F. Sweeney

Guardianships and Conservatorships

Lynn L. Marine, Chair
Douglas G. Chalgian
George A. Cooney, Jr.

Business Law and Business Law Section Liaison

John R. Dresser, Chair

WESTERN AMERICAN MAILERS, INC.
720 Monroe Ave., N.W.
Grand Rapids, MI 49503

Presorted Standard
U.S. POSTAGE
PAID
GRAND RAPIDS, MI
PERMIT NO. 1

SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

Date	Place
Jan. 17, 2004	University Club, Lansing
Feb. 21, 2004	University Club, Lansing
Mar. 20, 2004	University Club, Lansing