

MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

TABLE OF CONTENTS

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Feature Articles

The Slayer's Statute and Slayer's Rule Alan A. May.....	3
Top Ten Mistakes Made on Estate and Gift Tax Returns Lorraine F. New	26
Court Rule Changes Joan Von Handorf.....	29
Recent Cases on Estate Tax Allocation: "How the Best Laid Plans of Mice and Men Can Often Go Awry" Thomas F. Sweeney	32



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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@fosterzack.com.

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TABLE OF CONTENTS

From the Desk of the Chairperson

Michael J. McClory 1

Feature Articles

The Slayer's Statute and Slayer's Rule

Alan A. May 3

Top Ten Mistakes Made on Estate and Gift Tax Returns

Lorraine F. New 26

Court Rule Changes

Joan Von Handorf 29

Recent Cases on Estate Tax Allocation: "How the Best Laid Plans of Mice and Men Can Often Go Awry"

Thomas F. Sweeney 32

Departments

Tax Nuggets

George W. Gregory, Christopher L. Edgar, Robin D. Ferriby, Thomas F. Sweeney, Patricia M. Ouellette, and Christine M. Savage 37

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

Hon. Phillip E. Harter 40

Legislative Report

Harold G. Schuitmaker 44

Probate and Estate Planning Council Q & A

Shaheen I. Imami and Patricia Gormely Prince 45

Miscellaneous

EPIC Cost-of-Living Adjustments for 2006 2

ICLE Resources 49

Section Council 50

Section Committees 52

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From the Desk of the Chairperson

By Michael J. McClory



I'd like to update you on the projects the Probate and Estate Planning Council has been working on throughout the 2005-2006 year. Some of these are ongoing items which the Council has been involved with for some time; others are reactions to events that have occurred outside of the Section's control.

Efforts to produce a Michigan Trust Code (MTC) continue. To date, Mark K. Harder's committee has completed a review of approximately two-thirds of the sections that will ultimately be part of legislation to be introduced at some point in the future. The overwhelming majority of the proposed provisions are based on language from the Uniform Trust Code (UTC). The most controversial sections have yet to be debated and reviewed by the Council. Mark and his committee are saving these provisions for the last phase of this project. The Council welcomes any input you may have on this issue; do not hesitate to contact Mark or any member of his committee if you would like to provide comments or merely wish to become more informed about the MTC.

Special thanks to all those who submitted responses to the Economics of Law survey, which was e-mailed to all Section members. I (and the entire Section) am also grateful to the probate judges who completed the Judicial survey, which was also sent out electronically. The information gathered in both of these surveys will be invaluable for probate practitioners and members of the probate bench. The results will be published in a future edition of the *Journal*. Kudos to Robin Ferriby and the Community Foundation for Southeastern Michigan, which generously provided funding.

On November 15, 2005, the Michigan Supreme Court adopted several probate court

rule amendments which were given immediate effect. This was unusual, since amendments typically become effective on January 1, May 1, or September 1. These rule changes dealt with guardianships, conservatorships, and uniformity of practice issues. As a result of these amendments, several probate court forms had to be modified, and some new forms had to be added. A summary of the court rule amendments and court form changes will be presented at ICLE's 46th Annual Probate and Estate Planning Institute this spring. The amendments can be found on the Supreme Court's Web site, at www.courts.michigan.gov, or on the Wayne County Probate Court's Web site, at www.wcpc.us.

The issuance of these modified court rules and forms has resolved some uniformity of practice issues but has also raised others. Joan Von Handorf's Uniformity of Practice Committee is attempting to address these items. If you have questions, suggestions, or comments on this matter, please feel free to contact Joan or any member of her committee.

Finally, the Council continues to grapple with the issue of specialization and certification. Two questions on this topic were included in the Economics of Law survey in an effort to obtain additional feedback from Section members. This input will help us decide whether the Council should pursue a program to have estate planning and probate administration formally recognized as a specialty in Michigan. Do not hesitate to contact Committee Co-Chairs Shaheen Imami and Richard Shapack if you wish to weigh in on this important debate.

I want to reiterate the invitation made in my last Chairperson's column: feel free to call me at (313) 224-5685 if you have any questions, complaints, suggestions, or comments about what the Section is or should be doing to help you, our members.

The Slayer's Statute and Slayer's Rule

By Alan A. May

Acknowledgement: This analysis is the product of more than just my efforts. I would like to acknowledge and thank the following: Thomas Fraser and Barbara Andruccioli, for their research; Shannon Demeshko, for her annotations and corrections; my partner, Thomas Trainer, for his proofreading, sense of humor, and kind suggestions; and my assistant, Janis Vaughn, for her many proof reads, drafts, and suggestions.

I. The Slayer's Statute and the Slayer's Rule

Although my practice has taken me into a number of issues surrounding wrongful death, in the past year I have been working in a subspecies of the topic: the rights of an individual to a decedent's property when that individual, in some way, allegedly is involved in the death of the decedent.

To begin, the Michigan Slayer's Statute says:¹

- (1) An individual who feloniously and intentionally kills the decedent forfeits all benefits under this article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.
- (2) The felonious and intentional killing of the decedent does all of the following:
 - (a) Revokes all of the following that are revocable:
 - (i) Disposition or appointment of property made by the decedent to the killer in a governing instrument.
 - (ii) Provision in a governing instrument conferring a general or nongeneral power of appointment on the killer.
 - (iii) Nomination of the killer in a governing instrument, nominating or appointing the killer to serve in a fiduciary or representative capacity, including a personal representative, executor, trustee, or agent.
 - (b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.
- (3) A severance under subsection (2)(b) does not affect a third party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon, in the ordinary course of transactions involving that type of property, as evidence of ownership.
- (4) A provision of a governing instrument is given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.
- (5) A killer's wrongful acquisition of property or interest not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrong.
- (6) After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the

court, upon the petition of an interested person, shall determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section."

Before discussing the Act and its permutations, it will be helpful to examine the case law and the common law. Two factors stand out to me. First, there was no codification of law on this topic in Michigan until 1979. Second, there is a dearth of case law interpreting either the Revised Probate Code, former MCL 700.1–.993, or the Estates and Protected Individuals Code, MCL 700.1101–.8102. Therefore, the pre-1979 case law examination is the most relevant. Likewise, a predicate to understanding the case law is an understanding of its underlying jurisprudential basis.

II. Jurisprudential Basis

I believe the Slayer's Statute and related common law and case law on the Slayer's Rule are the progeny of five separate legal precepts: *lex talionis*, worthy blood, worthy title (my own word—not to be confused with worthier title), equity and public policy, and felony forfeiture.

Exodus

We begin at the beginning, or at least with a passage from Exodus: "When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning. But if other damage ensues, the penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."²

This section is quoted not to provoke a debate on abortion but instead for clarification. In his commentary, Rabbi Gunther Plaut cites Ephram Speiser to the effect that compensation is given on the basis of the number of months the woman was pregnant. This is a segue to economic damages, not a differentiation from some other sort of compensation.³ Plaut goes on to say that this is not literal retribution (Talion) but a detailed system of compensation, even for homicide. Pure literal Talion is found in the Code of Hammurabi.⁴

We see, therefore, the first pecuniary responsibility for homicide. At that time there was no differentiation between what we would call wrongful death and the Slayer's Statute. Speiser believes that this pentateuchal⁵ reference is based upon Hittite law, which required the slayer to pledge his estate as security following the death while resolving recompense.⁶

Since the system of compensation appears so well defined, the author believes that this provides a basis for later theories of equity, as we will find as the basis for most of the Slayer's Rule and Slayer's Statute.

Felony—Forfeiture—Escheat

The first and most thorough codification of descent and distribution is Sir William Blackstone's *Principles of Descent and Distribution*.⁷ As Blackstone says, "By attainder also, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer inheritable."⁸

Blood is the *sine qua non* of descent and distribution. One gets property because of the sharing of the most worthy blood with the previous decedent. If one's blood is corrupted by felony, one cannot inherit. This is true regardless of whether or not the felony was committed against the property owner.

Lex talionis looks at the slayer and the slain and creates equity. Blood corruption, on the other hand, looks at the slayer and his actions and bars his right to inherit. Though attainder is abolished

in American law, the theory is strikingly similar, not because of recompense, but because of a bar to inheritance.

Blackstone goes on to differentiate felony causing forfeiture of lands to the King by corrupted blood and by escheat to the Lord. The former is punishment for a criminal offense and is Saxon.⁹ Escheat is subservient to forfeiture because the former passes to the Lord of The Manor and the latter passes to the King. But since the King always wins, when would escheat come into play? Here we have something like the Slayer's Rule, because not only does the felon's property pass to the King, but the felon cannot inherit from his father, so this inheritable property passes to the Lord of the Manor.¹⁰ You lose your property (as in wrongful death) and you lose your inheritance (Slayer's Rule). Again, this is for any felony not just against one wherein an inheritance was expected. The taint is irrevocable because the felon "and his heirs" have corrupted blood, hence the son of the felon is obstructed from inheriting from his grandfather.¹¹ The blood which carried descent could also be otherwise corrupted by leprosy, with the church taking instead of the crown.¹² This also would occur if there was intestacy. The local Bishop would then write your will passing your property to the church to ensure your soul's salvation.¹³ Thus, we have a second separate relationship between homicide and inheritance.

Equity/Public Policy

A person should not benefit from his or her criminal act. This theory again appears to be an outgrowth of compensation of *lex talionis*, which focuses on the slain and the slayer. The focus of equity, on the other hand, is on the slayer alone, depriving him or her of benefit instead of directing where the benefit should go.

The finest opinion expressing the Slayer's Rule (when there is no Slayer's Statute) and the equitable principles supporting it is the New York case of *Riggs v Palmer*.¹⁴ This exemplary decision, in its classical style, sets forth a

brief analysis of the positions of Appellee and Appellant, announces a well-reasoned ruling based on an analysis of numerous equitable principles, and concludes with a dissent, well stating the principles of strict construction.

In this matter, the grandfather was killed by his grandson, who sought to inherit through a will. Justice Earl, speaking for the majority, said:

- It is never the intention of the testator to benefit his murderer. Justice Earl hedges his bet by later saying, "[A] will may contain provisions which are immoral, irreligious or against public policy, and they will be held void." (Just in case this might have been the testator's intent).
- When a court feels it could not have been the intent of the legislature to include a result, the court excludes it through "equitable construction." He distinguishes between a case not within the letter of the law versus the meaning of the law.

Going to Blackstone, he further says:

- "It is unreasonable that any man should determine his own quarrel."
- With reference to meaning of law versus letter of law, God allows us to work on the Sabbath for necessity, charity, or benevolence (neither Blackstone nor Earl recognizes that both of these are God's rules and it is God versus God not Parliament versus Judge).
- No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found a claim upon his own inequity, or to acquire property by his own crime. These maxims are dictated by public policy and their foundations are administered in universal law.
- It is akin to nullifying a will for fraud.
- We are not increasing a criminal penalty by "taking away" property, only preventing a wrongdoer from acquisition.¹⁵

Justice Gray dissents and says:

- "We are bound by the rigid rules of law [inheritance], which have been established

by the legislature, and within the limits of which the determination of this question is confined.”

- “In the absence of such legislation here, the courts are not empowered to institute such a system of remedial justice.”
- The court cannot make a new will for the testator.
- A bar to property acquisition is an additional criminal punishment.¹⁶

What we learn from the majority’s use of equitable construction is the equitable principle establishing the Slayer’s Rule, despite the absence of a Slayer’s Statute. We learn the primacy of legislation from the dissent and that the interpretation of the laws of descent and distribution is strict and not remedial.

The dissent is made somewhat moot by a Slayer’s Statute. The equitable rule is established by Michigan’s Slayer’s Statute and seems to be self-broadening through the codification of the equitable principle per se rather than just its effects through MCL 700.2803(5).

Case law will still be relevant if one in Michigan uses strict construction. One could easily ignore MCL 700.2803(5) in favor of a strict construction of a more specific section, under the doctrine of *ejusdem generis*.¹⁷ As we will see in the balance of this article our legislators have left many open questions which may require the use of other principles of law aside from equity.

Slayer’s Rule

We now turn to the Michigan Slayer’s Rule, as set forth before the codification of the Slayer’s Statute.

The discussion of the Slayer’s Rule begins with an analysis of *Budwit v Herr*.¹⁸ This case looks at numerous elements of succession, divides them for purposes of analysis, then reaches some conclusions about all elements.

In *Budwit*, the murderer, a husband, stood to gain insurance as the beneficiary of his wife, and he inherits from her estate, claiming a total fee

interest through tenancy by the entireties.

The eight-person supreme court unanimously:

- barred insurance and inheritance to the murderer;
- mentioned, without comment, a lower court’s granting of pre-judgment injunctive relief;
- stated the equitable principle of barring the wrongdoer, “or those taking under” (probably obiter dictum—because the issue of subsequent death was not faced);
- found no distinction between murder and manslaughter;
- linked equity and public policy, saying “[u]nder accepted principles of public policy, equity and justice, one may not be permitted to profit by his criminal act;”
- under *ipse dixit*, said that this utilization of equitable principles does not constitute a forfeiture under the state and federal constitutions.¹⁹ (Although it is certainly within the supreme court’s power to speak *ipse dixit*, it is unfortunate that they did not give reasons why this was not a forfeiture.)

The court was evenly split regarding what to do with property held by the entireties. As the lower court²⁰ had allowed the murderer an undivided one-half interest, and the deceased’s wife’s other heirs the other undivided half, as tenants in common this amounted to affirmance.

In doing so, the affirming opinion:

- Employed the “equitable construction” rule to get around the strict constructionist argument that the courts were preempted by the legislature. Here, the “getting around strict construction” issue was in the area of succession by tenancy by the entireties. (Remember in the New York case of *Riggs* that strict construction was used even against the statute on descent and distribution. Here the majority and the minority seem to accept that equitable principles could be applied and upheld over a real property succession statute).

- Cited a creditor's rights case where a creditor's claim was defeated by a court, saying that the husband and wife each had a contingent remainder in the other share and that survivorship was an incident to the estate, which was not vested in it.²¹
- Examined the law of many states, including Oregon and Colorado, to the effect that courts could not supersede specific title statutes (similarly used by the dissent against a bar to inheritance of the wrongdoer in *Palmer*).²² The court also looked at the Tennessee view that the murderer got the entire estate because he got nothing new.²³ On the other extreme, the constructive trust theory was examined where title passed, but was held for the family of the slain.²⁴
- Rejected all of the above in lieu of the Florida and Mississippi position that the wrongdoer gets his "half" and the other heirs of the slain get "their half" as tenants in common (our current Slayer's Statute).

The Dissent—"Worthy Title"—The Slayer

Justice Dethmers speaks for affirmance regarding insurance and personal property, but for reversal in regard to the property held by tenancy by the entireties. The opinion is pure Blackstone, as modified by the State and U.S. Constitutions. In adopting the law of Tennessee, Dethmers cited the provision that "[i]t was not the intention of the general assembly that vested rights of this character should be forfeited by the murderous act of the owner therein stated. It was only intended that he should not in any way acquire any new rights or property interest from others as the result of his crime. Any other construction of the statute would render it void. Our Constitution (article 1, § 12) prohibits the enactment of any law to the effect that a conviction for crime shall work corruption of blood or forfeiture of estate."²⁵

The court distinguishes insurance by saying that the Slayer was deprived of no vested right and that, with entireties property, the survivor takes nothing from the deceased, having

ownership in the whole from the beginning. The rule that no man may benefit from his own wrong is not violated, because he takes nothing he does not already have. Dethmers then cites Ohio law to the effect that property rights are to be sacred and not subject to a taking because of the violation of public policy.²⁶

Dethmers distinguishes Missouri law, which allows the bar to succession, by saying that in that state there was no unity of title in entireties property.²⁷ He then faces a crucial issue: How can the unity of the entireties be severed and turned into tenancy in common in a divorce case? Simply, says Dethmers: there is a statute that says so, "which statute must be read into every conveyance by the entireties as of the time of vesting, thus becoming a limitation thereon or condition thereof *at that time*."²⁸

Assuming four justices would agree with Justice Dethmers today, how would the court rule now? The answer is not all that clear. While we do have a Slayer's Statute, if Judge Dethmers gives credence to a statute governing the imposition of a bar "read into every conveyance at the time of vesting," one would think that he would also read it into the "Slayer's Statute." Remember that in England until the enactment of the statute of 1 Edward c. 12, a widow lost her dower if her husband was a felon.²⁹ But:

- Though a statute can supersede case law, the statute on divorce speaks to effect and not to cause. It does not say that there is a bar *ab initio*, and the court does without citation.
- A statute given that reading as to a slayer could still be unconstitutional if it violated a forfeiture provision of the constitution of the U.S. or of a state.

Dethmers does allude to the possibility of a different result if there were a statute on title and slaying as there is in divorce when he says:

- "There being no comparable statute regarding the ownership or disposition of entireties property upon the murder of one spouse by the other, how can an analogy

be said to exist requiring like disposition, in both situations, of entireties property in derogation of the common law?"³⁰

But query, is our statute such a statute? The Michigan statute says joint tenants; it does not say tenancy by the entireties. Therefore, through strict construction, it meant only what it said. However, the Slayer's Statute does have an equitable catch-all in section 5. But, if title prevails over equity—then what? The probable answer is that, in light of the statute's aims and the majority opinion on equity, equity will prevail, even if the statute is strictly construed.

"Worthy Title"—The Slain

Although the name of this theory originates with the author, the theory does not. The most thorough delineation of the following was made by Professor Mary Louise Fellows of the University of Minnesota Law School.³¹ While Professor Fellows graciously attributes her theory to Judge Earl's decision in *Riggs v Palmer*,³² this author analyzed that case as pure equity and attributes much more of the original thought to Professor Fellows.

Fellows' theory is simply that reliance on equity leads to the employment of fictions, inconsistent results, and the denial of a jury trial. It does not fill legislature gaps and does not resolve all potential legal conflicts. Fellows instead prefers to focus on the slain, rather than the potential benefits sought to be barred to the slayer for his or her acts. Fellows, as a concomitant part of that theory, believes that the killing of the victim "disrupts the disposition of the property" and, hence, "impairs the purposes of the property transfer law just as much as allowing the slayer who does not commit suicide³³ to retain ownership of the victim's property."³⁴ Professor Fellows suggests this change in focus will "ameliorate the interference with the property transfer caused by the heinous act. Once attention focuses on property transfer law rather than equity, the proper disposition of the failed interests becomes a central concern."³⁵

The reader is directed to that article for a thorough explanation of the application of the "worthy title approach." My purpose is to use the Fellows theory and others to help resolve intra-statute conflict and unresolved issues, either under case law or under the Michigan Slayer's Statute.

III. Issue Resolution

Constitutionality

I have already alluded to the probable answer to the question, What if the unconstitutionality of forfeiture were raised as a defense against the bar to succession? Would four Justices still follow Justice Dethmers? My pragmatic answer is no, because a new supreme court would distinguish the Dethmers view, probably by saying that the severance is a contemplated contingency *ab initio* due to the Slayer's Statute, as divorce was in the *Budwig* court. The Michigan Supreme Court would probably go on to say that there was no Slayer's Statute at the time of Dethmers' opinion.

To say a buyer contemplated severance because there was such a statute allowing it, under unusual circumstances, to me is the employment of a fiction that the buyer has knowledge of real estate law, domestic relations, and probably probate law. Few lawyers know it, let alone the millions who buy real estate without the assistance of counsel. I think it is quite a stretch to say that when two people buy property jointly that the contemplation of one murdering the other, and the results that would flow from there, is a pre-condition built into the purchase *ab initio*. Let us, therefore, resolve the constitutional issue directly without resorting to a fiction. The majority resolved the conflict by saying that severance and tenancy in common were not a forfeiture under state and federal constitutions. Again they did *ipse dixit*, with no citations. They reasoned that we are not taking what you already have, only what you would get—therefore, there is no forfeiture (remember Tennessee did this with the

entire interest). Here again Professor Fellows is helpful. Rather than analyze the fiction cases, I will cite her summary:

1. The constitutional provisions abolishing forfeiture of the estate and corruption of blood apply only to property the felon owned and not to property in which the felon had an expected interest.³⁶ Forfeiture ‘yes;’ escheat ‘no.’ (Let us not quibble, though, as we don’t have Lords to whom an ancient doctrine of escheat would bar inheriting). We abolished forfeiture, not escheat.
2. Forfeiture laws are those where the State, and not a private individual, took.³⁷
3. The Constitutional provision against forfeiture applies to criminal statutes. Fellows goes on to cite cases where a civil taking has been upheld by the U.S. Supreme Court³⁸ as to a specific res and not to one’s estate.³⁹
4. Looking at the Slayer’s Rule as a regulation of property and not a principle of equity mitigates the adverse impact.⁴⁰

Now let us follow Professor Fellows’ theory to a logical conclusion. The wrongful death act regulates the transfer of property. It punishes a felon and a lesser taker of life. It takes the wrongdoer’s estate by an elongated process of litigation. Why not a truncated one? Due process is not violated. One who commits a crime is guilty of negligence per se. If we focus on property regulation, as so interpreted, why not authorize by statute a direct taking of the slayer’s estate by extension of the theory of wrongful death? This also solves the issue of the subsequent or simultaneous death of the slayer.

Conflicts in the Slayer’s Statute Per Se

Section 2(A)(i) revokes the disposition of property made by the decedent to the killer in a governing instrument. Section 2(B) severs a joint tenancy interest into tenancy in common. Section 4 says that a provision in a governing instrument is given effect as if the killer disclaimed all provisions revoked by this section.

Let us attempt to apply the following to the above:

Person X quitclaims to X and Y, with rights of survivorship. Y kills X. The deed is considered a governing instrument;⁴¹ Subsection 2(a)(1) revokes the deposition; 2(b) severs the joint tenancy and turns the holding of the fee into tenancy in common.

Possible Results:

1. Applying *ejusdem generis*—2(a)(1) is more specific than 2(b) and the result is a “truncated wrongful death.” The killer loses his share, because revocation returns the ownership to X.
2. A supreme court finds an illegal forfeiture, as you are taking what the killer had, rather than what he expected.
3. The forfeiture is concluded to be “specific” and “civil” and thus constitutional.
4. Section 2803(5) is useless because it speaks of acquisition, not dispossession.

Remember this is different from X and Y taking from Z. Pure revocation means just that the property would return to X. One could argue that this was the intention, because X had it originally. It certainly could not be intended if X and Y took from Z. There should be no revocation benefiting Z.

Now let us apply this to section 2803(4). If revocation happens, the governing instrument is given effect “as if the killer disclaims.” Section 2908(1) of the Disclaimer Statute says that if the disclaimant is the last to die the property passes to the disclaimant’s estate.

- Is this a third result? The victim’s estate does not get? The killer doesn’t get his “half” but his estate does.
- Does Section 2908 (1) have any efficacy in light of Section 2803(2)(b)?

Conflicts with Probable Intent and Other Law

Let us imagine that A is the owner of an insurance policy, and B is the beneficiary. C is the

child of B and is an alternative beneficiary. B kills A. Section 2803(2) (ii) revokes the beneficiary designation. Section 2804 says the revocation acts as a disclaimer. The disclaimer statute, MCL 700.2907(3), implies, by the negative inference that the insurance, therefore, passes to the alternative beneficiary.

- (a). Did the decedent really intend this under the circumstances? Can the killer benefit his own heirs by his own wrongful act? When the decedent took out the policy, wouldn't he have said, "if my beneficiary kills me I don't want his heirs to have it"?
- (b). Case law compares this to benefiting from undue influence and fraud. Such actions revoke the document when the benefit is for the tortfeasor or other third parties.⁴²
- (c). It is tort law and hornbook law that the criminal act of another is not reasonably foreseeable. Applying this principle, one cannot foresee the murder and, hence, the alternative beneficiary would not be preferred.
- (d). Justice Carr cited *Wharton on Homicide* in support of his decision that the common law doctrine of succession to property does not operate in favor of the killer "against any person claiming through or under the slayer."⁴³ Is this obiter dictum or is this part of the ruling?

A recent Maryland decision applies the Slayer's Rule (Maryland is not one of the 44 states with Slayer's Statutes) as follows:⁴⁴ This was not a case that concerned insurance but one that looked at the right of a grandchild to take in place of his killer father. The court does not apply the "through or under rule." It ignores the fiction that the killer predeceased. The Maryland case concludes by putting the burden on the legislature to specifically allow the child of a slayer to take. They did this because they cannot allow the death of the grandfather to place the grandchildren in a better position than they would be if the grandfather died of natural causes. Others should take, under the statute of descent

and distribution, and if the statutes of descent and distribution need to be changed to allow the children of the slayer to inherit from the slayer's victim then that change should come from the legislature, not the judiciary. The Maryland court also cites Professor Fellows' article to the effect that the overreaching policy to prevent the undeserving slayer from controlling the disposition of the victim's property should not be changed by judicial fiat. Other courts have held that when the same heirs would take through the victim, as well as through the slayer, they should do so despite the act of their predecessor slayer.⁴⁵

Better to allow the killer to take, rather than his heirs, so at least he would be a collectible defendant in a wrongful death action. States are split as to whether creditors can go after a disclaimed share, although this would be an involuntary, rather than voluntary, disclaimer.

Open Questions and Other Conflicts

1. A Third Owner; None Married

A, B and C own Blackacre jointly with rights of survivorship. A is young; B and C are elderly. This often occurs when a child buys a house for his elderly relative, such as aunts or uncles, but anticipates that he will be the last survivor. Assume, for this example, that B and C are not married and that B killed C.

- (a) Section 2803(3) applies to third parties who acquire in reliance. Therefore, this provision is of no relevance, but it does show the legislative intent to favor innocent parties, of which A certainly is.
- (b) Assume 2(b) is deemed more specific than 2(a)(i) and we are dealing with a severance rather than a revocation.
 - (1) B would be a tenant in common with C's estate.
 - (2) Presumably B and C's estate would be tenants in common versus each other, but as a unit, joint tenants with A. This shouldn't be the case because A, being young, anticipated B and C

both predeceasing and not an estate with younger heirs being interposed. Further as to A, C's joint estate should pass to A because A didn't care how C died, only that C predeceased A.

- (3) C's joint interest would normally pass by operation of law to A and B. B can't take because he's a slayer. C's estate should not take because it would be an unexpected windfall. My conclusion is that B retains his one-third interest with right of survivorship and A has a two-thirds interest. The statute does not say this, but if we look at the comparative equities and employ equitable construction, A is not unjustly enriched with this result and C's estate is not getting an interest. Remember also the Professor's theory about not disrupting the disposition of property. It is, to me, most relevant here. We should focus on A's property rights.

2. A Third Owner; Two Others Are Married

Assume the same facts, but B and C are married. Remember the Michigan's Slayer's Statute doesn't mention tenancy by the entireties, only joint tenancy. A court could:

- (a) Find the legislature intended entireties, even though it did not say so, and have to stretch to get around the doctrine of *expressio unius est exclusio alterius*.
- (b) Apply the decision affirming four justices in *Budwit* and adjust the rights of A as set forth above.

3. Disparate Equities

A and B own Blackacre. A puts in all the money and B is to build a house with sweat equity. B kills A before the house is built.

- (a) The result is tenancy in common but in what percentage?
- (b) Tenancy in common does not have to be equal and the statute does not say so.

The statutes and case law are silent, but I believe 100 percent should go to A's estate.

This would be the result with an account of convenience or if a deed were procured by fraud. Otherwise, it would be unjust enrichment to the slayer's estate gained by murder. Blackstone and Wharton are right. You should not, under these circumstances, be able to take "by or through" any more than you would because of the undue influence against the testator for the benefit of another. This would be a balance of equities and not a corruption by blood. Yes, it would be the taking of the estate, but the estate taken would be determined to be zero.

Query: Does MCL 700.2803(5), the equitable catch-all, preempt other theories like the Worthy Title theory of Professor Fellows? Probably not. Recall the dissenting arguments in *Budwit* and *Riggs* that the legislature, by enacting succession laws and property laws, preempted an attempt to apply the Slayer's Rule.⁴⁶ I do not believe that the catch-all was meant to be preemptive but suggestive. I do believe equity would prevail if a court felt that "worthy title" violated equitable principles, because equity is what the legislature mandated.

IV. Order of Trial

Subsection 6 of MCL 700.2803 stipulates the order of trial. The absence of conviction can mean pre- and post-criminal trial. Nothing can limit a probate court from trying a civil issue first, and there need not be a criminal trial at all. If a criminal trial is pending, it may be pragmatically less expensive to wait if there is proper injunctive relief, but, as will also be shown below, it might be best to proceed. A federal court using Michigan law said that acquittal was no bar.⁴⁷ At that time, the court would allow neither conviction nor acquittal to have an effect on the bar to inheritance;⁴⁸ however, our Slayer's Statute has since spoken on that subject.

V. Insanity

Not Guilty By Reason of Insanity

The statute does not address the issue. Under the Slayer's Rule, the Michigan Supreme Court

said that there was no bar to the succession to the slayer when the killer was insane at the time of the homicide.⁴⁹ The Michigan court quoted an Illinois court to this effect: “Where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary were sane, such killing does not cause a forfeiture of the policy nor bar his right of recovery for the insurance money.”⁵⁰ *Scott on Trusts* is also cited to the same effect.⁵¹

Narrowing Forfeiture Even Further

There is but one test for insanity in a criminal milieu. It would seem, however, that diminished capacity may be less than insanity, but still such that there is no “felonious intent.” Further, the normal burden of proof on a defendant in the criminal case is to prove insanity. This may or may not apply to some other mental disorder, as it is up to the petitioner to prove intent. Further under the Slayer’s Statute, the petitioner still must prove “criminal accountability.” If a defendant still has the burden of proof of insanity in a criminal matter then he should still have it in a civil matter, but by a preponderance of evidence—the same standard allowed the petitioner. But query, if the theory to bar forfeiture is diminished capacity and not insanity, would the burden rest with the one seeking forfeiture under his or her general burden of proving intent?

Expanding Forfeiture Further

We now have a statute which still allows a trial without a conviction. A bar could be broadened because:

1. We look at the preponderance of evidence, under MCL 700.2803(6), and not beyond a reasonable doubt.
2. Criminal accountability may not mean criminal conviction, e.g., some felony less than murder may be proven in the civil case, which requires a different standard of *mens rea*, and to which an insanity might not be a defense.⁵²

3. A provision in an insurance policy excluding coverage, where a bodily injury was intentionally caused, was recently looked at by the Michigan Supreme Court. There was no criminal trial, but there was an allegation of insanity and mental illness. The court ruled that even if insanity were proved, the killer could have intended his acts and, therefore, the exclusion would apply.⁵³

Applying this same logic to a Slayer’s Statute, a mentally ill person could “still intend or expect the results of his acts.” Admittedly, there was no “not guilty by reason of insanity” verdict here.

The author’s conclusion is that insanity or mental illness are questions of fact as to whether the slayer is both criminally accountable and whether he intended his acts. Mental illness or insanity, depending on their extent, could be a bar to forfeiture, under both the words criminal accountability and the term “intentional” if there was no preponderance.

I believe the slayer would have the burden of proof that there was no accountability, as the slayer would in the criminal trial if such a defense were raised to show his lack of mental capacity. I believe the slayer would only have to preponderate because the victim would only have to preponderate.

Unable to Stand Trial

The Michigan Supreme Court held that the mere inability to stand trial, because of not being able to assist counsel due to mental illness, was to be treated *sui generis* and not equated with not guilty by reason of insanity.⁵⁴ The court found that:

1. Up until the act of strangulation there were no signs of insanity. Therefore, it cannot be inferred that he was mentally irresponsible until after the killing.
2. The marital union was destroyed by the unlawful act.
3. The implication is that when there is no criminal trial, for these reasons, there is no

relation back of the reasons for that lack of criminal trial to the time of the wrongful act.

4. It would seem that if a slayer could “civilly” prove his own insanity at the time of the wrongful act then there would be a bar to forfeiture.

VI. Minority

In *Riggs v Palmer*, Elmer Palmer was 16 years of age when he killed his grandfather.⁵⁵ Further, a 15-year-old parricide who was convicted of juvenile delinquency was barred from inheritance by the New York Court of Appeals following *Riggs*.⁵⁶ There is no Michigan case law on this topic, however, and the Michigan statute is silent and lacking an equitable catch-all. The New York Supreme Court, in denying an adult killer’s claim, cites *Riggs* as relying upon the equitable maxim of *ex turpi causa non oritur actio*.⁵⁷ MCL 700.2803(5) is the same. Therefore, the equitable principle should be applied and should require forfeiture, and the minority should not be a bar. Cases could be resolved in the opposite manner should the facts show that the maturation of the minor was such that there was reduced mental capacity.

VII. Criminal Accountability for Felonious and Intentional Killing

What Need Be Proved?

The author believes that MCL 700.2803(6) requires that all elements of the crime must be proven by the standard of proof of preponderance of evidence. It must be proven that there was a felony that was intentional. Cause of death is implied in the necessity to prove criminal accountability.

Felony

1. *Manslaughter*. *Budwit*, in quoting *Garwols*, itself quoting *Wharton on Homicide*, concluded that there was no distinction between a death caused by murder and one caused by manslaughter.⁵⁸

2. *Involuntary Manslaughter*. This is a felony and is criminally accountable, but is held to be unintentional.⁵⁹

Even the “misdemeanor manslaughter” rule converts a misdemeanor into involuntary manslaughter.⁶⁰ But that same case also defines involuntary manslaughter as either an act “with intent to injure or in a grossly negligent manner.”⁶¹ However, even where this is the case and intent is proven by such a charge of manslaughter, we would be lacking the element of “felony.” The author, therefore, agrees that if all that is proven is involuntary manslaughter, one may have an action for wrongful death but not an action under the Slayer’s Statute.

The author does believe, however, that with certain acts and under certain circumstances the same facts might result in the ability to prevail under a Slayer’s Statute. For instance, if the *Datema* case were utilized and interpreted to define involuntary manslaughter as a crime of intent, as an alternative to gross negligence, and the plaintiff proved another felony such as

1. MCL 257.625 (1), which makes a third drunk-driving conviction a felony and,
2. MCL 257.625(4), which makes it a felony if death is caused.

Intoxication

“I was drunk, therefore I couldn’t have intentionally committed the felony.”

This is spurious. Voluntary intoxication constitutes a defense to specific intent crimes.⁶² When the crime involves only a general intent, voluntary intoxication is not available as a defense.⁶³ The defense of voluntary intoxication also is not available to a charge of second-degree murder because this is a crime of general intent.⁶⁴ In addition, voluntary drug addiction is not a defense to either murder or manslaughter.⁶⁵

The Michigan Supreme Court denigrated the Specific/General Intent Rule, stating it was a compromise to give the intoxicated some relief⁶⁶ and called for the legislature for further reform

in the area, but in the absence of that reform, used the rule.⁶⁷ The court iterated at page 651 an analysis of Professors LaFave and Scott:

The person who unconsciously creates risk because he is voluntarily drunk is perhaps morally worse than one who does so because he is sober but mentally deficient. At all events, the cases generally hold that drunkenness does not negate a depraved heart by blotting out consciousness of risk, and the Model Penal Code, which generally requires awareness of the risk for depraved-heart murder ... so provides.

Our Michigan Supreme Court does not believe a drunk killer should escape felony prosecution. Combining this with the "equitable catch-all," MCL 700.2803(5), intoxication is not a bar to forfeiture, but may actually potentiate the result.

VIII. Pendente Lite

The Fifth Amendment

The author has already opined that the civil hearing on the Slayer's Statute could be held before, during, or after the criminal trial. Assuming it is held beforehand, the defendant is likely to consider the invocation of the Fifth Amendment.

Before analyzing the implications and ramifications of the invocation of the Fifth Amendment in Michigan, some general review of applicable constitutional law is helpful. No person shall be compelled, in a criminal case, to be a witness against himself. This, in its primary sense, means the defendant does not have to take the stand in a criminal proceeding and no adverse interest may be drawn.⁶⁸ Once the witness stand is taken, the privilege is voluntarily waived.⁶⁹

In contrast, you do not waive the privilege if you take the stand in a civil trial, and you can invoke the privilege if an answer may lead to proof of a crime.⁷⁰ In the criminal setting, you simply do not have to speak outside the setting of the trial⁷¹ until you choose to speak.⁷²

Forcing one to be a defendant in a civil trial before the conclusion of the criminal trial, arising out of the same conduct, is constitutional.⁷³ Plaintiff's dismissal violates his due-process rights if the grounds are that the defendant's testifying might violate the defendant's right against self-incrimination.⁷⁴

There is no requirement under these circumstances for a civil court to grant a stay, pending resolution of the criminal trial.⁷⁵

It is not a violation of the right against self-incrimination if a court tells a party he must waive his Fifth Amendment right or his testimony will be stricken.⁷⁶ Further, it is not a violation of the right against self-incrimination to take invocation of the privileges into account when weighing the evidence in a civil trial.⁷⁷ Further, a court may sanction a civil litigant who fails to testify while invoking the privilege against self-incrimination.⁷⁸ Finally, the U.S. Supreme Court allowed the drawing of an adverse inference when there was a refusal to testify, based on the invocation of the right against self-incrimination.⁷⁹

Citing *Baxter*, the Michigan Court of Appeals said that the Fifth Amendment does not forbid an adverse inference against one refusing to testify in response to probative evidence offered against him.⁸⁰ The court said that the failure to testify, because of the invocation of the Fifth Amendment, was no greater reason than for any other and that this could be the basis of a summary disposition against the defendant.⁸¹

In a child custody hearing, evidence can be submitted as to the manner of a mother's death.⁸² This is so even though a probate court cannot find someone guilty in that court. It is not precluded "from determining that a preponderance of the evidence demonstrates that the respondent engaged in criminal behavior and that the behavior has rendered the home or environment unfit."⁸³ Further, the probate court errs in considering the potential of bias the respondent would suffer in criminal proceedings. Even in the absence of criminal conviction his due-process rights are not violated.⁸⁴ The reader will recall that the author

spoke of the desirability of obtaining a civil trial before a criminal trial. The above discussion is one reason. The respondent may not testify and a summary disposition may be granted against him and his pleadings stricken. Is this fair? The United States Supreme Court and the Michigan Courts say it is.

Lis Pendens

MCL 600.2701 says:

- (1) To render the filing of a complaint constructive notice to a purchaser of any real estate, the plaintiff shall file for record, with the register of deeds of the county in which the lands to be affected by such constructive notice are situated, a notice the pendency of such action, setting forth the title of the cause, and the general object thereof, together with a description of the lands to be affected thereby.
- (2) Such a notice may be filed with the complaint before the service of the summons; but, in that case, personal or substituted service of the summons must be made upon a defendant, within 60 days after the filing, or else, before the expiration of the same time publication must be commenced, or service thereof must be made without the state, as prescribed by law. If the defendant dies within 60 days after the filing of the notice and before commencement or completion of service of the summons, the summons may be served upon the person substituted for the defendant within 60 days after such substitution.
- (3) The register of deeds shall record such notice, in a book kept for that purpose, upon the payment of the fee as is provided by law. A copy of such record, authenticated by the register of deeds, is evidence of such notice, and the recording of the same, in all courts and places.

As to real estate, there is no question that a slaying is an impediment to the passage of title, by operation of law. Further, the Slayer's Statute allows protection under MCL 700.2803(3) to

bona fide for purchaser value. Haste, therefore, is important in filing the lis pendens.

The author has been using a petition to plead the Slayer's Statute in a victim's estate under MCL 700.1302(a) and MCL 700.1303(1)(a). To date, no objection has been made to this procedure or his use of Notice of Lis Pendens, either because of jurisdiction or because a petition is a civil proceeding and not a complaint in a civil action.

This application of a lis pendens fits within accurate use, as determined by the Michigan Court of Appeals, which has said that the use of lis pendens is to warn persons who deal with property, while it is litigation, that they are charged with a notice of the rights of the vendors' antagonist and takes subject to the judgment rendered in the litigation.⁸⁵

In other sections above, the author has cited cases which have compared the equities in the Slayer's Statute to the setting-aside of deeds for fraud. The use of lis pendens was held to be valid in a suit to set aside a deed on the basis of fraud.⁸⁶

The court has held that a lis pendens is not a restraint on alienation (except practically) and is not invalid due to that allegation.⁸⁷ A court can use equitable principles to set aside a lis pendens.⁸⁸ Under MCL 600.2731, a court also can require either party, the filer or the slayer, to post a bond.⁸⁹

Other Unintended Consequences

The author has previously criticized the legislative approach to address a revocation by reference to the disclaimer statute. The result might not only be a benefit to a slayer's heirs, as set forth supra, but also a benefit to the slayer.

The author assumes that Michigan allows a disclaimer which adversely affects a disclaimant's creditors. If the author is wrong, the following possible scenario becomes even more odious. The supreme court, resolving a conflict among circuits, held unanimously that a qualified disclaimer does not defeat a federal tax lien

which attaches under Internal Revenue Code Section 631.⁹⁰

This is a direct benefit to the slayer. If the property he can't use himself is used to pay his debt, with the balance possibly going to his heirs, then there certainly is a benefit rendered to the murderer. The legislature must be artful, or it will fall to the litigators to go to the United States Supreme Court and distinguish voluntary from involuntary disclaimer. This might be another reason to pursue the slayer expeditiously before a criminal trial and before the U.S. government enters its pleadings.

Probate Court

The author has had success using the probate code to invoke the jurisdiction of the probate court against the slayer in order to protect the interest of the victim. While most non-adjudicative proceedings in the probate court are designed to protect the object of the fiduciary's responsibility, this is not always the case. The author believes conservatorship or a protective order is designed not only to protect the "protected individual" but also his or her creditors.

Three sections of EPIC support the author's opinion:

1. MCL 700.5402 states, *inter alia*, in section (b) that the probate court has:

[e]xclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of the state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents *or other claimants* (emphasis added).

Why give a probate court exclusive jurisdiction to determine how an estate is to be managed as to creditors—if not for the protection of those creditors?

2. MCL 700.5401(1) makes a person who would be adversely affected by the lack of effective management a proper petitioner. The

probate court, therefore, must have the duty to protect those "affected people."

3. MCL 700.1309(b) allows for requests of an interested person (including a creditor with a right to claim against the protected individual under MCL 700.1105(c)) to obtain an injunction to prevent dissipation "or jeopardy to an interested person's interest." This section goes on to define the process for this prejudgment relief.

A slayer is usually confined. "Confinement" is a ground for conservatorship and protective order under MCL 700.5401(3)(a). Confinement does not mean that every incarcerated person needs a conservator, but when a claimant's rights might be adversely affected that inmate needs a conservator or protective order to protect the claimant, not necessarily himself. The court can control and oversee expenditures to prevent dissipation and, in the proper case, to grant injunctive relief.

The author has been able to obtain a protective order in a pre-wrongful death claim. Procedures should certainly be available for the victim of an estate vis-à-vis a slayer regarding the property transfer sought to be prevented under the Slayer's Statute for which *lis pendens* does not apply, e.g., personality, insurance, and joint bank accounts.

Even if a conservator or protective order is not sought, if a valid slayer's action is pending out of a victim's estate the court has jurisdiction over the slayer and, hence, MCL 700.1309(B) can provide injunctive relief where the *lis pendens* is insufficient.

IX. Conclusion

This is a conclusion not a summation of the state of the law. I conclude that the law requires change and I hope the reader finds the following probative rather than polemic. I believe, for the most part, that the changes should come from the legislature, leaving court action for what the legislature fails to do .

Kindly consider the following. Rather than make the disclaimer statute *in pari materia* with

the Slayer's Statute, make the Slayer's Statute *in pari materia* with the Wrongful Death Statute and the Victim's Rights Statute.

The Slayer's Statute is a cousin to the Wrongful Death Statute, but far enough removed from the family tree to allow the two to marry.

There is no slayer that is not a wrongful-death tortfeasor, though there may be a wrongful-death tortfeasor who is negligent and, therefore, not a slayer. Just a little drafting skills should take care of this partnership.

As mentioned above, there is nothing wrong with an individual taking property away from another individual; it just requires a cause of action and due process. This does not amount to a forfeiture if it is not criminal and the state is not the beneficiary.

What would be wrong with forcing a convicted killer to turn over his or her own property to the estate of the slain? After all, a violation of a criminal statute is negligence per se. There is no reason why the money of a killer should not be available to the victim's family. If Blackacre is held in joint tenancy and is worth more than the damages the victim's heirs incur, then it can be given to the slayer's family. This would not only be doing equity and allowing title to pass, it would justify freezing it. No fictions, no claims of attainder. As a judge said, when I prevailed over an arrested slayer whose defense attorney said "I can't be paid," "too bad."

There is no inclusion of a disclaimer with all its pitfalls. No inclusion of Uncle Sam, with an indirect benefit to the slayer. If you would ask a victim, while alive, what they would want—I venture to say that they would want the slayer's money to pass to the same people as if there had been an automobile accident rather than a murder.

And, suppose one-half of Blackacre was worth \$2 million? Why convert it to tenancy in common and let the IRS take estate taxes? Why not let the killer take, freeze it, and give it to the victim's heirs tax free as loss of society and companionship.

And, regarding multiple joint owners of property? Let the victim's share pass to the innocent survivor who didn't care how the victim died, freeze the slayer's joint interest until his death and, during his lifetime, pay the victim's estate or the assignees, thereof, one-third of the income—or even buy the victim's estate out for the actuarial value of the victim's life. If the legislature or some court in adjusting equities allows for a reasonable attorney fee to the killer's attorney, so be it. Anything that would help marshal assets in the slayer's estate should be paid for. After all, we are not Communists.

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF XXXXXXXXXX
IN THE MATTER OF THE ESTATE OF

Deceased.
/

File No.
Hon.

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/

PETITION SEEKING FORFEITURE, REVOCATION OF BENEFITS, ISSUANCE OF
TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
WHY AN INJUNCTION SHOULD NOT ISSUE

NOW COME the Special Co-Personal Representatives by their attorneys, Kemp
Klein Law Offices and for their Petition state as follows:

- 1. The Petitioners have been appointed by this court as the special co-personal representatives of the Estate
of (the "Decedent").
2. (the "Respondent") is the surviving spouse of the decedent.
3. This court has exclusive jurisdiction over this petition since it pertains to the administration of a decedent's
estate. MCL 700.1302.
4. This petition is brought pursuant to MCL 700.2803.
5. Under information and belief from Deputy of the County Sheriff's
Office, on was charged in violation of MCL
257.625 OWI Causing Death for the death of her husband, deceased ("Decedent").
6. In summary, the facts are as follows:
A. , who was physically dependent on his wife, the Respondent for his
care, .
B. The Petitioners and their family on numerous occasions were concerned regarding the physical
well-being of their father, as they had witnessed the alcohol use and abuse of their step-mother, the
Respondent. The complaint consisted of concerns over the
Respondent's heavy drinking and the failure to comply with the Decedent's doctor's orders and giving
the Decedent his prescribed medications. Allegations were also made regarding verbal and possible
physical abuse by the Respondent to the Decedent.

- C. At approximately _____ on _____ the Decedent and the Respondent were _____.
- D. After drinking excessively, the Respondent drove from the party, with the Decedent in the front passenger seat. Although the Respondent herself was secured in the car with a seatbelt, she failed to have the Decedent wear a seat belt.
- E. At _____, while driving recklessly, the Respondent drove off the roadway and struck a tree on the passenger's side of the car. The car overturned in the roadway and the Decedent was partially ejected through the sunroof. He was killed during the rollover as the car came to rest on top of him. A picture of the vehicle is attached as Exhibit A.
- F. According to the police report of the accident, the Respondent's alcohol level was .21, over twice the legal limit when they arrived on the scene. (Exhibit B)

9. It is believed that the Decedent carried policies of life insurance on his life, although it has been difficult to get information from the insurance companies. Also, the Respondent owned entireties property with the Decedent as well as joint accounts and other jointly owned assets. Absent affirmative action to prevent such a result, Respondent will take sole ownership of, or benefit from, such property and assets.

10. MCL 700.2803 provides in pertinent part:

(1) An individual who feloniously and intentionally kills the decedent forfeits all benefits under this article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.

(2) The felonious and intentional killing of the decedent does all of the following:

(a) Revokes all of the following that are revocable:

(i) Disposition or appointment of property made by the decedent to the killer in a governing instrument.

(ii) Provision in a governing instrument conferring a general or nongeneral power of appointment on the killer.

(iii) Nomination of the killer in a governing instrument, nominating or appointing the killer to serve in a fiduciary or representative capacity, including a personal representative, executor, trustee, or agent.

(b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.

11. The Decedent's Last Will and Testament was executed on _____. The Petitioners have every reason to believe that the 1979 will is a valid, unrevoked testamentary instrument.

12. Both the State of Michigan and the Petitioner assert that the Respondent feloniously and intentionally killed the Decedent by intentionally drinking to excess, intentionally driving a vehicle with the Decedent as an unrestrained passenger, and intentionally, feloniously and recklessly driving the vehicle off the road and into a tree, resulting in the death of the Decedent.

13. As a result, Respondent must forfeit all benefits from the decedent's estate as provided by EPIC, the Michigan Estates and Protected Individuals Code, 1998 PA 386, as amended; MCL 700.11101 et seq., specifically EPIC § 2803; MCL 700.2803.

14. A wrongful death action will be brought in another court which does not have jurisdiction over this matter.

15. Petitioners believe in good faith that the Respondent may obtain and/or transfer assets, to which she would not be entitled, to the detriment of other interested parties, because of the pending investigation into a possible wrongful death action against her.

16. The Petitioners are entitled to enjoin the Respondent from dissipating the assets, pursuant to MCLA 700.1309(b), which states as follows:

“Upon reliable information received from an interested person, county or state official, or other informed source, including the court’s files, the court may enter an order in a proceeding to....

(b) Enjoin a person subject to the court’s jurisdiction from conduct that presents an immediate risk of waste, unnecessary dissipation of an estate’s or trust’s property, or jeopardy to an interested person’s interest. Under this subdivision, the court shall not enjoin a respondent in a proceeding to appoint a guardian or conservator or enjoin a ward or protected individual. An enjoined person shall be given a prompt hearing, if requested, to show cause why the order should be terminated.”

WHEREFORE, Petitioner requests that this Honorable Court enter an award or judgment granting the following relief:

- A. Determine that _____ feloniously and intentionally killed the decedent;
- B. Order the forfeiture by Respondent of any and all interests in the Decedent’s estate, including but not limited to: property passing to the Respondent as a named beneficiary, her elective share right, and the homestead, family and exempt property allowances pursuant to MCL 700.2803(1) & (2)(a)(1);
- C. Order that all property held by the Decedent and the Respondent as joint tenants with rights of survivorship is now held by the Decedent’s estate and the Respondent as tenants in common pursuant to MCL 700.2803(2) (b);
- D. Order that all insurance proceeds, joint bank accounts, trust and other interests which would otherwise go to Respondent, be forfeited to the Decedent’s estate.
- E. Requiring Respondent to account for all assets subject to forfeiture under the slayer statute, including those which have already been dissipated by her, and ordering that the value of such dissipated assets be returned to the estate or trust or included in any judgment against Respondent;
- F. Pursuant to MCL 700.1309 (b), enjoin the Respondent from conduct which presents an immediate risk of waste, unnecessary dissipation of the estate’s property or jeopardy to an interested person’s interests;
- G. The court enter a Temporary Restraining Order enjoining _____ in any capacity from transferring any property of _____;
- H. Issue an Order to Show Cause to _____ to establish reason why the TRO should not be converted into a Preliminary Injunction to remain in full force and effect throughout the pendency of this matter and any subsequent appeals;
- I. Awarding to the Petitioner its costs and attorney fees incurred in bringing this action; and
- J. Awarding such other relief as may be appropriate.

Respectfully submitted,

KEMP, KLEIN, UMPHREY, ENDELMAN & MAY, P.C.

By: _____

Alan A. May (P17230)

Barbara P. Andruccioli (P55080)

Attorneys for Special Co-Personal Representatives

201 W. Big Beaver, Ste. 600

Troy, MI 48084

(248) 528-1111

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF XXXXXXXXXXXX
IN THE MATTER OF THE ESTATE OF

Deceased.
/

File No.
Hon.

KEMP KLEIN LAW OFFICES
Alan A. May (P17230)
Barbara P. Andruccioli (P55080)
Attorneys for Special Co-Personal Representatives
201 W. Big Beaver, Ste. 600
Troy, MI 48084
(248) 528-1111

[Opposing counsel]
/

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

At a session of said Court held in the Court-
house in the City of _____, _____ County,
Michigan on _____, 2005.

PRESENT: Honorable _____ Probate Court Judge

Upon the filing of Petitioners' Petition for Forfeiture, Revocation of Benefits, for Issuance of Temporary Restraining Order and Order to Show Cause having been filed and the Court being otherwise fully advised in the premises;

NOW THEREFORE:

IT IS ORDERED that _____, her lawyers, officers, agents, servants, employees, attorney or any person in active concert or participation with her, is restrained from:

- 1. Concealing, secreting, selling, assigning, transferring (including transfers to any other person as trustee, guardian or nominee), conveying, mortgaging or otherwise disposing of or encumbering any of the assets of _____ (real or personal, tangible or intangible), or any interest therein (legal or equitable) (including any assets jointly held , including but not limited to: stocks, bonds or other securities, cash, savings accounts, checking accounts, automobiles, valuable contained in safe deposit boxes, or any other assets or business interests;

2. This Order is granted without notice because the Respondent may obtain and/or transfer assets, to which she would not be entitled, to the detriment of other interested parties, because of the pending investigation into a possible wrongful death action and the pending Petition for Forfeiture and Revocation of Benefits against her.

3. Violators of this order may be subject to the contempt powers of this Court.

IT IS FURTHER ORDERED that this Restraining Order shall become effective immediately upon entry and shall remain in full force and effect during the pendency of this matter or until the further Order of the Court.

IT IS FURTHER ORDERED that _____ shall show cause before this court on _____, 2005, at _____ .m., why a preliminary injunction should not be issued as requested.

HON. _____

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF XXXXXXXXXX
IN THE MATTER OF THE ESTATE OF

Deceased. File No.
/

NOTICE OF LIS PENDENS

Notice is given that a proceeding has been commenced and is pending in a court on a Petition Seeking Forfeiture and Revocation of Benefits. Notice is also given that the premises to be affected by this action is located in the Township of _____, County of _____, State of Michigan and described as:

XX
XX
XX
XX
XX
XX

Respectfully submitted,

KEMP KLEIN LAW FIRM

By: _____

ALAN A. MAY (P17230)
201 W. Big Beaver Road, Suite 600
Troy, MI 48084

Dated: _____

(248) 528-1111

NOTES

1. MCL 700.2803.
2. Exodus 21:22–25.
3. W. Gunther Plaut, *The Torah: A Modern Commentary* 568 (1981).
4. *Id.* at 571.
5. The word *Pentateuch* refers to the first five books of the Hebrew Bible and the Christian Old Testament: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.
6. Plaut at 574–575. Cavaet, if the Torah is cognate, and given by God and not derived from Hittite Law, many would reject Speiser.
7. Sir William Blackstone, *Law Tracts* (1762).
8. *Id.* at 246.
9. *Id.* at 247.
10. *Id.* at 249.
11. *Id.* at 251.
12. Sir Matthew Hale, *Hale's Common Law* 94 (5th ed 1794).
13. *Id.* at 100.
14. 115 NY 506, 22 NE 188 (1889).
15. *Id.* at 509–514.
16. *Id.* at 515–520.
17. See *Gebhardt v O'Rourke*, 444 Mich 535, 542–543, 510 NW2d 900 (1994).
18. 339 Mich 265, 63 NW2d 841 (1954).
19. *Id.* at 265–272.
20. *Id.* at 269.
21. *Id.* at 273.
22. Hale at 100.
23. *Budwit* at 274.
24. *Id.* at 275–276.
25. *Id.* at 285.
26. *Id.* at 287.
27. *Id.* at 288.
28. *Id.* at 292 (emphasis added).
29. Blackstone at 249. But even Blackstone goes on to say on page 251 that “the corruption of blood cannot be absolutely removed by an act of Parliament. The King may excuse the public punishment of the offender, but cannot abolish the private right, which has accrued or may accrue to the individuals as a consequence of the criminal's attainder.”
30. *Budwit* at 293.
31. Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 Iowa L Rev 489 (1986).
32. *Id.* at 551–52.
33. I will deal with the problem caused by slayer's suicide under the “Michigan Law” heading and offer solutions under some of the other cited theories.
34. Fellows at 496.
35. *Id.* at 538.
36. *Id.* at 540.
37. *Id.* at 541. But query, what happened in Connecticut (see *Kelo v City of New London*, ___ US ___, 125 S Ct 2655, (2005)) in condemnation? Was not the State of Connecticut taking from a person to give it to another person and doesn't that, by inference, condone any a public taking when the property is given to another.
38. Fellows at 543.
39. Michigan allows restitution in addition to other penalties allowed under the statute. See *People v Bixman*, 173 Mich App 243, 433 NW2d 417 (1988), and section 16 of the Crime Victim's Rights Act, MCL 780.766.
40. Fellows at 544–545.
41. MCL 700.1104(j).
42. See M Civ JI 170.44 (an “undue influence” injects the will of another for the will of the Testator. It need be for the influencer's benefit).
43. *Budwit* at 271.
44. *Cook v Grierson*, 380 Md 502, 845 A2d 1231 (2004).
45. *In re Estate of Dorsey*, 161 Misc 2d 258, 613 NYS2d 335 (1994).
46. See also *Garwols v Bankers' Trust Co*, 251 Mich 420, 232 NW 239 (1930).
47. *Aetna Life Ins Co v McDuffie*, 273 F2d 609 (6th Cir 1960).
48. *Day v Gold Star Dairy*, 307 Mich 383, 12 NW2d 5 (1943).
49. *Ohio State Life Ins Co v Barron*, 274 Mich 22, 263 NW 786 (1935).
50. *Id.* at 24, citing *Holdom v Ancient Order United Workmen*, 159 Ill 619, 43 NE 772 (1895).
51. *Scott on Trusts* (4th) § 492.3.
52. See *People v Beardsley*, 150 Mich 206, 113 NW 1128 (1907) (when one spouse placed another spouse in a position of peril that was deemed to be manslaughter).
53. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 489 NW2d 431 (1992).
54. *Goldsmith v Pearce*, 345 Mich 146, 75 NW2d 810 (1956).
55. *Riggs*, 115 NY at 506.
56. *In re Sengillo's Estate*, 206 Misc 751, 134 NYS2d 800 (1954).
57. *Dorsey*, 161 Misc 2d at 260.
58. *Budwit*, 339 Mich at 270–271.
59. See *Metropolitan Life Ins Co v McDavid*, 39 F Supp 228 (ED Mich 1941). Voluntary manslaughter found would bar a slayer from inheriting, but acts amounting to involuntary manslaughter did not. The case provides a good discussion for the difference between voluntary and involuntary manslaughter under the common law. See also *People v Ryczek*, 224 Mich 106, 194 NW 609 (1923).
60. *People v Datema*, 448 Mich 585, 544 NW2d 272 (1995).
61. *Id.*

62. *People v Laur*, 128 Mich App 453, 340 NW2d 655 (1983).
63. *People v Watts*, 133 Mich App 80, 348 NW2d 39 (1984).
64. *People v Langworthy*, 416 Mich 630, 331 NW2d 171 (1982).
65. *People v Coffey*, 42 Mich App 683, 202 NW2d 456 (1972).
66. *Langworthy*.
67. *Id.* at 653.
68. *Grunewald v United States*, 353 US 391 (1957).
69. *Burrell v Montana*, 194 US 572 (1904).
70. *McCarthy v Arndstein*, 266 US 34 (1924).
71. *Miranda v Arizona*, 384 US 436 (1966).
72. *Brooks v Tennessee*, 406 US 605 (1972).
73. *United States v White*, 589 F2d 1283 (5th Cir 1979).
74. *Wehling v Columbia Broad Sys*, 608 F2d 1084 (5th Cir 1979).
75. *United States Trust Co v Herriott*, 10 Mass App Ct 313, 407 NE2d 381 (1980).
76. *Meyer v Second Judicial Dist Ct*, 95 Nev 176, 591 P2d 259 (1979).
77. *Maine Midland Bank v John E Russo Produce Co*, 50 NY2d 31, 405 NE2d 205 (1980).
78. *Pulawski v Pulawski*, 463 A2d 151, 1983 RI LEXIS 1015 (1983).
79. *Baxter v Palmigiano*, 425 US 308, 318 (1976).
80. *Phillips v Deihm*, 213 Mich App 389, 541 NW2d 566 (1995).
81. *Id.* at 400.
82. *Family Independence Agency v Unger (In re MU)*, 264 Mich App 270, 690 NW2d 495 (2004).
83. *Id.* at 280.
84. *Id.* at 282.
85. *Attorney General v Ankersen*, 148 Mich App 524, 385 NW2d 658 (1986).
86. *Maximovich v Wojtowicz*, 236 Mich 643, 211 NW 65 (1926).
87. *Kauffman v Shefman*, 169 Mich App 829, 426 NW2d 819 (1988).
88. *Altman v City of Lansing*, 115 Mich App 495, 321 NW2d 707 (1982).
89. *Action Auto, Inc v Anderson*, 165 Mich App 620, 419 NW2d 36 (1988).
90. *Drye v United States*, 528 US 49 (1999).



Alan A. May, vice president of Kemp, Klein, Umphrey, Endelman & May, P.C., Troy, is a lifelong Michigan resident. Born in Detroit in 1942, Mr. May received his Bachelor of Arts degree in 1963 from the University of Michigan, where he was president of the Phi Sigma Delta fraternity. He graduated cum laude from the University of Michigan Law School in 1966. Throughout his career, Mr. May has practiced in the Metropolitan Detroit area, concentrating on probate law. He is a member of the Michigan and District of Columbia Bar Associations.

Mr. May serves as Michigan special assistant attorney general and Wayne County public administrator. He has chaired the Federal Judicial Evaluations Committee and the Michigan Civil Rights Commission, and was a six-year district chairperson of the Republican Party of Oakland County. Mr. May served for four years on the Michigan Civil Service Commission and was a delegate to the 1984 and 1988 Republican National Conventions.

An avid author in the field of probate law, Mr. May also has been a lecturer and instructor for the Institute of Continuing Legal Education, the Michigan Trial Lawyers Association, Wayne State University, and Oakland University. Until 2001, he practiced under the firm name of May & May, P.C.

Top Ten Mistakes Made on Estate and Gift Tax Returns

By Lorraine F. New

Most estate and gift tax returns submitted to the Cincinnati Service Center are satisfactorily completed and, after about a year's processing, result in a closing letter indicating acceptance. But some returns are reviewed and selected for audit, and their resolution can take up to the three-year statutory period—or longer. If you have a concern about a closing letter, found assets, or other amended return issues, or if you have questions about extensions or penalties, you can call the Service Center's estate tax unit, toll free, at 1-866-699-4083. Even if you have no specific questions or concerns, it still never hurts to get a few good reminders, so I offer the following top ten pitfalls for tax preparers.

1. Asset Valuation

The claimed valuation of closely held businesses, limited liability companies (LLCs), and family limited partnerships (FLPs) needs to reflect their fair market value, that is, the price at which the property would be transferred between a willing buyer and a willing seller. An actual sale to an independent party is the best evidence of value, but the next-best support would be an independent appraisal indicating the value as of the date of the gift or death, or an alternate valuation date. Returns should include copies of relevant entity agreements or trusts, as well as support for any discounts taken. Representatives should be prepared to provide documents relating to a business' set-up or purpose, income tax and distribution records, buy-sell agreements, and any relevant deeds or documents of sale. Failure to make adequate disclosure on gift tax returns can lead to an indefinite extension of the three-year statute, and failure to have support for valuation on estate tax returns can lead to penalties for undervaluation or negligence.

2. Real Estate Valuation

Real estate that is part of an estate or the subject of a gift should not be valued using a local property assessor's state-equalized valuation. An independent appraisal is once again essential, and it should be supported by specific and comparable market data. Any sale of the property within a reasonable time after the valuation date may be relevant. Closing expenses for selling property of the estate are deductible "if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution."¹ The IRS will look at the decedent's assets and the necessity of sale and actual sale as required.

3. Retained Control

Code sections 2035 through 2039 must be considered, since the decedent may not appear to own these assets at death. Transfers of life insurance policies during the three years prior to death are includable in the return, as are real estate with retained use or control, and family partnerships or LLCs in which the decedent continues to use assets or control the entity. The IRS will ask for evidence of the badges of ownership, such as proof of who paid the property taxes or other expenses. If a business is indicated, it must be operated according to its terms to be respected.

4. Life Insurance and Annuities

Life-insurance proceeds need to be supported by Form 712, Life Insurance Statement, from the insuring company. The amount should include postmortem dividends but exclude interest. Gifts of life insurance policies are valued by the interpolated terminal reserve value, which the insurance company should also provide. Insurance proceeds paid to a business are included in the business' value. Note carefully

the regulations for annuities, as almost all of these are fully includable, and individual retirement accounts are not to be discounted for any potential income-tax liability.²

5. Deals with Family

All transactions with family members are subject to close scrutiny. The IRS may review any notes from the decedent to other family members, any loans from family members to the decedent, and any claims of family members or others with such standing for past services. Be prepared to supply copies of documents supporting your position. Part 1 of Schedule E in Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, provides for one-half ownership to be reported for assets owned only by spouses. If the name of anyone other than the spouse appears on the account or deed, the amount of the asset to be included on Part 2 of Schedule E is determined by who contributed to it. Without proof of independent contribution—which you should be prepared to present—the asset must be included at 100%.

6. Marital Deduction

The marital deduction is reported on Schedule M of Form 706. Make sure this number agrees with the half of Schedule E that passes to the spouse, all assets passing to the spouse by operation of law, and correctly reports what passes to the spouse in a marital trust or outright. A trust election can be a percentage, specific items or a described amount, a formula or a dollar amount. It helps to explain these items or include support.

7. Gift Tax Matters

Adjusted taxable gifts, reflecting gifts made during the decedent's lifetime, belong on line 4 on the front of Form 706. If a gift tax was due on gifts made after January 1, 1977, this should be reported on line 7. Married couples can split gifts, but then each spouse must file a return.

Split gifts must include all gifts for the year except those made to the other spouse; if a spouse dies during the year, gifts up to the date of death can be split.

Once the returns are filed, these elections cannot be changed. In 2006, the gift tax exclusion amount will be \$12,000. In order to claim the exclusion, the gift must be a present interest.

8. Disclaimers

Disclaimers must meet statutory time requirements. Make sure that the proper person, i.e., the trustee, represented minor, etc., disclaims, and that this person has not accepted benefit of an item by applying for the asset or using the account. Also make sure that you know where the item will pass after the disclaimer.

9. Special Elections

In Part 3 of Form 706, the executor can elect to pay taxes in installments³ or employ special-use valuations for farms or rental real estate.⁴ Such elections must be made on the first filed return. If qualified, both elections require a lien or bond, and participants must agree to report any change in business or sale to the IRS. Tax recapture may be due and payable. Entities such as closely held corporations, LLCs, and FLPs must allow for liens in their agreements and/or obtain the agreements of other owners for the lien.

Also in Part 3, the executor can elect an alternate valuation date, which will be the earlier of the following: the date of the asset's sale or distribution, or the sixth-month anniversary of the decedent's death. Such an election applies to all items on the return but will have the most impact on items whose value fluctuates as a matter of time, such as stock. This value can be elected on the return only if the overall value drops from the value at the date of death. Both values must be indicated for each item. The lower value will become the basis of the asset for sale-reporting purposes.

10. State Death Taxes

For estates of persons dying after December 31, 2004, there is no longer a state death tax credit. If state death tax is paid to any state, it should be reported as a deduction on line 3b on the front of Form 706. Other deductible expenses may be reported on Schedule J, Funeral Expenses and Expenses Incurred in Administering Property Subject to Claims, or on Schedule K, Debts of the Decedent and Mortgages and Liens. All expenses must be legal obligations of the decedent, benefiting the estate and not the heirs, and all expense deductions must meet the criteria for reasonableness and necessity. Preparers should always keep their justification materials and proof of payment in case of a possible audit.



Lorraine F. New, of the IRS Estate & Gift Tax Division, Detroit, practices in the area of estate tax returns. Ms. New has worked for the federal government for over 30 years. She has been in estate and gift tax since 1988 and a manager since January 2002.

Ms. New is a member of the Probate and Estate Planning and Taxation Sections of the State Bar of Michigan. She has spoken to lawyers, accountants, and other financial professionals on the subject of federal estate and gift tax and current topics of interest.

NOTES

1. Treas Reg 20.2053-3(d)(2).
2. See *Estate of Kahn v Commissioner*, 125 TC No 11 (2005).
3. IRC 6166.
4. IRC 2032A.

Court Rule Changes

By Joan Von Handorf

There is a saying that the only certainties in life are death and taxes. Attorneys know there is another certainty—that the law will change. This article will discuss some of the recent changes to the probate court rules, many of which were made in response to proposals from the Uniformity of Practice Committee of the Probate and Estate Planning Section of the State Bar of Michigan. These changes, which became effective November 15, 2005, appear in Supreme Court Administrative File No. 2004-54. The text of the new court rules can be found on the Michigan Supreme Court's Web site, at www.courts.michigan.gov.

Decedent Estates

MCR 5.302

Two court rules regarding decedent estates were changed to try to achieve uniformity of practice among the probate courts. In the past, when opening a decedent estate, some courts required a death certificate while others did not. MCR 5.302(A) now requires that a copy of a death certificate be attached to any application or petition to open a decedent estate. If a death certificate is not available, which often happens when someone dies outside the United States, alternate documents can be provided. Furthermore, the revised rule provides that the courts cannot request additional documentation about the personal representative when an estate is opened. Currently, the Acceptance of Appointment form, PC 571, requires the personal representative's date of birth and driver's license number. The Uniformity of Practice Committee has recommended changing this form to comply with the new court rule.

MCR 5.307

Calculation of the inventory fee is addressed in revised section (A) of MCR 5.307. This

change was also prompted by a concern about uniformity of practice, as the inventory fee had been calculated differently in different counties. With the new rule, all counties must calculate the inventory fee by allowing deductions for secured loans on the property listed on the inventory.

Conservatorships

MCR 5.207

The court rule for sale of real estate, MCR 5.207, applies to both decedent estates and conservatorships. However, since it is more often applicable to conservatorships than to decedent estates it will be discussed under this heading. The Supreme Court Administrative Office (SCAO) recently reviewed the conservatorship files in many probate courts and became concerned about the sale of real estate by conservators. As the SCAO discovered, conservators were apparently selling at a low price real estate that would soon be sold at a much higher price. To eliminate this problem, a provision was added to MCR 5.207(A) that required the petitioner to attach a copy of the most recent assessor statement showing the SEV of the real estate to the Petition for Approval of Sale of Real Estate (PC 646). This new provision also allows the court to require a written appraisal if it still is not satisfied with the sale price of the real estate.

MCR 5.144

In its review of conservatorship files, the SCAO also became concerned about administratively closed files. Accordingly, MCR 5.144(A) was amended to provide that a court may only administratively close a conservatorship file without a hearing when there are insufficient assets to employ a successor or special fiduciary. Otherwise, in order to administratively close a conservatorship file, the court must conduct a hearing and find good cause to administratively

close the file. The SCAO developed PC 671, Order for Administrative Closing (Conservatorships), to address this issue.

MCR 5.409

Of the several changes made to MCR 5.409, Report of Guardian; Inventories and Accounts of Conservators, one was made because probate courts had different requirements for showing joint property on an inventory for a conservatorship. In an attempt to achieve uniformity of practice, a sentence was added to MCR 5.409(B)(2) requiring the conservator to “list” property held jointly or in common by the ward and to describe the type of ownership. In this list, the SCAO wants to see a description of the property and its total value. However, it is not clear from the court rule what to show on PC 577, Inventory, in the column entitled “Estate’s Interest” for property held jointly or in common by the ward. Staff at the SCAO have indicated that it is not necessary to show a value in this column for property held jointly or in common by the ward; however, if someone chooses to show a value, it will be accepted. Due to the vagueness of this rule, courts are addressing the change in different ways. The Uniformity of Practice Committee has recommended changes to the instructions for PC 577 to resolve this issue.

Because of the problems the SCAO found when it reviewed conservatorship files, most of the changes to the conservatorship court rules involve accounts. MCR 5.409(C)(1) now requires that all accounts be served on interested persons and that a proof of service be filed with the court.

If the assets of the ward are held in a restricted account, revised MCR 5.409(C)(4) requires that proof of the restricted account be filed with the court within 14 days of the qualification of the conservator, or as otherwise ordered by the court. The conservator also must file an annual verification of funds on deposit for a restricted account, as well as a copy of the corresponding financial institution statement. The SCAO has

added form PC 669, Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor), to meet these requirements. If the conservatorship account is not restricted, MCR 5.409(C)(5) provides that the conservator must file an annual account and present a copy of the financial institution statement when funds are held, dated within 30 days of the end of the accounting period, unless waived by the court. Revised MCR 5.409(C)(6) requires the court to review or allow accounts annually and to set a hearing for annual accounts at least once every 3 years.

Guardianships

MCR 5.404

Because courts often want additional information about the environment in which the minor will reside, many probate courts have developed forms entitled “Social History” that must be filed with a petition for a minor guardianship. In order to achieve uniformity of practice, new section MCR 5.404(A) was added to provide that if a probate court requires a social history for a minor guardianship it must use an SCAO form. The SCAO developed form PC 670, Minor Guardianship Social History, for this purpose.

Conclusion

Hopefully you have found this summary of some of the changes in the probate court rules helpful to you in your practice. Be forewarned that more changes are in the works. Proposed conservatorship court rules are merely awaiting the Supreme Court’s approval. There is also a new trust code in the making. As stated above, the law just continues to change.



Joan Von Handorf is an attorney with Joan Von Handorf Law Offices, Warren, where she concentrates in the areas of probate and estate planning. Ms. Von Handorf has previously published articles in the *Michigan Bar Journal* and the *Probate and*

Estate Planning Journal, and has served as an author and speaker for ICLE. She is currently a member of the Probate and Estate Planning Council and serves as co-chairperson of the Uniformity of Practice Committee.

Recent Cases on Estate Tax Allocation: “How the Best Laid Plans of Mice and Men Can Often Go Awry”¹

By Thomas F. Sweeney

Two recent appellate decisions, one in the Michigan Court of Appeals and one in the United States Court of Appeals for the Seventh Circuit, demonstrate the problems that can result when the allocation of the estate tax burden does not match the allocation of taxable transferred property. This inevitably leads to concerns about the adequacy of the estate planning documents and the proper implementation of the estate plan, as well as questions about the decedent's intent, and whether or not subsequent changes in the estate tax burden resulting from changes in the decedent's property or circumstances were intentional. In these two cases, the allocation of the estate tax burden approved by the courts was significantly different from the allocation of the transferred property. Based on the evidence discussed in these appellate opinions, it appears that the result in each case was at variance with the intent of each decedent, but was nonetheless required by the estate tax allocation provision in the dispositive instruments.

Estate of Morris v Morris

The first case is the unpublished Michigan Court of Appeals decision, *Estate of Morris v Morris*, No 262751, 2005 Mich App LEXIS 2648 (Oct 25, 2005) (“*Morris*”). In *Morris*, decedent was a divorced father of three adult children, among them Greg, who had worked at decedent's company for years. Decedent's 1988 and 1995 wills and revocable trusts both reflected an intent that, after decedent's death, Greg would own all of the company stock and be responsible for all of the estate taxes, while the other two children would receive all other property free from any estate tax obligation. The company owned \$975,000 of life insurance on decedent's life, and decedent's apparent intent was that Greg would use the life insurance proceeds to cover the estate taxes. Decedent made no apparent

changes to his will and revocable trust after 1995 and before his 2003 death.

In 1988, decedent sold 5.5 percent and gifted 43.5 percent of the company stock to Greg, retaining the remaining 51 percent. In 2002, decedent caused that 51 percent of his company stock to be redeemed by the company for \$1 million, leaving Greg as the sole company stockholder. The company funded the redemption of decedent's stock with a bank loan, secured by the company's assets and Greg's residence.

Upon decedent's death, Greg had no beneficial interest under the 1995 will and revocable trust, since there had been an ademption of the bequest to him of decedent's company stock as a result of the 2002 redemption. Nor was there an enforceable obligation under the will or revocable trust to make Greg pay the \$236,000 estate tax obligation. Under the terms of the will and revocable trust, the estate tax obligation would be paid from the revocable trust. The other two children received decedent's remaining property, including what was left after the capital gain taxation of the \$1 million redemption payment. But with little else to go on, they sought, unsuccessfully, the equitable relief of the imposition of a constructive trust upon Greg's company stock or the insurance proceeds to cover the estate tax obligation they were required to pay.

Lurie v Commissioner

The second case, *Lurie v Commissioner*, 425 F3d 1021 (7th Cir 2005) (“*Lurie*”), arose in Illinois. Decedent died in 1990, apparently intending that the property passing under his will, revocable trust, and several irrevocable trusts established by others, but over which he had exercised powers of appointment shortly before death, would be free of any estate tax. The will provided for a pour over of his \$760,000 estate to the revocable trust,

which held additional assets of \$88 million and contained an upfront pecuniary formula bequest to a marital trust. The residue would pass to a residuary credit shelter trust, provided there was any credit available at decedent's death. Under the will and revocable trust, the probate estate—and, if this was insufficient, the revocable trust estate—was responsible for all estate taxes, for which the trustee could not seek contribution from any beneficiary. Before his death, decedent exhausted the applicable credit so that the probate estate and the entire revocable trust were bequeathed to the marital trust under the pourover will and pecuniary-formula revocable trust.

In February 1990, four months before his death, decedent exercised the powers of appointment granted to him under the several irrevocable trusts appointing property to several new irrevocable trusts for the benefit of his wife and children. These irrevocable trusts had been established by his mother, and perhaps another person, as early as 1969. At the time of decedent's death, they had a value of \$40 million.

After decedent's death, the IRS contended that the irrevocable trusts were includable in decedent's taxable estate. This was resolved by a stipulated agreement, made before the tax court hearing,² that some portion of the irrevocable trusts were subject to the estate tax and that the estate tax obligation was \$12 million.

The Seventh Circuit case involved the widow's unsuccessful effort in the tax court to have the estate tax allocated to the irrevocable trusts, rather than to the marital trust. The court of appeals sustained the tax court's decision that the default, common-law rule in Illinois requiring equitable apportionment did not apply, since decedent's will and revocable trust directed that the estate tax be paid from the probate estate and revocable trust, all of which passed to the marital trust. The additional \$12 million of estate tax was payable from the marital trust. The opinion does not indicate if this was before or

after the required recalculation of an estate tax payable from a marital bequest.

Lessons

What can be learned from these two cases?

1. The decedent's intent regarding the allocation of estate taxes must be ascertained by the estate planner under the various contingencies normally involved in estate planning.
2. The decedent's intent should be stated clearly and consistently in the will and revocable trust, and in any other dispositive instrument transferring taxable property.
3. The initial implementation of the estate plan, including the titling of assets and the funding of any revocable trust, should be carried out consistently with the tax-allocation provision reflecting the decedent's intent.
4. If there are significant changes in the titling, beneficiary, or value of decedent's property interests, or if there are other changed circumstances that will have a significant effect on the allocation of the estate tax burden, the decedent's intent regarding the burden of estate taxes should be reviewed and either confirmed or revised to reflect this new intent.

In *Morris*, the will, revocable trust, and other evidence reported in the opinion make clear that the intent of decedent, at least through 1995, was that Greg would pay all of the estate taxes accruing at decedent's death. The apparent rationale for this was that Greg had received, either by gift, bargain sale, or bequest at death, all of decedent's company stock, in addition to the proceeds of the \$975,000 company-owned life insurance payable either to the company or to Greg. This tax allocation appears to have been decedent's attempt at rough justice to provide equity to his other two children. What is not clear

from the facts stated in the opinion, however, is whether decedent fully understood the impact on this intent of the 2002 stock redemption, which left his son as both the sole company stockholder, the recipient of the life insurance proceeds, and an heir exonerated from any estate tax obligation. If it was decedent's intent that Greg would no longer be responsible for payment of all estate taxes, then this intent should have been memorialized in his will and revocable trust when he caused the redemption of his remaining stock. Clarifying his intent would have substantially reduced the likelihood of intra-family litigation over the estate tax obligation. If decedent did not intend to change the estate tax obligation and did not realize the impact of his redemption action on Greg's obligation to pay the estate taxes, then the resulting allocation of the estate taxes to the other two children was not only costly to them but also inconsistent with decedent's intent.

In *Lurie*, the statement of facts in the opinion does not disclose why the power of appointment over the irrevocable trusts created by others was taxable, so we are left to speculate on that point. We know that decedent's fiduciaries agreed, before trial in the tax court, that the powers of appointment over the irrevocable trusts resulted in a stipulated estate tax of \$12 million. This indicates the weakness of the taxpayer's legal position on exclusion of the irrevocable trusts from estate taxation. This result can be traced back to either the inadequate planning by the creators of these irrevocable trusts or to the time when the powers of appointment were exercised. It is possible that decedent exercised the powers of appointment on his own, without the advice of counsel. It is also possible that, due to a change in statutory or case law, the original planning regarding these irrevocable trusts had been rendered ineffective—but this again is mere speculation. Decedent may have fully intended to accelerate the estate tax and allocate the estate tax burden to the marital trust. More likely, however, it appears that decedent was

unaware of this risk and that he did not intend to accelerate the estate tax on up to \$40 million of irrevocable trust property. Had he been aware of the risk, decedent's will and revocable trust could have been revised to use the default equitable apportionment rules under Illinois common law to eliminate any estate tax at his death.

In 2000, with the adoption of the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et seq., Michigan made a significant shift in its default rules regarding estate tax allocation. With EPIC came the repeal of the Uniform Estate Tax Apportionment Act, in effect since 1963, and its equitable apportionment approach. The former Uniform Act generally allocated the estate tax burden based on the taxable property interests received by each beneficiary, regardless of the form of transfer. EPIC, on the other hand, provides a structured arrangement allocating no estate tax obligation to certain categories of beneficiaries and all of the obligation to others, regardless of the relative values of the transferred property interests. The EPIC estate tax allocation rules contained in MCL 700.3920–.3923 also are default rules that can be superseded by provisions in the controlling documents.

In 2003, the National Conference of Commissioners on Uniform State Laws (NCCUSL) published a new version of the Uniform Estate Tax Apportionment Act that was not available when EPIC was being considered. The revised Uniform Act continues to apply the principle of equitable apportionment to allocate the estate tax burden based on taxable transferred interests, unlike EPIC's structured allocation to particular types of transfers.

However, both when the default estate tax allocation rules of the former Uniform Act were operative, and now under EPIC, it has appeared that the widespread practice of Michigan estate planners has been to avoid these default rules. Instead, many estate planners appear to use a standard, self-drafted or adopted estate tax allocation provision that did not then and does

not now follow either of the statutory default provisions. A common approach in Michigan is the use of an estate tax allocation provision assigning all estate taxes to the residue, either under a will or revocable trust. For most situations in which all beneficiaries will receive the same share of all property interests, whether by operation of law or by passing under a will, revocable trust, irrevocable trust, or beneficiary designation, the specific tax allocation provision that is used will not affect the beneficiaries' estate tax burden. Rather, this type of tax allocation usually will result in a pro rata sharing of the estate tax obligation commensurate with a pro rata transfer of property interests.

However, the tax allocation burden may not be consistent with the transfers in cases where (1) beneficiaries receive different property interests by operation of law or under different dispositive instruments, beneficiary designations, or powers of appointment; or (2) if there are substantial lifetime transfers to some, but not all, of the ultimate beneficiaries, with or without subsequent equalization at death. If this is not what the decedent intended, then the result is inequitable. Of course, a decedent has every right to be inequitable in the allocation of the estate tax burden. In *Morris*, decedent had reasons to allocate all of the estate tax obligation to Greg, because he had received substantial lifetime transfers and was going to receive an additional death-time transfer. What is problematic in *Morris* is that it is not clear whether decedent's intent changed one year before his death or whether the stock redemption inadvertently changed the estate tax burden in a manner inconsistent with his intent.

In *Lurie*, the stated facts suggest that either decedent was unaware, shortly before his death, of the risk involved in the exercise of the powers of appointment, or that he was unaware that his will and revocable trust should be revised to use the Illinois default rules or to add similar provisions to the will and revocable trust. With the possibility of such a large estate tax, there

should have been a more careful planning and implementation, including a memorializing, of the decedent's intent.

As drafters and counselors, it is important to explain the estate tax allocation issues in appropriate cases, to determine the client's intent and to adequately memorialize that intent in the client's will, revocable trust or other instruments, and to advise the client that substantial changes in the titling, beneficiary designation, or value of property interests—or any other changes in family or financial circumstances—may have an impact on the carrying out of the client's intent regarding estate tax allocation.

NOTES

1. *Lurie v Commissioner*, 425 F3rd 1021, 1022 (7th Cir 2005).
2. *Estate of Lurie v Commissioner*, TC Memo 2004-19.



Thomas F. Sweeney, of Clark Hill PLC, Birmingham, has extensive experience in federal and state taxation, with a particular focus on estate and gift taxation and fiduciary and individual income taxation, including planning, return preparation, negotiation with

tax authorities, and tax litigation. Mr. Sweeney is actively involved in the planning and administration of revocable and irrevocable trusts, estates, family limited partnerships, and companies. When designing and implementing estate plans, he makes provisions for tax consequences, probate avoidance, and investment strategy. He also participates in the administration of trusts, conservatorships, and guardianships, and offers trust and estate dispute resolution, as well as other fiduciary services. In addition, Mr. Sweeney is actively involved in business planning, including the organization of business entities, consultation with business owners and officers, the drafting of business agreements, and other related services involved in the design and operation of a business.

Mr. Sweeney is a member of the Council of the Probate and Estate Planning Section of the State Bar of Michigan and a past chairperson of the Taxation Committee of the Oakland County Bar Association. He has been a frequent speaker for the Institute of Continuing Legal Education and a guest lecturer at the University of Michigan Law School. Several of his articles on trust and tax matters have appeared in the *Michigan Probate and Estate Planning Journal*, and since 2003 he has been included in the *Best Lawyers in America*.

Mr. Sweeney has served on the Birmingham Charter Review Commission and as a board member and president of Community House Association. He is a member and past president of the Baldwin Public Library Board and a member of the Board of Directors of the Birmingham Rotary Club Endowment Fund.

Departments

Tax Nuggets

By the Transfer Tax Committee:

**George W. Gregory, Chair,
Christopher L. Edgar, Robin D. Ferriby,
Thomas F. Sweeney, Patricia M. Ouellette,
and Christine M. Savage**

Automatic Extensions Now Longer

In the past, an application for an automatic extension of time to file an individual income tax return was filed on IRS Form 4868. This extended the filing date from April 15 to August 15. After that, Form 2688 could be filed to extend the date to October 15.

For tax year 2005, the automatic extension is until October 15, although no additional extension will be granted. Payment is still required but now can be made by credit card, though card-payment providers will charge a convenience fee. These extensions, like many other tax-return documents, also can be filed electronically. For a copy of the form and new instructions, go to <http://www.irs.gov/pub/irs-pdf/f4868.pdf>.

Mileage Rates Drop January 1

Optional standard automobile and van mileage rates fluctuated in 2005, rising when gasoline peaked at over \$3.50 per gallon earlier in the year. In 2006, the price per mile will go down as follows:

Period Beginning:	Jan. 1, 2005	Sept. 1, 2005	Jan.1, 2006
Business miles	\$0.405	\$0.485	\$0.445
Medical or moving miles	\$0.150	\$0.220	\$0.180
Charitable miles	\$0.140	\$0.140	\$0.140

Special charitable rates have been established for certain miles driven in support of organizations providing Hurricane Katrina relief. For August 25 through August 31, 2005, the rate is \$0.29/mile for deduction purposes and \$0.45/mile for reimbursement purposes. For September through December 2005, these rates are \$0.34 for deductions and \$0.485 for reimbursements. And for 2006, they are \$0.32 for deduction purposes and \$0.44 for reimbursement purposes.

These rates can be used instead of keeping track of all expenses, but they are not available in the following cases: (1) for a vehicle that has already used the Modified Accelerated Cost Recover System (MACRS), (2) after an IRC 179 expensing election has been claimed, (3) for a vehicle for hire, or (4) for more than four vehicles. For more information about limitations and warnings, please see Rev Proc 2004-64 and 2005-78, the latter of which can be found at <http://www.irs.gov/irb>.

2006 Transfer Tax Changes

- *Annual Gift Tax Exclusion Increases to \$12,000 for 2006.* The first \$12,000 of present gifts to any individual is excluded from the taxable gifts during the taxable year.
- *Non-Citizen Spouse Annual Gift Tax Exclusion Increases to \$120,000 for 2006.*
- *Gift Tax Form 709A is Obsolete.* All gift tax returns now must be filed on Form 709.
- *Form 706 for Deaths in 2004 is Now Available from the IRS.* The revised form reduces the allowable death tax credit to 50% of what it was under IRC 2011(b).

2006 Federal Income Tax Rates for Estates and Trusts

Taxable Income	Tax
Under \$2,050	15% of the taxable income
\$2,050 to \$4,850	\$307.50 plus 25% of the amount over \$2,050
\$4,850 to \$7,400	\$1,007.50 plus 28% of the amount over \$4,850
\$7,400 to \$10,050	\$1,721.50 plus 33% of the amount over \$7,400
Over \$10,050	\$2,596 plus 35% of the amount over \$10,500

Estate Taxes Applicable Credit Amount (Not Gift Taxes) and Maximum Rates

Year	Amount	Maximum Rate
2006	\$2 million	46%
2007	\$2 million	45%
2008	\$2 million	45%
2009	\$3.5 million	45%

- *Gift Taxes Applicable Credit Amount Remains at \$1 million.*
- *Qualified Funeral Trust Contract Contribution (IRC 685) Limited to \$8,500.*
- *Qualified Family-Owned Business Interest Deduction is Repealed.*
- *Special Use Valuation Under IRC 2032A is Limited to \$900,000.*

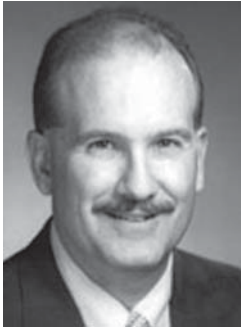


George W. Gregory, of George W. Gregory PLLC, Birmingham, practices in the areas of probate and estate planning, tax planning, and business planning. A former revenue agent with the IRS, Mr. Gregory is a frequent ICLE speaker and a former lecturer and assistant professor at Wayne State University School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



Christopher L. Edgar, of Law Weathers & Richardson PC, Grand Rapids, 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 and at handling probate-related litigation. Mr. Edgar also 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.



Robin D. Ferriby, of the Community Foundation for Southeastern Michigan, Detroit, practices in the areas of estate planning, nonprofit organizations, and charitable giving. Mr. Ferriby is a council member of the Probate and Estate Planning Section of the

State Bar of Michigan and, as a past chairperson of its Legislative Enactment Group, was involved in the passage of the Estates and Protected Individuals Code. He was also involved in drafting the Michigan Estate Tax Act and provided testimony on the repeal of the Michigan Intangibles Tax. He is a member of the Real Property, Probate and Trust Law, and Taxation Sections of the American Bar Association; of the Probate and Estate Planning, Taxation, and Business Law Sections of the State Bar of Michigan; and of the Planned Giving Roundtable of Southeast Michigan. He was a fellow in the Michigan Political Leadership Program at Michigan State University. Mr. Ferriby is a frequent lecturer and writer in his areas of practice.



Thomas F. Sweeney, of Clark Hill PLC, Birmingham, practices in the areas of taxation, estate and business planning, trust and estate administration, and probate litigation. For Mr. Sweeney's complete biography, please see page 36.



Patricia M. Ouellette, of Bernick Omer Radner & Ouellette PC, Lansing, practices in the areas of estate planning, probate administration, family law, and business tax. She has been a certified public accountant since 1978, a chartered financial consultant since 1986, and a certified life underwriter since 1997. Currently, she serves on the board of directors for the Lansing Community College Foundation. She is a former board member of the Greater Lansing Estate Planning Council and the Litigation/Business Valuation Task Force for the Michigan Association of Certified Public Accountants. She is also a former president of the Central Michigan Chapter of the Society of Financial Service Professionals. Ms. Ouellette maintains active membership in various professional organizations and has written numerous articles and spoken on various tax, estate planning, and family law topics.



Christine M. Savage, of Lowe Law Firm, PC, Okemos, practices in the areas of estate planning, estate and gift tax, retirement planning, welfare benefit planning, and probate, trust, and estate administration. She is a member of the Real Property, Probate and Trust Section of the American Bar Association, the Probate and Estate Planning Section of the State Bar of Michigan, the Ingham County Bar Association, the board of directors of the Greater Lansing Estate Planning Council, the Michigan State University - DCL College of Law American Inns of Court, the Women Lawyers Association of Mid-Michigan, and the Tax and Estate Planning Society. Ms. Savage has written several articles and is a lecturer on trusts and estates for Lorman Educational Services.

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

By Hon. Phillip E. Harter

Will—Trust—Estate Settlement Agreement— *Guardian Ad Litem*— Personal Representative

Katzen v Kramek (In re Estate of Kramek), 268 Mich App 565, ___ NW2d ___ (2005)

This case is very dependent upon the facts as given by the court of appeals. Those facts as given are as follows:

Decedent's will provided:

I direct that all real property that I own at the time of my death, in Otsego County, be placed in trust for the use of my children, DAVID KRAMEK and LORRAINE BROWN and their families and anyone they would wish to enjoy it. At the time of the death of the survivor of DAVID KRAMEK and LORRAINE BROWN, the real property in Otsego County would then go to the surviving child/children of DAVID KRAMEK and LORRAINE BROWN, fifty percent (50%) to go to LORRAINE's child/children.

The residue of the estate was divided equally between Kramek and Brown. The will further provided that, if either Kramek or Brown predeceased decedent, their share would go to his or her children, to be held in trust and distributed to each child, 50 percent at age 30 and 50 percent at age 35. Decedent named Kramek as trustee of this trust. The will also nominated Kramek as personal representative. Decedent bequeathed to Katzen \$5.

Decedent died on April 7, 2003. On April 14, 2003, Kramek filed an application for informal probate. On April 15, 2003, Kramek, Brown, and Katzen entered into an estate settlement agreement.

On October 2, 2003, Katzen filed a petition for approval and construction of the estate settlement agreement. Katzen also requested that a *guardian ad litem* (GAL) be appointed to ensure the protection of decedent's grandchildren.

In response, Kramek asserted that the estate settlement agreement did not include the real estate in Otsego County (the Otsego Property). He also requested that the GAL be discharged because the grandchildren were represented by another attorney, John Mabley, who also represented Brown.

Brown asserted in response that the agreement "contemplates" that the trust for the Otsego property not be created, but that the property be divided among Katzen, Kramek, and Brown equally. Brown asserted that the agreement, "if given effect by this court," would extinguish the rights of decedent's grandchildren. She asserted that the grandchildren were not represented when the agreement was negotiated and executed. On this basis, Brown requested that the court determine that the provisions of the agreement that affect the Otsego property be held unenforceable. But she requested that the remainder of the agreement be approved.

The trial court permitted the GAL to continue representing decedent's grandchildren. After a hearing, the trial court entered an order approving the agreement with the Otsego property included and holding that provision concerning it enforceable. The trial court also entered an order removing Kramek as personal representative.

The court of appeals first determined whether MCL 700.3914 or MCL 700.7207 should be applied to the case. The court noted that MCL 700.3914 applies when parties enter into an agreement to change, alter, or amend the terms of a will, and that MCL 700.7207 applies when parties enter into an agreement to change, alter, or amend the terms of a trust. In this case, a trust was not created before decedent's death nor

before the settlement agreement was entered into. Therefore, the parties did not modify a trust or the distribution of trust assets with their agreement. They did, however, modify the terms of the will. The court concluded that MCL 700.3914 would apply and that MCL 700.7207 would not.

In applying MCL 700.3914, the court of appeals rejected the argument that a *guardian ad litem* was required to represent decedent's grandchildren before the parties could execute their agreement. The court stated that the statute does not require that a representative be appointed before the agreement is executed, but only that a representative be appointed and given notice of the agreement. It is then up to the trial court to determine whether the agreement is "made in good faith and appears just and reasonable." In this case, a GAL was appointed for the minors for the court hearing. The proceedings were therefore in compliance with MCL 700.3914.

The court of appeals also rejected the argument that the trial court should not have reviewed extrinsic evidence. The court opined that extrinsic evidence may be used where there is a latent ambiguity to indicate the actual intent of the parties. In this case the court of appeals held that such a latent ambiguity existed.

The court of appeals next addressed the issue of the removal by the trial court of the personal representative, Kramek. Kramek objected to his removal because Katzen was not a "party" and thus could not request removal, and because there was no basis for removal. The court rejected the first objection, finding that Katzen was an "interested person" because she was a party to the settlement agreement. However, the court did hold that there was no basis for removal. The trial court had removed Kramek because of what it characterized as a conflict of interest, opining that the "bickering" would cost the estate money and that the appointment of a disinterested personal representative would expedite administration. The court of appeals held that while MCL 700.3611 broadly permits the trial

court to remove a personal representative if it is "in the best interests of the estate," this standard is not met just because the personal representative contests some issue involving the estate. The court characterized resolving the present dispute as a normal function of the probate court. Therefore, Kramek's role as personal representative was not tainted by a conflict of interest merely because he disputed the terms of the settlement agreement. The court also noted that this particular dispute was handled expeditiously by both the parties and the trial court.

In conclusion, the court of appeals affirmed the order approving the estate settlement agreement and reversed the order removing Kramek as personal representative.

Attorney—Estate Planning— Legal Malpractice—Negligence in Drafting Estate Planning Documents

***Sorkowitz v Lakritz, Wissbrun & Assocs, PC,* 474 Mich 925, 706 NW2d 9 (2005)**

The Michigan Supreme Court peremptorily reversed the court of appeals and reinstated the order of the Oakland Circuit Court granting defendants' motion for summary disposition. In so doing they reaffirmed the principle given in *Mieras v DeBona*, 452 Mich 278, 550 NW2d 202 (1996), that a beneficiary may not "use extrinsic evidence to prove that the testator's intent is other than that set forth in the will." While two justices dissented, the court has clearly refused to chip away at the *Mieras* rule, which gives estate planning attorneys a great deal of protection from malpractice when they engage in the drafting of estate planning documents.

The following is a summary the 2004 *Sorkowitz* decision:

***Sorkowitz v Lakritz, Wissbrun & Assocs, PC,* 261 Mich App 642, 683 NW2d 210 (2004)**

Defendants agreed to provide estate planning services to decedents. Plaintiffs contended that such services included tax planning. Plaintiffs

alleged that defendants violated their duties and the standard of care, and failed to include a Crummey clause and the necessary generation-skipping tax language in the estate planning documents. Defendants moved for summary disposition under MCR 2.116(C)(8), asserting that “Michigan law directs that only those who can establish, *without the use of extrinsic evidence*, that a decedent’s intent has been frustrated by an attorney’s negligent drafting of estate planning documents have standing to pursue a legal malpractice action against that attorney.” Plaintiffs had provided the affidavit of an expert attesting that the standard of practice requires that an attorney practicing in the field of estate planning discuss and recommend the use of a Crummey clause, and that the failure to include the clause in the irrevocable trust here is unusual and extraordinary. Relying on *Mieras v DeBona*, 452 Mich 278, 550 NW2d 202 (1996), and *Bullis v Downes*, 240 Mich App 462, 612 NW2d 435 (2000), the circuit court granted summary disposition, concluding that other than by use of extrinsic evidence such as set forth in the expert affidavit, plaintiffs were unable to establish that decedents’ intent was frustrated. The court of appeals reversed the circuit court and remanded.

The court of appeals began by explaining the importance of Crummey withdrawal rights to convert what would otherwise be a future interest into a present interest to obtain the benefit of the annual gift exclusion:

[This] is consistent with a donor’s intent to grant a future interest because, although a beneficiary is given an unqualified right to withdraw for a limited time, the beneficiary is not expected to exercise that right and almost never does, and to do so is at the peril of incurring the displeasure of, and forgoing future gifts or bequests from, the donor.... The use of Crummey clauses has become standard in irrevocable trusts, allowing the donor to convert \$10,000 (at the time of these trusts, now \$11,000) for

each beneficiary into a present excludable interest.

The court of appeals agreed that if the “four corners” limitation enunciated in *Mieras* controlled, the grant of summary disposition would have been proper. However, the court of appeals distinguished the present case from *Mieras*, as well as from *Karam v Kliber*, 253 Mich App 410, 655 NW2d 614 (2002), pointing out that both of these cases were concerned with (1) imposing conflicting duties on the drafting attorney where the interests of the client and the beneficiaries might diverge, and (2) imposing liability based on beneficiary claims that might be inconsistent with the decedent’s intent. In the present case, the only dispute is between the use of tax-saving language and the payment of taxes asserted to be unnecessary.

In limiting the *Mieras* line of case protection of the drafting attorney, the court of appeals explained the reason and need for such limitation as follows:

In this day and age, clients go to estate planning experts not only to have valid testamentary documents prepared, but also to have an estate plan that will minimize the taxes payable recommended, and thus have the maximum amount transferred to the donor’s intended beneficiaries at the intended times and intervals. We would be ignoring reality to dismiss legal malpractice cases such as this one on the basis of the fiction that one cannot know the decedent’s intent unless it is apparent within the four corners of the estate planning documents, and without regard to common sense and expert opinion on estate planning matters. We should not ignore as judges what we know as lawyers and as men and women. It is far more likely that the decedents here intended to minimize the taxes payable upon their deaths than that they were indifferent to the amount of taxes payable, and it is virtually certain that they did not intend to pay more taxes than necessary.

The court of appeals held that the *Mieras* rule is applicable in a dispute between potential beneficiaries concerning the intended distribution of the total estate. The rule is not applicable to a claim such as this case, where the malpractice action is sought to recover for diminution of the estate caused by the negligence of the defendants who provide estate planning. In this case, the interests of the deceased clients, the estate, and all the beneficiaries are aligned on the same side, and there is no danger that drafting attorneys will be wrongly held accountable to a third party for properly implementing the desires of their clients.



Hon. Phillip E. Harter is a judge with the Calhoun County Probate Court, Battle Creek. He was chairperson of the Michigan Supreme Court Task Force on Guardianships and Conservatorships and a member of the Michigan Supreme Court bar examination staff (1976-1991). He also is a member of the Calhoun County Bar Association, a fellow of the Michigan 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 the immediate past chairperson of the State Bar of Michigan Probate and Estate Planning Section, a former chairperson of the Probate Law Committee, and a former chairperson of the Probate Rules Committee of the Michigan Probate Judges Association. He reviews cases for the *Michigan Probate and Estate Planning Journal* and has lectured at ICLE's Annual Probate and Estate Planning Institute for many years.

Legislative Report

By Harold G. Schuitmaker

Public Act 204 of 2005 Effective November 10, 2005 Technical Changes to EPIC

MCL 700.1104(b)—Definition of “Estate”:

The definition of “estate” was expanded to include the purposes of paying claims, allowances, and taxes. The subsection now includes reference to priority of claims payments, credit for foreign tax paid, and a trustee’s duty.

MCL 700.2301—New Subsection 4: New language states that a spouse who receives an intestate share under this section may also exercise the right to election under Section 2202, but the election under 2202(2)(b) will be reduced by the intestate share taken.

MCL 700.2908—Disclaimers: A revised subsection 2 dealing with powers of appointment and disclaimers has been added. *This is a must read in disclaimer decisions.*

Three sections deal with the topic of attorney services from an attorney associated with a fiduciary:

- **MCL 700.3715(w)** allows an attorney associated with a personal representative to perform necessary legal services for the personal representative.
- **MCL 700.5423(z)** allows the same in conservatorships.
- **MCL 700.7401(w)** allows the same in a trust.

MCL 700.7502—Trustees’ Duties to Pay Obligation: If a personal representative is not appointed for the settlor’s estate within four months of the date of publication of notice to creditors by the trustee, the trust is not liable for payment of homestead, family, or exempt property allowances.

Public Act 163 of 2005 Effective January 1, 2006 Real Estate Disclosure Statement

The act amends the Seller’s Disclosure Statement to add the following:

This information is a disclosure only and is not intended to be a part of any contract between buyer and seller.

The act expands the disclosure to add the italicized portion of the following:

Buyer should obtain professional advice and inspections of the property to more fully determine the condition of the property. *These inspections should take indoor air and water quality into account, as well as any evidence of unusually high levels of potential allergens including, but not limited to, household mold, mildew and bacteria.*



Harold G. Schuitmaker, of Schuitmaker Cooper & Schuitmaker PC, Paw Paw, 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 and a former member of the Probate Court Rules Committee and Probate Forms Committee. He also formerly served on the State Board of Medicine for 10 years. Mr. Schuitmaker is a member of the National Association of Elder Law Attorneys, the Kalamazoo County Bar Association, and the Van Buren County Bar Association. He also serves in numerous civic and charitable organizations. He is a past president of the Rotary District Foundation and a level II Certified Assessing Officer with the State Assessor Board. Mr. Schuitmaker is also a regular contributor to the *Michigan Probate and Estate Planning Journal*.

Probate & Estate Planning Council Q & A

By Shaheen I. Imami &
Patricia Gormely Prince

Question: Does Personal Jurisdiction Over a Trustee Who Resides Outside of Michigan Guarantee that a Michigan Probate Court Will Entertain a Matter?

Answer: The short answer is no. As you may remember, last issue's Q & A discussed the manner in which personal jurisdiction over a foreign trustee can be obtained by a Michigan probate court. The final comment in that Q & A was that "[t]he breadth of these categories within the Michigan long-arm statutes is such that the mere fact that a trustee is not located in Michigan should not cause the knee-jerk reaction that a proceeding cannot be maintained in a Michigan probate court." A corollary of that statement is that certain circumstances exist under which a Michigan probate court *will* decline to entertain a proceeding. As a result, practitioners should be mindful that the existence of personal jurisdiction and subject-matter jurisdiction do not always guarantee a proceeding a place in a Michigan probate court.

So when will a Michigan probate court decline to entertain a matter? MCL 700.7203 provides that:

- (1) If a party objects, the court shall not entertain a proceeding under section 7201 involving a trust registered or having its principal place of administration in another state, unless either of the following applies:
 - (a) All appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration.
 - (b) If the interests of justice would otherwise seriously be impaired.
- (2) The court may condition a stay or dismissal of a proceeding under this section on the consent of a party to jurisdiction of the

state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter another appropriate order.

While the application of MCL 700.7203 is not terribly difficult, the basis and theory on which it operates can be confusing.

In *In re Murray Estate*, 191 Mich App 347, 477 NW2d 510 (1991), a panel of the Michigan Court of Appeals indirectly characterized former MCL 700.807 (the Revised Probate Code precursor to MCL 700.7203) as depriving the probate court of jurisdiction over a matter involving an Illinois corporate trustee. The holding and language of *Murray* has led some practitioners to conclude that MCL 700.7203 is jurisdictional in nature. I respectfully disagree with such a characterization because, in my opinion, it misunderstands the nature of and differences between "jurisdiction" and "venue." When viewed properly and historically, it seems much more likely that MCL 700.7203 is simply a codification within EPIC of the principle of forum non conveniens.

As discussed in last issue's Q & A, the existence of personal jurisdiction over a foreign trustee is rooted both in "minimum contacts" and Michigan's long-arm statute, not in any specific provision of EPIC. Further, a Michigan probate court's subject-matter jurisdiction in trust matters (which is quite broad) is governed by MCL 700.1302, .1303, and .7201. When the *Murray* panel and other practitioners have suggested that a probate court lacks "jurisdiction" over a foreign trustee, it seems obvious that the reference is to *subject-matter* jurisdiction. Yet it is equally clear that nothing in the plain language of MCL 700.7203 (or its predecessor, MCL 700.807) limits the scope of a Michigan probate court's subject-matter jurisdiction granted by EPIC.

In fact, Michigan courts have defined subject-matter jurisdiction as:

[T]he right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind

or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.¹

So, assuming that a matter involving a foreign trustee falls within MCL 700.1302 or .1303, an objection by a party does not divest a Michigan probate court of its statutory subject-matter jurisdiction by applying MCL 700.7203. Rather, it dictates the proper venue in which the matter should be heard, i.e., it applies the traditional notions of forum non conveniens and comity.² While the practical application of inherent differences between jurisdiction and venue may have limited use related to the disposition of a particular case, it is certainly worth knowing that such differences do exist.

NOTES

1. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 375, 689 NW2d 145 (2004), quoting *In re AMB*, 248 Mich App 144, 166-167, 640 NW2d 262 (2001).

2. Compare MCL 700.7203 with *Derderian*, 263 Mich App at 376 n 4 (citations omitted); *Miller v Allied Signal, Inc*, 235 Mich App 710, 713, 599 NW2d 110 (1999); and 28 USC 1404.



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(ICLE 2d ed 2003) and has been a speaker for ICLE. Mr. Imami cowrote the article, "The Probate Judge Ordered Mediation—Now What?" for the Fall 2002 issue of the *Michigan Probate and Estate Planning Journal*.



Patricia Gormely Prince, of Patricia Gormely Prince PC, Farmington Hills, practices in the areas of probate and estate planning, tax planning, estate administration, and related contested probate matters. She is a member of the Probate and Estate Planning

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Douglas A. Mielock, Chair Elect

BUDGET

Mission: To develop the annual budget and to alert Council as to revenue and spending trends.

Nancy L. Little, Chair
Harold C. Schuitmaker

BYLAWS

Marilyn K. Lankfer, Chair
Robert P. Tiplady
Teresa Schafer Sullivan

MICHAEL W. IRISH AWARD

Mission: To honor a practitioner (supported by recommendations from his or her peers) whose contributions to the Section reflect the high standards of professionalism and selflessness exemplified by Michael W. Irish.

Brian V. Howe, Chair
Hon. Phillip E. Harter
Patricia Gormely Prince
Fredric A. Sytsma

LONG-RANGE PLANNING

Mission: To refine the Section's Strategic Plan through periodic review and to identify priorities and methods for implementing those priorities so as to meet the evolving needs of Section members.

Douglas A. Mielock, Chair
Dirk C. Hoffius, Ex-Officio
Christine M. Savage

NOMINATIONS

Mission: To select nominees for Council who are committed to the probate and estate planning practice and who are candidates for leadership of our diverse and changing Section.

Dirk C. Hoffius, Chair
Henry M. Grix
Hon. Phillip E. Harter

RELATIONS WITH STATE BAR

Mission: To monitor and report to Council on developments at the State Bar that affect our practice.

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

ANNUAL MEETING

Mission: To arrange the annual meeting at a time and place and with an agenda that will accomplish necessary Section business and will address, as appropriate, matters of professional concern to the Membership.

Douglas A. Mielock, Chair
Christopher L. Edgar
Ellen Sugrue Hyman
Marlaine C. Teahan

EDUCATIONAL AND ADVOCACY SERVICES FOR SECTION MEMBERS

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Amy N. Morrissey
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Wendy M. Parr
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STATE BAR JOURNAL

Lauren M. Underwood, Chair

PAMPHLETS

Mission: To determine the need for pamphlets to assist practitioners in educating the public, and, based on such findings, to update, develop, and distribute user-friendly pamphlets.

Kenneth J. Seavoy, Chair
Ellen Sugrue Hyman
Wendy M. Parr
Christopher Ballard

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Mission: To develop the Section Web site and Listserv and to monitor and evaluate the content of electronic communication between and among the Council and Section Members.

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Josh Ard
George W. Gregory
John D. Mabley

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Christopher L. Edgar, Co-Chair

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LEGISLATION COMMITTEE

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Daniel E. Cogan
Rebecca Bechler
Everett R. Zack

MICHIGAN TRUST CODE

Mission: To review the Uniform Trust Code and to determine the need for adopting such legislation in Michigan.

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Daniel E. Cogan
Marilyn K. Lankfer
Douglas A. Mielock

PROFESSIONALISM AND STANDARDS**ETHICS**

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Mission: To monitor forms, procedures, standard jury instructions, and legislation so as to facilitate the administration of prompt and consistent justice in contested and uncontested probate court proceedings and through alternative dispute resolution.

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Joan Von Handorf
Everett R. Zack
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UNIFORMITY OF PRACTICE

Mission: To determine local practice issues that could be conformed to a standard of Michigan probate and

trust practice and to work with probate registers and other stakeholders in achieving uniformity of probate and trust practice throughout the state.

Sebastian V. Grassi, Jr., Co-Chair
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PRACTICE ISSUES, RELATED AREAS, AND LIAISONS**CHARITABLE GIVING/EXEMPT ORGANIZATIONS**

Mission: To educate practitioners about charitable giving and to determine the need for Michigan legislation authorizing exempt organizations to serve as trustees of charitable trusts.

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Mission: To monitor developments regarding transfer taxes, particularly at the state level, and to recommend any appropriate action for the state of Michigan.

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Date	Place
Apr. 22, 2006	University Club, Lansing
May 18-20, 2006	46th Annual Probate and Estate Planning Institute, Grand Traverse Resort, Acme
June 9-10, 2006	46th Annual Probate and Estate Planning Institute, MSU Management Education Center, Troy
June 17, 2006	University Club, Lansing