

# MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

## TABLE OF CONTENTS

Vol. 24 • Summer 2005 • No. 3

### Feature Articles

The Effect of Recent Changes in Circular  
230 on Written Communications

George W. Gregory .....3

Clearinghouse for Uniformity of Practice  
Issues

Joan C. Von Handorf .....10

Guardian ad Litem Immunity Revisited:  
Recent History

Lawrence G. Snyder and Alan A.

May .....11

Generation-Skipping Transfer Tax Update

Sebastian V. Grassi, Jr. ....15

The Facts About Organ Donation

Diane Russell .....24



## TABLE OF CONTENTS

### Subscription Information

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

### Editorial Policy

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

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

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

### Citation Form

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

### Section Web Site

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

### *Michigan Probate and Estate Planning Journal*

Nancy L. Little, Managing Editor  
2125 University Park Dr. #250, Okemos, MI 48864  
(517) 706-5790, fax (517) 706-0500  
E-mail [nancy.little@fosterzacklowe.com](mailto:nancy.little@fosterzacklowe.com)

### From the Desk of the Chairperson

Hon. Phillip E. Harter ..... 1

### Feature Articles

The Effect of Recent Changes in Circular 230 on Written Communications  
George W. Gregory ..... 3  
Clearinghouse for Uniformity of Practice Issues  
Joan C. Von Handorf ..... 10  
Guardian ad Litem Immunity Revisited: Recent History  
Lawrence G. Snyder and Alan A. May ..... 11  
Generation-Skipping Transfer Tax Update  
Sebastian V. Grassi, Jr. .... 15  
The Facts About Organ Donation  
Diane Russell ..... 24

### Departments

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law  
Hon. Phillip E. Harter ..... 29  
Legislative Report  
Harold G. Schuitmaker ..... 34  
Probate and Estate Planning Council Q & A  
Shaheen I. Imami & Carine J. Hails ..... 36  
Unauthorized Practice, Image, and Ethics  
Ramon F. Rolf, Jr. .... 38  
A View from the Bench  
Hon. Milton L. Mack, Jr. .... 40

### Miscellaneous

Sample Durable Power of Attorney—Health Care ..... 27  
Proposed Amendments to Probate and Estate Planning  
Section Bylaws Article II—Membership ..... 28  
ICLE Page ..... 45  
Section Council ..... 47  
Section Committees ..... 48

### Editorial Board

Nancy L. Little, Managing Editor  
Foster, Zack & Lowe, PC, Okemos

Amy Nehs Morrissey  
Westerman & Associates, Ann Arbor

Wendy M. Parr  
Miller, Johnson, Snell & Cummiskey, PLC, Grand Rapids

Robin D. Ferriby  
Community Foundation for Southeastern Michigan, Detroit

Kate Ernsting and Jennifer E. Muladore, Copy and Production Editors  
The Institute of Continuing Legal Education, Ann Arbor

## From the Desk of the Chairperson

By Hon. Phillip E. Harter



It has been a particular pleasure and privilege to serve this last year as the chair of the Probate and Estate Planning Section of the state bar. I have been associated with this fine organization for most of my professional life. I cannot think of any other organi-

zation more dedicated to service to its members and the public. One of the constant themes I have heard over the last year is that our section is probably one of the most active and effective sections of the state bar. This just does not happen. The knowledge and work volunteered by the members of our Council and others members is astounding. When I reflect on what has been and is being accomplished by our Council, I am indeed proud of our accomplishments and proud to be a small part of this organization. The following is a partial summary of where we have been over the last year and where we are going.

- **Internet discussion group:** The Internet discussion group, which was begun in June 2003, continues to grow. This feature allows section members to exchange valuable information on a daily basis. Presently, more than 872 practitioners are using the service.
- **Certificate program:** The Probate and Estate Planning Certificate Program, inaugurated in 2003, continues to exceed all expectations. This series of intensive educational courses was undertaken in cooperation with the Institute of Continuing Education (ICLE). One hundred forty-two practitioners have completed the program and earned certificates, and 1,073 practitioners are enrolled.
- **Specialization:** The success of the certificate program has encouraged the Probate and Estate Planning Council, the governing body of the Section, to investigate the possibility of proposing a state bar-sponsored specialization in wills, trusts, and estate planning. A committee of the Council, in cooperation with ICLE, is outlining what such a specialization program might entail and cost.
- **Conservatorship controversy:** The Council submitted proposed amendments to court rules to the Michigan Supreme Court for its consideration. This was as a result of a project undertaken in October 2003 when the Michigan auditor general issued a report that was critical of the way probate courts handle conservatorship matters. These rules address procedures in conservatorships as well as other areas of probate practice. They attempt to improve the present system to better protect those individuals under conservatorship and to improve the procedures used in our probate courts. These rules attempt to maintain the principle that the probate court should be a trier of fact and not an auditor. The rules attempt to encourage the uniform administration of these protections throughout the state while allowing for courts to exercise discretion on a case-by-case basis to avoid injustice in any particular case.
- **Sprenkle-Hill case:** The Council has followed the case of *Hill v Flint (In re Estate of Sprenkle-Hill)*, No 248783, 2004 Mich App LEXIS 2811 (Oct 26, 2004), *vacated and superseded*, 265 Mich App 254 (2005). A decision was originally handed down in this case on October 26, 2004, in which the court of appeals held that a surviving spouse

who met the qualifications for receiving an intestate share under MCL 700.2301 because of a premarital will was barred from taking an elective share under MCL 700.2202. The Council felt this decision to be incorrect and was working on corrective legislation and joining in an appeal when the court of appeals issued an order vacating the first opinion and issuing a new one. The new opinion indicates that a spouse may qualify under MCL 700.2301 and still elect to take against the will. The Council will continue to monitor this case.

- **Legislation:** The Council continued to monitor proposed legislation with the assistance of our section lobbyist, who was engaged last year. The Council also has proposed two new pieces of legislation. The first is a statute of repose, which would provide some limitations on when an attorney can be sued for his or her estate planning work. The second would be a bill containing several amendments to the Estates and Protected Individuals Code that would make technical corrections and clarify some areas where there is ambiguity. The Council is also working with the Michigan Funeral Directors Association to improve the law governing decisions concerning burial.
- **Uniform Trust Code:** A Council committee, chaired by Mark Harder, has continued reviewing section by section the Uniform Trust Code (UTC). This project was undertaken because the Council felt it would be helpful to have Michigan trust law codified. Some parts of the UTC have proved to be controversial. The Council hopes to be able to propose legislation in this area in the future.
- **Uniformity of practice:** The Council continues to work on the ever-present problem of uniformity of practice. Our Uniformity of Practice Committee, chaired by Joan Von Handorf, has surveyed our probate courts,

proposed new court forms, and proposed new court rules to help make probate practice more uniform throughout Michigan.

- **Amicus briefs:** The Council has been active in filing amicus briefs in cases of special interest to our section members. On two occasions this year, the Council was invited to file an amicus brief by the Michigan Supreme Court in cases before that court.
- **Economic survey:** The Council will undertake an economic survey of its members this year and will publish the results of this survey.
- **Future:** The Council will continue to actively work toward bettering the probate and estate planning practice. We will continue to work toward increasing our membership and expanding the services offered to members. We have increased section dues to \$25 to pay for those activities.

I believe that as I leave, I leave our organization as strong as when I began and in very good hands. As I have in the past, I would urge all members to become involved in the Council. It is an excellent opportunity to learn and to share your knowledge with others. All it takes is a desire to help and a commitment of some time to assist with the numerous projects undertaken by the Council. The Council meets on a Saturday morning, once a month, for nine months of the year. The meetings generally take place in Lansing. I have never left one of these meetings without having gained some new knowledge helpful to me. While I will no longer be chair of this fine organization, I will continue to attend its meetings and volunteer my time. It would be a hard habit to break and one that I have no intention of ending. This is where the action is. I hope to see you at a meeting sometime soon.

## The Effect of Recent Changes in Circular 230 on Written Communications

By George W. Gregory

**Government regulations in Circular 230 require written communications on federal tax issues to be “covered opinions” or for certain items to be prominently disclosed. Although this written communication addresses certain tax issues, it is not a covered opinion as described in circular 230 and therefore cannot be relied on by itself to avoid any tax penalties. If you would like a covered opinion letter, please contact us, and we will discuss the cost of preparing one.**

Estate planners routinely consider tax consequences such as the marital deduction, the use of IRC 529 plans, etc. As such, they inevitably communicate about taxes. Recent changes to Circular 230 will effect communications about tax issues.

This article provides an overview of Circular 230 and its statutory authority, for the purpose of highlighting recent changes. These changes have both increased sanctions that can be imposed on practitioners and imposed new requirements on written communications with a client. Written communications include e-mails, faxes, and other electronic communications. Written communications for “covered opinions” resemble those traditionally associated with formal opinion letters, with a few additions. In certain circumstances, this type is the only form of written communication allowed. Other forms of written communication must disclose that the client cannot rely on the communication alone to avoid penalties. The disclosure must be in type which is at least as large as any other in the written communication. Sanctions may be imposed, not only on the offending practitioner but also on the firm to which the practitioner belongs. Management is supposed to take affirmative steps to ensure that Circular 230 compliance exists at its firm. This article provides

a practical way to do this.

### An Overview of Circular 230

Circular 230 contains the rules for attorneys, certified public accountants, enrolled agents, and others in various federal tax matters.<sup>1</sup> When one signs various Internal Revenue Service (IRS) forms (for example part 2 of IRS Form 2848, Power of Attorney and Declaration of Representative), one declares “under penalties of perjury . . . I am aware of the regulations contained in Treasury Department Circular 230 (31 CFR, Part 10, as amended) concerning the practice of attorneys.” Both Circular 230 and the proposed section changes are posted on the ICLE Partnership Web site, with the course materials by this author titled *Drafting in Light of Abolition of State Inheritance Taxes* (ICLE Seminar held Jan. 21, 2005). Circular 230 contains the duties, restrictions on conduct, and sanctions for violations of practice before the IRS.

Subpart B of Circular 230 contains the duties of practicing before the IRS. These duties are quite varied and include the obligations to furnish information requested by the IRS (unless it is privileged), to advise clients who have failed to comply with tax laws of the noncompliance and its consequences, to exercise due diligence as to accuracy in preparing documents relating to IRS matters, and to act promptly in pending matters.<sup>2</sup> Various ethical rules also exist that concern assisting suspended or disbarred practitioners, former IRS employees who might be involved in a matter in which they used to have official responsibility, notarizing statements if one is interested in the matter in any way, fees, clients’ records, conflicts of interest, advertising and solicitation, taxpayer’s checks, and the practice of law.<sup>3</sup> Circular 230 also provides best practices for tax advisors, standards on advising with respect to tax return positions and for preparing

and signing tax returns, standards for “covered opinions,” procedures for those who have or share principal authority for a firm that provides advice on federal tax issues, and requirements for other written advice.<sup>4</sup>

Subpart C of Circular 230 contains sanctions for violation of Circular 230. If a practitioner is incompetent or disreputable, fails to comply with Circular 230, or willfully and knowingly misleads a client or prospective client; he or she may be censured, suspended, or disbarred.<sup>5</sup>

### Changes to Sanctions

As stated above, potential sanctions include censure, suspension, or disbarment before the IRS.<sup>6</sup> In addition to the traditional fines,<sup>7</sup> the IRS may impose more meaningful fines. These more meaningful fines may not exceed the gross income derived from the sanctioned conduct.<sup>8</sup>

The IRS Office of Professional Responsibility (the successor to the director of practice) is responsible for the administration of Circular 230. The present director is Cono Namorato. He requested the changes to 31 USC § 310 and IRC § 6707(a) as part of his negotiations to take on the job. Administrative procedures exist for hearings (not subject to the Federal Rules of Evidence) in front of an administrative law judge with an appeal to the secretary of the treasury or his or her delegate, who will review the entire record and submit a reply brief to the appeal. The standard on appeal is clearly erroneous, in light of the record and applicable law.

### New Written Communication Standards

Although the “written communications” changes to Circular 230 were motivated by CPA firms and tax attorneys involved in tax shelters (and even more specifically by listed transactions and their progeny),<sup>9</sup> the response was much broader than the target. It affects anyone who wants to (1) practice before the IRS (prepare tax returns, handle audit, represent clients in unagreed cases, request private letter rulings, and the like) and who also wants to (2) communicate with his

or her client in writing under Circular 230. Written communications include electronic communications (e-mail).<sup>10</sup>

Circular 230 divides written communications into (1) “covered opinions” (with subtypes that include reliance opinions, marketed opinions, opinions subject to conditions of confidentiality, and opinions subject to contractual protection), (2) limited-scope opinions, and (3) other written advice.

For each of these divisions, many of the requirements of Circular 230 are just good legal practice: find out what the client is asking you to do, learn the facts, learn the law, apply the facts to the law, and reach a logical conclusion. Some are procedural. Some will make some written communications economically impossible (for example the \$10,000 opinion letter responding to the e-mail inquiry, “I was going to put \$10,000 in my child’s UTMA; is a section 529 plan a better idea?”).

### “Covered Opinions”

“Covered opinions” are any written advice concerning any plan or arrangement for which the principal purpose is to avoid a federal tax<sup>11</sup> or for which a significant purpose is to avoid a federal tax.<sup>12</sup> It includes reliance opinions and marketed opinions. If a written communication is subject to conditions of confidentiality or is subject to contractual protection, it is also subject to the rules that apply to “covered opinions.”

“Covered opinions” do not include written advice that will be followed by a covered opinion. In addition, with some exceptions, “covered opinions” do not deal with the qualification of a qualified plan or a state or local bond opinion. Another exception exists for documents required to be filed with the SEC.

In addition, in response to comments from practitioners, advice after a tax return is filed, solely for the use of the client and that will not be used for any other purpose including amended returns or subsequent returns, is not subject to the covered opinion rules.<sup>13</sup> (Probably, this would

be postfiling strategy communications.) Negative advice (“This strategy will never work, and you should not do it.”) is not subject to the covered opinion rules, as long as it does not conclude that there is any confidence level that could be relied on (even as low as “not frivolous”).<sup>14</sup> Similarly, in response to practitioner comments, the written advice provided by the in-house counsel to employees is not subject to the covered opinion rules as long as the sole purpose of the written communication is determining the employer’s tax liability (“that subsidiary uses the cash method of accounting”).<sup>15</sup>

A reliance opinion is one that states that “more likely than not,” the conclusion will ultimately be upheld. It may not state that it cannot be used to avoid penalties.<sup>16</sup>

A marketed opinion is used to market something, typically a product or transaction. Although a marketed opinion is a type of covered opinion, the rules are different. A marketed opinion should prominently disclose that (1) it may not be used to avoid penalties, (2) it was written to support the marketing of something, and (3) the taxpayer should seek other advice appropriate to the taxpayer’s circumstances.<sup>17</sup> An exception is described below.

In the first final regulations, TD 9165, “prominently disclosed” meant placement at the beginning of the written advice in bold and in larger typeface than any other typeface in the communication. TD 9201 modified 31 CFR 10.35(b)(8) for “prominently disclosed” to mean “readily apparent to a reader of the written advice.” This depends on the facts and circumstances, including the “sophistication of the taxpayer and the length of the written advice.” However, “at a minimum ... the item must be set forth in a separate section (and not in a footnote) in a typeface that is of the same size or larger than the typeface of any discussion of the facts or law in the written advice.”

In a covered opinion, the practitioner must identify and ascertain the facts that may relate to future events, identify those facts and consider

all of them,<sup>18</sup> and not make or accept any unreasonable or incomplete factual assumptions. It is unreasonable to assume a profit motive or that a transaction is potentially profitable.<sup>19</sup> In addition, the practitioner must

- identify, in a separate section, all factual assumptions relied on;<sup>20</sup>
- relate the law (including judicial doctrines) to the facts;<sup>21</sup>
- not assume favorable resolution of any issue, except in a limited-scope opinion or when relying on another who is identified and who the practitioner knows is qualified and competent;<sup>22</sup>
- not base an opinion on any unreasonable legal assumptions, representations, or conclusions;<sup>23</sup>
- not make any inconsistent legal analysis or conclusions;<sup>24</sup>
- consider all significant tax issues, except in a limited-scope opinion or when relying on another who is identified who the practitioner knows is qualified and competent;<sup>25</sup>
- provide a conclusion as to each significant tax issue, including the likelihood that the taxpayer will prevail on the merits;<sup>26</sup>
- provide specific disclosures if unable to reach a more-likely-than-not opinion.<sup>27</sup>
- not take into account the “audit lottery;” and<sup>28</sup>
- prominently disclose
  - any relationship to any promoter including any compensation arrangement, including referral fees or fee-sharing arrangements, both direct and indirect, other than the client, and
  - any referral agreement.<sup>29</sup>

### **Covered Opinions That Are Marketed Opinions**

The criteria for marketed opinions is similar, but it can only be issued if the practitioner concludes that each significant federal tax issue meets the more-likely-than-not standard, and requires more disclosure.<sup>30</sup> A marketed opinion must also prominently disclose that the opinion was written to promote or market the item addressed and that the taxpayer should seek independent advice.<sup>31</sup> If the practitioner can not issue a more-likely-than-not opinion, an alternative is to prominently disclose that (1) the advice may not be used to avoid penalties, (2) the advice was written to support the transactions or matters addressed, and (3) the client should obtain advice based on the client's particular circumstances from an independent tax advisor.<sup>32</sup>

### **Limited Scope Opinions**

In a limited scope opinion,<sup>33</sup> the practitioner can consider less than all of the federal tax issues, if the practitioner and taxpayer agree and if the client's potential reliance does not extend to avoiding penalties; if the advice does not deal with listed transactions, a transaction with a principal purpose of avoiding tax, or a marketed opinion; and if appropriate disclosure is made.<sup>34</sup> The written opinion must be limited to the federal tax issue addressed;<sup>35</sup> it must disclose that additional issues may exist that would affect the federal tax treatment<sup>36</sup> and that the opinion was not written to address any other federal tax issue, and may not be used to avoid penalties on the other issues.<sup>37</sup> A reasonable assumption may be made about the resolution of an issue the limited opinion is not addressing but must be identified in a separate section.<sup>38</sup>

### **Conclusions and Their Importance**

In all "covered opinions," an overall conclusion must be stated or the reason it cannot be reached.<sup>39</sup> If an opinion can not meet the more-

likely-than-not standard, it must prominently disclose that it does not do so and that it may not be used to avoid penalties.<sup>40</sup> The practitioner may not provide advice contrary or inconsistent with the required disclosure.<sup>41</sup>

Of course meeting these standards does not mean that the opinion is correct.<sup>42</sup>

### **Other Written Advice**

Other written advice (including electronic communications such as e-mail) must not be based on unreasonable factual or legal assumptions (including for future events); must not unreasonably rely on representations, statements, etc., of the taxpayer or any other person; and must not fail to consider anything relevant or take into account the "audit lottery." It must additionally take into account what the client is asking for and how this advice might be used by others.<sup>43</sup>

### **Disclosure and Required Information Summary**

Although, under the latest amendments, disclosures need not be at the beginning of the written advice in bold and in a typeface larger than any other typeface in the communication, they must be "readily apparent to a reader of the written advice." This depends on the facts and circumstances, including the "sophistication of the taxpayer and the length of the written advice." However, "at a minimum ... the item must be set forth in a separate section (and not in a footnote) in a typeface that is of the same size or larger than the typeface of any discussion of the facts or law in the written advice."

For "covered opinions" (including reliance, marketed, confidential, or contractual), one must (1) identify in a separate section, all factual assumptions relied on; (2) consider all significant tax issues; (3) provide a conclusion for each significant tax issue, including the likelihood that the taxpayer will prevail on the merits; (4) disclose any relationship to any promoter including any compensation arrangement, including referral

fees or fee-sharing arrangements, both direct and indirect, other than the client; and (5) any referral agreement.

Marketed opinions need not be treated as “covered opinions” unless they deal with tax avoidance transactions described in Treas Reg 1.6011-4(b)(2) (listed transactions). But a marketed opinion must also disclose (1) that it may not be used to avoid penalties, (2) that it was written to support the marketing of something, (3) that the taxpayer should seek other advice appropriate to the taxpayer’s circumstances, (4) that the opinion was written to promote or market the item addressed, and (5) that the taxpayer should seek independent advice. This additional disclosure is enough, assuming no opinion on being “more likely than not” is provided, to exempt nonlisted transaction opinion letters from the covered opinion requirements.

For a limited scope opinion, the rules are a little relaxed because one discloses and limits the opinion to the federal tax issue addressed, discloses that additional issues may exist that would affect the federal tax treatment, and states that the opinion was not written to address any other federal tax issue and may not be used to avoid penalties on the other issues.

### Best Practices

Nonsanctionable “best practices” are aspirational standards that include communicating clearly with the client about the terms of the engagement (for example the form and scope of advice); establishing the facts; testing the reasonableness of assumptions; relating the law (including common-law doctrines) to the facts and arriving at a conclusion based on the law and the facts; advising the clients of the importance of the conclusions reached, including relying on the opinion to avoid penalties; and acting fairly with integrity before the IRS.

### Responsibility of Firm Management

Persons in charge, or who share responsibility, for the management of a practice, must take

steps to ensure compliance with the requirements for written communications.<sup>44</sup>

### Effective Date of Changes

If one reads the changes to Circular 230 literally, these are effective now. The IRS has said they will take effect June 20.

### A Course of Action

First, every practitioner and every firm should identify when it gives “written tax advice.” Be aware that written tax advice includes e-mail.

Consider starting all communications, other than “covered opinions,” with a notice, not unlike the first paragraph of this article.

Make sure the notice is in type which is at least as large and prominent as any type in the communication. Make sure that it is in a separate section and that the author is making reasonable assumptions and is taking into account all of the information known to the author.

Then determine if this is a “covered opinion.” Most estate planners will not routinely draft a covered opinion. The following are covered opinions:

- any written communication about a “listed transaction,” unless it is wholly negative with no level of assurance
- a written communication whose principal purpose is tax avoidance or evasion
- a written communication of which a significant purpose is tax avoidance or evasion and that is
  - a reliance opinion with a significant tax issue,
  - a marketed opinion,
  - subject to a condition of confidentiality, or
  - subject to contractual protections

### Conclusion

Every practitioner and firm should decide if he, she, or it has written communications about tax

issues. If one has written communications about tax issues, one needs to find a way to monitor and control them. If there is no communication that requires a covered opinion, the firm should make sure that every communication that might include tax issues has a disclaimer, such as that shown at the beginning of this article. This author created that disclaimer; it has been criticized because the “by itself” language is not authorized by Circular 230, so another practitioner or firm might not want to adopt it as is. If a lawyer’s or firm’s work includes what is in the covered opinion portion of the above discussion, that lawyer or firm should take steps to comply with requirements for covered communication.

### Notes

1. Technically, Circular 230 is Title 31, CFR Subtitle A, Part 10. Unless otherwise stated, all footnotes will be to Circular 230 sections as amended by TD 9165, 69 Fed Reg 75839 (Dec. 21, 2004), as further amended by TD 9201, 70 Fed Reg 28824 (May 19, 2005). Its basic authority is not the Internal Revenue Code, but 31 USC §330. Title 31 deals with “Money and Finance.”
2. 31 CFR 10.20–.23.
3. 31 CFR 10.24–.32.
4. 31 CFR 10.33–.37.
5. 31 CFR 10.50.
6. 31 CFR 10.52.
7. IRC §§ 6694, 6695, 6696, 6701, and 6702 provided for a variety of penalties for practitioners. The dollar amount of these penalties varies from \$50 to \$1,000 each.
8. Effective for actions taken after October 22, 2004, the American Jobs Creation Act of 2004, Pub L No 108-357, §822(a), 118 Stat 1418 (2004), amended 31 USC §330(b) to include monetary penalties in the sanctions that may be imposed on practitioners under Circular 230. Although the 2004 final Circular 230 regulations issued in TD 9165 and the amendments in TD 9201, do not reflect the amendments made by the American Jobs Creation Act of 2004, the preamble to TD 9165 indicates that the Treasury Department and the IRS expect to propose additional regulations implementing the amendments.
9. IRC 6707A(c) (2) (added by section 811 of the American Jobs Creation Act of 2004 defines a “listed transaction” as a reportable transaction that is the same as, or substantially similar to, a transaction identified by the secretary of the treasury as a tax avoidance transaction for purposes of IRC section 6011. See *also* Treas Reg § 1.6011-4(b)(2). For a list of transactions identified by the secretary as listed transactions, go to the IRS Web page and click on Site Map, then click on Abusive Tax Shelters and Transactions. See *also* Notice 2004-67, 2004-41 IRB 600 (Oct. 12, 2004), and subsequent published guidance. At the time of the submission of this article, there are 31 different listed transactions.
10. 31 CFR 10.37.
11. 31 CFR 10.35(b)(2)(i)(B).
12. 31 CFR 10.35(b)(2)(i)(C).
13. TD 9201, *amending* 31 CFR 10.35(b)(2)(ii)(C).
14. TD 9201, *amending* 31 CFR 10.35(b)(2)(ii)(C). Cono Namarato took questions on a Web cast, and someone pointed out that under the December version one could not write anything about a listed transaction, even a negative review, unless it was a full-blown “covered opinion.” This author thinks this change was a result of that or similar comments.
15. TD 9201, *amending* 31 CFR 10.35(b)(2)(ii)(D).
16. 31 CFR 10.35(b)(2)(C)(ii)(4).
17. 31 CFR 10.35(b)(2)(C)(ii)(B)(5).
18. 31 CFR 10.35(c)(1)(i).
19. 31 CFR 10.35(c)(1)(ii).
20. *Id.*
21. 31 CFR 10.35(c)(2).
22. 31 CFR 10.35(c)(2)(ii).
23. 31 CFR 10.35(c)(2)(ii).
24. 31 CFR 10.35(c)(2)(iii).
25. 31 CFR 10.35(c)(3).
26. 31 CFR 10.35(c)(3)(ii).
27. *Id.*
28. 31 CFR 10.35(c)(3)(iii).
29. 31 CFR 10.35(e).
30. 31 CFR 10.35(c)(3)(iv).
31. 31 CFR 10.35(e)(2).
32. 31 CFR 10.35(b)(5)(ii),(c)(3)(iv).
33. 31 CFR 10.35(c)(3)(v).
34. *Id.*
35. 31 CFR 10.35(e)(3)(i).
36. 31 CFR 10.35(e)(3)(ii).
37. 31 CFR 10.35(e)(3)(ii)–(iii).
38. 31 CFR 10.35(c)(3)(v)(B).
39. 31 CFR 10.35(c)(4).
40. 31 CFR 10.35(e)(4).
41. 31 CFR 10.35(e)(5).
42. 31 CFR 10.35(f).
43. 31 CFR 10.37.
44. 31 CFR 10.36.



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*.

## Clearinghouse for Uniformity of Practice Issues

By Joan C. Von Handorf

The Uniformity of Practice Committee of the Probate and Estate Planning Council of the Michigan State Bar has established a procedure to act as a clearinghouse for uniformity of practice issues in the Michigan probate courts. The committee will collect uniformity of practice problems from practitioners. Based on the information received from practitioners, the committee will prepare another survey for the Michigan probate courts to complete and will publish the results of this survey in the *Michigan Probate and Estate Planning Journal*. The committee will also propose court rules and forms to try to resolve the problems that practitioners are encountering.

Practitioners should submit uniformity of practice issues to the committee by e-mail to [uniformpractice@cs.com](mailto:uniformpractice@cs.com). The e-mail must contain the following:

- the name and telephone number of the practitioner (so that the committee can contact the practitioner if more information is needed)
- the name of the county where the uniformity of practice problem was encountered
- a description of the uniformity of practice problem (in 200 words or less)

A member of the committee will review this e-mail on a regular basis. When the committee determines that it has identified a sufficient number of issues, it will prepare a survey and send it to the probate courts for completion. The cooperation of the probate courts, once again, will be important for this process to be successful.

However, this procedure will only be successful if practitioners participate as well. Many practitioners, willing to complain about the lack of uniformity in the probate courts,

should welcome this opportunity to actually do something about it.



Joan C. Von Handorf is an attorney with Joan Von Handorf Law Offices, Warren, Michigan. Her areas of concentration are probate and estate planning. She has published articles in the *Michigan Bar Journal* and the *Michigan Probate and Estate Planning Journal*. Ms.

Von Handorf also has served as an author and speaker for ICLE. She is currently a member of the Probate and Estate Planning Council and serves as cochairperson of the Uniformity of Practice Committee.

## Guardian ad Litem Immunity Revisited: Recent History

By Lawrence G. Snyder and Alan A. May

The Michigan Legislature adopted guardian ad litem immunity in 1996<sup>1</sup> in response to the court of appeals ruling in *Bullock by Bullock v Huster*.<sup>2</sup> In *Bullock*, a domestic relations matter, plaintiff alleged that defendant acted in a negligent and grossly negligent manner while performing her duties as guardian ad litem in a child custody suit; that she breached an expressed or implied contract with plaintiff and breached implied warranties incident to that contract; and that she intentionally inflicted emotional distress on plaintiff. The circuit court ruled that the Governmental Immunity Act (1986 Act)<sup>3</sup> did not apply to guardians ad litem and denied the defendant's motion for summary disposition. The 1986 Act added a number of provisions to the prior act, which had applied only to governmental agencies. The court said that when the legislature undertakes broad reform, "the expression of one thing in the resulting statute may be deemed the exclusion of another."<sup>4</sup> The court went on to say, "The wisdom of this exclusion is not a matter for our review."<sup>5</sup> On remand from the Michigan Supreme Court after the 1986 Act was amended to include guardians ad litem, the court of appeals reversed the trial court's order, regarding the claims that the defendant acted in a negligent or grossly negligent manner while performing her duties as guardian ad litem. The court remanded the claims of breach of expressed or implied contract and intentional misconduct for a determination of whether the acts were committed while defendant was acting within the scope of her authority as guardian ad litem and whether defendant could be held liable for those acts.<sup>6</sup> The case was ultimately settled in the circuit court for one dollar.<sup>7</sup>

### The Purpose of Guardian ad Litem Immunity

Guardians ad litem are appointed only if required by statute or court rule or if the court determines that a guardian ad litem must be appointed to represent the interests of a person in a proceeding or to assist the court in making its determination. When guardian ad litem immunity was argued in the state legislature,<sup>8</sup> it was noted that guardians ad litem serve at the direction of the court in a quasi-judicial capacity, and that before *Bullock*, many guardians ad litem believed that they would be protected. It was argued that fewer people would be willing to accept appointments as guardian ad litem, and that, without immunity, the guardian ad litem could be sued by a disgruntled losing party. Some legal malpractice insurers were denying coverage on the theory that the guardian ad litem was not acting as an attorney but as a representative of the court. The bill would grant the immunity that was already presumed before the *Bullock* decision. The Michigan Probate Judges Association and a representative of the Michigan Protection and Advocacy Service supported the bill. The Michigan Trial Lawyers Association opposed the bill.

Although *Bullock* did not address the public policy considerations of quasijudicial immunity, a detailed analysis is provided in *Diehl v Danuloff*,<sup>9</sup> in which the court of appeals ruled that a psychologist was entitled to absolute quasijudicial immunity for alleged negligence in performing a court-ordered evaluation. Citing *Maiden v Rozwood*,<sup>10</sup> the court adopted the principle that "those persons other than judges without whom the judicial process could not function" enjoy quasijudicial immunity.<sup>11</sup> In *Martin v Children's Aid Society*,<sup>12</sup> the court said, "[p]rofessional assistance to the Probate Court is critical to its ability to make informed ... judgments ... . Its advisors and agents cannot be subject to potential suits by persons, aggrieved by the Court's decision vindictively

seeking revenge against the Court's assistants as surrogates for the jurist."<sup>13</sup>

The court in *Diehl* cited public policy considerations, including: (1) the need to save judicial time in defending suits, (2) the need for finality in the resolution of disputes, (3) the need to prevent the threat of a lawsuit from discouraging independent action, and (4) the existence of adequate procedural safeguards.<sup>14</sup>

### When Does Immunity Not Apply?

The governmental immunity statute generally provides for immunity from tort liability for governmental agencies and individuals acting on their behalf, judges, legislators, the elective or highest appointed executives, and, most recently, guardians ad litem. The 1986 Act specifically creates a "gross negligence" exception for individuals acting on behalf of governmental agencies. Gross negligence is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.<sup>15</sup> Immunity for guardians ad litem (as well as judges, legislators, and the highest elective or appointed officials) is a separate and distinct subsection of the 1986 Act, which contains no exception for gross negligence. On remand, the court of appeals in *Bullock* specifically ruled that the guardian ad litem was immune from the claims that she acted in a grossly negligent manner while performing her duties as guardian ad litem.<sup>16</sup> It is the authors' opinion that the court of appeals intended this result, and that gross negligence is not an exception to guardian ad litem immunity as the act is currently written.

Under *Bullock* and under the statute, a plaintiff must first prove that the complained of acts were outside the scope of the guardian ad litem's authority. There is no case law on which acts are outside the scope of a guardian ad litem's authority.

The probate court rules require the court to state the purpose of the appointment of the guardian ad litem.<sup>17</sup> The guardian ad litem must

conduct an investigation and make a written report and recommendations.<sup>18</sup> Presumably, the guardian ad litem may perform any acts reasonably necessary to obtain sufficient information to prepare a complete report and make recommendations in the best interests of the individual for whom the guardian ad litem has been appointed. Arguably, any act—beyond what is necessary to accomplish the purpose stated in the court's order, to complete the investigation, and to prepare the report—is beyond the guardian ad litem's authority. For example, a guardian ad litem appointed on a petition for guardianship has a duty to consider whether a durable power of attorney is an appropriate alternative to a guardianship.<sup>19</sup> If the guardian ad litem goes beyond making the determination and drafts a durable power of attorney, immunity should not apply.

Gratuitous statements and recommendations might also be beyond the scope of the guardian ad litem's authority. For example, the guardian ad litem can bring facts to the court's attention that raise questions about the suitability of a nominated guardian or conservator. But the guardian ad litem has no authority to recommend a fiduciary who has not been nominated by a person already interested in the proceedings. The authors are aware of a case in which a guardian ad litem gratuitously offered an opinion that a trust was invalid when the issue of the validity of the trust was not before the court in the proceeding for which the guardian ad litem was appointed. This would appear to be outside the scope of the authority of the guardian ad litem.

It is by no means certain that a guardian ad litem has the broad immunity extended to judges. Judges have been held immune for liability for judicial acts, even though alleged to have been done maliciously.<sup>20</sup> However, the courts have held that individuals with quasijudicial powers, acting within their authority, are immune from liability only if acting in good faith.<sup>21</sup> As stated above, the court of appeals in *Bullock* instructed the trial court to determine whether the alleged intentional misconduct of the guardian ad litem

was committed when defendant was acting within the scope of her authority.<sup>22</sup> It is the authors' opinion that acts of intentional misconduct would be held to be outside of the scope of the authority granted the guardian ad litem.

### Lawyer–Guardian ad Litem

The Michigan Legislature established the position of lawyer–guardian ad litem in 1999.<sup>23</sup> A lawyer–guardian ad litem may be appointed in minor guardianship proceedings if the court determines the minor's interests are, or may be, inadequately represented<sup>24</sup> and must be appointed in neglect proceedings, or in divorce proceedings in which the circuit court has waived jurisdiction to the family court.<sup>25</sup> The duties and powers of a lawyer–guardian ad litem are described in detail in the Probate Code.<sup>26</sup> A lawyer–guardian ad litem's duty is to the child and not to the court. The lawyer–guardian ad litem is subject to the attorney-client privilege and serves as an independent representative for the child's best interests as determined by the guardian ad litem. If the child's wishes are inconsistent with the child's best interests as determined by the guardian ad litem, the court may appoint an attorney for the child, who serves in addition to the lawyer–guardian ad litem. It is unclear whether the legislature intended guardian ad litem immunity to apply to a lawyer–guardian ad litem. One might argue that, as a guardian ad litem's duty is to the court and the lawyer–guardian ad litem's duty is to the child, immunity does not apply.

### Alternatives to Civil Liability

The probate court may withhold compensation from a guardian ad litem who fails to perform statutorily mandated duties.<sup>27</sup> Further, a guardian ad litem who does not diligently perform his or her duties will not be appointed on future cases.

Disciplinary proceedings are also available. Disciplinary actions may be instituted against the guardian ad litem either by the court or by an aggrieved party.<sup>28</sup> There has been at least one instance of a guardian ad litem being reprimanded

and assessed costs for violation of the Michigan Rules of Professional Conduct.<sup>29</sup>

Other areas in which guardians ad litem might be subject to liability are litigation costs<sup>30</sup> and mediation sanctions.<sup>31</sup> Guardians ad litem are generally appointed to represent minors, incapacitated adults, or those whose interests are unknown or unascertained. Frequently, the position taken by the guardian ad litem is taken without meaningful consultation with the individual whom the guardian ad litem represents. Consider a hypothetical case in which a guardian ad litem, appointed to review an account of fiduciary, objects to the allowance of the account, including fees. The matter is sent to case evaluation, and the guardian ad litem rejects the case evaluation award. The trial court allows the account as stated. Since the purpose behind the mediation sanction rule is to place the burden of litigation costs on the party who insists on a trial,<sup>32</sup> it would appear that the guardian ad litem, not the minor or incapacitated individual, would be responsible.

### Conclusion

The guardian ad litem is immune only when acting within his or her authority. Guardians ad litem should be aware of alternatives to civil actions, such as sanctions and disciplinary proceedings. It is incumbent on the guardian ad litem to have a complete knowledge of his or her duties before undertaking an assignment. This will ensure that the incapacitated individual's or minor's interests are adequately represented and that the purposes of the guardian ad litem's appointment are fulfilled.

### Notes

1. MCL 691.1407(6) provides, "A guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem. This subsection applies to actions filed before, on, or after May 1, 1996."

2. 209 Mich App 551, 532 NW2d (1995),

*vacated and remanded*, 451 Mich 884, 549 NW2d 573, *on remand, remanded*, 218 Mich App 400, 554 NW2d 47 (1996).

3. MCL 691.1407.
4. 209 Mich App at 555.
5. *Id.*
6. 218 Mich App at 403.
7. Wayne County Circuit Court No 92-234549 CZ.
8. HB 5043 (Jan 18, 1996).
9. 242 Mich App 120, 618 NW2d 83 (2000).
10. 461 Mich 109, 133, 597 NW2d 817 (1999).
11. 242 Mich App at 133.
12. 215 Mich App 88, 544 NW2d 651 (1996).
13. *Id.* at 97.
14. 242 Mich at 133.
15. MCL 691.1407(2)(c).
16. 218 Mich App at 404.
17. MCR 5.121(A)(1).
18. MCR 5.121(C).
19. MCL 700.5305.
20. *Mundy v McDonald*, 216 Mich 444, 185 NW 877 (1921).
21. *Pawlowski v Jenks*, 115 Mich 275, 73 NW 238 (1897); *Ampers v Winslow*, 75 Mich 234, 42 NW 823 (1889).
22. 218 Mich App at 403.
23. 1998 PA 480 (eff. Mar 1, 1999) (after guardian ad litem immunity was enacted).
24. MCL 700.5213(4).
25. MCL 712A.17c(7).
26. MCL 712A.17d.
27. MCL 700.5305(2).
28. MCR 9.104.
29. ADB No 04-95-GA.
30. MCR 2.625A(1).
31. MCR 2.403.
32. *Bien v Venticinque*, 151 Mich App 229, 232, 390 NW2d 702 (1986).



Lawrence Snyder, of Kemp, Klein, Umprey, Endelman and May, PC, Troy, is an associate concentrating his practice in the areas of probate, estate planning, collections, and workers' compensation. Mr. Snyder has been a special assistant attorney general for the State of Michigan in the Collections Division since 1992 and in the Workers' Compensation Division since 1994. He has served as a case evaluator for the Wayne County Probate Court since 1999. He has lectured for the National Business Institute in the areas of probate law and procedure.



Alan May, of Kemp, Klein, Umprey, Endelman and May, PC, Troy, is a shareholder who is sought after for his experience in guardianships and conservatorships. He has written and lectured extensively and has taught classes at Wayne State University and Oakland University on these topics. He was also president of Medical-Legal Seminars, Inc.

## Generation-Skipping Transfer Tax Update

© By Sebastian V. Grassi, Jr.

### Introduction

This article is an overview of selected issues concerning recent changes, regulations, and revenue procedures in the generation-skipping transfer (GST) tax rules. Fortunately, since the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub L No 107-16, 115 Stat 38 (2001 Tax Act), there has been no new GST tax legislation; however, as discussed below, new regulations and revenue procedures have been issued, and the U.S. gift tax return has been updated to reflect the changes brought about by the 2001 Tax Act.

### Increase in the GST Tax Exemption Amount and Lowering of the GST Tax Rate

Under the 2001 Tax Act, the GST tax exemption amount is currently equal to the estate tax applicable exclusion amount under IRC § 2010(c) for the year in which the GST transfer is made. In 2010, the GST tax will be repealed in its entirety, and there will be no GST tax exemption amount. IRC §§ 2631(c), 2664. Then in 2011, the GST tax exemption will revert back to the amount it would have risen to, with inflation adjustments, under

the tax regulations in force before the 2001 Tax Act. Thus, the GST tax exemption and GST tax rate is illustrated in the table below.

### Distributions and Gifts in 2009 and 2010

In 2009, clients may want to consider making inter vivos gifts into GST trusts that are not direct-skip trusts, paying gift tax, and using their remaining GST tax exemption (since this exemption will disappear in 2010 and will reappear at only \$1.1 million, plus post-2002 inflation adjustments, in 2011). An alternative, if direct skips can be made, would be to make direct skips in 2010 when there is no GST tax and a 35 percent gift tax rate. In addition, in 2010 when there is no GST tax, non-GST tax-exempt trusts should make distributions to skip persons. Consider including a trust protector or special power holder in the trust instrument who is authorized to appoint the trust property to the grantor's descendants, especially during the no GST tax window period of 2010. Because there will be no GST tax exemption available in 2010 (and thus no ability to allocate a person's exemption to create a GST tax-exempt trust), it is uncertain whether or not, if

Year	GST tax exemption amounts	GST tax rate
2002	\$1,100,000	50%
2003	\$1,120,000	49%
2004	\$1,500,000 (no inflation adjustment)	48%
2005	\$1,500,000 (no inflation adjustment)	47%
2006	\$2,000,000 (no inflation adjustment)	46%
2007	\$2,000,000 (no inflation adjustment)	45%
2008	\$2,000,000 (no inflation adjustment)	45%
2009	\$3,500,000 (no inflation adjustment)	45%
2010	Repealed	0%
2011	\$1,100,000 (plus post-2002 inflation adjustments)	55%

This article is excerpted and adapted from chapter 5 of Sebastian V. Grassi, Jr., *A Practical Guide to Drafting Irrevocable Life Insurance Trusts*, ALI/ABA, Philadelphia, PA (2003), (800) 253-6397, available at <http://www.ali-aba.org/aliaba/BK28.htm>. © 2005 by Sebastian V. Grassi, Jr.

other irrevocable trusts are established in 2010, they will be grandfathered from the GST tax once the pre-2001 Tax Act law returns in 2011.<sup>1</sup> If these trusts are not grandfathered from the GST tax, they will have an inclusion ratio of one.

In addition, especially during the no GST-tax-window period of 2010, when non-GST-tax-exempt trusts should make distributions to skip persons, consider including a trust protector or special power holder in the trust instrument who is authorized to appoint the trust property to the grantor's descendants.

### **Retroactive Allocation of GST Tax Exemption for a Nonskip Beneficiary's Unnatural Order of Death While the Transferor Is Alive**

The 2001 Tax Act allows a transferor to make a retroactive allocation of the transferor's GST tax exemption for lifetime transfers to an inter vivos trust if a nonskip beneficiary of the trust dies after December 31, 2000, but before the transferor. IRC § 2632(d). The retroactive allocation does not protect against an unnatural order of death that occurs *after* the transferor's death. Nor does the retroactive allocation apply to grantor-retained annuity trusts, qualified personal residence trusts, or any inter vivos trust that is subject to an estate tax inclusion period (ETIP), since IRC § 2642(f) prohibits the allocation of the transferor's GST tax exemption while the trust is subject to possible inclusion in the gross estate of the transferor or of his or her spouse. Any allocation of the GST tax exemption during the ETIP period will not take effect until this period's expiration and would be applied at the trust's then fair market value.

This retroactive allocation is available only if the predeceasing beneficiary was both a nonskip person and a lineal descendant of the transferor's grandparent or of a grandparent of the transferor's spouse, assigned to a generation younger than the generation of the then living transferor. The value of the property on the date that prop-

erty was transferred to the trust is used to determine the applicable fraction and inclusion ratio for the retroactive GST tax exemption allocation on a chronological basis (i.e., to earlier transfers first). The retroactive allocation of the GST tax exemption must be made on the transferor's U.S. gift tax return for the calendar year in which the nonskip person died. IRC § 2632(d).

**Caution:** The new rule applies for retroactive allocations for nonskip beneficiaries dying after December 31, 2000, but will be automatically repealed when the 2001 Tax Act sunsets on December 31, 2010.

### **Trust Severance Rules Liberalized**

The 2001 Tax Act liberalizes the rules for severing a trust. IRC § 2642(a)(3). The act permits the qualified severance of an existing single trust (inter vivos or testamentary) into multiple trusts

- if the severance or division is permitted by state law or is authorized in the governing instrument;
- if the single trust is divided on a fractional basis (and not on a pecuniary basis);
- if the terms of the new (divided) trusts provide, in the aggregate, for the same succession of interests of beneficiaries as in the original trust; and
- if the original trust has an inclusion ratio other than one or zero (It is then divided into two trusts, one of which has an inclusion ratio of one and the other of which has an inclusion ratio of zero).<sup>2</sup>

### **Qualified Severance and Unnatural Order of Death**

The qualified severance rule may be used in conjunction with the unnatural order of death election under IRC § 2632(d), which is discussed above. For example, an irrevocable life insurance trust (ILIT) providing an income interest to the transferor's spouse with remainder to the

transferor's two children may now be divided. This, together with the unnatural order of death election, could allow the ILIT to be divided into two parts, and then the transferor's GST tax exemption could be allocated to the part that the deceased child's descendants succeed to, if one of the transferor's children were to predecease the transferor.

### **Determining the Value of Property on a Timely GST Tax Exemption Allocation**

The 2001 Tax Act provides that the value of property, for purposes of determining the inclusion ratio (and, thereby, the rate of GST tax imposed on taxable events) in connection with timely and automatic allocations of GST tax exemption, is the value finally determined for gift or estate tax purposes. IRC §§ 2642(b)(1)–(2). The value, for purposes of an allocation that was made at the end of an ETIP, is its estate or gift tax value at the end of the ETIP.<sup>3</sup>

**Caution:** This new rule is effective for transfers made after December 31, 2000, but will be automatically repealed when the 2001 Tax Act sunsets on December 31, 2010.

### **The Internal Revenue Service May Grant an Extension of Time to Make a Timely GST Tax Exemption Allocation**

The 2001 Tax Act directs the Internal Revenue Service (IRS) to grant extensions of time to allocate the GST tax exemption and to grant exceptions to the filing deadlines, considering all relevant circumstances, including evidence of intent in the trust instrument or instrument of transfer for it to be GST tax exempt. IRC § 2642(g)(1). If a time extension to make a GST tax exemption allocation is granted, the allocation will not be considered "late" under Treas Reg § 26.2642-2(a)(2) but rather "timely" under Treas Reg § 26.2642-2(a)(1); therefore, the applicable fraction and inclusion ratio will be determined by the date of the transfer, not by the date on which the

allocation is actually made. Relief for filing a late, but timely, GST tax exemption will be available for

- lifetime allocations of GST tax exemption under IRC §2642(b)(1);
- death-time allocations of GST tax exemptions under IRC §2642(b)(2);
- elections out of automatic allocations to direct and indirect skips under IRC §§ 2632(b)(3) and (c)(5)(A)(i); and
- elections into automatic allocations for trusts that are neither direct skips nor indirect skips, as is permitted under IRC § 2632(c)(5)(A)(ii).

**Caution:** This relief is available for requests pending on, or filed after, December 31, 2000, but will be automatically repealed when the 2001 Tax Act sunsets on December 31, 2010. 2001 Tax Act §§ 564(b)(1), 901.

### **IRS Guidance**

The IRS issued preliminary guidance on this relief provision in IRS Notice 2001-50, 2001-2 CB 189, which is effective for relief requests pending on or filed after December 31, 2000. The notice states that taxpayers may seek an extension of time to make the above allocations and elections under the rules of Treas Reg § 301.9100-3. In general, under these rules, relief is granted if it is established to the satisfaction of the IRS that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the government's interests. Taxpayers requesting relief should follow the procedures in Rev Proc 2001-3, §5.02, 2001-1 IRB 111.

In Rev Proc 2004-46, 2004-31 IRB 141 (July 29, 2004), the IRS issued additional guidance for relief concerning certain inter vivos gifts to trusts made on or before December 31, 2002, and qualified for the gift tax annual exclusion. This revenue procedure provides a simplified alternate method (which is also less expensive, since

no user fee is charged for requests filed under this revenue procedure) to obtain an extension of time to make a late allocation of GST tax exemption. As a result of this revenue procedure, there will be no need to obtain a private letter ruling if 15 conditions are satisfied. Relief under the revenue procedure is available if

- on or before December 31, 2000, the taxpayer made or was deemed to have made a transfer by gift to a trust from which a GST may be made;
- at the time the taxpayer files the request for relief under the revenue procedure, no taxable distributions have been made and no taxable terminations have occurred;
- the transfer to the trust qualified for the gift tax annual exclusion under IRC § 2503(b), and the amount of the transfer, when added to the value of all other gifts by the transferor to that donee in the same year, was equal to or less than the amount of the applicable annual exclusion amount under IRC § 2503(b) for the year of the transfer;
- no GST tax exemption was allocated to the transfer, whether or not a U.S. gift tax return (IRS Form 709) was filed;
- at the time the taxpayer files a request for relief under the revenue procedure, the taxpayer has unused GST tax exemption available to allocate to the transfer;
- the taxpayer files a U.S. gift tax return for the year of the transfer to the trust, regardless of whether a Form 709 had been previously filed for that year, and states at the top of the gift tax return that it is being "FILED PURSUANT TO REV. PROC. 2004-46";
- the taxpayer reports on the gift tax return the value of the transferred property as of the date of the transfer;
- the taxpayer allocates GST tax exemption to the trust by attaching a statement to the gift tax return entitled "Notice of Allocation";<sup>4</sup> and
- the U.S. gift tax return is filed on or before the date prescribed for filing the taxpayer's federal estate tax return for the his or her estate (determined with regard to any extensions actually obtained), regardless of whether an estate tax return is required to be filed. If the IRS grants the relief, the transferor's GST tax exemption will be allocated effective on the date of the inter vivos transfer. A grant of relief does not, however, preclude a subsequent determination by the IRS that the transfer is subject to an ETIP under IRC § 2642(f).

### **Substantial Compliance Suffices for GST Tax Exemption Allocations**

The 2001 Tax Act provides that substantial compliance with the statutory and regulatory requirements for allocating the GST tax exemption under IRC § 2632 is sufficient to establish that this exemption was allocated to a particular transfer or trust. IRC § 2642(g)(2). A taxpayer who demonstrates an intent to have an inclusion ratio of zero with respect to a particular transfer or trust is deemed to have allocated to the transfer or trust sufficient GST tax exemption to produce the lowest possible inclusion ratio. The IRS is directed to consider all relevant circumstances to determine whether there has been substantial compliance, including evidence of intent in the trust instrument or instrument of transfer and any other factors as the secretary of the treasury deems appropriate. Drafters may want to consider adding an introductory clause to trusts that are intended to be GST tax exempt. In light of the new automatic GST tax exemption allocation rules for new lifetime transfers under IRC § 2632(c), the substantial compliance rules or extension-of-time rules could be best used for GST transfers occurring some time after the transferor's death. IRC § 2642(g)(2).

**Caution:** The new rule applies to transfers made after December 31, 2000, and will be automati-

cally repealed when the 2001 Tax Act sunsets on December 31, 2010. 2001 Tax Act § 901.

### Automatic Allocation of GST Tax Exemption to Indirect Skips

The 2001 Tax Act provides for automatic allocation of a transferor's GST tax exemption to certain lifetime transfers that are not direct skips but that are made to an inter vivos trust (such as an ILIT) that subsequently could have a GST with respect to the transferor (indirect skips). Such a trust is referred to as a GST trust under IRC § 2632(c)(3)(B). The rule applies to inter vivos transfers made after December 31, 2000, and to ETIPs ending after December 31, 2000. IRC § 2632(c). This new rule is in addition to the pre-2001 Tax Act automatic GST tax exemption allocation rules concerning lifetime direct skips under IRC § 2632(b). Thus, as a result of the new law, both lifetime direct skips and lifetime indirect skips are subject to the automatic GST tax exemption allocation rules.<sup>5</sup>

**Practice Point:** Trusts that were initially designed to not be GST trusts (including many typical ILITs in which the surviving spouse has a life estate if he or she survives the insured spouse) may, as a result of the new law, be classified as GST trusts. GST tax exemptions will automatically be allocated to transfers made to these trusts. Consequently, taxpayers should consider making a one-time election to permanently opt in or out of GST trust status and the GST automatic allocation rules. See below for a discussion of how to opt in or out of the GST automatic allocation rules.

**Caution:** The new automatic allocation rule to indirect skips applies to transfers made after December 31, 2000, and will be automatically repealed when the 2001 Tax Act sunsets on December 31, 2010. 2001 Tax Act § 901.

### Revised U.S. Gift Tax and GST Tax Return and Proposed Automatic GST Allocation Regulations

In 2003, the IRS revised IRS Form 709 (United States Gift [and Generation-Skipping Transfer] Tax Return) to incorporate the revisions in the GST tax rules promulgated by the 2001 Tax Act; in particular, the automatic GST allocation rules (discussed in the section above).

- Transfers to a trust that is both a nonskip person and not a "GST Trust" (as defined in IRC § 2632(c)(3)(B)) are reported on Part 1 of Schedule A, and a Notice of GST Tax Exemption Allocation must be attached to the Form 709.
- Direct skips (including transfers to a trust that is a skip person) are reported on Part 2 of Schedule A. Allocation of GST tax exemption for direct skips reported on Part 2 of Schedule A are made on line 4 of Part 2 of Schedule C.
- A new Part 3 (Indirect Skips) has been added to Schedule A of Form 709, which is to be used to report gifts to trusts that are currently subject only to the gift tax, but may later be subject to the GST tax, i.e., a GST trust. Only those gifts defined as indirect skips in IRC § 2632(c)(3)(A) (or those gifts that the donor wants to be treated as indirect skips) are to be listed in Part 3 of Schedule A. In addition, if a donor wants to treat gifts to a non-GST for purposes of the GST automatic allocations rules, the donor must attach an explanation to the Form 709.
- A new line 5 has been added to Part 2 of Schedule C of Form 709 for use in reporting the allocation of GST tax exemption to indirect skip transfers reported on Part 3 of Schedule A.
- Column C in Parts 2 and 3 of Schedule A of Form 709 is now used to *elect out* of the GST automatic allocation rules of IRC §§ 2632(b) (concerning direct skips) and (c)

(concerning indirect skips to a GST trust), and an explanation must be attached to the Form 709.

- As stated above, if a donor does not want to have the GST automatic allocation rules apply to both the current transfer and all future transfers or, if the donor wants to treat a non-GST trust as a GST trust for purposes of the GST automatic allocations rules, the donor must attach an explanation to the Form 709. On July 13, 2004, the IRS issued proposed regulations concerning the electing in and out of the GST automatic allocation rules concerning indirect skips and GST trusts (discussed above). Prop Treas Reg § 26.2632-1. The proposed regulations provide guidance on how to (1) elect out of the GST automatic allocation rules for a current transfer to a GST trust, (Prop Treas Reg § 26.2632-1(b)(2)(ii)); (2) elect out of the GST automatic allocation rules for both a current transfer and any future transfers to a GST trust, and how to terminate that election (Prop Treas Reg § 26.2632-1(b)(2)(iii)); and (3) elect to treat a non-GST trust as a GST trust and have the GST automatic allocation rules apply to both current and future transfers to that trust and terminate that election, Prop Treas Reg § 26.2632-1(b)(3).
- Split gifts are now reported on Parts 1, 2, and 3 on page 2 of Form 709, rather than being split out in the taxable gift reconciliation section.

The instructions for IRS Form 709 also state that IRS Form 709-A, U.S. Short Form Gift Tax Return, is obsolete. All gift tax returns must now be filed on IRS Form 709.

The IRS has issued Form 8892, Payment of Gift/GST Tax and/or Application for Extension of Time to File Form 709, to request an extension of time to file IRS Form 709 (and paying any applicable gift or GST taxes). Form 8892 should be used when (1) the taxpayer owes gift or GST tax

and has requested an initial extension to file his or her individual income tax return pursuant to IRS Form 4868, (2) the taxpayer has already obtained an initial four-month extension to file Form 709 pursuant to IRS Form 4868 and the taxpayer needs an additional extension of time only for his or her Form 709 (and not for his or her individual income tax return), or (3) the taxpayer needs an initial extension of time only for his or her Form 709 (and not for his or her individual income tax return).

### **IRS Permits Late Reverse QTIP Election**

The reverse QTIP election allows the decedent, rather than the surviving spouse, to be treated, for GST tax purposes, as the transferor of property for which the QTIP election is made. IRC § 2652(a)(3). Since the reverse QTIP election is not available for an IRC § 2056(b)(5) general power of appointment trust, care must be taken to make sure that the QTIP trust does not give the surviving spouse any powers that rise to this general power of appointment trust level.

### **Time for Making the Reverse QTIP Election**

Generally speaking, a reverse QTIP election for a decedent-transferor must be made on the last timely filed estate tax return (including extensions) or, if no timely return is filed, on the first late return. Treas Reg § 20.2056(b)-7(b)(4)(i).

### **Extension of Time to Make a Late Reverse QTIP Election**

A discretionary extension of time to make a reverse QTIP election is available under Treas Reg § 301.9100-1, but the extension of time is not available to modify automatic allocation of the GST tax exemption. Treas Reg § 26.2632-1(d). However, Rev Proc 2004-47, 2004-32 IRB 169 (Aug 5, 2004), provides a simplified alternate method (which is less expensive—no user fee is charged for requests filed under this revenue procedure) for making a late testamentary reverse QTIP election for a deceased transferor. This alternate method, which became effective August

9, 2004, may be used in lieu of the private letter ruling process, if the requirements of the revenue procedure are met.<sup>6</sup> If the IRS grants the relief, the deceased transferor's unused GST tax exemption will be automatically allocated to the reverse QTIP trust (or reverse QTIP property, as the case may be) effective on the decedent's date of death and at the property's value as finally determined for federal estate tax purposes. A grant of relief (1) does not extend the time to make an allocation of any remaining GST tax exemption, (2) does not include or grant permission to retroactively allocate the decedent's remaining GST tax exemption, and (3) does not include or grant permission to make a late severance of a trust included in the decedent's gross estate into two or more trusts (such as the severance of a single QTIP trust into a reverse QTIP trust and a non-reverse QTIP trust).

**Practice Point:** A reverse QTIP election is effective as to the whole QTIP trust in question. A partial reverse QTIP election (as to part of a QTIP trust) is not permitted. Treas Reg § 26.2654-1(b)(1). Therefore, if the deceased transferor's unused GST tax exemption amount is less than the single QTIP trust, it will be necessary for the single QTIP trust to first be divided (severed) into a reverse QTIP trust and a nonreverse QTIP trust prior to the allocation of the deceased transferor's GST tax exemption. Because the revenue procedure does not authorize a late severance of the QTIP trust, it may be possible to make a qualified severance of the QTIP trust prior to requesting a late reverse QTIP election under the revenue procedure. A qualified severance of a trust may be made at any time. IRC § 2642(a)(3)(C). See above.

### Predeceased Parent Rule Regulations Update

The predeceased parent rule provides that if a skip person's ancestor, who is a descendant of the transferor (for GST tax purposes), prede-

ceases the transferor, the skip person moves up in generation assignments (vis-à-vis the transferor). Furthermore, if a beneficiary who is a descendant of the transferor (for GST tax purposes) dies within 90 days after the date of the GST transfer (e.g., dies within 90 days of the death of the transferor), the deceased beneficiary's child will move up a generation assignment (vis-à-vis the transferor) and be placed in the same generation assignment held by his or her (now deceased) parent vis-à-vis the transferor. IRC § 2651(e). The predeceased parent rule also works in conjunction with the 90-day survivorship rule under Treas Reg § 26.2612-1(a)(2)(i), which provides, "A living descendant who dies no later than 90 days after the subject transfer is treated as having predeceased the transferor to the extent that either the governing instrument or applicable local law provides that such individual shall be treated as predeceasing the transferor."

This survivorship rule expands the "predeceased parent rule" of IRC § 2651(e), by allowing a grandchild to move up into his parent's generation for GST tax purposes if the parent dies within 90 days of a transferor. Expanded by the Tax Reform Act of 1997 (TRA 1997), the "predeceased parent rule" now applies to taxable terminations, taxable distributions, and direct skips and, under certain circumstances, includes grandnieces and grandnephews as permissible skip persons. (Note: The regulations are in the process of being revised to reflect TRA 1997. Before TRA 1997, only direct skips were eligible for the predeceased parent rule. Thus, current Treas Reg § 26.2612-1(f), example 7, which has not been updated to reflect the changes brought about by TRA 1997, is inaccurate as concerns the "predeceased parent rule," but that example is in the process of being updated under Prop Treas Reg § 26.2612-1(f), example 7, which was issued on September 3, 2004.) That same day, the IRS also issued proposed regulations concerning the predeceased parent rule under IRC § 2651(e). See Prop Treas Reg §§ 26.2651-1, .2651-2, .2651-3. The proposed regulations dis-

cuss the 90-day survival rule, how to determine the date of a transfer for applying the predeceased parent rule, and when certain adopted individuals (and their spouses and descendants) are to be reassigned to a different generation for GST purposes.

### Conclusion

Although the GST tax is scheduled to be repealed in 2010, the nation's current fiscal crisis, the trade deficit, the war on terrorism, and the looming Social Security and Medicare crisis all combine to provide additional uncertainty about the likelihood of a permanent repeal of this tax. Therefore practitioners still need to consider the impact the GST tax may have on a client's estate plan. The GST tax may be well alive in 2011, and planning today will help to minimize the tax.

### Notes

1. A testamentary trust (whether established under a will or under a decedent's previously revocable living trust), established by a person who dies in 2010 when there is no federal estate tax or GST tax, should be able (theoretically) to make subsequent distributions to skip persons that are not subject to GST tax, since there will be no transferor under IRC § 2652(a)(1) with respect to the testamentary trust. An inter vivos trust established in 2010 when the GST tax will not be in effect, however, will probably see its subsequent distributions to skip persons be subjected to GST tax, since there will be a transferor when the trust is established, due to the gift tax being in effect in 2010. How does a transferor allocate the GST tax exemption to such a trust? Would he or she use a prospective protective election? Will the late allocation rules apply? Will the automatic allocation rules apply? These questions remain unanswered at the moment.

2. See Sebastian V. Grassi, *Coping with the Proposed GST Tax Qualified-Severance Regulations (with Drafting Examples)*, *Prac Tax Law*, Winter 2005, at 21, for a more detailed discussion of the qualified severance rule and its proposed regulations.

3. Allocation of GST tax exemption is not effective until the close of the ETIP. IRC § 2642(f). An ETIP is the period during which the trust property would be included in the gross estate of the transferor or the transferor's spouse if either were to die. Treas Reg § 26.2632-1(c)(2).

4. The notice of allocation must contain the following

information: (1) a clear identification of the trust, including the trust's taxpayer identification number, as defined in IRC § 6109 and the regulations under it, when applicable; (2) the value of the property transferred as of the date of the transfer (adjusted to account for split gifts, if any); (3) the amount of the taxpayer's unused GST exemption at the time the notice of allocation is filed (a taxpayer must have unused GST exemption at the time the notice of allocation is filed); (4) the amount of GST exemption allocated to the transfer; (5) the inclusion ratio of the trust after the allocation; and (6) a statement that all of the nine requirements (discussed above) of § 3.01 of Rev Proc 2004-46 have been met. The U.S. gift tax return and its notice of allocation, if sent by mail, should be sent to Internal Revenue Service Center, Cincinnati, OH 45999. If the gift tax return is sent by private delivery service, such as FEDEX, it should be sent to Internal Revenue Service Center, 201 W. Rivercenter Blvd., Covington, KY 41012.

5. See §4.22 of *A Practical Guide to Drafting Irrevocable Life Insurance Trusts* for a detailed discussion (with examples) of the new GST tax exemption allocation rules.

6. Relief is available under Rev Proc 2004-47, if, on the date of the filing of the request for relief, the following requirements are met: (1) a valid QTIP election under IRC § 2056(b)(7) was made for the property or trust on the federal estate tax return filed for the decedent's estate; (2) the reverse QTIP election was not made on the estate tax return as filed because the taxpayer relied on the advice and counsel of a qualified tax professional and that qualified tax professional failed to advise the taxpayer of the need, advisability, or proper method to make a reverse QTIP election; (3) the decedent has a sufficient amount of unused GST tax exemption, after the automatic allocation of the GST tax exemption under IRC § 2632(e) and Treas Reg § 26.2632-1(d)(2), to result in a zero-inclusion ratio for the reverse QTIP trust or property; (4) the decedent's estate is not eligible under Treas Reg § 301.9100-2(b) for an automatic six-month extension to file the decedent's estate tax return; (5) the surviving spouse has not made a lifetime disposition of all or any part of the qualifying income interest for life in the QTIP trust or property; (6) the surviving spouse is alive or no more than six months have passed since the death of the surviving spouse; (7) the decedent's estate files with the IRS a request for an extension of time to make a reverse QTIP election and the request has a cover sheet that states at the top of the document, Request for Extension Filed Pursuant To Rev Proc 2004-47; (8) the following items are attached to the request for relief: (a) copies of Parts 1 through 5 and Schedule M of the decedent's estate tax return as filed with the IRS; (b) a properly completed Schedule R, which is required to make a reverse QTIP election; (c) a statement describing why the reverse QTIP election was

not made on the decedent's estate tax return as filed; (d) a statement affirming that all of the requirements in items (1)–(6) have been met; (e) a dated declaration, signed by the executor of the decedent's estate, stating, "Under penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented in support of this election are true, correct, and complete. In addition, all attachments provided in support of this request for relief are true and correct copies of the original documents"; and (f) a signed statement from the qualified tax professional on whom the taxpayer relied when preparing the decedent's original estate tax return. The statement should establish the tax professional's qualifications as a qualified tax professional and must include a dated declaration stating, "Under penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented in support of this request for relief are true, correct, and complete." The request for relief is to be sent to the Internal Revenue Service Center, Cincinnati, OH 45999 (or if sent by private delivery service [such as FEDEX], Internal Revenue Service Center, 201 W. Rivercenter Blvd., Covington, KY 41012).

Relief under the revenue procedure is not available if (1) the transfer is to an inter vivos QTIP trust or (2) the surviving spouse is not a U.S. citizen.



Sebastian V. Grassi, Jr., of Grassi & Toering, PLC, Troy, Michigan, is a member of the Christian Legal Society, where he served on its national board of directors. He is a fellow of the American College of Trust and Estate Counsel and is listed in *The Best Lawyers in America*. He is also a member of the Michigan Probate and Estate Planning Council. Sebastian's practice emphasizes business law, estate planning, probate, and related real estate. Sebastian has published over 65 articles on business law, estate planning, and tax matters in *ABA Probate and Property*, *ACTEC Journal*, *Estate Planning*, *Journal of Practical Estate Planning*, *The Journal of Taxation*, *The Journal of Taxation of Estates and Trusts*, *Michigan Bar Journal*, *Michigan Probate and Estate Planning Journal*, *Michigan Tax Lawyer*, *Probate Practice Reporter*, *Tax Management Estates, Gifts and Trusts Journal*, *Practical Tax Strategies*, *The Practical Lawyer*, *The Practical Tax Lawyer*, and *Tax Ideas*. Sebastian is also a frequent lecturer for the Institute of Continuing Legal Education and serves on its Probate and Estate Planning Advisory Board. Sebastian is the author of *A Practical Guide to Drafting Marital Deduction Trusts (with Sample Forms and Checklists)* published by ALI/ABA (<http://www.ali-aba.org/aliaba/BK36.asp>), *A Practical Guide to Drafting Irrevocable Life Insurance Trusts (with Sample Forms and Checklists)* published by ALI/ABA (<http://www.ali-aba.org/aliaba/BK28.asp>), and *Understanding Your Eternal Estate Plan* (<http://firms.findlaw.com/GTPLC/memos.htm>).

Sebastian can be reached at [www.grassiandtoering.com](http://www.grassiandtoering.com) or (248) 269-2020.

## The Facts About Organ Donation

By Diane Russell

*Editor's note: In our role as trust and estate lawyers, we frequently prepare medical powers of attorney for clients. Clients may ask about organ donation. Do you have enough facts to answer such questions? Diane Russell, a transplant social worker at St. John Hospital, Detroit, and past president of the Donate Life Coalition of Michigan, has graciously contributed the following article about organ donation. For those of you who do not have a health care power of attorney form, a copy of the Foster Zack & Lowe health care power of attorney follows this article. It includes a provision permitting the patient advocate to make organ donations. In the next issue, Michigan Court of Appeals Judge Kurtis T. Wilder, who chairs Secretary of State Terri Lynn Land's Organ and Tissue Advisory Committee, will address how legal practitioners can tie organ and tissue donation into their practice.*

The health care vocabulary is so familiar, much like our routines: smoking, obesity, high blood pressure, and diabetes. We know the acronyms and are familiar with the names of the threats: HIV, AIDS, SARS, West Nile; there is the lead poisoning of children; then there are Parkinson's and Alzheimer's, and the many dreaded cancers, including breast, cervical, prostate, and colon. These threats touch our families, our coworkers, our friends, our neighbors, and us, day after day after day. There is so much out there; it is very easy to lose focus.

One of these health crises in Michigan and in our nation—one that, so far, refuses to subside—is the number of people who are waiting for their own medical miracle through organ and tissue transplant.

In your roles as counselors and community leaders, you have a huge opportunity to influence this discussion and focus on the need for organ and tissue donation.

And there are some easy ways you can lend a hand and your voice.

The United Network for Organ Sharing (UNOS) is a nonprofit scientific and educational organization that administers the nation's only organ procurement and transplantation network. Congress established it in 1984. The great news from UNOS is that in 2003, there were 25,459 transplants from 13,270 donors. Those numbers have been climbing every year. However, the sad, often tragic, part of this report is that for each person who receives a transplant, two more are added to the national waiting list. Today, more than 88,400 Americans wait for their moment, their opportunity for a better, healthier life. In 2003, unfortunately, 6,103 patients died waiting for organs.

Here, Gift of Life Michigan, based in Ann Arbor, serves as our state's organ procurement organization. They track the human numbers that are our families, friends, and neighbors awaiting a transplant. And when that special moment arrives, Gift of Life Michigan coordinates the arrangements. As of May 1, Gift of Life Michigan has 2,781 patients on its waiting list. More than 77 percent of them—2,144 people—wait for a kidney transplant. We have 47 people waiting for a heart, 80 waiting for a lung, 390 waiting for a liver, and 120 waiting for a pancreas. So far this year, 51 people have died waiting.

What can you do to help? First, understand the facts. Grasping facts such as the following can be the easiest part of responding to this crisis.

- There should be no mystery about discussing organ and tissue donation. However, some have an innate fear of the unknown that comes into play with the concept of death. Part of it is that people do not want to contemplate death. Part of it is that when they do, they have trou-

ble imagining themselves minus some organs.

On the practical side, quite simply, when we die we're not using those organs and tissue anymore. We're done with them. We certainly cannot take them with us! One illustration of our changing culture comes from the Cremation Association of North America. This organization states that the cremation rate in the United States has grown from 6 percent in 1975 to more than 26 percent in 2002 and is trending toward a 43 percent rate by 2025.

So why not help another fellow human being who desperately needs the organ or tissue? Why should a strong, healthy muscle, such as a heart, be silenced and wasted? A grandpa, who at one time could not lift his tiny granddaughter onto his lap because his heart was too weak, now carries her around because he has rediscovered an active life with a new heart. And he can do so much more, such as playing 18 holes without a cart; and, years from now; dancing with his granddaughter at her wedding.

- As a patient, no one will be hovering over you to recover your organs. Your medical team, working to save your life, is separate from the transplant team. Gift of Life Michigan is not contacted until you are declared brain-dead by a separate medical treatment team.
- There is no cost to the donor's family or estate for organ and tissue donation. Costs are borne by those receiving the organs and tissue.
- All major religions support organ and tissue donation. For example, the *Catechism of the Catholic Church* calls organ donation after death "a noble and meritorious act ... to be encouraged as an expression of generous solidarity" (§ 2296). Organ donation is permitted

when an organ is needed for a specific, immediate transplant.

In August 2000, Pope John Paul told attendees at the International Congress on Transplants in Rome, "Transplants are a great step forward in science's service of man, and not a few people today owe their lives to an organ transplant. Increasingly, the technique of transplants has proven to be a valid means of attaining the primary goal of all medicine—the service of human life. ... There is a need to instill in people's hearts, especially in the hearts of the young, a genuine and deep appreciation of the need for brotherly love, a love that can find expression in the decision to become an organ donor."

In the Jewish religion, it is a great mitzvah to donate organs to save another person's life. As the rabbis point out, organ donation is not necessarily limited to dead people. Someone who can afford to spare a kidney, for example, may donate one to someone in need.

- The donor's body is not disfigured. When the donor is deceased, surgery is performed with the same tenderness and skill as if the donor were alive. And, as with most other surgical procedures, when you look upon the deceased lying peacefully in his or her coffin, you would never know this person had hip replacement surgery 15 years ago or an appendectomy as a child. There is the potential that a donor can help 50 others through organ and tissue donation.

Every day, hundreds of people in our country are in need of other tissues, such as heart valves, veins, tendons, bone, and corneas, in order to survive or maintain their quality of life. According to UNOS, there were more than 900,000 tissue transplants and 46,000 cornea

transplants performed in 2003.

- The advances in medical science are remarkable. The surgical procedures are constantly improving, the drugs to suppress organ rejection work, and the organ and tissue donation success rates are astounding.
- Cost savings to health insurance and Medicaid are substantial. For example, when comparing the cost of dialysis to health care costs after a kidney transplant, the difference is a reduction of more than \$50,000 annually per patient. I have a friend from the National Kidney Foundation of Michigan who will soon be celebrating the 20 anniversary of her transplant. She refers to herself the “million dollar baby.”
- We can also work to build Michigan’s donor registry, housed at Gift of Life Michigan. The secretary of state recruits for the donor registry by mailing information with every new driver’s license or state ID card. However, much more could be done to build the registry, as it currently approaches one million names, or about eight percent of our population. There are numerous opportunities for organ and tissue donor awareness drives and events.

Under legislation currently making its way through the state legislature (HBs 4082, 4469, and 4470, and SB 301), the secretary of state in 2007 would begin asking people about being on the donor registry as they renew their licenses. People who agree would have a heart logo, signifying their willingness to be on the registry, placed on the face of their license or ID card.

A second important step is go to the Web site for Gift of Life Michigan or the secretary of state and enroll in the donor registry. Then be sure to fill out the back of your driver’s license and, most

important, tell your family and friends.

In my experience with the families of donors and the recipients, it is the sense of accomplishment that matters the most. It is the giving or the receiving of such a precious gift. And it is not just the recipients who benefit, but their whole family.

People return to work, they experience the beauty of restored vision, they go out without carrying an oxygen tank, they play golf and swim, they even have more children or get to meet their new grandchildren, and go to the graduations and weddings of these offspring. They resume normal lives, always enjoying the moment; many having never felt better in their lives.

You have the power to donate life. It does not take an extraordinary effort to become a donor after our deaths, but it allows us to become heroes to so many. And a sense of peace comes with the knowledge that we’ve truly done the right thing.

For more information, try some of these Web sites, which also offer links to many other organ and tissue donor sites:

Donate Life Coalition of Michigan:

[www.donatelifemichigan.org](http://www.donatelifemichigan.org)

Gift of Life Michigan:

[www.giftoflifemichigan.org](http://www.giftoflifemichigan.org)

United Network for Organ Sharing:

[www.unos.org](http://www.unos.org)

Michigan Secretary of State:

[www.michigan.gov/sos](http://www.michigan.gov/sos)

Midwest Eye Banks in Michigan:

[www.mebtc.org](http://www.mebtc.org)

**DURABLE POWER OF ATTORNEY—  
HEALTH CARE**

I, \_\_\_\_\_, a resident of Michigan, designate \_\_\_\_\_ and \_\_\_\_\_, and each of them, acting alone, my agent (called “Agent” in this document and to include “health care surrogate”, “patient advocate” and similar terms) to make care, custody and medical treatment decisions on my behalf including, but not limited to, consenting to my placement in a hospital or other similar facility for care, to consent for my medical, surgical and dental treatment, and to determine whether life support systems should be withheld or withdrawn from me. My Agent may exercise this authority only when I am unable to participate in medical treatment decisions.

If I am suffering from physical or mental disability, and there is no reasonable expectation of my recovery, I want to be allowed to die and not kept alive by artificial means or heroic measures, including, but not limited to supplying food or water by a tube into my stomach or by intravenous tubes, cardiopulmonary resuscitation to start my heart beating, and use of a respirator if I cannot breathe. I fear the indignities of deterioration, dependence and hopeless pain more than I fear death. I ask that medication be administered to me to alleviate suffering even though the medication may hasten the time of my death. I acknowledge that a decision to withhold or withdraw treatment could or will allow my death.

I also give my Agent the authority to make anatomical gifts of all or part of my body. This authority remains exercisable after my death.

Any lawful act performed by my Agent shall be binding upon any provider of health care, and upon my heirs, beneficiaries, devisees, personal representatives and assigns. I authorize all health care providers and plans, insurers and persons

having protected health information about me to disclose to my Agent, upon request, all individually identifiable health information about me, under the Health Insurance Portability and Accountability Act of 1996, as amended, and any other applicable statute or rule. I reserve the right to amend or revoke this Durable Power of Attorney—Health Care at any time; provided, any person or entity dealing with my Agent may rely upon this Durable Power of Attorney—Health Care until actual receipt of an executed copy of its amendment or revocation.

Any reproduced copy of a signed original shall be deemed to be an original counterpart of this Durable Power of Attorney—Health Care. This Power of Attorney—Health Care shall not be affected by my disability or by the lapse of time.

I voluntarily have signed and delivered this Durable Power of Attorney—Health Care on \_\_\_\_\_, 2005.

Executed in the presence of and witnessed by:  
\_\_\_\_\_ and \_\_\_\_\_

Acknowledged before me in \_\_\_\_\_ County, Michigan, on \_\_\_\_\_, 2005, by \_\_\_\_\_.

Notary Public \_\_\_\_\_ County, Michigan

My commission expires: \_\_\_\_\_

Acting in the County of \_\_\_\_\_  
This instrument prepared by:

\_\_\_\_\_

**PROPOSED AMENDMENTS TO  
PROBATE AND ESTATE PLANNING SECTION BYLAWS  
ARTICLE II—MEMBERSHIP**

The following amendment to Article II of the Probate and Estate Planning Section Bylaws was approved by the Probate and Estate Planning Council on November 20, 2004, and will be voted on for adoption by the membership at the annual meeting scheduled for 10:00 a.m. on September 24, 2005, at the MSU University Club, East Lansing, Michigan.

The amendments are as follows:

“Article II of the Bylaws of the State Bar of Michigan Probate and Estate Planning Section shall be amended, effective \_\_\_\_\_, 2004, in the following respects:

**SECTION 1.** ~~Active, members, inactive, law student, members, affiliate members, and emeritus members~~ of the State Bar of Michigan may become members of the Section by paying to the ~~State Bar of Michigan~~ Section dues in an amount ~~not to exceed \$25~~, as may be determined ~~from time to time~~ by the Council, and shall become members of the Section for the current fiscal year. Thereafter, dues shall be payable in advance at the beginning of the fiscal year of the State Bar of Michigan. Any member of the Section whose annual dues shall be more than six months past due shall cease to be a member of this Section. Members enrolled and whose dues are paid shall constitute the membership of the Section. All lawyers admitted to practice in Michigan shall be considered members of the Section until the end of the fiscal year of the State Bar of Michigan following the year of their admission to practice and shall not be required to pay dues until after that time.

**SECTION 2.** ~~Law Student Section members of the State Bar of Michigan may become members of the Section by paying to the State Bar of Michigan dues equal to 1/2 those paid by active members and shall become Law Student Section members of the Section for the current fiscal year. Thereafter, dues shall be payable in advance at the beginning of the fiscal year of the State Bar of Michigan. Law Student Section members shall not be eligible to vote or hold office. Only active members of the State Bar of Michigan who are members of the Section shall be eligible to vote or hold office.~~

**SECTION 3.** ~~Law student, affiliate, and emeritus members and [add other classes] active members of the Probate Section who attain age 70 shall thereafter pay dues equal to 1/2 those paid by active members. Senior active members shall be eligible to vote and hold office.”~~

## Departments

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

By Hon. Phillip E. Harter

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

#### Power of Appointment— Exercise—Will—Trust

*Paine v Kaufman (In re Estate of Reisman)*, No 252172, 2005 Mich App LEXIS 1271 (May 24, 2005).

The court of appeals succinctly stated the facts of this case as follows:

Geraldine G. Reisman established a revocable living trust, which in part created a marital trust for the benefit of her husband, Samuel Reisman. In the marital trust, Geraldine provided:

Upon the death of [Samuel], ... [Samuel] shall have a limited power of appointment, exercisable only by the Last Will and Testament of [Samuel] and only by specific reference to such power, to appoint the entire principal and undistributed income ... to a class of persons consisting of [Geraldine's children] and the descendants of [Geraldine's children] and subject to any conditions, trusts and restrictions as may be determined by [Samuel].

In the Third Codicil to his Last Will and

Testament, Samuel provided that if he was survived by two of his five children, petitioners' Elliot Michael Reisman and Shelley Naomi Paine, he was exercising the power of appointment by appointing all the property to the trustee of his revocable living trust, and directing that it be distributed pursuant to Section 5 his trust. Further, he provided:

It is my intention that the property appointed by me under this Section shall not be an asset of my probate estate, or be subject to administration by the personal representative of my will, or otherwise be treated for any purpose as if it were an asset of my probate estate.

Section 5 of Samuel's revocable trust provided for distribution into issue trusts for his surviving children and, on a per capita basis, to descendants of his deceased children. However, concurrent with his third codicil, Samuel executed the sixth amendment to his revocable living trust, which amended section 5 to state that if petitioners, but not their living descendants, survived him, they should be treated as having predeceased him.

Thus, the effect of the Third Codicil and the amendment of section 5 of the trust were to bypass petitioners in favor of petitioners' children.

Petitioners challenged Samuel's exercise of the power of appointment. The probate court held that Geraldine had granted Samuel a special limited power of appointment, as defined in MCL 556.112(i), and not a general power of appointment, as defined in MCL 556.112(h). The court further held that the limited power of appointment designated the permissible appointee to be a class of persons consisting of

Geraldine's children and their descendants, and that by "appointing the property to the Trustee of his own revocable living trust, or his own estate, rather than to the limited class specified in Geraldine[s] Revocable Living Trust," Samuel had exercised a general power of appointment. The court concluded that the exercise of the power of appointment was invalid.

The court of appeals reversed the trial court. It discussed that powers of appointment are of two types: general powers and special powers. A general power is "a power exercisable in favor of the donee, his estate, his creditors or the creditors or his estate, whether or not it is exercisable in favor of others." MCL 556.112(h). A special power means "a power exercisable only in favor of one or more persons not including the donee, his estate, his creditors or the creditors of his estate." MCL 556.112(i). In this case, Geraldine's revocable living trust created a marital trust upon her death, which in turn had a clause granting Samuel "a limited power of appointment" over the assets remaining in the marital trust, which could only be exercised in his will and only by specific reference to the power. The power also stated that Samuel could only distribute the assets to Geraldine's children and their descendants but that the distribution could be "subject to any conditions, trusts and restrictions as may be determined by Samuel." They concluded that under the statute and trust, Samuel clearly had a special power of appointment with the additional limitations that it could only be effectively exercised in his will and that it must specifically refer to the grant of power.

Samuel exercised his special power of appointment in the third codicil to his will by the following language:

Under Section 3 of the Geraldine G. Reisman Revocable Living Trust Agreement dated February 12, 1987 executed by my wife as Settlor and Initial Trustee, as amended, of which Jack Kaufman and I now are Trustees,

a separate trust named the Marital Trust was created at my spouse's death. Under Section 3D of that trust agreement, I am given testamentary power of appointment as to all property constituting the Marital Trust at the time of my death. If my son, Elliot Michael Reisman, or my daughter, Shelley Naomi Paine, survives me, I hereby exercise that power by appointing all property over which I have power of appointment under that Section 3D to the then acting Trustee(s) of the Revocable Trust referred to in Section 4A of this Last Will and Testament, to be distributed pursuant to Section 5 thereof.

This exercise of the special power of appointment transferred the assets in the marital trust to the then acting trustee of his own revocable living trust subject to the condition that the trustee distribute the assets according to the terms stated in section 5 of Samuel's revocable living trust. Section 5 of Samuel's living trust creates issue trusts for each of his children or their heirs, if they should predecease him, and distributes the assets of the marital trust to those trusts equally. As amended, section 5 treats petitioners as though they had predeceased Samuel. The court observed that by its plain language, this transfer did not pass any interest in the marital trust property to Samuel or his estate as opined by the trial court. They then addressed the question of whether Samuel could effectively exercise his special powers of appointment by transferring the marital assets to an individual (trustee) who was not a member of the specified class of possible recipients, with instruction that this individual distribute those assets to members of the class, according to specific terms.

The court held that, absent a restriction placed on the limited power of appointment by Geraldine, Samuel could exercise the power in favor of the members of the class in any way that he could have had he owned the property, including the use of a trust. The fact that the trustee named

by Samuel is not a member of the class of beneficiaries contemplated in Geraldine's grant of power will not defeat Samuel's exercise of that power. Therefore, the fact that Samuel effected the transfer via a trust does not by itself constitute an invalid exercise of power.

The court acknowledged that a transfer through a trust does not necessarily mean that he could do so through his own revocable living trust, since this could lead to benefiting his own estate and creditors. Petitioners had also argued it could expose the marital trust assets to expenses incurred in the operation of the revocable trust. The court, however, observed that when Samuel exercised his power of appointment, he specifically transferred the marital trust property to the trustee of his revocable living trust, with instruction that those assets were not to become part of his estate but were to be distributed pursuant to section 5 of his trust. This language effectively stripped the trustee of any authority to use those particular assets for anything other than distribution pursuant to that section. The court further held that petitioners' argument concerning administrative or estate expenses was without merit, since, pursuant to MCL 700.7501(4), the marital trust assets may not be invaded by third parties for the payment of administration expenses, claims against Samuel's estate, or an allowance. The court also rejected petitioners' argument that Samuel's exercise of the power failed because it subjected the marital trust assets to possible adverse tax consequences without merit. The court observed that the potential for adverse tax consequences attaches to every transfer of property, no matter how well structured, and that therefore, absent clear language in the grant of power instructing the donee to avoid certain tax consequences, it would not place such a limitation on the exercise of a power of appointment.

This is a good case to read. It is a technical case that is very dependent on specific facts. While the court holds that the exercise of a power of appointment may be accomplished

through a trust, the language of the exercise and provisions of the trust may still cause the power to fail if the transferred assets have the effect of benefiting the estate or the creditors of the individual exercising the power.

### **Gift—Rents—Statute of Frauds— Summary Disposition**

*Comerica Bank v Goldman (In re Handelsman)*, No 252205, 2005 Mich App LEXIS 1149 (May 19, 2005).

Petitioner, the successor trustee of the Sarah Handelsman Trust, claimed that Handelsman gave Lowell Schultz the right to receive the upstairs rents from the second floor of a two-story commercial building that two Handelsman family trusts owned in 1985, before she was found to be incompetent in 1995. Petitioner moved for summary disposition because there was no genuine issue of material fact. Respondent opposed the motion, claiming (1) that whether Handelsman intended the transfer of rents as a gift remained a genuine issue of fact and (2) that the purported gift was void under the statute of frauds, because it involved the transfer of an interest in real property without a writing signed by the donor. The trial court granted summary disposition because respondent failed to produce evidence to refute petitioner's evidence and ruled that the statute of frauds did not apply. Respondent appealed.

The court of appeals affirmed the trial court. As to the granting of summary disposition, they noted that petitioner submitted two items of evidence to show that Handelsman made a gift of the upstairs rents to her son-in-law, Schultz. First, an affidavit by a Comerica trust department employee was submitted. Second, the deposition of the attorney who drew up the Sarah Handelsman Trust was submitted. The court of appeals observed that a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. Respondent attacked the credibility of petitioner's evidence and made several arguments against petitioner's

position. Since this was a purported gift, the court set forth the three elements of a valid gift: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession; and (3) the donee must accept the gift, which is presumed if the gift is beneficial to the donee. Respondent conceded that the upstairs rents were delivered to and accepted by Schultz. Therefore, the only remaining issue as to gift was whether Handelsman intended to transfer the upstairs rents gratuitously to Schultz. Respondent attacked the credibility and consistency of petitioner's witnesses because of bias and because petitioner gave a contrary position regarding part of the upstairs rents in a prior proceeding. However, the court of appeals emphasized that the issue was not how others viewed the situation but rather what Handelsman intended. They opined that it was undisputed that dating back to 1985 Handelsman wanted Schultz to have the upstairs rents. Respondent offered no evidence of her own—as opposed to evidence attacking petitioner's evidence or credibility—to support her claim that Handelsman did not intend to give the rents to Schultz. While the court acknowledged that summary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind, they held that, even giving the benefit of reasonable doubt to respondent, reasonable minds could not differ and would find that Handelsman intended the upstairs rents as a gift to Schultz. Therefore, summary disposition was proper.

As to the issue of whether the statute of frauds applied to a gift of rents, the court of appeals held that the statute of frauds did not apply to the oral gift of rental income. They reasoned that when an oral agreement relates to the money generated by real property rather than to creating or transferring an interest in the real estate itself, the statute of frauds is not implicated.

### **Wills—Election Against Will— Election of Incapacitated Spouse**

*Taverniti v Gorski (In re Estate of Eggleston)*, No. 249957, 2005 Mich App LEXIS 1056 (April 28, 2005).

Max D. Eggleston and Florence L. Downs Eggleston were married in 1999. Max Eggleston suffered a series of strokes in June 2002, which left him paralyzed on his left side. He was also diagnosed with dementia. He was transferred to a nursing home facility selected by his wife and daughter. On July 24, 2002, Florence Eggleston died. Her will was dated July 27, 1990, and did not provide for Max Eggleston. In the fall of 2002, Max Eggleston was diagnosed with lung cancer. The lung cancer was inoperable, and he was not receiving treatment for the disease.

Petitioner, the daughter, guardian, and conservator of Max Eggleston, sought the election against the will of Florence Eggleston. An evidentiary hearing was held. Kimberly Cosgrove, a CPA and granddaughter of decedent, testified that Max Eggleston's expenses exceeded his monthly income. She calculated that Max Eggleston's assets were sufficient to provide for his care for 19.43 months without the sale of any assets. With the sale of assets, his resources were sufficient for his care for 53 months. Attorney Douglas Chalgian gave an expert opinion that the resources were sufficient to meet Mr. Eggleston's needs and that, if additional money were funneled into his estate, it would likely pass to his heirs. Dr. Fred Isaacs, Mr. Eggleston's treating physician, estimated that Mr. Eggleston had between six months and two years to live. Petitioner submitted a life-expectancy table prepared by the Internal Revenue Service showing that a man Mr. Eggleston's age had a 14.8-year life expectancy. At the conclusion of the hearing, the probate court denied petitioner's request to exercise the election. Petitioner appealed.

The court of appeals affirmed the probate court. It cited MCL 700.2202, which reads in part as follows:

(2) The surviving spouse of a decedent who was domiciled in this state and who dies testate may file with the court an election in writing that the spouse elects 1 of the following:

(a) That the spouse will abide by the terms of the will.

(b) That the spouse will take 1/2 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by 1/2 of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death.

(c) If a widow, that she will take her dower right under sections 1 to 29 of 1846 RS 66, MCL 558.1 to 558.29.

....

(5) In the case of a legally incapacitated person, the right of election may be exercised only by order of the court in which a proceeding as to that person's property is pending, after finding that exercise is necessary to provide adequate support for the legally incapacitated person during that person's life expectancy.

Petitioner first alleged that the probate court abused its discretion by failing to allow the election. Petitioner argued that the probate court should have relied on the mortality tables. The court of appeals rejected that argument, holding that when specific information regarding the health and life expectancy of the legally incapacitated person is available, the trier of fact may properly consider the evidence and the trier of fact resolves the factual issues surrounding the use of the mortality tables. In the present case, there was evidence showing that Mr. Eggleston's condition was such that the court

could find he had a much shorter life expectancy than given in the mortality tables. The evidence indicated that the resources currently and potentially available were adequate to provide for Mr. Eggleston during his lifetime.

Petitioner also alleged that MCL 700.2202(5) was unconstitutional because it treats legally incapacitated individuals differently from other individuals. The court of appeals found the statute to be constitutional. They held the legislation to be reasonably related to a legitimate governmental purpose. It acknowledges the difference in motivation and theory for the election by the surviving spouse in the context of a legally incapacitated person. Since a fiduciary making the election may be motivated by personal gain, as opposed to the strict needs of the legally incapacitated person, the legislature saw fit to require the court to make the election when the spouse is incapacitated. The court summed up as follows:

Thus, in the present case, the probate court was presented with evidence that the resources available and subsequent liquidation of assets were sufficient to maintain Max's care during his lifetime. Furthermore, the probate court was presented with evidence that funneling additional money into Max's estate could merely result in a windfall to Max's heirs. Thus, the legislation treating legally incapacitated individuals differently is designed to ensure that financial decisions are made with regard to need and adequacy, and are not tainted by an improper financial motive. The probate court properly determined that the statute at issue is constitutional.

This is a good case. It reminds us that, when dealing with an incapacitated spouse, the right of election may only be exercised by order of the court after finding that exercise is necessary to provide adequate support for the legally incapacitated person during that person's

life expectancy. The case demonstrates what evidence and factors a court may consider in reaching its decision.

**Amendment to MCR 5.784 to Broaden the Rule Concerning Proceedings for Durable Powers of Attorney for Mental Health Treatment**

1. Amends MCR 5.784 to broaden its scope to include proceedings concerning durable powers of attorney for mental health treatment.
2. Effective: March 8, 2005.
3. Adds language to the rule that acknowledges the change in the statute that allows a patient advocate to make mental health treatment decisions, effective January 3, 2005.



Hon. Phillip E. Harter is a judge with the Calhoun County Probate Court, Battle Creek, Michigan. He was chairperson of the Michigan Supreme Court Task Force on Guardianships and Conservatorships and a member of the Michigan Supreme Court bar examination staff (1976-1991). He 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. He is the chairperson of the State Bar of Michigan Probate and Estate Planning Section Council, former chairperson of the Probate Law Committee, and former chairperson of the Probate Rules Committee of the Michigan Probate Judges Association. He 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**

*The following is some of the new EPIC legislation, effective September 1, 2004:*

**2004 PA 314**

**MCL 700.2301**

... if a testator's surviving spouse marries the testator after the testator executes his or her will, the surviving spouse is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that is not any of the following:

(a) Property devised to or in trust for the benefit of a child of the testator who was born before the testator married the surviving spouse and who is not the surviving spouse's child.

(b) Property devised to or in trust for the benefit of a descendant of a child described in subdivision (a).

(c) Property that passes under section 2603 or 2604 to a child described in subdivision (a) or to a descendant of such a child.

**MCL 700.2902**

(2) A disclaimer may be of a specific asset, an interest in a specific asset, a pecuniary amount, a fractional or percentage share, or a limited interest or estate." A power of attorney that grants "the agent the authority to do whatever the principal could do, or words of similar effect, includes the authority to disclaim, unless the authority to disclaim is specifically excluded or limited.

**MCL 700.7303**

Adds a new section (3)(d) describing a statement of account—a report of the trustee that shall “list the trust assets, if feasible giving their market values, the trust liabilities, receipts, and disbursements, and state the source and amount of the trustee’s compensation.”

*The following are other laws worthy of notice:*

**2004 PA 454—Privacy  
MCL 445.84  
Effective January 1, 2006**

(1) Beginning January 1, 2006, a person who obtains 1 or more social security numbers in the ordinary course of business shall create a privacy policy that does at least all of the following concerning the social security numbers the person possesses or obtains:

(a) Ensures to the extent practicable the confidentiality of the social security numbers.

(b) Prohibits unlawful disclosure of the social security numbers

(c) Limits who has access to information or documents that contain the social security numbers.

(d) Describes how to properly dispose of documents that contain the social security numbers.

(e) Establishes penalties for violation of the privacy policy.

(2) A person that creates a privacy policy under subsection (1) shall publish the privacy policy in an employee handbook, in a procedures manual, or in 1 or more similar documents, which may be made available electronically.

(3) This section does not apply to a person who possesses social security numbers in the ordinary course of business and in compliance with the fair credit reporting act, 15 USC 1681 to 1681v, or

subtitle A of title V of the Gramm-Leach-Bliley act, 15 USC 6801 to 6809.

**2004 PA 481—Notice  
to the Friend of the Court  
Effective October 1, 2005**

MCL 700.3705(6) is amended to require that, at the same time notice is given to the decedent’s heirs and devisees,

the personal representative shall give notice to the friend of the court for the county in which the estate is being administered, which notice identifies the decedent’s surviving spouse and the individuals who are, for a testate estate, the devisees or, for an intestate estate, the heirs. The personal representative is not required to notify the friend of the court of a devise to a trustee of an existing trust or to a trustee under the will.

**MCR 5.784—Proceedings on a Durable  
Power of Attorney for Health Care  
or Mental Health Treatment**

This court rule has been amended to allow an interested party or the patient’s attending physician to file a petition concerning a durable power of attorney for health care.

**HB 4752—Medical Treatment  
by a Conflicted Spouse**

In response to the Terry Schiavo case, this legislation would provide that, “If the guardian is the ward’s spouse and if the guardian has been granted the power to consent to or approve medical treatment for the ward, a request [to remove that guardian] may be made because the guardian has a marital conflict of interest. If the court determines that the guardian has a marital conflict of interest, the court shall modify the guardianship’s terms to prohibit the guardian from making a medical treatment decision to

withhold or withdraw treatment, nourishment, or hydration from the ward that would result in the ward's death." "Marital conflict of interest" means either the guardian has commenced an action for a divorce or that the guardian is engaged in a current, commonly known, or openly acknowledged adulterous relationship.



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

---

## Probate and Estate Planning Council Q & A

By Shaheen I. Imami and Carine J. Hails

**Question: Who has priority to be appointed personal representative in an intestate estate when a decedent's surviving child dies before proceedings are commenced?**

**Answer:** This situation is not directly addressed by EPIC, nor does it appear to have been the subject of published Michigan case law. Still, a

careful review of EPIC provides a framework for those willing to connect the dots. For the purpose of this question, assume that the decedent left no surviving spouse and that the decedent's child survived him by more than 120 hours.

MCL 700.3203(1) governs priority for appointment as a personal representative. If a decedent dies intestate and leaves no surviving spouse, then priority rests with the "other heirs of the decedent." Heirs include any person "entitled under the statutes of intestate succession to a decedent's property." MCL 700.1104(m). The entire intestate estate, if there is no surviving spouse, passes in the following order to the following individuals who survive the decedent: (1) the decedent's descendants by representation; (2) the decedent's parents equally if both survive or to the surviving parent; (3) the descendants of the decedent's parents by representation; (4) the survivor of the decedent's grandparents or the surviving descendants of the grandparents on either the paternal or maternal side. MCL 700.2103.

But does a surviving heir's estate qualify as a "person" eligible for appointment as personal representative? MCL 700.1106(m) defines "person" as "an individual or an organization"; and under MCL 700.1106(h), an "organization" means "a corporation, business trust, estate, trust, partnership, joint venture, association, limited liability company, government, governmental subdivision or agency, or another legal or commercial entity" (emphasis added). Thus, a decedent's estate is a "person" entitled to appointment as personal representative, but for practical purposes, it is the personal representative of the estate who qualifies for the appointment.

While there is an established priority for the distribution of an intestate estate under MCL 700.2103, heirs of an intestate estate, other than the decedent's surviving spouse, share equal priority for appointment as personal representative under MCL 700.3203. As a result, a surviving child's estate shares equal priority

with the decedent's other surviving heirs for appointment as personal representative.

If other such heirs exist, MCR 5.309 provides that anyone who wants to be nominated as personal representative in informal proceedings must file a Notice of Intent to Seek Informal Appointment (PC 557) along with a copy of his or her application and serve the notice on each person having a prior or equal right to appointment. Alternatively, the person would have to obtain a signed Waiver/Consent (PC 561) and Renunciation of Right to Appointment, Nomination of Personal Representative and Waiver of Notice (PC 567) from the other heirs and file them along with his or her application. In formal proceedings, the person seeking appointment would serve a Notice of Hearing of the Petition for Probate on the other heirs.

If a personal representative has not been appointed in a surviving child's estate, that estate is still entitled to notice of the probate proceedings and of another person's intent to seek informal appointment as personal representative. Yet, if there is no open estate, the address of the surviving child's estate is unknown and cannot be ascertained. Therefore, pursuant to MCR 5.309, the Notice of Intent to Seek Appointment must be published in accordance with MCR 5.106. Although not required, counsel should consider sending a copy of the notice to the surviving child's last known address and to his or her known heirs. This may prompt someone to seek appointment as personal representative in a surviving child's estate, which may be desired for complete administration of the decedent's estate.

Consider also that, if an heir of a surviving child is also an heir of the decedent, that person is entitled to receive the notice of intent to seek appointment, as that person shares equal priority for appointment with other heirs, pursuant to MCL 700.3203, regardless of whether a surviving child's estate has been opened. However, if an heir of a surviving child is not an heir of the

decedent and that person cannot claim priority for appointment by operation of any other provision of MCL 700.3203, that person is not entitled to the notice.



Shaheen I. Imami is a 1995 graduate of Georgia State University College of Law and a 1991 graduate of Michigan State University. Shaheen joined Patricia Gormley Prince, PC, Farmington Hills, in 2002 after spending the previous seven years in solo and other private practice. His main areas of practice are contested probate litigation, estate administration, associated business and real estate law, general civil litigation, and business immigration. He also successfully completed the ICLE 40-hour general civil case mediator training. He is an active member of the Probate and Estate Planning and Business Law Sections of the State Bar of Michigan and serves on several different committees. In addition, he serves on the American Immigration Lawyers Association.

Shaheen is a contributing author to *Michigan Probate Litigation: A Guide to Contested Matters* (ICLE 2d ed 2003) and has been a contributor and speaker for ICLE on topics involving estate administration and contested probate litigation. In addition to being a regular contributing author for the *Michigan Probate and Estate Planning Journal's* regular Q & A column, he also cowrote the article, "The Probate Judge Ordered Mediation—Now What?" in fall 2002.



Carine J. Hails, also of Patricia Gormley Prince, PC, Farmington Hills, attended the University of Michigan, Ann Arbor, and received a bachelor of arts degree in English in 1990. She went on to attend Wayne State University Law School and graduated in

1993. She began her legal career as a litigator, practicing in the areas of medical malpractice and insurance defense with a prominent law firm in western Michigan. She returned to metropolitan Detroit in 1996 and then established a private practice handling estate planning, probate, and family law matters in the areas of estate planning, estate administration, and probate-related matters. She is a member of the Elder Law and Probate and Estate Planning Sections of the State Bar of Michigan and actively involved in community service organizations.

---

## Unauthorized Practice, Image, and Ethics

By Ramon F. Rolf, Jr.

My column in this issue will attempt to bring you up to date on the status of the proposed Pro Hac Vice Rules and a collaborative educational effort of the State Bar of Michigan. First, however, I would like to give you my opinion on what the future holds for trust and the estate planning lawyers.

### Future of Estate Planning

Recently I was asked to be part of a panel discussion with Bob Brower (Grand Rapids) and John Mabley (Detroit). Our topic was "Life After Estate Tax Repeal." There was no consensus among the panelists on estate tax repeal. Some commentators have said the House of Representatives begins each session with a prayer and a vote on estate tax repeal. There

does appear to be a general dislike among Congress and the public for the estate tax (more commonly known as the death tax). Aristotle has been quoted as saying, "a tax at death is the most pernicious because it increases the grieving of the family." Aristotle aside, Mr. Brower, Mr. Mabley, and I all agree that a major tax bill will be forthcoming in 2006.

Whatever the outcome of the estate tax repeal, or significant increase in the exclusion amount (Senator John McCain has suggested a \$5,000,000 exclusion per person), major estate tax legislation will cause us all to contact every client who has tax-sensitive documents. Even with a total repeal of the estate tax, we may have a crazy quilt of carry-over basis rules.

My nonscientific observation is that fewer law students have an interest in trust and estate planning. *What does this all mean for the estate planning profession?* In my opinion, it will produce an increased demand for estate planning services in the short term. With fewer clients requiring estate tax planning and fewer federal estate tax returns to prepare, *what is the long-term outlook for estate planning?* Do not worry—our clients will require consulting for lifetime gifts and first-rate planning documents to dispose of their wealth at death. There will undoubtedly be some transition from estate tax planning to various other related legal areas. These areas include the following:

- **Elder law.** The population is aging. Medical and incapacity issues will occur more and more frequently with our clients.
- **Creditor protection planning.** I have observed a strong trend in clients wanting to delay children's distributions. "I want to create a pension for my children," these clients will say.
- **Trust and estate controversy.** Our practices may begin to shift toward litigating and mediating family disputes. In the last several months, I have been directly involved in three family disputes involving

the care of an elderly member.

- **State estate taxes.** The State of Michigan may still adopt some form of inheritance tax, although I personally believe this to be unlikely. More probable would be a sales tax on legal services! Our services would be required, should a Michigan estate or inheritance tax be adopted.
- **Fiduciary services.** I have spoken with a number of trust and estate planning attorneys in Michigan who are beginning to actively solicit services as trustee or personal representative. This trend will likely accelerate and continue.

### Pro Hac Vice Rules

Changes to MRPC 5.5 have been adopted by the Representative Assembly and forwarded to the Michigan Supreme Court. Rule 5.5 contains the new rules on multijurisdictional practice in the transaction setting. Proposed Rule 18 of the Rules Concerning the State Bar of Michigan concerns multijurisdiction practice rules for practicing in Michigan Courts and before governmental agencies. Rule 18 has not been approved by the Representative Assembly.

Twenty-three states have now adopted the new Pro Hac Vice Rules (Rule 5.5 and Rule 18). Eight of these twenty-three states have included some form of reciprocity. Michigan has not included a reciprocity rule in its new rules.

As mentioned previously in this column, the Probate and Estate Planning Counsel offered comments on new proposed Rule 5.5, specifically concerning the definition of “temporary practice” and the need for an even playing field. When adopting new Rule 5.5, the Representative Assembly accepted the Counsel’s comments and modified the definition of “temporary practice” to no more than three separate representations within a 365-day period.

When discussing the history and philosophy behind the new multijurisdictional practice rules (I, for one, generally do not like change), one comment stuck with me. The comment related to

my concerns about having non-Michigan lawyers coming into Michigan to practice law on a regular basis without a license. The comment was essentially as follows: Right or wrong, good or bad; politics, consumers, the marketplace, and technology are all changing the rules. The role of a bar association is to help its lawyers work smarter and better. These new rules governing Michigan lawyers’ representations of clients in other states and non-Michigan lawyers practicing in Michigan are here to stay. It’s a brave new world!

### State Bar of Michigan Seminars Continue

The State Bar of Michigan has partnered with AARP and the Michigan Office of the Attorney General and is continuing to conduct estate planning seminars statewide. The purpose of these seminars is to educate the public on estate planning and to discuss the pros and cons of investing in annuity contracts and the dangers presented by poorly trained will and trust kit sellers. Seminars have been held in Owosso, Lansing, Grand Rapids, St. Clair Shores, Jackson, and Bloomfield Hills. If you are interested in having a program in your area, contact Catherine O’Connell at the State Bar of Michigan, (517) 346-6333. Public education is the best way to combat the false representations and exaggerated claims of will and trust kit sellers.



Ramon F. (Fred) Rolf, Jr., is the chair of the Probate and Estate Planning Section’s Ethics, Unauthorized Practice of Law, and Multidisciplinary Practice Committee and is a member of the Midland/Saginaw firm of Currie Kendall Polasky Meisel, PLC. He is a past president of the Northeastern Michigan

Estate Planning Council. Mr. Rolf is a fellow of the American College of Trust and Estate Counsel.

## A View from the Bench

By Hon. Milton L. Mack, Jr.

*Editor's note: Our "A View from the Bench" column is a forum for our probate judges to share with us their perspective on hot topics, unusual and interesting legal issues they encounter, and helpful practice tips. In this issue, Judge Milton L. Mack, Jr., chief judge of the Wayne County Probate Court, shares with us two opinions he issued in March 2005. These relate to discovery in probate court proceedings and to what constitutes a fraudulent transfer that would require a personal representative to recover assets transferred prior to a decedent's death.*

### Discovery Rules for Probate Proceeding

*Editor's note: Judge Mack recently granted a protective order for an estate on motion of the personal representative. In his order, Judge Mack discussed the distinction between general discovery in probate proceedings and discovery for the purpose of commencing a civil action. A portion of his protective order, excerpting this discussion, is set forth below.*

This matter is before the Court on the Personal Representative's Motion for Protective Order. Dearborn Federal Credit Union Financial (DFCU) is a creditor of the estate of the deceased, Neal B. LaFave (LaFave). LaFave died on June 14, 2004. His daughter, Katherine LaFave was appointed Personal Representative of his estate on July 7, 2004. The Inventory showed net assets of \$22,090.45. Claims filed against the estate total \$50,307.40.

DFCU filed its Statement and Proof of Claim on August 3, 2004, seeking payment of \$18,077.19. DFCU took the deposition of the Personal Representative on November 4, 2004. A second deposition of the Personal Representative was taken on February 1, 2005. At the hearing on the Personal Representative's Motion for Protective Order, counsel for DFCU stated that the purpose of the discovery was to obtain information to

commence a potential civil action under the Michigan Uniform Fraudulent Transfer Act.

DFCU correctly observes that MCR 5.131 provides that the "general discovery rules apply in probate proceedings." MCR 5.131(A). However, DFCU fails to acknowledge MCR 5.131(B), adopted by the Michigan Supreme Court on July 12, 2001, to limit the scope of discovery in probate proceedings. By its terms: "...discovery in a probate proceeding is not available for the subject matter of a prospective civil action before the filing of such an action." MCR 5.131 (Comment).

MCR 5.131(B) was modified at the invitation of the Court of Appeals in *In re Brown Estate*, 229 Mich App 496, 582 NW2d 530 (1998), to address policy-based objections to engaging in discovery in probate proceedings for the subject matter of a prospective civil action when a *contested* civil action had not been commenced.

Counsel has plainly stated that the purpose of this discovery is to gather evidence for a potential civil action. This is expressly prohibited by MCR 5.131(B). Therefore, the Motion for Protective Order will be granted.

### What Constitutes a Fraudulent Transfer?

*Editor's note: Judge Mack also recently denied a motion brought by a creditor for the appointment of a special personal representative. The creditor argued that the appointment of a special personal representative was necessary because a personal representative has the exclusive authority to recover property that has been fraudulently transferred and the current personal representative refused to take steps to recover certain nominal gifts made during the decedent's lifetime. In his order, Judge Mack discussed whether a lifetime transfer, made while the decedent is solvent, may later be characterized as a fraudulent transfer if the decedent's estate is insolvent. A portion of his order, excerpting this discussion, is set forth next.*

This matter is before the Court on the petition of Dearborn Federal Credit Union Financial (DFCU) seeking the appointment of a Special Personal Representative to commence civil actions under the Uniform Fraudulent Transfer Act. DFCU is a creditor of the estate of the decedent, Neal B. LaFave (LaFave). LaFave died on June 14, 2004. His daughter, Katherine LaFave, was appointed Personal Representative of his estate on July 7, 2004. Her Inventory showed net assets of \$22,090.45. Claims filed against the estate total \$50,307.40.

Notwithstanding MCR 5.131(B), DFCU conducted formal discovery relating to transfers of assets by the deceased during his lifetime. DFCU has produced a list of checks written by the deceased between July 2, 2000, and June 3, 2004, totaling \$6,692.50, it claimed might be fraudulent transfers. Eliminating duplicates, the actual amount is \$6,492.50. These checks included nominal Christmas and birthday presents for his three children and college expenses for two of his children. Checks were written to 9 persons or organizations. LaFave also had a 401(k) plan and an employer provided life insurance policy that passed to his children outside probate that are also of interest to DFCU.

Both DFCU and the Personal Representative correctly observe that MCL 700.3710 grants the Personal Representative the exclusive right to recover property for the benefit of unsecured creditors where a prior transfer might be void or voidable. The Personal Representative argues that there are no prior transfers which could be recovered and objects to the appointment of a special personal representative who could be empowered to commence such an action. The Personal Representative further objected noting that LaFave had died unexpectedly of a heart attack, had a good paying job, ate out about every day and was current with his creditors. LaFave's home was sold in a soft market but did generate cash and avoided further expense to the estate. In addition, payments for his daughter

Karen's education allowed him to claim her as a dependent for income tax purposes. In fact, \$1,500 of that amount was reimbursed to LaFave and deposited in the DFCU account on March 5, 2004.

MCL 700.3614(b) permits the court to appoint a special personal representative if it is necessary to preserve the estate or to secure its proper administration. The appointment may be to perform a particular act on terms the court directs. Because MCL 700.3710 permits only a personal representative to bring an action to recover fraudulent transfers, DFCU asks that its attorney be appointed special personal representative.

Before appointing a special personal representative, the court requires a showing that it is necessary to preserve the estate or secure its proper administration. In this case the question for the court is: should the court appoint a special personal representative to seek to set aside transfers that would then flow into the estate? If the appointment will not preserve the estate or secure its proper administration, no special personal representative can be appointed. If the appointment of a special personal representative would result in the depletion of the estate in pursuit of a futile claim, the court will not appoint a special personal representative. MCR 700.3514(b).

The Uniform Fraudulent Transfer Act (UFTA) provides different potential avenues to seek to set aside a transfer as fraudulent. See MCL 566.34(a), MCL 566.34(b), MCL 566.35(1) and MCL 566.35(2). The only basis set forth in DFCU's petition is MCL 566.35(1).

If a transfer is made while a debtor is insolvent or which causes the debtor to become insolvent without receiving a reasonably equivalent value, the transfer is fraudulent as to a creditor whose claim arose before the transfer. MCL 566.35(1). A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets. MCL 566.32(1). The date of transfer governs the determination as to whether a transfer is fraudulent.

UFTA permits a creditor to bring an action against the transferee and may attach the property. MCL 566.37. However, the death of the debtor limits the use of MCL 566.37. Only a duly appointed personal representative may bring an action to recover property that may have been fraudulently transferred. Assets that might be collected are for the payment of decedent's unsecured debts and not for the benefit of a particular creditor. MCL 700.3710. DFCU argues this means that the creditors would be paid prior to statutory exemptions and other priorities. However, before creditors are paid, MCL 3805(1) explicitly provides that statutory exemptions and other priorities must be paid first. Further, MCL 700.3805(2) prohibits giving preference to one claim over another. This has long been the law in Michigan. See *Walkinshaw v Knox*, 226 Mich 298, 197 NW 522 (1924) which held that the conveyance of a homestead exemption did not constitute a fraud on creditors and said: "A homestead exemption is placed beyond the reach of creditors." *Walkinshaw, supra*, at 300. In that case, the conveyance of real estate was held to be fraudulent; however, it was only fraudulent "as to any value above the homestead exemption." *Walkinshaw, supra*, at 300.

To hold as suggested by DFCU would require the court to ignore the plain language of EPIC as summarized in MCL 700.2404 which plainly states that: "Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate... ." To elevate the priority level of creditors as suggested by DFCU violates the plain language of EPIC and represents a public policy change that would have a major impact on the administration of estates and estate planning in Michigan. It is more appropriate for DFCU to seek relief with the legislature. *Van v Zahorik*, 460 Mich 320, 327, 597 NW2d 15 (1999).

The intersection of UFTA and the Estates and Protected Individuals Code (EPIC) creates a threshold requirement for the commencement of an action under UFTA by a personal

representative. The personal representative may only seek to set aside transactions to the extent they exceed the amount that must first be paid for after-death statutorily created obligations under EPIC.

After death, an estate may become insolvent as a matter of fact due to the legislature's decision to elevate certain exemptions, as well as the cost of administration, funeral and other expenses above those of general unsecured creditors. These priorities only come in to play after death. In this case, these expenses, together with the exempt property allowance of \$11,000, would have priority over any claims by unsecured creditors against the estate. MCL 700.2404.

For example, if a debtor, as of the date of death, has net assets of \$60,000 and unsecured debts of \$50,000, the debtor is solvent pursuant to MCL 566.32(1) as of the date of death. However, at death, new obligations are created which are payable by the estate and are given priority over pre-existing claims of unsecured creditors. These after-death legislatively created obligations would cause such an estate to become insolvent as to unsecured creditors. Since the insolvency occurs after the death of the debtor, no right would be created to enable a creditor to set aside a conveyance made prior to the death of the debtor since the debtor was solvent at the date of death.

If LaFave had net assets of \$50,307.40 as of the date of his death, he would not have been insolvent on that date, but his estate would be insolvent due to after-death, statutorily created obligations. In this case, the \$11,000 exempt property allowance, together with the funeral bill and cost of administration, exceeds \$27,000. If the estate had an additional \$11,000, it would be available to pay the exempt property allowance. If DFCU can identify a viable claim that exceeds \$27,000, it would meet the threshold and a special personal representative could be appointed to pursue sums that might have been fraudulently transferred that exceed the statutorily imposed, after-death obligations. See also, *Drake v*

*Bissenger*, 294 Mich 487, 293 NW 729 (1940). That threshold has not been met. The amount identified by DFCU that is arguably subject to UFTA, is well below \$5,000, which is far below the \$27,000 threshold in this case or even the unpaid exempt property allowance of \$11,000, which has priority over all unsecured creditors.

However, even assuming there was no threshold requirement or that the threshold was the amount of unsatisfied priority obligations, DFCU has failed to demonstrate to the court that there are improper transfers that would justify the expense of appointing a special personal representative.

DFCU has identified checks totaling \$6,492.50 it claims may be fraudulent transfers: deducting the reimbursement of \$1,500, that leaves potential identified claims of \$4,992.50. The checks were issued as long ago as July 2, 2000, and involve amounts as low as \$50. For example, Jeffrey LaFave received one check for \$50. Esther LaFave also received one check for \$75. Roberta Chapman received three checks in 2000 and 2001 totaling \$742. Over \$4,000 went to educational expenses, whether directly to educational organizations or to Karen LaFave. College payments were for "reasonably equivalent value" since LaFave was able to claim his daughter as a dependent for tax purposes. Therefore, these would not be fraudulent transfers under UFTA. MCL 566.35(1). At oral argument, DFCU suggested that actions could be commenced in federal district court to set aside these transactions. As to all the checks, DFCU has failed to show that LaFave was insolvent at the time any of those checks were issued. The personal representative's decision to decline to engage in this type of litigation is understandable.

DFCU claims it can also recover premiums the deceased paid on his employer-provided life insurance; however, DFCU has failed to present any evidence that LaFave made any premium payments on his employer-provided life insurance. However, even if LaFave made all the

premium payments, premium payments are not "transfers" within the meaning of UFTA. DFCU misrepresents the decision of the Michigan Supreme Court in *Equitable Life Assurance Society of the United States v Hitchcock*, 270 Mich 72, 258 NW 214 (1935). The Supreme Court actually held as follows:

We therefore believe that until the death of the insured nothing except the cash surrender value of an insurance policy, the actual value of what was transferred, is properly within the meaning of the statute declaring fraudulent conveyances and assignments void, and that the proper rule is to limit creditors to a recovery of the cash surrender value of the policy at the time of transfer. (emphasis added) *Equitable Life*, supra, at 78.

The transfer referred to by the Supreme Court in *Equitable Life* was not the payment of premiums but a change of beneficiary from the estate to the decedent's children. In the instant case, there is no claim that LaFave transferred the beneficial interest in his life insurance policy from his estate to his children at a time he was insolvent.

In *Equitable Life*, supra, at page 78, the Supreme Court observed as follows:

However, we are at the same time mindful that the general policy of the law in this State, as well as in other States, is to protect from the claims of creditors the insurance taken out by a husband for the maintenance and support of his widow and children after his death.

This State's policy of protecting the widows and children is embodied in EPIC's elevation of various allowances and expenses over the interests of unsecured creditors. It can also be found in MCL 556.128 which expressly provides that a personal representative may not, on behalf of creditors, seek to recover life insurance or

other distributions from qualified pension, profit sharing, or stock bonus plans that might be payable as a result of the death of the grantor.

DFCU also asserts that pre-tax contributions by LaFave to his employer sponsored 401(k) plan may be recovered, citing *In the Matter of Phillip J. LaFata, M.D.*, 41 B R 842 (Bkrtcy ED Mich SD, 1984). That case has no application to this case. *LaFata* involved the treatment of funds deposited to a self-settled ERISA plan under the Bankruptcy Code. The judge in that case observed that funds deposited by an employee to a qualified ERISA plan managed by an independent trustee are protected.

The Court finds that the Personal Representative is satisfactorily administering this estate and declines to appoint a Special Personal Representative. The court finds that the decision of the Personal Representative to decline to take action under UFTA is reasonable and prudent and the court will not disturb that decision. The court is not persuaded that the appointment of a special personal representative will preserve the estate or secure its proper administration and will deny the petition.



Hon. Milton L. Mack, Jr. is a judge with the Wayne County Probate Court, Detroit, Michigan. He is chief judge for the Wayne County Probate Court and a past president of the Michigan Probate Judges Association. He also served as a member

of the Governor's Michigan Mental Health Commission. He has served as a member of the Michigan Supreme Court Guardianship Task Force and the board of directors of the Wayne County Probate Bar Association, chairperson of the board of trustees of Oakwood Healthcare System, president of the National Association of Regional Councils, chairperson of the Southeast Michigan Council of Governments, chairperson of the Wayne County Solid Waste Planning Committee, and chairperson of the Wayne State University Library Advisory Board. He is a frequent author and lecturer on probate issues for ICLE and other organizations. Judge Mack is a contributing author to *Michigan Guardianship and Conservatorship Handbook, Revised Edition* (ICLE 2000 & Supps).

## ICLE Products of Interest to Probate Practitioners

### Books

#### ***Estates and Protected Individuals Code with Reporter's Commentary, 2005 Edition***

Includes the full text of EPIC with Reporter's Commentary by John H. Martin, with major supplemental commentary added in 2005. Also includes Probate Court Rules. This book is also published in looseleaf form as part of the *Michigan Probate Sourcebook*.

**Price:** \$85.00

*Published April 2005.*

**ICLE Partners:** \$76.50

**Product #:** 2005556518

#### ***Michigan Probate Sourcebook, Third Edition—Just Supplemented***

Compiles all the Michigan statutes, rules, and forms you need for probate practice. Includes EPIC with Reporter's Commentary by John H. Martin, as supplemented in 2005, Probate Court Rules, other statutes related to probate, and selected federal and SCAO forms.

**Price:** \$195.00

*Published April 2005.*

**ICLE Partners:** \$175.50

**Product #:** 2000556515

#### ***Michigan Real Property Law, Third Edition—Just Published***

*By John G. Cameron, Jr.*

The authoritative real property treatise, covering all major topics related to Michigan real estate law, completely revised in 2005. An excellent starting point for any real estate research question.

**Price:** \$185.00

*Published June 2005.*

**ICLE Partners:** \$166.50

**Product #:** 2004557120

### Upcoming ICLE Seminars

#### ***Preparing Estate and Gift Tax Returns and Post-Death Tax Planning***

*CoSponsored by the Probate and Estate Planning Section of the State Bar of Michigan*

Ideal if you handle tax returns and other matters for decedents' estates, this seminar covers IRS Forms 706, 709, and 1041, plus an overview of post-death elections and planning. Features sample completed forms and insights from the IRS. **This seminar fulfills one requirement for ICLE's Probate and Estate Planning Certificate Program.**

**Date:** September 8, 2005\*

**Location:** Troy

**Seminar #:** 2005CR6542

**General fee:** \$195.00

**Lawyers in 0–3 years of practice:** \$50.00

**CoSponsor Member:** \$175.00

**ICLE Partners:** *Free!*

\*Video replays around the state.

#### ***2nd Annual Solo and Small Firm Institute—Prosper in Challenging Times***

*CoSponsored by: State Bar of Michigan, the General Practice and Law Practice Management Sections of the State Bar of Michigan*

Back by popular demand! For any lawyer seeking to prosper in challenging times. Want to add new practice areas, increase revenue and expand your client base? Do a better job setting your fees and collecting them? Find bargains & free stuff for your law office? Reduce overhead & cut expenses? Take the guesswork out of technology & software purchases with recommendations and prices from experts? Want your staff trained on Word and Excel for law practice? Plus, networking with colleagues and faculty at breakfast, lunch, and an outstanding reception. All at a great price, thanks to support from the State Bar of Michigan. You can't afford to miss it!

*Register now to get these early bird registration fees! After September 16, 2005, your fee will increase by \$30.*

**Date:** October 20 - 21, 2005

**Location:** Dearborn

**Seminar #:** 2005CI3860

**General fee:** \$145.00

**Lawyers in 0–3 years of practice:** \$95.00

**CoSponsor Member:** \$110.00

**ICLE Partners:** \$95.00

## Notes

## Notes

## State Bar of Michigan Members of Section Council—2004–2005

### Officers

Chairperson:  
Hon. Phillip E. Harter  
Calhoun County Probate Court  
161 E. Michigan Ave.  
Battle Creek, MI 49014

Chairperson-Elect:  
Michael J. McClory  
Wayne County Probate Court  
2 Woodward Ave., Rm. 1307  
Detroit, MI 48226

Vice-Chairperson:  
Douglas A. Mielock  
313 S. Washington Sq.  
Lansing, MI 48933-2193

Secretary:  
Lauren M. Underwood  
32100 Telegraph, Ste. 200  
Bingham Farms, MI 48025

Treasurer:  
Nancy L. Little  
2125 University Park Dr., Ste. 250  
Okemos, MI 48864

### Council Members

Term Expires 2005:  
Daniel E. Cogan  
2723 S. State St., Ste. 210  
PO Box 1127  
Ann Arbor, MI, 48106

John R. Dresser  
112 S. Monroe St.  
Sturgis, MI 49091

Robin D. Ferriby  
333 W. Fort St., #2010  
Detroit, MI 48226

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

Ramon F. Rolf, Jr.  
6024 Eastman Ave.  
PO Box 2765  
Midland, MI 48641

Richard J. Siriani  
30150 Telegraph Rd., Ste. 371  
Bingham Farms, MI 48025

Term Expires 2006  
Douglas G. Chalgian  
1860 Abbott Rd.  
East Lansing, MI 48823

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

George W. Gregory  
401 S. Old Woodward, Ste. 456  
Birmingham, MI 48009

Ellen Sugrue Hyman  
PO Box 974  
East Lansing, MI 48826

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

Kenneth J. Seavoy  
128 W. Spring St.  
Marquette, MI 49855

Term Expires 2007  
George A. Cooney, Jr.  
43902 Woodward Ave., #100  
Bloomfield Hills, MI 48302

Sebastian V. Grassi, Jr.  
888 W. Big Beaver Rd., Ste. 750  
Troy, MI 48084

Amy N. Morrissey  
345 S. Division St.  
Ann Arbor, MI 48104

Harold G. Schuitmaker  
181 W. Michigan, Ste. 1  
Paw Paw, MI 49079

Thomas F. Sweeney  
255 S. Old Woodward, 3rd Floor  
Birmingham, MI 48009

Joan C. Von Handorf  
8292 E. 12 Mile Rd.  
Warren, MI 48093

### Ex Officio

Darryl M. Coon  
2241 Oak St.  
Wyandotte, MI 48192

Julian E. Hughes  
176 Higman Park  
Benton Harbor, MI 49022

Raymond T. Huetteman, Jr.  
2698 Salisbury Ln.  
Ann Arbor, MI 48103

Joe C. Foster Jr.  
2125 University Park Dr., Ste. 250  
Okemos, MI 48864

Russell M. Paquette  
19701 Vernier Road, Ste. 290  
Harper Woods, MI 48225

James A. Kendall  
6024 Eastman Ave.  
PO Box 2765  
Midland, MI 48641

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

Everett R. Zack  
2125 University Park Dr., Ste. 250  
Okemos, MI 48864  
PO Box 27337  
Lansing, MI 48909

Douglas J. Rasmussen  
500 Woodward Ave., Ste. 3500  
Detroit, MI 48226

Susan S. Westerman  
345 S. Division St.  
Ann Arbor, MI 48104

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

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

John E. Bos  
2400 Lake Lansing Rd., Ste. F  
Lansing, MI 48912

W. Michael VanHaren  
111 Lyon St., NW, Ste. 900  
Grand Rapids, MI 49503

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

Robert D. Brower, Jr.  
250 Monroe Ave, NW, Ste. 800  
PO Box 306  
Grand Rapids, MI 49501

John D. Mabley  
31313 Northwestern Hwy., Ste. 215  
Farmington Hills, MI 48334

Raymond H. Dresser, Jr.  
112 S. Monroe St.  
Sturgis, MI 49091

John H. Martin  
400 Terrace Plaza  
PO Box 900  
Muskegon, MI 49440

Patricia Gormely Prince  
31300 Northwestern Hwy.  
Farmington Hills, MI 48334

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

Richard C. Lowe  
2125 University Park Dr., Ste. 250  
Okemos, MI 48864

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

John A. Scott  
1000 S. Garfield, Ste. 3  
Traverse City, MI 49686

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

Henry M. Grix  
38525 Woodward Ave., Ste. 2000  
Bloomfield Hills, MI 48304

### *Commissioner Liaison*

Kimberly M. Cahill  
24735 Van Dyke Ave.  
Center Line, MI 48015

## Probate and Estate Planning Section 2004-2005 Committee Assignments

### Internal Governance

Hon. Phillip E. Harter, Chair  
Michael J. McClory, Chair Elect

#### Budget

Lauren M. Underwood, Chair  
Nancy L. Little

#### Bylaws

Marilyn A. Lankfer, Chair  
Teresa Schafer Sullivan

#### Michael W. Irish Award

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

#### Long-Range Planning

Michael J. McClory, Chair  
Henry M. Grix, Ex Officio

### Nominations

John A. Scott, Chair  
Dirk C. Hoffius  
Henry M. Grix

#### Relations with State Bar

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

#### Annual Meeting

Michael J. McClory, Chair  
Christopher L. Edgar  
Shaheen I. Imami

### Educational and Advocacy Services for Section Members

#### Amicus Curiae

Mark K. Harder, Chair

#### Continuing Education and Annual Probate Seminar

Douglas A. Mielock, Chair  
Elaine M. Cohen  
J. Thomas MacFarlane  
Amy N. Morrissey  
Sheldon J. Stark

#### Section Journal

Nancy L. Little, Editor  
Amy N. Morrissey  
Wendy A. Parr  
Robin D. Ferriby

#### State Bar Journal

Sebastian V. Grassi, Jr., Chair  
Thomas F. Sweeney

#### Pamphlets

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

#### Electronic Communication

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

### Committee on Special Assignments

George A. Cooney  
Christopher L. Edgar

### Legislation and Lobbying

#### Legislation Committee

Harold G. Schuitmaker, Chair  
John H. Martin  
George A. Cooney, Jr.  
Daniel E. Cogan  
Rebecca Bechler

#### Uniform Trust Code

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

### Professionalism and Standards

#### Ethics

Thomas F. Sweeney, Chair  
Lauren M. Underwood  
Richard J. Siriani

#### Unauthorized Practice and Multidisciplinary Practice

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

#### Specialization and Certification

Richard A. Shapack, Co-Chair  
John E. Bos, Co-Chair  
Sebastian V. Grassi, Jr.  
George W. Gregory

#### Practice Management

Richard J. Siriani, Chair  
Michael J. Hughes

### Administration of Justice

#### Contested and Uncontested Probate Proceedings

Amy N. Morrissey, Co-Chair  
Harold G. Schuitmaker, Co-Chair  
Douglas G. Chalgian  
Shaheen I. Imami  
Michael J. McClory  
Ramon F. Rolf, Jr.  
Richard Siriani  
Joan C. Von Handorf  
Everett R. Zack

#### Uniformity of Practice

Sebastian V. Grassi, Jr., Co-Chair  
Joan Von Handorf, Co-Chair  
Shaheen Imami  
Ellen Sugrue Hyman  
Lisa Langton  
Jean A. Mahjoory  
Richard Siriani

### Practice Issues, Related Areas, and Liaisons

#### Charitable Giving/Exempt Organizations

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

#### Transfer Tax

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

#### Guardianships and Conservatorships

Douglas G. Chalgian, Chair  
George A. Cooney, Jr.  
Joan C. Von Handorf

#### Business Law and Business Law Section Liaison

John R. Dresser, Chair

WESTERN AMERICAN MAILERS, INC.  
5510 33rd St SE  
Grand Rapids, MI 49512

Presorted Standard  
U.S. Postage  
**PAID**  
Grand Rapids, MI  
Permit No. 1

## SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

<b>Date</b>	<b>Place:</b>
Sept. 24, 2005	University Club, Lansing Annual Meeting and Strategic Planning Session
Oct. 22, 2005	U-M Student Union Ballroom, 530 State St., Ann Arbor Organizational Meeting

*On the following dates, the Committee on Special Projects will meet from 9:00-10:00 a.m., and the Council will meet from 10:00 a.m.–12:00 noon:*

Nov. 12, 2005	Mar. 11, 2006
Dec. 10, 2005	Apr. 22, 2006
Jan. 7, 2006	Jun. 17, 2006
Feb. 11, 2006	