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## *Probate and Estate Planning Section*

### **Michigan Probate and Estate Planning Journal**

Volume 15, Fall 1996, No. 1  
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## *Probate and Estate Planning Section*

### **From the Chairperson's Desk**

By John H. Martin *Published in the [Fall 1996](#) issue of [Michigan Probate and Estate Planning Journal](#)*

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A deadline for a print publication requires the writer to look at a moment frozen, as if in a photograph, when events actually continue to flow as in a motion picture. So, knowing that events will overtake and replace these comments, I mention the Estate Settlement Act. At this moment (early October), it has sailed through the Michigan Senate (on a 36-0 vote) and now awaits its reception after the November election in the House of Representatives. By the time this issue of the *Journal* is in circulation, you will know whether we have a new statute or whether we simply came close to achieving enactment this year.

Passage in the Senate was achieved after intense negotiation with a number of special-interest groups. Over the past several months, it became clear that the proposed changes in the spousal elective share will require much more study and education before they gain full acceptance. Because concern over the spousal elective share threatened to delay passage of the Estate Settlement Act, your Council decided to retain the approach to elective rights from the Revised Probate Code and to delete the proposed changes. In addition, it became necessary to separate Article VI of the proposed Estate Settlement Act into a separate bill where specific attention could be given to issues regarding multiple-party bank accounts and other nonprobate transfer provisions.

The balance of the proposed Estate Settlement Act may well be law as you read this article. If it is, your and my focus will be on massive retooling of our knowledge and approach to estate planning and estate settlement. Future articles in the *Journal* certainly will assist us in that regard. If the act is not yet law, I assure you it is only a postponement of the time that we must learn new tricks.

### **Council Operations**

As the complexity of our practices and all aspects of our professional lives has increased, your Probate and Estate Planning Council has broadened into many areas. Actually, we found that we were listing as many as 31 committees on our meeting agenda. Surprisingly, nearly every committee had matters on which it was currently working.

At our October organizational meeting, the Council decided to assign all

committees to one of four functional categories. This was done to emphasize the primary focus of our business and to show the connection between the subject matters handled by various committees. The functional areas and some examples of their constituent committees are (1) Services to Section Members (covering such activities as the Annual Seminar; our publications, including this *Journal*; and our proposed Web site on the Internet); (2) Law Reform (the Estate Settlement Act project and the monitoring of proposed legislation); (3) Practice Issues (our participation in the development of court rules and forms, liaisons to other sections of the bar, and uniformity of practice issues); and (4) Internal Governance (the mundane matters, such as budget and bylaws).

A new committee, to be chaired by our chairperson-elect, Patricia Gormely Prince, is a committee on relations with the State Bar. This committee will address the optimal relationship between a practice-orientated section and the services the central bar organization provides. It will explore ways in which the relationship can be strengthened. In particular, we need to articulate the expectations that we as a section have of the State Bar and the services that it best can provide to us. In turn, we need a dialogue on our role in helping the parent organization fulfill its commitments to all members of the Bar and the public.

The name and function of our Standing Committee on Code, Procedure and Rules (affectionately dubbed SCOCPAR) has given way to a new Committee on Special Projects. This committee meets for an hour immediately preceding every Council meeting. Most of those who attend Council meetings come early to participate in an open workshop on one or two topics that require extended consideration. The change in name permits the delegation to that committee of a broad array of problems and concerns. Literally anything that is within the Council's purview may be sent to what has become a committee of the whole.

## Court Reform

Your council has begun discussions about the impact of the court reform on our daily practice. Preliminary assessments indicate that there will be limited effects on decedents' estates and trust matters. Experienced probate judges will continue to hear those matters in a familiar setting and under familiar procedures. Far less certain is the environment for juvenile matters, guardianships, and conservatorships. With probate judges, a probate register, and practitioners from throughout the state among our council members, we will continue the dialogue and determine whether the active participation of our group can facilitate the transition to the new court structures.

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## *Probate and Estate Planning Section*

*The following is an article excerpt. The complete article was published in the [Fall 1996](#) issue of [Michigan Probate and Estate Planning Journal](#)*

### **ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE**

**By Steven A. Mitchell** **RESOLVING CONFLICTS OF INTEREST: WHEN IN DOUBT SEEK AN ETHICS OPINION**

Conflicts of interest present some of the most complicated and intellectually challenging problems for probate and estate planning practitioners. They are often subtle and not readily apparent, and the resolution of a conflict of interest can mean the loss of one or more clients and, hence, a loss of revenue for reasons that have nothing to do with lawyerly ability or quality of service.

Identifying a conflict of interest and then attempting to resolve it often requires time spent on research and analysis for which no fees can be generated. After a considerable amount of nonbillable research, one may still be left scratching one's head for the solution to the problem. As lawyers, we pride ourselves on our ability to solve problems. Nevertheless, we should all acknowledge that there are situations in which a second opinion would be helpful to resolve dilemmas beyond our expertise.

The State Bar of Michigan has established a Standing Committee on Professional and Judicial Ethics, which provides guidance to lawyers on questions involving legal ethics. The committee fulfills this function by issuing written ethics opinions in response to written requests from attorneys for guidance concerning their prospective conduct. The service is not a substitute for an individual lawyer's responsibility to be familiar with ethics requirements, and the use of the service may not be used as an absolute defense to a challenge to one's license from the Attorney Grievance Commission. Yet it is recognized that the opinions are well-reasoned, and state courts often cite them in discipline cases.

The Committee on Professional and Judicial Ethics requires that an Ethics Opinion Request be in writing, and a form is provided for that purpose. The request may not be made anonymously, and it may only involve conduct in which the lawyer proposes to engage. In other words, the request may not involve a hypothetical, and it may not involve conduct that has already been committed.

A request for an ethics opinion is not a substitute for doing your own homework. The Ethics Opinion Request form requires that you identify the ethics issue that arises out of your proposed course of conduct. In addition, you must identify the particular rules of conduct that apply to the question and cite any cases or ethics opinions that you think may apply.

The best source for determining the applicable ethics opinions is a publication called *State Bar of Michigan Ethics Opinions*. The volume is a compilation of the formal and informal opinions the Committee on Professional and Judicial Ethics has issued, as well as opinions governing judicial conduct, the applicable codes of conduct, and other resources pertaining to legal ethics. The text also includes an Ethics Opinion Request form, and periodic updates are offered in anticipation of the issuance of future ethics opinions. There is even an expanded ethics library available on computer disk, which is also periodically updated.

Formal ethics opinions reflect the policy of the State Bar of Michigan and primarily deal with matters of widespread interest and significance to the Bar. Informal ethics opinions are driven more by the specific facts and circumstances of the case and do not necessarily deal with policy issues. Neither type of ethics opinion has the force and effect of law, although they are an excellent source of general guidance.

A good example of the complexity of conflicts issues facing practitioners in the field of probate and estate planning is the recent informal opinion RI-237 (June 6, 1995). Most instructively, the opinion points out that there are some conflicts of interest that are not curable in spite of specific measures taken to cure the problem and satisfy the needs of all affected clients.

The opinion presents a fact situation in which a law firm had previously represented two separate business clients. The controlling shareholder of one of the corporate clients was deceased, and the personal representative of the estate was a retired partner of the law firm who maintained an "of counsel" relationship with the firm. The firm also represented the personal representative in probate court.

The personal representative sought the sale of certain estate assets to another business client of the firm. The personal representative specifically engaged in negotiations on behalf of the seller corporation and with the purchasing corporation, although neither the purchaser nor the seller conducted the negotiations with the participation of counsel.

At the conclusion of negotiations, the parties sought counsel to document and close the transaction. Realizing that a conflict-of-interest issue was present, the law firm proposed the following steps to cure the conflict and to permit it to represent the purchaser in documenting and closing the transaction. The law firm sought to

1. arrange for separate counsel to represent the interests of the seller and the estate beneficiaries,
2. retain separate counsel for the purchaser to advise it on the issue of a waiver of a conflict of interest,
3. obtain the consent of all parties to the law firm's representation of the purchaser after consultation with independent counsel, and
4. present the terms of the transaction to the probate court for approval and the consent of all estate beneficiaries.

Given all those facts and the proposed course of conduct, could the law firm represent the purchaser (or any other party) in this transaction? At first blush, and particularly in light of all of the curative measures that the law firm proposed to undertake, it would appear that the representation could take place. After all, the consent of all parties would be obtained based on the advice of independent counsel, and the approval of the probate court would be sought for the appropriateness of the terms of the transaction.

Nevertheless, as the opinion points out, since the personal representative, who maintained an "of counsel" relationship with the law firm, could not directly undertake the representation of any party, neither could any other member of the law firm. The opinion undertakes a complex analysis of MRPC 1.7(b) and its relationship to MRPC 1.10(a), in addition to citing several other ethics opinions. The opinion's analysis is sound, and the citation to the applicable rules is correct, although it is significant that the opinion cites no case authority in support of its position. The significance, for the purpose of this article, lies in the fact that practitioners may have difficulty finding case precedent to guide them through the resolution of conflicts of interest. That is why the ethics opinion request service is so valuable and should not be overlooked as a tool for assisting probate and estate planning practitioners in dealing with conflicts of interest.

Steve Mitchell is a shareholder at Willingham & Coté, PC, where he concentrates his practice on the defense of lawyers and judges in professional disciplinary proceedings. Your questions or comments are welcome at (800) 361-1542.

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## Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the [Fall 1996](#) issue of [Michigan Probate and Estate Planning Journal](#)

### NEWS AND COMMENTS

#### By Fredric A. Sytsma A Veritable Plethora of New Tax Opportunities

The Small Business Job Protection Act of 1996 contains several provisions of interest to individual taxpayers, although the title of the legislation would never cause you to suspect that.

1. *Medical savings accounts.* I think that we'll be hearing a lot about these MSAs, which are the medical equivalent of IRAs. They are available to taxpayers who receive income from self-employment (sound familiar?) and who have no other medical insurance except Medicare supplemental insurance, worker's compensation, insurance for a specified disease or illness, or insurance that provides for a fixed payment for hospitalization.

The taxpayer may deduct as much as \$2,000 annually for contributions to the MSA (or \$4,000 if a spouse or dependent is also covered). Distributions for unreimbursed medical expenses are not taxable, regardless whether the payment is directly to the medical service provider or to the taxpayer as reimbursement for expenses incurred. Distributions other than for medical expenses will be subject to income tax, as well as a 15 percent penalty if made before age 65 (except payments at the time of the taxpayer's death or in the event of his or her disability). There is a rollover feature similar to IRAs for payments at death to a surviving spouse.

2. *Prepaid tuition trusts.* The act provides (a) that prepaid tuition trusts like the Michigan Education Trust are exempt from taxation; (b) that neither the purchaser nor the child has income until the proceeds are distributed; (c) that if the proceeds are used to pay for college or are otherwise distributed to the child, they are taxable to the child and not to the purchaser; and (d) that the use of the proceeds to pay for *tuition* will not be treated as a gift. This should put an end to IRS attacks on these programs.
3. *Gifts of appreciated stock to private foundations.* The act extends until May 31, 1997, the special rule that a donor may deduct the fair market value of "qualified appreciated stock" contributed to a private foundation, rather than just the donor's cost basis. "Qualified appreciated stock" is generally publicly traded stock that is long-term capital gain property. There is a limit on this special treatment for donors of large amounts: if cumulative gifts by one donor to the private foundation of stock in a single corporation exceed

10 percent of the outstanding stock, a deduction for the excess is limited to the donor's basis.

4. *Long-term care insurance.* The premiums paid for long-term care insurance now qualify as an itemized deduction, subject to a threshold of 7.5 percent of adjusted gross income.
5. *Qualified plan distributions.* The act permits employees who are not owners of 5 percent or more of their employer to delay the distribution of their retirement benefits until retirement, even if that is after age 70. Employees who are currently over age 70 and are receiving distributions will be able to stop receiving the distributions beginning in 1997 if their corporate plan permits it and they elect to do so. The new rules do *not* apply to IRAs.
6. *Contributions to IRAs.* The limits on contributions to IRAs have been increased so that a nonworking spouse may contribute up to \$2,000 annually beginning in 1997, a \$1,750 increase from the \$250 limit in 1996. However, the rules on deductibility remain unchanged, so that a couple earning over \$50,000 may not deduct the \$2,000 contribution if either spouse participates in a qualified plan. Even without a deduction, the nonworking spouse gets the benefit of tax-deferred growth in his or her account.
7. *Moratorium on the collection of the 15 percent excise tax on "excess distributions."* There is currently a 15 percent penalty on a participant in a qualified retirement plan or an IRA depositor who withdraws more than a specified amount (which is \$155,000 in 1996). The excise tax is imposed on the amount of the "excess distribution." The new statute suspends the collection of the excise tax on any excess distributions made during 1997, 1998, or 1999.

There is also a 15 percent excise tax imposed at death on an "excess accumulation," which is the amount by which the account balance when the plan participant dies exceeds the amount that would be required to pay the same dollar amount (i.e., currently \$155,000) annually for the rest of the plan participant's *actuarial* life expectancy, calculated as of the day preceding the date of death. There is *no* moratorium on the collection of this tax.

Those with large accounts thus find themselves on the horns of a dilemma. Early withdrawal accelerates the income tax burden and results in the loss of the use of the tax dollars, but it reduces the eventual tax burden by eliminating the excise tax. The normal inclination would be to wait until the end of 1999 and decide then. The risk is that the plan participant will die unexpectedly and miss the opportunity to avoid the excise tax.

In a related development, the election of five-year income tax averaging for lump sum distributions from qualified retirement plans will be eliminated after 1999. The ten-year averaging provision for people born before 1936 will still be available.

### **Health Care Fraud?**

Were you aware that the Health Insurance Portability and Accountability Act of 1996, Pub L No 104-191, 42 USC 1320a-7b(a)(6), effective January 1, 1997, makes "health care fraud" a crime punishable by a fine of up to \$10,000 and imprisonment for not more than one year? A person guilty of health care fraud "knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX [the Medicaid statute], if disposing of the assets results in the

imposition of a period of ineligibility for such assistance under section 1917(c)." Pub L No 104-191 §217.

Query: if this applies only to the transferor (envision a very elderly woman of modest means), how much of a deterrent is it? On the other hand, if it applies to the transferees (or, heaven forbid, to the attorney who supervised the transaction), that is a statute to be reckoned with. Some food for thought: 18 USC 2 imposes criminal liability on anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense by another.

### **Guidance from the Michigan Department of Treasury on the Michigan Inheritance Tax**

The Michigan Department of Treasury issued a bulletin on August 22, 1996, that contains valuable pointers for practitioners. The entire bulletin, including 13 pages of text and forms, should be available from the Michigan Department of Treasury, Inheritance/Estate Tax Section, Treasury Building, Lansing, Michigan 48922.

Some of the items that caught my eye include the following:

1. The volume of *inheritance* tax returns filed has slowed appreciably, which is understandable since they are appropriate only for estates of decedents who died before September 30, 1993. Nevertheless, one of the department's big problems is people who continue to file inheritance tax returns for estates of decedents who died after September 30, 1993. Conversely, there are those who erroneously file estate tax returns for estates of decedents who died before October 1, 1993.
2. As might be expected, commonly encountered errors include a failure to include all of the necessary information (e.g., the personal representative's Social Security number) and a failure to include all required attachments (e.g., a copy of the Form 706 and any approved federal extensions of the filing or payment deadline). On the request for a waiver of the estate tax lien, the legal description of the property must be on the form, and most of the specified reasons for requesting a waiver necessitate the attachment of supporting documentation. You are advised to read all forms carefully and to complete them fully.
3. The statute says that the certificate of no tax liability is to be issued to the personal representative. The department will send it to the estate's attorney *only if* (a) in box 6 of the estate tax return, the personal representative's address is listed as in care of the attorney's name and address; (b) the PR's actual address is typed in the far right corner of box 6; *and* (c) documentation (such as Treasury Department form C-1029) is attached to the return evidencing the attorney's authority to receive the certificate. You are advised to routinely include a form C-1029 with your initial filing.
4. Many register of deeds offices are refusing to record certificates of no tax liability that are not on the official Michigan Department of Treasury forms (e.g., computer-generated forms not approved by the department).
5. You should allow four to six weeks for the issuance of a waiver of the estate tax lien.
6. The administration fee that was due with the inheritance tax is no longer due. It should not be paid with the estate tax payment.
7. Michigan's share of any generation-skipping tax should be calculated on federal form 706GS(D) or 706GS(T) (depending on whether it is a taxable distribution or a taxable termination). Michigan is presently designing its own form but does not yet have one. The federal form should be accompanied by a Michigan Estate Tax Estimate Voucher, form C-6569. On the line for the amount of tax due, write "706GS(D)" or 706GS(T)." With

a distribution, the distributee's name and Social Security number are to be used, while a termination involves the use of the trust's employer identification number.

8. The proper forms are as follows:
  - a. Death before October 1, 1993; no tax due (unless the gross estate exceeds \$250,000 and no Form 706 was required)—form C-6567
  - b. Death before October 1, 1993; tax due (or the estate does not qualify to use Form C-6567)—form C-6560
  - c. Death after September 30, 1993; no Form 706 required—form C-6570
  - d. Death after September 30, 1993; Form 706 required—form MI 706 or MI 706A
9. You may telephone the department at (517) 373-3163 between 8:00 a.m. and 5:00 p.m. if you have questions.

### **Accessibility of Living Wills**

Reluctant as I am to tout commercial ventures, I recently learned of a service that might be of interest to clients.

Most of us routinely prepare and have clients sign living wills and designations of a patient advocate. I typically advise my clients to be sure that the designated patient advocate is aware that the document exists and has a copy, reasoning that if the client has an incapacitating illness or injury, the patient advocate will be aware of it and will step in. However, it is certainly conceivable that the client will suddenly need the services of his or her patient advocate but that the patient advocate will not be aware of that need.

An organization called Advance Choice, Inc., has a service it calls DocuBank, which addresses this problem. An individual may register his or her advance medical directive with the DocuBank for a fee of \$20 for one year or \$60 for five years. Additional information is also recorded, including the names and addresses of family members. The participant is given a wallet-sized membership card with DocuBank's number on it as well as the name and telephone number of an emergency contact person the registrant selects. DocuBank promises to fax copies of the pertinent material within minutes of receiving a telephone call, 24 hours a day, 365 days a year.

If you are interested in this service for your clients (or for yourself), you can get promotional materials by calling (800) 362-8226. It does occur to me (as it may have occurred to you as you read this) that a client could achieve *almost* the same level of security at no cost by simply carrying an emergency notification card in his or her wallet or purse (and perhaps attorneys should routinely prepare such a card for each client). The one feature that DocuBank offers that is superior is the guarantee of day-in, day-out 24-hour accessibility to the full text of a living will.

### **You Say Your Son Actually Exercised His Crummey Power?**

Under the heading of things I should have known but didn't is the Service's advice in Priv Ltr Rul 89-01-004 (Sept 16, 1988). The taxpayer created a trust that included more-or-less standard Crummey powers but included a provision that any donor making a gift to the trust could specify in writing that a particular beneficiary was not to have a power of withdrawal with respect to the donor's

addition. Wouldn't this be helpful? Your spendthrift son might get one bite of the apple, but no more.

The specific question was whether the donor's power to keep the beneficiaries from exercising their right of withdrawal regarding a given contribution constitutes a retention of control under section 674 of the Code sufficient to subject the donor to income tax under section 671. The Service concluded that since the donor's decision regarding the withdrawal right had to precede the gift, there was no problem under section 674.

You can draft the trust to provide that each donor must decide each time a gift is made whether or not the beneficiaries have the right to withdraw all or a portion of the gift. However, drafting the trust to make the withdrawal right automatic but reserving the right to eliminate it in connection with specified gifts will involve a lot less paperwork for the client and the trustee.

The trust can usually be drafted so that the elimination of one beneficiary's withdrawal right doesn't necessitate the use of the donor's unified credit, as long as a smaller gift is made. For example, in a "pot" trust with eight beneficiaries, all of whom have withdrawal rights, if the donor decides to eliminate one beneficiary's withdrawal right, he or she can simply multiply the available annual exclusion (e.g., \$5,000 or, if greater, 5 percent of the trust principal) by the seven beneficiaries who still have withdrawal rights and give that amount to the trust.

Fredric A. Sytsma is a partner with Varnum, Riddering, Schmidt & Howlett, LLP, in Grand Rapids. He is a fellow of the American College of Trusts and Estates Counsel, and past chairperson of the Probate and Estate Planning Section of the State Bar of Michigan. Mr. Sytsma frequently writes and speaks on estate planning topics, and occasionally speaks on other topics as well.

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## *Probate and Estate Planning Section*

The following is an article excerpt. The complete article was published in the [Fall 1996 issue of \*Michigan Probate and Estate Planning Journal\*](#)

### **RECENT DECISIONS IN MICHIGAN PROBATE, TRUST, AND ESTATE PLANNING LAW**

**By Hon. Phillip E. Harter** WILLS—HOLOGRAPHIC—LOST

*Flury v Flury (In re Flury Estate)*, 218 Mich App 211 (1996)

Defendant Marvin Flury is the father of plaintiff Gerald Flury and decedent Gloria Flury, who died June 13, 1991, leaving a sizable estate. Plaintiff contended that Gloria had written a holographic will that left everything to Gerald. When the will turned up missing, Gerald, an attorney, visited his elderly estranged father and obtained, among other documents, an executed assignment of the father's interest in Gloria's estate. Admission of the lost will to probate was contested. The validity of the assignment was also contested. A jury found that a holographic will existed, that it was validly written, and that Gerald was the sole heir. The jury also found the assignment was without consideration but was not the result of undue influence and was not executed as a result of actual or constructive fraud. The verdict was appealed. The court of appeals reversed and remanded for a new trial.

The first issue the court of appeals addressed was whether the probate court erred in failing to grant summary disposition denying the admission of the purported holographic will to probate. The court found the evidence, when viewed in a light most favorable to the nonmovants, to show (1) that the decedent was an organized person; (2) that the decedent asked Gerald for information regarding the drafting of a holographic will; (3) that newspaper articles about holographic wills were found in her apartment; (4) that the decedent told two witnesses that she had a will; (5) that the decedent told two witnesses that she had left all her property to Gerald; and (6) that Arlene Murray told Gerald that she had Gloria's will in her possession.

The court of appeals concluded that the critical obstacle was that there was no evidence that the decedent drafted and executed a will in accordance with MCL 700.123; MSA 27.5123. There was no evidence that anyone saw Gloria sign the will and therefore no testimony regarding its execution. MCL 700.149(1); MSA 27.5149(1) was not satisfied. Since plaintiff could not show that the will was signed, dated, and in Gloria's handwriting, the alleged holographic will should not have been admitted.

The second issue deals with the admission of certain evidence. Evidence was admitted over the objection of defendant to show that defendant Marvin was estranged from his family, especially his daughter Gloria. The court of appeals concluded that any probative value of the evidence of defendant's poor relationship with his family over many years was solely related to the intent of Gloria Flury. Since her purported holographic will should not have been considered, this evidence was irrelevant and created undue prejudice against defendant in the mind of the jurors.

The third issue concerned the execution of the assignment of defendant's interest in his daughter's estate to his son. The court of appeals stated that defendant may have been the victim of overreaching by plaintiff. Gerald had advised defendant that Gloria's will named him, Gerald, as the beneficiary. He neglected to mention that the will could not be found, that he had not prepared the will, or what the size of the estate was. Defendant also testified he did not understand what he was signing. Nonetheless, the court was hesitant to overturn the jury's finding of fact with respect to the assignment. However, it concluded that prejudice that resulted from the improper introduction of evidence regarding defendant's poor relationship with his family had likely tainted the jury's consideration of the assignment issue. The court reversed and remanded for a new trial with issues and evidence properly limited in accordance with its opinion.

#### ADOPTION—PUTATIVE FATHER—TERMINATION OF PARENTAL RIGHTS—SUPPORT

*In re Brianna Marie Gaipa, Minor*, 1996 Mich App LEXIS 298 (Sept 24, 1996)

Petitioner became aware that she was pregnant in mid-May 1994. It was undisputed that respondent was the child's father. The trial court found that during the pregnancy, respondent made some contribution to rent and to the purchase of groceries and meals at restaurants for petitioner. He also provided the use of his automobile for the petitioner's personal use as well as travel to prenatal clinic visits and other matters. This case involved MCL 710.39; MSA 27.3178(555.39), which provides in pertinent part:

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except in accordance with section 51(6) of [the adoption code] or section 2 of chapter XIA [the neglect provision of the juvenile code].

The issue was whether respondent fell within the first group of putative fathers—those with no established custodial or support relationship and whose rights may be terminated under §39(1) on a finding that it would not be in the child's best interest to be placed in the father's custody—or whether he instead fell within the second group of putative fathers who have an established relationship and whose rights may be terminated only under the neglect provisions of the juvenile code pursuant to §39(2). The trial court found the

respondent fell into the second category. This was based on its interpretation that the statute only required "some contribution" before the stricter standard for termination of parental rights must be used. The petitioner appealed.

The court of appeals reversed the trial court, holding that the trial court had misinterpreted the statute. They reasoned as follows:

As the phrase is used in § 39(2), "support or care," without more, cannot rationally mean all support or care for the mother during pregnancy, nor can it mean any support no matter how inconsequential. We therefore hold that the test to be applied in determining whether a putative father "has provided support or care for the mother during pregnancy" is whether the father provided reasonable support or care under the circumstances of the case. In determining whether the father has provided reasonable support or care under the circumstances, the court should consider such factors as the father's ability to provide support or care, the needs of the mother, the kind of support or care provided, the duration of the support, whether the mother impeded the father's efforts to provide her with support, and any other factors that might be significant under the facts of the case. This approach best promotes the adoption code's dual purposes of promoting speedy adoptions and protecting the rights of putative fathers.

1996 Mich App LEXIS 298 at \*7–\*8.

The matter was remanded to the probate court to determine whether respondent provided reasonable support or care for petitioner during her pregnancy.

The Honorable Phillip E. Harter has been a Calhoun County Probate Court judge in Battle Creek since 1984 and chief judge since 1992. He has served as chairperson of the Probate Rules Committee of the Michigan Probate Judge Association and on the advisory committee and as a faculty member of the Michigan Judicial Institute. He has been admitted to the bars of the U.S. Supreme Court and the U.S. Court of Appeals. He is a fellow of the Michigan State Bar Association and a member of the Probate and Estate Planning Section of the State Bar of Michigan and of the Calhoun County Bar Association. He is a frequent lecturer and writer on probate topics.

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