Bar Sections

Family Law Section

Labor and Employment Law Section

Probate and Estate Planning Section

Probate and Estate Planning Section

Michigan Probate and Estate Planning Journal

Volume 18, Fall 1998, No. 1
Table of Contents

From the Chairperson's Desk

Feature Articles

- Drafting the Marital Deduction Trust for the Qualified Family-Owned Business Interest Deduction Under the 1998 Tax Act
  By Sebastian V. Grassi, Jr.
- Estate Planning Protection for Retirement Plans and IRAs: An Overview
  By James R. Keller

Departments

- Protecting Your Attorney Fees When Representing Fiduciaries
  By Steven A. Mitchell
- Ethics, Unauthorized Practice, and Image
  By Ramon F. Rolf, Jr.
- Legislative Report
  By Douglas A. Mielock
- Recent Decisions in Michigan Probate, Trust, and Estate Planning Law
  By Hon. Phillip E. Harter
- Digest of Michigan Probate Opinions
  By Julia R. Hathaway

Miscellaneous

- Section Meetings
- Readers' Questions Form
- Table of Authorities
- ICLE Products of Interest to Probate Practitioners

- The Probate and Estate Planning Section of the State Bar is on the Web

@ Your Service:
About ICLE | Privacy Statement | Contact ICLE | Customer Support

---

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Probate and Estate Planning Section

The following article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

FROM THE CHAIRPERSON'S DESK
By Brian V. Howe

I am honored to have been elected chairperson of the Probate and Estate Planning Section. Having observed a number of my predecessors in office and what they accomplished on behalf of the Section, I have my work cut out for me. Since it has been my experience that our Section is one of the most active and productive of all of the sections in the bar, I will try to continue this momentum in 1999.

Our outgoing chairperson, Patricia Gormely Prince, should be commended for her excellent leadership and accomplishments over the last year. Pat always tells it like it is and never backs off from a challenge. Her hard work and aggressive positions caused all of us to put forth more effort on Section matters.

I would also like to thank our outgoing Council members, Judge John Kirkendall, Michael Love, and Judge Gerald Supina. Their time and effort were greatly appreciated, and we hope that they will continue to lend their experience and expertise as needed.

During my first week in office I was delighted to see the passage of the Estates and Protected Individuals Code (EPIC) by both the Michigan House and Senate. As many of you know, your Council and various committees have been working on the passage of the Estate Settlement Act (which, at the last minute, was renamed EPIC) for almost 10 years. The bill was subsequently signed into law by Governor Engler on November 10, 1998, with an effective date of April 1, 2000. When the new Code becomes effective, it will have been almost 22 years since the passage of its predecessor, the Revised Probate Code.

We are now working with the Institute of Continuing Legal Education (ICLE) to set up a number of seminars to review EPIC, which is a combination of the Revised Probate Code and the Uniform Probate Code. It now appears that an initial seminar introducing EPIC will be held in early 1999, with the code being addressed in more detail at the Annual Probate Seminar, which will be held in May and June. The Institute will also conduct an in-depth analysis of EPIC in early 2000. In addition, ICLE is working on the integration of EPIC into the *Michigan Probate Sourcebook*.

I would be remiss if I did not acknowledge our great debt of gratitude to John H. Martin, whom we have dubbed the "Father of ESA," for his EPIC accomplishment. John has spent between 2,000 and 3,000 hours assisting in the drafting and,

almost single-handed, editing of the new code. He has also made many trips to Lansing to testify before House and Senate subcommittees and to fend off some rather unremarkable amendments. John has been assisted by a number of our Section members, whom I will not attempt to identify at the risk of leaving someone out. Once again John, you have our sincere thanks.

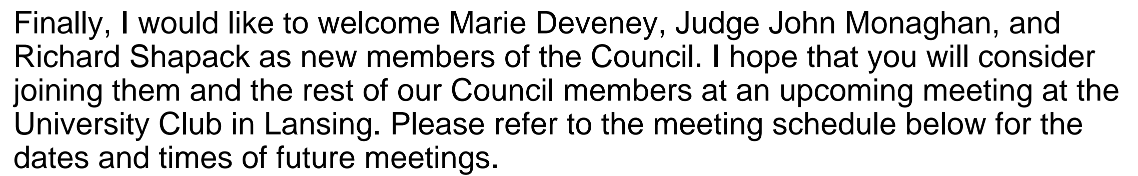
Many of you are either aware of or have served on the various committees that are an important part of the Section activities. In reviewing this year's committee assignments, which are listed on the last page of the *Journal*, you will note that we have established two new standing committees, which we are initially labeling Access to Justice and Elder Law.

The Access to Justice Committee will be chaired by Robin Ferriby and is intended to interact with the State Bar personnel who are developing the Access to Justice program. The State Bar of Michigan has determined that approximately 80 percent of the civil legal needs of Michigan's low-income community go unanswered because of limited legal aid resources. We have been advised that while there is one attorney for every 340 Michigan citizens, there is only one civil legal aid attorney for every 9,000 low-income citizens of Michigan. We recognize the need for the State Bar to help provide services to the indigent and to enhance our image as a profession with the general public. Hopefully, our efforts in raising money and volunteering time for pro bono services will help to make the program successful.

Our new Elder Law Committee will be chaired by Robert Pytell and is intended to expand our activities in dealing with Michigan's older residents. A number of our members are already engaged in various aspects of Medicare and Medicaid practice and will be called on to assist with the direction of our new committee. Since a number of our senior citizens fall into the low-income category, our two new committees will be working together to provide services to these individuals. If you have an interest in assisting in either of these areas, please call Robin or Bob to volunteer for committee membership.

Our Committee on Special Projects will be chaired this year by Douglas Mielock. This committee, which meets every month before our Council meetings, reviews pending legislation and issues that both the Council and Section members have referred to it. The committee is currently reviewing several proposed acts: the Uniform Principal and Income Act (SB 1255), the Michigan Uniform Transfers to Minors Act (HB 5643), the Uniform Statutory Rule Against Perpetuities (HB 5647), the Uniform Anatomical Gift Act (HB 5686), and the Uniform Fraudulent Transfer Act (HB 5708). The committee is also studying potential legislation, including a statute of limitations for malpractice by attorneys, provisions concerning private trust companies, provisions concerning charitable organizations as trustees of trusts benefitting them, and the Uniform Trust Act. In addition, the committee will be addressing practice issues such as the unauthorized practice of law and conflicts of interest. If you wish to get involved with any of these issues, please contact Doug to volunteer your time.

I would also like to congratulate Douglas Rasmussen as the recipient of this year's Michael Irish Award, which was presented on October 23, 1998. The Michael Irish Award was established in 1995 in memory of the late Michael Irish, who was chairperson elect at the time of his death. This award annually recognizes a probate and estate planning attorney for significant professional or community contributions. These contributions may include a special effort in connection with the Probate Council, the state bar, a professional project, an article in a professional publication, leadership in some community activity, or any other activity deemed particularly worthy. Doug Rasmussen has excelled in all of these activities during his years of practice.



Finally, I would like to welcome Marie Deveney, Judge John Monaghan, and Richard Shapack as new members of the Council. I hope that you will consider joining them and the rest of our Council members at an upcoming meeting at the University Club in Lansing. Please refer to the meeting schedule below for the dates and times of future meetings.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Bar Sections

Family Law Section

Labor and Employment Law Section

Probate and Estate Planning Section

Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

DRAFTING THE MARITAL DEDUCTION TRUST FOR THE QUALIFIED FAMILY-OWNED BUSINESS INTEREST DEDUCTION UNDER THE 1998 TAX ACT

By Sebastian V. Grassi, Jr.

Introduction

This article updates and supersedes the author's prior discussion concerning the qualified family-owned business exclusion as it appeared in the Michigan Probate and Estate Planning Journal, Winter 1998, at 3.

Overview of IRC § 2057

The Taxpayer Relief Act of 1997 (the 1997 Act) included the confusing and controversial IRC § 2033A. Under the Internal Revenue Service Restructuring and Reform Act of 1998 (the 1998 Act), which was signed into law on July 22, 1998, by President Clinton, IRC § 2033A has been repealed and replaced with new IRC § 2057.

IRC § 2057 is exceptionally complicated, will be extremely difficult for many estates to use, and will decrease the decedent's unified credit over time. . ."

IRC § 2057 permits the value of certain family-owned businesses to be deducted from the decedent's gross estate, up to certain limits, effective for persons dying on or after January 1, 1998. The deduction is available only for testamentary transfers, not for inter vivos gifts. The deduction is in addition to valuation discounts (lack of marketability, minority interest, and so on). IRC § 2032A special

use valuation, IRC § 303 (redemption of stock to pay death taxes and administration expenses), and IRC § 6166 (installment payment of estate taxes) may also be used in conjunction with the deduction. The conversion of the exclusion into a deduction clarifies that the business interest is entitled to a stepped-up basis under IRC § 1014.

IRC § 2057 is exceptionally complicated, will be extremely difficult for many estates to use, and will decrease the decedent's unified credit over time, as shown in table 1. In most instances, it will be more expedient to purchase life insurance to pay for the estate taxes that would otherwise be saved under IRC § 2057 than to expend the time and costs of monitoring the family-owned business to ensure IRC § 2057 qualification.

Before the 1998 Act, IRC § 2033A provided for an exclusion of the family business from the decedent's gross estate. The 1998 Act converts the exclusion into a deduction of up to $675,000; however, the maximum combined IRC § 2057 deduction and unified credit exemption equivalent amount available to the decedent may not exceed $1,300,000. There is a further limitation that the unified credit exemption equivalent amount may not exceed the phase-in amount for the year in question. Thus, the 1998 Act caps the unified credit exemption equivalent amount when an IRC § 2057 deduction is taken.

To qualify for the IRC § 2057 deduction, several requirements must be met:

- The decedent must be a citizen or resident of the United States at the date of death.
- The executor must elect to use this deduction (on Schedule T of the federal estate tax return) and file an agreement signed by all qualified heirs who have an interest in the property consenting to the election.
- The value of the family-owned business plus any gifts of the business by the decedent to family members (other than the spouse) must exceed 50 percent of the decedent's adjusted gross estate (as defined in IRC § 2057(c)).
- The business interest must have been owned by the decedent or a member of the decedent's family (as defined in IRC § 2032A(e)(2)) during five of the eight years before the decedent's death. IRC § 2057(b)(1)(D)(i), (e)(1).
- The decedent or a member of the decedent's family must have materially participated in the business for five of the last eight years, ending on the decedent's death. IRC § 2057(b)(1)(D)(i).
- The decedent's interest in the business must pass to or be acquired by a qualified heir of the decedent, who must be a U.S. citizen. IRC § 2057(g)(1). The 1998 Act clarifies that the deduction is allowed with respect to interests transferred to a trust if all of the beneficiaries are qualified heirs. IRC § 2057(i)(3)(L). If the heir is not a U.S. citizen, the noncitizen heir's interest must be held in a "qualified trust." IRC § 2057(g)(1). A qualified heir means an ancestor of the decedent; the spouse of the decedent; or a lineal descendant (or spouse of a lineal descendent) of the decedent, the decedent's spouse, or a parent of the decedent. Additionally, a qualified heir also means any active employee who has been employed by the business for at least 10 years before the decedent's date of death. IRC § 2057(i)(1).

The 1998 Act adds a new IRC § 2057(f)(3) that clarifies that the material

participation requirement by the decedent and the qualified heir is satisfied by material participation by another family member. If the participation of the family member occurs under a net cash lease, the 1998 Act clarifies that the leasehold income will not be treated as personal holding company income that could otherwise disqualify the business from qualifying for the IRC § 2057 deduction.

"IRC § 2057 requires trust beneficiaries to materially participate in the qualified family-owned business to preserve the tax benefit of the deduction; therefore, it is advisable to permit the trustee to delegate its management powers to those beneficiaries without regard to their experitse."

Family-owned business interests qualifying for the deduction include

- an interest as a proprietor in a trade or business carried on as a sole proprietorship or
- an interest in an entity carrying on a trade or business, if at least
  - 50 percent or more is owned solely by the decedent and the decedent's family (as defined in IRC § 2032A(e)(2));
  - 70 percent or more is owned by two families (of which at least 30 percent is owned by the decedent or the decedent's family); or
  - 90 percent or more is owned by three families (of which at least 30 percent is owned by the decedent or the decedent's family).

Ownership may be either direct or indirect through a corporation, partnership, or trust. A beneficiary of a trust must be a vested beneficiary with a present interest in the trust.

A business does not qualify as a qualified family-owned business if

- the business is located outside the United States;
- stock or debt of the business was traded on an established securities market or secondary market (defined by the secretary of the Treasury) within three years of the decedent's death; or
- the business has more than 35 percent of adjusted ordinary income that would qualify as personal holding company income if the business were a C corporation (the personal holding company restriction does not apply to banks or domestic building and loan associations).

In addition, if the business has cash or marketable securities in excess of the reasonably expected day-to-day working capital needs or other assets that are not used to actively conduct business, this portion of the business is not treated as a qualified family-owned business interest.

If the qualified heirs do not materially participate in the qualified family-owned business or if there is a disposition of the business within 10 years of the decedent's death, there is an additional estate tax (a recapture tax) similar to the IRC § 2032A recapture provisions. Events that trigger the IRC § 2057 recapture tax include the following:

- A qualified heir (or a member of the qualified heir's family) fails to materially participate in the business for at least five years in any eight-year period.
- The qualified heir disposes of any portion of his or her interest in the business, other than to a member of the qualified heir's family or through a conservation contribution under IRC § 170(h).
- The principal place of business moves outside the United States.
- The qualified heir loses U.S. citizenship. However, if an heir loses U.S. citizenship, the business assets may be placed in a qualified trust similar to a qualified domestic trust to avoid the recapture tax.

If a recapture tax is triggered, each qualified heir is personally liable for the portion of recapture tax that is imposed with respect to his or her interest in the business. The additional tax is based on the difference between the tax due without the IRC § 2057 deduction and the tax due using the IRC § 2057 deduction plus interest on the difference. The additional tax is phased out, depending on when the recapture event occurs, as shown in table 2.

Trust Drafting Issues

IRC § 2057 requires trust beneficiaries to materially participate in the qualified family-owned business to preserve the tax benefit of the deduction; therefore, it is advisable to permit the trustee to delegate its management powers to those beneficiaries without regard to their expertise. Without such express power in the trust instrument, the trustee may not be able to delegate substantive powers and may not be able to hire nonprofessional managers.

Drafting Example

> *Trustee powers*. The trustee shall have the power to employ, revocably delegate powers (including discretion) to, and act without independent investigation on the recommendation of accountants, agents, attorneys, custodians, employees, investment advisors, managers, and other representatives (including any fiduciary of my estate or under this trust instrument) and to pay their reasonable compensation and expenses even though such persons are associated with the trustee or may also be a trustee (or a nominated trustee) under this trust instrument or a fiduciary of my estate. Such compensation shall be in addition to their fiduciary fees. When qualification for or the preservation of a federal tax benefit attributable to a trust asset depends on material participation or management by an individual, the trustee may, without liability, designate any such individual as a manager and may delegate to that individual whatever powers the trustee decides to delegate, even though the individual may not be specially qualified to exercise such powers.

Note that the estate tax savings of IRC § 2057 benefits the residuary beneficiaries of the decedent's estate, and the recapture tax falls on those who inherit the business. This means that it is important to consider those situations in which the individuals are different, especially if a qualified employee acquires the business from the decedent's estate. How should the estate tax savings be apportioned and the recapture tax assumed? If a qualified employee who does not participate in the estate tax savings purchases the business for fair market value and a subsequent recapture event results in the employee having to pay the recapture tax (to the benefit of the decedent's residuary beneficiaries), should the employee be entitled to contractual indemnification from the decedent's residuary beneficiaries concerning the payment of the recapture tax? Should the underlying purchase agreement contain a purchase price holdback provision during the recapture period? The purchase agreement between the decedent's estate and the qualified employee may need to address these matters.

"The change of the qualified family-owned business interest exclusion to a deduction, with clarification that the deduction does not apply for GST tax purposes, helps the estate planner."

IRC § 2057 provides a deduction of a dollar amount from the decedent's gross estate; this means that it is very important that the amount deducted be properly distributed pursuant to the decedent's will and trust, since IRC § 2056(b)(9) prohibits two estate tax deductions for the same property. Thus, a deduction of a business interest under IRC § 2057 precludes that interest from being deducted as a marital deduction, and vice versa. It also means that traditional marital deduction reduce-to-zero formulas need to be drafted with the deduction in mind. Most reduce-to-zero formulas refer to an amount equal to the decedent's unified credit. Thus, when using a reduce-to-zero formula, reference should be made to the decedent's unified credit; rather, it should be kept straightforward and simple.

Drafting Examples

> *Marital trust pecuniary funding formula*. First, the trustee shall allocate to the credit shelter trust any property (or property interests) that is deducted under IRC § 2057. Second, the trustee shall allocate to the marital trust the smallest dollar amount (if any) necessary as a marital deduction to eliminate (or reduce to the extent possible) any federal estate tax and state death tax being due from my estate, provided the use of the credit for state death taxes does not increase the death tax payable to any state. However, the trustee shall allocate to the marital trust only property or interests in property that qualify for the federal estate tax marital deduction. In determining the amount of this bequest, final federal estate tax values shall be used. In determining the "smallest amount," the trustee shall ignore the effects of any disclaimer and assume that a federal estate tax deduction is allowed for any property allocated to any marital trust and is not allowed for property allocated to any nonmarital trust. In other respects, the "smallest

amount" shall be determined after giving effect to the exercise of tax elections, and no particular exercise of any tax election is required. Third, the trustee shall allocate the balance of the trust estate (including any property or interests in property that does not qualify for the federal estate tax marital deduction) to the credit shelter trust.

Credit shelter trust pecuniary funding formula. First, the trustee shall allocate to the credit shelter trust any property (or property interests) that is deducted under IRC § 2057. Second, the trustee shall allocate to the credit shelter trust the largest amount (if any) that produces no (or the least possible amount of) federal estate tax and state death tax being due from my estate, provided that the use of the credit for state death taxes does not increase the death tax payable in any state. In determining the amount of this bequest, final federal estate tax values shall be used. In determining the "largest amount," the trustee shall ignore the effects of any disclaimer and assume that a federal estate tax marital deduction is allowed for property allocated to any marital trust and is not allowed for property allocated to any nonmarital trust. In other respects, the "largest amount" shall be determined after giving effect to the exercise of tax elections, and no particular exercise of any tax election is required. If the initial amount allocable to the credit shelter trust, determined under the foregoing formula, is insufficient to satisfy debts, taxes, and other charges allocable to the initial credit shelter trust amount, including outright distributions that are payable from or allocable to the initial credit shelter trust amount as part of the settlement of my estate, the trustee shall increase the amount otherwise allocable to the credit shelter trust to the smallest amount necessary to provide for the payment of such items. Third, the trustee shall allocate the balance of the trust estate (except any assets that do not qualify for the federal estate tax marital deduction) to the martial deduction trust.

The 1998 Act makes it clear that the IRC § 2057 deduction does not apply for generation-skipping transfer (GST) tax purposes. IRC § 2057(a)(1). Hence, GST tax may be imposed on the deducted value to the extent that value has not been made GST tax-exempt. It is possible that the credit shelter trust determined under the formula above could have a value larger than the current GST tax exemption. Until inflation causes the GST tax exemption to increase to $1,300,000, it may be necessary to create two credit shelter trusts: one that is exempt from GST tax and has an inclusion ratio of zero and one that is not exempt from GST tax and has an inclusion ratio greater than zero. In this regard, it may be desirable to have the property deducted under IRC § 2057 be specifically allocated to the GST tax-exempt credit shelter trust, if the business is to be passed on to successive generations.

Drafting Example

Specific allocation of property to GST tax-exempt credit shelter trust. If the credit shelter trust is divided (or is to be divided) into two or more trusts, one of which has an inclusion ratio of zero for GST tax purposes (the "GST tax-exempt credit shelter trust"), assets that are deducted from my gross estate for federal estate tax purposes under IRC § 2057 shall be initially allocated to the GST tax-exempt credit shelter trust to the extent possible and consistent with the trust's maintenance of a zero inclusion ratio.

Additional Drafting Issues

The IRS has expressed concern that the trust interest of a qualified heir may be divested if the heir dies during the recapture period and the heir's interest devolves to a non-qualified heir. Such divesting may occur if the decedent's will or trust contains a common disaster clause or gives the deceased heir a testamentary limited power of appointment that includes a class of appointees not limited to qualified heirs. Until regulations are issued concerning IRC § 2057, it may be prudent to limit the class of appointees to qualified heirs. A general testamentary power of appointment should not present the same problem because the power causes the inclusion of the interest in the deceased qualified heir's estate.

Similarly, the common disaster clause should include a qualifying provision that when the asset passing under the common disaster clause is a qualified family-owned business for which a deduction was taken under IRC § 2057, the deduction shall be distributed only to heirs who would be qualified heirs under IRC § 2057 in order not to trigger the IRC § 2057 recapture tax.

Other trust drafting issues include provisions that limit the trustee's ability to divest a qualified heir from his or her interest in the business during the recapture period. A divestment might occur if the trustee exercises its discretionary withholding power under a spendthrift clause or postpones a distribution. An omnibus savings clause may be helpful.

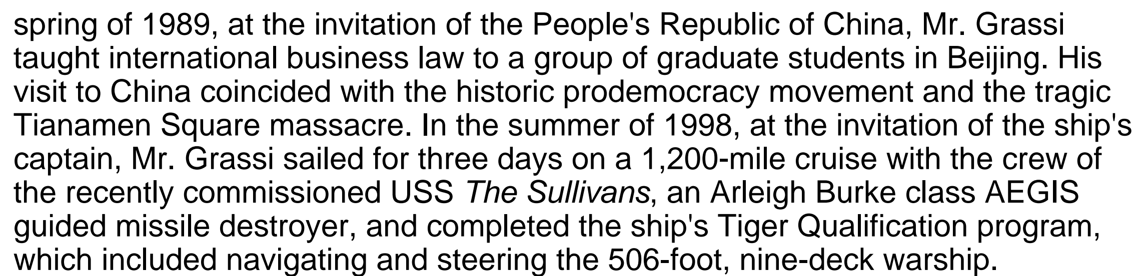
Conclusion

Business owners who desire to pass on the family business to the next generation need to know how the 1998 Act affects their choices. The change of the qualified family-owned business interest exclusion to a deduction, with clarification that the deduction does not apply for GST tax purposes, helps the estate planner. However, the linkage of the deduction to the unified credit amount so as to reduce the amount of the unified credit exemption equivalent amount (through the $1,300,000 combined cap) still shows that Congress is not placing the nonfarming family-owned business on a par with closely held family farm businesses, which are entitled to a reduction in value without any offset to the decedent's unified credit amount, e.g., the special use valuation for farms under IRC § 2032A. Nevertheless, IRC § 2057 is an improvement over the repealed IRC § 2033A exclusion and provides some relief to family-owned businesses and to their estate planners.

Note

1. For a comprehensive analysis of IRC § 2057 and the qualified family-owned business interest deduction, see Steven K. Akers, *Estate Planning for the Family Business* (ICLE Experts in Estate Planning Series Course Materials Oct 1998).

Sebastian V. Grassi, Jr., is a partner in the law firm of Grassi & Toering, PLC, in Troy. He is a member of the State Bar of Michigan, the American Bar Association, and the Christian Legal Society. A fellow of the American College of Trust and Estate Counsel, Mr. Grassi's practice is concentrated in estate planning, wealth preservation, and business law matters. He has authored numerous articles for the *Michigan Probate and Estate Planning Journal, Estate Planning, the Journal of Taxation of Estates and Trusts, the Michigan Bar Journal, and the Practical Lawyer*. Mr. Grassi is also a frequent speaker for the Institute of Continuing Legal Education and serves on its Probate and Estate Planning Advisory Board. In the



spring of 1989, at the invitation of the People's Republic of China, Mr. Grassi taught international business law to a group of graduate students in Beijing. His visit to China coincided with the historic prodemocracy movement and the tragic Tianamen Square massacre. In the summer of 1998, at the invitation of the ship's captain, Mr. Grassi sailed for three days on a 1,200-mile cruise with the crew of the recently commissioned USS *The Sullivans*, an Arleigh Burke class AEGIS guided missile destroyer, and completed the ship's Tiger Qualification program, which included navigating and steering the 506-foot, nine-deck warship.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Bar Sections

Family Law Section

Labor and Employment Law Section

Probate and Estate Planning Section

Probate and Estate Planning Section

The following article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

Estate Planning Protection for Retirement Plans and IRAs: An Overview

By James R. Keller

Introduction

This article is intended to provide an overview of the basic framework within which estate planning decisions are made for the disposition of tax-qualified retirement plans and individual retirement accounts (IRAs). The goal is not mastery but an understanding of how these principles interact to both create and solve problems for the estate planning client.

Tax-qualified retirement plans and IRAs[1] have been in existence a considerable length of time. However, recent concerns about the viability of the Social Security system, employer concerns about the cost of traditional defined benefit plans, and the general interest of the public in tax-deferred savings have increased both the number of participants and the amount of total contributions. The bull markets of the last 15 years have further increased the value of plan assets. Yesterday's "Depression baby" is today's retiree, and "average" clients with substantial qualified plan balances are increasingly common. The preservation of those balances is frequently the single most pressing concern.

I discuss specific concerns, including problems resulting from the allocation of qualified plan assets to a credit shelter trust, a marital trust, charitable gifting, and spousal rollovers. The so-called Roth IRA created by the Taxpayer Relief Act of 1997 (the 1997 Act) may also offer relief in limited circumstances. I also discuss the use of the multi-generational IRA to extend the deferral past the participant's lifetime.

The Four Tax Bites out of the Apple

Qualified plan assets are subject to four separate taxes or penalties (in addition to any taxes that a state or municipality might impose). The good news is that this number represents an improvement from the previous situation in which there were six potential taxes or penalties.

In addition to potential estate tax liability and income tax liability on distributions, two penalties may apply to distributions from IRAs and other qualified retirement plans (QRPs):

- *Too soon*. A penalty will be imposed if distributions (other than certain qualified distributions) are made before the participant reaches age 59 1/2. The 1997 Act relaxed this penalty by adding several additional exclusions.
- *Too little*. A penalty will be imposed if the distributions are less than the required minimum distribution.

The 1997 Act repealed two other penalties:

- *Too much*. Before the 1997 Act, an income tax penalty was imposed if the participant took distributions that exceeded a statutory maximum.
- *Too late*. Before the 1997 Act, an estate tax penalty was imposed if the participant died leaving a fund balance in excess of a statutroy maximum not subject to rollover by a spouse.

While a discussion of these penalties is beyond the scope of this presentation, the "too little" penalty remains the driving force behind the multigenerational IRA. Many individuals have managed to accumulate large IRA balances (particularly given market performance) that they do not require for living expenses. Therefore, the required minimum distribution represents a distribution of taxable income that is neither needed nor desired, defeating the goal of the continued deferral of income.

The Dirty Dozen

The art of providing maximum protection for retirement benefits and IRAs requires the mastery of 12 principles. The "Dirty Dozen" principles provide the foundation for any analysis of a plan for QRPs and IRAs.

1. Required Beginning Date

Distributions from the participant's plan must begin by April 1 of the year following the year in which the participant turns age 70 1/2.[2] The amount of the required distribution depends on the participant's beneficiary designation as of the required beginning date.[3]

Distributions must be made over the life or the life expectancy of the participant or over the joint lives or life expectancies of the participant and a designated beneficiary. [4]

Planning note. Although no distribution is required in the year the participant turns age 70 1/2, taking a distribution in that year is usually advantageous to avoid bunching two distributions in the following year.[5]

2. Life Expectancy

In all cases, a joint life expectancy will result in increased income tax deferral both during the lifetime of the participant and on the participant's death.[6] A joint life expectancy may be used only if the participant has named a designated beneficiary.[7]

3. Designated Beneficiaries

Individuals may be designated beneficiaries. Nonindividuals such as estates and charities do not qualify.[8] A trust may qualify as a designated beneficiary if it meets four requirements:[9]

- The trust must be valid under state law, or would be but for the fact there is no corpus.
- The trust must be irrevocable or become, by its terms, irrevocable on the death of the employee.[10]
- The beneficiaries (all of whom must be individuals) must be identifiable from the trust instrument.[11]
- A copy of the trust or specific beneficiary information must be provided to the plan administrator before the required beginning date or within nine months after a death. [12]

The trust must satisfy these requirements as of the earlier of the participant's required beginning date or the end of the ninth month beginning after the date of death.[13]

If a trust meets the requirements, the participant is allowed to "look through" the trust to the trust's beneficiaries to determine the designated beneficiary.[14] The oldest beneficiary of the trust (who has the shortest life expectancy) is used as the designated beneficiary for the purpose of calculating life expectancies.[15]

4. Multiple Beneficiaries
If a participant has multiple designated beneficiaries, the beneficiary with the shortest life expectancy is the designated beneficiary for determining the required minimum distributions.[16] When the designated beneficiary is a look-through trust, the multiple beneficiary rule applies.

5. Changing Beneficiaries (WINO)
The participant has the right to change plan beneficiaries at all times. Once he or she has reached the required beginning date, however, the required minimum distribution calculation can never be improved.[17] A change of beneficiary to a designated beneficiary with a longer life expectancy has no effect at that point. If the change is to a beneficiary with a shorter life expectancy (which will result in increasing minimum required withdrawals), the shorter life expectancy *must* be used.[18] Thus, changing beneficiaries produces a "worst in, never out"--or WINO--scheme of beneficiary designations.

6. Calculation Method
Proper selection of the payout strategy at the required beginning date is crucial to meeting overall tax planning and distribution goals.

If the participant's plan permits, the participant may elect to recalculate the life expectancy of the participant, the participant's spouse, or both annually.[19] No other beneficiary's life expectancy may be recalculated. Recalculation results in extending the payout period during the participant's lifetime (the longer you live, the longer you live) but can reduce the payout period after death, as the beneficiary's life expectancy is reduced to zero at death (when you're dead, you're dead).[20]

Nonrecalculation results in the life expectancy being reduced by one full year each year. Recalculation is based on IRS tables. Each year a recalculated life

expectancy is reduced by less than a full year, resulting in a longer payout period.

Planning notes. The terms of the IRA or qualified plan document must be reviewed. The plan document may require recalculation. If the document is silent, recalculation of the participant and the participant's spouse's life expectancies is required.[21]

The four payout strategies are

- *recalculated/recalculated*, in which both the participant's and the spouse's life expectancies are recalculated (this option is available only when the spouse is the designated beneficiary);
- *recalculated/nonrecalculated*, in which the participant's life expectancy is recalculated but the designated beneficiary's is not;[22]
- *nonrecalculated/recalculated*, in which the spouse's life expectancy is recalculated but the participant's is not (again, this option is available only when the spouse is the designated beneficiary);[23] and
- *nonrecalculated*, in which a fixed term or *term certai*n is used to determine minimum distributions (one and done).

Be prepared for some flack from other advisors when suggesting the "one and done" approach. Clients have been hearing "You don't want to outlive your IRA" from all sides. Stark comparison of the outcomes in the case of an early death usually provide a wake-up call to all concerned. The bottom line is that the modest reduction in the required payout during the life of the qualified plan participant is generally insufficient to warrant the risk of immediate taxation on the second death.

7. The Minimum Distribution Incidental Benefit Requirement
If a participant names a designated beneficiary (other than a spouse) who is more than 10 years younger than the participant, the minimum distributions during the participant's lifetime are calculated as if the designated beneficiary is only 10 years younger than the participant.[24] This rule is known as the MDIB requirement.

On the death of the participant, the designated beneficiary's actual life expectancy (minus the numbers of years during which distributions were made) is used to determine the term certain for continued minimum distributions.[25]

8. Withdrawals Before the Required Beginning Date
Withdrawals made before the beginning date (except those made in the year the participant turns 70 1/2) are not credited against the required minimum distributions.

9. Minimums Are Minimums
The minimum distribution rules determine the minimum amount that must be withdrawn from a plan. The participant can always decide to withdraw more than the required minimum. This may be a necessary piece of comfort information to clients who are concerned about having access to their pension funds.

10. Alternative Rule
If a person has more than one IRA, the required withdrawals may be made from any one or more of the IRAs.[26] This rule does not apply to qualified plans. Thus, an individual can preserve the earnings of high-performing funds while

withdrawing poor-performing funds. (This rule can also allow one beneficiary to be preferred over another when separate funds are maintained.)

11. Contingent Beneficiaries
The planner should always be sure that contingent beneficiaries are named on the IRA or plan beneficiary designation form. Failure to name a contingent beneficiary causes benefits to be paid to the plan document's default contingent beneficiary.

In many cases, plan documents make these benefits payable to the participant's estate, resulting in the loss of designated beneficiary status.[27] This means lifetime distributions must be based on single life expectancy and subjects the proceeds to the five-year rule (if death occurs before the required beginning date)[28] or the one-year rule (if death occurs on or after the required beginning date),[29] as described below.

12. Disclaimer Strategies
In most cases, the order of deaths might be as predicted, and our estimates of the relative estate values would match projections. In these cases, the control issues raised by the client and dealt with inside the estate plan should be adequate to achieve the intended goals. However, there may be circumstances in which a different protocol is required.

In this situation, disclaimers can prove useful. It may be convenient to have the trust disclaim its designation to permit a lower priority beneficiary to succeed to the benefits. If the intended allocation of the IRA is to the marital trust (qualified terminable interest property [QTIP] or otherwise) and control is not an issue, it may be preferable to have the trustee and spouse disclaim the trust interest and allow the spouse, as a contingent beneficiary, to rollover the IRA into the spouse's own IRA and do a subsequent single or joint life calculation, or further defer the tax under the MDIB requirement.

Which Trust to Fund

Funding the Credit Shelter Trust
Using IRA or qualified plan funds to fund the credit shelter trust creates several problems:

- If the instrument uses a pecuniary formula funding clause in favor of the credit shelter trust, funding may result in a taxable transfer made to satisfy a pecuniary obligation.
- Because of the "income in respect of a decedent" nature of the asset, this results in potential underuse of the applicable exclusion amount.
- If the credit shelter trust requires payment of the trust income to the surviving spouse, additional amounts may need to be withdrawn to pay taxes, further diluting the value of the asset.

However, if these funds are the bulk of the estate and the client desires to preserve the greatest value for nonspouse beneficiaries, this may be the only option.

Funding the Marital Trust
Using IRA and qualified plan assets to fund the marital trust involves many of the

same problems as exist with the credit shelter trust. Obviously, underuse of the applicable exclusion amount does not present a problem, but there are other issues:

- Complying with the QTIP requirements might shift the cost of plan maintenance from the spouse to the lineal descendants.
- If the spouse is a noncitizen, there will be qualified domestic trust (QDOT) issues.
- Insuring that all QTIP requirements are met may require trust provisions that go beyond those the individual wants.

Special Problems

Two special issues need to be addressed:

- If the IRA or qualified plan assets were created under community property law, the value of the nonparticipant spouse's community property interest will not be available for the credit shelter trust if the nonparticipant spouse dies before the participant. This same problem is presented in separate property states, including Michigan, when the participant outlives the spouse and there are insufficient assets to fund the credit shelter trust at the first death.
- Charitable motives should be investigated because these assets can pass to the charity without being diminished by income taxes. Proceed with caution, however. Many planned giving counselors use the myth of immediate taxation to encourage donors to designate charities as beneficiaries for qualified plans, even though deferral may be available as discussed above. Look to the client's preexisting charitable inclinations as a better indicator for arranging a charitable gift. The use of charitable planning techniques may also present a useful tool when the client has passed the required beginning date but has not selected optimal beneficiary and calculation methods.

To Roth or Not to Roth

The so-called Roth rollover, while much publicized, contains a potential snare. Given the dual assumptions that the tax rate in retirement will be the same as at present and that the distribution pattern will be unaffected, the Roth rollover is tax neutral. There are several specific situations in which a rollover would be useful, all of which depend on "advance knowledge" of dates of death, etc.

Absent special circumstances, a rollover to a Roth IRA does not generally benefit the client and may actually be to the client's detriment. Deferral is a traditional goal, and a rollover generates immediate tax. Tax rates may change, and consider, if you will, the impact of changing to a consumption-based tax system (admittedly remote, but stranger things have happened).

However, there are circumstances in which a rollover may benefit the client. Assuming the client is eligible for a rollover, one of these circumstances may favor a rollover, particularly if death is imminent:

- The qualified plan assets are needed to fund the credit shelter trust. The rollover will prevent postdeath erosion of the value of the applicable exclusion amount through income taxation.
- The participant has already passed the required beginning date with an unfavorable set of facts affecting the calculation of required minimum distributions. The rollover, as a cleanup strategy, may enhance the client's ability to continue tax-free growth and distributions.
- There is a potential adverse interaction with the client's QTIP or QDOT requirements.
- It is fairly certain that the future tax rates will be significantly higher and there will be no necessity of withdrawing the funds.

The Legacy IRA

The multigeneration IRA provides a means to extend the life expectancy on which the required minimum distributions are calculated and depends primarily on the application of the MDIB requirement.

The following facts illustrate the outcome:

> Mr. Joe Gotrocks (born July 17, 1927) is a married individual with an IRA balance as of December 31, 1997, of $800,000. He and his wife of 45 years, Jane (born February 2, 1928), have two children: Joe Jr. (born April 15, 1957) and Susan (born May 28, 1961). They have additional assets in excess of $2,000,000. Mr. Gotrocks also has a substantial defined benefit plan from his former employer, and they can live comfortably on the proceeds of the defined benefit plan and Social Security. The IRA balances have been averaging 10 percent growth over the lifetime of the IRA and 17 percent recently.
>
> Under Joe's current IRA agreement, his spouse is automatically the death beneficiary, and unless another election is made, the IRA distribution will be recalculated annually using a joint life expectancy.

What's wrong? Because of recalculation, the survivor will need to shift to single life expectancy, accelerating the distributions. Also because of recalculation, if Joe and Jane die before their life expectancies of 20.8 years, the IRA balance will need to be fully distributed by December 31 of the year following the year of the last death. It would be possible to project 70 percent taxation on the balance, due almost immediately.

Instead, let us consider the following alternative:

> Joe partitions his IRA into two equal IRAs. He names Joe Jr. the beneficiary of one and Susan the beneficiary of the other. (Joe might have elected to name each child's separate share trust as the beneficiary under his revocable trust if control was an issue.) Jane, recognizing that the remainder of the estate and the pension plan gives her sufficient support, is happy to go along with this plan. (Some states may require consent.)

What happens? Several good things:

- Joe, through the application of the MDIB requirement, gets to make calculations based on the joint life expectancies of him and Joe Jr. or him and Susan (nonrecalculation is required because of the nonspouse beneficiary). Even though Joe Jr. and Susan will be treated as being 60 years old, this still extends the joint life expectancy to 28.6 years.
- Because of the increased life expectancy, only 3.4 percent will need to be distributed.
- Because only 1/28.6 of the balance needs to be taken in year 1, the growth in excess of 3.4 percent will be added to the IRA balance tax free.
- Assuming the lower growth rate of 10 percent, it will be more than 18 years before the IRA balance stops growing. At the higher rate, it could be 22 years before the crossover.
- At Joe's death, each child becomes the single beneficiary. At that point the minimum distributions will be calculated based on their life expectancies at Joe's required beginning date less the number of elapsed years. Depending on the date of death, this could produce a second 30-year term.
- If we assume that Joe Jr.'s life expectancy at Joe Sr.'s required beginning date was 35 years and that Joe Sr. lives five years, the crossover is delayed for an additional 8 years, or a total of almost 30 years.
- During this time, the IRA has continued to grow and, depending on the rates, could be worth substantially more than the original $800,000.
- If the funds get out of balance, Joe Sr. can solve this by using the alternative rule, taking more from one IRA than the other, thereby continuing to equalize the funds.

Obviously, the younger the beneficiary, the longer the wait for the second crossover date, the greater the deferral, and the larger the benefit. When small IRA balances are involved, the use of a grandchild as a beneficiary can produce an optimum result, provided the GST tax exemption is available.

Using this approach, rather than a charitable remainder trust, the heirs will realize substantially the same benefits from the income stream and retain the remainder interest. When clients are not motivated by charitable principles, this approach may represent an alternative to preserve family wealth.

Conclusions

- Listen to and focus on the client's goals and needs.
- Obtain and review the plan documents or custodial agreements.
- Use the "Dirty Dozen" principles to analyze the plans.
- Continue to use deferral strategies unless specific advance information suggests a contrary strategy.
- Use charitable gifting strategies when clients have charitable goals or as a cleanup strategy after the required beginning date.

Don't miss the opportunity to provide value-added services to your estate planning clients with qualified plan assets. By doing so, you will be cementing the client relationship and enhancing your estate planning practice.

Notes

1. For the purpose of this article, the term *qualified plan* encompasses both employer-sponsored plans and IRAs. When the distinction is of import, they are differentiated.

2. IRC § 401(a)(9)(A).

3. Prop Treas Reg § 1.401(a)(9)-1, Q&A D-3(a).

4. *Id.*

5. Prop Treas Reg § 1.401(a)(9)-1, Q&A F-1(b).

6. Life Expectancy Tables can be found in IRS Publication 590.

7. Prop Treas Reg § 1.401(a)(9)(A).

8. Prop Treas Reg § 1.401(a)(9)-1, Q&A D-2A(2).

9. Prop Treas Reg § 1.401(a)(9)-1, Q&A D-5.

10. The relaxed requirement allowing for trusts that become irrevocable on death represents a change introduced by modifications to the proposed regulations in IRB 1998-4.

11. This is the so-called heartbeat rule. Each beneficiary must have a heartbeat. If charities and other institutions are beneficiaries of even a portion of a trust, they disqualify the entire trust as a designated beneficiary. This does not include charities named as beneficiaries in the event of the unavailability of any other beneficiary (ultimate disaster designations). Practitioners need to be aware of charitable bequests within trusts to prevent inadvertent disqualification.

12. Prop Treas Reg § 1.401(a)(9)-1, Q&A D-7(1), (2).

13. Prop Treas Reg § 1.401(a)(9)-1, Q&A D-5(b)(4), Prop Treas Reg § 1.401(a)(9)-1, Q&A D-7(b). A change proposed in IRB 1998-4 clarifies the timing issue to some degree. Maintaining a current statement at all relevant times is prudent under most circumstances.

14. Prop Treas Reg § 1.401(a)(9)-1, Q&A D-5(a).

15. Prop Treas Reg § 1.401(a)(9)-1, Q&A E-5(a).

16. *Id.*

17. Prop Treas Reg § 1.401(a)(9)-1, Q&A E-7(c).

18. Prop Treas Reg § 1.401(a)(9)-1, E-5(c).

19. IRC § 401(a)(9)(D).

20. Prop Treas Reg § 1.401(a)(9)-1, Q&A E-8(a).

21. Prop Treas Reg § 1.401(a)(9)-1, Q&A E-7(c).

22. Prop Treas Reg § 1.401(a)(9)-1, Q&A E-7(b).

23. *Id.*

24. Prop Treas Reg § 1.401(a)(9)-2.

25. Prop Treas Reg § 1.401(a)(9)-1, Q&A F-3A(b)(1).

26. Prop Treas Reg § 1.401(a)(9)-1, Q&A H-1.

27. *See, e.g.*, the form of the A.G. Edwards Custodial Agreement.

28. IRC § 401(a)(9)(B)(ii); Prop Treas Reg § 1.401(a)(9)-1, Q&A C-2.

29. Prop Treas Reg § 1.401(a)(9)-1, E-8A.

James R. Keller, LLM, is a sole practitioner in Bloomfield Hills. He is a member of the National Network of Estate Planning Attorneys, and he chairs the Technology

Committee of the Michigan Forum of Estate Planning Attorneys.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Bar Sections

Family Law Section

Labor and Employment Law Section

Probate and Estate Planning Section

Probate and Estate Planning Section

The following article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

PROTECTING YOUR ATTORNEY FEES WHEN REPRESENTING FIDUCIARIES

By Steven A. Mitchell

Generally, when an attorney enters into a professional relationship with a client, a written fee agreement is not required, although it is recommended. In addition, in most attorney-client relationships there is no requirement for an attorney's fee to be approved by the court or any other authority. However, that is not true when a lawyer undertakes the representation of a fiduciary in connection with matters brought under the jurisdiction of the probate court. With certain limited exceptions, "attorney fees must be approved by the court prior to payment."[1]

MCR 8.303(B) requires that a written fee agreement be executed by a fiduciary or a proposed fiduciary at the commencement of the representation:

> **Written Fee Agreement**. At the commencement of the representation, the attorney and the fiduciary or the proposed fiduciary must enter into a written fee agreement signed by them. A copy of the agreement must be provided to the fiduciary.

Furthermore, the fee agreement notwithstanding, MCR 8.303(C) requires that the attorney representing a fiduciary maintain detailed time records for legal services rendered:

> **Records**. Regardless of the fee arrangement, every attorney who represents a fiduciary must maintain time records for services that must reflect the following information: the identity of the person performing the services, the date the services are performed, the amount of time expended in performing the services, and a brief description of the services.

The attorney must also provide a detailed notice of the arrangement to all interested parties pursuant to MCR 8.303(D):

> Notice to Interested Parties. Within 10 days after the appointment of a fiduciary or the retention of an attorney by a fiduciary, whichever is later, the attorney must mail to the interested parties whose

> interests will be affected by the payment of attorney fees, a notice in the form substantially approved by the State Court Administrator and a copy of the written fee agreement. The notice must state:
>
> (1) the anticipated frequency of payment,
>
> (2) that the party is entitled to a copy of each statement for services or costs upon request,
>
> (3) that the party may object to the fees at any time prior to the allowance of fees by the court, or, in the case of independent probate, before the Certificate of Completion is issued,
>
> (4) that an objection may be made in writing or at a hearing and that a written objection must be filed with the court and a copy served on the fiduciary or attorney. A copy of the notice and a proof of service must be filed with the court.

Failure to strictly comply with these rules may put the attorney's ability to receive fees for legal services duly rendered at peril. In deciding whether to award fees, "[t]he court may also take into account the failure to comply with" these rules.[2] Accordingly, it is important to have and use written fee agreement forms and notice forms for these types of representation.

How may different fiduciaries are included under MCR 8.303?

> (F) Definition. For purposes of this rule, "fiduciary" includes those fiduciaries described in MCL 700.5; MSA 27.5005 and a testamentary trustee.

The statute includes conservators, guardians, and personal representatives. It does not expressly include the trustee of a living trust. If you are in doubt about whether a fiduciary is represented, I recommend that you comply with MCR 8.303.

While a fiduciary may pay an attorney periodically without prior court approval, certain conditions must be met:

> (1) the attorney and the fiduciary have entered into a written fee agreement;
>
> (2) copies of the fee agreement and the notice required by subrule (D) have been sent to all interested parties who are affected;
>
> (3) a statement for services and costs (containing the information required by subrule [C]) has been sent to the fiduciary and each interested party who has requested a copy of such statement; and
>
> (4) no written, unresolved objection to the fees, current or past, has been served on the attorney or the fiduciary.[3]

Under any circumstances, the attorney's compensation for legal services rendered on behalf of a fiduciary must be "reasonable."[4] Reasonableness is determined by consideration of the factors listed in MRPC 1.5(a), but the probate court may also consider other factors. Problems may arise in the interpretation of

what is reasonable.

A probate court has broad discretion in determining what constitutes reasonable compensation for legal services performed by an attorney on behalf of a fiduciary.[5] On review, the probate court's determination of what constitutes reasonable compensation for legal services will be reversed only if there has been an abuse of discretion.[6] Accordingly, your best shot at obtaining the fees you feel you have earned is before the probate court, so documenting your claim for the reasonableness of your fees before the probate court is critical.

Factors the probate court may consider to determine the value of legal services include the time spent on the matter, the amount of money involved, the character and nature of services rendered, the skill and experience called for, and the results obtained.[7] To the surprise and chagrin of some attorneys, the probate court may even go outside the record to obtain information helpful in evaluating the reasonableness of the requested attorney fees.[8] The probate judge in *In re Thacker Estate* consulted publications from the state bar, the local bar, and other judges to evaluate the reasonableness of the requested fee. The court justified this research based on the principles of judicial notice and summary jurisdiction over officers of the court as well as the duty of the probate court to protect parties interested in an estate from excessive or unfair fees.[9] The court of appeals in *Thacker Estate* upheld the probate court's practice of going outside the record to obtain information to assist it in evaluating the reasonableness of the fee by noting that "the court has the broadest discretion to evaluate the worth of the services rendered in light of its experience and knowledge of such matters."[10] Accordingly, great care must be taken to properly persuade the probate court that your fees are reasonable. Although it might be helpful to employ a respected expert in the field to provide an affidavit regarding the reasonableness of the fee, the supreme court has, on at least one occasion, disregarded such evidence, relying on its own collective experience in reducing an attorney fee in such a case.[11]

Recently, the court of appeals followed the rule established in *Thacker Estate* when the probate judge went outside the record to consider information from local attorneys in concluding that the requested attorney fee was unreasonable.[12] While overreaching on the part of the attorney involved may have been evident in some of these cases, in others, the attorney fee was at least arguably reasonable. Therefore, care must be taken to fully comply with the letter of MCR 8.303 as well as to document the reasonableness of fees for legal services duly provided.

Finally, can attorney fees incurred in establishing and defending a petition for attorney fees be paid from an estate? The court of appeals has said no.[13] The reasoning in *Sloan Estate* is based on the statutory[14] principle that, to be compensable, legal services rendered to an estate must be necessary and provided on behalf of the estate. The court of appeals in *Sloan Estate* held that legal fees for services incurred in perfecting a claim for attorney fees were not performed on behalf of the estate. Accordingly, the attorney could not recover fees for services performed in connection with presenting a claim for legal services on his own behalf.

The *Sloan Estate* case reinforces the notion that laying the proper groundwork by strictly complying with the requirements for the payment of attorney fees is by far the best way to make certain that you will be compensated reasonably, fully, and fairly for your efforts in the representation of a fiduciary. In today's litigious society, failure to follow these principles and rules increases the risk that a litigant will challenge your request for reasonable compensation. In accordance with

Sloan Estate, not only may your fees be at risk in such a contest, but also you may not expect to be compensated by the estate for waging a fight for your duly earned fees.

Notes

1. MCR 8.303(E).
2. MCR 8.303(A).
3. MCR 8.303(E).
4. *In re Krueger Estate*, 176 Mich App 241, 438 NW2d 898 (1989).
5. *Id.* at 248.
6. *In re Prichard Estate*, 164 Mich App 82, 416 NW2d 331 (1987).
7. *Id.* at 88.
8. *In re Estate of Thacker*, 137 Mich App 253, 358 NW2d 342 (1984).
9. *Id.* at 257.
10. *Id.* at 258.
11. *Becht v Miller*, 279 Mich 629, 640?641, 273 NW 294 (1937).
12. *In re Provenzano Estate*, No 201479 (Sept 15, 1998) (unpublished).
13. *In re Sloan Estate*, 212 Mich App 357, 538 NW2d (1995).
14. MCL 700.543, MSA 27.5543.

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.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Probate and Estate Planning Section

The following article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE
By Ramon F. Rolf, Jr.

The Unauthorized Practice of Law--
A Hot Topic Gets Hotter

In Michigan we have witnessed a steady increase in "marketers" selling will and trust kits. These unlicensed individuals and organizations advertise their products with such slogans as

- "Avert the high cost, trauma, and delays of probate";
- "Leave your money to your children, *not* your lawyer";
- "Cut all estate taxes to zero"; and
- "Avoid all probate and estate taxes using the best trust and a unique LP."

These advertisements raise important questions for attorneys about fraud, consumer protection, and the unauthorized practice of law.

A lawyer who advertised using the language quoted above would be violating MRPC 7.1. This rule states that an attorney may advertise in any form of public communication provided that the communication is not false, fraudulent, misleading, or deceptive. Moreover, advertisement by a licensed Michigan attorney may not create an unjustified expectation of results. An advertisement that is intended to undermine the public's confidence in our probate courts by misrepresenting the costs of probate or that promises a foolproof strategy to cut estate taxes in all cases would violate the rule.

Logic dictates that a misleading advertisement should be prohibited whether it is promulgated by a lawyer or by an unlicensed individual. Michigan has two statutes that arguably prohibit false advertising by anyone.

- The Pricing and Advertising Act, MCL 445.356 et seq., MSA 19.853(16) et seq., prohibits a person from knowingly making or distributing advertisements that contain untrue, deceptive, or misleading statements or representations. The statute defines *advertising* as "all representations disseminated in any manner by any means for the purpose of inducing, or

which are likely to induce, directly or indirectly, the purchase of a consumer item, service, good, merchandise, commodity, or real property." MCL 455.351, MSA 19.853(11). This law would appear to apply to both attorneys and nonattorneys in circulating general advertisements.

- The Michigan Consumer Protection Act, MCL 445.901 et seq., MSA 19.418(1) et seq., prohibits unfair, unconscionable, and deceptive methods, acts, and practices in the conduct of a trade or commerce.

Neither of these two acts has been applied to attorneys and the provision of legal services in Michigan. Although no Michigan case has decided whether attorneys may be liable, a court has held a physician liable under the Michigan Consumer Protection Act. *Nelson v Ho*, 222 Mich App 74, 564 NW2d 482 (1997). The *Nelson* case implies that individuals providing professional services are subject to the act. In other states, such consumer protection laws have sometimes been applied to professionals, but no majority rule emerges from a review of other jurisdictions.

From this writer's viewpoint, the will and trust kit advertisements set forth at the start of this article violate both of the cited Michigan statutes, whether or not the advertiser is a licensed attorney.

The next-and more difficult-question is whether the selling of estate planning forms or advice about the preparation of forms constitutes the unauthorized practice of law. Michigan law states that it is unlawful for any person to practice law unless the person has been authorized to practice law in this state. Specifically, MCL 600.916, MSA 27A.916 states that it is unlawful for unauthorized persons to practice law, engage in the law business, lead others in any manner to believe that one is authorized to practice law, or in any manner to represent or designate oneself as an attorney. To be qualified for admission to the State Bar of Michigan, a person must meet age, moral, residency, and fitness requirements. MCL 600.934, MSA 27A.934. Therefore, the practice of law in Michigan is "unauthorized" if a person has not met the requirements and been duly licensed by the state of Michigan.

What is *the practice of law*? There is no statutory definition. In seeking to determine what activities are prohibited, it is reasonable to look for the reasons for prohibiting such unauthorized practice. The regulation of the practice of law arose from a need to protect the public from unskilled and unscrupulous persons. This overriding purpose of public protection should dictate which activities are construed to be the unauthorized practice of law.

Without a statutory definition of *unauthorized* practice, we must rely on the courts to determine what constitutes practicing law without a license. *Detroit Bar Ass'n v Union Guardian Trust Co*, 282 Mich 216, 276 NW 365 (1937). The courts in Michigan have not formulated a precise definition of the practice of law because the meaning must necessarily change with the changing social and business order. *Grand Rapids Bar Ass'n v Denkema*, 290 Mich 56, 287 NW 377 (1939). The court in G*rand Rapids Bar Ass'n* listed the following as clear examples of unauthorized practice: counsel and advice, drawing of agreements, the organization of corporations and preparing related papers, and the drafting of legal documents of all kinds, including wills and conveyances. What activity raises itself to the unauthorized practice of law, therefore, seems to be based on the facts and circumstances of each case with the determinative factor being the overriding concern to protect the public.

In *State Bar v Cramer*, 399 Mich 116, 249 NW2d 1 (1976), the Michigan Supreme

Court indicated that a nonlawyer may advertise to sell forms, instructions for completing the form, and typing services. Virginia Cramer and her partner were not attorneys, but they nevertheless advertised in local daily newspapers throughout the state of Michigan marketing a do-it-yourself divorce plan. Mrs. Cramer stated that she and her partner were primarily interested in making their kits available to persons who anticipate divorce proceedings that are uncontested and do not involve children, alimony, or marital property. The court found, however, that they had not always been so selective in their business practices. The court stated that the mere "advertisement and distribution to the general public of forms and documents [used] to obtain a divorce together with any related . . . instructions does not constitute the practice of law." *Id.* at 136. However, the court found that Mrs. Cramer and her codefendants went well beyond merely making available those materials necessary to effect a legal divorce. The court found that the defendants in Cramer advertised professional guidance and conducted personal conferences with their clients to discuss the divorce. The divorce complaint and summons were prepared by the defendants and not by the client. It was further found that Mrs. Cramer had personally advised her clients on the proper testimony to provide in court. The court concluded that "[b]ecause defendant offers counsel in the form of professional guidance to persons seeking to extricate themselves from a legal relationship, the party represented, as well as the public in general, has a right to be assured that these interests are properly represented by members of the bar." *Id.* at 138.

Two recent Ohio Supreme Court cases held that a California company selling living trust documents and an Ohio marketing company both engaged in activities that constituted the practice of law. *Trumbull County Bar Ass'n v Hanna*, 684 NE2d 329 (Ohio 1997); A*kron Bar Ass'n v Miller*, 684 NE2d 288 (Ohio 1997). Specifically, the court found in each case that the defendants were rendering legal advice and were preparing documents involving legal rights. The court described the script the defendant typically followed, which was designed to elicit positive responses from the prospective client. The canned presentation characterized the probate process in pejorative terms and lauded the living trusts intended to be sold. The final series of questions quoted a $14,000 probate fee for a hypothetical $300,000 estate. Without referring to the particular facts involved, the defendant trust marketer would ask whether the client wanted to pay $14,000 in unnecessary probate expenses to the "detriment of the client's family."

Time recently published an article entitled "A Legal Press in Texas," Aug. 3, 1998, at 51. The article began with the following statement:

> Can a book or software program impersonate a lawyer? You might not think so, but a panel supervised by the Texas Supreme Court is hauling in the most prominent U.S. publisher of self-help legal aids to determine if its products are doing just that. The possible culprit, Nolo Press is a cheeky Berkeley, California publisher whose logo depicts lawyers as brief-case-toting sharks with neck ties. But Nolo's real crime may be putting the law into the hands of lay people for $15.00-$45.00 a pop.

Practitioners should know that the Michigan Supreme Court has empowered the State Bar of Michigan to investigate, file, and prosecute possible unauthorized practices. The Ethics, Unauthorized Practice, and Image Committee of the Probate and Estate Planning Council will attempt to act as a liaison with the State Bar in representing our Section. The concern of the State Bar, as well as of our Section, is that members of the public are susceptible to grave injury at the hands of those who practice tax and estate planning without the necessary knowledge,

experience, and qualifications. The estate planning process has become extremely complex, involving not only federal estate and gift tax implications but also interrelated property, contract, and income tax laws. Misrepresentation of results or the failure to ask the right question can result in a botched estate plan and unanticipated and unnecessary taxes.

The State Bar of Michigan has informed us that they need the practicing bar's assistance in policing the unauthorized practice of law by persons in the state of Michigan. In short, they require evidence of unauthorized practice. We invite members of our Section to write or call our Section Council members with suggestions or comments on how we approach the unauthorized practice of law issues in the future. Your Council believes this issue is important to our Section and to each of us who practices estate planning.

Fred Rolf is a member of the Midland-Saginaw law firm of Currie Kendall Polasky Meisel, PLC. He is a member of the Probate and Estate Planning Section Council. A graduate of the Detroit College of Law-MSU, he is past president of the Northeastern Michigan Estate Planning Council. Mr. Rolf is a member of the American Bar Association, the State Bar of Michigan, and the Midland County Bar Association.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Bar Sections

Family Law Section

Labor and Employment Law Section

Probate and Estate Planning Section

Probate and Estate Planning Section

The following article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

LEGISLATIVE REPORT *By Douglas A. Mielock*

Information on Michigan legislation is available at the Michigan Legislature Web site.

Recently Enacted Legislation

Estate Settlement Act, now titled Estates and Protected Individuals Code
1998 PA 386
Effective April 1, 2000
Sponsor: Senator W. Van Regenmorter
Introduced: February 19, 1997

1998 PA 386 repeals and replaces the Revised Probate Code.

Family Division of Circuit Court
1998 PA 298 (SB 808)
Effective September 15, 1998

1998 PA 298 provides that the chief circuit judge and the chief probate judge of each judicial circuit shall enter into an agreement that establishes a plan for how the family division will be operated in that circuit and how the services of various agencies will be coordinated to promote more efficient and effective services to families and individuals.

Michigan Estate Tax Act-Technical Amendments
1998 PA 277 (SB 754)
Effective September 15, 1998

1998 PA 277 amends MCL 205.240 et seq., MSA 7.591(10) et seq. of the Michigan Estate Tax Act to provide that references in that act to the "Internal Revenue Code" refer to the United States Internal Revenue Code of 1986, in effect on January 1, 1998.

Roth IRA Creditor Protection
1998 PA 61 (SB 856)
Effective April 22, 1998

1998 PA 61 amends MCL 600.6023, MSA 27A.6023 of the Revised Judicature Act of 1961 to provide that an individual retirement account or individual retirement annuity as defined in § 408A of the Internal Revenue Code (a Roth IRA) is included in the list of debtor's property exempt from levy and sale under any execution.

Proposed Legislation

Delivery of Decedent's Cash and Wearing Apparel
HB 4649
Sponsor: Representative Schroer
Introduced: April 22, 1997
Current status: Referred to the House Judiciary Committee (April 22, 1997)

MCL 700.103, MSA 27.5103 authorizes a hospital, convalescent or nursing home, morgue, or law enforcement agency holding cash and wearing apparel of a decedent to deliver such property to a spouse, child, or parent of the decedent. HB 4649 increases, from $100 to $500, the amount of cash that may be delivered pursuant to this statute.

Estate Recovery-Amendment to the Social Welfare Act
HB 5452
Sponsor: Representative D. Olshove
Introduced: January 14, 1998
Current status: Referred to the House Human Services and Children Committee (January 14, 1998)

HB 5452 amends the Social Welfare Act to provide that the amount of medical assistance paid on behalf of a person receiving medical assistance under the social welfare act is not a claim against (1) the estate of the recipient following the death of that recipient or (2) the estate of a deceased spouse who survived the recipient. It also provides that the State of Michigan shall not impose a lien against real property of a recipient before or after his or her death to secure amounts properly paid for medical assistance on behalf of the recipient.

Michigan Estate Tax Act
HB 5503
Sponsor: Representative J. McNutt
Introduced: January 27, 1998
Current status: Referred to the Tax Policy Committee (January 27, 1998)

HB 5503 amends the Michigan Estate Tax Act to modify how interest on refunds accrues and to allow the personal representative of the estate the option to treat references to the Internal Revenue Code in the Michigan estate tax act to refer to the code as in effect on the decedent's date of death.

Standby Guardian
HB 5541
Sponsor: Representative D. Gubow
Introduced: February 5, 1998
Current status: Referred to the House Judiciary Committee (February 5, 1998)

HB 5541 amends sections of the Revised Probate Code to add provisions for a new type of guardian, designated a "standby guardian." Under the bill, a standby guardian may be appointed for a minor child on a petition by the minor

child's parent or guardian. Among other things, the petition must state (1) that there is a significant risk of the parent's or guardian's death, incapacity, or debility as a result of a progressive chronic condition or fatal illness and (2) the triggering event or events that would activate the authority of the standby guardian.

Michigan Uniform Transfers to Minors Act
HB 5643
Sponsor: Representative L. Baird
Introduced: March 10, 1998
Current status: Passed by the House of Representatives on May 20, 1998; referred to the Senate Committee on Economic Development, International Trade, and Regulatory Affairs (May 21, 1998)

HB 5643 repeals the Michigan Uniform Gifts to Minors Act and replaces it with the Michigan Uniform Transfers to Minors Act. HB 5643 provides that the custodian shall transfer the custodial property to the minor on the minor becoming 18 years of age unless, at the time of the initial transfer to the custodian, a later time is specified, but in no event may the transfer of the custodial property to the minor be delayed beyond the minor's 21st birthday.

Michigan Uniform Prudent Investor Act
HB 5645
Sponsor: Representative L. Baird
Introduced: March 10, 1998
Current status: Passed by the House of Representatives on May 20, 1998; referred to the Senate Committee on Economic Development, International Trade, and Regulatory Affairs (May 21, 1998)

HB 5645 adopts the Uniform Prudent Investor Act. SB 209 (the Estates and Protected Individuals Code) includes the Uniform Prudent Investor Act.

Uniform Statutory Rule Against Perpetuities
HB 5647
Sponsor: Representative L. DeVuyst
Introduced: March 10, 1998
Current status: Passed by the House of Representatives on May 20, 1998. Referred to the Senate Committee on Economic Development, International Trade, and Regulatory Affairs (May 21, 1998)

HB 5647 amends MCL 554.72, MSA 26.48(2) of the Michigan Uniform Statutory Rule Against Perpetuities to add language that would prevent an irrevocable trust from inadvertently losing its grandfathered status under the generation-skipping transfer tax by reason of an exercise of a power of appointment under the trust that attempts to extend the term for a period that is the later of the common-law rule against perpetuities period or the uniform statutory rule against perpetuities period (90 years).

Uniform Anatomical Gift Act
HB 5686
Sponsor: Representative L. Baird
Introduced: March 12, 1998
Current status: Referred to the House Health Policy Committee

HB 5686 repeals certain portions of the Public Health Code and adds new sections consisting of the Uniform Anatomical Gift Act.

Uniform Fraudulent Transfer Act
HB 5708
Sponsor: Representative A. Richner
Introduced: March 19, 1998
Current status: Passed by the House of Representatives on May 20, 1998; referred to the Senate Committee on Economic Development, International Trade, and Regulatory Affairs (May 21, 1998)

HB 5708 repeals the Uniform Fraudulent Conveyance Act, MCL 566.11-566.23, MSA 26.881-.893, and adopts the Uniform Fraudulent Transfer Act.

Inheritance Tax Refund
HB 5725
Sponsor: Representative Leland
Introduced: April 1, 1998
Current status: Referred to House Tax Policy Committee (April 1, 1998)

HB 5725 amends the Michigan Estate Tax Act to provide that a judge may grant a rehearing on the determination of death taxes applying to a person dying before October 1, 1993, at "any time prior to the allowance of the final account." The bill is intended to correct a perceived injustice in a case where an estate overpaid Michigan inheritance tax by more than $28,000 but could not get a refund because it missed the 90-day deadline for petitioning for redetermination of inheritance tax.

Guardian's Power in Relation to Patient Advocate
HB 6046
Sponsor: Representative A. Richner
Introduced: September 16, 1998
Current status: Referred to the House Judiciary Committee (September 16, 1998)

HB 6046 amends various sections of the Revised Probate Code to (1) limit a court's ability to grant a guardian the same powers that are held by a patient advocate under MCL 700.496, MSA 27.5496 and (2) limit a court's ability to authorize a guardian or conservator to sell a ward's real property.

Model Policies Regarding Attorneys and Guardians ad Litem Representing Children
HB 6086
Sponsor: Representative E. LaForge
Introduced: September 16, 1998
Current status: Referred to the House Human Services and Children Committee (September 16, 1998)

HB 6086 amends MCL 722.630, MSA 25.248(10) to require the Family Independence Agency to develop and distribute model policies regarding the roles of attorneys and guardians ad litem in representing children in cases filed under MCL 712A.1 et seq., MSA 27.3178(598.1) et seq. of the Probate Code and MCL 700.427, MSA 27.5427 of the Revised Probate Code, which concern the procedure for appointing a guardian for a minor. The Family Independence Agency would be required to use as a model for its policies the State Bar of Michigan's publication, "Guidelines for Advocates for Children in Michigan Courts."

Health Care Surrogate
HB 6088

Sponsor: L. Martinez
Introduced: September 16, 1998
Current status: Referred to the House Judiciary Committee (September 16, 1998)

HB 6088 adds a § 496a to the Revised Probate Code to allow for the appointment of a *health care surrogate*, who would be authorized to make health care decisions for an individual who does not have a guardian or patient advocate. HB 6088 is similar to SB 671.

Mediation of Guardianship and Protective Proceedings
HB 6089
Sponsor: Representative A. Frank
Introduced: September 16, 1998
Current status: Referred to House Judiciary Committee (September 16, 1998)

HB 6089 amends MCL 700.401, MSA 27.5401 of the Revised Probate Code to allow a court to recommend mediation of issues involved in protective proceedings and guardianship proceedings before the court.

Collection of Data on Adult Guardianships and Conservatorships
HB 6090
Sponsor: Representative W. Callahan
Introduced: September 16, 1998
Current status: Referred to House Judiciary Committee (September 16, 1998)

HB 6090 would add a § 402 to the Revised Probate Code to require the state court administrator to establish a system for collecting data on adult guardianships and conservatorships. The data collected would be made available to the public.

Guardian Following Ward's Wishes
HB 6091
Sponsor: Representative L. Martinez
Introduced: September 16, 1998
Current status: Referred to House Judiciary Committee (September 16, 1998)

HB 6091 amends MCL 700.447, .455, MSA 27.5447, .5455 of the Revised Probate Code to require a guardian to be guided by the wishes expressed by the guardian's ward before the ward became legally incapacitated. In addition, whenever meaningful communication is possible, before making a major decision affecting the ward, the guardian would be required to consult with the ward.

Duties of a Guardian ad Litem
HB 6092
Sponsor: Representative M. Schauer
Introduced: September 17, 1998
Current status: Referred to the House Judiciary Committee (September 17, 1998)

HB 6092 amends MCL 700.443a, MSA 27.5443(1) of the Revised Probate Code to add to the list of duties of a guardian ad litem the duty to inform the court of appropriate alternatives to a guardianship.

Requirements for Appointment of a Guardian
HB 6093
Sponsor: Representative L. Baird
Introduced: September 17, 1998
Current status: Referred to the House Judiciary Committee

(September 17, 1998)

HB 6093 amends MCL 700.444, MSA 27.5444 of the Revised Probate Code to (1) require that each finding necessary for the appointment of a guardian be supported separately on the record and (2) prohibit a court from granting a guardian the same powers that are held by a patient advocate, unless the patient advocate is not complying with the designation or MCL 700.496, MSA 27.5496.

Guardian's Sale of Ward's Real Property
HB 6094
Sponsor: Representative R. Bogardus
Introduced: September 17, 1998
Current status: Referred to the House Judiciary Committee (September 17, 1998)

HB 6094 amends MCL 700.455, .468, .484, MSA 27.5455, .5468, .5484 of the Revised Probate Code to restrict a guardian's ability to sell a ward's real property.

Embezzlement by Fiduciary

HB 6154
Sponsor: A. Frank
Introduced: September 22, 1998
Current status: Referred to the House Judiciary Committee

HB 6154 adds a § 174a to the Revised Probate Code to provide that a person in a relationship of trust with a vulnerable adult shall not use the vulnerable adult's money or property for the benefit of any person other than the vulnerable adult and with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of that money or property. A person who violates these provisions is guilty of a felony punishable by imprisonment for not more than 10 years, a fine of not more than $5,000, or both.

Medical Self-Determination
SB 80
Sponsor: Senator J. Berryman
Introduced: January 28, 1997
Current status: Referred to the Senate Health Policy
and Senior Citizens Committee (January 28, 1997)

SB 80 allows an individual 18 years of age or older who is of sound mind to execute a declaration to authorize types of medical intervention or the withholding or withdrawal of medical intervention if the declarant is terminally ill or permanently unconscious and unable to participate in medical treatment decisions.

Abolishment of the Doctrine of Adverse Possession
SB 417 and 418
Sponsor: Senator J. Conroy
Introduced: April 22, 1997
Current status: Referred to the House Judiciary
Committee (April 22, 1997)

SB 417 and SB 418 amend MCL 565.101, 600.5801, .5867, MSA 26.1271, 27A.5801, .5867 and add a section 600.5867a to abolish the doctrine of securing title to real property by adverse possession, effective beginning on the effective date of the acts. SB 417 and SB 418 are tie-barred.

Michigan Medical Treatment Decisions Act
SB 671
Sponsor: Senator C. Dingell

Introduced: July 10, 1997
Current status: Referred to the Senate Judiciary
Committee (July 10, 1997)

SB 671 authorizes the making of medical treatment decisions for a patient when the patient is unable to participate in medical treatment decisions and does not have a patient advocate or guardian. Under the bill, the following individuals are authorized to make medical treatment decisions for the patient, in the following order of priority: (1) the patient's spouse, (2) an adult child of the patient, (3) a parent of the patient, (4) an adult sibling of the patient, (5) an adult grandchild of the patient, (6) a grandparent of the patient.

Appointment of a Child Attorney
SB 955
Sponsor: Senator W. VanRegenmorter
Introduced: February 26, 1998
Current status: Passed by the Senate on May 14, 1998;
referred to the House Human Services and Children
Committee (May 19, 1998)

SB 955 amends the Revised Probate Code to provide for the appointment of a *child attorney* to represent a minor's interest in guardianship proceedings if the court determines that the minor's interests are or may be inadequately represented. SB 955 also describes the powers and duties of such a child attorney.

Michigan Penal Code-Felony by Fiduciary
SB 1122
Sponsor: Senator Gougeon
Introduced: May 7, 1998
Current status: Passed by the Senate on June 4, 1998;
referred to the House Judiciary Committee (June 4, 1998)

SB 1122 amends the Michigan Penal Code to provide that a guardian, conservator, personal representative, trustee, or other fiduciary appointed under the Mental Health Code or the Revised Probate Code commits a felony punishable by 10 years imprisonment, a $5,000 fine, or both if the fiduciary fraudulently disposes of, converts to his or her own use, or takes or secretes with the intent to dispose of or convert to his or her own use without the appointing court's consent any money or property of the person or estate for whom he or she is the fiduciary.

Court Reorganization-Merger of Probate and Circuit Courts
SB 1132
Sponsor: Senator W. Van Regenmorter
Introduced: May 14, 1998
Current status: Passed by the Senate on May 27, 1998;
referred to the House Judiciary Committee (May 28, 1998)

SB 1132 amends the Revised Judicature Act to provide the implementing legislation for SJR R, which proposes an amendment to the State Constitution of 1963 to abolish the probate court and transfer its jurisdiction to the circuit court.

Uniform Principal and Income Act
SB 1255
Sponsor: Senator C. Dingell
Introduced: September 15, 1998
Current status: Referred to the Senate Economic
Development, International Trade and Regulatory Affairs

Committee (September 15, 1998)

SB 1255 adopts the latest version of the Uniform Principal and Income Act.

Corporate Guardians
SB 1287
Sponsor: Senator G. Hart
Introduced: September 16, 1998
Current status: Referred to the Senate Judiciary Committee (September 16, 1998)

SB 1287 amends MCL 700.454, .501a, MSA 27.5454, .5501(a) of the Revised Probate Code to (1) prohibit kickbacks between guardians and public officials and (2) describe the conditions under which a nonprofit corporation may be appointed as a guardian, a limited or temporary guardian, or a conservator.

Constitutional Amendment-Structure of Trial Courts
HJR EE
Sponsor: Representative N. Ciaramitaro
Introduced: February 11, 1998
Current status: Referred to the House Judiciary Committee (February 11, 1998)

HJR EE proposes an amendment to the state constitution that would provide for one trial court of general jurisdiction. The probate court would be eliminated. The state would be divided into judicial units along county lines.

Constitutional Amendment-Structure of Trial Courts
SJR R
Sponsor: Senator W. Van Regenmorter
Introduced: May 12, 1998
Current status: Passed by the Senate May 27, 1998;
referred to the House Judiciary Committee (May 28, 1998)

SJR R proposes an amendment to the State Constitution of 1963 to abolish the probate court and transfer its jurisdiction to the circuit court.

Douglas A. Mielock is a shareholder with the law firm of Foster, Swift, Collins & Smith, PC, in Lansing. He is licensed to practice law in both Michigan and Illinois. His areas of practice include estate planning and trust litigation.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Bar Sections

Family Law Section

Labor and Employment Law Section

Probate and Estate Planning Section

Probate and Estate Planning Section

The following article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

RECENT DECISIONS IN MICHIGAN PROBATE, TRUST, AND ESTATE PLANNING LAW
By Hon. Phillip E. Harter

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

GUARDIANSHIP-DEVELOPMENTALLY DISABLED PERSON-LEGALLY INCAPACITATED PERSON-MENTAL HEALTH CODE-PROBATE CODE

Neal v Neal (In re Neal), 230 Mich App 723, 584 NW2d 654 (1998)

In this case, petitions were filed pursuant to the Revised Probate Code for the appointment of both a guardian and a conservator for Lawrence Neal and Richard Neal. Lawrence and Richard filed a motion for summary disposition arguing that they were developmentally disabled and that any guardianship proceedings should be brought only under Chapter 6 of the Mental Health Code. Both were clearly developmentally disabled. The probate court denied the motion and subsequently appointed guardians and conservators pursuant to the Revised Probate Code. The matter was appealed to the circuit court, which held that there was no error in the trial court's characterization of Lawrence and Richard as legally incapacitated and that a determination whether they were also developmentally disabled was unnecessary and merely exalted form over function. Richard appealed, and leave was granted.

The court of appeals reversed, holding that an adult guardianship may not be established pursuant to Chapter 4 of the Revised Probate Code when the subject of the petition is developmentally disabled. Section 1604(2) of the Mental Health Code is clear and unambiguous. It states, "An appointment of a guardian for a developmentally disabled person shall be made only pursuant to [the Mental Health Code]." Therefore, the appointment of a guardian for a developmentally disabled person under the Revised Probate Code directly contradicts the legislature's clear mandate that such proceedings be conducted pursuant to the Mental Health Code.

SPOUSE-PRETERMITTED SPOUSE-FAMILY ALLOWANCE-RETROACTIVITY-SPOUSAL ELECTION AGAINST WILL-TIME LIMITS

Herbach v Herbach (In re Estate of Herbach), 230 Mich App 276, 583 NW2d 541 (1998)

This case deals with three important probate issues. The testator, Walter Herbach, executed his last will and testament on March 13, 1982. He bequeathed $50,000 to the petitioner as a "friend." The petitioner and the testator were married in April 1983 and remained married until the testator's death on January 25, 1995. Estate proceedings were commenced in February 1995. On June 15, 1995, the petitioner filed a petition with the probate court for a family allowance within the statutory time period for making a spousal election. The petitioner elected to take her elective share of the estate rather than abide by the terms of the will. The petitioner also filed a petition to take a share of the estate as a pretermitted spouse pursuant to §126 of the Revised Probate Code.

The probate court ruled that the petitioner could take as a pretermitted spouse although she was named in the will as long as she was not named in the will in contemplation of marriage. After a trial, the jury determined that (1) the testator did not contemplate marriage to the petitioner when he executed his will; (2) the testator provided for the petitioner by transfers outside of the will; and (3) these transfers were made in lieu of a testamentary disposition. Because of findings (2) and (3), the probate court ruled that the petitioner was not entitled to take as a pretermitted spouse. The petitioner appealed.

The probate court awarded the petitioner a monthly prospective family allowance on July 5, 1995. The court subsequently ruled that all payments after January 25, 1996, the one-year anniversary of the testator's death, had to be treated as advancements against the petitioner's interest in the estate. On March 7, 1996, the petitioner petitioned for family allowance payments retroactive to the date of the testator's death. The court denied the petitioner's request for retroactive payments. The petitioner appealed. After the jury trial, the personal representative moved for reimbursement of the family allowance, claiming that the testator's nontestamentary transfers to the petitioner reduced the value of her elective share to zero. The petitioner requested that she be permitted to withdraw her election of the statutory spouse's share and to take under the will instead. This request was made beyond the time limits set for making the election. The probate court ordered reimbursement and denied the request to withdraw the election. The petitioner appealed.

First, the court of appeals found that because the petitioner was named in the will, she was precluded as a matter of law from taking as a pertermitted spouse. There was no issue for a jury. Under the plain language of the pretermitted spouse statute, the petitioner was not eligible to take a share because she was not "omitted" from the testator's will. The statute makes no distinction between a bequest to a future spouse in contemplation of marriage and a bequest to a future spouse as a friend or in a different capacity.

Second, the court of appeals held that after filing a petition for family allowance, the petitioner is entitled to payments retroactive to the time of a decedent's death. They found the statutory language to be unambiguous. They concluded that the legislature's intent in drafting the family allowance statute was to provide for the support of surviving spouses during the period between the decedent's death and the distribution of an estate.

Third, the court of appeals held, as a general rule, that a surviving spouse should not be permitted to withdraw an election after the statutory time period for making such an election has passed. In this case the petitioner failed to show that her election was uninformed because the initial inventory allegedly contained factual errors.

TRUSTS-DISCRETIONARY-
SETTLOR AS BENEFICIARY

Colman v Department of Mental Health (In re Hertsberg Inter Vivos Trust), 457 Mich 430, 578 NW2d 289 (1998)

Barbara Hertsberg was a developmentally disabled person. In 1983, her guardian filed a complaint against Edith Hertsberg, her mother, alleging that Edith had neglected Barbara and failed to provide for her with the Social Security benefits Edith had received on behalf of Barbara. A consent judgment was entered in 1986, and Edith was ordered to fund a trust for the benefit of Barbara with $150,000. A discretionary trust with spendthrift provisions was established pursuant to the consent judgment. The trust named Edith as the grantor and two other persons as the cotrustees. On Barbara's death, the trust principal was to be distributed to several of her relatives.

As a recipient of mental health services, Barbara was subject to a financial liability determination. The Department of Mental Health determined that the trust assets were available to reimburse the state. The trustees opposed this position, and both sides sought a court determination. The probate court noted that when the settlor of a trust is also the beneficiary, the assets are reachable by creditors. It concluded that Barbara was the true settlor because she was the plaintiff in the lawsuit from which the trust arose. The court of appeals reversed, holding that Edith had created the trust and furnished the funds for it. Barbara had contributed none of the trust assets. They concluded that creditors could not reach the assets. The Department of Mental Health appealed the matter to the Michigan Supreme Court.

The Michigan Supreme Court reversed the court of appeals and reinstated the order of the probate court. They approved the rule announced in *In re Johannes Trus*t, 191 Mich App 514, 479 NW2d 25 (1991), that when the beneficiary is also the settlor of the trust, creditors may reach the assets of the trust. So the controlling issue was whether Barbara was the settlor of this trust. In determining that she was the settlor, they defined the settlor as the one who provides the consideration for a trust. They observed that it was the identity, not the intent, of the settlor that needed to be determined. In this case, the cause of action was a form of property that belonged to Barbara, and the proceeds of the settlement formed the consideration for the trust. The trust's assets were attributable to the beneficiary, making her the settlor of the trust.

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 Judges 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.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education

Bar Sections

Family Law Section

Labor and Employment Law Section

Probate and Estate Planning Section

Probate and Estate Planning Section

The following article was published in the Fall 1998 issue of Michigan Probate and Estate Planning Journal

DIGEST OF MICHIGAN PROBATE OPINIONS *By Julia R. Hathaway*

98-7

Juvenile crime; Miranda warnings; motion to suppress statement; voluntary statement;
*In the Matter of a Mino*r; Judge Michael J. Anderegg, Marquette County. Although the juvenile defendant did not waive his *Miranda* rights, the court found that his incriminating statement was "voluntary" under the totality of the circumstances and denied the motion to suppress. 453 Mich 1 (1996); 186 Mich App 180 (1990); 227 Mich App 113 (1997).

Julia R. Hathaway is an attorney, a student in the Wayne State University Library and Information Science Program, and a graduate research assistant in the WSU Law Library.

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© Copyright 1996-2001 The Institute of Continuing Legal Education