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## *Probate and Estate Planning Section*

# Michigan Probate and Estate Planning Journal

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## *Probate and Estate Planning Section*

The following article was published in the [Fall 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

### FROM THE CHAIRPERSON'S DESK

By Richard C. Lowe

I am honored to lead the Probate and Estate Planning Section, the State Bar's largest section, into the new millennium as its chairperson. I follow my friend, Brian Howe, who skillfully guided us as chairperson during the last year of the 20th century. Our thanks to Brian for a very successful and productive year. Most notably, the Estates and Protected Individuals Code (EPIC) was enacted into law during Brian's tenure as chairperson.

No mention of EPIC would be complete without acknowledging the extraordinary contribution of John H. Martin. EPIC is the culmination of several years of work by your Council, many Section members, and other interested persons. There is no one who has worked harder than John Martin. There is no one who has worked longer than John Martin. John has been an inspiration to many of us for his relentless pursuit of the drafting and passage of EPIC. John has given more than 2,000 hours during the last several years in connection with his work on EPIC and as chair of the EPIC drafting and enactment committees. John, the Section is extremely grateful for your dedication to the success of EPIC. Many thanks.

In just a few days the new millennium will be here. The most talked and written about subject during the past few months is whether this, that, or the other thing is Y2K compliant. As I write my first chairperson's column, I am able to tell you that probate and trust administration in the State of Michigan is Y2K compliant thanks to EPIC. This is the direct consequence of the foresight and leadership of the officers and council members over the past decade.

EPIC will become effective April 1, 2000. EPIC replaces the Revised Probate Code (RPC) and several other Michigan statutes. It will modernize probate and trust law in our state.

Recently, John Martin has prepared a series of technical amendments to EPIC and finished the official reporter's commentary to EPIC. The Institute of Continuing Legal Education (ICLE) will publish the reporter's commentary as part of its *Michigan Probate Sourcebook*. In addition, it will be published in a separate paperback. The reporter's commentary will be an invaluable tool for practitioners, judges, and probate court personnel in understanding EPIC.

ICLE is planning at least one seminar before the effective date of EPIC at which a detailed analysis of EPIC will be presented. A substantial portion of our Section's annual seminar in May and June next year, chaired by John Scott, will be devoted to EPIC-related topics.

The court rules committee, chaired by Judge Monaghan, has completed the important task of drafting court rules in conformity with EPIC. Judge Supina's court forms committee has worked diligently to create the necessary forms to be used in connection with EPIC. Our thanks to Judges Monaghan and Supina and their committees for their extraordinary work on the rules and forms necessary for the judges, court staff, and practitioners to make a smooth transition from the RPC to EPIC.

Douglas Mielock will again chair our Committee on Special Projects (CSP). The CSP reviews and analyzes legislation and issues important to our Section members. It meets every month immediately before the Section Council meeting.

The CSP is presently working on the following important matters: adoption of the Uniform Principal and Income Act (SB 1255), repeal of the rule against perpetuities, consolidation of the probate courts, and a statute of limitations for malpractice against attorneys and independent trust companies.

Ramon (Fred) Rolf is chair of our Ethics, Unauthorized Practice, and Image committee. Fred's committee continues to point out that various people and organizations that are not licensed to practice law in the State of Michigan are preying on Michigan citizens. These organizations, known as "trust mills," are alive and well. Fred's committee is working with the State Bar of Michigan to identify the promoters of these type of products.

The American Bar Association formed a special committee to study the issue of multidisciplinary practices. All of us have seen traditional estate planning work previously done by attorneys being performed by nonlawyers. It appears that the decision whether to permit multidisciplinary practices will be made state by state.

The State Bar of Michigan has formed a special committee to study the relationships between law and accounting firms. Our Section will provide input to this special committee. Our Section's activities in this area will be coordinated through Fred Rolf's Ethics and Unauthorized Practice committee and Tess Sullivan's Fees and Compensation Committee. The effect of multidisciplinary practices on our estate planning practices is likely to be substantial.

I'd like to extend special thanks to our two outgoing Section Council members, Gayle Robinson and Walter Marsh. The Section is grateful for the time they volunteered while working on Section matters. Gayle and Walter, thank you.

We welcome Judge Phil Harter, who is a familiar face due to his prior service; Tess Sullivan; and Bruce Groom to the Council. Congratulations to Henry Grix, who was elected the Section's treasurer. I am very pleased to announce that Ken Seavoy has been elected to the Council to fill the balance of Henry's term. Our Council has prided itself on, among other things, geographic diversity. Ken is the first Council member from the upper peninsula. We believe that this will add a new dimension to the perspective of our Section Council. Welcome Ken.

I want to end my first message with an invitation to all Section members to participate in Council activities. Each officer, Council member, and committee member volunteers his or her time to participate in Council meetings and fulfill various committee assignments.

Twenty years ago, one of my partners, Joe Foster, became chairperson of the Section. Five years after that, Ev Zack, another of my partners, became Section chairperson. I was always amazed at the amount of time they volunteered for Section activities. Over the years they convinced me, as well as others in our firm, that active participation in Section activities is vital to its long-term success. They were right. Now more than ever.

I invite every Section member to get involved in our Section activities. There is much to do. I will paraphrase State Bar President Al Butzbaugh: what we accomplish as a Section during the year ahead will largely be the product of our collective efforts. Please help me accomplish as much as possible during this next year by participating in Section activities. The dates and locations of our CSP and Council meetings are published in the Journal.

I look forward to serving as chairperson of your Section as we enter the new millennium together.

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## *Probate and Estate Planning Section*

The following article was published in the [Fall 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

### Readers' Questions on Estate Planning And Estate Settlement

By [Dic L. Dorney and Anita Martin](#)

Since our article on trust accounting under EPIC was published in the Winter 1999 issue of the Journal, we have received inquiries about how an account prepared in accordance with the requirements of EPIC differs from an account prepared in accordance with current law. Enclosed is a sample accounting we devised to help answer the question. [Note: Please see the printed version of the Journal for this accounting.]

Under current law, an account acceptable to the court consists of the total assets on hand at the beginning of the period increased by receipts and reduced by disbursements during the period. The account has separate schedules for receipts and disbursements. Assets on hand at the end of the accounting period must be itemized. Current law does not require that receipts and disbursements be allocated between income and principal. SCAO form PC 22b provides for listing gains and losses, while SCAO form PC 22a does not.

In addition to an account filed with the court, MCL 700.814, MSA 27.5814 requires that presently vested beneficiaries of testamentary and inter vivos trusts be given a "statement of the accounts of the trust annually." This phrase also is used in §7-303(c) of the Uniform Probate Code. The comments accompanying §7-303(c) of the Uniform Probate Code indicate that the phrase denotes an informal account (e.g., a narrative that accompanies a copy of the income tax return).

EPIC §7307(3) describes the types of information that must be disclosed for an account to cause the statute of limitations to run on actions against the trustee. The criteria listed in EPIC §7307(3) are the national Fiduciary Accounting Standards.

EPIC §7307(3) provides: "For purposes of subsections (1) and (2), an accounting shall be considered an annual or final account if the account does all of the following: . . . (b) Begins with a concise summary of its purpose and content." The identical language in the accounting standards requires that the entire account be set out on the first page, entitled "Summary of Account," with all page references

to supporting schedules.

EPIC (1) requires supporting schedules, (2) eliminates redundant entries relating to a mere change in form (e.g., the purchase and sale of units of a money market fund), (3) classifies entries as income or principal, (4) uses tax costs as fiduciary acquisition values, (5) lists current values, (6) accounts for income and principal separately, and (7) sets out the entire account in the summary of account with page references to the supporting schedules.

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Dic L. Dorney and Anita Martin are partners in the law firm of Dorney & Martin, in Dexter. Established in 1988, the firm concentrates its practice in the areas of trust and estate taxation and estate planning and administration.

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The following article was published in the [Fall 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

### Representing Yourself As Personal Representative

By [Steven A. Mitchell](#)

Not infrequently, lawyers find themselves acting as a personal representative of an estate by virtue of a client's appointment. The client had the lawyer draft a will in conjunction with an estate plan, in which the client requested, and the lawyer acquiesced, in appointing the lawyer as personal representative for the estate. While the practice is not unusual, the lawyer needs to be attuned to a number of situations that can create problems if things do not go smoothly. Indeed, before actually accepting an appointment as personal representative, the lawyer should thoroughly analyze the situation to make certain that the lawyer is not creating more problems than are being solved.

First, the lawyer needs to recognize that it is impractical to be both lawyer and client under any circumstance, much less one in which the lawyer's conduct will be carefully monitored and closely scrutinized. The maxim, "he who represents himself has a fool for a client," needs to be given careful consideration.

The lawyer needs to recognize that as a personal representative, he or she is undertaking the role of a fiduciary and will be held to the strictest standard of conduct, which may come under scrutiny by both the courts and the attorney discipline system. The fiduciary will be required to document that a written fee agreement has been executed in connection with securing legal services pursuant to MCR 8.303(B), and the lawyer must maintain detailed time records for any legal services rendered in connection with the representation pursuant to MCR 8.303(C).

In other words, the lawyer must enter into a contract with himself or herself and must distinguish between services performed as a lawyer and those performed as a fiduciary. Sometimes, the distinctions become blurred, and the lawyer may suffer a loss of fees or a suspension of his or her law license as a consequence.

In a recent unpublished court of appeals decision, *In re Estate of Laverty*, No 207040 (Mich Ct App June 18, 1999) (unpublished), a lawyer encountered just such difficulty. The lawyer was sanctioned and surcharged for various breaches of the fiduciary duties required of a personal representative. Among other things, the probate court found that the lawyer, as personal representative, failed to file federal and state tax returns, which subjected the estate to penalties and interest;

failed to provide adequate documentation and justification for the valuation of estate assets; failed to conduct an investigation into the extent of the estate's assets; and failed to use accepted regulatory methods for the valuation of estate assets.

On whose advice was the personal representative relying when these decisions were made (or not made)? Obviously, the personal representative would have benefited from the judgment and advice of a separate, independent counsel. As a consequence, the personal representative was removed, sanctioned, and surcharged.

This result placed the lawyer (and former personal representative) in the position of having to go back into probate court to fight with the subsequently appointed personal representative over approval of the attorney fees. While the probate court approved the lawyer's fees for services as counsel for the former personal representative (himself), the court of appeals reversed and remanded on an appeal filed by the subsequently appointed personal representative. As the court of appeals pointed out, MCL 700.543, MSA 27.5543 allows a lawyer employed by the fiduciary of an estate to perform necessary legal services and receive "reasonable compensation for the legal services." Legal services rendered by a lawyer on behalf of the personal representative of an estate are compensable when the services confer a benefit to the estate by either increasing or preserving its assets. In re Sloan Estate, 212 Mich App 357, 362, 538 NW2d 47 (1995). However, pursuant to MCR 8.303, a detailed description of the services provided must be submitted to the probate court in connection with approval for such fees. In re Kreuger Estate, 176 Mich App 241, 483 NW2d 898 (1989). In addition, a fiduciary may receive "reasonable expenses incurred in the administration of the estate" as the probate court deems "just and reasonable" pursuant to MCL 700.541, MSA 27.5541. But a lawyer, acting as a fiduciary, may not charge lawyer rates for the performance of fiduciary services. See Wisner v Mabley Estate, 70 Mich 271, 38 NW 262 (1888).

In remanding the case for further proceedings in the probate court, the court of appeals pointed out that the reasonableness of attorney fees depends on a number of factors, including "the amount of time spent, the amount of money involved, the character of the services rendered, the skill and experience necessary, and the results obtained." See Kreuger Estate, 176 Mich App at 248. Of course, the burden of proof for demonstrating the reasonableness of the fees requested is on the lawyer.

Thus, the lawyer in Estate of Laverty placed himself in a very difficult position. This is not to mention that a lawyer may not be compensated for fees and services incurred in connection with establishing proofs on a petition for attorney fees. See Sloan Estate.

In the initial probate proceeding, the lawyer initially took the position that he did not have to provide an itemization for either fiduciary fees or attorney fees to be compensated. After being corrected by the probate court, he indicated that all of his time constituted services provided as attorney for the personal representative of the estate. The court of appeals rejected this position, pointing out that many of the services and activities performed by the lawyer could well have been performed by a layperson and did not require the expertise of a lawyer. While \$150 per hour was a reasonable rate for his fees as a lawyer, the court found that a personal representative's fiduciary fees are not supportable at that rate. In other words, lawyers who take on the responsibility of fulfilling duties as a personal representative cannot expect to be paid at their normal billing rates for services performed as a lawyer.

At least one lawyer has recently been disciplined with a suspension of 179 days for charging an excessive fee in connection with the performance of fiduciary responsibilities as a personal representative. In addition to the suspension, the lawyer was required to make restitution to the extent that the estate was overcharged for his services. The point is, not only may a lawyer be subjected to sanctions and surcharges in the probate court for failure to observe the duties of a fiduciary as personal representative, the lawyer's very law license may be held up to scrutiny if the breach of fiduciary responsibility is determined to be lawyer misconduct. See ADB Case No. 99-11-GA.

Additional guidance concerning the lawyer's role in representing a personal representative is set forth in State Bar of Michigan Ethics Opinion R-10 (Apr 19, 1991). There are also a number of informal ethics opinions dealing with fact-specific hypothetical circumstances. It should be noted that Michigan formal ethics opinions reflect the policy of the State Bar of Michigan. However, ethics opinions do not have the force and effect of law and may not be relied on as an absolute defense to a charge of misconduct.

In conclusion, any time a lawyer considers accepting a role as personal representative, a number of issues must be considered, including who will represent the fiduciary as lawyer and what value the lawyer as fiduciary will place on his or her services, remembering that a lawyer-fiduciary may not charge lawyer rates for fiduciary services. Dealing with these issues before the responsibility is undertaken can assist the lawyer in avoiding problems that may affect the lawyer's license to practice law.

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

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## *Probate and Estate Planning Section*

The following article was published in the [Fall 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

### EPIC Practice Issues

By [Patricia Gormely Prince](#) and [Randall J. Soverinsky](#)

#### Question

How will EPIC affect the administration of revocable living trusts following the death of the grantor? Specifically, what are the new creditor protection rules facing trusts?

#### Answer

Section 7501 of EPIC provides that the assets of a revocable inter vivos trust are liable for the following claims, expenses, and allowances of the grantor, but only to the extent that the grantor's probate estate is unable to satisfy such claims, expenses, and allowances:

- administration expenses of the grantor's estate
- enforceable and timely presented creditors' claims
- homestead, family, and exempt property allowances

In addition, pursuant to EPIC §7504, if there are no probate proceedings and thus notice to creditors has not been made, the trustee of a decedent's revocable inter vivos trust is required to publish a creditors notice and follow all other notice requirements otherwise imposed on the personal representative of a decedent's estate.

#### Question

How will the above requirements affect (1) revocable living trusts executed before April 1, 2000, whose grantors die after April 1, 2000, and (2) revocable living trusts whose grantors have died and thus are already being administered when EPIC takes effect on April 1, 2000?

#### Answer

The effective date of EPIC is April 1, 2000. The act applies to governing instruments executed by decedents who die after April 1, 2000. In addition, the act applies to court proceedings pending on or after April 1, 2000, or commenced after April 1, 2000, regardless of when the decedent died—unless, in the opinion of the court, the former procedure should be applied in a particular case in the interests of justice or because of the infeasibility of applying EPIC's new procedures.

It is clear that EPIC §§7501 and 7504 will apply to all trusts executed on or after April 1, 2000, as well as all trusts executed before April 1, 2000, if the trust's grantor dies after April 1, 2000. The application of EPIC is less clear when dealing with trusts executed before the effective date of EPIC whose grantors have died and which thus are already being administered on April 1, 2000.

For example, the act does not address what would happen in such a situation when there is no probate estate. On the other hand, it seems likely that in the same situation, if a probate estate has been opened, then EPIC §§7501 and 7504 will apply unless the court decides otherwise. In either situation, to be safe, it is recommended that the trustee petition the court for instructions on how to proceed.

### **Question**

What should a practitioner do to prepare for the changes described above?

### **Answer**

The estate planning practitioner should incorporate the requirements of EPIC §§7501 and 7504 into his or her current revocable living trust document. Specifically, practitioners should change their current documents, which likely contain provisions allowing the trustee to pay debts and expenses of the decedent's estate, to require the trustee to pay such items if the estate does not have sufficient funds to do so.

Practitioners should also add language to their trusts mandating that the trustee publish a creditors notice and follow all other requirements in EPIC §3801 when there is no probate estate for the decedent and thus no published creditors.

For documents executed before April 1, 2000, these changes should be prefaced by a statement indicating that they will only be effective if EPIC §§7501 and 7504 apply to the trust.

Adding such requirements to the trust will alert the trustee to EPIC and help to conform the trust's administration to the new law.

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**Patricia Gormely Prince** practices at Patricia Gormely Prince, PC, in Farmington Hills. Her areas of concentration include estate planning, estate administration, tax planning, and related contested probate matters. She is a member of the Probate and Estate Planning Section Council of the State Bar of Michigan and was formerly the council's chair. She is also a member of the Women Lawyers Association of Michigan and the Real Property and Probate Sections of the American Bar Association. Ms. Prince was editor of the *Michigan Probate and Estate Planning Journal*, coeditor of *Taxation of Estates and Trusts* (ICLE 1994), coauthor of *How to Protect the Protected Person*, 75 Mich BJ 1296 (1996), a

contributor to *Trust Administration in Michigan* (ICLE 1999), and a supplement author for Lawyers Cooperative Publishing Company. Ms. Prince is also a consultant for the probate and estate sections of Callaghan's *Michigan Pleading and Practice*. She has served as a speaker at ICLE seminars in the areas of estate and tax planning.

**Randall J. Soverinsky** is an associate at Patricia Gormely Prince, PC, in Farmington Hills, practicing in estate planning and administration. He is a member of the Probate and Estate Planning Section of the State Bar of Michigan and was a contributor to *Michigan Probate Litigation* (ICLE 1998) and *Trust Administration in Michigan* (ICLE 1999). Mr. Soverinsky has also lectured for ICLE.

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## *Probate and Estate Planning Section*

The following article was published in the [Fall 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

### Ethics, Unauthorized Practice, and Image

By [Ramon F. Rolf, Jr.](#)

**Ethical Issues in Estate Planning for Older Clients** There are now approximately 40 million Americans over the age of 65, and this number will continue to grow as a percentage of the U.S. population. Estate planning practitioners should not and cannot ignore these statistics, as this older population faces a wide range of distinct legal issues. In addition to traditional estate planning, older clients also face nontraditional issues such as understanding and qualifying for various governmental benefits, implications of second marriages, and planning for unique health concerns and diminishing capacity. Nonlegal issues, such as making provisions for finances, tax planning, and medical treatment, will also be important considerations for older clients.

There are inherent challenges in representing older clients. Older clients can be vulnerable and the subject of undue influence. They can be in failing health, which can diminish their ability to make decisions and articulate those decisions. To complicate things further, the older clients' legal issues may affect the interests of other family members. Closely held family businesses can raise problems with differing opinions and priorities and ensuring that there enough other assets to go around to children not involved in the family business.

When meeting with older clients, it is common to discover the entire family in the conference room. A practitioner must carefully evaluate the situation and be conscious of the underlying principle that the attorney is representing the older client, not the family members.

One source of guidance when dealing with the difficult issues raised by planning for older clients is the Michigan Rules of Professional Conduct. These rules, adopted by Michigan in 1988, are based on the American Bar Association's Model Rules of Professional Conduct, developed in the early 1980s. The American Bar Association is currently considering major revisions to the Model Rules. These revisions are expected to be acted on at the annual meeting in 2000 and are hoped to contain additional guidance with respect to the representation of older clients.

While the MRPC can serve as a good guide, they are sometimes of limited use. The rules are, by their very nature, general in scope. The rules are structured

more as disciplinary standards and have limited use for determining the correct approach in everyday practice. Ethics opinions applying these standards may be of some help but are rarely right on point. (The full text of all Michigan Ethics Opinions can now be found at the State Bar web site, <http://www.michbar.org>.) The MRPC were not written to address the unique issues raised by older clients. A 1994 Fordham Law Review article found,

[I]n many areas of legal practice, and in particular those areas that most often affect the elderly client (such as domestic relations, estate planning, and life and health care planning), the lawyer [may] act as counselor, intermediary, and fiduciary [rather than as a litigator]. In such roles, the lawyer often must function without clear guidance from the profession's ethical standards.<sup>1</sup>

As mentioned above, the practitioner must focus on the identity and interests of the older client he or she is serving. Identifying the client may not always be as simple as it sounds. The commentaries from the American College of Trust and Estate Planning Counsel (ACTEC) contain a statement offering guidance to practitioners on the issue of multiple-family-member representation: "it is often appropriate for a lawyer to represent more than one member of the same family in connection with the estate plans . . . . Recognition should be given in the fact that estate planning is fundamentally non-adversarial in nature and estate administration is usually non-adversarial."<sup>2</sup>

As with any other type of representation, if the practitioner anticipates representing multiple family members, this multiple representation should be clearly disclosed to all of the clients involved. An engagement letter sent to each client at the commencement of the representation is an excellent means to make this disclosure. At a minimum, the engagement letter should set forth the identity of the clients, what services and documents will be provided, and how services will be billed. The letter should also discuss what information will be disclosed to whom in a multiple-family-member representation.

Common sense and good listening skills are required when working in a multigenerational setting. Practitioners should be especially cautious when working with a family they have known for years, to make sure they have clearly identified the client and the priorities of that client.

Obviously, when working with older clients, practitioners need to be attuned to whether a client's decision-making capacity is impaired. An excellent article on competency/capacity was presented by Lauren M. Underwood at Michigan's 39th Annual Probate and Estate Planning Seminar.<sup>3</sup> Factors to balance when evaluating capacity include the following:

- the client's ability to articulate the reasoning behind his or her decision
- the client's knowledge of what assets he or she owns and the approximate value of those assets
- the client's ability to appreciate the consequences of his or her decision
- the irreversibility of any decision
- the fairness of any decision (Does someone in the family benefit to the detriment of others?)

- the consistency of any decision with other lifetime commitments previously made by the client

While it may be difficult in some circumstances, it is extremely important for the practitioner to speak with the client alone to independently assess the client's capacity and true wishes. The practitioner should also consider meeting with the client on more than one occasion. This allows the practitioner to confirm the client's capacity in more than just an isolated event. With these issues in mind, the following are several case studies that pose ethical issues and suggested actions for dealing with older clients.

### **Case Study 1**

A parent and a child visit an attorney to make an estate plan that significantly favors one child over the parent's other children.

*Issue:* Who is the client? What steps should the practitioner take to define the attorney-client relationship? Should the practitioner ask to meet with the parent alone?

*Answer:* At the outset of the representation, the practitioner should determine who the client is. In most traditional estate planning practices, the parent would be the client. At some point during the initial meeting or even at the outset, the practitioner should ask to meet with the parent alone. The client (the parent) should be asked how he or she wants the estate distributed and why. Documenting the scope of the practitioner's work in an engagement letter is always a good idea. In addition to estate planning documents, the practitioner should also consider preparing an explanatory letter summarizing the documents and stating the client's planning objectives.

### **Case Study 2**

An agent, under a power of attorney that a practitioner previously prepared for a client, asks the practitioner to assist with Medicaid planning.

*Issue:* Who is the client?

*Answer:* There are two ways to look at this client representation. One would be to represent the agent. The second would be to represent the former client. Consistency dictates that the preference would be to represent the former client and indicate accordingly in an engagement letter.

I discussed this fact situation with John Bos, Michigan's resident expert on Medicaid planning. John stated that he would look at this question a bit differently. John indicated that the agent would be his client, assuming that the agent has authority to hire agents and engage services under the power of attorney. In either case, the identity of the client should be clearly set forth in an engagement letter.

### **Case Study 3**

A long-term client is having difficulty managing at home and elsewhere. The client's children are geographically scattered throughout the United States.

*Issue:* May a lawyer make a disclosure to the client's children or care providers without violating the attorney-client privilege?

*Answer:* The MRPC, specifically, MRPC 1.14, Client Under a Disability, do not

provide such authority. However, the comments to MRPC 1.14 suggest that if an attorney makes a good-faith judgment that his or her client's health, safety, or financial interests are at stake, then a disclosure to the children would be appropriate.

#### **Case Study 4**

A practitioner previously prepared a will for a client. The client has now returned to the practitioner and indicated a desire to make a major change in his estate planning. The practitioner suspects undue influence by the child who brought the client to the office. The client's capacity appears to be significantly diminished since the last time the practitioner met with him.

*Issue:* If the practitioner withdraws from the engagement, is there a duty to tell the client's other children or to advise a new lawyer?

*Answer:* The question to be considered is, Does harm to the client's other children warrant action by the practitioner? In my opinion, the answer is probably no, unless harm to the other children can be considered to frustrate the client's prior intentions (i.e., treating all the children equally in the estate planning). I would strongly recommend that the practitioner meet with the client alone, assess the client's competency, and determine exactly what the client's objectives are as distinct from what the child wants. When the practitioner has determined what the client's objectives truly are, these objectives should be documented in a letter to the client.

Due to the unique issues raised by aging, the representation of older clients has become a specialty. Analyzing capacity, developing a rapport, and making clients feel at ease are all extremely important. Above all else, ascertaining what the client wants the practitioner to do is critically important.

As mentioned throughout this article, engagement letters can serve an especially important role for older clients. Consider using a larger font in written correspondence to older clients, be alert to capacity issues, be alert to conflicts issues, and document the client's file.


The preamble to the MRPC states:

[A] lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service. . . . The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a frame work for the ethical practice of law.

#### **Notes**

1. Edward D. Spurgeon and Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 *Fordham Rev* 1357, 1359 (1994).
2. American College of Trust and Estate Counsel, *The Commentaries on the Model Rules of Professional Conduct* (2d ed March 1995).
3. Lauren M. Underwood, *Standards of Competence*, 39th Annual Probate and Estate Planning Seminar (ICLE 1999).

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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. He chairs the Section's Ethics, Unauthorized Practice, and Image Committee.

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## *Probate and Estate Planning Section*

The following article was published in the [Fall 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

### Legislative Report

By [Harold Schuitmaker](#)

Information on Michigan legislation is available at the Michigan Legislature Web site, located at <http://www.michiganlegislature.org>.

#### **SB 552**

**Amendment to §64 of the Adoption Code, MCL 710.64, MSA 27.3178(555.64) (Senator Dingell)**

The court must dismiss a petition to modify or set aside an order of adoption (1) if the individual filing the petition is an individual whose parental rights were terminated, unless the court finds, by clear and convincing evidence, that the challenged order is no longer in the best interests of the adoptee, or (2) if the individual whose parental rights were terminated failed to respond in the time allowed. Furthermore, a challenge to an order of adoption brought more than six months after the date of the order must be dismissed.

This bill has been referred to the Committee on Families, Mental Health and Human Services.

*Attorney general opinion of interest:*

#### **Opinion No. 7024**

July 1, 1999

Neither the Revised Probate Code nor the Banking Code of 1969 authorizes a for-profit, nonbanking corporation to act as a guardian of a protected person or as a conservator of the estate of a protected person.

*All the following proposed legislation reported in the last issue is still in committee:*

**HB 4226**

**Supervision of Trustees for Charitable Purposes  
(Representatives Martinez, Baird, and Scott)**

**HB 4282 and HB 4283  
Probate Code of 1939  
(Representatives Hardman, Reeves, Rison, Garza, and Daniels)**

**HB 4384  
Estates and Protected Individuals Code  
(Representatives Martinez, Brater, Schauer, LaForge, Dennis, Baird,  
Borardus, Jacobs, and Minore)**

**HB 4649  
Delivery of Decedent's Cash and Wearing Apparel  
(Representatives Schroer, Bogardus, Cherry, Baird, et al.)**

**HB 5452  
Estate Recovery  
(Representative Olshove)**

**SB 80  
Michigan Medical Self-Determination Act  
(Senator Berryman)**

**SB 119  
Attorney Fees to Prevailing Party  
(Senator Steil)**

**SB 393  
Uniform Principal and Income Act  
(Senator Dingell)**

**SB 417 and SB 418  
Abolishment of Doctrine of Adverse Possession  
(Senators Conroy, Young, Bullard, and Cherry)**

**SB 671  
Michigan Medical Treatment Decisions Act  
(Senator Dingell)**

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## *Probate and Estate Planning Section*

The following article was published in the [Fall 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

### Digest of Michigan Probate Opinions

By [Veronica Foster](#)

**98-13**

**Contempt; distribution; fraud; heirs, determination of; personal representatives; pretermitted heirs; sanctions; settlement;** In the Matter of the Estate of Merle Thompson, Deceased; Judge Milton L. Mack, Jr., Wayne County. A nonrelative beneficiary to the estate of the decedent filed a suit alleging that the decedent's daughter improperly withdrew money from her mother's bank account. A settlement agreement was reached in which the daughter received approximately half of the liquid assets of the estate. Subsequent facts established that the decedent's daughter knew of the existence of her half brother before the court approved the settlement agreement. The court set aside the settlement agreement when it found that the decedent's daughter had failed to disclose material information necessary for a just determination of entitlement. The question of sanctions for the fraudulent concealment was to be addressed at a future hearing. All parties were required to turn over the estate's assets to the temporary personal representative or be held in contempt. 31 CFR 103.11; MCR 2.612(C)(1)(c), (3), 5.205(C)(16); 128 US 383; 269 Mich 424; 231 Mich App 22; 214 Mich App 391; 212 Mich App 176; 127 Mich App 14; 20 Mich App 68.

**99-1**

**Attorney fees; personal representatives; quitclaim;** In the Matter of the Estate of Alice Loretta Kress, a/k/a Alice Loretta O'Neil; Judge Milton L. Mack, Jr., Wayne County. The decedent's will left her home to both of her daughters in equal shares. Before her death, the decedent executed a quitclaim deed that transferred the title to herself and only one of her daughters. The petitioner filed a motion as the estate's personal representative challenging the quitclaim deed and seeking the admission of decedent's will. The court held that the quitclaim deed was valid. The petitioner's request for reimbursement for attorney fees was denied for failure to prove (1) that the legal services he supplied were necessary, (2) that those services were provided on behalf of the estate, and (3) that the amount requested was reasonable. MCL 700.543; MSA 27.5543; 311 Mich 288; 212 Mich App 357; 164 Mich App 82; 141 Mich App 412; 119 Mich App 796.

**99-2**

**Attorney fees; burden of proof; fiduciaries; personal representatives;** In the Matter of the Estate of Mary Baydoun, Deceased; Judge Freddie G. Burton, Jr., Wayne County. The respondents filed objections to the personal representative's first and final accounts of the decedent's estate, arguing that the attorney fees requested for two attorneys and the fiduciary fees were excessive and duplicative. After a hearing, the court disallowed the attorney fees for one of the attorneys in the first account as being duplicative. The court permitted the second attorney's fees enumerated in both accounts. The burden of proof was on the attorneys to show (1) that the legal services supplied were necessary, (2) that those services were provided on behalf of the estate; and (3) that the amount requested was reasonable. The petition for reasonable fiduciary fees was not challenged, so the court granted it. MCL 700.541, .543; MSA 27.5541, .5543; MCR 2.602; 316 Mich 285; 233 Mich 467; 165 Mich 586; 212 Mich App 357; 179 Mich App 172; 168 Mich App 540; 164 Mich App 82; 141 Mich App 412; 137 Mich App 634; 121 Mich App 585; 119 Mich App 796.

### 99-3

**Attorney fees; claims against estates; protective orders; settlement; summary disposition; tender back doctrine;** In the Matter of the Estate of Mary Louise Matouk, Deceased; Freddie G. Burton, Jr., Wayne County. The petitioner, a cotrustee to the decedent's estate, entered into a settlement agreement under which he received money and property from the estate. The agreement contained a waiver of any future claims against the estate. The petitioner filed a claim to dismiss the settlement based on fraudulent misrepresentation. The respondents filed a motion for summary disposition, which the court granted based on the doctrine of accord and satisfaction. The petitioner's failure to tender back the consideration received prevented him from challenging the settlement agreement. The court denied the respondents' motion for a protective order for documents subpoenaed by the petitioner, holding that the documents were relevant and that their production could lead to admissible evidence. The court also granted the petitioner's objection to the payment of attorney fees from the trust. The request was premature and could only be granted after a successful defense against the impropriety claim. MCL 339.732, .732(1), 700.541, .543, .809; MSA 18.425(732), (732)(1), 27.5541, .5543, .5809, .5826; MCR 2.116(C)(7), (8), .302(C)(1), .602; 439 Mich 158; 435 Mich 155; 384 Mich 276; 311 Mich 288; 221 Mich App 273; 215 Mich App 379; 213 Mich App 422; 213 Mich App 143; 206 Mich App 46; 198 Mich App 335; 194 Mich App 446; 189 Mich App 334; 184 Mich App 80; 176 Mich App 615; 174 Mich App 649; 165 Mich App 205; 163 Mich App 25; 117 Mich App 1; 53 Mich App 13.

### 99-4

**Distribution; election; estoppel; residue; summary disposition; tender back doctrine; trustees; wills, validity;** In the Matter of the Estate of Harry Latos, Deceased; Judge Milton L. Mack, Jr., Wayne County. Pursuant to the decedent's will and trust, an amendment, and a codicil, the petitioner received a lump-sum payment from the decedent's estate with no entitlement to a share of the residue. The petitioner moved to have the documents declared invalid based on incompetency or undue influence. The respondents filed a motion for summary disposition that sought dismissal of the petitioner's claim. The court granted the respondents' motion and held that the petitioner's claim was barred for failure to tender back the benefit she received pursuant to the trust agreement. The doctrine of election or estoppel by acceptance also barred the petitioner's claims. MCR 2.116(C)(7), (8), .602; 455 Mich 56; 439 Mich 158; 435 Mich 155; 371 Mich 432; 221 Mich App 274; 213 Mich App 422; 213 Mich App 143; 206 Mich App 46; 194 Mich App 446; 165 Mich App 205.

## 99-5

**Conflicts of interest; disqualification, motion; interested parties; judges, disqualification;** In the Matter of Minor Child; Judge Michael J. Anderegg, Marquette County. The petitioner filed a motion to disqualify the presiding judge, alleging a conflict of interest because the petitioner's child was a student of the judge's wife. The controlling statute requires disqualification only if the judge's spouse has "more than a de minimis interest that could be substantially affected by the proceeding" or if the spouse is likely to be a material witness in the proceeding. The grant of a motion for disqualification is not automatic, and the motion must be supported by an affidavit, which was absent from the petitioner's motion. The court, in denying the motion, held the request to be premature. The petitioner could renew the motion if the judge's wife were called as a witness. GCR 2.003(B), (B)(5), (6), (C)(2).

## 99-6

**Felonious killing; insanity; legally incapacitated persons; personal representatives; sale;** In the Matter of the Estate of Marjorie A. Satmary, Deceased; Judge Freddie G. Burton, Jr., Wayne County. The decedent was killed by her husband, who was ruled legally incapacitated at the time of the crime. The petitioners filed a suit alleging that the decedent's estate had been administered without notice of proceedings. The husband took half the proceeds from the sale of the marital home, but the administrators did not account for the decedent's portion. The court granted the petitioner's motion to reopen the estate, for court supervision of the proceedings and for the appointment of a successor personal representative. Though the husband was ruled not guilty by reason of insanity, a preponderance of the evidence proved that he intentionally killed his wife. Consequently, his right to take under the decedent's will was severed as well as his joint ownership in the marital home. MCL 700.251, .251(1), (2), (6), 768.21a(1); MSA 27.5251, .5251(1), (2), (6), 28.1044(1)(1); MCR 2.602; 456 Mich 922; 448 Mich 909; 440 Mich 560; 434 Mich 883; 419 Mich 858; 222 Mich App 276; 218 Mich App 221; 177 Mich App 253; 126 Mich App 611; 350 SE2d 616 (Va).

## 99-7

**Creditors; jurisdiction; notice; personal representatives; reopening estates; summary disposition, timeliness;** In the Matter of the Estate of Helen Schoenfeldt, Deceased; Judge Milton L. Mack, Jr., Wayne County. A creditor of the decedent's estate filed a memorandum of law in opposition to the probate court's challenge to the circuit court's appellate jurisdiction. The creditor sought to have the probate court reopen the estate, to pursue its claim. In denying the motion, the court held that six months before the estate's closing, the creditor had spoken directly with the estate's attorney. The personal representative had also given notice to creditors by publication. The creditor filed an appeal in circuit court that was granted, and the cause was reversed and remanded back to the probate court. The probate court again denied the creditor's motion for summary disposition to reopen the estate. The court held that it is the court of appeals that has subject matter jurisdiction over an appeal of a probate court decision to deny a claim against an estate. The circuit court's ruling was therefore void. MCL 700.703; MSA 27.5703; MCR 2.602, 5.706(B), .801(B), (B)(3)(f), (C); 455 Mich 558; 375 Mich 238; 355 Mich 210; 340 Mich 185; 288 Mich 392; 216 Mich App 343; 197 Mich App 482; 188 Mich App 189; 10 Mich App 296; 9 Mich App 579; 2 Mich App 161; Court of Appeals No 200182 (June 12, 1998) (unpublished).

## 99-8

**Deeds; domicile; forum non conveniens; jurisdiction; real property; wills;** In the Matter of the Estate of Pauline E. Shanahan, Deceased; Judge Freddie G. Burton, Jr., Wayne County. Before the decedent's death, she had executed a will in Florida making her son and daughter co-personal representatives and sole devisees of her estate. The decedent's son filed a petition requesting that Wayne County exercise jurisdiction to determine the ownership of a home located in Wayne County. The property in question had been deeded to the decedent's daughter. The court relied on the principle of forum non conveniens, which permits a court to resist the imposition on its jurisdiction even though such jurisdiction could properly be invoked. The court found that since the majority of the evidence, witnesses, and supporting documents were in Florida, it would be unduly burdensome to require that the title determination be made in a Michigan court. MCL 700.21; MCR 2.602; Fla Stat ch 733.101; 389 Mich 382; 267 Mich 391; 265 Mich 451; 226 Mich 175; 187 Mich 667; 171 Mich 486; 159 Mich 474; 131 Mich 265; 195 Mich App 35; 194 Mich App 519.

### 99-9

**Attorney fees; fiduciaries; legally incapacitated persons; reimbursement;** In the Matter of the Estate of Thomas Allan Schmitzer, a Legally Incapacitated Person; Judge Freddie G. Burton, Jr., Wayne County. The successor conservator of the estate of a legally incapacitated person filed a summons and complaint against the insured's automobile insurance company, alleging failure of the insurance provider to pay fiduciary and attorney fees pursuant to the existing contract under the Michigan No-Fault Act. The court held that a guardianship or conservatorship created in response to injuries received in an automobile accident is entitled to the payment of reasonable fiduciary and attorney fees by the no-fault insurance provider. MCL 500.3101, .3107, .3148, 700.543; MSA 24.13101, .13107, .13148, 27.5543; MCR 2.602; 453 Mich 913; 214 Mich App 195.

### 99-10

**Felonious killing; forfeiture of spousal rights; guardians ad litem; nolo contendere;** In the Matter of the Estate of Maria A. Slattery, Deceased; Judge Milton L. Mack, Jr., Wayne County. The decedent's husband pled nolo contendere and was convicted of second-degree murder in the death of his wife. The guardian ad litem questioned whether such a conviction warranted the granting of a petition for the determination of forfeiture of spousal rights. The court held it irrelevant whether the husband was convicted based on a nolo contendere plea. Pursuant to Michigan law, a second-degree murder conviction means the individual feloniously and intentionally killed another and therefore forfeits any rights to the decedent's estate or assets. The court granted the petition and held that the order of conviction and sentence was sufficient to preclude the husband from benefiting from his wife's death. MCL 700.251, .251(6), 750.316, .317; MSA 27.5251, (6), 28.548, .549; MCR 2.602; MRE 410(2); 459 Mich 950; 457 Mich 442; 456 Mich 922; 451 Mich 261; 450 Mich 937; 444 Mich 941; 435 Mich 408; 434 Mich 883; 415 Mich 577; 230 Mich App 459; 222 Mich App 276; 221 Mich App 455; 218 Mich App 221; 208 Mich App 137; 202 Mich App 318; 201 Mich App 650; 177 Mich App 253; 115 Mich App 543.

### 99-11

**Conversion; equitable remedies; jurisdiction; trusts; unjust enrichment;** In the Matter of the Estate of Elmer G. Mongiat, Deceased; Teresa S. Mongiat v. Falvero L. Mongiat; Judge Michael J. Anderegg, Marquette County. The decedent's wife filed motions for summary disposition to settle several disputes

regarding jointly owned personal property of the decedent and the plaintiff. The plaintiff alleged that, before her husband's death and without her knowledge, her husband transferred co-owned assets into joint ownership with another party. The plaintiff alleged that the two notes left by the decedent indicated that the funds and accounts were for her benefit. The plaintiff sought a constructive trust on the assets, a restraining order, and a permanent injunction. The court granted the defendant's motion for summary disposition, which challenged the conversion argument, holding that the plaintiff presented no genuine issue of material fact. The notes the decedent left were insufficient to prevail over the formal joint ownership the decedent had created with the defendant. The defendant's motion against the plaintiff's constructive trust claim was also granted due to the plaintiff's failure to present adequate evidence to support her claim. The court also held that the decedent had created no express trust; therefore, summary judgment as a matter of law was granted. The court allowed the plaintiff's unjust enrichment claim against the defendant, holding that the decedent's notes could be illustrative of his intent for the property. MCL 700.22(1)(a); MSA 27.5022(1)(a); MCR 2.116(C)(8), (10), (G)(3); 219 Mich App 667; 120 Mich App 84; 115 Mich App 461.

### 99-12

**Joint tenancy; partnership;** In the Matter of the Estate of Norman Vance Luoma, Deceased; Judge Michael J. Anderegg, Marquette County. Before the decedent's death, his father filed a bill of sale for the purpose of making his two sons joint tenants in a family-owned business by equally dividing his one-third share. After the decedent's death, the surviving partner filed a motion to determine whether the bill of sale to joint tenancy meant that the decedent's estate had a monetary interest in the business partnership and, if so, what the value of the interest was. The petitioner also sought a determination of whether any value rested in the surviving partner's services for winding up the partnership. The court held that the joint tenancy provision was void since the brothers were operating under a partnership before the bill of sale was executed. The court determined that the estate was entitled to a monetary payment for excess capital contribution. The claim against the decedent's estate for expenses incurred during the operation of the partnership was dismissed; however, the brother was entitled to a nominal winding-up expense. MCL 449.1ff, .18(f); MSA 20.1ff, .18(f).

### 99-13

**Alimony; divorce; ex-spouses;** In the Matter of the Estate of Donald E. Economy, Deceased; Judge Freddie G. Burton, Jr., Wayne County. The plaintiff filed a suit against her former husband's estate seeking priority payment of alimony and arrearages due to her, pursuant to their judgment of divorce. In response, the personal representative sought dismissal of the claim and denied the estate's liability for alimony payments. The court held that absent an agreement to the contrary, the periodic payment of alimony constitutes an obligation on the estate and that the liability for unpaid installments survives the death of the payer spouse. A court may order an estate to remain open to meet this obligation, or the plaintiff may seek a lump-sum payment from the estate. The statutes and court rules do not discuss the priority of alimony payments; however, the court inferred it to be a general obligation at the lowest priority. MCL 700.192, .715(1), .720(1), .730, .732; MSA 27.5192, .5715(1), .5720(1), .5730, .5732; MCR 2.114(F), .602; 351 Mich 286; 312 Mich 157; 308 Mich 506; 222 Mich 166; 143 Mich 375; 105 Mich 584; 190 Mich App 35; 189 Mich App 716; 37 Mich App 561.

### 99-14

**Admission of wills to probate;** In the Matter of the Estate of Abie Stein, Deceased; Judge Freddie G. Burton, Jr., Wayne County. The petitioner, the

nephew of the decedent, filed a petition to commence proceedings and at a subsequent hearing sought to have an unsigned copy of the decedent's will, which named him sole beneficiary, admitted to probate. The original will was allegedly stolen from the decedent's residence. The court held that the lost will statute applies when the testator's copy is missing. Michigan law requires that a will be in writing and signed by the testator and two witnesses. In the instant case, only one witness was available to establish the will's execution and content. The unsigned will was therefore ruled inadmissible. MCL 700.122, .144, .145(3), .146, .149, .151; MSA 27.5122, .5144, .5145(3), .5146, .5149, .5151; MCR 2.602; 349 Mich 339; 347 Mich 186; 274 Mich 10; 261 Mich 394; 141 Mich 506; 16 Mich 405; 218 Mich App 211; 193 Mich App 468.

### 99-15

**Guardianship, limited; parental rights, termination; visitation;** In the Matter of Minor Child; Judge Michael J. Anderegg, Marquette County. The parents, while residing in Tennessee, gave custody of their minor child to the maternal grandmother, who resided in Marquette County, to avoid neglect proceedings. The grandmother was granted a temporary limited guardianship over the child. A petition to terminate parental rights was later filed, alleging that the parents lived in an unfit home. After a negotiated settlement was reached, the parents failed to appear at the hearing or subsequent proceedings. Service of process was made by publication because they failed to provide the court with an accurate address, due in part to their transient nature. The hearing was conducted in the parents' absence. The court found that the parents had failed to provide for the minor child's physical, emotional, or legal needs. To allow them to participate in the dispositional phase of the hearing, the court allowed their attorney 30 days to attempt to contact the parents to schedule the hearing regarding the termination of parental rights. MCL 712A.2(b)(2); MCR 5.973(A)(2).

### 99-16

**Abandonment; best interests; child support; custody; desertion; guardians ad litem; powers of attorney; paternity; parental rights, termination;** In the Matter of a Minor Child; Judge Michael J. Anderegg, Marquette County. The court terminated the parental rights of the mother and the unidentified father of the minor child. The child resided with her maternal grandmother, who had been given a power of attorney. The mother of the minor child did not respond to the notices of dispositional hearings. She lived in another state and had effectively deserted the child. The court held that it was in the child's best interests to terminate the parental rights of both parents. MCL 712A.19b(3)(a)(i), (ii); MSA 27.3178(598.19b)(3)(a)(i), (ii).

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