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## *Probate and Estate Planning Section*

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

Volume 15, Spring-Summer 1996, No. 3  
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## *Probate and Estate Planning Section*

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

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

By Raymond H. Dresser, Jr.

Fees and practice development are subjects of continuing interest to the probate practitioner. The Council of the Probate and Estate Planning Section continues to explore these areas and ways to assist the practitioner.

Judge Gerald J. Supina chairs the committee that is investigating a new fee survey to update the one that appeared in the Summer 1991 issue of the *Michigan Probate and Estate Planning Journal* (which was actually taken in 1990). Some attorneys have questioned the validity, timeliness, and use of the survey. The probate judiciary, however, has strongly indicated that they consider the survey to be a valuable resource in evaluating fee disputes in the courts. The Council has authorized the committee to proceed with the preparation of a questionnaire for a new survey.

It is always a concern whether practitioners will take the time to complete a survey in numbers that are representative of probate lawyers by firm size and location. It was thought that the attendees at the Annual Probate Seminar might form a statistical base for an expanded survey.

We all realize that attorneys are inundated with survey after survey. The amount of time a person can spend on a survey is limited. The new survey will be in a condensed form and will try to limit inquiry to fees and billing methodology rather than getting into ancillary questions about time, billing software, equipment, etc.

One of the areas that we wish to address is fiduciary fees. Since corporate fiduciaries are professionals in the area, they set the standard for charges. A recent survey was made in Grand Rapids of bank fiduciary fees. One finding was that trust departments charged substantially more (three to four times more) when the trust assets were not invested in the bank's private mutual funds. On the basis of fees alone, it appeared that bank trust departments were competitive and that each bank had different charges for its services.

In determining fees, there is a growing interest in task-based billing and a fixed fee as an alternative to hourly rate billings, which have become a bugaboo and have overemphasized time billing compared to value billing. One suggested estate planning fee agreement uses a fixed fee with a limit on the time that is included after the document is drafted. If that time is exceeded, there are

additional charges at the hourly rate. The fixed fee is a response to client demand.

The legal profession is constantly being challenged by competition wanting to make inroads into the traditional areas of the practice of law. Legislation has been introduced (which fortunately has not received a favorable response) to permit nonlawyers to render a number of traditional legal services. It is up to the Bar to continue to combat the claims of escalating attorney fees and to respond to the public by providing quality legal services efficiently. Some of these things can be accomplished through alternative fee arrangements, strategic planning, networking and affiliations, and cross-selling.

Sometimes we are not aware of what works in marketing our services. We need to be reminded that of all the marketing strategies, satisfied clients are the best source of new business.

### **Fiduciary Litigation**

There is a growing awareness in the plaintiffs' bar of potential litigation arising from a breach of fiduciary responsibilities. A recent case decided in Dade County, Florida, *In re Estate of Gruber*, No 95-01161, has received a lot of publicity. The case involved an elderly, disabled individual whose affairs were taken over by a younger relative. With the cooperation of a "private banker," the younger relative depleted the disabled person's accounts and invested in various "products" the Florida bank offered. The court made reference to an "assistant vice president and private banker" involved in the alleged conspiracy as being under pressure from the bank not only to retain substantial depositors but to sell new products to them. The court found that the bank participated in assisting in a scheme to loot the decedent. The bank did not give the private banker a course of training either before or after it empowered her to serve as a "private banker." She had only a high school diploma and pursued no further education. Nevertheless, she was assigned between 100 and 200 accounts. She was prepared to be a private banker by "on the job training of the *products* offered by private banking."

Another individual defendant who was accused of manipulating the affairs of the deceased was alleged to have had the deceased sign a subsequently invalidated will that had been prepared by a lawyer from "the yellow pages." A final judgment was entered against the codefendants, including the bank, of \$1,533,689.55; in addition, a final judgment for punitive damage in the amount of \$4,500,000 was entered against the bank in favor of the estate. This is a scary case, and a stunning result that all should be aware of as an example of potential fiduciary litigation.


### **Estate Settlement Act**

The Council and its spokespeople, John Martin and Robin Ferriby, continue to pursue the enactment of the Estate Settlement Act. We are still hoping for passage of the bill during 1996.

### **Charitable Giving Committee**

At the meeting of the Council on March 23, 1996, an expanding area of interest in probate and estate planning led to the formation of a new Charitable Giving Committee. It was constituted as follows: Henry Grix, chair; Paul Winter, vice-chair; John Scott; Catherine Jacobs; Harold Draper; Brian Howe; and Robin Ferriby. Volunteers are welcome.

We are always looking for participation by all members of the Section in the activities of the Council. Your help is welcome, and it is particularly rewarding to



have people step forward and volunteer as attorney William. C. Hood from Mt. Pleasant did. He asked me if we would be interested in an index of the feature articles from the *Journal*. Obviously, that was welcomed and was soon forwarded to me. This index will benefit all Section members, and we thank Mr. Hood and his staff for preparing it.

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## *Probate and Estate Planning Section*

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

### **Proving the Deaths of Missing Persons**

**By Marie R. Deveney**

#### I. Introduction

This article provides an overview of the methods that may be employed to prove the death of a missing person in probate court under existing Michigan law and under the proposed Estate Settlement Act (ESA).

In it, I explain that the Revised Probate Code (RPC) establishes two statutory procedures for obtaining a declaration of a missing person's death from a probate court. One procedure is governed by RPC § 492 [MCL 700.492] and may be used to establish the death of a person who has been missing without explanation for at least seven years. The other procedure is governed by RPC § 492a [MCL 700.492a] and may be used to establish, before seven years have elapsed, the death of a person who appears to have died in an accident or a disaster.

I argue that probate court proceedings brought under §§ 492 and 492a are not the only probate court proceedings in which the death of a missing person may be established under existing law. I contend that, in any proceeding properly before a probate court—such as a petition to terminate a conservatorship established to preserve a missing person's estate under RPC § 461(b) [MCL 700.461(b)] or a petition to admit a will to probate—the court may determine that a person has died and may rely on circumstantial evidence and common-law presumptions to make that finding.

Finally, I offer a preview of how the deaths of missing persons may be established under the proposed ESA and how the estates of such persons will be administered under that act. I conclude that the ESA's provisions will constitute a substantial improvement over the RPC's provisions.

*Article continued in the [Spring-Summer 1996](#) issue of the [Journal](#).*

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## *Probate and Estate Planning Section*

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

### **Disclaimer of Property Interests Act: Public Act 131 of 1996**

**By Lauren M. Underwood and Everett R. Zack**

#### I. Historical Background

At common law, title to the property of a deceased person who died intestate passed by force of law, and no voluntary act of the decedent or the one who took by intestacy could change the result. Therefore, the recipient of the property could not renounce or disclaim the right to receive the property.

On the other hand, a beneficiary under a will had the ability to disclaim the right to receive property under a will.

The Michigan Disclaimer of Succession to Property Act, MCL 554.501–.520, MSA 26.1236(1)–(20), became effective on January 1, 1972 (the Old Act). The Old Act was copied almost verbatim from the Uniform Disclaimer Act that had been prepared by the National Conference of Commissioners on Uniform State Laws but not yet published.

The Old Act contains an unusual provision. MCL 554.503, MSA 26.1236(3), dealing with the effect of a testamentary disclaimer, and MCL 554.513, MSA 26.1236(13), dealing with the effect of a nontestamentary disclaimer, contain the following statement: "A person who has a present and a future interest in property and disclaims his present interest in whole or in part, shall be deemed to have disclaimed his future interest to the same extent."

This provision does not appear in any of the uniform acts,<sup>[1]</sup> and its origin and purpose are unknown. When this provision was brought to the attention of the Probate and Estate Planning Council, a committee<sup>[2]</sup> was appointed to review the Old Act.

#### **Notes**

1. The Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act, and the Uniform Disclaimer of Property Interests Act. See *8A Uniform Laws Annotated* (1993).

2. The committee consisted of Kenneth W. Kingma, John H. Martin, Michael J. Taylor, Professor Lawrence W. Waggoner, and Everett R. Zack.

*Article continued in the [Spring-Summer 1996](#) issue of the [Journal](#).*

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

### **Ethics**

By **Steven A. Mitchell**

#### **Confidentiality and Joint Representation— Not As Simple As It Seems**

As lawyers, we all have a basic understanding of our duty of confidentiality. The duty is set forth explicitly in MRPC 1.6. But how does the rule really work in practice? How do other rules affect it? How do our clients come to understand the nature and extent of our obligation of confidentiality to them? Is it necessary for our clients to understand this obligation?

The answer to the last question is easy: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MRPC 1.4(b).

It is the remaining questions for which the answers are difficult, particularly when placed in practical context. The following example is illustrative.

An elderly couple, Mr. and Mrs. Smith, married for 40 years, come to you for an estate plan. You have never met them previously, and they were referred by another client. You give them your standard advice regarding potential conflicts of interests, and the Smiths elect and consent to joint representation. Wills are drafted in which each leaves his or her estate to the survivor, and the survivor leaves all of the couple's estate to their son. The wills are executed, but six months later you get a telephone call from Mrs. Smith, who asks you to prepare a codicil to her will leaving half of her estate to her life-long friend, Ms. Jones. She further instructs you that Mr. Smith must not know about the codicil because she does not want to argue with him over the change.

Clearly, Mrs. Smith's request to prepare and execute a codicil will frustrate the couple's joint testamentary intentions. A clear conflict has presented itself, and you must choose between the duty of loyalty and confidentiality to Mrs. Smith and the duty of disclosure and loyalty to Mr. Smith. MRPC 1.7 applies to this conflict, unless you conclude that the six-month lapse of time since the execution of the wills classifies the Smiths as former clients, in which case MRPC 1.9 would govern. Under either a "present client" or "former client" analysis, resolution of the confidentiality problem is fraught with peril.

The best way to make certain that the confidentiality rule works for you (as

opposed to being used against you in a disciplinary proceeding) is to structure the scope of the representation so that it envisions as many contingencies as one might reasonably foresee. In situations involving joint representation, where specific potential conflicts are foreseeable, it is not enough to define the concept of *conflict of interests*, have the clients acknowledge that they understand the concept, and then obtain their waiver. It furthermore is not sufficient to explain in the next breath that everything that the joint clients may say to you will be held in strict confidence. Neither the rules nor the advice an attorney gives exist in a vacuum. It is up to the attorney to recognize such legal issues and fully explain them to the clients.

The scope of an attorney's representation is governed by MRPC 1.2 and ideally should be reduced to writing in every case. In the foregoing example, simply remembering to inform the clients that everything they communicate to the attorney will be held in strict confidence *except from each other* and confirming that advice in a detailed, written fee agreement either should avoid the problem completely or would provide you with a precise road map to follow if Mrs. Smith actually approached you with her request for a secret codicil. Either way, the joint clients would be advised in advance how the rule of confidentiality would be applied to their situation, and neither would have a basis to complain that you had betrayed their interests.

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Steve Mitchell is a shareholder at Willingham & Cot., PC, where he concentrates his practice on the representation and defense of attorneys and judges in professional discipline cases.

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### News and Comments

By Fredric A. Sytsma

#### Oops!

At an After Hours Tax Law seminar sponsored by ICLE and the Taxation Section, Brian Trindell, Chris Scott, and Michael Mulcahy from the IRS told the audience about an estate in which the Form 706 was accompanied by a copy of a *Crummey* trust, complete with withdrawal notification letters going back several years to the date the trust was established. Unfortunately for the taxpayer's credibility, each and every letter was printed on stationary reflecting the new 810 area code.

#### Gifts by Agents

I think that most of us now understand that if an agent is going to make a gift on behalf of his or her principal, the power of attorney must specifically authorize gifting or the IRS will refuse to recognize the gift for estate tax purposes at the time of the principal's death, with the result that the gifted assets will still be included in the principal's gross estate.

A related rule is that if a gift is made from the donor's revocable trust, the three-year "contemplation of death" rule will apply unless the donor is the *only* permitted distributee from the trust, regardless of whether the donee is a permitted distributee. There have been several statutory proposals to eliminate the applicability of the three-year rule in this situation, but none has yet been enacted.

TAM 96-01-002 (Sept 22, 1995) illustrates the need to keep both of these rules in mind when preparing powers of attorney. The decedent held his assets in a revocable trust. He signed a power of attorney specifically authorizing his agent to make gifts on his behalf, but he neglected to specifically authorize the agent to withdraw assets from his trust for the purpose of completing the gifts. Although the agent did withdraw funds from the trust and used them to make annual

exclusion gifts to the decedent's grandchildren, the IRS refused to recognize the gifts and included the gifted assets in the decedent's estate, because neither the power of attorney nor the trust agreement authorized the agent to make the withdrawals.

Since this type of planning comes up every day, it is important to pay heed to this ruling.

### **Execution of Florida Trusts**

Florida recently enacted Fla Stat Ann § 737.111 (effective October 1, 1995), which provides as follows:

(1) The testamentary aspects of a trust . . . are invalid unless the trust is executed with the formalities required for the execution of a will.

(2) The testamentary aspects of a trust created by a nonresident are not invalid because the trust does not meet the requirements of this section, if the trust is valid under the laws of the state or country where the settlor was at the time of execution.

(3) The testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as a will.

(4) For the purposes of this section, the term "testamentary aspects" means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor's estate.

The statute does not specifically state that it applies only to trusts created on or after the effective date of the statute, but that is believed to be the intent.

Although subparagraph (2) does not apply to residents, query what the outcome would be if a Florida resident executed a pour-over will directing that the residue of his or her estate was to be added to a nonconforming trust that included in it a direction that it is to be governed by the laws of a state like Michigan under which the trust was validly executed.

### **Don't Step on Superman's Cape**

As if we don't already have enough problems dealing with the IRS, there always has to be a practitioner like the attorney involved in TAM 95-48-002 (June 30, 1995) to make the rest of us look bad.

In the estate of the first spouse to die, the attorney and the surviving spouse as fiduciary of the estate made a QTIP election, which the Service accepted. A copy of the trust agreement accompanied the Form 706.

When the surviving spouse died, the attorney argued on behalf of the estate that the property in the trust established by the first spouse to die was not includible in the surviving spouse's estate because spendthrift language in the trust document

limited the surviving spouse's interest in the trust.

The IRS rejected the assertion as a matter of state (Ohio) law but also observed that the "doctrine of consistency" applied. The attorney argued that the Service had been placed on notice in the first estate that the gift might not qualify for a QTIP election because a copy of the trust agreement accompanied the estate tax return. The Service concluded that in the absence of any indication by the taxpayer of a potential problem on the first Form 706, this argument was not persuasive.

You can't have your cake and eat it too.

### **Why Dogs Do Not Survive Shipwrecks**

At the annual meeting of the American College of Trust and Estate Counsel (ACTEC) in March, several speakers expressed concern that the burgeoning use of family limited partnerships (FLiPs) would eventually force the IRS to seek legislation to stop the loss of revenue resulting from valuation discounts, much as preferred stock recaps were brought to a halt, first by the short-lived IRC 2036(c) and now by Chapter 14 of the Internal Revenue Code.

One speaker analogized the situation to a cartoon he had seen captioned "why dogs don't survive shipwrecks." The cartoon showed 10 dogs in a life raft, with a pile of dog food. A sinking ship is in the background. All of the dogs have one paw raised as the lead dog says "all those in favor of eating the food now, please raise. . . ."

On the other hand, there seemed to be a consensus that this does not mean that you should not counsel your clients to use FLiPs and that you might well be subject to claims of malpractice if you don't. It's just that it would be nice if everyone else exercised a little restraint.

### **Hot Topics from ACTEC**

In the past, I have shared with you some of the topics discussed at the "hot topics" presentation at the ACTEC Annual Meeting. There were three particularly interesting developments this year (in addition to such old familiar favorites as the final GST tax regulations):

1. The Exempt Organizations Branch of the IRS has announced plans to audit 120 private foundations with assets under \$1 million. Up to this point, the Service has pretty much ignored these smaller entities. If you represent a foundation included in this description, you should alert the trustees so that they can begin an internal audit, just to be sure that everything is in order.
2. Similarly, the Service is also going to begin auditing Forms 5227 (tax returns for charitable remainder unitrusts) for the first time.
3. The case of *In re Estate of Janes*, 165 Misc 2d 743, 630 NYS2d 472 (Sur Ct 1995), involved an estate in which 71 percent of the portfolio of marketable securities on the decedent's death consisted of Eastman Kodak common stock. During the 8 years following the date of death, the stock went from \$135 per share to as much as \$148 per share, then down to \$45 per share. The cofiduciaries of

the estate, who were the widow and Lincoln First Bank, apparently discussed the Kodak holdings regularly but never sold any shares. After a proceeding to settle the fiduciaries' accounts, which stretched over a period of 14 years (during which period the widow died), the bank was surcharged more than \$6,000,000 for holding on to the stock. The surcharge was calculated on the basis of the court's conclusion that the stock holdings should have been reduced to no more than 5 percent of the portfolio shortly after the date of death and that if this had been done and the proceeds had been reinvested in the bank's equity common trust fund, the amount on hand as of the date the decision was rendered would have exceeded the value of the Kodak stock by \$6,000,000. The bank was also required to forfeit all fees.

Although one is tempted to dwell on (and marvel at) the absolutely astounding approach to calculating damages, the decision serves as a warning that in situations like this, prudent fiduciaries should do more than document regular discussions. They should press for diversification and, if the beneficiaries hold out for retention, should secure written indemnification agreements from them or a court order.

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## *Probate and Estate Planning Section*

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

### Legislative Developments

By Douglas A. Mielock

#### **HB 4023—REVIEW OF CERTAIN GUARDIANSHIPS (Representatives Profit and Wallace)**

HB 4023 amends MCL 330.1626 to require an informal review of a guardianship within five years after the guardian's appointment and at intervals of not more than five years after the initial review if the term of the guardianship exceeds five years.

It has been assigned to the House Judiciary and Civil Rights Committee.

#### **HB 4024—NOTIFICATION OF CHANGE OF LOCATION OF WARD (Representatives Profit and Wallace)**

HB 4024 amends MCL 700.431 to require the guardian to notify the court within 14 days after a change in the ward's place of residence.

It passed the House on January 23, 1996, and has been assigned to the Senate Committee on Families, Mental Health, and Human Services.

#### **HB 4025—AMENDMENTS REGARDING JUDICIAL ADMISSIONS (Representatives Profit and Wallace)**

HB 4025 amends MCL 330.1517 to require that the court notify the individual of his or her right to the following: (1) a full court hearing, (2) appearance at the hearing and the right to waive appearance at the hearing, (3) representation by legal counsel, (4) demand for a jury trial, and (5) an independent medical or psychological evaluation.

It has been assigned to the House Judiciary and Civil Rights Committee.

#### **HB 4026—RELIEF FROM ANNUAL REVIEW OF CERTAIN GUARDIANSHIPS (Representatives Profit and Wallace)**

HB 4026 amends MCL 700.424b by deleting the requirement of an annual review of guardianships of minors under six years of age.

It has been assigned to the House Judiciary and Civil Rights Committee.

**HB 4027—RELIEF FROM MANDATORY REVIEW OF GUARDIANSHIPS  
(Representatives Profit and Wallace)**

HB 4027 amends MCL 700.446a by deleting the requirement that all guardianships be reviewed within the first year of the appointment of the guardian and no later than every three years after that. Instead, the court, in its discretion, would determine when to review the guardianship.

It has been assigned to the House Judiciary and Civil Rights Committee.

**HB 4113—REGISTRATION OF SECURITIES AND TRANSFER-ON-DEATH  
FORM  
(Representatives Alley, Middaugh, Gnodtke, Wetters, Bodem, Gernaat,  
Randall, Porreca, Kaza, Rhead, and Murphy)**

HB 4113 provides for the registration of a security to permit it to be transferred to one or more designated beneficiaries following the death of one or more owners. An entity is not required to offer or accept security registration in beneficiary form. If it does, the registering entity is afforded protection for its actions.

It passed the House on February 23, 1995, and has been assigned to the Senate Financial Services Committee.

**HB 4274—APPORTIONMENT OF ADMINISTRATION EXPENSES  
(Representative Nye)**

HB 4274 amends Chapter 720 of the Michigan Compiled Laws to provide for the apportionment of expenses incurred by a fiduciary or interested persons in connection with the determination of the amount and apportionment of estate taxes.

It has been assigned to the House Judiciary and Civil Rights Committee.

**HB 4462—STATE RECOVERY PROGRAM  
(Representatives Nye, Alley, Johnson, Dalman, Hammerstrom, Bodem,  
Bush, Law, Gilmer, DeLange, Kaza, Yokich, Oxender, Bobier, and Middleton)**

HB 4462 amends MCL 400.1 et seq. by providing for the implementation of an estate recovery program as required by the Social Security Act. The bill directs the Michigan Department of Social Services to promulgate rules that include the following:

1. procedures for waiving recovery based on undue hardship
2. a procedure for the attachment and enforcement of liens
3. standards for waiving recovery based on cost - effectiveness
4. procedures for waiving the recovery of a house with a value of \$100,000 or less, an automobile with a value of \$15,000 or less, and personal property (excluding automobiles) with a value of less than \$10,000

It has been assigned to the House Human Services Committee.

**HB 4524—DO-NOT-RESUSCITATE PROCEDURE ACT  
(Representatives Nye, Bush, Law, Rocca, Freeman, Walberg, Dobb, Hill,  
Martinez, Pitoniak, Baird, Goschka, Weeks, Yokich, Hammerstrom,  
Johnson, and Byl)**

HB 4524 provides for the execution of a do-not- resuscitate order for patients who

are not in a hospital setting. The bill provides a form do-not-resuscitate order for use by individuals who desire to take advantage of the Do-Not-Resuscitate Procedure Act. It is similar, but not identical, to SB 452.

It has been assigned to the House Health Policy Committee.

**HB 4601—MICHIGAN MEDICAL SELF-DETERMINATION ACT  
(Representatives Wallace, Anthony, DeHart, Dobronski, Parks, Leland,  
Baird, Scott, Yokich, Brater, Martinez, Dolan, Hill, DeMars, Freeman,  
Saunders, and Bobier)**

HB 4601 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. The bill is virtually identical to SB 78.

It has been assigned to the House Health Policy Committee.

**HB 5043—IMMUNITY FOR GUARDIAN AD LITEM  
(Representatives Profit, DeMars, Varga, Wallace, Law, Jersevic, Cropsey,  
Bullard, Baird, and Hanley)**

HB 5043 amends MCL 691.1407 to provide a guardian ad litem with immunity from civil liability for injuries to persons or damages to property whenever the guardian ad litem is acting within the scope of his or her authority. The amendment applies to actions filed before, on, or after May 1, 1996.

The bill was passed; signed by the governor on March 24, 1996; and became 1996 PA 143, to take effect May 1, 1996.

**HB 5158—REVISIONS TO THE REVISED JUDICATURE ACT OF 1961  
(Representatives Nye, Walberg, Voorhees, LeTarte, Middleton, Green,  
Geiger, Bobier, Law, Bush, Galloway, and Llewellyn)**

HB 5158 provides for the reorganization of the trial courts in Michigan.

The bill was passed by the House on March 28, 1996.

**HB 5246—BAR TO ESTATE RECOVERY  
(Representatives Olshove, Weeks, Brewer, McBryde, Yokich, Price,  
Martinez, Hanley, DeHart, Baird, Pitoniak, Freeman, Anthony, Baade,  
LaForge, Willard, and DeMars)**

HB 5246 amends MCL 400.1 et seq. by providing that the amount of medical assistance paid on behalf of a recipient is not a claim against the estate of the recipient following the recipient's death or against the estate of a deceased spouse who survived the recipient. It also provides that the state shall not impose a lien against the real property of a recipient to secure amounts properly paid for medical assistance on behalf of the recipient.

It has been referred to the House Human Resources and Labor Committee.

**HB 5441–5449—REQUIREMENT THAT WILLS, ESTATES, AND DOWER BE  
GENDER NEUTRAL  
(Representatives Pitoniak, DeMars, Brewer, Varga, Bobier, Hanley and  
Scott)**

HB 5441 through HB 5449 amends various parts of the Michigan Compiled Laws referring to dower to make them gender neutral.

It has been referred to the House Judiciary and Civil Rights Committee.

**HB 5475—REGISTRATION OF SECURITIES AND TRANSFER-ON-DEATH FORM**  
**(Representatives Pitoniak, Gnodtke, Baade, DeHart, Yokich, DeMars, Martinez, LaForge, Anthony, Scott, Willard, Goschka, DeLange, Freeman, Curtis, and Palamara)**

HB 4113 provides for the registration of a security to permit it to be transferred to one or more designated beneficiaries following the death of one or more owners. An entity is not required to offer or accept security registration in beneficiary form. If it does, the registering entity is afforded protection for its actions. It is identical to HB 4113.

It has been referred to the House Commerce Committee.

**HB 5554—RELEASE OF CASH AND APPAREL TO DECEDENT'S FAMILY**  
**(Representatives Schroer, Agee, Prusi, Martinez and Tesanovich)**

HB 5554 amends MCL 700.103 to increase from \$100 to \$500 the amount of a decedent's cash held by a hospital, convalescent or nursing home, morgue, or law enforcement agency that may be delivered to a spouse, child, or parent of the decedent.

It has been referred to the House Judiciary and Civil Rights Committee.

**SB 78—MICHIGAN MEDICAL SELF-DETERMINATION ACT (Senator Berryman)**

SB 78 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. The bill is virtually identical to HB 4601.

It has been referred to the Senate Health Policy and Senior Citizens Committee.

**SB 452—DO-NOT-RESUSCITATE PROCEDURE ACT (Senators Schwarz, Shugars, Byrum, and O'Brien)**

SB 452 provides for the execution of a do-not-resuscitate order for patients who are not in a hospital. The bill provides a form do-not-resuscitate order for use by individuals who desire to take advantage of the Do-Not-Resuscitate Procedure Act. It is similar, but not identical, to HB 4524.

It has been referred to the Senate Health Policy and Senior Citizens Committee.

**SB 487—MICHIGAN UNIFORM TRANSFERS TO MINORS ACT (Senator Bennett)**

SB 487 repeals the Michigan Uniform Gifts to Minors Act, MCL 554.451 et seq., and adopts the Uniform Transfers to Minors Act. It is an improvement over the current Uniform Gifts to Minors Act because it (1) permits any type of property to be transferred to a custodial account for a minor; (2) permits estates, trusts, custodianships, and guardianships to transfer property to the custodian; and (3) allows the custodian to retain the custodial property until the beneficiary attains age 21 (rather than the current limit of age 18).

The Senate passed the bill with a recommendation for immediate effect. It has been assigned to the House Judiciary and Civil Rights Committee.

## **SB 490—TECHNICAL CORRECTIONS (Senator Van Regenmorter)**

SB 490 amends MCL 700.497 concerning powers of attorney. The change provides that action by the agent without knowledge of the death or without actual knowledge of the disability or incompetence of the principal is binding. The bill also makes technical corrections to MCL 700.703, .704, .710, .712, and .717, all of which deal with the processing of claims in a probate administration.

The bill was passed; signed by the governor on March 15, 1996; and became 1996 PA 130. Section 2 of the act provides that it shall take effect June 1, 1996.

## **SB 496—DISCLAIMER OF PROPERTY INTERESTS ACT (Senator Rogers)**

SB 496 causes the Michigan disclaimer of property interests act to conform with the federal act. Among other things, the bill allows a recipient to bifurcate his or her interest and disclaim either the current interest or the future interest. Under current Michigan law, one must disclaim the entire interest. The act will allow clients to use the disclaimer as an effective postmortem planning tool.

The bill was passed; signed by the governor on March 15, 1996; and became 1996 PA 131. Section 20 of the act provides that it shall take effect June 1, 1996.

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## *Probate and Estate Planning Section*

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

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

By Hon. Phillip E. Harter

#### FIDUCIARY—REMOVAL—ATTORNEY FEES

*In re Hammond Estate*, 215 Mich App 379, 547 NW2d 36 (1996)

These cases involved an independent estate proceeding and a living trust. Certain beneficiaries sought to remove the fiduciary, to require an accounting, and to determine the fiduciary to be liable for breach of fiduciary duty. The trial court granted summary disposition in favor of the fiduciary. It also granted the fiduciary attorney fees for defense of the attempts of beneficiaries to remove the fiduciary. The trial court assessed attorney fees against the petitioning beneficiaries rather than the entire trust. The petitioning beneficiaries appealed.

The court of appeals affirmed the trial courts summary disposition, finding that the arguments that the beneficiaries raised were unsupported and without merit. The court of appeals also held that attorney fees a fiduciary incurs to defend against a petition for removal are properly chargeable against the estate when no wrongdoing is proven. They found the trial court's decision to assess attorney fees against the petitioning beneficiaries rather than the entire estate to also be appropriate. They pointed out that the petitioning beneficiaries had raised every conceivable issue, causing an independent estate to be practically reprobated as a supervised estate proceeding. Under these circumstances, they found it would be grossly unjust and inequitable to assess a portion of the attorney fees against those beneficiaries who declined to participate in the effort to "reprobate" the estate.

This is an excellent case in that it provides some protection to fiduciaries who are forced to defend against baseless objections.

#### WRONGFUL DEATH—CLAIMS PROCEDURE—RELEASE

*Burgess v Clark*, 215 Mich App 542, 547 NW2d 59 (1996)

This was a wrongful death case involving the death of Sherisa Burgess. Sherisa was the child of Robert Burgess and Lisa Stearnes. Her parents were divorced.

Sherisa died in a house fire while at the home of her grandparents, the Clarks. The Clarks, who owned a funeral home, provided funeral services totaling \$5,467.59 for Sherisa. The Clarks submitted a claim against their insurer for property damage from the fire and received a settlement of \$120,000. In December 1990, Stearnes signed a release and received \$20,000 from the Clarks' settlement. Stearnes released the Clarks and the insurer from any claims brought by her related to Sherisa's death. In January 1991, Robert Burgess, the personal representative of Sherisa's estate, claimed an interest in the Clarks' insurance policy and filed a claim for wrongful death. In January 1991, a notice for claims was published that gave creditors four months to file their claims. In September 1992, Burgess and the Clarks accepted a mediation award of \$40,000 in the wrongful death action. In October 1992, the Clarks submitted a claim for the funeral bill to Robert Burgess's counsel and the probate court. This was well after the time for submitting claims set forth in the publication notice but before the hearing on distribution. The trial court ruled that the Clarks' claim was barred and that Stearnes's previous release barred her from sharing any of the \$40,000 proceeds. Both the Clarks and Stearnes appealed.

The court of appeals held that the Clarks' claim was not barred. They pointed out that there are different procedures for resolving claims under the wrongful death act and under the Probate Code. The Probate Code procedure should be followed when no wrongful death action was pending when the personal representative filed notice to present claims; and the wrongful death act procedure should be followed when, as in this case, the wrongful death action was pending when the notice to present claims was published. Under the wrongful death act procedure, the court held that a claim could be presented on or before the hearing date on the motion for distribution. Therefore, the Clarks' claim was timely.

The court of appeals next considered Stearnes's appeal. In affirming the trial court, they found the release not to be ambiguous. The release clearly expressed Stearnes's intent to refrain from joining with Sherisa's estate to bring a claim against the Clarks regarding Sherisa's death. Therefore, the trial court correctly found that Stearnes could not share in the settlement proceeds.

#### 1995 PA 184—DISTRIBUTION OF THE PORTION OF AN ESTATE OTHERWISE DUE TO A DISAPPEARED HEIR OR DEVISEE

1. MCLA 700.493; MSA 27.5493

2. Effective October 23, 1995

3. Summary

a. The amendment provides that the estate may be distributed to the disappeared heir or devisee after a lapse of 18 months after the death of the decedent. The former period was three years.

b. The amendment provides that the heir or devisee is considered to have disappeared if he or she is absent from the last known place of abode for at least five continuous years. The former period was seven years.

If no claim is made, the portion of the estate that would be distributed to the disappeared heir or devisee, if alive, less expenses, shall be distributed by order of the court to each person who would be entitled to the portion if the disappeared heir or devisee predeceased the decedent.

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## *Probate and Estate Planning Section*

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

### **Digest of Michigan Probate Opinions**

By Hon. John N. Kirkendall

**96-1 Contact; Imprisonment; Neglect; Parental Rights (Termination); Support;** In the Matter of Minor; Judge Richard J. Liedel, Otsego County. The natural mother petitioned for termination of the natural father's parental rights on grounds of nonsupport and noncontact. The father opposed termination, but an order entered against him for an arrearage on child support in excess of \$11,000 and his minimal personal or other contact with the minor during or between frequent periods of incarceration warranted the entry of a court order terminating his parental rights. The court further held that the order was in keeping with MCL 710.51(6) supporting stepparent adoption in families in which the natural parent regularly and substantially fails to support and communicate with the child. MCL: 710.51(6); 710.51(6)(a); MSA: 27.3178(555.51)(6); 144 Mich App 805; 161 Mich App 474; 162 Mich App 19; 174 Mich App 85; 198 Mich App 202

**96-2 Auction; Real Property;** In the matter of the Estate of Patricia Bur, Deceased; Judge Michael J. Anderegg, Marquette County. The court entered an order confirming the sale of property to the highest bidder made during the period extended after the first auction failed to attract a minimum acceptable dollar amount for the designated realty. Although the auctioneer testified the original bid was a fair one, the order rejected this first auction bid made by an interested party, since it was under the acceptable minimum and contested by other interested parties.

**96-3 Child Abuse; Guardian ad Litem; Neglect; Parental Rights (Termination);** In the matter of Minor Children; Judge Michael J. Anderegg, Marquette County. Over the father's protest, an order was entered granting the guardian ad litem's petition for the termination of parental rights. While the neglect of the children's physical and emotional needs was not intentional, personal limitations and parenting history demonstrated that providing for proper care and custody of the children continued to be beyond the parents' limited abilities. Continued intervention and monitoring by social agencies and the court could not alter parenting enough to allow continued contact with the mother or the father to be in the best interests of the children. MCL: 712A.19b(3)(c)(i); 712A.19b(3)(g); MSA: 27.3178(598.19b)(3)(g)

**96-4 Account; Expense; Personal Representative;** In the matter of the Estate

of Patricia A. Bur, Deceased; Judge Michael J. Anderegg, Marquette County. Pursuant to the filing of an annual account, objections by interested parties, and related hearings, the court entered an order allowing compensation for the personal representative at an hourly rate of \$25 and reducing to \$8 an hour the rate for basic caretaking. Predeath work, including funeral arrangements, were not to be charged against the estate. One of the multiple trips between Michigan and California was found unnecessary and therefore disallowed. Hours spent on monthly reviews of stocks and broker statements were allowed, but daily stock review expenses were disallowed because the more frequent reviews were of more benefit to the personal representative than to the estate as a whole. The estate's accounting and bookkeeping expenses rated \$550 monthly for the services of a certified public accountant (CPA) and \$200 monthly for services not reflecting or requiring CPA skills. Further amounts owing to the estate for an automobile purchased from the estate were to be offset against compensation overpayment and future distributions. MCL: 700.541; MSA: 27.5541; 137 Mich App 634; 141 Mich App 412; 357 NW2d 912; 367 NW2d 873

**96-5 Acceptance; Contract; Counteroffer; Deed; Easement; Offer; Personal Representative; Power of Attorney; Real Property;** In the matter of Russell L. Heaton (aka Lozell Russell Heaton); Judge Frederick R. Mulhauser, Charlevoix County. The decedent's will had specified that the realty should be offered to his heirs and devisees through an auction process. The court addressed the question of the validity and extent of an easement subsequently granted to the rear parcel through the lakefront parcel for the purpose of lake access. The court ruled affirmatively (1) that the independent personal representative could and did convey good title to real estate through an attorney acting as and by a power of attorney and (2) that there was delivery to and acceptance by the party who purchased the rear parcel of a deed and the party's verbal reservations about the easement language had no legal import and were only musings or expressions of "hoped for future possibilities." The court rejected the argument that the revised easement language the purchaser of the lakefront parcel offered could be conditionally accepted, revised, or revived under the facts of this case. The lakefront purchaser made no response to the "Final Easement Revision" the purchaser of the rear parcel returned. Once the counteroffer was made, the original offer was deemed rejected and could not be revived unless the original offeror restated or renewed the offer. MCL: 556.112; 565.1; 700.21; 700.22; 700.331; 700.334; 95 Mich 412; 96 Mich 179; 222 Mich 631; 355 Mich 103; 53 Mich App 653; 115 Mich App 19; 147 Mich App 615; 169 Mich App 317

**96-6 Guardian ad Litem; Parental Rights (Termination);** In the matter of Minor Child; Judge Michael J. Anderegg, Marquette County. The court entered an order terminating the natural mother's parental rights. An earlier order regarding the father's rights had been entered pursuant to his signed release, and the mother's mental illness and developmental disability made it unlikely that she would ever be able to provide adequate care for the child, who herself had special needs related to learning problems. On the court's related findings and the recommendation of the child's guardian ad litem, the termination of parental rights was in the child's best interests. MCL: 712A.19b(3)(c)(i); 712A.19b(3)(g); MSA: 27.3178(598.19b)(3)(c)(i)

**96-7 Account, Administration, Fees (Fiduciary), Personal Representative, Undue Influence;** In the Matter of Jack Dunn, Deceased; Judge Michael J. Anderegg, Marquette County. In allowing the account of the personal representative for the estate, the court entered an order approving of fiduciary fees incurred in the, albeit unsuccessful, attempt to defend the will, which would have substantially benefited the fiduciary. The fiduciary expenses need only be determined just and reasonable in the administration of the estate, as contrasted with the "benefit to the estate" standard applied to determine the reasonableness

of attorney fees. The court considered conflicting appellate rulings on the issue and followed the rule that allowed a fiduciary fee for any action that is necessary to the routine administration of the estate, even though there had been some evidence of undue influence. In addition, the court allowed an hourly rate with a reduction for duplication, inefficiency, and inappropriate actions. Loans were not collectible by the estate when evidence of their forgiveness was on record. Reimbursement for airfare was disallowed when no claim for it had been filed with the estate. Finally, the court refused the request for the removal of the personal representative, in spite of ongoing conflict with the remaining contestants, because no action had been so egregious as to require removal. MCL: 700.541; RPC § 148; UPC § 3-720; 296 Mich 148; 121 Mich App 585; 212 Mich App 357; Mich Prob & Est Plan J, Spring 1989, at 6

**96-8 Codicil; Divorce; Ex-spouse; Personal Representative; Stepchildren; Will;** In re Estate of Curtis Tigner, Deceased; Judge Bruce A. Newman, Genesee County. Will and codicil provisions for stepchildren remained valid after the testator's divorce from the stepchildren's mother. Prior to the court's ruling, the parties stipulated that the decedent's ex-wife was barred from taking under the will. An order was entered holding valid the provisions for the stepchildren, including the naming of one of the stepsons as an alternate personal representative. MCL: 700.124(2); 700.133(2); MSA: 27.5124(2); 230 Mich 148; 154 Mich App 350

**96-9 Child Abuse, Collateral Estoppel, Crossover estoppel, Guardian ad Litem;** In the Matter of Minor Child(ren); Judge Richard J. Liedel, Otsego County. The issue of child abuse having been "necessarily determined" in a criminal case against the father of the child in question (one of twins), relitigation in a juvenile court trial of the same issue could not be permitted. An order was entered granting the dismissal of the child protective proceeding. MCL: 712A.2(b); 712A.2(b)(1); 750.136b(2); MCR: 5.972; 434 Mich 146; 188 Mich App 189

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