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## *Probate and Estate Planning Section*

### Michigan Probate and Estate Planning Journal

Volume 15, Spring 1996, No. 2  
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## *Probate and Estate Planning Section*

The following article was published in the [Spring 1996](#) issue of [Michigan Probate and Estate Planning Journal](#)

### FROM THE CHAIRPERSON'S DESK

By Raymond H. Dresser, Jr.

The October meeting of the Council of the Probate and Estate Planning Section was highlighted by the first Michael W. Irish Award and a presentation by ICLE on cyberspace and the Internet as it relates to probate practitioners.

A special award was established in honor of Michael W. Irish, who would have been the chairperson of the Council of the Probate and Estate Planning Section this year had it not been for his untimely death. The award reflects the professional and community leadership of its namesake. There was no question about the qualifications of the first award winner, Joe C. Foster, Jr., of Lansing. Joe's involvement in the profession and his community is limitless. He is past president of the American College of Trust and Estate Counsel and chairperson of the Council of the Probate and Trust Law Section. It was a heartwarming pleasure to have Mike's widow, Ann, and son, Jonathan, on hand to participate in the presentation. My thanks to Brian Howe and Fred Sytsma for their work on this event.

At the business meeting of the Council, ICLE made a presentation showing information that it will be making available on the Internet to assist probate practitioners in their practice of law, expedite communications, and inform us of the latest research information. ICLE is working on a Web site that will provide us with current information over the Internet and will assist in the interaction of Probate practitioners. In response to a hand survey at the presentation, most of the attorneys responded that they already had e-mail addresses. The Council is discussing with ICLE means to provide a Web site to the Probate and Estate Planning Section so that it would be accessible by some type of code arrangement to attorneys who are members of the Section. More information on this will be available with time.

The proposed Estate Settlement Act continues to wind its way through the legislative process. Robin Ferriby and Cathy Jacobs have appeared before the probate judges and the appropriate legislative committees to gain support for the act. The response from both groups has been positive. In the meantime, fine tuning continues. The act in the draft form has been submitted to the Legislative Service Bureau, which is in the process of conforming the act to its legislative format for consideration by the House and the Senate. A number of practitioners have inquired about the availability of a copy of the act as drafted. We have asked

practitioners to wait until it is available from the Legislative Service Bureau.

The legislature currently is dealing with key court reform legislation that has priority over the Estate Settlement Act. Proposals by Representative Nye and Senator VanRingenmorter as well as the Judiciary incorporate basically the recommendations made by the State Bar's special committee on court reform. These proposals particularly affect members of the Section and Probate practitioners. The Section is monitoring these proposals as they are being finalized for legislative action. This is a primary project of the State Bar, and the Section takes no position other than that of the State Bar of Michigan. It is our desire that cases dealing with historical probate matters be retained in the same administrative area or division of the courts. We are prepared to offer assistance whenever we are requested to appear before the appropriate legislative committees and the judiciary.

Plans are underway for the annual probate seminar at the Grand Traverse Resort near Traverse City and in Dearborn. Patricia Gormely Prince is chairperson of the seminar this year and is working on some innovative changes in the format. Since much of the planning has to take place months in advance, the program will not concentrate on the Estate Settlement Act. When enacted, the Council, in cooperation with ICLE, will present special seminars to address the Estate Settlement Act specifically. One change that is being seriously considered is the replacement of the annual Bench and Bar Banquet with a more comprehensive reception that would provide more flexibility and at the same time give us a chance to honor the judiciary. Formal presentations of the Bar speakers would be made at the plenary sessions of the seminar. Any feedback in this regard is welcome. We are always considering other alternatives to encourage attendance and provide flexibility and innovation for the attendees.

Raymond H. Dresser, Jr.

Council Chairperson

Probate and Estate Planning Section

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## *Probate and Estate Planning Section*

*The following is an article excerpt. The complete article was published in the Spring 1996 issue of Michigan Probate and Estate Planning Journal*

### **An Analysis of the Michigan Supreme Court's First Decision in a Withdrawal of Life Support Case: *In re Martin***

**By Bettye Elkins**

On August 22, 1995, the Michigan Supreme Court issued its first decision in a refusal or withdrawal of treatment case, *In re Martin*, 450 Mich. 204, 538 N.W.2d 399 (1995), *cert. denied*, 133 L. Ed. 2d 843 (1996). This article summarizes the *Martin* opinion and addresses the issues the case raises for Michigan residents and for the Michigan lawyers who advise them and prepare advance directives for them.

#### **Facts**

Michael Martin, his wife, and two of his children were injured in a car-train accident in 1987. A third child was killed. Mary Martin and her two surviving children eventually recovered. Michael Martin's injuries were permanent. He suffered a closed head injury and was left significantly impaired, physically and mentally. He is almost completely paralyzed and cannot talk or eat. He receives nutrition and hydration via a gastrostomy tube. He has a colostomy. Except for periods when he has required acute care, Michael Martin has resided in nursing homes since he was discharged from the hospital after his initial injuries. Mary Martin serves as her husband's guardian.

Early in January 1992, five years after the accident, Michael Martin was treated as an inpatient at Butterworth Hospital for a bowel obstruction. During that admission, Mary Martin sought advice from the hospital's bioethics committee. She asked whether life-sustaining medical treatment could be withdrawn from her husband. On January 15, 1992, the bioethics committee issued a report stating that the withdrawal of medical treatment in the form of artificial nutrition and hydration was both medically and ethically appropriate.

For reasons that are not stated in the supreme court opinion, either the bioethics committee or the hospital determined that court approval of the withdrawal should be obtained before the hospital would honor a request that treatment be withdrawn. As guardian, Mary Martin petitioned the appropriate probate court for authorization to withdraw medical treatment. Michael Martin's mother and sister opposed the guardian's petition.

Michael Martin had not made a living will or given a durable power of attorney for health care while he was still competent. The Michigan Patient Advocate Designation Act had not yet been adopted when he was injured.

*Article continued in the [Spring 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 1996 issue of [Michigan Probate and Estate Planning Journal](#)*

### **Memorandum re Mary Brown's Petition for the Removal of Carolyn Como's Feeding Tube**

**By Todd M. Anthes**

The following memorandum of law was prepared by University of Detroit Mercy law student Todd M. Anthes. The memorandum was the 1995 first-place winner of the Wayne County Probate Judges' Memorial Scholarship sponsored by the Wayne County Probate Bar Association.

The scholarship competition was established in 1994 to encourage interest in probate law. The competition is open to students at the Detroit College of Law, the University of Detroit Mercy Law School, and Wayne State University Law School who have completed their first year of law school. Contestants are required to submit a memorandum of law based on a hypothetical legal problem. First, second, and third prizes are awarded.

This year, students were asked to advise a probate judge about a case of first impression in Michigan. The probate court has been asked to resolve a dispute between a duly designated patient advocate and a court-appointed guardian about the withdrawal of life support from a comatose patient. The facts are set forth in the memorandum. The Michigan Supreme Court decision in *In re Martin*, 450 Mich. 204 (1995), *cert. denied*, 133 L. Ed. 2d 843 (1996), was issued during the competition.

#### **MEMORANDUM**

TO: Chief Judge of the Wayne County Probate Court

FROM: Research Attorney

RE: Mary Brown's petition for removal of Carolyn Como's feeding tube

DATE: 10-10-95

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#### **Questions Presented**

I. Do Michigan courts recognize an individual's right to decline life-sustaining medical treatment?

A. Are Michigan courts under an obligation to follow the advance directive of an incompetent patient who, prior to becoming incompetent, expressed a desire not to have her life sustained by artificial means and duly executed the advance directive in - accordance with Michigan law?

B. What surrogate decision-making standard should apply to Carolyn Como, an incompetent patient who, while competent, followed Michigan's procedure for memorializing an advance directive?

C. Was Carolyn Como's properly executed designation of patient advocate for health care, pursuant to M.C.L. 700.496, sufficiently broad to cover her current medical situation?

II. Should a contrary decision by a court-appointed guardian supplant a decision by a duly designated patient advocate to remove life-support systems?

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

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

### **STC Bulletin No. 16 Transfers of Ownership**

*Editor's note:* The State Tax Commission of the Department of Treasury issued Bulletin No. 16 on September 20, 1995, describing certain "transfers of ownership" of real property for purposes of "uncapping" taxable valuations. The bulletin is intended to clarify the meaning of Proposal A, which was approved by Michigan voters in March 1994, and accompanying Michigan law changes made by 1994 PA 415. The bulletin is reprinted here at the request of the State Tax Commission and because it affects probate and estate planning practitioners.

The bulletin is concise enough and important enough to warrant reading in its entirety. Among other things, the bulletin addresses the following:

- Transfers between spouses (or into a trust for a spouse) are exempt.
- A transfer to a grantor's revocable living trust does not uncapse the taxable valuation. At the grantor's death, however, a transfer into a credit shelter "sprinkle" trust would be a transfer of ownership that would lead to uncapping the taxable valuation.
- Adding a beneficiary to a trust or to joint ownership, depending on the circumstances, may be a transfer of ownership, in whole or in part.

An owner who fails to report a transfer can become liable for back tax, interest and penalty, and a penalty for failure by the transferee to report the transfer.

*The full text of this article, including a copy of Bulletin No. 16, is continued in the [Spring 1996](#) issue of the [Journal](#).*

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## *Probate and Estate Planning Section*

The following article was published in the [Spring 1996](#) issue of [Michigan Probate and Estate Planning Journal](#)

### NEWS AND COMMENTS

By Fredric A. Sytsma

#### THE IRS REVERSES ITS COURSE

For those of you who missed a development that will doubtless generate a significant amount of discussion, Rev. Rul. 95-58, 1995 I.R.B. 36, which was released on August 4, 1995, represents an IRS reversal on a significant issue that has long troubled estate planners.

In the infamous Rev. Rul. 79-353, 1979-2 C.B. 325, the service first announced its position that a grantor's retained right to remove the corporate trustee of an irrevocable trust and replace it with another corporate trustee was equivalent to a reservation of the right to exercise all of the trustee's discretionary powers over the trust's assets, almost inevitably resulting in inclusion of the trust's assets in the grantor's estate under Sections 2036 and 2038 of the Code.

Estate planners generally scoffed at the reasoning that led the service to its conclusion, but nobody wanted to risk having the IRS argue that his or her clients' irrevocable trusts should be included in the clients' estates, so everyone learned to work around 79-353 (e.g., by giving the grantor a removal power but putting in place some other mechanism for selecting a successor trustee).

At last, in *Vak v. Commissioner*, 973 F.2d 1409 (8th Cir. 1992), *rev'g* T.C. Memo 1991-503, and *Wall v. Commissioner*, 101 T.C. 300 (1993), the courts considered Rev. Rul. 79-353 and its progeny and refused to accept the service's reasoning.

Bowing to the inevitable, the IRS issued Rev. Rul. 95-58, in which Rev. Rule 79-353 was revoked, and the service acknowledged that as long as the grantor's removal and replacement power is limited to an independent corporate trustee or a noncorporate trustee who is neither related nor subordinate to the grantor, the grantor will not be charged with the trustee's discretionary powers.

#### DO SWEAT THE DETAILS

Let's face it, Crummey letters are a pain in the neck! Clients don't want to pay us to write what appears to them to be a simple letter, yet the calculations are often so complicated that we can't readily instruct them how to write their own letters. Moreover, many clients really don't want to send the letters to children or

grandchildren, because it introduces a topic (i.e., the extent of their wealth) that they would prefer not to discuss with family members. However, a recent ruling illustrates that the letters are critical.

In the situation discussed in Tech. Adv. Mem. 95-32-001 (Apr. 12, 1995), the grandparent grantors asked their grandchildren to sign a written waiver of the right to receive future notification of their withdrawal rights. We've all been tempted to try this ploy (if in fact we haven't actually done it) to avoid the issue of having to give future notices. Well, the service isn't buying it! They ruled that without a current notice, the beneficiaries were deprived of the real and immediate benefit of the gift. Accordingly, annual exclusions were denied for all but the first year's gifts, when notices were sent, because later gifts were gifts of future interests. An added factor was that the trust agreement contained the fairly common requirement that the donor notify the trustee each year how much of each addition to the trust was subject to withdrawal, but the grandparents neglected to do this, so technically the additions were not subject to withdrawal.

The service's acceptance of the tax benefits of Crummey powers has been grudging at best, so this insistence that taxpayers follow the letter of the law is not surprising. You should be forewarned of the need to give your clients comprehensive instructions on the procedure for sending withdrawal notices, and you can trot out this ruling to demonstrate the taxes they are saving by paying you to see that everything is done right.

## **HOW TO COMBAT THE STATUTORY REDUCTION OF YOUR ITEMIZED DEDUCTIONS**

I love stories like this, which I offer simply for its entertainment value. This is the tale of T. Van Zelst, 70 T.C.M. (CCH) 435, T.C. Memo 1995-396, a case that proves again (as if we need proof) that there are no limits to greed and stupidity.

The taxpayer purchased a parcel of property and the subsurface rights to a second parcel of property, both in the Alaskan wilderness, for a total of \$30,000. Less than two years later, both parcels were donated to the National Park Service. The taxpayer claimed a charitable deduction of \$2,750,000! The first \$2,100,000 of this was for the parcel owned outright, and the remaining \$650,000 was for the mineral interests.

The taxpayer argued that the parcel owned outright was suitable for a commercial recreational lodge. For some reason, the court found it relevant (1) that the property was so steep that it would be dangerous to try to reach it even in a helicopter; (2) that although there was a gravel airstrip nearby, it was separated from the property by a creek that had no bridges and was generally impossible to cross in spring and summer because of dangerous currents; (3) that the property was so thickly covered with vegetation that vehicles couldn't access it; and (4) that it was on the north slope and received little sunlight. It's hard to imagine why Holiday Inn wasn't beating down the taxpayer's door.

One small problem with the mineral interests was that there was an injunction in effect that prohibited mining in the area, and the court found no evidence that the injunction would ever be lifted. Experts also testified that even absent an injunction, mining wasn't economically feasible on the property.

Probably illustrating the axiom that "hogs get slaughtered," the court (quite generously, I think) concluded that both parcels were worth \$38,000, and in light of the fact that the claimed deduction was approximately 91 times the taxpayer's purchase price, imposed additions to tax for negligence or intentional disregard of the rules and for valuation overstatement.

## MICHIGAN ESTATE/INHERITANCE TAX DEVELOPMENTS

Here's a mixed bag of recent developments with regard to our state death tax.

Deferred inheritance tax. Under the Michigan Inheritance Tax statute, vestiges of which are still relevant, it was possible to defer the inheritance tax attributable to interests subject to a contingency (which was usually survival of the life tenant). Since this gave the estate the interest-free use of the inheritance tax dollars pending resolution of the contingency, deferral was a popular election.

The deferred tax liability was not affected by substitution of an estate tax for the inheritance tax, and sooner or later it will be time to pay the piper. The Michigan Department of Treasury takes the position that the deferred tax must be paid within 30 days of the date that the contingency is resolved (most typically by the death of the life tenant), and a penalty of 5 percent per month will be assessed if the payment is not made in a timely fashion.

Department of Treasury no-tax certificates. At the December 9, 1995, meeting of the Council of the Probate and Estate Planning Section, it was reported that the Department of Treasury keeps no record of tax clearances issued to estates that owe no tax. If your client receives one, needs it later (e.g., in connection with a sale of real estate), has misplaced it, and didn't file a copy with the probate court (see the next comment), you'll have to start all over again. It would behoove you to see that you have a copy in your file.

*Tax clearance on final accounts.* At the same December 9 Council meeting, it was pointed out that probate courts are not consistent with respect to their procedures regarding Michigan Estate Tax clearance.

The final account forms (PC 22a and PC 22b) provide two boxes at item 6 or at item 5 where it can be indicated (1) that no Michigan Estate or Inheritance Tax is due or (2) that any Michigan Estate Tax has been paid in full, with evidence of full payment from the Michigan Department of Treasury to be attached. The inconsistency relates to estates from which no tax is due.

Some courts are apparently requiring that the estate obtain a certification from the Michigan Department of Treasury that no tax is due, while other courts are satisfied when the box is checked indicating that no tax is due, inasmuch as the form does not in this situation require the attachment of any acknowledgement from the Department of Treasury. MCR 5.707(A)(4) provides that "the personal representative must file with the court proof that no estate taxes are due or that the estate taxes have been paid." Since the action of the Department of Treasury determining that no tax is due is based on a statement by the personal representative or the attorney that no tax is due, the Forms Committee and the supreme court approved the accounting form without the addition of a requirement that there be an attached certification from the Department of Treasury that no tax is due. Some courts have nevertheless interpreted the court rule requirement that the personal representative file proof as necessitating Department of Treasury certification.

The Council determined after discussion that it would not request any further clarification. It was felt (and perhaps we sense just a bit of paternalism here) that it was good practice to have a Department of Treasury certification in the file (e.g., as proof at some later date that there was no lien on a piece of real estate) and that everyone should follow the Florida practice of routinely obtaining certification that no tax is due and recording that certification whenever the estate includes real estate.

*Deferred payment of federal and Michigan estate taxes.* At the November 18,

1995, Council meeting (they sure do meet a lot), Robin Ferriby reported on Ruling 95-2 issued by the Michigan Department of Treasury, which deals with extensions of time to pay Michigan Estate Tax.

Robin indicates that the state recognized deferred payment of federal estate taxes under Section 6166 of the Internal Revenue Code (which applies to estates with interests in one or more closely held businesses) and that it will also extend the time for payment of the Michigan Estate Tax.

Robin points out that the way that the State recognizes a Section 6166 deferral is somewhat unusual, and not quite as advantageous as the federal deferral. The taxpayer has to furnish proof of payment of the Michigan Estate Tax to obtain a credit for state death taxes on the Form 706. This precludes an actual deferral of the Michigan Estate Tax. However, each year the taxpayer will file an amended Form 706, claiming the interest paid as a deductible administration expense. This will result in the issuance of a revised tax calculation (and a smaller credit for state death taxes). The taxpayer can send this to the Department of Treasury and obtain a partial refund of the Michigan Estate Tax.

The state will not permit deferred payment of Michigan Estate Tax in situations covered by I.R.C. Section 6166A (which applies only to estates of decedents dying before January 1, 1982), Section 6163 (which relates to estate taxes attributable to reversionary or remainder interests in property), or Section 6081 (which is a discretionary extension).

In situations covered by Code Section 6161, which is another and somewhat more useful discretionary deferral, the Estate Tax Act (M.C.L. 205.236) provides that the state will also permit deferral if the IRS has granted a Section 6161 extension but that it will collect interest and penalties during the extension period. The Department of Treasury has taken the position that no penalties will be assessed for approved extensions under Section 6161, despite the statute.

*Recognition of an attorney's status to act on behalf of an estate.* Robin Ferriby also reports that in a conversation with Floyd Schmitzer at the Department of Treasury, he was told that the department will not deal directly with an attorney representing an estate unless either the department has an executed copy of the federal power of attorney or the portion of the Form 706 identifying the attorney as the estate's representative has been completed. This certainly seems like a reasonable precaution.

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## *Probate and Estate Planning Section*

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### **Readers' Questions on Estate Planning and Estate Settlement**

By **Kenneth E. Konop**

#### QUESTION

An attorney recently met with a couple in their midthirties, with children, wishing to establish a revocable living trust. The main reason for the trust was the avoidance of probate. The couple's total assets were less than \$600,000. There were no foreign real estate and no health concerns.

It appeared that a joint revocable living trust might be the appropriate vehicle. The concern was, if either of the couple were involved as a defendant in a serious liability lawsuit and if that suit resulted in a judgment against one of the parties, could the successful plaintiff reach the trust's assets? The attorney's concern was whether funding the trust would eliminate the asset protection afforded by entireties property.

Would it be advisable, given the young age of these people, simply to suggest wills and contingent trusts for their children or wills and testamentary trusts? Such a strategy would defer the question of titling assets in the name of a trust until their estate becomes such that tax planning becomes important.

#### ANSWER

The issue of liability is an interesting one. One answer is that the couple should carry adequate liability insurance for their home, automobile, boat, and business. In addition, so-called umbrella policies are available. Estate planning attorneys should exercise caution in advising clients about insurance matters.

It might not be possible to avoid liability to lenders because a lender may require that both spouses sign the note, guaranty, or other loan documents. Thus, the protection afforded entireties property may be partly illusory.

Assets held as tenants by the entireties are generally exempt from the claims of creditors of one of the spouses. The home is the most common example. However, not all assets owned by husband and wife qualify as being held as tenants by the entireties. Michigan has a special rule in M.C.L. 557.151. This statute extends entireties treatment to certain property. M.C.L. 557.151 applies to

stocks, bonds, mortgages, and promissory notes held by husband and wife. Bank accounts are not covered by M.C.L. 557.151. Assets held in a joint trust may not be described in M.C.L. 557.151. For a discussion of jointly owned assets and the rights of creditors, see John H. Martin, *Estate Planning for the Client or Beneficiary with Significant Liability Exposure*, Mich. Prob. & Est. Plan. J, Fall 1990, at 3, 5. I do note that the title of Mr. Martin's article includes the word *significant*. The point, perhaps, is that the risk of liability should be significant before it becomes the engine that drives the estate plan. See also Susan Westerman's outline entitled "Using Joint Trusts in the Estate Plan: Problems and Possibilities," in the materials for the 33rd Annual Probate and Estate Planning Seminar given by the Institute of Continuing Legal Education and the Probate and Estate Planning Section of the State Bar of Michigan.

With some clients, the use of wills that leave their property to the surviving spouse or to an inter vivos trust if the spouse does not survive them can be attractive. The trust can be the contingent beneficiary of life insurance and retirement benefits. The purpose of the trust is to provide for the couple's children. A durable power of attorney would also be appropriate. In a simple estate plan, this can be more attractive than wills and testamentary trusts.

Each option has its advantages and disadvantages. However, a realistic appraisal needs to be done on whether liability protection dictates the use of entireties property. On close examination, liability protection for clients with relatively little to protect can result in poor planning. As noted, bank accounts are excluded from the protection of M.C.L. 557.151; "street name" brokerage accounts may likewise be excluded from M.C.L. 557.151's protection. Ultimately each alternative calls for a measured judgment.

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

By Hon. Phillip E. Harter

#### **GUARDIANS--TERMINATION OF LIFE SUPPORT**

*In re Michael Martin, a Legally Incapacitated Person*, 450 Mich. 204 (1995), cert. denied, 133 L.Ed.2d 843 (1996)

Michael Martin, as a result of a 1987 auto accident, was in a condition where he was unable to walk or talk and was dependent on a gastrostomy tube for nutrition. Michael's wife was the petitioner in the trial court action. She had been appointed his guardian and conservator after the accident. On March 9, 1992, petitioner requested the authorization of the probate court to withdraw Michael's nutritive support. Respondents, Michael's mother and sister, opposed the petition and requested that petitioner be removed as guardian and conservator. An evidentiary hearing was held from October 13, 1992, through October 30, 1992. Conflicting testimony was presented regarding Michael's current level of physical, sensory, emotional, and cognitive functioning. All witnesses agreed that Michael was neither in a persistent vegetative state nor terminally ill. The trial court denied the petition to terminate nutritive support, and this issue along with several others was appealed.

The Court of Appeals reversed and remanded the decision of the trial court. In so doing, they set forth the standards and sequence to be followed in cases in which a termination of life support is requested. They indicated that the trial court must first decide whether the patient has the capacity to decide on his or her own.

When the patient is unable to do so, the following standards and sequence apply:

1. Is there clear and convincing evidence of the patient's previously expressed desires regarding life support under the conditions in which the court finds the patient to be?
2. If such evidence is not clear and convincing, the court may use the substituted judgment test as defined in *Rosebush*.
3. Only if the evidence in categories 1 and 2 does not yield a result may the court move on to consider a pure best-interest standard.

On remand, the trial court found that Michael did not have and would not regain

the requisite capacity to make a decision regarding the withholding or withdrawal of life-sustaining medical treatment and found that there was clear and convincing evidence demonstrating Michael's previously expressed preference to decline life-sustaining medical treatment under the circumstances presented. The trial court, therefore, granted the petition to withhold nutritive support. This decision was appealed. The Court of Appeals upheld the trial court's determination regarding the withdrawal of life support, and the matter was appealed to the Michigan Supreme Court.

The Michigan Supreme Court framed the issue very narrowly, dealing with only a particular type of patient. They stated the issue to be whether life-sustaining treatment in the form of a gastrostomy tube that provides nutritive support should be removed from a conscious patient who is not terminally ill or in a persistent vegetative state but who suffers from a mixture of cognitive-function and communication impairments that make it impossible to evaluate the extent of the patient's cognitive deficits. The Michigan Supreme Court reversed the decision of the Court of Appeals, concluding that while Michael himself could not presently or in the future make any decision, there was not clear and convincing proof that Michael made a firm and deliberative decision, while competent, to decline medical treatment in these circumstances.

The Supreme Court began its analysis by stating that there are two broad types of standards used in deciding these cases. A subjective standard, which looks to the wishes of the patient while competent, is based on a patient's right to self-determination. An objective standard, which looks to criteria other than the patient's wishes, such as a best-interest test, is based on the state's *parens patriae* power. The state's interest would only seem to come into play when some threshold has been met, such as pain, terminal illness, foreseeable death, a persistent vegetative state, or a similar affliction. Since Michael's condition never met such a threshold, the Court concluded that the only proper test to apply was a purely subjective test, since there was no basis for any kind of objective test. Therefore, the beginning and end of the analysis of this particular situation was determined by trying to determine Michael's wishes when competent by clear and convincing proof.

The Court held that the common-law doctrine of informed consent allows a person to refuse life-sustaining treatment. Such a right survives incompetency and may be discharged by a surrogate decision maker. Therefore, once it is determined that the individual is conscious and was competent at some time before his or her present injuries were sustained but never expressed his or her wishes regarding the withdrawal of treatment, a surrogate decision maker may not make a decision for or in place of a conscious, incapacitated individual regarding the decision to waive the right to continue life-sustaining medical treatment. However, if the surrogate decision maker can establish by clear and convincing evidence that the conscious, incapacitated individual, while competent, stated a desire to refuse life-sustaining medical treatment under these circumstances, the surrogate must be allowed to effect the incapacitated individual's expressed preference. In the absence of clear and convincing evidence of the conscious, incapacitated individual's preinjury statement expressing a decision to refuse life-sustaining medical treatment under the present circumstances, courts will not authorize the removal of life-sustaining medical treatment.

In weighing the statements Michael made that were offered to prove that he would not have wished to live, the Court observed that statements made in response to seeing or hearing about another's prolonged death do not fulfill the clear and convincing standard. Only when the patient's prior statements clearly illustrate a serious, well-thought-out, consistent decision to refuse treatment under

these exact circumstances, or circumstances highly similar to the current situation, should treatment be refused or withdrawn. Since the Court did not believe there was clear and convincing proof that Michael would not have wanted to continue to live under these particular circumstances, they refused to allow the removal of life-sustaining medical treatment.

This case should be read in full, along with Justice Levin's dissent. It is an important case in an increasingly active and important area of the law. It must not be read too broadly since it deals only with the issue of a conscious patient who is not terminally ill or in a persistent vegetative state. It unfortunately sets aside the criteria the Court of Appeals set for dealing with these very complicated cases. Presumably, we must now wait for the other types of cases to be litigated and the standards decided for each. As the Martin case aptly demonstrates, this will be a painful process for the litigants and the courts involved. In this particular type of case, the Supreme Court set a standard that is almost impossible to meet without a written document. As the dissent points out, the majority seems to give little deference to the findings of fact of the trial court and seems to minimize statements the patient made concerning his wishes because they were made in the context of the prolonged or painful deaths of others. This is exactly the context in which one would most expect such statements to occur. At one point in the decision, the Supreme Court talks about written directives and states "we strongly urge all persons to create such a directive." In light of this decision, that is excellent advice.

### **GUARDIANS--DEVELOPMENTALLY DISABLED PERSON-- STERILIZATION OF WARD**

*In re Lora Faye Wirsing, Developmentally Disabled Person*, 214 Mich. App. 131 (1995)

Lora Faye Wirsing was adjudicated in 1981 to be a developmentally disabled person due to mental retardation. Her mother was appointed her plenary guardian under the Mental Health Code. In 1986, guardian petitioned the probate court for authorization to consent to sterilization of the ward for the purpose of birth control. The probate court granted the authorization after an extensive hearing. In 1992, the Michigan Supreme Court remanded the case to the Court of Appeals, "to consider, without limitation, whether probate judges possess the power to authorize a guardian to consent to the sterilization of a developmentally disabled citizen."

The Court of Appeals concluded that the probate court did not have the jurisdiction or power to authorize the guardian of a ward to allow the ward's surgical sterilization. They emphasized the point that the probate court's jurisdiction and power are derived entirely by statute and may not arise by implication. They pointed out that for five years the legislature considered and expressly authorized by statute the probate courts to grant a guardian permission to surgically sterilize a developmentally disabled ward. Since 1974, the legislature amended the Mental Health Code three times, and in each instance, sterilization was not expressly authorized. A court of limited jurisdiction may not gain such authority by implication when the expressed statutory authority has been removed.

### **IRREVOCABLE TRUST--TERMINATION--AGREEMENT OF SETTLOR AND BENEFICIARIES**

*Edmund Hein v Herbert Hein, Trustee*, 214 Mich. App. 356 (1995)

The trust in question was an irrevocable spendthrift trust. The settlors and lifetime beneficiaries were Edmund and Else Hein, and the residual beneficiaries were

their children. Herbert Hein was both the trustee and a residual beneficiary of the trust. All the parties are living and not incapacitated. Edmund Hein petitioned to terminate the trust for a variety of reasons concerning alleged inappropriate actions of the trustee. The parties, after mediating the matter, drafted a settlement agreement, which was later presented to the court. At the hearing, Herbert Hein's attorney was present, but Herbert Hein was not. The attorney indicated he had authority to bind his client. The attorney indicated that his client wanted to be released from all his duties as trustee, including his accounting duties, in exchange for terminating the trust. However, the attorney conceded that the probate court could not abdicate its jurisdiction over accountings and then consented to the settlement agreement. Accordingly, the probate court entered a consent judgment on the record that reflected the parties' settlement agreement. Herbert Hein appealed the consent judgment, contending that all interested parties did not agree to terminate the trust because he did not consent to its termination.

The Court of Appeals affirmed the action of the probate court. They held that a review of the record indicates that Herbert Hein consented to the termination of the trust in his capacity as beneficiary. His objections, if any, were made in his capacity as trustee. He only objected because the settlement agreement required him to render accountings. The duty to account is a duty imposed on trustees, not beneficiaries. Therefore, any objections to the settlement were made only in his capacity as trustee. Thus, the issue becomes whether the consent of the trustee is required before a court may terminate an irrevocable spendthrift trust when the settlor and all beneficiaries consent to its termination. The Court of Appeals held that a court may terminate an irrevocable spendthrift trust without the consent of the trustee when the settlor and all the beneficiaries consent to its termination.

### **ADOPTION--PUTATIVE FATHER-- TERMINATION OF PARENTAL RIGHTS-- SUPPORT**

*In the Matter of Krystal Leigh Schnell, a Minor*, 214 Mich. App. 304 (1995)

Krystal Leigh Schnell was born on January 11, 1991. Krystal's mother was unmarried. In January 1992, after blood tests, a circuit court order of filiation declaring Michael Sanchez's paternity was entered. This order also required Sanchez to pay child support and provided for the entry of an order of income withholding. Commencing in February 1992, child support payments were withheld from his paychecks. In November 1994, the mother placed Krystal with adoptive parents. In December 1994, Sanchez was served with a "Notice of Hearing Termination of Parental Rights." In February 1995, Sanchez petitioned the probate court for custody of Krystal. In March 1995, an evidentiary hearing was held at which it was established that Sanchez had not established a custodial relationship with Krystal pursuant to Section 39(2) of the Adoption Code. It was also established that Sanchez had continued to pay support for Krystal through the order of income withholding.

At this point the trial court had to decide if it could terminate Mr. Sanchez's parental rights under Section 39(1) of the Adoption Code or if it was required by Section 39(2) of the Adoption Code to use the stricter standards identified in that section. Section 39 provides in relevant part as follows:

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

shall terminate his rights to the child.

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

M.C.L.A. 710.39(1)-(2) (emphasis added).

The probate court determined that Sanchez had not provided support or care for Krystal or her mother pursuant to Section 39(2). The court then considered the best interests factors in Section 22 of the Adoption Code. It found that there was clear and convincing evidence that it was in Krystal's best interest to deny custody to Sanchez, the "putative" father. It terminated the parental rights of Sanchez, clearing the way for adoption. Sanchez appealed the termination of his parental rights.

The Court of Appeals stated that the dispositive issue in the case was whether the word "support" as used in Section 39(2) of the Adoption Code includes an order of income withholding. They reversed the trial court and held that it does. They found nothing in the statutory language to suggest that the legislature intended only a certain kind or quality of support be considered in determining whether a putative father has "provided support" under Section 39(2). In fact, Section 51(6) of the Adoption Code specifically contemplates that a court may not terminate a father's rights under the applicable circumstances if the father has substantially complied with an order of support. Because Sanchez had "provided support" pursuant to Section 39(2), his rights could not be terminated under the best interest standard enunciated in Section 39(1).

This case stands for the rule that there is no distinction between support that is obtained voluntarily or involuntarily. The problem I have with this case is that the court was dealing with Section 39 of the Adoption Code. This provision deals only with putative fathers. Sanchez had been determined by an order of filiation to be the father and thus was not a putative father but a legal father. As such, he would be entitled to the higher standards before his rights could be terminated. The Court of Appeals seems to have reached the right result, but by a totally wrong route.

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## *Probate and Estate Planning Section*

The following article was published in the [Spring 1996](#) 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 requires an informal review of a guardianship within five years 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 requires the guardian to notify the court within 14 days of a change in the ward's place of residence.

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

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

HB 4025 requires the court to give notice to the individual of the following rights: (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 deletes the requirement for an annual review of guardianships of minors under the age of six.

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 deletes the requirement that all guardianships must be reviewed within the first year of appointment of the guardian and within 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 provides that the apportionment of expenses incurred by a fiduciary or interested persons in connection with the determination of the amount and apportionment of the tax shall be apportioned and collected in the same manner as the federal estate tax, the Michigan estate tax, and the Michigan inheritance tax.

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

**HB 4328—MICHIGAN PARTNERSHIP FOR LONG TERM CARE PROGRAM (Representatives DeLange, Dalman, Hammerstrom, Brackenridge, and McNutt)**

HB 4328 provides for the financing of long-term care through a combination of private insurance and Medicaid. Under the bill, the individual is eligible to participate in the partnership program if he or she (1) is a Michigan resident, (2) purchases and maintains a partnership policy after the effective date of the legislation, and (3) exhausts the minimum benefits under the partnership policy.

The department would determine eligibility for Medicaid as follows:

1. The department would disregard the sum of the financial assets exempted under Medicaid eligibility requirements and the amount of financial assets equal to the dollar amount of coverage under the partnership policy.
2. The individual's income would be determined in accordance with Medicaid eligibility requirements.

As a prerequisite to the implementation of the partnership program, a federal waiver of Medicaid requirements would be necessary, and federal law would exempt individuals who receive Medicaid under this program from the estate recovery requirements of the Social Security Act.

This bill became Public Act No. 85 and was given immediate effect.

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

HB 4462 provides for the implementation of an estate recovery program as

required by the Social Security Act. The bill requires that the rules include:

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; and
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 4563—JURISDICTION OF PROBATE COURTS (Representatives Jersevic, Lowe, Kaza, Llewellyn, McManus, Bush, Weeks, Brackenridge, Hill, Dalman, Goschka, Voorhees, McBryde, Horton, Anthony, Green, Hammerstrom, Pitoniak, Cropsey, Leland, Middaugh, Gustafson, Olshove, and Jaye)**

HB 4563 provides that if there is an accident or a disaster that occurs outside the state of Michigan, the probate court of the individual's county of residence has jurisdiction.

This bill became Public Act No. 101 and was given immediate effect.

**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 provides immunity from tort liability for a guardian ad litem acting within the scope of his or her authority. It is identical to HB 5140. (HB 5043 is the Democrat bill, and HB 5140 is the Republican bill.)

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

**HB 5140—IMMUNITY FOR GUARDIAN AD LITEM (Representatives McNutt, Profit, Middleton, Lowe, Pitoniak, Hill, and Dalman)**

HB 5140 provides immunity from tort liability for a guardian ad litem acting within the scope of his or her authority. It is identical to HB 5043.

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

**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 to create one trial court of general jurisdiction in each county as a unit (except (1) Wayne County, which would have one unit for the City of Detroit and one unit for the balance of the county, and (2) two or more contiguous counties, which could vote to combine themselves into one multicounty unit). Each unit of the trial court would consist of a circuit court, a district court, and a family court.

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

**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 provides 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 (Representative Pitoniak)**

HB 5441 through HB 5449 require wills, estates, and dower to be gender neutral in various parts of the Michigan Compiled Laws.

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 349—PROBATE COURT MEETING SITES (Senators Van Regenmorter, Stille, Bouchard, and Honigman)**

SB 346 provides that the county board of commissioners and the state court administrator may authorize the chief judge to designate one or more places in the county at which regular sessions of the probate court may be held. Otherwise, regular probate court sessions will be held at the county seat of each county and in any city where sessions of the circuit court are authorized by law to be held.

Probate judges may maintain an office any place where sessions of the probate court are held.

The bill acknowledges that a probate judge may continue to hold hearings regarding allegedly legally incapacitated persons or mentally ill persons in accordance with the Revised Probate and Mental Health Codes.

This bill became Public Act No. 14 and was given immediate effect.

### **SB 390—UNIFORM UNCLAIMED PROPERTY ACT (Senator Emmons)**

SB 390 provides for a comprehensive procedure for the reporting and disposition of unclaimed property. The bill provides that holders of unclaimed property after stated periods of time must deliver the unclaimed property to the state treasurer. The time period is five years for a person who holds property in a fiduciary capacity for the benefit of another. The state treasurer then publishes notice of its possession of the unclaimed property and disposes of it under a prescribed procedure. This bill would repeal the Michigan Code of Escheats relating to escheated and abandoned property.

This bill became Public Act No. 29 of the Public Acts of 1995, which took effect January 1, 1996.

### **SB 391—REPEAL OF BOARD OF ESCHEATS (Senator Emmons)**

SB 391 repealed, effective January 1, 1996, the Board of Escheats. This bill was tie barred to Senate Bill 390.

This bill became Public Act No. 44 of the Public Acts of 1995 and was given immediate effect.

### **SB 394—CHANGE OF DUTIES OF STATE PUBLIC ADMINISTRATOR (Senator Emmons)**

SB 394 would require the state public administrator or a county public administrator to transfer the residue of an estate that escheats to the State of Michigan to the state treasurer pursuant to the Uniform Unclaimed Property Act instead of to the Board of Escheats. This bill took effect January 1, 1996, and was tie barred to Senate Bill 390.

The bill became Public Act No. 47 of the Public Acts of 1995 and was given immediate effect.

### **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 situated 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, HB 4524.

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

### **SB 459—DISTRIBUTION OF THE SHARE OF A BENEFICIARY WHO HAS DISAPPEARED (Senator Dunaskiss)**

SB 459 permits the share of a disappeared person to be distributed after waiting only 18 months (instead of three years under former law) after the decedent's death.

The bill was passed, signed by the governor, and became Public Act No. 184 of the Public Acts of 1995.

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

SB 487 adopts the Uniform Transfers to Minors Act. It is an improvement over the current Uniform Gifts to Minors Act (UGMA) 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). (This bill is identical to Senate Bill 801 introduced by Senator Van Regenmorter on August 31, 1993.)

This bill passed by the Senate 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 provides for changes to Section 497 of the Revised Probate Code 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 Sections 703, 704, 710, 712, and 717 of the Revised Probate Code, all of which deal with the processing of claims in a probate administration. (This bill is identical to Senate Bill 800 introduced by Senator Van Regenmorter on August 31, 1993.)

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

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

SB 496 would cause the Michigan disclaimer of property interests act to conform with the federal act. Among other things, the bill will allow 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. (This bill is identical to Senate Bill 802 introduced by Senator Van Regenmorter on August 31, 1993.)

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

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