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Probate and Estate Planning Section

Michigan Probate and Estate Planning Journal

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Probate and Estate Planning Section

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

FROM THE CHAIRPERSON'S DESK

By Brian V. Howe

House Joint Resolution F

On March 3, 1999, House Joint Resolution F was introduced in the Michigan House of Representatives, proposing a constitutional amendment to abolish the probate court, which is currently mandated by the Michigan Constitution. This resolution precedes the complete consolidation of the probate and circuit courts, which many government officials in Lansing think is a foregone conclusion. Your Council, which is adamantly opposed to the abolishment of the Michigan Probate Courts under existing conditions, in preparation for pending legislation, adopted the following resolution on February 20, 1999:

The Probate and Estate Planning Council opposes elimination of the Probate Court based upon our experience to date with Court reform and our concern that without a separate Court, Judges, and staff, trained and experienced in Probate matters, the public, and, particularly, protected individuals and their families, will not receive the service and consideration which they are entitled to and have received as citizens of the State of Michigan.

The State Bar Board of Commissioners has not yet taken a position supporting or opposing Resolution F. However, they will take up the matter at their meeting on June 11, 1999.

In my letter of April 22, 1999, to the Board of Commissioners, I indicated that the Council would only approve the consolidation of the courts if provisions were first made to retain a probate division or a probate seat or seats on the circuit bench in every county.

The assignment of some of our probate judges to the family division of the circuit court has not been a resounding success since domestic relations cases assigned to these judges have prevented them from spending adequate time on

their remaining probate cases. We note that while up to half of marriages end in divorce, which necessitates a family court, 100 percent of lives end in death, and a fair number of individuals require a conservator or guardianship during their lives. If there is a need for the family court concept, there is even a greater need for the continuation of the Michigan probate courts.

In larger counties, probate matters require as many as four to five full-time judges to handle the heavy workload generated by estates, trusts, conservatorships, guardianships, and juvenile matters. Wayne County, which is our largest county, currently has over 85,000 open probate files. Many of these files have been opened and maintained on a pro per basis due to the availability of a separate probate court and the willingness of the probate courts to assist citizens in pursuing various matters. The elimination of the probate court and its staff and procedures will force many of these individuals to seek counsel, which will simply make the courts unavailable to many of our citizens. Unless we completely revamp our legal aid system, this result flies in the face of our new Access to Justice program.

While many probate court cases are nonadversarial, they require education, training, and temperament on the part of both the bench and the staff that is not universal throughout Michigan's judicial system. The elimination of the probate court, in our opinion, would adversely effect the legal needs of many of the young and elderly in the State of Michigan.

So much for preaching to the choir. If you agree that the abolition of the probate court as proposed in House Joint Resolution F is detrimental to both you and your clients, I suggest that you contact your representative on the Board of Commissioners or your state representative.

EPIC Publication Planned

To assist our members in understanding the new Estates and Protected Individuals Code, we are very pleased to announce that John H. Martin will be preparing the Official Reporter's Commentary to EPIC. We are also pleased to announce that the Council has entered into an exclusive agreement with the Institute of Continuing Legal Education to publish the commentary. The commentary will be included in Volume I of the *Michigan Probate Sourcebook* and will also be published in a separate paperback volume that will include the text of the code. Both of these publications should be available by February 2000.

We continue to be grateful to John Martin (whom we have dubbed the father of EPIC) for the numerous hours he has devoted, and continues to devote, to this project. John's unique understanding of the code and the legislative process that led to its enactment will be invaluable to both practitioners and judges as they begin to operate under the new procedures.

EPIC Court Rules and Forms

The Honorable John R. Monaghan is chairing the new Probate and Estate Planning Council Court Rules and Forms Committee to develop new rules and forms under EPIC. This committee comprises 24 members, including 11 probate judges. The committee has had two meetings to date and is making excellent progress with their project. I want to thank Judge Monaghan and all of his committee members for their help in making EPIC a success.

Unauthorized Practice of Law

Ramon F. Rolf, Jr. (Fred), and the members of his committee on Ethics, Unauthorized Practice of Law, and Image have been working to prevent the unauthorized practice of law in Michigan. Their first task is to define what constitutes the "unauthorized practice of law." Fred's committee assisted in the drafting of my March 29, 1999, letter to the American Bar Association, which is included in this issue of the *Journal*. Fred is making good progress, since I understand the State Bar now intends to set up a commission or task force in 2000 to address this problem.

Meetings

I close by encouraging you to express your views to the Council. You are also welcome to attend our regular Council meetings. A schedule of meetings appears below. I can assure you that attendance at our meetings will benefit you and your profession.

[Upcoming Meetings](#)

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Probate and Estate Planning Section

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

WORKING WITH THE NEW GST PREDECEASED ANCESTOR RULES: EXPLANATION AND EXAMPLES

By Nancy A. Downie

The Taxpayer Relief Act of 1997 (1997 TRA) significantly expanded the "predeceased parent" exception to the federal generation-skipping transfer (GST) tax. The new rules are effective for transfers occurring after December 31, 1997.

Before the 1997 TRA, IRC § 2612(c)(2) provided that transfers to grandchildren of a transferor (or of the transferor's spouse or former spouse) were not considered direct skips if the grandchild's parent who was a lineal descendant of the transferor (or of the transferor's spouse or former spouse) was deceased at the time of the transfer.

This rule had two significant limitations. First, it applied only to transfers to a *lineal descendant* of the transferor, the transferor's spouse, or the transferor's former spouse. It did not apply to transfers to collateral relatives, i.e., to grandnieces and grandnephews. Second, it applied only to *direct skips*, not to taxable distributions or taxable terminations.

The 1997 TRA repealed the former IRC § 2612(c)(2) and recharacterized the former § 2612(c)(3) as § 2612(c)(2). The act substituted a new IRC § 2651(f)(2) for the former § 2612(c)(2). Therefore, the predeceased ancestor rules are now found under IRC § 2651 (generation assignment) rather than under IRC § 2612 (taxable termination; taxable distribution; direct skip).

Transfers to Collateral Relatives

Under the new rules, a transfer to a person who is a "lineal descendant of the parent of the transferor (or the transferor's spouse or former spouse)" and whose parent is dead when the transfer is subject to federal gift or estate tax imposed on the transferor will not be considered a GST. Therefore, the predeceased ancestor rule now applies to transfers to collateral relatives, such as grandnieces and grandnephews.¹

Important Exception

The predeceased ancestor rule does not apply to transfers to collateral relatives if the transferor has any living lineal descendant.²

Example 1: Granduncle Louis, a lifelong bachelor with no children, gives \$50,000 outright to grandniece Louise, who is the daughter of Granduncle's deceased nephew. The gift *does* qualify for the predeceased ancestor exception and is not considered a GST.

Example 2: Grand aunt Loulabelle, a widow who has living children, gives \$50,000 outright to grandnephew Leon, who is the son of Grand aunt's deceased niece. The gift *does not* qualify for the predeceased ancestor exception, and it is a direct skip.

That the transferor's spouse or former spouse has living lineal descendants does not preclude the application of the predeceased ancestor exception to transfers to the *transferor's* collateral relatives.

Example 3: If Louis were to marry Loulabelle, he could still make transfers to Louise that would qualify for the exception. He could also make transfers to Leon that would qualify for the exception. However, transfers from Loulabelle to Louise would not qualify.

The exception does not apply to transfers to *wives* of either lineal descendants or collateral relatives.

Example 4: Louis also wants to give \$50,000 outright to Louise's husband, Lawrence. Lawrence is not a relative of Louis for GST purposes³ and he is more than 37 1/2 years younger than Louis.⁴ Louis's transfer to Lawrence is a direct skip.

Regulations

In at least two instances, the regulations have not caught up with the changes in the statute. With regard to disclaimers, the regulations provide that a "descendant of the transferor" is treated as having predeceased the transferor only if the descendant is really dead and not if the descendant disclaimed.⁵ This rule now presumably applies to collateral relatives as well, although the regulation has not yet been amended to reflect the 1997 TRA changes.

In addition, under the regulations, "[a] living descendant who dies no later than 90 days after the subject transfer is treated as having predeceased the transferor to the extent that either the governing instrument or applicable local law provides that such individual shall be treated as predeceasing the transferor."⁶

Presumably, this rule now also applies to collateral relatives, although the regulation has not been amended to provide that. (Neither current Michigan law nor the new Estates and Protected Individuals Code⁷ incorporate a 90-day survivorship rule for GST purposes, so documents must include the rule if clients are to take advantage of it.)

Application to Taxable Terminations and Taxable Distributions

The new rules apply to any GST when the transferee's parent who is a lineal descendant of a parent of the transferor (or of the transferor's spouse or former spouse) is dead when the transfer is subject to federal gift or estate tax imposed on the transferor.⁸ Therefore, the predeceased ancestor exception applies to

post-1997 taxable distributions and taxable terminations, as well as to direct skips. Note: the transferee's parent must be dead *at the time of the transfer*, not just when the taxable distribution or taxable termination occurs.

Example 5: In 1998, Grandfather John created an irrevocable trust for the lifetime benefit of his son, Jonathan. On Jonathan's death, the trust property will pass to Jonathan's children and to the children of Grandfather's daughter Joan, who died in 1995. When Jonathan dies, there will be a taxable termination for the portion that passes to Jonathan's children, but there will be no GST for the portion that passes to Joan's children.

Example 6: In 1998, Grandmother Julia created an irrevocable trust for the benefit of her living children, Jack and Jill; Jack and Jill's children; and the children of Grandmother's deceased son, Joe. The trustee, in the trustee's discretion, could "sprinkle" income, principal, or both among any one or more of the beneficiaries for their health, support, maintenance, and education. In 1999, the trustee distributes \$10,000 to Jack's daughter for college room and board and also distributes \$10,000 to Joe's daughter to buy a car so that she can attend school. The distribution to Jack's daughter is a taxable distribution, but the distribution to Joe's daughter is not a GST. Jack then dies in January 2000. In July 2000, the trustee distributes \$10,000 to both Jack's daughter and Joe's daughter. The distribution to Jack's daughter is still a taxable distribution, notwithstanding that Jack is now deceased, because Jack was alive when Grandmother's initial transfer to the trust was subject to gift tax.

With respect to additions to trusts, the time of the addition (and not the time of the first transfer to the trust) is the relevant time to determine whether the predeceased ancestor exception applies.

Example 7: In 1998, Grandmother Beverly created an irrevocable trust for the lifetime benefit of her son, Bob. The remainder beneficiary is Bob's 10-year-old daughter, Betty, who will receive the trust property after Bob's death on attaining age 25. At the time of the transfer in 1998 (since Bob is then living), a transfer to Betty after Bob's death would be a taxable termination, and Grandmother would have to allocate a GST tax exemption to the 1998 transfer to protect it from GST tax. In early 1999, Bob dies. In late 1999, Grandmother makes an additional contribution to the trust. Since Bob is now dead, the 1999 transfer is not a GST, and no GST tax exemption need be allocated to it.

The New Rules and the Reverse QTIP Election

Before the 1997 TRA, the predeceased parent exception was not available under any circumstances for a transfer on the surviving spouse's death from a trust for which a reverse qualified-terminable-interest-property (QTIP) election had been made. This was because the exception applied only to direct skips. Since the reverse QTIP election caused the first spouse to die to remain the transferor for GST tax purposes, a taxable termination (rather than a direct skip) occurred on the surviving spouse's death.⁹ In many instances, to preserve the first decedent's GST tax exemption, the reverse QTIP election was compelled even if one or more of the first decedent's children had predeceased him or her.

Example 8: Albert died in 1995. A portion of his estate passed to a QTIP trust for the benefit of his surviving spouse, Alberta. A reverse QTIP election was made for the trust. Alberta dies in 2000, and the trust property passes to Alfred's granddaughter, Agnes, whose parent, Albert's son Alfred, had died in 1994. The

transfer to Agnes does not qualify for the predeceased parent exception, notwithstanding that Alfred had predeceased Albert, because the transfer was a taxable termination rather than a direct skip.

Under the 1997 TRA, the predeceased ancestor exception applies to taxable terminations (and taxable distributions) as well as to direct skips.

Example 9: Same facts as in example 8 above, except that Albert died in 1998 rather than 1995. The transfer to Agnes on Alberta's death would not be a GST because, since Alfred died before Albert, the predeceased ancestor exception would apply to what would otherwise be a taxable termination.

Caution: The 1997 TRA does not change the result if the transferee's parent survived the first spouse to die but predeceased the surviving spouse.¹⁰

Example 10: Albert died in 1998. His son, Alfred, dies in 1999. Alberta dies in 2000. The transfer to Agnes does not qualify for the predeceased ancestor exception because Alfred was not dead when the transfer was subject to estate tax on the transferor. Because the reverse QTIP election was made, Albert is still the transferor for GST tax purposes, notwithstanding that the trust is included in Alberta's gross estate for estate tax purposes.

Under the 1997 TRA rules, the practitioner needs to think twice about whether to make a reverse QTIP election or not. In many cases, a reverse QTIP election may not be necessary, but there are still circumstances under which it should be used.

Example 11: David dies in 1999, survived by his spouse, Dorothy, and his grandson, Donald (son of their deceased daughter, Denise). David's estate is divided into a residuary trust (\$650,000) and a QTIP trust (\$2,000,000). Dorothy is the sole beneficiary of both trusts during her lifetime, and on her death both trusts vest in Donald. On Dorothy's death, the transfer to Donald from the residuary trust will qualify for the predeceased ancestor exception (since Denise predeceased the transferor, David), so it is not necessary to allocate any portion of David's GST tax exemption to the residuary trust. The QTIP trust will be included in Dorothy's gross estate, so unless a reverse QTIP election is made, Dorothy will become the transferor. Since Denise predeceased Dorothy, the transfer to Donald will qualify for the predeceased ancestor exception *as to Dorothy*, so there is no need to make a reverse QTIP election for any portion of the QTIP trust.

Example 12: David dies in 1999, survived by his wife, Dorothy; his daughter, Denise; and his grandson, Donald. His estate is divided into a residuary trust (\$650,000) and a QTIP trust (\$2,000,000). Dorothy is the sole beneficiary of both trusts during her lifetime. At her death, both trusts are to be distributed outright to Denise or, if she is then deceased, to be vested in Donald. David is the transferor of the residuary trust, so a portion of his GST tax exemption must be allocated to the residuary trust to protect the trust from GST tax if Denise dies before Dorothy. However, for the QTIP trust, Dorothy will become the transferor unless a reverse QTIP election is made. If Denise dies before Dorothy, the transfer to Donald will qualify for the predeceased ancestor exception *as to Dorothy*, so there is no need to make a reverse QTIP election for any portion of the QTIP trust.

Note that if, in examples 11 and 12, the trusts did not vest in Donald and Donald might predecease the time of distribution, the exemption must be allocated to protect against GST tax if the property passes to Donald's issue.

Example 13: David dies in 1999, survived by his wife, Dorothy, and his daughters Denise (age 40) and Darlene (age 35), both of whom have two children. He has not used up any of his \$1 million GST tax exemption during his life. His estate is divided into a residuary trust (\$650,000) and a QTIP trust (\$4,000,000). Dorothy is the sole beneficiary of both trusts during her lifetime. At her death, each trust is divided into separate shares, one for Denise and her issue and the other for Darlene and her issue. Each daughter's share is to be held in trust until the daughter is age 50; if the daughter is alive at age 50, she receives the balance of her share outright; if a daughter dies before age 50, her share passes to her issue. David is the transferor of the residuary trust, so \$650,000 of his GST tax exemption must be allocated to the residuary trust to protect the trust from GST tax if either daughter dies before age 50. A reverse QTIP election should also be made for a percentage of the QTIP trust equal to David's remaining GST tax exemption (\$350,000) because if either daughter survives Dorothy but dies before age 50, a taxable termination will occur, regardless of whether David or Dorothy is deemed to be the transferor.

Example 14: Polly Practitioner is preparing an estate plan for David. David has a wife, Dorothy; their two daughters, Denise (age 40) and Darlene (age 35), both of whom have children; and three grandchildren who are the issue of their predeceased son, Daniel. David's net worth is \$6 million. He wants a reduce-to-zero estate plan that provides for his wife if she survives him and, on her death, treats Denise, Darlene, and Daniel's issue equally. In addition, he does not want his daughters to receive their shares outright until they are 50. In this case, it will make tax planning sense (albeit with drafting and administrative complexity) to create separate shares of the residuary trust and the QTIP trust as follows:

Residuary trust:

- A one-third share for Dorothy for life; the remainder to Daniel's issue. The predeceased ancestor rule will apply because Daniel predeceased David, and no GST tax exemption need be allocated.
- A two-thirds share for Dorothy for life; the remainder in equal shares to Denise and Darlene. If Denise or Darlene dies before age 50, her share goes to her issue by right of representation. On David's death, allocate a GST tax exemption in the amount of two-thirds of David's applicable exclusion (\$434,000 in 1999) to protect against the daughters' untimely deaths.

QTIP trust:

- A QTIP grandchildren's trust for Dorothy for life; the remainder to Daniel's issue. Dorothy will be the transferor unless a reverse QTIP election is made. Since Daniel predeceased Dorothy, the "predeceased ancestor" rule will apply *as to her*, and no reverse QTIP election need be made.
- An exempt QTIP trust for Dorothy for life, the remainder to Denise and Darlene or their issue. On David's death, a reverse QTIP election is made and David's remaining GST tax exemption (\$566,010 in 1999) is allocated to this trust to protect against GST tax if the daughters survive Dorothy but die before age 50.
- A nonexempt QTIP trust for Dorothy for life; the remainder to Denise and Darlene or their issue. Dorothy will be the transferor, and her executor, if willing, may allocate Dorothy's own \$1 million GST tax exemption to transfers from this trust, if necessary.

For the sake of relative simplicity, example 14 takes into account only circumstances existing at the present time; actual drafting should consider the possibility that Denise or Darlene also might predecease David. Furthermore, the practitioner should consider whether Dorothy is likely to reserve her GST tax exemption for David's children. If Dorothy has children by a prior marriage, she may be unwilling to do so.

The New Rules and Charitable Lead Trusts

Before the 1997 TRA, the "predeceased parent" rules could not apply to transfers to charitable lead trusts because the lead interest of the charity prevented a direct skip from occurring. Under the new rules, if *at the time of the transfer to the trust*, the remainder beneficiary's parent is dead, no taxable termination is deemed to occur when the charity's interest terminates.

Example 15: In 1998, Grandfather Kenneth created a 10-year charitable lead trust. The remainder beneficiary is Grandson Kenny, whose parent, Grandfather's daughter Karen, died in 1995. When the charity's interest terminates in 2008, a transfer to Kenny, if vested in him, will not be a taxable termination. If Kenny's interest is not vested, a taxable termination would occur on the transfer to Kenny's issue.

The New Rules and Section 2702 Trusts Before the 1997 TRA, the predeceased parent rules could not apply to grantor retained annuity trusts (GRATs), grantor retained unitrusts (GRUTs), or qualified personal residence trusts (QPRTs) when the grantor survived his or her retained interest because, again, the grantor's retained interest prevented a direct skip from occurring. Under the new rules, the predeceased ancestor exception will apply if the remainder beneficiary's parent predeceased the initial transfer to the GRAT, GRUT, or QPRT.

Has the Exception Been Narrowed?

The new rules provide that the predeceased ancestor exception applies if the parent of the transferee is dead when the transfer is subject to gift or estate tax on the transferor "and if there shall be more than 1 such time, then at the earliest such time."[11](#)

The provision quoted above seems to mean that the exception will no longer be available if (1) the transfer is from a trust the transfer to which constituted, at least in part, a completed gift (such as a GRAT, GRUT, or QPRT) and (2) the transferee's parent died *after the initial transfer to the trust*. If this interpretation is correct, then the exception has been narrowed if the transferred property is included and taxed in the transferor's gross estate because the transferor died before the expiration of the income term. Before the inclusion in the statute of the quoted language, the inclusion of the property in the estate of the grantor would have allowed the predeceased parent exception to apply.[12](#)

Example 16: In 1998, Grandfather Thomas creates a five-year GRAT. The remainder beneficiary is grandson Tony, the son of Grandfather's daughter, Tessie. Tessie dies in 1999. Grandfather dies in 2000 (before the expiration of the five-year income term), so the trust is included in his gross estate. Given the provision noted above, the transfer to Tony does not qualify for the predeceased parent exception because Doris was alive in 1998 (when the transfer was first subject to gift tax), even though the transfer was subsequently subject to estate tax in Grandfather's estate because Grandfather did not survive the income term. Before the 1997 TRA, the more liberal answer would have been that, because the

property was includable in Grandfather's gross estate, the direct skip to Tony would have qualified for the exception.

The legislative history of the 1997 TRA expresses Congress's intent to extend the predeceased parent exception rather than narrow it.¹³ It is hoped that technical corrections will modify this provision, but so far, none have occurred.

Meanwhile, providing that the GRAT property is to revert to Grandfather's estate (or be transferred to Grandfather's revocable living trust) if Grandfather dies before the expiration of the income term *might* preserve the exemption because the initial transfer to the GRAT is not "the transfer (from which an interest of such individual is established or derived)."¹⁴ Grandfather's will or revocable living trust could then provide that the GRAT property be transferred to Tony.

The New Rules and Discretionary "Spray" Trusts

Before the 1997 TRA, the predeceased parent rules could not apply to *spray* or *sprinkle* trusts for living children and children of a predeceased child, because the interests of the living children would have prevented a direct skip from occurring with respect to the trust. Under the new rules, distributions to and terminations in favor of the children of the predeceased child will not be considered GSTs if the predeceased child was dead when the transfer to the trust first became subject to estate or gift tax imposed on the transferor.

Example 17: Grandmother Martha dies, creating a spray trust for the benefit of her living children, Mary and Monica, and the children of her predeceased son, Michael. Any beneficiary may receive discretionary distributions of principal for health, support, and education. The trustee distributes \$10,000 to Michael's son, Morris, to pay for his room and board while he is in college. The distribution to Morris is not a taxable distribution. See also example 6.

The expansion of the predeceased ancestor rules should help clients who wish to give property to collateral relatives or who do not want to make direct skip gifts or bequests to younger generation beneficiaries. In most cases, the new rules should make living with GSTs a bit easier for practitioners, too!

Notes

1 IRC § 2651(e)(1).

2 IRC § 2651(e)(2).

3 IRC § 2651(b).

4 IRC § 2651(d)(2).

5 Treas Reg § 26.2612-1(a)(2)(i).

6 *Id.*

7 1998 PA 386, MCLA 700.1101 et seq., MSA 27.51101 et seq.

8 IRC § 2651(e).

9 IRC § 2652(a)(3).

10 See Rev Rul 92-26, 1992-1 CB 314.

11 IRC § 2651(e)(1)(B).

12 See the estate tax inclusion period (ETIP) rules of Treas Reg § 26.2632-1(c).

13 HR Rep No 148, 105th Cong (1997).

14 IRC § 2651(e)(1)(B).

their Bloomfield Hills office and specializes in estate taxation, estate planning, and estate and trust administration. She received her bachelor of arts from Albion College and her juris doctor from the University of Michigan, magna cum laude. Her professional associations include membership in the Probate and Estate Planning and Taxation Sections of the State Bar of Michigan and in the Probate, Estate, and Trust Committee of the Oakland County Bar Association. She was formerly assistant vice president of Comerica Bank, where she served in the estate tax department. For several years she has been an instructor in GST tax for Midwest Trust Schools. She has contributed articles to the *Michigan Probate and Estate Planning Journal* and to the Oakland County Bar Association's journal, *Laches*, and has also given seminars on GST tax law for ICLE.

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CURRENT STATUS OF THE LAW REGARDING DEEDS TRANSFERRING DIVISION RIGHTS UNDER THE LAND DIVISION ACT

By Diane L. Bernick

Section 109(3) of the Michigan Land Division Act, MCL 560.101 et seq., MSA 26.430(101) et seq., states:

A person shall not sell a parcel of unplatted land unless the deed contains a statement as to whether the right to make further divisions exempt from the platting requirements of this act under this section and section 108 is proposed to be conveyed. The statement shall be in substantially the following form: "The grantor grants to the grantee the right to make [insert number] division(s) under section 108 of the land division act, Act No. 288 of the Public Acts of 1967." In the absence of a statement conforming to the requirements of this subsection, the right to make divisions under section 180(2), (3), and (4) stays with the remainder of the parent tract or parent parcel retained by the grantor.

In response to the requirements of this section, many practitioners had been inserting the words "all" or "the maximum" in the required statement when preparing deeds conveying unplatted land. However, in an informational letter dated January 26, 1998, to State Representative Pat Gagliardi, Assistant Attorney General Joe D. Sutton stated that "if grantors of unplatted real property desire to also transfer their right to make further exempt divisions, their deed must recite the specific number of such divisions." According to the informational letter, the language of the statute is unambiguous in its requirement of a specific number, and the statute is to be applied as written without further interpretation. The letter goes on to state that specific numbers must also be included in the notice to city or township assessors required by section 109(2) and developed by the State Tax Commission. That form, which must be filed within 45 days of a transfer of land division rights, requires grantors to answer the following questions:

"Did the parent parcel or parent tract have any unallocated divisions under the land division act, 1967 PA 288, MCL 560.101 to

560.293? If so, how many?"

"Were any unallocated divisions transferred to the newly created parcel? If so, how many?"

Id.

Attorneys who practice in probate and estate planning frequently prepare deeds for a variety of reasons, including transfers of ownership of property to a trust, transfers of ownership from one spouse to another, gifts of real property, and transfers to change the character of ownership from tenants by the entireties to tenants in common. Application of the January 26, 1998, Attorney General Information Letter made the practice of probate and estate planning economically unfeasible when unplatted property is involved. The expense incurred to analyze parent parcels and to calculate the number of divisions and bonus divisions would be enormous and well beyond the financial resources of most of our clients.

The members of the Probate and Estate Planning Section Council responded to the informational letter and requested immediate action to remedy this situation. In response to the council's request, the attorney general issued Opinion No 7005, dated December 30, 1998, which found that the Land Division Act does not apply to a grantor who conveys his or her entire interest in unplatted land, if no divisions from the parcel have been made since March 31, 1997. The attorney general's opinion held, "It is my opinion, therefore, that a grantor, . . . is not required by the Land Division Act to include in the deed of conveyance a statement on whether the right to make further exempt divisions is being conveyed. The right to make further exempt divisions is conveyed with the land."

The attorney general's opinion does not remedy all of the problems that estate planning practitioners face when drafting deeds of unplatted land. However, it does address many of our immediate concerns.

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THE UNAUTHORIZED PRACTICE OF LAW AND THE CYBER-LAWYER

By Steven A. Mitchell

This article is a follow-up to Fred Rolf's fine article on the unauthorized practice of law in the Fall 1998 issue of this journal, in light of a recent federal court decision in which a nationally known computer software publisher was enjoined from the sale and distribution of a product known as Quicken Family Lawyer (QFL) within the state of Texas. *Unauthorized Practice of Law Committee v Parsons Tech, Inc*, No 3:97-CV-2859-H, 1999 US Dist Lexis 813 (ND Tex Jan 22, 1999). The case is interesting for several reasons. It was brought by the Unauthorized Practice of Law Committee in Texas and sets an example for committees in other jurisdictions. It addresses unauthorized-practice-of-law issues within the context of advanced communication and computer technology, tackling head-on the definition of what constitutes the practice of law, not to mention who (or what) may practice it. The case was decided on cross-motions for summary disposition, the court recognizing that the determination of what constitutes the unauthorized practice of law is a legal question when neither side disputes the facts.

The plaintiff committee consists of nine members—six lawyers and three nonlawyers—and is responsible for enforcing the unauthorized-practice-of-law statute in Texas. The defendant is a nationally known developer and publisher of computer software products including the Quicken financial software products.

In its latest version, QFL provides over 100 different legal forms in its software package. The forms deal with various areas of the law, including employment agreements, real estates leases, premarital agreements, and wills. It also provides instructions on how to fill out the forms, and its makers claim that QFL's forms are "valid in 49 states including the District of Columbia." 1999 US Dist LEXIS 813, at *4.

The makers go on to claim that QFL was "developed and reviewed by expert attorneys," that it can tailor documents to the user's particular situation, and that the software provides "handy hints and comprehensive legal help topics" to reassure the user and instill confidence in using the forms. *Id.*

Quicken Family Lawyer asks the user for his or her name and state of residence and inquires whether the user would like QFL to suggest particular documents for

use. If the user says "yes," QFL's "document adviser" asks some preliminary questions and then displays a list of printed documents but singles out a few of them as perhaps being especially appropriate for the user, based on responses given to the questions.

When a user actually accesses a document, QFL again asks questions to assist the user in filling in the legal form. On some of the questions, there is a separate text box that attempts to explain pertinent legal considerations that the user may find useful in filling in the form. As the user goes through the questions pertinent to completing the form, QFL either fills in the appropriate blanks or adds (or deletes) entire clauses from the form based on applicability.

Additionally, there are other help features that provide the user with legal information. The user can either key in to predetermined frequently asked questions or tailor specific questions prompting a specific response. The responses to the questions may differ from state to state, reinforcing the conclusion that particularized legal advice is being provided for the individual user. The only disclaimer provided by QFL appears in its help menu at the top of the main screen. Although the program acknowledges that it provides forms and information about the law, the disclaimer states that the program cannot provide specific information for the user's exact situation. Yet that is exactly what the program does, the disclaimer notwithstanding.

In a footnote to the opinion, the court observed that the injunction sought by the plaintiff "would result in a loss of sales to Parsons of \$500,000 and a loss of profits in excess of \$100,000." *Id.* at *9n6. The court made this statement to establish jurisdiction, yet it is interesting to observe the amount of money at stake, keeping in mind that these figures apply to sales and profits in only one state. It is also interesting to note that while this is only one product, it covers many areas of practice, demonstrating that there is more than money at stake on the issue of what constitutes the practice of law and who may practice.

As indicated above, the court decided this case on cross-motions for summary disposition. The court simply stated that the defendant's act of publishing QFL is undisputed, as are the contents of the software program. "All that remains to be determined is the legal consequences, if any, of these undisputed acts." *Id.* at *13. This statement is significant because it suggests that an unauthorized practice of law committee in any jurisdiction should have little difficulty getting such questions to a trial judge expeditiously when the facts are not disputed. In other words, in this type of case, it should be fairly easy for the committee to investigate and come to some conclusion about whether the content of a computer software program constitutes the unauthorized practice of law and then to take action in court to enforce Michigan's statute.

The federal court in Texas had no difficulty determining that the format and information provided by QFL constituted the practice of law in Texas. The opinion goes so far as to refer to QFL as a "cyber-lawyer." *Id.* at *14. The court recognized that "a comprehensive definition" of just what qualifies as the practice of law is "impossible" and that "each case must be decided upon its own particular facts." *Id.* (quoting *Palmer v Unauthorized Practice of Law Committee*, 438 SW2d 374, 376 (Tex App—Houston 1969, no writ). The court opinion cites several cases, including, interestingly enough, *State Bar of Michigan v Cramer*, 399 Mich 116, 249 NW2d 1 (1976). Under Texas law, developing case law provides the threads for the fabric that defines the unauthorized practice of law. Michigan is no different.

In Texas, providing instructions in connection with the sale of will forms containing blanks to be filled in by the user constitutes the unauthorized practice of law. The

reasoning is based on the fact that properly filling in the blanks, or even selecting the proper form, requires the exercise of judgment in properly drafting any legal document.

The court's specific reasoning is set forth as follows:

QFL goes beyond merely instructing someone how to fill in a blank form. While no single one of QFL's acts, in and of itself, may constitute the practice of law, taken as a whole Parsons, through QFL, has gone beyond publishing a sample form book with instructions, and has ventured into the unauthorized practice of law.

1999 US Dist LEXIS at *19. It is no defense that the cyber-lawyer is not a human being engaged in personal contact with the client/user. The court rejected the defendant's assertion that the unauthorized practice of law depends on personal contact or the establishment of an attorney-client relationship. The court found that the Texas statute is broadly drafted, enabling the court to determine that many acts can constitute the unauthorized practice of law, depending on the facts. Indeed, the court referred to "the range of conduct" constituting the unauthorized practice of law. *Id.* at *18. Yet the court recognized that the range of conduct has been established by case law in Texas. Standards establishing a range of conduct in Michigan will also require the development of additional case precedents.

We live in an age when advancements in communications and the dissemination of information move with the speed of light. These advancements quickly change how business is conducted and can conceivably have a devastating impact on the very nature of the legal profession if certain practices are not investigated and challenged.

Will the cyber-lawyer eventually replace us? I submit that the answer lies in our collective reaction and response to business services and products that attempt to lower the bar, defining for themselves what constitutes the practice of law. At any rate, the federal court's decision involving QFL provides hope and comfort, however temporary it may be.

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

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ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE

By Ramon F. Rolf, Jr.

Two issues ago, I wrote an article for the *Journal* discussing the unauthorized practice of law by unlicensed individuals promoting will and trust kits. As many of you are no doubt aware, other professionals (CPAs, CLUs, CFPs) and even other industries (the insurance industry and brokerage firms) would like to be able to prepare wills, trusts, powers of attorney, and, for that matter, all types of business documents. The American Bar Association has a commission reviewing these issues and the ramifications of allowing multidiscipline practice groups. The ABA commission sought comments, and your Section responded. The following is Brian V. Howe's (our Section chairperson) letter to the ABA Commission on Multidisciplinary Practice. **Note:** Letter available only in print *Journal*.

We need all of your help in lighting a fire under the State Bar of Michigan. If you have an opinion on these important practice issues, please write to either J. Thomas Lenga, President, Board of Commissioners, or D. Larkin Chenault, Executive Director. Letters to both Mr. Lenga and Mr. Chenault can be sent to State Bar of Michigan, 306 Townsend, Lansing, MI 48933-2083.

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

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

By Hon. Phillip E. Harter

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

GUARDIANSHIP OF MINORS—CRITERIA

1998 PA 494M

1. Amends MCL 700.424, MSA 27.5424.
2. Effective March 1, 1999.
3. Summary:

a. The act amends the Revised Probate Code to allow a court to appoint a guardian for an unmarried minor if the parent or parents have allowed the minor to reside with another person without providing the person with legal authority for the care and maintenance of the minor as long as the minor is not residing with the parent or parents when the petition is filed.

b. Most courts presently require that the criteria exist at the time of the hearing before a guardianship will be considered. This change will allow the appointment of a guardian even when the parent or parents appear at the hearing and indicate that they want the minor to live with them and are no longer permitting the minor to stay with the third party as long as the criteria existed when the petition was filed.

APPOINTMENT OF A LAWYER— GUARDIAN AD LITEM

1998 PA 481

1. Amends MCL 700.3, .8, .427., 437, MSA 27.5003, .5008, .5427, .5437, and adds MCL 700. 427a, MSA 27.5427(1).
2. Effective March 1, 1999.
3. Summary:

a. Amends the Revised Probate Code to provide for the appointment of a lawyer—guardian ad litem to represent a minor in a guardianship proceeding if the

court determines that the minor's interest are inadequately represented. Such a lawyer-guardian ad litem is to be an advocate for the minor and owe allegiance only to the minor.

b. Permits the court to appoint a traditional guardian ad litem, not necessarily an attorney, to assist the court in determining the minor's best interests.

c. Allows the court to assess all or part of the costs and reasonable fees of a lawyer-guardian ad litem against one or more of the parties involved in the proceedings or against the money allocated from marriage license fees for family counseling services under MCL 551.103, MSA 25.33. A lawyer-guardian ad litem may not be paid a fee unless the court first receives and approves the fee.

TAXATION—APPORTIONMENT OF TAXES— LANGUAGE OF WILL OVERRIDING APPORTIONMENT

In re Webb H Coe Marital & Residuary Trusts, 233 Mich App 525 (1999)

Webb H. Coe died in 1978. He had established a marital trust and a separate residuary trust for the benefit of the respondent, Phyllis Finney, a daughter, and three grandchildren of a deceased daughter. The residuary (or family) trust included \$600,000 in Webb's exempt marital assets, which were to be divided with one-half to Finney and one-half to the grandchildren. The marital trust had \$465,326 in assets and was to be divided in the same manner as the residuary trust. Hazel Coe, wife of Webb Coe, had a power of appointment over the marital trust.

Hazel Coe died in 1994 without exercising any power of appointment. Hazel owned taxable assets, both probate and nonprobate, valued at \$495,490, which Finney received by operation of law and specific bequests. The residue of her estate after the payment of three \$5,000 bequests to grandchildren was to be split between Finney and the three grandchildren. I am informed that there was no residue in this estate. Therefore, any charges against the estate were to be paid from specific bequests given to Finney.

When the marital trust was added to Hazel Coe's estate, the combined assets generated \$91,325 in federal estate tax and \$28,426 in Michigan estate tax. The portion of these taxes attributed to the marital trust was \$60,917. The trustee paid the trust's share of the taxes pursuant to MCL 700.133a, MSA 27.5133(1). The grandchildren objected to this payment. They argued that the express language of Hazel Coe's will that her estate should pay all death taxes was controlling. They filed a motion for summary disposition, which the probate court granted. Finney appealed.

The court of appeals affirmed the trial court. The issue decided was whether the tax clause in the will was more than a "general direction" to pay taxes and thus overrode the statutory language of MCL 720.12, MSA 27.3178(167.102) and MCL 700.133a, MSA 27.5133(1), to apportion taxes. Put another way, was the estate of Hazel Coe liable for all taxes, including those generated by the marital trust. In examining this issue, the court of appeals carefully examined the following portions of the will and two statutes.

The pertinent portion of Hazel Coe's will reads, "I further direct my Personal Representative to pay all death taxes imposed by reason of my death. I direct my Personal Representative not to seek reimbursement of taxes from, and not to apportion any taxes among any persons receiving property by reason of my death."

According to MCL 720.12, MSA 27.3178(167.102),

Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose. In the event the decedent's will directs a method of apportionment of tax different from the method described in this act, the method described in the will shall control.

In addition, MCL 700.133a(2), MSA 27.5133(1)(2) provides:

A general direction in a will to pay all taxes imposed on account of a testator's death shall not be construed to include taxes imposed because of the testator's exercise, nonexercise, or release of a power of appointment unless the testator expressly manifests an intention that taxes so imposed be paid out of his or her estate.

The court of appeals found the statutory language to be clear and unambiguous and in need of no judicial interpretation. Applying that language to the will, they found that Hazel Coe clearly desired to avoid apportionment. This was based primarily on the second sentence of the quoted language. They pointed out that Hazel Coe had directed her personal representative not to seek reimbursement of taxes from or apportion taxes among any person receiving property as a result of her death. She had specifically referred to the apportionment of taxes, and she had specifically directed the personal representative not to apportion among those receiving any property as a result of her death. Therefore, they concluded that the taxes were to be paid from the estate without any apportionment.

This is a dangerous case for those drafting wills. One might conclude that under MCL 700.133a(2), MSA 27.5133(1)(2), to "expressly manifest an intention" that taxes not be imposed due to a power of appointment, the language of the will should at least specifically mention the power of appointment. The court of appeals has adopted a lesser standard. Furthermore, the standard does not allow for the introduction of evidence to show what the testator may have intended by his or her words.

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

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LEGISLATIVE REPORT

By Harold Schuitmaker

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

The following bills have been introduced and are currently in committee:

SB 64

Increases income tax deductions on interest, dividends, and capital gains (Senators Bullard, Dunaskiss, Goschka, Hammerstrom, Jaye, McCotter, North, Rogers, Shugars and Sikkema)

The bill allows limited income tax deductions for political contributions, advanced tuition payment contracts, dividends to senior citizens, child care, and long-term care premiums; increases the personal exemption; and amends certain items included and not included in gross income. It has been referred to the Committee on Finance.

SB 378

Prohibits and provides penalties for embezzlement by certain court-appointed fiduciaries (Senator Gougeon)

The bill amends MCL 750.1–.568, MSA 28.191–.836, in particular adding section 174a, which prohibits and provides for penalties for embezzlement by court-appointed guardians, conservators, personal representatives, trustees, and other fiduciaries. It has been referred to the Committee on Judiciary.

SB 393

Conforms to latest version of uniform act (Senator Dingell)

The bill creates a new act, repeals MCL 555.51–.68, MSA 26.79(1)–(18), and adopts the latest version of the Uniform Principal and Income Act. It has been referred to the Committee on Economic Development.

SB 405

Single business tax credit for qualified retirement plans (Senator Peters)

The bill amends the single business tax to allow the taxpayer to claim a credit against the tax in an amount equal to 50 percent of the costs of a qualified retirement plan or \$1,500, whichever is less. It has been referred to the Committee on Finance.

HB 4226

Suspension of charitable trusts; excludes hospitals from exemptions (Representatives Baird, Martinez, and Scott)

The bill amends MCL 14.253, MSA 26.1200(3), on the supervision of trustees for charitable purposes to exclude any trust from registration and periodic reporting requirements if the charitable remainder beneficiaries are remote (i.e., 5 percent or less of the value of the property subject to the trust). Referred to the Committee on Tax Policy.

HB 4282

Amends the Adoption Code to establish the Child Custody Act provisions as controlling (Representatives Daniels, Garza, Hardman, Reeves, and Rison)

The bill amends MCL 710.60, MSA 27.3178(555.60). The word "person" is changed to "individual." An adopted child is no longer an heir at law after adoption unless an interest vests before a final order of adoption is made. The amendment would allow grandparenting time in step-parent adoption. It is tie-barred to HB 4283. It has been referred to the Committee on Family and Civil Law.

HB 4283

Expands and clarifies the right to bring an action for grandparenting time (Representatives Daniels, Garza, Hardman, Reeves, and Rison)

The bill would amend MCL 722.22, MSA 25.312(2) and MCL 722.27b, MSA 25.312(7b) to be more specific regarding when grandparenting time may be ordered. Adoption would terminate grandparenting time except in step-parent adoption. The bill is tie-barred to HB 4282. It has been referred to the Committee on Family and Civil Law.

HB 4384

Adds patient advocates to individuals authorized to make an anatomical gift for another (Representatives Baird, Bogardus, Brater, Dennis, Jacobs, LaForge, Martinez, Minore, and Schauer)

The bill would amend the Estates and Protected Individuals Code to adopt the Michigan prudent investor rule. It would allow for a designation of authority to make anatomical gifts. The bill is tie-barred to HB 4383. It has been referred to the Committee on Health Policy.

Harold Schuitmaker practices with the law firm, Schuitmaker, Cooper & Schuitmaker, PC, in Paw Paw. His areas of practice include estate planning, probate and trust administration, municipal law, corporations, and real estate. He is licensed to practice law in both Michigan and Florida. He is a member of the State Bar of Michigan, the Kalamazoo and Van Buren County Bar Associations, the Southwest Michigan Estate Planning Council, and the National Academy of Elder Law Attorneys. Mr. Schuitmaker is a member of the State Bar's Probate and Estate Planning Section Council and is chairperson of its Legislative Committee. He also serves on the Region F Character and Fitness Committee of the State Bar of Michigan.

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