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Probate and Estate Planning Section

Michigan Probate and Estate Planning Journal

Volume 15, Summer 1996, No. 4
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Probate and Estate Planning Section

From the Chairperson's Desk

By Raymond H. Dresser, Jr.

Published in the [Summer 1996](#) issue of [Michigan Probate and Estate Planning Journal](#)

During the course of the year as chairperson of the Council of the Probate and Trust Law Section, there are some things that tend to repeat themselves. To me, this is an indication that we sometimes need to communicate better with our more than 5,000 members. A chairperson receives a number of telephone calls throughout the year, but at no time are they burdensome. It has been my pleasure to talk with a number of practitioners who all have legitimate questions and inquiries. Sometimes it even leads to a referral that can work both ways.

It is always a debate whether to attend to a matter yourself or within your office or to refer it to a committee. Sometimes time is of the essence and one has to react. Generally, all matters are referred to dedicated committee chairpersons who react with promptness and perception.

A frequent request is for the mailing list of the members of the Section. The State Bar office refers those requests to the chairperson of the Section. Those requests are easy to answer. The Council's policy is that the mailing list is not available to any outside parties other than for the direct purposes of the Section. Sometimes this is perceived as being uncooperative, but it is always difficult to sort out what might be an appropriate purpose or an abuse of an appropriate purpose, and that is the reason for the Section's policy.

A recent use of the mailing list was the new survey of probate practitioners and judges regarding fees. This survey has been a major project of the Section. The information should be useful. The survey has been made user friendly, and I implore all of you who have been selected at random to receive the survey to give it your immediate attention and return it.

Another major project of the Section for 1996 was the introduction of the Estate Settlement Act (ESA). The bill has now been assigned a number, and legislative hearings have been conducted, with the principal participants on behalf of the Section being Robin Ferriby and Cathy Jacobs. We continue to have high hopes that this legislation will be passed yet this year.

A proposal has been made to the Representative Assembly to adopt a resolution

requesting the Michigan Supreme Court to convene a statewide task force. The task force would study the current operations of the state's guardianship and conservatorship systems and make necessary recommendations for improvements to serve the state citizens who need guardianship or conservatorship services. The report in connection with the proposed resolution indicates that Michigan leads the nation in guardianship appointments, with over 50 percent of the orders being issued in Wayne County.

I have referred to committee the January 1996 Preliminary Report of Receiver, John M. Chase, Jr., to the Wayne County Probate Court. This report indicates the need to convene a statewide task force on guardianship and conservatorship. This action is being proposed by the Senior Justice Council, and as chairperson of the Probate and Trust Law Section Council, I have supported the proposed task force.

It has been my privilege to act as chairperson of the Section Council during 1995–1996. It has been an informative and rewarding experience. The people you deal with make you proud to be a member of the legal profession. I encourage lawyers to participate in the affairs of the Section and attend the Council meetings to share their views and to hear those of others.

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Probate and Estate Planning Section

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

The Internet for Probate and Estate Planning Lawyers: A Primer

by Karl Brevitz

Unless you live an enviable life of seclusion and solitude, chances are that by now you've heard a lot about the Internet and the World Wide Web. Discussion of the Internet seems to be inescapable. If you're a computer user, you may by now have ventured onto the Internet to see what all the talk, not to say hype, was about. In this article, I describe what the Internet is, review its primary utilities for lawyers, list some valuable Internet resources for probate and estate planning practitioners, and briefly discuss how one gets connected. (Readers already familiar with and using the Internet in their practices might wish to go first to the final sections of this article, which list some specific probate and estate planning resources on the Internet.) While there is an abundance of both legal and nonlegal information on the Internet, it is not yet a substitute for other online legal research services. However, it can be a valuable and very inexpensive supplement to those services and a tremendous means for quick and very inexpensive communication with clients and other lawyers.

Just What Is the Internet?

Put simply, it is a vast, decentralized, and global network of computers (and of computer networks), all linked together and communicating with each other electronically. As of January 1996, it was estimated that more than 30 million computers were connected to the Internet. Anyone with a computer, a modem, and the necessary software can link to the Internet and communicate via e-mail, upload and download files, and access the plethora of information and images to be found there. There is no central clearinghouse or control unit for the Internet, for one very good reason: it was developed by the U.S. government to survive and function after a catastrophe such as a nuclear attack. For many years it was the exclusive domain of government agencies, educational institutions, and large corporations, which used it for communication on research and defense projects. In recent years the Internet was opened up for public and commercial use, and with the development of the World Wide Web and its capability for attractive graphics and hypertext links, the past two years have seen an explosion in Internet connections and usage.

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

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Probate and Estate Planning Section

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

Ethics: Why You Need a Record Retention Plan

By **Steven A. Mitchell**

A probate and estate planning practice involves long-term attorney-client relationships that include the receipt and retention by the attorney of valuable client property, original client records, and the attorney's representation file. The representation can terminate formally (for example, with a termination letter, substitution of counsel, etc.) or informally (for example, because of the relocation of the client to another jurisdiction without notification to the attorney). Under any circumstance, issues are raised concerning the maintenance, retention, and disposition of client property and the client representation file.

Ethically, it is not enough to appropriately store and subsequently dispose of client property and records and the representation file. A record retention plan is also required in firms where lawyers have supervisory authority over other lawyers and in the offices of solo practitioners where nonlawyer staff participate in record retention (or destruction) functions. See MRPC 5.1, 5.3; State Bar of Michigan Ethics Opinion R-5 (Dec 15, 1989). The requirement for all attorneys to establish a record retention plan is comprehensive.

Formal Opinion R-5^[1] sets forth the basic minimum requirements as follows:

- (1) instructions to lawyer and nonlawyer personnel concerning their obligations under the policy;
- (2) information concerning the location of storage facilities;
- (3) methods for the eventual disposition of records and files;
- (4) information concerning retention periods and the establishment of retention periods; and
- (5) a system for monitoring lawyer and nonlawyer employee compliance with the plan.

Ethics considerations generally affected by the record retention plan include the duty of confidentiality, MRPC 1.6, and the duty to safely keep client property, MRPC 1.15. Consequently, the record retention plan must incorporate the requirements of these two concepts. Confidentiality issues are beyond the scope of this article; the focus is instead on record retention issues as they affect client property and the representation file.

A record retention program presents several practical problems, most of which hinge on both ethical considerations and issues of effective law office management. For example, what constitutes client property, and how must it be

maintained? How long must client property be maintained before it can be disposed of? What notice, if any, must be given to the client before records can safely be destroyed? What if the client is unavailable or fails to respond to the notice? What records can be stored electronically? The record retention plan should deal with each of these questions in a way that fulfills the requirements of the Michigan Rules of Professional Conduct as well as promotes efficiency and effective law office management practices.

What Is Client Property?

Generally, what constitutes client property is a question of law. See State Bar of Michigan Ethics Opinion RI-178 (Nov 4, 1993) (citing State Bar of Michigan Ethics Opinion R-12 (Sept 27, 1991)). Clearly, money, securities, and items of tangible personal property are items that the client would reasonably expect to have returned. But other documents that find their way into a representation file may have value and probably belong to the client, and the client might expect their return.

Thus, original documents dealing with the client's personal affairs, especially those documents not filed or recorded in public records, most likely constitute client property subject to the provisions of MRPC 1.15. See State Bar of Michigan Ethics Opinion R-12. Examples of documents that constitute client property might include original wills, codicils, birth certificates, adoption papers, deeds, and even a real estate title abstract. See State Bar of Michigan Ethics Opinion R-5. If documents that constitute personal property are kept in a client representation file, they are subject to the provisions of MRPC 1.15, which requires that a record of such property be maintained for at least five years after the termination of the representation.

Of course, client funds must be deposited in an interest-bearing trust account. The failure to keep client funds separate from the lawyer's own funds constitutes commingling and is a violation of MRPC 1.15(a). See State Bar of Michigan Ethics Opinion R-7 (Apr 27, 1990).

How Long Must Records Be Maintained?

One must determine what belongs to the lawyer and what belongs to the client to determine how long the lawyer must retain client property. As indicated above, an attorney must keep records of property that the attorney is holding for a client for five years under MRPC 1.15. A client representation file that contains no client property may be destroyed pursuant to the attorney's record retention plan. However, a prudent record retention plan must include

an examination of each file which is a candidate for destruction at the end of the chosen retention period, to ascertain whether "client property" is present. If client property is present, then the material should either be permanently retained, delivered to the client, or notice given to the client with an opportunity to object.

See State Bar of Michigan Ethics Opinion RI-240 (June 26, 1995).

Keeping client property separate from the representation file can help in keeping the record retention requirements of the two categories of property straight. However, the client's property interest in the representation file itself poses some additional questions. Generally, a client is entitled to the original representation file on request. See State Bar of Michigan Ethics Opinions CI-722 (Jan 18, 1982), CI-1200 (July 31, 1988).^[2]

Note that the client is entitled to the original file. If a lawyer needs to retain copies

of the representation file, the lawyer should bear the expense for copying, unless other arrangements are made by prior written agreement. See State Bar of Michigan Ethics Opinion CI-845 (Nov 1, 1982). Thus, even the representation file belongs to the client, and the best record retention practice provides for including the client in the decision to destroy the file.

Notice to the Client

In fact, an attorney is required to give a client notice of the disposition of a representation file closed on or after October 1, 1988. Files closed before October 1, 1988, may not be destroyed without "reasonable notice" to the client. See State Bar of Michigan Ethics Opinion R-12. These notice requirements clearly add to the cost of law office management, but those costs can be minimized if an efficient record retention plan includes notice provisions with appropriate implementation. For example, the notice that is required to be given to a client for files closed after October 1, 1988, gives the attorney several options. First, an agreement could be reached at the inception of the attorney-client relationship regarding file disposition, consistent with the attorney's record retention plan. Second, an agreement could be reached at the conclusion of the particular transaction, or when the file is closed. Finally, the attorney and the client can agree about the disposition of the file after the retention period expires. Such an agreement would include an offer to the former client to retrieve the file. See *id.*

Of these three options, the first seems to be the most efficient. If such an agreement included provisions for destroying the file at the expiration of the attorney's record retention plan period, no subsequent notification to the client would be necessary. In addition, if the agreement includes a provision for turning the original file over to the client, a provision that explicitly limits the lawyer's notification requirements could be included in case the client is difficult to locate. When notification is required, the attorney must use reasonable efforts to locate the client, and the burden is on the attorney to show that "reasonable efforts were made." See State Bar of Michigan Ethics Opinion R-12.

State Bar of Michigan Ethics Opinion R-12 also states, "Microfilming presents special considerations." In today's age of rapidly advancing technology, those special considerations extend to document scanning and hard-disk storage. The attorney must consider the interests of the client in determining what documents may be reproduced and retained by using technological media. The opinion states, "when there is doubt, the lawyer should retain the document" in the original.

Conclusion

In Michigan, a record retention plan is necessary to comply with ethical requirements. A record retention plan must also preserve the property of clients and serve their needs as well as promote efficiency and cost containment in law office management.

The State Bar of Michigan periodically publishes and updates a record retention kit with a compilation of ethics opinions, including the ones cited in this article. It is a most valuable resource in establishing a record retention plan and in keeping current on evolving policies and requirements. The kit is available from the State Bar of Michigan, Membership Services, and every law office should have a copy.

Notes

1. Ethics opinions do not have the force and effect of law and may not be relied

on as an absolute defense to a charge of ethical misconduct. To the extent that the opinions are well reasoned, use relevant citations, and address real dilemmas faced by lawyers practicing in all fields, they are held in high regard. Formal ethics opinions reflect the policy of the State Bar of Michigan. Informal ethics opinions generally deal with situations of limited interest or individual application. See *generally* State Bar of Michigan Ethics Opinions.

2. The designation "CI" indicates an informal ethics opinion that interprets the Michigan Code of Professional Responsibility, the attorney discipline code that predates the Michigan Rules of Professional Conduct.

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

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Probate and Estate Planning Section

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

News and Comments

By Fredric A. Sytsma

A New, Flexible Charitable Giving Technique

Estate planners routinely encounter clients who would like to make a gift to charity (or at least secure a charitable deduction for income taxes) but who cannot afford (or are not ready) to part with the income from the assets that would be given.

We all recognize that a charitable remainder trust is an excellent solution to this dilemma, but unfortunately not all of our clients are as eager to have us draft trusts for them as we are to do the drafting. Clients sometimes want a less complicated planning alternative.

In an effort to entice charitable gifts, many charities offer pooled income funds. These are like charitable mutual funds, in which the contributor gets his or her pro rata share of the fund's income each year, but when the contributor dies, his or her share of the fund becomes the property of the charity.

But what of the client whose favorite charity doesn't have a pooled income fund, or the client who doesn't yet have a favorite charity, or the client who has several of them but lacks the wherewithal to contribute to multiple pooled income funds? This is where the well-known fund manager Fidelity Investments has something to offer: their Charitable Pooled Income Fund.

The Charitable Pooled Income Fund will pay the donor the income on contributions to the fund, provide a partial income tax charitable deduction for the gift, and pass the remaining assets to the donor's designated charity at death. The donor's gift is invested in one of two pooled funds, either equity-income or income only. Both comprise Fidelity mutual funds.

Fidelity also has a Charitable Gift Fund that is much like a private foundation and acts as a conduit for distributions to other charities. This fund allows a donor to make a charitable gift today (presumably with appreciated securities) or in a year (when the donor needs a deduction) and then to direct the distribution of the funds to specified charities in later years. The advantage to the donor is that he or she doesn't have to incur the cost of a private foundation. Much the same advantage is often available in the form of an *advised fund* with a local community

foundation, but some clients might prefer the relative anonymity of using Fidelity's fund.

Given Fidelity's excellent track record as a money manager and the ability a donor has to select charitable beneficiaries, these are planning options that many of our clients will find appealing.

"Check the Box" Regulations

This phrase refers to proposed regulations under IRC § 7701 that would substitute a simple election for complicated tests for classifying a business as a corporation or a partnership (including limited liability companies) for federal tax purposes.

As under the present rules, co-ownership of income-producing property or expense-sharing arrangements wouldn't necessarily give rise to a tax entity. Moreover, the rules regarding trusts wouldn't be changed.

Nontrust entities, known as *business entities*, would be categorized under a very simple two-part analysis:

1. Is the business already incorporated? If so, it is a corporation. If not, it is an *eligible entity*.
2. Does it have at least two members? Eligible entities with more than one member may be classified as either a corporation or a partnership, and those that do not make an election are deemed to be partnerships under the default rule.

One-member entities may elect to be classified as corporations but under the default rule would be disregarded as separate entities if no election is made. Disregarded entities would, for example, include sole proprietorships.

The proposed regulations might well have been adopted by the time you read this, but whether they are or not, you should become familiar with this development if you advise clients on entity selection.

New Annuity Products

Many investors who are concerned about lifelong security, particularly individuals who are retired, are attracted to fixed annuities because of the assurance that the payments will never run out. The investor receives a predetermined amount on a monthly, quarterly, semiannual, or annual basis for life. Part of the payment is taxed as ordinary income, and part of it is a tax-free return of principal.

It is readily apparent to anyone who has analyzed annuities that they aren't without risk. If the investor purchases an annuity when interest rates are low, he or she will be locked into that return despite a later rise in available rates. Even if interest rates go up, it is tough to change investments (or to meet unexpected needs) because the annuitant doesn't have access to principal without paying a significant monetary penalty. If the annuitant dies prematurely, his or her heirs and devisees will be shortchanged. Perhaps most worrisome to the investor is the fact that inflation will erode the value of the annuity. Even a modest 2 percent inflation rate will reduce the purchasing power of a monthly payment by about 25 percent over 15 years, and a 5 percent inflation rate cuts the value by more than half.

The *Financial and Estate Planning* service published by CCH reports that insurance companies have begun responding to these concerns by offering new

annuity products. For example, it is possible to purchase an annuity that is indexed for inflation, although the trade-off is a lower initial payment than an investor would receive with a traditional fixed annuity. A similar variation that responds to concerns about low interest rates at the time of purchase is an annuity with payments based on returns on specified mutual funds. Of course the risk is that the returns on the mutual funds can go down as well as going up.

Another new product is an annuity with a term-certain feature, which guarantees payments for a fixed period, even if the annuitant dies, thus guarding against payments ending prematurely because of death. Just as with the inflation-indexed annuity, the cost is lower initial payments.

Finally, some companies are responding to concerns about illiquidity by offering limited penalty-free access to principal.

Impact of the Canada–United States Income Tax Convention on Death Taxes

The Third Protocol to the 1980 Canada–United States Income Tax Convention went into effect on November 9, 1995 (but its benefits are retroactive to November 10, 1988). Although the protocol deals with tax topics other than death taxes, it makes some important changes in death-tax planning for Americans and Canadians with cross-border ties. Since we live in a state in close physical proximity to Canada, we are likelier than many practitioners to encounter questions involving these rules.

The July/August 1996 issue of *Probate and Property*, the publication of the Real Property, Probate and Trust Law Section of the ABA, contains an excellent, in-depth review of the protocol, beginning at page 44. For those of you who would appreciate a *Reader's Digest* version of the article, I have attempted to summarize the parts that I thought were the most interesting and important. However, I'd advise you to refer to the full article (or even—gasp!—to the protocol itself) if clients have specific questions.

It is critical to keep in mind that claims for refunds of taxes that were overpaid as a result of the retroactivity feature of the protocol must be filed by the later of November 8, 1996, or the date on which the applicable period for filing such a claim expires under domestic law.

If you want to understand the changes, it helps to understand the basic law. I hope that you're familiar with our estate tax, and most of you probably know that Canada's death tax is basically an income tax on 75 percent of accrued but previously untaxed capital gain and 100 percent of recaptured depreciation. Canada joins the United States in permitting deferral of the death tax when assets pass to (or to a trust for the exclusive benefit of) the surviving spouse.

The changes effected by the protocol will have a different impact on different categories of Americans and Canadians:

1. Those that are citizens of or domiciled in the United States will receive a U.S. estate tax credit for Canadian taxes imposed at death on Canadian situs property, rather than simply being entitled to an estate tax deduction for the Canadian taxes in calculating the value of the taxable estate. This will be particularly important for the estates of American citizens who reside in Canada, which were previously subject to both taxes on the full value of the decedent's assets. Such estates are further aided by a first-time foreign tax credit against Canadian income taxes due as a result of death for U.S. estate taxes imposed on property situated in the United States.

2. Canadian residents who are not U.S. citizens will, for the first time, receive a credit against their Canadian tax liability for estate taxes imposed on U.S. situs property. Before the protocol, Canada made no allowance for foreign death taxes.
3. Smaller Canadian estates (i.e., estates of Canadian resident citizens who own property in the United States) will be entirely exempt from U.S. estate tax. This clearly protects estates with a gross value (wherever situated) not in excess of US\$600,000, but it might also protect slightly larger estates as well, as the result of applying a rather complicated mathematical formula.
4. Canadian estates with a gross value not exceeding US\$1.2 million will be subject to estate tax only on U.S. *real* property interests.

American citizens who reside in the United States are responsible for Canadian taxes on all "taxable Canadian property." An anticipated amendment to the Canadian Income Tax Act will make it clear that this definition extends to ownership interests in non-Canadian entities (e.g., U.S. corporations) that derive at least half of their value from Canadian real estate holdings. Although the Convention clearly permits Canada to impose this tax, it does not require the United States to give a credit for the Canadian tax in this situation. The credit must be given only for property situated in Canada, which doesn't include shares in U.S. corporations. Therefore, in this limited situation, the decedent's estate will doubtless be limited to a deduction (but not a credit) for the Canadian taxes. For some very technical reasons cited in the article, U.S. partnership and trust interests (as opposed to stock in a U.S. corporation) that are taxed by Canada may qualify for an estate tax credit.

A Thought-Provoking Reminder from Your Insurance Agent

Included in a recent mailing from the office of a local Northwestern Mutual agent was a single sheet that began with the following question: "If you had a bank that credited your account each morning with \$86,000 . . . That carried over no balance from day to day . . . Allowed you to keep no cash in your account . . . And every evening canceled whatever part of the amount you had failed to use during the day . . . What would you do?" I didn't have to read ahead to know the answer; you'd draw out the money and use it!

The surprise, at least to me, was that the \$86,000 is an analogy to the number of seconds in a day (actually 86,400 if you want to be precise). This certainly caused me to pause and conclude regretfully that there are many occasions when I allow the bank to take back far too much at the end of the day.

Fredric A. Sytsma is a partner with Varnum, Riddering, Schmidt & Howlett, LLP, in Grand Rapids. He is a fellow of the American College of Trusts and Estates Counsel, and past chairperson of the Probate and Estate Planning Section of the State Bar of Michigan. Mr. Sytsma frequently writes and speaks on estate planning topics, and occasionally speaks on other topics as well.

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Probate and Estate Planning Section

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

Readers' Questions on Estate Planning and Estate Settlement

By Kenneth E. Konop Question

Can the beneficiaries of a trust agree to continue a trust under MCL 700.822(c) under the following facts? The deceased was the settlor and, until his death, the trustee of an inter vivos trust. The trust was funded with two homes and three retail stores. One of the homes is leased, and the other home will be sold. The beneficiaries of the trust are the six adult children—three living in Missouri, one in Florida, and two in Michigan. An elderly sister is the present successor trustee. None of the Michigan residents is suitable to become the trustee. The real estate is all located in Oakland County, Michigan. The trust provides that on the death of the settlor, the trust shall terminate and the assets be distributed equally among the beneficiaries. The trust provides that if the trustee is the owner of any business, the trustee may continue the business as long as it is in the best interests of the beneficiaries.

Answer

The answer is that Section 822(c) of the Revised Probate Code does not apply. That section authorizes the trustee of a trust to "[c]ontinue or participate in the operation of a business or other enterprise, and effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise. . . ."

The purpose of Section 822(c) is to grant to a trustee the authority to continue or participate in a business in which the trust is engaged. The trustee may, under the authority granted by Section 822(c), incorporate or dissolve the business in which the trust is engaged. Thus, for example, the trustee could incorporate a proprietorship that the trustee was operating. Section 822(c) does not authorize the trustee to continue or dissolve the trust. Section 822(c) refers only to the trust's assets.

If the trustee and the trust's beneficiaries wish to continue the trust, it would seem unnecessary to obtain probate court approval because the trust by its terms terminates.

Since the trust by its terms terminates, the beneficiaries could establish a new trust with whatever provisions were acceptable to them. They would be the settlors of the trust and would reconvey the property to a new trust. They could

choose the trustee and the trust's provisions. The question does not say what provisions are in the trust that the beneficiaries wish to preserve. If they want the same provisions, they could still reconvey the property to a new trust. Since they would all have to agree to continue the trust, there would seem to be little to gain by seeking court approval. Perhaps that is not the best approach.

My suggestion would be to allow the trust to terminate, to distribute the assets to the beneficiaries, and then to transfer the assets to another entity. Two options are to use either a partnership, including a family limited partnership (FLP), or a limited liability company (LLC). Charles A. Janssen, a speaker at the 36th Annual Probate and Estate Planning Seminar (1996) spoke on and prepared an outline entitled *Alphabet Soup (or Acronymaphobia): FLPs, LLCs, and the Choice of Entity Issues Facing Today's Estate Planner*, where he discussed the use of FLPs and LLCs. The materials are available for purchase from the Institute of Continuing Legal Education (313-764-0533). The use of one of these two entities would seem to better fit your client's circumstances. These entities could provide greater flexibility in tailoring provisions to suit their circumstances and could be used in conjunction with a trust as a member or limited partner.

Kenneth E. Konop, of Miller, Canfield, Paddock and Stone, PLC, in Bloomfield Hills, practices in the areas of probate and estate planning and probate litigation. He has served as chairperson of the SCOCPAR Committee of the Probate and Estate Planning Council and also as chairperson of its Publications Committee. He is a fellow of the American College of Trusts and Estate Counsel and a member of the Financial and Estate Planning Council of Detroit, the Illinois State Bar, and the District of Columbia Bar. He has been a columnist for the *Michigan Probate and Estate Planning Journal* since 1993 and has published several articles in the *Journal* and in *Laches*. Mr. Konop is also a former adjunct professor at Walsh College and has been a speaker for its College of Accounting and Business Administration and for ICLE.

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

By Hon. Phillip E. Harter

Minors—Educational Residency—Power of Attorney

Feaster v Portage Public Schools, 451 Mich 351, 547 NW2d 328 (1996)

The mother of Deonte Carpenter, the minor who was the subject of these proceedings, was a resident of South Carolina. The mother executed a power of attorney so that Deonte could live with Phillip Feaster, the mother's brother, in Portage, Michigan. Feaster enrolled Deonte in the Portage Public Schools pursuant to MCL 380.1148; MSA 15.41148, which provides:

Except as provided in [MCL 380.1711; MSA 15.41711], a child placed under the order or direction of a court or child placing agency in a licensed home, or a child whose parents or legal guardians are unable to provide a home for the child and who is placed in a licensed home or in a home of relatives in the school district for the purpose of securing a suitable home for the child and not for an educational purpose, shall be considered a resident for education purposes of the school district where the home in which the child is living is located. The child shall be admitted to the school in the district.

The school district refused to continue the enrollment of Deonte, contending he was not a resident of the district according to its policy. The Portage school district's residency requirement mandated that a guardianship be established to continue eligibility for enrollment. Feaster filed a complaint for declaratory and injunctive relief. The circuit court granted the school district's motion for summary disposition, and the court of appeals affirmed the decision of the trial court.

In a unanimous per curiam decision, the Michigan Supreme Court held that the school district's policy violates the provisions of MCL 380.1148; MSA 15.41148 and that if a child meets state-mandated requirements for residency, the child is to be admitted to school in a district. They stated that it is well established that residency for educational purposes is not the equivalent of legal domicile. Our

school laws are to be liberally construed consistent with Michigan's public policy of encouraging free public education. The School Code does not require the appointment of a legal guardian as a condition of educational residency. Rather, it defines educational residency as court-ordered placement or placement by a parent or guardian in a licensed home or the home of a relative. The effect of the school district's policy was to impose restrictions not mandated by the School Code in the absence of any authority to do so.

Distribution of the Portion of an Estate Otherwise Due to a Disappeared Heir or Devisee

1. MCL 700.493; MSA 27.5493
2. Effective October 23, 1995
3. Summary
 - a. The act provides that the estate may be distributed to the disappeared heir or devisee after a lapse of 18 months after the death of the decedent. The former period was three years.
 - b. The act provides that the heir or devisee is considered to have disappeared if he or she is absent from the last known place of abode for at least five continuous years. The former period was seven years.
 - c. If no claim is made, the portion of the estate that would be distributed to the disappeared heir or devisee, if alive, less expenses, shall be distributed by an order of the court to each person who would be entitled to the portion if the disappeared heir or devisee predeceased the decedent.

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 Judge 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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Probate and Estate Planning Section

The following article was published in the [Summer 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 amends MCL 330.1626 to require an informal review of a guardianship within five years after the guardian's appointment and at intervals of not more than five years after the initial review if the term of the guardianship exceeds five years.

It passed the House on March 19, 1996, and has been assigned to the Senate Committee on Families, Mental Health, and Human Services.

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

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

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

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

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

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

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

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

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

**HB 4027—RELIEF FROM MANDATORY REVIEW OF GUARDIANSHIPS
(Representative Profit)**

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

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

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

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

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

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

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

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

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

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

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

It has been assigned to the House Human Services Committee.

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

HB 4601 allows an individual 18 years of age or older who is of sound mind to execute a declaration to authorize types of medical intervention or the withholding or withdrawal of medical intervention if the declarant is terminally ill or

permanently unconscious and unable to participate in medical treatment decisions. The bill is virtually identical to SB 78.

It has been assigned to the House Health Policy Committee.

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

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

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

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

HB 5158 reforms the court system in Michigan. It includes provisions for (1) the funding of state courts based on the caseload of the courts; (2) the full funding of judicial salaries, equalized throughout the state; and (3) the elimination of Detroit Recorders Court. It does not create a family court division of the circuit court, nor does it eliminate the probate court (the elimination of the probate court would require a constitutional amendment).

The bill was passed, signed by the governor on July 17, 1996, and became 1996 PA 375, with immediate effect.

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

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

It has been referred to the House Human Services Committee.

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

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

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

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

HB 5475 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.

The bill has been referred to the House Commerce Committee. It is identical to HB 4113.

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

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

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

HB 5769–5773—REQUIREMENT THAT WILLS, ESTATES, AND DOWER BE GENDER NEUTRAL (Representatives Jersevic, Baird, and Munsell)

HB 5769 through HB 5773 amend various parts of the Michigan Compiled Laws referring to dower to make them gender neutral.

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

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

SB 78 allows an individual 18 years of age or older who is of sound mind to execute a declaration to authorize types of medical intervention or the withholding or withdrawal of medical intervention if the declarant is terminally ill or permanently unconscious and unable to participate in medical treatment decisions. The bill is virtually identical to HB 4601.

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

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

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

The bill was passed, signed by the governor on May 14, 1996, and became 1996 PA 193.

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

SB 487 repeals the Michigan Uniform Gifts to Minors Act, MCL 554.451–461, and adopts the Uniform Transfers to Minors Act. It is an improvement over the current Uniform Gifts to Minors Act because it (1) permits any type of property to be transferred to a custodial account for a minor; (2) permits estates, trusts, custodianships, and guardianships to transfer property to the custodian; and (3) allows the custodian to retain the custodial property until the beneficiary attains age 21 (rather than the current limit of age 18).

The bill was 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 amends MCL 700.497 concerning powers of attorney. The change provides that an action by an agent who does not know of the death of the principal or who does not actually know of the disability or incompetence of the principal is binding. The bill also makes technical corrections to MCL 700.703, 700.704, 700.710, 700.712, and 700.717, all of which deal with the processing of claims in a probate administration.

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

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

SB 496 amends the Michigan Disclaimer of Property Interests Act to conform with the federal act. Among other things, the bill allows a recipient to bifurcate his or her interest and disclaim either the current interest or the future interest. Under former Michigan law, one must disclaim the entire interest. The amendment allows clients to use the disclaimer as an effective postmortem planning tool.

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

SB 750—TECHNICAL CORRECTIONS RE: ACKNOWLEDGMENT OF PATERNITY ACT (Senator Geake)

SB 750 amends MCL 700.111 to clarify and conform the intestate succession provisions with the Acknowledgment of Paternity Act.

The bill was passed, signed by the governor on June 20, 1996, and became 1996 PA 306, with immediate effect.

SB 1010—TECHNICAL CORRECTIONS TO DISCLAIMER OF PROPERTY INTERESTS ACT (Senator Rogers)

SB 1010 makes minor technical corrections to the Disclaimer of Property Interests Act. It replaces the words "fiduciary relationship" with the word "trust" in the section defining the word *trust*.


The bill was passed by the Senate and assigned to the House Judiciary and Civil Rights Committee.

SB 1059—ESTATE SETTLEMENT ACT (Senator Van Regenmorter)

SB 1059 repeals the Revised Probate Code and replaces it with a new Estate Settlement Act.

The bill has been assigned to the House Judiciary Committee.

Douglas A. Mielock practices with the law firm of Foster, Swift, Collins & Smith, PC, in Lansing. His areas of practice include estate and tax planning, trust litigation, probate and trust administration, and general business planning. He is licensed to practice law in both Michigan and Illinois. He is currently a member of the American Bar Association, the State Bar of Michigan, the Ingham County Bar Association, and the Greater Lansing Estate Planning Council. Mr. Mielock serves as a member of the governing council of the State Bar of Michigan's Probate and Estate Planning Section, and he is the chairperson of the Legislative Committee of the Section. He also serves on the Probate and Estate Planning Section's Standing Committee on Code, Procedure, and Rules, which has drafted the proposed Estate Settlement Act. Doug is a former legal consultant for the Legal



Hotline for Older Michigianians and a former instructor at Lansing Community College. Doug is a frequent speaker and author of articles relating to various aspects of estate planning.

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