

[Bar Sections](#)[Family Law Section](#)[Labor and Employment Law Section](#)[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

Michigan Probate and Estate Planning Journal

Volume 16, Summer 1997, No. 4
Table of Contents

[From the Chairperson's Desk](#)

Feature Articles

- [Estate Planning for Loan Guarantees](#)
By James E. Mulvoy
- [Revenue Ruling 76-490: A Little-Known Tool to Salvage the Annual Exclusion for Irrevocable Life Insurance Trusts](#)
By Nancy A. Downie

Departments

- [Ethics, Unauthorized Practice, and Image](#)
By Steven A. Mitchell
- [News and Comments](#)
By Fredric A. Sytsma
- [Recent Decisions in Michigan Probate, Trust, and Estate Planning Law](#)
By Hon. Phillip E. Harter
- [Digest of Michigan Probate Opinions](#)
By Hon. John N. Kirkendall

Miscellaneous

- [Section Meetings](#)
- Section Publications
- New Research Tool for Probate Practitioners
- Michigan Probate Opinions Index
- Table of Authorities
- ICLE Products of Interest to Probate Practitioners

@ Your Service:

[About ICLE](#) | [Privacy Statement](#) | [Contact ICLE](#) | [Customer Support](#)

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© [Copyright](#) 1996-2001 The Institute of Continuing Legal Education

[Bar Sections](#)[Family Law Section](#)[Labor and Employment Law Section](#)[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the Summer 1997 issue of [Michigan Probate and Estate Planning Journal](#)

FROM THE CHAIRPERSON'S DESK

By John H. Martin

Your Probate Council has been active in a number of areas that are important to all practitioners. These include the proposed requirement for written fee agreements, the dissemination of probate court opinions, and the familiar fields of seminars and legislation.

Mandated Fee Agreements

As most of you realize, the Michigan Supreme Court has asked for comments on a proposed amendment to Rule 1.5 of the Michigan Rules of Professional Conduct. The amendment would require "the basis or rate of the fee [to be] communicated to the client, in writing, before or within a reasonable time after commencing the representation." This proposed change was discussed at two successive Council meetings.

After deliberation, the Council authorized its chairperson to communicate its objections to the State Bar and to the supreme court. The text of the letter sent to the Michigan Supreme Court reads:

The Council of the Probate and Estate Planning Section is opposed to the proposed change to MRPC 1.5. The Council, on behalf of its more than 5,000 members, is opposed for the following reasons:

1. The absence of a written fee agreement should not be an indicator of unethical conduct. Ethical rules define moral behavior. If written fee agreements are desirable, it seems that they are because of a desire for certainty and for protection of the consumer. This is a question of good business practice, not ethical behavior.
2. There are many matters, e.g., telephone advice, single-in-office conferences, deeds or similar documents requested for preparation in one day, etc., for which it will be difficult or impossible to have an agreement prepared for review and signature at the time the service is rendered. Because there is no contact beyond the single transaction, a follow-up request for a written-fee agreement is peculiar to say the least. Yet, failure to obtain a written agreement would be a matter of discipline. This surely will ensnare attorneys who have acted ethically and with whom clients have no complaint.

3. We suspect grievances will increase if the proposed rule is adopted. The proposed rule would make it very easy for an unhappy client to complain about the lack of a written agreement. If indeed, there is no agreement, discipline seemingly would need to go forward without regard to the merits of any other issue.

If the lack of written agreements is indeed a significant problem, we suggest lawyers be barred from maintaining suit to collect fees unless there is a written fee agreement. This will move an issue of business practices into the realm of business administration and away from the measurement of ethical behavior.

We sincerely believe the proposed change in Rule 1.5 misses the mark. While we hope for eventual rejection of the requirement for a written fee statement as an ethical requirement, practitioners certainly should consider the wisdom of written agreements from the standpoint of sound business policy.

Opinion Bank

For many years, Wayne State University Law Library has maintained an opinion bank of decisions by probate judges. Judges have been encouraged to send opinions, which, in turn, have been indexed, with abstracts published periodically in the *Journal*. Those interested in an opinion have been able to secure a copy from the WSU Law Library. Georgia Clark, the law librarian, has shepherded this project with financial assistance from the Section. The law library now has put the opinions on a searchable CD-ROM, which is available to all Michigan attorneys at a cost of \$30. The opinions are from 1973 though 1996. The CD-ROM is formatted for either DOS or Windows. It can be ordered from Wayne State University Law Library, 468 West Ferry, Detroit, Michigan 48202.

The Council has agreed to pay for a CD-ROM for each probate court in Michigan so that the opinions are available to all judges. We hope this technological advance will encourage the continued submission of opinions, and we look forward to having updated editions of the CD-ROM.

Annual Seminar

The annual seminar at the Grand Traverse Resort and the Michigan State University Education Center were again presented to large numbers of attendees. Snow at Grand Traverse was an unwelcome accompaniment, however. Brian Howe, the vice chairperson, did a superb job of planning and producing this year's production. A fine job done, and with our thanks, Brian.

Estate Settlement Act

The ever-optimistic members of the Legislative Enactment Committee remain at work on the Estate Settlement Act, now Senate Bill 209 in the legislature. It has passed the Senate and now is in the House of Representatives. We like to think that good news of passage is right around the corner and that news of passage may reach you before this printed word. Realizing, however, that near success counts for nothing, we are tempering enthusiasm and still working diligently on the project.

An obvious but sobering concluding thought is that when enactment of the ESA is secured, new and multiple challenges will appear for all of us.

[Bar Sections](#)[Family Law Section](#)[Labor and Employment Law Section](#)[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the Summer 1997 issue of [Michigan Probate and Estate Planning Journal](#)

ESTATE PLANNING FOR LOAN GUARANTEES

By James E. Mulvoy


The client who is acting as a guarantor for loans that may be outstanding at his or her death may need special attention in the estate planning process, because an unexpected call on a decedent's guarantee during estate settlement (or even later) can disrupt the best laid plans. Not only can proper planning minimize potential aggravation and inconvenience during estate settlement, but early attention to this issue might save taxes as well.

The estate planning attorney should assume at the outset that not all clients will be sensitive to the potential impact of guarantees on their estate plans. For any of a number of reasons, a client may not feel that a guarantee is very important. For example, a parent guaranteeing a child's credit—perhaps co-signing for a school or business loans—may not feel that he or she will ever be out of pocket for doing so because everyone expects that the child will satisfy the loan under its terms. A business owner guaranteeing his or her company's credit may similarly presume that the business will take care of the debt without affecting the family's inheritance. A client may have given guarantees for other transactions (perhaps involving sensitive marital issues, such as business dealings with siblings or in-laws) that present their own substantial issues for the planner. Some clients may not be concerned about the issue because they think that a guarantee is nothing more than a mortgage using an alias or that their guarantee agreement was just another of the innumerable forms that made eyes glaze over at the loan closing.

However, in all guarantee situations, the estate planning attorney should be alert. Regardless of its purpose or pedigree, every guarantee is worth reviewing closely. This article discusses how guarantees can have an unexpected effect on estate liquidity needs and how they may affect the extent of the marital deduction available to shelter assets from transfer taxation during the life of a surviving spouse. Suggestions are also offered on how the attorney can plan to minimize potential guarantee problems during estate administration.

Article continued in the [Summer 1997](#) issue of the [Journal](#).

James E. Mulvoy is a shareholder of Denison Maxwell, P.L.C., in Bloomfield Hills,



concentrating on estate planning. He was born in Boston and graduated from Boston College in 1970. He received his J.D. from Notre Dame in 1973 and is a member of the Massachusetts and Michigan Bars and the American Bar Association.

@ Your Service:

[About ICLE](#) | [Privacy Statement](#) | [Contact ICLE](#) | [Customer Support](#)

Institute of Continuing Legal Education

Phone Toll Free: (877) 229-4350 or (734) 764-0533

Fax Toll Free: (877) 229-4351 or (734) 763-2412

Address: 1020 Greene Street, Ann Arbor, MI 48109-1444

E-mail: icle@umich.edu

© [Copyright](#) 1996-2001 The Institute of Continuing Legal Education

[Bar Sections](#)[Family Law Section](#)[Labor and Employment Law Section](#)[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the Summer 1997 issue of [Michigan Probate and Estate Planning Journal](#)

REVENUE RULING 76-490: A LITTLE-KNOWN TOOL TO SALVAGE THE ANNUAL EXCLUSION FOR IRREVOCABLE LIFE INSURANCE TRUSTS

By Nancy A. Downie

Crummey withdrawal rights are often used to qualify contributions to an irrevocable life insurance trust as gifts of a present interest (and therefore for the annual exclusion) for federal gift tax purposes. The withdrawal rights are named after the case that blessed their use: *Crummey v Commissioner*, 397 F2d 82 (9th Cir 1968). However, what if you want the annual exclusion but don't want to create *Crummey* powers (because they might actually be exercised)? What if, after the fact, you discover a document that doesn't have them? In certain limited circumstances, Rev Rul 76-490, 1976-2 CB 300, may provide an answer.

Rev Rul 76-490 deals with the question whether life insurance premiums paid by an employer with respect to a group term policy held by an employee's irrevocable trust qualify as gifts of a present interest. Under the terms of the trust, the beneficiary or the beneficiary's estate was to receive the full proceeds of the policy immediately on the insured's death. There were no withdrawal rights. The ruling concludes that the payment of each premium was not a gift of a future interest in property and therefore qualified for the annual exclusion under IRC § 2503(b).

Article continued in the [Summer 1997](#) issue of the [Journal](#).

Nancy A. Downie is an assistant vice president with the Estate Tax Department of Comerica Bank, Detroit, Michigan. She is a magna cum laude graduate of the University of Michigan Law School and a member of the Order of the Coif. She has written articles and spoken at numerous professional and community seminars on various aspects of probate practice and teaches the course on generation-skipping transfer tax at Midwest Trust Schools. At Comerica, she coordinates all transfer tax work for over 300 decedents' estates. She is a member of the Michigan Bar Association, Probate and Estate Planning and Taxation Sections, and the Detroit Bar Association.

[Bar Sections](#)[Family Law Section](#)[Labor and Employment Law Section](#)[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

The following article was published in the [Summer 1997](#) issue of [Michigan Probate and Estate Planning Journal](#)

ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE

By Steven A. Mitchell

The Unauthorized Practice of Law Affects Us All

For most of us who have the privilege of possessing a license to practice law, we take little notice of the impact of the unauthorized practice of law. After all, if we are fortunate enough to have a license and are members in good standing, the unauthorized practice of law seems of little consequence to us or our professional situation. But is that really true? Does the unauthorized practice of law have little or no consequence to our practices or to our professional status?

To the contrary, the unauthorized practice of law has both a direct and an indirect impact on each practitioner's status as a professional. The direct impact lies in that each lawyer who receives the privilege to practice law is subject to the rules of a regulated profession. The law as a profession, and lawyers as individuals, must be committed to high standards of ethical conduct on their oath.

The public is best served in legal matters by a highly trained and regulated profession committed to such standards. Only lawyers are subject to the special fiduciary duties in the attorney-client relationship and to the regulations of an effectively policed profession. [1]

The primary reason for setting and adhering to such high standards of ethical conduct is to make certain that the public is adequately protected when seeking high-quality professional services concerning the weighty matters of their personal and business affairs.

Moreover, a lay person who seeks legal service often is not in a position to judge whether he or she will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding role of a lawyer unless he or she is subject to high standards. [2]

Indirectly, the unauthorized practice of law affects the ability of legal professionals to earn reasonable compensation for the high-quality legal services that are provided. Indeed, some individual practitioners would say that this effect is sometimes direct. As a profession, we should all be vigilant against efforts to

lower the regulatory barriers for the provision of services that have traditionally required a law license. We must also recognize the ways in which issues concerning the unauthorized practice of law affect our own professional status.

The Michigan Rules of Professional Conduct contain specific regulations for practitioners in connection with the unauthorized practice of law. MRPC 5.5 provides:

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The comment to MRPC 5.5 explains that subparagraph (b) of the rule does not prohibit the employment of paralegals to whom related functions may be delegated as long as it is the lawyer who not only supervises the delegated functions but retains responsibility for the work in accordance with MRPC 5.3:

With respect to a nonlawyer employed by, retained by, or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The foregoing rules can be brought into focus in examining a hypothetical scenario involving a solicitation for the sale of will and trust forms. In Michigan Informal Ethics Opinion RI-191 (Feb 14, 1994), a lawyer in private practice developed an idea for establishing a business in which the lawyer would employ nonlawyer agents to sell will and trust forms door-to-door. The lawyer proposed that the agent would interview the client for any necessary changes in the forms and would record the relevant information and forward it to the lawyer for review and editing. A fee would be charged for the forms as edited, as well as any consultation provided by the agent. The lawyer would have no direct contact with the client.

This scenario is interesting. On the one hand, it presents a clever and potentially lucrative business opportunity. The ability to reach and service numerous clients through agents seems very attractive. On the other hand, the proposed arrangement violates several ethics principles, including the rules on solicitation and advertising, [3] the protection of client confidences, [4] the exercise of independent professional judgment, [5] the duty to supervise the conduct of

nonlawyer employees, [6] and the duty to prevent the unauthorized practice of law, [7] among others.


Within the context of the unauthorized practice of law, delegating the responsibility for the formation of the attorney-client relationship to a nonlawyer is forbidden. In other words, in door-to-door sales of will and trust forms, the nonlawyer agent is not permitted to decide whether the client needs such services. In addition, it is difficult to envision a situation in which a nonlawyer performing such sales can determine whether the client requires such services without receiving information that would be confidential within the attorney-client context and without providing consultation that constitutes legal advice with respect to such issues.

The foregoing analysis is not meant to suggest that legal assistants may not perform services that constitute the practice of law under circumstances in which there is direct supervision by a lawyer; but it is the lawyer who must determine whether the services are necessary, and it is the lawyer who is responsible for making certain that the conduct of the legal assistant is in accordance with the rules of professional conduct. [8] It is also important that the lawyer make full disclosure to the client concerning any tasks delegated to a nonlawyer employee that the client might otherwise expect the lawyer would perform. Such disclosure fulfills the lawyer's responsibility to keep the client adequately informed, as well as defines the scope of the representation. [9]

The unauthorized practice of law can take many forms. As indicated, even licensed lawyers may be responsible and ultimately held accountable for activity that constitutes the unauthorized practice of law. As regulated professionals, lawyers should be mindful of issues the unauthorized practice of law raises because of the obligation to report such conduct. [10] There are resources within the State Bar of Michigan to assist lawyers in dealing with these issues, [11] and practitioners are encouraged to use them.

Notes

1. Michigan Ethics Opinion, R-1 (Dec 16, 1988).
 2. *Id.*
 3. MRPC 7.2, .3.
 4. MRPC 1.6.
 5. MRPC 2.1, 5.4.
 6. MRPC 5.3.
 7. MRPC 5.5.
 8. See also RI-125 (Apr 17, 1992); RI-128 (Apr 21, 1992).
 9. MRPC 1.2, .4.
 10. RI-101 (Oct 1, 1991).
 11. See *Michigan Guidelines for the Utilization of Legal Assistant Services*, 72 Mich BJ 563 (1993). Attorneys can also contact the State Bar of Michigan, Standing Committee for the Unauthorized Practice of Law.
-



Steve Mitchell is a shareholder at Willingham & Coté, PC, where he concentrates his practice on the defense of lawyers and judges in disciplinary matters. Your comments and questions are welcome at 1-800-361-1542.

@ Your Service:

[About ICLE](#) | [Privacy Statement](#) | [Contact ICLE](#) | [Customer Support](#)

Institute of Continuing Legal Education

Phone Toll Free: (877) 229-4350 or (734) 764-0533

Fax Toll Free: (877) 229-4351 or (734) 763-2412

Address: 1020 Greene Street, Ann Arbor, MI 48109-1444

E-mail: icle@umich.edu

© [Copyright](#) 1996-2001 The Institute of Continuing Legal Education


[Bar Sections](#)
[Family Law Section](#)
[Labor and Employment Law Section](#)
[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

The following article was published in the [Summer 1997](#) issue of [Michigan Probate and Estate Planning Journal](#)

NEWS AND COMMENTS

By Fredric A. Sytsma

Correction: Sometimes I get rolling along and don't stop in time. In my last column, in a comment on the new regulations for qualified domestic trusts, I correctly pointed out that in certain situations, it is not necessary to have a U.S. bank as trustee or to have an individual trustee post a bond. I should have stopped there, but I went on to conclude that the noncitizen spouse could act as sole trustee. That is not true! It is still necessary to have a U.S. trustee.

Perceptions

At the Probate Council meeting in May, Carol Karr and Robin Ferriby brought to the attention of the Council a sales brochure for something called a "Sovereignty Pure Trust—A Common Law Pure Trust Organization," complete with pictures of *both* the American flag and a bald eagle. According to the promotional material from Toni Smith, billed as a "Trust Consultant/Paralegal," Sovereignty Pure Trusts "are one of the most Closely Guarded Secrets of Americas (sic) Mega-Wealthy!" They purportedly eliminate income taxes, probate, all inheritance and death taxes and (drat!) associated legal fees as well as afford "iron clad" property and asset protection against creditors. The material blathers on for several pages of predictable mishmash and as absolute proof of the validity of the assertions offers a copy of a response from the IRS to a request for an Employer Identification Number for a "Pure Trust Organization" in which the service indicates that a "Pure Trust organization has no tax requirements"

We all had a good laugh about this nonsense, but John Scott said something that started me thinking. He observed that in social settings, he is often asked about techniques like this by intelligent acquaintances who have heard or read about them and who imply that if John and his probate lawyer friends are the specialists we claim to be in this field, why aren't we offering this fabulous tax avoidance and asset protection planning as part of our services. Lord knows we charge enough that we *ought* to be offering it!

My experience is that most of our clients know there isn't any free lunch, and they appreciate and act on the advice we give them without harboring suspicions that we're holding something back. Just as they know in their hearts that the Big Three automakers aren't hiding the fact that they can build a car that gets 1,000 miles to a gallon of gas, they know that they can't go blithely through life without paying

their debts and without paying taxes on their earnings and accumulated wealth (or at least that they can't do so without a significant risk of lengthy incarceration).

However, with rare exceptions, clients most definitely do *not* know what we know. Just as we have no comprehension of the client's widget manufacturing business, he or she has no comprehension of the rule against perpetuities, the calculation of inclusion ratios under the generation-skipping transfer tax, the difference between a general and a special power of appointment, etc. Clients honor us by reposing in us complete confidence that we will give them the plan that best suits their needs. Although everyone is cautioned to read and understand everything before he or she signs it, how many of your clients understand your trusts? Do they appreciate why you used a fractional share marital deduction formula to avoid income tax on funding a pecuniary gift with income in respect of a decedent? No, they do not!

Any flaw in most products we buy will come to light in a relatively short period of time (occasionally a distressingly short period of time), and we can take action to have the flaw corrected. However, the nature of estate plans is that flaws may not come to light for decades and usually not until after the purchaser of the product has passed on. In view of this fact, and keeping in mind the trust that our clients have in us, we owe it to them and to ourselves to deliver the best technical product we can. That is why so many of us regularly attend continuing education sessions like the Annual Probate Seminar.

This comment is not about technical competence or incompetence, however. I think that one thing John Scott's comment illustrates is that most clients don't know (and shouldn't be expected to know) technical competence if they see it. The old joke is that "any lawyer can draft a will," and although we know that the wills so drafted will vary wildly in content, each of us should do his or her best to make technical competence a given.

What occurs to me is that there is often a big difference between our perception of good lawyering and a client's perception of good lawyering. I am among the group of lawyers who thought for many years that if I offered cutting-edge techniques, the product would sell itself; but I've come to understand that isn't true (although it's always tempting to fall back into this frame of mind, because it reduces the effort required). What then can we offer our clients that they *can* understand, that will make the clients think they have a good lawyer, and that in turn will cause existing clients to refer us to their friends so that we'll have more clients?

I know many estate planning lawyers whom I consider successful. They have lots of clients, and I assume they make a good living as a result. My own opinion is that they have varying levels of technical ability, but my conclusion is that this has very little bearing—for good or ill—on why they are successful. I think that first and foremost, they are successful because they are tuned in to people. They are good listeners, and they hear what is being said to them, rather than hearing only those things that support already formed conclusions and strategies. They genuinely want to know and understand the client's situation and what the client hopes to accomplish, not only in terms of saving taxes but also in terms of enhancing the client's life and achieving long-range objectives for children and other beneficiaries.

Successful estate planners (and I think a better term is *counselors*) are also good communicators. They can match the client's desires and objectives with available techniques and then communicate the options effectively and understandably. This may well necessitate the use of supplemental explanatory materials, whether those materials are commercial products or are produced in house. The idea is to make it as easy as possible for the client to understand what he or she is getting

and why. If a client purchases a grantor retained annuity trust, he or she is going to get more out of a computer program that illustrates the likely outcome of the GRAT and out of a checklist for implementing the trust than out of the GRAT itself.

The other things that make successful estate planners are the things that make successful people in all walks of life. They are (at least usually) cheerful and friendly when meeting with clients. I don't think we have to be best buddies with all of our clients, but we have to convey the impression we like them, even when we don't. Successful estate planners are also courteous, which means more than polite greetings and hot coffee. It also means returning telephone calls promptly, responding in a timely fashion to letters (traditional and electronic), and getting work product out when we say we will.

We cannot (at least with a straight face) offer Sovereignty Pure Trusts to our clients and solve all of their problems, but in addition to providing clients with sound documents to implement their plans, which they expect anyway, we can do those other things that will lead our clients to conclude that they have a good lawyer who cares about them and who is giving them the best possible professional service.

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 Estate 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.

@ Your Service:

[About ICLE](#) | [Privacy Statement](#) | [Contact ICLE](#) | [Customer Support](#)

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© [Copyright](#) 1996-2001 The Institute of Continuing Legal Education


[Bar Sections](#)
[Family Law Section](#)
[Labor and Employment Law Section](#)
[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

The following article was published in the [Summer 1997](#) issue of [Michigan Probate and Estate Planning Journal](#)

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

By Hon. Phillip E. Harter

ADOPTION—TERMINATION OF PARENTAL RIGHTS—ABILITY TO VISIT

Kaiser v Esswein (In re Kaiser), No 194120, 1997 Mich App LEXIS 122 (Apr 4, 1997)

This is a stepparent adoption case in which the parental rights of the biological mother (respondent) were terminated pursuant to §51(6) of the Adoption Code, which provides:

If the parents of a child are divorced . . . and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:

- (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
- (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

Respondent was subject to a circuit court order that terminated her visitation until the court received a favorable report from a therapist that visitation should be reinstated. This order was in effect during the relevant two-year period. The probate court found that respondent was able to contact her children if she would simply submit to a psychological evaluation. Respondent's parental rights were terminated.

The court of appeals reversed the probate court, finding no meaningful evidentiary support for the probate court's conclusion that respondent was able to contact her children. They observed that while petitioners were correct that respondent's attempts to communicate with her children via birthday cards and telephone calls—rebutted by petitioners—were not regular or substantial contacts

within the meaning of the statute, the record established that the circuit court order prevented respondent from having additional contact with her children. Respondent appeared to have made a good-faith effort to comply with the circuit court requirements to reestablish visitation by attending court-ordered counseling. Since it was not shown that respondent had the means to restore visitation but failed to do so for a period of two years or more, the termination of parental rights was reversed.

ADOPTION—TERMINATION OF PARENTAL RIGHTS—TWO-YEAR PERIOD

In re Hill, 221 Mich App 683, 562 NW2d 254 (1997)

This is a stepparent adoption case. Respondent was determined to be Crystal Hill's father by a judgment of filiation entered October 7, 1985. Crystal's mother and her husband petitioned for a stepparent adoption on November 7, 1995. They also filed a petition seeking the termination of respondent's parental rights to Crystal pursuant to §51(6) of the Adoption Code, which provides:

If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:

- (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
- (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed to or neglected to do so for a period of 2 years or more before the filing of the petition.

A judgment of support had been entered against respondent. It provided that respondent was responsible for supporting Crystal but stated that respondent's responsibility for support would be held in abeyance until petitioner again became a recipient of public assistance. Petitioner did not receive any further public assistance. The support order also required respondent to pay confinement expenses of \$862.21 and blood testing fees of \$395. It was undisputed that respondent never paid any of the ordered expenses or any other support. Petitioner testified that respondent had seen Crystal approximately six times, with most of the visits occurring before the child's first birthday. Petitioner also testified that Crystal had never received any cards or gifts from respondent, though respondent claimed to have sent cards and gifts from prison. The trial court found that clear and convincing evidence had been presented that respondent "has substantially failed in his obligations to Crystal Lee Hill for a period of two years prior to the filing of this petition." 221 Mich App at 688. The court noted that the statute does not specifically provide that the two-year period applies to the two years immediately preceding the filing of the petition and concluded that any two-year period preceding the filing of the petition would be sufficient. An order was entered terminating respondent's parental rights, and he appealed.

The court of appeals began its analysis by concluding that the trial court erred in its interpretation of §51(6). They relied on *In re Halbert*, 217 Mich App 607, 612, 552 NW2d 528 (1996), which held that the applicable two-year statutory period "must commence on the filing date of the petition and extends backwards from that date for a period of two years or more."

Having concluded that the trial court had erred in its interpretation of §51(6), the court of appeals addressed the issue whether the error required a reversal of the order terminating respondent's parental rights. In finding that it did not, they explored whether the trial court's factual findings established that the requirements of §51(6) were met. The court of appeals first distinguished this case from the *Halbert* case, in which the question decided was the commencement date for the statutory period, not whether events occurring outside the two-year period may be considered. The court here found that there was a legislative intent that circumstances beyond the applicable two-year statutory period may be considered.

The court of appeals first examined §51(6)(a). Since a support order had been entered, they were not concerned with ability to support as in *Halbert* but focused solely on whether the order was substantially complied with for two or more years before the petition was filed. The evidence showed that respondent had never paid the expenses and fees as ordered or paid any support whatsoever. Therefore, the requirements of §51(6)(a) were satisfied.

The court of appeals next examined §51(6)(b). Even though respondent was incarcerated, they found the requirements of it had been met. The subsection encompasses the ability to "visit, contact, or communicate." Since the acts are given in the alternative, petitioners were not required to prove respondent had the ability to perform all three acts. Petitioners merely had to prove the respondent had the ability to perform any one of the acts and substantially failed to do so for two or more years before the petition was filed. Respondent certainly had the ability to communicate by sending letters and gifts and did not do so. Therefore, the requirements of §51(6)(b) were satisfied. Since all the requirements of §51(6) were met, it was proper to terminate respondent's parental rights.

CLAIMS—DISALLOWED—CIVIL ACTION

Spears v NBD Bank, NA (In re Estate of Gordon), 222 Mich App 148 (1997)

A claim for services was filed against this estate. The personal representative disallowed the claim and sent notice to claimant that a civil action must be commenced within 63 days or the claim would be barred. Claimant filed a petition for the allowance of a disputed claim with the probate court within the time limit but did not commence a civil action by filing a complaint, nor was the personal representative served with a summons. The probate court quashed claimant's petition, holding that it did not conform with the procedural requirements in the Revised Probate Code (RPC) and Michigan Court Rules. The court then dismissed claimant's claim in its entirety because the petition had been quashed and the limitations period had passed by the time of the hearing. The court also denied claimant's request for leave to amend, reasoning that the RPC did not authorize the court to extend the time for filing a claim after the time for filing the claim had expired. Claimant appealed the dismissal.

The court of appeals first pointed out that there is a procedural conflict between RPC §717(1) and MCR 5.101(C). The RPC provides a claimant with two alternative procedures if the personal representative disallows a claim. One of those alternatives is to petition the court to allow the claim. By contrast, MCR 5.101(C) requires that after a notice of disallowance has been issued, a petition filed by a claimant must be titled a civil action and commenced by filing a complaint. This conflict between the procedural rules of the court rules and the RPC raised an issue of first impression according to the court of appeals. They held that the RPC provisions at issue did not address jurisdictional issues or any other identifiable substantive legislative policy consideration but merely procedural issues concerning how to initiate the probate court's review of a disallowed claim. Thus, the court rule supersedes the RPC's procedural

requirements, so a petition filed after a notice of disallowance must be labeled a civil action and a complaint must be filed in accordance with MCR 5.101(C).

The court of appeals next dealt with the issue of the probate court's denial of claimant's request to amend the pleadings. They found that it was improper for the probate court to quash claimant's pleadings for these procedural defects. They reasoned that MCR 5.101(C) provides that the civil actions concerning claim disallowance disputes are governed by the court rules that apply to actions brought in circuit court. Under those rules, a party who files a defective pleading may seek leave to amend the pleadings. MCR 2.118(A)(2) provides that "[l]eave [to amend] shall be freely given when justice so requires."

Finally, the court of appeals dealt with the personal representative's contention that claimant's pleading should have been dismissed because claimant failed to serve a summons with a complaint in the manner prescribed by MCR 2.105. The court observed that defective service of process will generally not warrant the dismissal of a party's pleadings unless the service failed to notify the defendant of the action " `within the time prescribed for service.' " 222 Mich App at 157 (quoting MCR 2.105(J)(3)). In this case, the personal representative was notified of the action within the time prescribed. In addition, a party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. They felt that disputed facts remained regarding whether the absence of a summons was due to claimant's act or omission or whether the personal representative had submitted to the court's jurisdiction. Consequently, they reversed the decision of the probate court and remanded for further proceedings.

The one problem I have with this case is that the court of appeals seems to use the "rules applicable to civil actions in the circuit court" to get to the civil action. 222 Mich App at 153. Those rules should only be applied after a civil action is properly commenced. Therefore, whether or not the pleading could be amended should have been controlled by the rules that apply to the probate court.

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.

Case summaries of new appellate cases, court rules, and statutes that affect the probate court may be found at the [Calhoun County Web site](#).

@ Your Service:
[About ICLE](#) | [Privacy Statement](#) | [Contact ICLE](#) | [Customer Support](#)

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© [Copyright](#) 1996-2001 The Institute of Continuing Legal Education

[Bar Sections](#)[Family Law Section](#)[Labor and Employment Law Section](#)[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

The following article was published in the [Summer 1997](#) issue of [Michigan Probate and Estate Planning Journal](#)

DIGEST OF MICHIGAN PROBATE OPINIONS

By Hon. John N. Kirkendall

96-10 Appointed Counsel; Indigency; Mentally Ill; In re Mentally Ill Person; Judge Michael J. Anderegg, Marquette County. The court issued an order denying a request for the appointment of counsel to appeal a jury verdict finding petitioner to be a person requiring treatment and an order for alternative treatment. It was reasonable to expect that payments on a long-term loan against equity in a house could fit within a limited budget and finance an appeal. MCL: 330.1454(2); MSA: 14.800(454)(2); 422 Mich 758; 375 NW2d 353.

96-11 Heir; Natural Parent; In the Matter of the Estate of Spencer Crummie, Jr., a/k/a Spencer Crummie, Deceased; Judge Milton L. Mack, Jr., Wayne County. Although a child born during a marriage is presumed to be the child of both spouses, such presumed natural parenthood may be rebutted. Similarly, a child born during a marriage who is not the product of that marriage will be considered the natural child of the parent (in this instance, Mr. Crummie) when there was a mutually acknowledged relationship of parent and child that began before the child became age 18 and continued until death. MCL: 700.111(2); 700.111(3); 700.111(4)(c); 147 Mich App 626; 383 NW2d 266; 894 F Supp 1114.

96-12 Assignment; Claims, Failure to State; Promissory Note; Rescission; In re the Estate of Raymond Burgen, Deceased; Judge Neil G. Mullally, Muskegon County. This case involved the issue of a promissory note and a mortgage payable to Diamond Mortgage Corporation and Diamond Mortgage's fraudulent assignment of an unfulfilled mortgage to unsuspecting assignees. The court found no authority that death constitutes a transfer under Truth in Lending Act or that an obligor's death prevents his or her right of rescission. MCL: 700.334(C); MSA: 27.5334(C); MCR: 2.116(C)(8) and (10); 182 Mich App 356; 187 Mich App 418; 197 Mich App 316; 882 F2d 379; 728 F Supp 1341.

96-13 Guardian; Patient Advocate; Right-to-Die; Surrogate Decision-Maker; Treatment; In the Matter of Ruth Johnson, Legally Incapacitated; Judge Neil G. Mullally, Muskegon County. This case involved third-person implementation of an incompetent patient's previously expressed decisions. The evidentiary standard is "clear and convincing evidence." MCLA: 700.496; 700.496(7)(d); MSA: 27.5495; 27.5496(7)(d); 450 Mich 104; 195 Mich App 675.

96-14 Conservator; Guardian; Guardian, Successor; Tenancy, Joint;

Partition; In the Matter of Gladys Bliss, Deceased; Judge W. Wallace Kent, Jr., Tuscola County. This case involved joint title to real estate and the personal liability of decedent for costs incurred for her care. The estate remains liable. Jointly held properties may be partitioned, and the joint titles to those properties are severable. MCL: 600.2921; 600.3320; 125 Mich 137; 213 Mich 617; 242 Mich 631; 436 Mich 271; 123 Mich App 592.

96-15 Fiduciary; Personal Representative; Quit Claim; Survivorship; Tenancy, Joint; In the Matter of Bonna Jean Morrill, Deceased; Judge Marvin E. Robertson, Clinton County. The entire tenancy on the death of any joint tenant remains to the survivors and, ultimately, to the last survivor. The personal representative has no obligation or authority to pay encumbrances from the decedent's estate. 54 Mich 547; 84 Mich 185; 334 Mich 368; 347 Mich 272; 151 Mich App 502.

96-16 Credit Union Account; Inheritance Tax; Taxes, Nonestate; In the Matter of Adolph Michael Hintz, Deceased; Judge Marvin E. Robertson, Clinton County. The court issued a judgment that the estate is not liable for taxes on a credit union account. Postdeath real estate expenses such as maintenance and restoration are not allowable as deductions for inheritance tax. 76 Mich 375; 335 Mich 551; 338 Mich 457; 110 Mich App 196.

97-1 Attorney (Fees); Claims, Frivolous; Conservator; Fiduciary (Fees); Fiduciary, Special; Sanctions; In the Matter of Seymour Iwrey, Protected Person; Judge Joan E. Young, Oakland County. This case involved a claim that a removal of assets jeopardized the financial stability of a company and the family and also disputed fiduciary actions and fees. MCL: 600.2591; 600.2591(3)(a); 700.461; 700.461(b); 700.474; 700.541; MCR: 2.114(B); 2.114(C); 2.114(E); 2.114(F); 5.717; 5.718; 424 Mich 675; 103 Mich App 322; 111 Mich App 496; 137 Mich App 634; 212 Mich App 357; 302 NW2d 867; 314 NW2d 666; 357 NW2d 912; 385 NW2d 586; 538 NW2d 586.

97-2 Beneficiary; Election; Premarital Agreement; Surviving Spouse; Will, Contested; In the Matter of the Estate of Henry Clyde Johnson, Deceased; Judge Sandra Silver, Oakland County. This case involved a request to set aside a premarital agreement because it was not fairly negotiated and did not disclose the true value of the husband's estate, as well as an attempt to set aside a widow's election agreeing to abide by the Will. MCL: 700.32; 700.291; 700.315; 700.322; 700.358(4); MCR: 2.116; 2.116(C)(7); 2.116(C)(8); 2.116(C)(10); 2.611(B); 2.612; 2.612(C)(1)(a); 2.612(C)(1)(b); 2.612(C)(1)(c); 342 Mich 29; 371 Mich 432; 416 Mich 681.

97-3 Claims (Services Rendered); Personal Representative; In the Matter of the Estate of Virginia Larson, Deceased; Judge Michael J. Anderegg, Marquette County. This case concerned the timeliness of certain claims by the original personal representative. The successor personal representative denied the claim. MCL: 700.712(2); MSA: 27.5712(2); 311 Mich 288; 18 NW2d 827.

97-4 Trust; Due Diligence; In the Matter of the Estate of Kenneth L. Koski, Deceased; Judge Michael J. Anderegg, Marquette County. The beneficiary of a decedent's estate brought a motion for a new trial, claiming that the decedent held certain accounts in a stock brokerage account as a trustee for his benefit rather than as part of the residual estate. No written evidence of the trust's existence was produced at trial except for an account title showing that decedent held the account in trust for the petitioner. After the trial, the stockbroker produced the written trust instrument. The court found that due diligence was not exercised in trying to secure the document. MCR: 2.610; 2.610(A)(1); 2.611; 2.611(B); 2.612(C)(1)(b); 291 Mich 701; 306 Mich 392; 152 Mich App 220; 289 NW 302; 11 NW2d 1; 393 NW2d 487.

97-5 Attorney (Fees); Mediation; Personal Representative; In the Matter of the Estate of Kenneth L. Koski, Deceased; Judge Michael J. Anderegg, Marquette County. This case involved a request to have the court assess attorney fees and costs against the estate for periods both before and after mediation. It also involved requests that attorney fees not be approved for payment out of the estate. MCR: 2.403(O); 164 Mich App 82; 416 NW2d 331.

97-6 Deed; Delivery; In the Matter of Bonna Jean Morrill, Deceased; Judge Marvin E. Robertson, Clinton County. This case involved a request by plaintiff to set aside her parents' deed to certain Michigan properties, thus granting her an equal interest with her sisters in real estate through the estate of her mother. At issue was whether there was a legally cognizable delivery of the deeds. 319 Mich 428; 335 Mich 429; 336 Mich 126; 344 Mich 119; 56 NW2d 246; 57 NW2d 468; 73 NW2d 205.

@ Your Service:

[About ICLE](#) | [Privacy Statement](#) | [Contact ICLE](#) | [Customer Support](#)

Institute of Continuing Legal Education
Phone Toll Free: (877) 229-4350 or (734) 764-0533
Fax Toll Free: (877) 229-4351 or (734) 763-2412
Address: 1020 Greene Street, Ann Arbor, MI 48109-1444
E-mail: icle@umich.edu

© [Copyright](#) 1996-2001 The Institute of Continuing Legal Education