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Probate and Estate Planning Section

Michigan Probate and Estate Planning Journal

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The following is an article excerpt. The complete article was published in the Summer 1998 issue of [Michigan Probate and Estate Planning Journal](#)

FROM THE CHAIRPERSON'S DESK

By Patricia Gormely Prince

Henry Grix, the current editor of the *Michigan Probate and Estate Planning Journal*, has been gently urging me to get my (last) column completed. Therefore, I will tell you all in advance that the reason this edition of the *Journal* is a few weeks late is because the (now out-going) chair has a difficult time selecting topics that are somewhat newsworthy, not libelous, and procedurally correct. Writing this column has been the hardest part of my job this year.

Indeed, this is my swan song. (By the way, whoever knows where that term started, I would appreciate a call.) I would like to say thank you to the numerous people who assisted throughout this year. First and foremost, I would like to publicly say thanks to my secretary, Virginia Addy, also known as Radar, who has cheerfully fielded calls, chosen menus for the meetings, and performed whatever other Council-related duties have been requested of her, either by me or Council members or members of the Section calling throughout the year. Certainly, this is not part of her job description, but she has never failed to assist (including reminding me to write this column over the past several weeks), no matter how busy we are with practicing law in the office. Indeed, the legal secretary, who seems to be a dying breed, still makes lawyers look good.

We have several Council members whose terms are expiring. They are Michael Love, Judge Gerald Supina, and Judge John Kirkendall. Judge Supina has given us much judicial insight, tempered with his own wonderful sense of humor. Mike Love has fulfilled many duties over the years, not the least of which was helping us become high-tech with the home page and other computer aspects of our area of the law. He has received the able assistance of Bob Pytell and former chair John Mabley. Judge Kirkendall chaired the Opinion Bank Committee, helping to collect words of probate wisdom, until court reorganization usurped his time.

You may not know it, but John Martin and Mike McClory have spent untold hours in Lansing before the House Judiciary Subcommittee so that the Estate Settlement Act could be reported out of committee. Judge Milton Mack, while not on the Council, was also helpful in this regard. We have cautious, optimistic hopes that we might actually get this legislation passed by the end of the year. Not surprisingly, it is not easy to get a 400-page act that is not considered "sexy"

passed, despite the large number of people affected by the Probate Code.

Doug Mielock chaired the Legislation Committee this year and kept up on what was introduced, passed, not passed, tabled, or thrown out.

Mary Ann Zito is in charge of this year's 63d Annual State Bar Program on Friday, September 18. Though the meeting will, of course, have passed by the time you read this, I know the speakers and the topics, and I expect it to be a knowledgeable presentation that should benefit the Section members who can attend. Mary Ann is also the chair of the Oakland County Bar Probate Committee and is working with the Oakland County Probate Court in connection with the changes to the court system, which seem to have thrown the courts and lawyers for a loop.

Dirk Hoffius has chaired the Committee on Special Projects for several years, and as a reward(?), he now moves on to become treasurer. By the way, Dirk, treasurer is an easy job, it's the job of secretary that puts us all to the test.

Robin Ferriby, Harold Schuitmaker, Lauren Underwood, and Bob Pytell are the newest Council members, and they have all survived with flying colors, freely volunteering (or not ducking when volunteered) for committee assignments and other jobs. Fred Rolf stepped in midyear to succeed to a vacancy and has jumped right in on the Ethics, Unauthorized Practice, and Image area. Henry Grix, who has edited the *Journal* for several years, has had the hardest job of all. He has not only had to find volunteers to write articles, edit them (*i.e.*, read every word), get them to print, etc., he has had to cajole or harass columnists to turn in their articles.

Other veterans of the Council include Gayle Robinson and Walter Marsh. Fortunately for them, the committees that they have chaired or been involved with have been mostly quiet this year. Such is the luck of the draw. However, Gayle and Walter can always be counted on to volunteer and assist when needed.

Finally, this year's officers—Brian Howe (the chair-elect's main duty is to rest up before being chair and after running the Probate Seminar), Dick Lowe (as vice-chair, planned a terrific Annual Seminar), John Scott (as treasurer, ably managed our budget), and Ken Konop (as secretary, has pretty well automated the minutes so that they are completed within a reasonable amount of time and are even correct)—have performed well and will continue to serve as they move up to the next level of officer duties.

Ex-officios still actively attend meetings; some attend almost as many as current Council members!

I have been asked how one becomes a Probate and Estate Planning Council member. In my case, and in the case of the vast majority of Council members, you start simply by attending meetings (see page 3 for next year's meeting schedule). The Council members will notice you, and if you are interested, you may very well get nominated. Probably, at least half of the present Council became members this way.

Another way of being nominated is through the Nominating Committee, which, each year, seeks lawyers who are likely candidates for the Council. This is a very busy Section, so the people who are interested in serving on the Council must have a great deal of energy, as all members are employed (at least) full time. An active sense of humor is also quite useful.

I have been pleased and proud to represent our Section. We have some of the

best lawyers in the Bar and also some of the most helpful. One of my duties this year has been to be what I refer to as the "Ann Landers of Probate," as when someone calls the State Bar with a general question, they are often given my number. The questions frequently come from other lawyers and the public. I have answered numerous questions, from how to find a lawyer to how to find an article in the *Journal* published years ago. However, there are times when I call other lawyers with the questions, "Have you ever heard of this?" or "Where do I find this?" I find that lawyers who practice our kind of law, because it is an area where we are not only attorneys but counselors, tend to be very helpful.

Having completed this final column, I now get to rest on my laurels. My term as chair has been a learning experience, and most of the time it has even been fun, and I thank you for the pleasure of being your Section chair this past year.

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PRIVATE FOUNDATIONS—A PRIMER

By Robin D. Ferriby [\[1\]](#)

Charitable giving has steadily gained in popularity during the past decade. Commentators believe this increase is due to several different factors. Among these factors are recent tax law changes that have reduced the availability of other tax deductions, a public perception that more needs to be done privately in light of decreased government spending on social programs and the arts, and the significant increase in private wealth due to a strong economy and the gains of the stock market. In light of these factors, charitable giving has become a focal point for estate planners and their clients.

The topic of private foundations will be raised in any estate planning practice in which charitable giving is considered. The major benefit that private foundations offer over other public charitable organizations is the degree of family involvement and control that they offer. Clients often wish to have their family continue to be involved in philanthropic pursuits and want the personal and family name recognition associated with those efforts. This can be best accomplished with a private foundation.

The major benefit that private foundations offer over other public charitable organizations is the degree of family involvement and control that they offer.

On the other hand, certain methods of gifting through public charities can provide a degree of family involvement. These include donor-advised funds at community foundations or supporting organizations affiliated with public charities. The estate planning attorney must be mindful of the various options available in charitable giving—whether through private foundations or public charities—to ensure that the client's intentions and needs are satisfied. Each choice has its own distinct set of benefits and restrictions that must be considered in light of the client's goals and objectives.

The purpose of this article is to provide a basic overview of the laws governing private foundations. Therefore, the scope of discussion is limited to the benefits and restrictions that apply to private foundations.

Choice of Form

Private foundations are generally established in one of two basic forms: a nonprofit corporation or a trust. Private foundations that are established as corporations may be established on a membership or a directorship basis.

Private foundations established as trusts were more popular in previous decades. Today, the preferred form of a foundation is the corporate entity. The corporate form is popular for several reasons. First, the charitable purposes and rules governing the administration of the foundation are more easily modified than in a trust. Trusts are subject to more stringent revision and reformation requirements. These requirements can sometimes be softened by trust administrative powers that grant the trustee a certain amount of power to amend the agreement.

The second benefit of the corporate form is the standard of care imposed on the directors of charitable corporations. The Michigan Nonprofit Corporation Act^[2] requires that a director "discharge the duties of that position in good faith and with that degree of diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances in a like position."^[3] Trustees are held to the more stringent "prudent man" standard. That law states that "if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills."^[4] See also the Charitable Trustees Powers Act. ^[5]

When a foundation is established as a charitable corporation, the director's responsibilities relating to the investment of the assets of the organization are governed by the Michigan Uniform Management of Institutional Funds Act (UMIFA).^[6] UMIFA requires that directors manage the assets using a standard of business care and prudence rather than the higher standard of care to which trustees are typically held. UMIFA also permits directors to delegate investment authority to third parties.

Another advantage of the corporate form is the availability of statutory protections for volunteer directors and officers. The Michigan Nonprofit Corporation Act allows nonprofit corporations to protect volunteer directors, board members, and officers from claims of breach of fiduciary duty, subject to certain exceptions specified in the law. Even more important, the law allows a nonprofit corporation to assume the liability of its volunteer directors, volunteer officers, or other volunteers provided that the volunteer is acting in good faith and within the scope of his or her authority and that certain other requirements are satisfied.^[7] These provisions require the articles of the nonprofit corporation to take advantage of these protections. Michigan law also has special provisions that address conflicts of interests with directors of nonprofit corporations, which may be helpful. ^[8]

The recently enacted federal Volunteer Protection Act of 1997 ^[9] can also provide further protection to volunteer directors and officers.

State Regulation of Private Foundations

A private foundation organized as a charitable trust or as a corporation is also subject to certain registration requirements. These requirements are found in the Supervision of Trustees for Charitable Purposes Act.^[10] If the charitable organization is going to solicit funds, they are also subject to the provisions of the Charitable Organizations and Solicitation Act.^[11] For a detailed discussion of the registration process of charitable organizations with the Michigan attorney general's office, see David W. Silver et al., *How and Why the Michigan Attorney General Supervises Charitable Trusts*, Mich Prob & Est Plan J, Fall 1997, at 3.

Private foundations may be created, sometimes unintentionally, from other trusts. For example, a trust agreement may provide for payments of income or principal to various individual beneficiaries. On some triggering event, the interests of those individual beneficiaries may cease, and the trust continues for the benefit of charitable organizations or interests. If all of the unexpired interests in a trust are charitable and a charitable tax deduction was previously allowed in connection with the trust, the trust becomes a private foundation pursuant to IRC § 4947(a)(1). This type of private foundation can arise inadvertently from estate plans.

Sometimes this type of private foundation arises out of wills that create testamentary trusts for the benefit of charities. These testamentary trusts are subject to ongoing administration and supervision of the probate court, which can increase the cost associated with maintaining the foundation. They can also become a burden on probate court dockets, which are already straining due to the other demands placed on them. It is possible to terminate this type of private foundation trust and convert it to a nonprofit corporation. This can be done without any court involvement with the agreement and consent of the Michigan attorney general's office. The Charitable Trustees Power Act gives the attorney general the authority to consent to the transfer of assets from a charitable trust to a corporate entity without a probate court hearing on the matter.^[12]

Operating Foundations

There is a class of private foundations known as *operating foundations*. Operating foundations are private foundations that meet certain additional requirements under IRC § 4942(j)(3). These entities are generally foundations that support a specific activity, such as the running of a museum or library.^[13]

The primary benefit of being a private operating foundation is that the contribution deduction limits, discussed below, placed on gifts to a private foundation are removed for gifts to a private operating foundation. Private operating foundations are still subject to most of the other private foundation rules and excise taxes, except they are not required to make minimum distributions under IRC § 4942.

Operating foundations can also be classified as *exempt operating foundations* under IRC § 4940(d)(2). An exempt operating foundation is a private operating foundation that also (1) has been publicly supported (as defined by IRC § 170(b)(1)(A)(vi) or § 509(a)(2)) for at least 10 taxable years; (2) has at least 75 percent of its governing body made up of individuals who are not disqualified individuals and otherwise broadly represent the general public; and (3) has no disqualified individuals acting as officers. The benefits of qualifying as an exempt operating foundation are that the entity's investment income is not subject to tax and that there is no responsibility for expenditures as provided under IRC § 4945(d)(4) and (h).

Tax Deduction Considerations

Contributions of property to private foundations are subject to a different set of income tax deduction rules than those imposed on contributions of property to public charities. These restrictions affect both the valuation of the property contributed to the private foundation and the limits on the amount a donor can claim on his or her income tax return. Generally, there is no difference in treatment between public charities and private foundations for purposes of the estate, gift, and generation-skipping transfer tax charitable deductions.[\[14\]](#)

A donor who contributes cash to a public charity may deduct up to 50 percent of his or her contribution base in the year of the gift.[\[15\]](#) A donor's contribution base equals the donor's adjusted gross income (AGI) without considering net operating losses under IRC § 172.[\[16\]](#) Generally, these annual percentage limitations on the donor's charitable income tax deduction are referred to as *AGI limits*. This is because most donors do not have net operating losses to take into consideration and because most individuals are not familiar with the term *contribution base*. If the same donor had made the cash contribution to a private foundation, his or her charitable deduction would be limited to 30 percent of his or her contribution base.[\[17\]](#)

Similarly, if a donor contributes appreciated assets to a public charity, he or she is allowed to deduct up to 30 percent of his or her contribution base in the year of donation. The same gift of appreciated assets made to a private foundation is limited to 20 percent of his or her contribution base.[\[18\]](#)

The Internal Revenue Code also restricts the valuation of gifts to private foundations . . . Contributions of long-term capital gain property and tangible personal property used in connection with the charity are valued at fair market value when contributed to a public charity but only at cost when contributed to a private foundation.

A donor may carry forward his or her charitable deduction in excess of the AGI limit over for the next five years. Any contribution deduction that is not fully used by the end of the six years (the year of contribution plus the five succeeding years) or before the donor dies is lost.[\[19\]](#) Contributions of long-term capital gain property and tangible personal property used in connection with the charity are valued at fair market value when contributed to a public charity but only at cost when contributed to a private foundation.[\[20\]](#) Gifts of cash are always valued at face value, regardless of whether the charity is public or private. The Internal Revenue Code also restricts the valuation of gifts to private foundations. Other special rules apply to gifts of inventory and other property.[\[21\]](#)

A specific exception that allowed gifts of publicly traded stock to private

foundations to be valued at fair market value expired June 30, 1998.^[22] This provision of the Internal Revenue Code routinely expires, and Congress has historically enacted an extension of this exception in legislation subsequent to the previous expiration. The recent commentary suggests that extension of this exception will be delayed this year.

The various gifting techniques that are available for gifts to public charities are also available for gifts to private foundations. These include such things as an outright gift, a charitable lead trust, a charitable remainder trust, or a bargain sale transaction. Keep in mind that deferred giving arrangements such as charitable remainder trusts are also subject to the valuation and contribution base limitations discussed above. For example, the charitable deduction generated by the funding of a charitable remainder trust that has as its charitable remainder beneficiary a private foundation will be subject to the same valuation and tax contribution base restrictions as a outright gift to a private foundation.

Federal Tax Regulation

Private foundations are defined under IRC § 509. Basically, this section states that any charitable organization not specifically excluded from the definition is a *private foundation*. The list of charities that are excluded are commonly referred to as *public charities*. The term *public charity* is not defined in the Internal Revenue Code. Rather, it is a term of art that has developed to encompass those charities that are excluded from the definition of a private foundation. These typically include hospitals, churches, and other organizations that receive public support.

[E]xcise taxes can be of significant consequence to a foundation. They range from 1 percent to 200 percent of the value of the transaction involved.

Private foundations are subject to several different federal tax provisions due to perceived and actual abuses of their exempt status to favor individuals. Any lawyer who works regularly in this area will ultimately be presented with a situation in which a client wishes to establish a foundation that will benefit the client's family or friends. Generally, the idea is to establish a charitable organization and to make family members officers and directors of the corporation. These officers and directors are then paid salaries and stipends from the charity.

While officers and directors may receive reasonable compensation and reimbursement of actual reasonable expenses incurred in connection with their duties, salary and benefit abuses have resulted in the enactment of various excise taxes and other regulations that now regulate the actions of private foundations. These excise taxes can be of significant consequence to a foundation. They range from 1 percent to 200 percent of the value of the transaction involved. The regulations, case law, and rulings that interpret and apply these provisions are the basis of lengthy treatises on the topic. These excise taxes are summarized below.

Excise Tax

A private foundation must pay a tax equal to 2 percent of its net investment income. That investment income includes rents, dividends, interest, payments from securities loans,^[23] net capital gains, and royalties less the foundation's expenses directly related to the production of such income. The foundation must make estimated quarterly tax payments of this excise tax.^[24] The excise tax is reduced to 1 percent for certain private foundations that meet certain distribution requirements.^[25]

Self-Dealing Tax

A private foundation may be subject to excise taxes for acts of self-dealing with disqualified persons. Disqualified persons include substantial contributors; foundation managers;^[26] owners of more than 20 percent of (1) the total combined voting power of a corporation, (2) the profit interest in a partnership, or (3) the beneficiary's interest of a trust or an unincorporated enterprise that is a substantial contributor; and certain family members of any of these.^[27] Trusts, estates, and others may also be disqualified persons.^[28] Examples of self-dealing include direct or indirect sales, exchanges, or leases of property between the foundation and the disqualified person. Loans and other forms of credit are also prohibited. Of course, disqualified persons may be reasonably compensated and have reasonable expenses reimbursed by the foundation. Therefore, a trustee or director may receive compensation for the services they render to the foundation.^[29] Special rules also apply to government officers. Tax rates range from 2.5 percent to 200 percent, depending on who is involved and whether the self-dealing was corrected. Other rules relative to penalty caps and other limits apply.

Tax for Failure to Distribute Income

As discussed above, a private foundation must make qualified distributions of at least its *minimum investment return*. This term is defined as 5 percent of the excess of the foundation's aggregate fair market value (other than assets used for its exempt purpose) less its acquisition debt. *Qualified distributions* include actual grants plus the expenses incurred in making those grants. Administrative expenses in connection with making the grants may also be included in satisfying the payout requirement to the extent those expenses do not exceed .65 percent of the foundation's net assets.^[30] These excise taxes range from 15 percent to 100 percent of the undistributed amount.

Tax on Excess Business Holdings

Internal Revenue Code § 4943 prohibits a foundation from holding a controlling interest in a business. In general, the interest that may be held is limited to (1) 20 percent of the business less holdings of disqualified persons and (2) 35 percent less holdings of disqualified persons if the business is actually controlled by persons who are not disqualified persons.

If a foundation and all similarly controlled foundations^[31] own less than 2 percent

of the company, disqualified persons are not limited in their ownership of the company. In other words, if a foundation has less than a 2 percent interest in a company, one of the disqualified persons may own the other 98 percent. In forming a private foundation, the foundation may initially own more than 20 percent of a company. However, the foundation must dispose of enough shares to bring it below the 20 percent limit within five years with a possible additional five-year extension.^[32] Applicable excise taxes range from 5 percent to 200 percent of the value of the excess holdings.

Tax on Jeopardy Investments

A private foundation will also face excise taxes if it invests in a *jeopardy investment*. Jeopardy investments are investments that are speculative in nature. These investments are considered a violation of prudent investment standards for the foundation. These excise taxes range from 5 percent to 25 percent of the value of the investment, with certain caps and other limits.^[33]

Tax on Taxable Expenditures

A private foundation may not make certain distributions and is required to perform special reporting for others. Some of these activities include (1) propaganda and lobbying, (2) political campaign activities, (3) voter registration drives, (4) scholarships or other grants to individuals unless they are made on an objective and nondiscriminatory basis according to procedures approved in advance by the IRS,^[34] (5) grants to nonpublic charities, and (6) grants to private foundations without expenditure responsibility. Rates range from 10 percent to 100 percent of the amount of the expenditure, with certain caps and other limits.

Tax on the Termination of Private Foundation Status

Under IRC § 507(a), charitable foundations may be subject to an additional excise tax on their termination.

Tax on Unrelated Business Taxable Income

A private foundation will be taxed at corporate rates on its unrelated business taxable income.^[35] Such income consists of the business earnings from a regular trade or business conducted by the foundation but unrelated to its charitable purpose. A business subsidiary controlled by a private foundation can give rise to such unrelated business taxable income.

Reporting Requirements

Private foundations are also subject to reporting requirements. Private foundations must annually file IRS Form 990-PF, which calls for detailed information regarding directors and the financial affairs of the foundation.^[36] In addition, an initial exemption application (IRS Form 1023) must be filed so that the private foundation can obtain its charitable exempt status from the Internal

Revenue Service. This application is subject to public inspection.

When preparing either a trust agreement or corporate documents to establish a private foundation, the practitioner must also be mindful that IRC § 508(e) requires that the governing instrument contain specific restriction on the activities of the organization. Failure to include these restrictions will prohibit the charitable organization from being an exempt organization under IRC § 501(a).

Conclusion

Private foundations are an exceptional estate planning tool that can benefit many clients. They afford our clients the opportunity to direct their charitable endeavors and to involve future generations in philanthropy. Private foundations offer the option of substituting the philanthropic goals of the client for the public policy supported by the estate tax. The estate tax acts merely as "forced philanthropy" that takes away property from a client's estate to support those activities, whether of a social or other nature, that the federal government chooses to fund. As discussed above, private foundations are subject to many tax regulations that must be carefully considered in the drafting and administrative process. However, the creation of a private foundation can be very rewarding to all involved.

Notes

1 The author acknowledges and appreciates the input of Duane L. Tarnacki to this article.

2 MCL 450.2101 et seq., MSA 21.197(101) et seq.

3 MCL 450.2541, MSA 21.197(541).

4 MCL 700.813, MSA 27.5813.

5 MCL 14.271 et seq., MSA 26.1200(21) et seq.

6 MCL 451.1201 et seq., MSA 25.1199(1) et seq.

7 MCL 450.2561–.2569, MSA 21.197(561)–(569).

8 MCL 450.2545, .2546, MSA 21.197(545), (546).

9 42 USC § 14501 et seq.

10 MCL 14.251 et seq., MSA 26.1200(1) et seq.

11 MCL 400.271 et seq., MSA 3.240(1) et seq.

12 MCL 14.285, MSA 25.1200(35).

13 For a complete discussion of these private operating foundations, see Lauren Watson Cesare, *Private Foundations and Public Charities—Definition and Classification*, 296—3d Tax Mgmt.

14 See IRC §§ 2055, 2522, 2613(a).

15 IRC § 170(b)(1)(A).

1 IRC § 170(b)(1)(F).

17 IRC § 170(b)(1)(C).

18 IRC § 170(b)(1)(D).

19 IRC § 170(b)(1)(C)(ii), (d)(1).

20 IRC § 170(e).

21 IRC § 170(e)(3).

22 IRC § 170(e)(5).

23 As defined by IRC § 512(a)(5).

24 IRC § 6655(g).

25 IRC § 4940(e).

26 As defined at IRC § 4946(b)(1).

27 Family members include spouses; ancestors; children; grandchildren; great-grandchildren; and spouses of children, grandchildren, and great-grandchildren. IRC § 4946(d).

28 See IRC § 4946(a) for a complete list of disqualified persons.

29 See IRC § 4941(d) for a list of acts that constitute self-dealing.

30 IRC § 4942(g).

31 IRC § 4946(a)(1)(H).

32 IRC § 4943(c)(6), (7).

33 IRC § 4944.

34 IRC § 4945(g).

35 IRC § 512.

36 36IRC § 6033(c). Robin D. Ferriby is a shareholder in the Birmingham office of Berry Moorman, PC. He is a graduate of the University of Detroit School of Law. Mr. Ferriby is a member of the Council of the Probate and Estate Planning Section of the State Bar of Michigan. He has played an active role in the Section, including involvement with the enactment of the Estate Settlement Act, the Michigan Estate Tax Act, and the repeal of Michigan's intangible tax. He is also a member of the Taxation Section of the State Bar of Michigan and the Real Property, Probate and Trust Law Section and Taxation Section of the American Bar Association. He is a member of the Planned Giving Roundtable of Southeast Michigan, a chapter of the National Committee on Planned Giving. Mr. Ferriby is a frequent lecturer and author on the topics of estate planning, postmortem administration, estate and gift tax planning, and charitable organizations and planned giving.

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MICHIGAN LAW AND THE RIGHT OF DECEDENTS TO DICTATE CHOICES REGARDING THEIR REMAINS

By Douglas G. Chalgian

To what extent, if any, does a person have the right to determine what happens to his or her body after death? The question comes up when a person dies having made specific arrangements regarding the disposal of his or her corpse, and a living friend or relative wants to disregard those arrangements and do something different. It's a question that has proved problematic for many years, but it appears to be settled in Michigan thanks to a rather obscure provision of the Mortuary Code. The answer, however, will surprise many.

Despite the rather unusual facts necessary to create these types of controversies, a fairly substantial body of law exists on the legal status of human remains, including many cases that predate the American legal system. From England, American courts inherited the so-called "no property" rule—that a corpse was not a piece of property, so no living person could derive legal rights in relation to it. However, early on, American courts began to deviate from the English tradition. A number of early American cases, including some in Michigan, discussed what became known as the "quasi-property" rule. As the name suggests, American courts began to recognize that, although a corpse may not be subject to all of the traditional rules of property law, relatives of the dead possess some legal rights with respect to the remains, which are similar, if not identical, to rights that have traditionally been identified as property rights.

While most American cases dealing with dead bodies have focused on the legal rights of living contestants, a few have addressed disputes between the living and the dead. On this issue, the cases provide little reliable authority. Some courts have held that the decedent's wishes should control, unless there are exceptional circumstances.^[1] Other courts have concluded that the decedent's wishes are, if anything, second to those of the living kin.^[2] In almost every case, the holding the court reached appears to be dictated by the unique facts of that particular case rather than a rule of law that should be applied at all times to all cases. The author of a comprehensive case review on the subject concluded that this issue "has always been extremely problematical."^[3] Even great legal minds, like Justice Benjamin Cardozo, have fallen victim to this confounding question,

offering high-sounding generalities in lieu of clear legal direction:

A benevolent discretion, giving heed to all those promptings and emotions that men and women hold for sacred in the disposition of their dead, must render judgment as it appraises the worth of the competing forces.^[4]

At least before the statutory developments discussed below, Michigan courts were similarly caught in the trap of balancing competing interests. In the one reported case on this issue,^[5] the Michigan Supreme Court reviewed a situation in which the decedent had been residing with members of a certain family for about 18 years. During that time, he had never mentioned that he had previously been married and had children. The children apparently never came to visit. When he died, he was engaged to be married to one of the family members. As a result, the family with whom he was living had him buried along with other members of their family in a Michigan cemetery. Several months later, the children appeared from California and sought to have their father disinterred and moved to California. The Michigan Supreme Court, relying heavily on the fact that the body was already buried and, "in all probability, where he wanted to be," ordered that the body be left where it was.^[6] In dicta, the court provided the following observation: "As a rule, the desire of the decedent, as expressed by his words and actions, should be respected."^[7]

For better or worse, in Michigan today, this macabre question has apparently been laid to rest. Pursuant to Michigan's Mortuary Code, the decision regarding what happens to a dead body is to be decided by the decedent's next of kin, regardless of what the decedent arranged before death. MCL 339.1810, MSA 18.425(1810) requires funeral directors to inquire of the "next of kin and of the person who may be chargeable with the funeral expenses." It further provides, "If kin is found, the person's authority and directions shall govern the disposal of the remains of the decedent."^[8]

**Pursuant to Michigan's
Mortuary Code, the decision
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arranged before death.**

However, the Mortuary Code appears to conflict with another Michigan law, the Revised Probate Code, which provides:

Before the appointment, a person named personal representative in a will may carry out written instructions of the decedent relating to the decedent's body, funeral, and burial arrangements.^[9]

According to the Michigan Funeral Directors Association,^[10] a funeral director caught between the mandatory, sanctionable language of the Mortuary Code and the discretionary language of the Revised Probate Code, to which no sanctions

attach, is advised to follow the former. As a result, someone who desires specific funeral arrangements, such as cremation, will almost certainly be advised by the funeral director that his or her wishes will only be adhered to if, after death, the next of kin consents.

Although this result may be surprising, one has to admit that if the intent of the Revised Probate Code was to create a right in decedents to dictate the method of disposal of their remains, the drafters could have done a better job. Compare, for instance, the Revised Probate Code provisions cited above with the language of a recently enacted state of Washington statute on the subject:

A person has the right to control the disposition of his or her own remains without the predeath or postdeath consent of another person. A valid written document expressing the decedent's wishes regarding the place or method of disposition of his or her remains, signed by the decedent in the presence of a witness, is sufficient legal authorization for the procedures to be accomplished.^[11]

There is one statutory exception to the rule that the desires of the next of kin prevail. Pursuant to the Uniform Anatomical Gift Act, an adult of sound mind may donate his or her body to science or dictate that his or her body not be used for science.^[12] However, if a person does not make a lifetime election, the right to decide falls on the next of kin.

Conclusion

At least for now, obscure or not, the Michigan Mortuary Code appears to provide certainty on an issue for which case law did not. Michigan practitioners should be aware of this law in advising clients who have strong desires regarding the disposition of their remains.

Notes

1 *In re Estate of Moyer*, 577 P2d 108 (Utah 1978).

2 *Burnett v Surratt*, 67 SW2d 1041 (Tex Civ App 1934).

3 Frank D. Wagner, Annotation, *Enforcement of Preference Expressed by Decedent as to Disposition of His Body After Death*, 54 ALR3d 1037.

4 *Yome v Gorman*, 152 NE 126, 128 (NY 1926).

5 *Koon v Doan*, 300 Mich 662, 2 NW2d 878 (1942).

6 *Id.* at 667.

7 *Id.* at 666.

8 MCL 339.1810(n), MSA 18.425(1810)[n].

9 MCL 700.118, MSA 27.5118; see also MCL 700.332, MSA 27.5332 for identical language relating to the authority of an independent personal representative.

10 Michigan Funeral Directors Association, *Michigan Funeral Facts* (1997).

11 Wash Rev Code § 68.50.160(1).

12 MCL 333.10101 et seq., MSA 14.15(10101) et seq. Douglas G. Chalgian is an associate with Bernick, Omer & Radner, PC, of Lansing. He specializes in probate and elder law. He is a 1996 magna cum laude graduate of Thomas M. Cooley Law School, and he received his undergraduate degree from Knox College in 1981. Before practicing law, Mr. Chalgian worked as a journalist in print and television. He is chair-elect of the Michigan State Bar Law and Media Committee.

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Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the Summer 1998 issue of [Michigan Probate and Estate Planning Journal](#)

ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE

By Steven A. Mitchell

REFERRAL FEES: WHEN, WHY AND HOW?

Referral fees provide an incentive for practitioners to give optimum service to their clients by compensating the lawyer who recognizes that it may be more efficient for the client to have the matter handled by another competent lawyer. Indeed, the use of referral fees can significantly enhance income, solidify networking relationships, and appreciably increase the efficiency of the delivery of legal services.

The use of referral fees is regulated. There are several methods of paying referral fees, including dividing the proceeds of fees recovered on a contingent fee basis. No such arrangement is permitted in domestic relations or criminal law matters, however, because contingent fee agreements are prohibited in those areas of the law. See MRPC 1.5(d). In addition, there are certain relationships that prohibit the use of referral fees. Specifically, a lawyer is prohibited from receiving a referral fee when he or she would be prohibited from handling the representation due to a conflict of interests. See RI-116 (Feb 19, 1992).

The Michigan Rules of Professional Conduct limit the use of referral fees as follows:

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the client is advised of and does not object to the participation of all the lawyers involved; and
 - (2) the total fee is reasonable.

MRPC 1.5(e). The purpose of the rule is to "prohibit brokering; to protect a client from clandestine payment and employment; to prevent aggrandizement of fees." *Krajewski v Klawon*, 84 Mich App 532, 537, 270 NW2d 9 (1978).

The best way to ensure that the client "does not object" to the payment of a referral fee is to obtain the client's consent at the beginning of the representation. The timing of obtaining this consent can be critical to the referring attorney's ability to collect a referral fee.

May a lawyer condition the referral of a client's matter on securing an advance promise by the client to agree to the payment of a referral fee? In general, a lawyer may not condition his willingness to provide a referral on securing a "promise" in advance that he or she will be able to receive the benefit of a referral fee. The lawyer has an unconditional duty of loyalty to the client and must not let his or her own interests adversely affect the client's best interests. See MRPC 1.7(b). In other words, if the lawyer has independently concluded that it is in the best interests of the client to refer the matter to another, then the lawyer must do that, irrespective of the lawyer's ability to be compensated by a referral fee.

A lawyer's effectiveness in being able to obtain the client's consent to a referral fee depends primarily on the lawyer's ability to communicate. In most cases, the lawyer need only explain two things to the client: First, the lawyer should explain why the matter should be referred to another lawyer. Usually, if the reason is that the referral attorney has more expertise in the subject area and can handle the matter more efficiently with a greater prospect for a positive result, the client will readily understand and agree. Second, and equally important, the client usually has no problem with a referral fee arrangement once it is explained that the total fee will be no greater than if no referral fee were paid. Remember, the total fee must be reasonable, and it would surely be difficult for the client to understand how an increase in the total fee due to a referral could be reasonable.

Under what circumstances may a lawyer condition the referral of a matter on the referral lawyer's agreement to pay a referral fee? There is no requirement that a matter be referred to a particular lawyer. Consequently, when the referring lawyer is inquiring into whether the referral lawyer accepts such cases, the conversation can be prefaced with an inquiry whether the referral lawyer pays referral fees. If not, the referring lawyer is free to seek other counsel. However, the client should be informed of this criteria for seeking referral. The willingness of referral counsel to pay a referral fee should not be the sole criteria for referring the matter; the primary consideration is serving the client's best interests. In this regard, see MRPC 2.1, which provides:

In representing a client, a lawyer shall exercise independent professional judgment and shall render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Of course, the candor envisioned by such advice includes the lawyer's duty of loyalty, as discussed above.

In entering into a referral arrangement, it is best to do so in writing, at or near the outset of the referred representation. This will avoid misunderstanding between the referring and the referral lawyers as well as any misunderstanding on the part of the client. As stated, there are several types of specific referral arrangements that can be used, and one unpleasant and expensive experience can serve as a painful lesson on the benefits of reducing such arrangements to writing.

Michigan Ethics Opinion RI-158, dated March 15, 1993, sets forth some compelling public policy reasons for using referrals, notwithstanding the issue of referral fees:

The lawyer plays a unique role in the administration of justice, and owes a duty to ensure public understanding and acceptance of that system. The lawyer has a duty to exemplify the legal profession's

ideals of public service and has a difficult and challenging task of addressing conflicting responsibilities, particularly between the lawyer's own economic aspirations and in ensuring full and fair legal services to the public. In order to maintain an independent legal profession, it is important to preserve, maintain and enhance the profession and that lawyers work to assist their clients in obtaining their lawful objectives. When an individual lawyer is not able to meet the needs of the lawyer's clients for legal services, the lawyer has every right to assist that client in finding a proper provider of legal services.

In other words, the issue of fees aside, lawyers should recognize that they are not equipped to handle every problem presented by every client and should freely assist their clients in obtaining legal services that best address their needs.

At the same time, the practice of law is a business, and lawyers should be compensated for providing the service of an effective referral. If a lawyer is unsuccessful in obtaining an agreement from either the client or a referral attorney for referral compensation, a referral should nevertheless be made.

Although nothing prevents the lawyer from attempting to obtain an appropriate referral fee for this activity, when and if that objective cannot be reached, it would appear not to be in the interests of the legal profession or the public for the lawyer to refuse to provide a recommendation or referral to appropriate services.

Id. There is an excellent discussion in RI-158 of the lawyer's responsibilities to the client within the context of referrals and referral fees. Success in obtaining fees for the referral of clients to lawyers providing legal services depends on effective communication between the referring lawyer, the client, and the referral attorney, as well as observation of the minimum requirements set forth in the Michigan Rules of Professional Conduct and ethics opinions.

Steve Mitchell is a shareholder at Willingham & Coté, PC, where he concentrates his practice on representing and defending judges and lawyers in professional discipline cases. Your questions and comments are welcome at (800) 361-1542.

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Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the *Summer 1998* issue of *Michigan Probate and Estate Planning Journal*

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

By Hon. Phillip E. Harter Case summaries of new appellate cases, court rules, and statutes that affect the probate court may be found at the Calhoun County Court's Web site at <http://courts.co.calhoun.mi.us>.

DISCOVERY—FIDUCIARY—PROCEEDING—ACTION *Brown v Townsend* (In re *Brown*), No 194150, 1998 Mich App LEXIS 131 (May 5, 1998)

Ryan Terrell Brown was killed in an auto accident. His mother hired an attorney to pursue a wrongful death action against the drivers of the other vehicles involved, one of whom was Loretta Townsend. The attorney had a personal representative appointed to represent the estate of Ryan Terrell Brown. The attorney subsequently sent Townsend a letter requesting that she appear at his office to give a statement regarding the accident. A subpoena signed by the attorney was attached to the letter. No lawsuit had been filed concerning Townsend or anyone else. Townsend appeared as directed and, without the benefit of an attorney, gave a recorded statement that the probate court later characterized as a deposition. Townsend eventually retained an attorney, who asked for sanctions against the estate's attorney for conduct in violation of the court rules. The probate court granted sanctions of \$1,584.12, reasoning that the commencement of a probate "proceeding" was not the commencement of an "action" within the meaning of MCR 2.302(A)(1), which governs discovery.

The court of appeals reversed the decision of the probate court. They cited MCR 2.302(A)(1), which states, "[a]fter commencement of an action, parties may obtain discovery by any means provided in Subchapter 2.300 of these rules." The court then went to the rules governing probate courts and observed that MCR 5.101(A) provides that, in probate court, there are two forms of "action"— a "proceeding" and a "civil action"—while subsection (B) provides that a proceeding is commenced by the filing of a petition in the probate court. They concluded that an "action" sufficient to authorize the use of a deposition subpoena in probate court includes a properly commenced proceeding. They seemed to place great weight on the fact that the specialized rules concerning probate court controlled the definition of action.

With all due respect, this decision is clearly wrong, both logically and for policy reasons. The specific probate court rule that controls is MCR 5.301, which states,

"The general discovery rules apply in probate proceedings." Once one goes to those general rules, specifically MCR 2.302, one does not jump back to get vital definitions from the probate rules since one is now operating exclusively under the General Court Rules. Under the General Court Rules, the term "action" as it appears in MCR 2.302 must be interpreted as an adversarial proceeding. The definition of "action" should be limited to the context of the General Court Rules.

To read this rule in the manner that the court of appeals did throws open the door to the abuse of discovery. Its interpretation creates a situation in which fiduciaries such as personal representatives and conservators have more authority than those they are representing. Obviously if a decedent were alive or if the ward of a conservator were acting without a fiduciary, he or she would be bound by MCR 2.302, which requires an adversarial action before there can be discovery. Since anyone can have a voluntary conservatorship established for almost any reason, anyone can now get discovery at any time after such a conservator is appointed. The power to require another person to be sworn under oath and answer questions is significant and should not be treated lightly. Before it is authorized, there should be a particular matter on which it should focus. Without such a requirement, the mere appointing of a fiduciary under the Revised Probate Code would virtually give rise to unlimited discovery of any matter. I do not believe that such a broad interpretation is warranted, justified, or fair. However, it is now our law until overturned.

JURISDICTION—TRUSTS—ACTIONS AGAINST TRUSTEES AND ATTORNEYS *Manning v Amerman*, No 198817, 1998 Mich App LEXIS 138 (May 12, 1998)

The plaintiffs were beneficiaries of a trust. They filed an action in circuit court against the trustee and his attorney. They alleged that the trustee had breached his fiduciary duty, used the trust assets for his own purposes, and eviscerated the trust of its value, causing the plaintiffs to suffer financial and emotional damages. They alleged that the trustee's attorney was guilty of legal malpractice because he owed fiduciary duties to them and failed to disclose the detrimental actions of the trustee. The circuit court found that the plaintiffs' claims were within the exclusive jurisdiction of the probate court and granted summary disposition. The plaintiffs appealed the dismissal.

The court of appeals affirmed the dismissal. They pointed out that MCL 700.21(b)(v), MSA 27.5021[b][v] plainly provides that the probate court has exclusive jurisdiction over proceedings concerning the administration of trusts, including the determination of "any question arising in the administration or distribution of any trust." It was clear from the face of the complaint that the plaintiffs' emotional distress and malpractice claims arose in the administration of the trust. Therefore, based on the plain language of section 21 of the Revised Probate Code, they found the claims to be within the exclusive jurisdiction of the probate court.

TRUSTS—TRUSTEES—JURY TRIALS—PRUDENCE—GOOD FAITH *Old Kent Bank v Remainder Beneficiaries (In re Messer Trust)*, 457 Mich 371, 579 NW2d 73 (1998)

An inter vivos trust was established for the benefit of the settlor's son, John Messer, to provide income during his lifetime, with the remainder to go on his death to his three children. In 1991, John Messer died, and the remainder was distributed. The trustee filed a final accounting, petitioned for allowance of the accounting, and asked to be discharged. The remainder beneficiaries objected to the accounting. They claimed that the trustee should be surcharged for imprudent management of the trust assets. They also filed a jury demand. The probate court

struck the jury demand because it held that factual issues in an equitable proceeding were governed by the laws of equity and therefore were to be resolved by the trial court as trier of fact. The probate court ultimately ruled in favor of the trustee, and the beneficiaries appealed.

The court of appeals, in an unpublished opinion, reversed the probate court and remanded the case for a jury trial. They relied on *In re Allwardt's Estate*, 278 Mich 80, 270 NW 223 (1936). They felt that *Allwardt's Estate* was controlling but had been wrongly decided. They felt compelled to decide that the trust beneficiaries had a right to a jury trial regarding whether the trustee acted imprudently when dealing with the trust assets. The trustee appealed, and the Michigan Supreme Court granted leave.

The four justices writing the majority opinion stated the issue before them to be whether the remainder beneficiaries of an inter vivos trust are entitled to a jury trial in probate court of the issues whether the trustee acted in good faith, with ordinary diligence, and with prudence while maintaining the trust corpus. They held that the remainder beneficiaries were entitled to a jury trial on all factual issues except the issue of the trustee's prudence, because that determination is properly left to the probate court. The opinion was based on an extensive review of the history of jury trials in the probate courts of Michigan. The court reasoned that while the former distinction between inter vivos trusts, once governed by the law of equity, and testamentary trusts, governed by statute, no longer exists, the issue of a trustee's prudence has traditionally been deemed by Michigan courts to be a question for the trial court to determine. The justices pointed out that *Allwardt Estate* only held that the administrator's good faith should have been submitted to a jury and that it was improper to submit issues of a trustee's or an administrator's propriety and discretion to the jury. In summary, they held that the issue of a trustee's prudence is a question for the trial court and that all other factual issues are properly submitted as jury questions.

Three justices concurred and dissented from the majority opinion. They would have ruled that neither the prudence nor the good faith of an inter vivos trustee are issues triable by a jury because of the express provisions of MCL 600.857(l), MSA 27A.857(1).

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

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Probate and Estate Planning Section

The following article was published in the [Summer 1998](#) issue of [Michigan Probate and Estate Planning Journal](#)

DIGEST OF MICHIGAN PROBATE OPINIONS


By Patrick Boland

98-5

Meretricious relationship; contract (express); contract (implied); promissory estoppel; In the Matter of the Estate of Robert J. Blittner, Deceased; Judge Milton L. Mack, Jr., Wayne County. Summary disposition was denied in part when the decedent's long-time girlfriend alleged facts sufficient to support a finding of consideration independent from the meretricious relationship for an express contract to transfer property, even though the decedent's will did not name her as a beneficiary. However, there was no genuine issue of material fact regarding her claims of implied contract, promissory estoppel, and several others. MCL: 600.2918(2)(c); 700.22(1)(j); 700.140; 750.213; MSA: 27.5022(1)(j); 27.5140; 27A.2918(2)(c); 28.410; MCR: 2.116(C)(8); 2.116(C)(10); 2.116(G)(3); 2.602; 147 Mich 266 (1907); 197 Mich 68 (1917); 240 Mich 506 (1927); 242 Mich 668 (1928); 248 Mich 147 (1929); 334 Mich 432 (1952); 341 Mich 371 (1954); 381 Mich 409 (1968); 24 Mich App 633 (1970); 44 Mich App 570 (1973); 62 Mich App 54 (1975); 73 Mich App 405 (1977); 77 Mich App 721 (1977); 82 Mich App 120 (1978); 109 Mich App 204 (1981); 128 Mich App 259 (1983); 159 Mich App 69 (1987); 167 Mich App 112 (1988); 168 Mich App 70 (1988); 191 Mich App 215 (1991); 194 Mich App 580 (1992); 200 Mich App 438 (1993); 202 Mich App 366 (1994); 203 Mich App 374 (1994); 204 Mich App 122 (1994); 204 Mich App 392 (1994); 205 Mich App 610 (1994); 209 Mich App 661 (1995); 210 Mich App 568 (1995); 213 Mich App 521 (1995); 226 Mich App 584 (1997).

98-6

Disclaimer; In the Matter of the Estate of Wilfred G. Stokes, Deceased; Judge Milton L. Mack, Jr., Wayne County. The petitioner's attempted disclaimer of a survivorship interest in jointly owned stock was held invalid because it did not accurately describe the disclaimed property, the petitioner took physical control of the stock, the disclaimer was improperly delivered, and Michigan's new Disclaimer of Property Interests Act does not provide a method for disclaiming jointly held property. MCL: 554.871 et seq.; 557.151; MSA: 26.211; 26.1236(871) et seq.; MCR: 2.116(C)(10); 2.116(G)(3); 2.602; 110 Mich App 672 (1981); 167 Mich App 112 (1988); 191 Mich App 215 (1991); 194 Mich App 580 (1992); 203 Mich App 374 (1994); 209 Mich App 661 (1995); 210 Mich App 568 (1995); 213 Mich App 263 (1995); 213 Mich App 521 (1995); 215 Mich App 512 (1996); 219 Mich App 405 (1996)



Julia R. Hathaway is an attorney, a student in the Wayne State University Library and Information Science Program, and a graduate research assistant in the WSU Law Library.

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Probate and Estate Planning Section

Council Nominations

Summer 1998

In accordance with Article IV, § 1 of the Bylaws of the Probate and Estate Planning Section, the Nominating Committee of the Section hereby submits its report of the nominations for the election of officers and members of the Council as follows:

Officers for 1998-1999

Brian V. Howe, Chairperson
Richard C. Lowe, Chairperson-Elect
Kenneth E. Konop, Vice-Chairperson
John A. Scott, Secretary
Dirk Hoffius, Treasurer

Council Members for Seats Open in September 1998

For a second three-year term expiring at the close of the annual meeting in 2001:

Michael J. McClory
Mary Ann Zito

For a first three year term expiring at the close of the annual meeting in 2002:

Marie R. Deveney
Hon. John R. Monaghan
Richard A. Shapack

The nominations will be put before the membership for a vote at the annual meeting of the Section to be held in Banquet Rooms 6 and 8 on the first floor of the Lansing Center in Lansing, Michigan, on Friday, September 18, 1998, at 9:30 a.m. Other nominations may be submitted from the floor.

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