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## *Probate and Estate Planning Section*

# Michigan Probate and Estate Planning Journal

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## *Probate and Estate Planning Section*

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

### FROM THE CHAIRPERSON'S DESK

By Brian V. Howe

As I write my last column as chairperson, it is with a great deal of gratitude to all of the Council and Section members who have made my job so much easier. The willingness of Probate and Estate Planning Section members to volunteer and to assist with educational programs, special projects, and Section business is unequaled in the State Bar.

Although I cannot begin to recognize all of the individuals who have contributed to the Section during my term, I would like to mention a few. Our *Journal* editor, Lauren Underwood, with the assistance of former editor Henry Grix has been responsible for the publication of *Michigan Probate and Estate Planning Journal*. Her persistence and follow-up have been tremendous in both obtaining authors and seeing that their articles are prepared on schedule. Lauren has even put up with my being late with a couple of columns.

Our Committee on Special Projects is chaired by Douglas Mielock, who holds meetings for an hour before every Council meeting. Doug's committee reviews current issues, pending legislation, and requests from Section members to determine what topics will be given priority. The committee is also responsible for proposing legislation or supporting legislation that meets with Council objectives.

Ramon (Fred) Rolf's Committee on Ethics, Unauthorized Practice, and Image also has been very active this year and has succeeded in finally getting some attention from the state bar regarding the unauthorized practice of law. We have all seen "trust kits" and seminars offered by various groups to resolve the estate planning problems of Michigan residents. Unfortunately, the inadequacies of these products are not discovered until death. Currently the state bar is looking into the planning efforts of one group, which will result in litigation against it.

Judge John Monaghan and his Committee on Court Rules and Forms are also doing an outstanding job in developing new rules and forms for EPIC. His committee has been meeting monthly in East Lansing and has indicated that their work will be completed before April 1, 2000.

Finally, no recognition would be complete without mentioning the continuing

efforts of the "Father of EPIC," John Martin. John continues to work on behalf of the Council and the Institute of Continuing Legal Education (ICLE) to ensure the publication of the Estates and Protected Individuals Code (EPIC) with commentary by February 2000. He has also proposed a number of changes to see that the code is technically correct by its effective date on April 1, 2000. Again, John is owed a debt of gratitude by all of us for his dedication, time, and effort in the drafting and passage of EPIC.

### **Legislation**

It appears that our efforts to derail House Joint Resolution F to abolish the Michigan Probate Courts have been successful for the time being. Both the bill's sponsor and its supporters on the Michigan Supreme Court are letting it sit in committee and apparently will leave it there due to strong opposition. I want to thank all of you who wrote letters and testified against the bill for your efforts. Special thanks to Susan Westerman, who participated in and arranged for a large turnout of the bill's opponents at the legislative hearing that was held in Washtenaw County. We should remain vigilant to see that the bill does not resurface in the future.

The bill introducing the new Revised Principal and Income Act remains in committee and may not pass this term. There is also a movement to abolish the Rule Against Perpetuities, which has already happened in three states. Should a bill be introduced to this effect, your Council will decide on appropriate action at that time.

### **Michael W. Irish Award**

This year's Michael W. Irish Award was presented to James A. Kendell of Midland. Jim is a former Council chairperson and has been active for many years in both the Section and community activities. For those of you who are not familiar with this award, it was established in 1995 following the death of our chairperson elect, Michael W. Irish. Mike had been very active in the educational efforts of both our Section and ICLE. He was also a leader in many community activities, which brought about the idea of an award in his honor for similar efforts. Our thanks to Jim for all of his contributions to both our Section and his community.

### **Publications**

Most of you know that ICLE has published the full text of EPIC with conversion tables from the RPC to EPIC and vice versa. In February, ICLE will publish EPIC with commentary by John Martin, reporter for the drafting committee, a book we are all anxious to own.

Professor Larry Waggoner, from the University of Michigan Law School, who has served for several years as the reporter for the new *Restatement of the Law Third, Property (Wills and Other Denotive Transfers)* (1999), has advised me that volume 1 is now available from the American Law Institute. This volume covers intestacy, execution and revocation of wills, and various rules of construction that apply when events change from the date of the execution of the will until the time of the testator's death. Larry further indicated that many of the rules adopted in the restatement track the provisions of the Revised Uniform Probate Code and hence those of EPIC. This volume could be very useful in your probate and estate

planning practice.

In my initial column, I indicated that I was honored to have been elected your chairperson for 1998-1999. I would like to repeat this comment, to add that it has been a privilege to serve as your chairperson, and to indicate that I will continue my efforts on behalf of the Section.

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## Probate and Estate Planning Section

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

### If It's the 1990s, It Must Be Time for Another Principal and Income Act

#### E. James Gamble

*Editor's Note: A new Uniform Principal and Income Act was introduced into the Michigan legislature in 1999 as Senate Bill 393. The Senate bill is based on a uniform act that the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment by all states in 1997. One of the two reporters for the uniform law drafting project was the author of the following article, E. James Gamble, of Bloomfield Hills. The uniform act, if adopted in Michigan, would update Michigan's current Revised Uniform Principal and Income Act, which has been in effect since 1966 and which was based on the 1962 version of the uniform law. The proposed new act would coordinate Michigan's principal and income provisions with the "prudent investor" rules included in the Estates and Protected Individuals Code (EPIC), scheduled to take effect on April 1, 2000. The most significant provision of the proposed Uniform Principal and Income Act is Section 104, which gives a trustee broad discretion to make adjustments between income and principal. The following article surveys the act in general and addresses more specifically a trustee's power to make adjustments under certain circumstances. The article is an excerpt drawn from Mr. Gamble's paper presented in January 1998 at the 32d Annual Philip Heckerling Institute on Estate Planning of the University of Miami School of Law.*

Principal and income legislation is significant for trusts whose terms describe a beneficiary's distribution rights in terms of the right to receive some or all of the trust's income. For trusts whose terms describe the current beneficiary's distribution rights exclusively in terms of an annuity or as a percentage of the trust's asset value, or that give the trustee complete discretion in deciding whether and to what extent distributions should be made to the current beneficiary, rules that tell a trustee how to allocate receipts and disbursements to or between principal and income are of little or no significance. The Uniform Principal and Income Act (1997) (the "1997 Act")<sup>1</sup> is primarily for - income-distribution trusts, although annuity trusts and unitrusts may be affected by the rules for the determination and distribution of income from a decedent's estate or a terminating income interest and the rules for the apportionment of

receipts and disbursements at the beginning and end of an income interest.

The 1997 Act is a revision of the Uniform Principal and Income Act (1931)<sup>2</sup> and the Revised Uniform Principal and Income Act (1962).<sup>3</sup> All three Acts deal not just with principal and income allocation matters, but with four questions that affect the rights of income and remainder beneficiaries:

1. How is income earned during the probate of an estate to be distributed to trusts and to persons who receive outright bequests of specific property, pecuniary gifts, and the residue?
2. When an income interest in a trust begins (i.e., when a person who creates the trust dies or when she transfers property to a trust during life), what property is principal that will eventually go to the remainder beneficiaries and what is income?
3. When an income interest ends, who gets the income that has been received but not distributed, or that is due but not yet collected, or that has accrued but is not yet due?
4. After an income interest begins and before it ends, how should its receipts and disbursements be allocated to or between principal and income?

The 1997 Act has two purposes. One is to revise the prior Act to support the widespread use of the revocable trust as a will substitute, to change the rules in those Acts that experience has shown need to be changed, and to establish new rules to cover situations not provided for in the prior Acts, including rules for financial instruments invented since 1962. The other purpose is to implement the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act,<sup>4</sup> especially the principle of investing for total return, without having to be concerned about realizing a particular portion of the total return in the form of "income" as traditionally perceived in terms of interest, dividends, and rents.

### **Changes from the 1931 and 1962 Acts**

Changes in the traditional sections are of three types: new rules that deal with situations not covered by the prior Acts, clarification of provisions in the 1962 Act, and changes to rules in the prior Acts.

#### **A. New Rules**

Issues addressed by some of the more significant new rules include:

1. The application of the probate administration rules to revocable living trusts after the settlor's death and to other terminating trusts.<sup>5</sup>
2. The payment of interest or some other amount on the delayed payment of an outright pecuniary gift that is made pursuant to a trust agreement instead of a will when the agreement or state law does not provide for such a payment.<sup>6</sup>
3. The allocation of net income from partnership interests acquired by the trustee other than from a decedent (the old Acts deal only with partnership interests acquired from a decedent).<sup>7</sup>
4. An "unincorporated entity" concept has been introduced to deal with businesses operated by a trustee, including farming and livestock operations, and investment activities in rental real estate, natural resources, timber, and derivatives.<sup>8</sup>
5. The allocation of receipts from zero-coupon bonds and other discount

obligations.[9](#)

6. The allocation of net income from harvesting and selling timber between principal and income.[10](#)
7. The allocation between principal and income of receipts from derivatives, options, and asset-backed securities.[11](#)
8. Disbursements made because of environmental laws.[12](#)
9. Income tax obligations resulting from the ownership of S corporation stock and interests in partnerships.[13](#)
10. The power to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply.[14](#)

## **B. Clarifications and Changes in Existing Rules**

A number of matters provided for in the prior Acts have been changed or clarified in this revision, including the following:

1. An income beneficiary's estate will be entitled to receive only net income actually received by a trust before the beneficiary's death and not items of accrued income.[15](#)
2. Income from a partnership is based on actual distributions from the partnership, in the same manner as corporate distributions.[16](#)
3. Distributions from corporations and partnerships that exceed 20% of the entity's gross assets will be principal whether or not intended by the entity to be a partial liquidation.[17](#)
4. Deferred compensation is dealt with in greater detail in a separate section.[18](#)
5. The 1962 Act rule for "property subject to depletion," (patents, copyrights, royalties, and the like), which provides that a trustee may allocate up to 5% of the asset's inventory value to income and the balance to principal, has been replaced by a rule that allocates 90% of the amounts received to principal and the balance to income.[19](#)
6. The percentage used to allocate amounts received from oil and gas has been changed—90% of those receipts are allocated to principal and the balance to income.[20](#)
7. The unproductive property rule has been eliminated for trusts other than marital deduction trusts.[21](#)
8. Charging depreciation against income is no longer mandatory, and is left to the discretion of the trustee.[22](#)

## **The Prudent Investor Rule and the 1997 Act**

The basic rules that apply to the investment of trust assets were restated in 1992.[23](#) In 1994 the Uniform Prudent Investor Act was approved by the National Conference of Commissioners on Uniform State Laws.[24](#)

The Prefatory Note to the Uniform Prudent Investor Act[25](#) states that the Act "makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the Restatement (Third) of Trusts: Prudent Investor Rule.

"1. The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term 'portfolio' embraces all the trust's assets. UPIA § 2(b).

"2. The tradeoff in all investing between risk and return is identified as the fiduciary's central consideration. UPIA § 2(b).

"3. All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. UPIA § 2(e).

"4. The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. UPIA § 3.

"5. The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. UPIA § 9.

With the abolition of categoric restrictions on types of investments and emphasis on the tradeoff between risk and return, a trustee may invest for higher yields, not necessarily derived from interest, dividends, and rents. However, trustees operating under documents that define a beneficiary's distribution rights in terms of the trust's income are forced to make investment decisions in significant part by the need to have a certain portion of the total return be realized in the income component of that return to insure impartiality between the income and remainder beneficiaries.[26](#)

Recent articles advocate abandoning the use of "income" to describe distribution rights and substituting provisions based on a percentage of a trust's asset value or changes in that value, and they deserve careful study.[27](#) However, that solution is not available for irrevocable trusts, and in many other trusts it will not be used for diverse reasons that spring largely from a natural human tendency to embrace change slowly. Professor Langbein has concluded that ". . . some decades will be needed to harmonize fully the present tensions among total return-investing as facilitated by the prudent investor paradigm, recognition-based income taxation, and principal-and-income law."[28](#)

The 1997 Act contains two significant provisions to aid the trustee of an income-distribution trust who operates under the prudent investor rule. One is the power to adjust between principal and income that Section 104 gives to such a trustee and the other is the abolition of the underproductive property rule.

### **Structure of the 1997 Act**

The sections of the 1997 Act are organized in six Articles:

Article 1—Definitions and General Principles[29](#)

Article 2—Decedent's Estate or Terminating Trust[30](#)

Article 3—Apportionment at Beginning and End of Income Interest[31](#)

Article 4—Allocation of Receipts During Administration of Trust

Part 1—Character of Receipts From Entities[32](#)

Part 2—Receipts Not Normally Apportioned[33](#)

Part 3—Receipts Normally Apportioned[34](#)

## Article 1—Definitions and General Principles (§§ 101–104)

The 1962 Act contains definitions for "income beneficiary,"<sup>37</sup> "inventory value,"<sup>38</sup> "remainderman,"<sup>39</sup> and "trustee."<sup>40</sup> The 1997 Act adds several more definitions, but drops the definition for inventory value because the provisions in which that term was used in the 1962 Act have either been eliminated (in the case of the underproductive property provision<sup>41</sup>) or changed in a way that eliminates the need for the term (in the case of bonds and other money obligations,<sup>42</sup> property subject to depletion,<sup>43</sup> and the method for determining entitlement to income from a probate estate).<sup>44</sup>

The definitions in the 1997 Act of income beneficiary<sup>45</sup> and income interest<sup>46</sup> cover both mandatory and discretionary beneficiaries and interests. There are no definitions for "discretionary income beneficiary" or "discretionary income interest" because those terms are not used in the Act.

In the definition of "net income,"<sup>47</sup> the reference to "transfers under this Act to or from income" means transfers made under Sections 104(a), 412(b), 502(b), 503(b), 504(a), and 506.

"Terms of the trust"<sup>48</sup> is used in the 1997 Act in preference to "terms of the trust instrument" (the phrase used in the 1962 Act)<sup>49</sup> or "governing instrument" (used in early drafts of the 1997 Act) to make it clear that the Act applies to oral trusts as well as those whose terms are expressed in written documents.<sup>50</sup> Constructional preferences or rules would also apply, if necessary, to determine the terms of the trust.<sup>51</sup>

The general rules in the 1962 Act about the duty of the trustee<sup>52</sup> are restated in Section 103(a) of the 1997 Act, without changing their substance, to emphasize that the 1997 Act contains only default rules and that provisions in the terms of the trust are paramount. Unlike the 1962 Act, however, Section 103(a) specifically applies to matters within the scope of Article 2 (income of an estate or terminating income interest) and Article 3 (apportionment at the beginning and end of an income interest) as well as to the allocation of receipts to or between principal and income. The 1962 Act applies only to the allocation of receipts and disbursements.<sup>53</sup>

The 1962 Act provides that a discretionary allocation made by the trustee that is contrary to a rule in the Act should not give rise to an inference of imprudence or partiality by the trustee.<sup>54</sup> That rule is now part of Section 103(a)(2). Neither the 1997 Act nor its predecessors contain rules regarding limits on the exercise of a trustee's discretion, since that subject is covered adequately elsewhere.<sup>55</sup>

The 1997 Act deletes the language that appears at the end of 1962 Act Section 2(a)(3)—"and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their affairs"—because persons of ordinary prudence, discretion and judgment, acting in the management of their own affairs don't normally think in terms of the interests of successive beneficiaries. If there is an analogy to an individual's decision-making process, it is probably the individual's decision to spend or to save, but this is not a useful guideline for trust administration. No case has been found in which a court has

relied on the "prudent man" rule of the 1962 Act.

### **A. Question for Which There Is No Provision**

Section 103(a)(4) allocates receipts and disbursement to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Act. This may occur because money is received from a financial instrument not available when the 1997 Act was drafted (inflation indexed bonds might have fallen into this category had they been announced after the 1997 Act was approved by the Commissioners on Uniform State Laws) or because a transaction is of a type, or occurs in a manner, not anticipated by the drafter of the trust instrument or the Drafting Committee for the 1997 Act.

Allocating a receipt or disbursement to principal in situations not provided for by either the governing instrument or the Act implements the rule that requires a trustee to administer the trust impartially, based on what is fair and reasonable to both income and remainder beneficiaries. For example, allocating to principal a disbursement for which there is no provision in the Act or the terms of the trust preserves the income beneficiary's level of income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with Section 103(b), after considering the return from the portfolio as a whole, the trustee may consider exercising the power to adjust under Section 104(a).

### **B. Duty of Impartiality**

Whenever there are two or more beneficiaries, a trustee is under a duty to deal impartially with them.<sup>56</sup> This rule applies whether the beneficiaries' interests in the trust are concurrent or successive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it.<sup>57</sup> "The precise meaning of the trustee's duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time."<sup>58</sup>

The terms of a trust may provide that the trustee, or an accountant engaged by the trustee, or a committee of persons who may be family members or business associates, shall have the power to determine what is income and what is principal. If the terms of a trust provide that the 1997 Act specifically or principal and income legislation in general does not apply to the trust but fail to provide a rule to deal with a matter provided for in the 1997 Act, the trustee has an implied grant of discretion to decide the question. Section 103(b) provides that the rule of impartiality applies in the exercise of such a discretionary power to the extent that the terms of the trust do not provide that one or more of the beneficiaries are to be favored. The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary.

### **Trustee's Power to Adjust (§ 104)**

The purpose of Section 104 is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents. Section 104(a) authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 103(a), that he is unable to comply with Section 103(b). In deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 104(b), but the trustee may not make an adjustment in circumstances described in Section 104(c).

Section 104 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of an investment decision made by the trustee under the prudent investor rule. The paramount consideration in applying Section 104(a) is the requirement in Section 103(b) that "a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." The power to adjust is subject to control by the court to prevent an abuse of discretion.<sup>59</sup>

Section 104 will be important for trusts that are irrevocable when a State adopts the prudent investor rule by statute or judicial approval of the rule in *Restatement: Prudent Investor Rule*. Wills and trust instruments executed after the rule is adopted can be drafted to describe a beneficiary's distribution rights in terms that do not depend upon the amount of trust accounting income, but to the extent that drafters of trust documents continue to describe an income beneficiary's distribution rights by referring to trust accounting income, Section 104 will be an important tool in trust administration.

### **A. Three Conditions to the Exercise of the Power to Adjust**

The first of the three conditions that must be met before a trustee can exercise the power to adjust—that the trustee invest and manage trust assets as a prudent investor—is expressed in the 1997 Act by language derived from the Uniform Prudent Investor Act, but the condition will be met whether the prudent investor rule applies because the Uniform Act or other prudent investor legislation has been enacted, the prudent investor rule has been adopted by the courts, or the terms of the trust require it. Even if a state's legislature or courts have not formally adopted the rule, the *Restatement: Prudent Investor Rule* establishes the prudent investor rule as an authoritative interpretation of the common law prudent man rule, referring to the prudent investor rule as a "modest reformulation of the Harvard College dictum and the basic rule of prior Restatements."<sup>60</sup> As a result, there is a basis for concluding that the first condition may be satisfied in virtually all states except those in which a trustee is permitted to invest only in assets set forth in a statutory "legal list."

The second condition will be met when the terms of the trust require all of the income to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a

trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or the greater of the trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust's income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 103(a), i.e., she must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that she is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that she is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion—that she is unable to administer the trust impartially or that she is unable to achieve the degree of partiality required or permitted—she may exercise the power to adjust under Section 104(a).

## **B. Impartiality and Productivity of Income**

The duty of impartiality between income and remainder beneficiaries is linked to the trustee's duty to make the portfolio productive of trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust's income. The 1962 Act implies that the duty to produce income applies on an asset by asset basis because the right of an income beneficiary to receive "delayed income" from the sale proceeds of underproductive property arises if "any part of principal . . . has not produced an average net income of at least 1% per year of its inventory value for more than a year. . . ."61 Under the prudent investor rule, "[t]o whatever extent a requirement of income productivity exists, . . . the requirement applies not investment by investment but to the portfolio as a whole."62

The power to adjust under Section 104(a) is also to be exercised by considering net income from the portfolio as a whole and not investment by investment. Section 413(b) of the 1997 Act eliminates the underproductive property rule in all cases other than trusts for which a marital deduction is allowed. The rule applies to a marital deduction trust if the trust's assets "consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets . . ."63—in other words, it applies by reference to the portfolio as a whole.

While the purpose of the power to adjust in Section 104(a) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio's total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio's liquidity as a whole to make that distribution.64

## **C. Factors to Consider in Exercising the Power to Adjust**

Section 104(b) requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 2(c) of the Uniform Prudent Investor Act sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section 2(c) of the Uniform Prudent Investor Act are the source of the factors in paragraphs (3) through (6) and (8) of Section 104(b) (modified where necessary to adapt them to the purposes of the 1997 Act) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust.

If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary under Section 104. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

#### **D. Assets Received from the Settlor**

Section 3 of the Uniform Prudent Investor Act provides that "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversify, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of the 1997 Act that apply to the retained assets.<sup>65</sup>

#### **E. Limitations on the Power to Adjust**

The purpose of subsections (c)(1) through (4) of Section 104 is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (c)(5), (6) and (8) deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and subsection (c)(7) denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under Section 104(c)(1), a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this section does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse. Section 104(c)(1) applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest property (QTIP) trust only if and to the extent the fiduciary makes the election required to obtain the tax deduction. Section 104(c)(1) does not apply to a so-called "estate" trust. This type of trust qualifies for the marital deduction because the terms of the trust require the

principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies; it is not necessary for the terms of an estate trust to require the income to be distributed annually.<sup>66</sup>

Section 104(c)(3) applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary's right to receive a fixed annuity or a fixed fraction of the value of a trust's assets is not subject to adjustment under Section 104(a). Section 104(c)(3) does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust's income, whichever is greater, Section 104(c)(3) does not prevent a trustee from making an adjustment under Section 104(a) in determining the amount of the trust's income.

If Section 104(c)(5), (6), (7), or (8), prevents a trustee from exercising the power to adjust, Section 104(d) permits a cotrustee who is not subject to the provision to exercise the power unless the terms of the trust do not permit the cotrustee to do so.

### F. Release of the Power to Adjust

Section 104(e) permits a trustee to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden. For example, if possessing the power would diminish the actuarial value of the income interest in a trust for which the income beneficiary's estate may be eligible to claim a credit for property previously taxed if the beneficiary dies within ten years after the death of the person creating the trust, the trustee is permitted under Section 104(e) to release just the power to adjust from income to principal.

### G. Trust Terms that Limit a Power to Adjust

Section 104(f) applies to trust provisions that limit a trustee's power to adjust. Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of the 1997 Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 104(a) if the need for adjustment arises because the trustee is operating under the prudent investor rule. Instruments containing such provisions that are executed after the adoption of the 1997 Act should specifically refer to the power to adjust if the settlor intends to forbid its use.<sup>67</sup>

### H. Examples

The following examples illustrate the application of Section 104:

**Example (1):** T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a

smaller amount of dividend and interest income. After considering the factors in Section 104(b), T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary.

**Example (2):** T is the trustee of a trust that requires the income to be paid to the settlor's son C for life, remainder to C's daughter D. In a period of very high inflation, T purchases bonds that pay double-digit interest and determines that a portion of the interest, which is allocated to income under Section 406 of 1997 Act, is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal.

**Example (3):** T is the trustee of a trust that requires the income to be paid to the settlor's sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E's income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E's health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E's accustomed standard of living, she is entitled to receive from the trust the degree of beneficial enjoyment normally accorded a person who is the sole income beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment.

**Example (4):** T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for "dire emergencies only." The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust under Section 104(a) to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust.[68](#)

**Example (5):** T is the trustee of a trust for the settlor's child. The trust owns a diversified portfolio of marketable financial assets with a value of \$600,000, and is also the sole beneficiary of the settlor's IRA, which holds a diversified portfolio of marketable financial assets with a value of \$900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under Section 409(c) of the 1997 Act. The total return on the IRA's assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with Section 103(b)

include the total return from all of the trust's assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be subject to income tax on the amount that T distributes to the income beneficiary.

**Example (6):** T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to Section 501(3) of the 1997 Act. After considering the return from the trust's portfolio as a whole and other relevant factors described in Section 104(b), T may exercise the power to adjust under Section 104(a) to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with Section 103(b).

**Example (7):** T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by \$2,000. If the fee had been paid directly by the trust, one-half of the fee would have been paid from income under Section 501(1) and the other one-half would have been paid from principal under Section 502(a)(1). After considering the total return from the portfolio as a whole and other relevant factors described in Section 104(b), T may exercise its power to adjust under Section 104(a) by transferring \$1,000, or half of the trust's proportionate share of the fee, from principal to income.

## Notes

1. Sections 101 to 104 of the 1997 Act are reprinted at the conclusion of this article. The 1997 Act was approved and recommended for enactment by all states at the Annual Conference Meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL), July 25–August 1, 1997, and approved by the American Bar Association in February 1998. The members of the Drafting Committee were Matthew S. Rae, Jr. (Chair), Frank W. Daykin, Joanne B. Huelsman, L. S. Kurtz, Jr., Edward F. Lowry, Jr., Robert A. Stein, and Harry M. Walsh. John H. Langbein, NCUSL Division Chair, was actively involved in the project from its inception. Joel C. Dobris and E. James Gamble were co-reporters. Other individuals reviewed drafts of the Act and participated in the Committee's meetings as advisers and observers. Advisers from the American Bar Association were Dave L. Cornfield and Ronald C. Link. Observers were Alexander P. Misheff (American Bankers Association); Byrle M. Abbin, Stephen S. McConnel, and David Schaengold (American Institute of Certified Public Accountants); and Anne K. Hilker (California State Bar Association).

2. 7B U.L.A. 187 (1985 & Supp. 1997) [hereinafter the 1931 Act]. The Act was approved by NCCUSL in 1931. See generally Charles E. Clark, *Interpretation of Proposed Uniform Principal and Income Act*, 54 TR. Companies 723 (1932). Dean Clark drafted the 1931 Act.

3. 7B U.L.A. 150 (1985 & Supp. 1997) [hereinafter the 1962 Act]. The Act was approved by NCCUSL in 1962. The Revised Uniform Principal and Income Act was adopted in Michigan by 1965 PA 340, and it may be found at MCL §§555.51 et seq.; MSA §§26.79(1) et seq. See generally E. James Gamble, *The Revised Uniform Principal and Income Act* (1966); George G. Bogert, *Uniform Principal and Income Act Revised: Newly Promulgated Act Makes Major Changes*, 101 TR.

& EST. 787 (1962); George G. Bogert, *The Revised Uniform Principal and Income Act*, 38 NOTRE DAME LAW. 50 (1962); Allison Dunham, *Highlights of Revised Principal and Income Act*, 102 TR. & EST. 210 (1963); Panel Discussion, *Uniform Principal and Income Act: Discussions of Newly Promulgated State*, 101 TR. & EST. 894 (1962).

4. 7B U.L.A. 18 (Supp. 1997). John H. Langbein served as reporter for the Act, which was approved by NCCUSL in 1994.

5. 1997 Act §§ 201–202, 301–303.

6. *Id.* § 201(3).

7. *Id.* § 401.

8. *Id.* § 403.

9. *Id.* § 406(b).

10. *Id.* § 412.

11. *Id.* § 414–415.

12. *Id.* § 502(a)(7).

13. *Id.* § 505.

14. *Id.* § 506.

15. *Id.* § 303.

16. *Id.* § 401.

17. *Id.* § 401(d)(2).

18. *Id.* § 409.

19. *Id.* § 410.

20. *Id.* § 411.

21. *Id.* § 413.

22. *Id.* § 503.

23. See *Restatement (Third) of Trusts: Prudent Investor Rule* (1992) [hereinafter *Restatement: Prudent Investor Rule*]. As to modern investing, see, e.g., the Preface to, terms of, and Comments to the Unif. Prudent Investor Act (1994); the discussion and reporter's note by Edward C. Halbach, Jr. in *Restatement: Prudent Investor Rule*; John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641 (1996); Bevis Longstreth, *Modern Investment Management and the Prudent Man Rule* (1986); John H. Langbein & Richard A. Posner, *The Revolution in Trust Investment Law*, 62 A.B.A.J. 887 (1976); and Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. Rev. 52 (1987). See also R. A. Brearly, *An Introduction to Risk and Return from Common Stocks* (2d ed. 1983); Jonathan R. Macey, *An Introduction to Modern Financial Theory* (2d ed. 1998). As to the need for principal and income reform, see, e.g., Joel C. Dobris, *Real*

*Return, Modern Portfolio Theory and College, University and Foundation Decisions on Annual Spending From Endowments: A Visit to the World of Spending Rules*, 28 Real Prop. Prob. & Tr. J. 49 (1993); Joel C. Dobris, *The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?*, 28 Real Prop., Prob. & Tr. J. 393 (1993); and Kenneth L. Hirsch, *Inflation and the Law of Trusts*, 18 Real Prop., Prob. & Tr. J. 601 (1983).

24. 7B U.L.A. 18 (Supp. 1997).

25. *Id.* at 19. The Prefatory Note refers to the Unif. Prudent Investor Act as UPIA.

26. *See Restatement: Prudent Investor Rule* § 227 cmt. i.

27. *See, e.g.*, William L. Hoisington, *Modern Trust Design: New Paradigms for the 21st Century*, 31 Philip E. Heckerling Inst. On Est. Plan. ¶ 600 (1997); Jerold I. Horn, *The Prudent Investor Rule—Impact on Drafting and Administration of Trusts*, 20 ACTEC Notes, Summer 1994, at 26; Robert B. Wolf, *Defeating the Duty to Disappoint Equally—The Total Return Trust*, 23 ACTEC Notes, Summer 1997, at 46 and 32 Real Prop., Prob. & Tr. J. 45 (1997); and Robert B. Wolf, *Total Return Trusts—Can Your Client Afford Anything Less?* ACTEC Notes, (Summer 1998) and 33 Real Prop., Prob. & Tr. J. (Spring 1998).

28. John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641, 669 (1996).

29. 1997 Act §§ 101–104.

30. *Id.* §§ 201–202.

31. *Id.* §§ 301–303.

32. *Id.* §§ 401–403.

33. *Id.* §§ 404–407.

34. *Id.* §§ 408–415.

35. *Id.* §§ 501–506.

36. *Id.* §§ 601–605.

37. 1962 Act § 1(1).

38. *Id.* § 1(2).

39. *Id.* § 1(3).

40. *Id.* § 1(4).

41. *Id.* § 12.

42. *Id.* § 7.

43. *Id.* § 11.

44. *Id.* § 5(b)(2).

45. 1997 Act § 102(5).

46. *Id.* § 102(6)
47. *Id.* § 102(8).
48. *Id.* § 102(12).
49. See, e.g., 1962 Act § 2(a)(1).
50. The definition of "terms of the trust" is based on *Restatement (Second) of Trusts* § 4 (1959) and *Restatement (Third) of Trusts* § 4 (Tent. Draft No. 1, 1996).
51. See *Restatement of the Law (Third) Property (Donative Transfers)* § 11.3 (Tent. Draft No. 1, 1995).
52. 1962 Act § 2(a).
53. *Id.*
54. *Id.* § 2(b).
55. The general rule is that, if a discretionary power is conferred upon a trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion. RESTATEMENT (SECOND) OF TRUSTS § 187. The situations in which a court will control the exercise of a trustee's discretion are discussed in the comments to § 187. See also *id.* § 233 cmt. *p.*
56. RESTATEMENT: PRUDENT INVESTOR RULE § 183 (1992).
57. *Id.* § 183, cmt. *a.*
58. *Id.* § 232, cmt. *c.*
59. RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). See also *id.* §§ 183, 232, 233, cmt. *p* (1959)
60. RESTATEMENT: PRUDENT INVESTOR RULE, Introduction, at 5.
61. 1962 Act § 12.
62. RESTATEMENT: PRUDENT INVESTOR RULE § 227, cmt. *i*, at 34.
63. 1997 Act § 413(a).
64. For a discussion of investment considerations involving specific investments and techniques under the prudent investor rule, see RESTATEMENT: PRUDENT INVESTOR RULE § 227, cmts. *k–p.*
65. See 1997 Act § 104(b)(5); Unif. Prudent Investor Act § 3, cmt, 7B U.L.A. 18, at 25–26 (Supp. 1997); RESTATEMENT: PRUDENT INVESTOR RULE § 229 and cmts. *a–e.*
66. Reg. § 20.2056(c)-2(b)(1)(iii).
67. See generally, Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).
68. See *id.*

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## *Probate and Estate Planning Section*

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

# Uniform Principal and Income Act (1997) §§101–104

## Article 1

### Definitions and Fiduciary Duties

**Section 101. Short title.** This [Act] may be cited as the Uniform Principal and Income Act (1997).

**Section 102.** Definitions. In this [Act]:

(1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir [, legatee,] and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in [Article] 4.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or

authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this [Act] to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

### **Section 103.** Fiduciary duties; general principles.

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of [Articles] 2 and 3, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this [Act];

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this [Act];

(3) shall administer a trust or estate in accordance with this [Act] if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this [Act] do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under Section 104(a) or a discretionary power of administration regarding a matter within the scope of this [Act], whether granted by the terms of a trust, a will, or this [Act], a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this [Act] is presumed to be fair and reasonable to all of the beneficiaries.

**Section 104.** Trustee's power to adjust.

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 103(a), that the trustee is unable to comply with Section 103(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) the nature, purpose, and expected duration of the trust;

(2) the intent of the settlor;

(3) the identity and circumstances of the beneficiaries;

(4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) the net amount allocated to income under the other sections of this [Act] and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a

will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust; or

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

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## *Probate and Estate Planning Section*

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

### **EPIC Practice Issues**

By [Patricia Gormely Prince](#) and [Randall J. Soverinsky](#)

#### **Question**

Should practitioners alter their will forms in light of the provisions in EPIC regarding self-proved wills?

#### **Answer**

The short answer is yes.

The Estates and Protected Individuals Code (EPIC) will take effect on April 1, 2000. Section 2504 of EPIC provides a change from the Revised Probate Code in that it allows for self-proved wills.

A self-proved will is one for which the testator and the witnesses have executed an affidavit describing the procedures used in the execution of the will. The affidavit the probate court may then use as admissible evidence for proving the proper execution of the will. A self-proved will expedites the admission of the will to probate and eliminates the need for the witnesses of the will to testify regarding its validity. Of course, wills that are not self-proved will still be valid if admissible under other sections of EPIC.

EPIC §2504 provides the appropriate language for a self-proved will. The affidavit required to make a will self-proved may be executed at the same time as the will itself or later if the affidavit is attached or annexed to the will. In addition, the statute allows for a will codicil to be made self-proved, and once that has been done, the codicil and the will itself are both considered self-proved.

Under EPIC §3406(2), in the new formal testacy proceedings and supervised administration, a properly self-proved will is "conclusively" presumed to comply with the signature requirements for execution. Other requirements of execution have a rebuttable presumption, unless there is proof of fraud or forgery that affects the acknowledgment and the sworn statement. A self-proved will

expedites the admission of the will to probate and eliminates the need for the witnesses of the will to testify regarding its validity. Formal and supervised testacy proceedings, EPIC §3405(2), have a procedure to prove the execution of a will if not self-proven, which is broader than RPC §146.

Under informal probate proceedings, once more, a self-proved will allows admission of the will without other proof. EPIC §3303(3) also states that the probate register may accept a will without an attestation clause if it appears to have been properly executed or if a sworn statement of the execution is filed by a person with knowledge. This person does not have to be a witness.

All practitioners should take advantage of this new addition to Michigan probate law and include self-proved language in their will forms, even before EPIC becomes effective on April 1, 2000. In addition, in light of the benefits provided by a self-proved will, practitioners may wish to send letters to existing clients suggesting that they update their wills to make them self-proved.

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## *Probate and Estate Planning Section*

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

# Ethics, Unauthorized Practice, and Image

By [Steven A. Mitchell](#)

## Lawyer Communication with Parties, Witnesses, Judges, etc.—Whom You Can Talk to and Whom You Can't

Day in and day out, the stock in trade of virtually every lawyer is communication. Indeed, communication is fundamental to the services lawyers provide, whether the communication is being received or transmitted. As lawyers routinely receive information and communications from various sources, or transmit communications as a way of obtaining additional information or rendering legal advice, a preliminary issue is often overlooked. Initially, the lawyer may need to address whether it is appropriate to communicate with an individual regardless of how the contact is initiated.

The issue often turns on the identity and status of the individual with whom the communication is shared and on the timing of the communication. Generally, the Michigan Rules of Professional Conduct establish standards for lawyer communications with persons other than clients. MRPC 4.2 addresses communications with persons who may be represented by counsel, and MRPC 4.3 addresses lawyer communications with persons unrepresented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

MRPC 4.2.

Obviously, great care should be taken when contact is made with a person represented by counsel, whether such contact is initiated by the lawyer or by the represented person. It is not misconduct for a lawyer to have contact with a party or an employee or agent of a party concerning matters outside of the subject of the representation. But what constitutes the scope of the representation for the purpose of this rule? The line between the scope of the representation and the subject of any particular communication may be blurred. Therefore, rather than

risk a subsequent allegation that misconduct was committed by virtue of an improper communication, the best practice in situations involving contact with a person known to be represented by another lawyer is to obtain the consent of that lawyer before proceeding with the communication.

A waiver by the person represented by counsel of the consent required from that person's lawyer is not effective for the purpose of the rule. In other words, the right of consent belongs to the lawyer providing the representation, not to the party who is represented. Therefore, if a represented party initiates contact with a lawyer for the purpose of negotiating a settlement and expresses a waiver of consent to communicate with adverse counsel pursuant to MRPC 4.2, and adverse counsel engages in communication with that represented party without first obtaining consent from the party's counsel, the lawyer engaging in such a communication has violated MRPC 4.2 and committed misconduct.

In Michigan Ethics Opinion RI-145 (Oct 1, 1992), a lawyer representing a party found out that the client had contacted opposing counsel to negotiate a settlement. The lawyer wanted to know whether there was a reporting requirement to the Attorney Grievance Commission because the communication had taken place without the lawyer's consent. Even though the client had consented, the State Bar Committee on Professional Ethics concluded in its opinion that the inquiring lawyer was indeed required to report the communication between opposing counsel and the client to the Attorney Grievance Commission. It is not believed that the lawyer who engaged in the prohibited contact was disciplined in that case; however, it is unknown whether the conduct was ever reported.

In a slightly different set of circumstances, a lawyer inquired whether a client could be instructed to tender a settlement offer directly to an opposing party represented by counsel without first obtaining the consent of the opposing party's counsel. In Michigan Ethics Opinion RI-171 (Sept 17, 1993), the ethics committee concluded that it would be improper for a lawyer to do indirectly what could not be done directly. Apparently, the lawyer was frustrated that an offer communicated to opposing counsel had not been, in turn, communicated to the opposing counsel's client. In an effort to make the opposing party aware of the settlement proposal, the lawyer was hoping that it would not be inappropriate to communicate the offer to the opposing party through the lawyer's client. However, since it would be improper for the lawyer to make contact directly with the opposing party to negotiate a settlement without the consent of opposing counsel, it would be equally improper to do so by using the client as a courier for the prohibited communication.

Certainly, it is not uncommon when the parties to a dispute have a prior history of communications and transactions for the parties to take it on themselves to negotiate directly with each other during the pendency of a dispute in which each party is represented by counsel. Unassisted negotiation between parties is not improper. However, lawyers must take care regarding any assistance provided to a client involved in direct negotiations with an adverse party to a dispute, particularly if it is without the knowledge and consent of opposing counsel.

May a lawyer whose client has a dispute with an organization represented by counsel contact employees of the organization without the consent of counsel? It is not uncommon for lawyers to face this question. The comment to MRPC 4.2 states:

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the

organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

These issues were considered in Michigan Ethics Opinion R-2 (Apr 21, 1989) (a formal opinion reflecting the policy of the State Bar of Michigan). That opinion dealt with whether counsel could communicate with present and former employees of a defendant organization. The opinion cited the comment to MRPC 4.2 quoted above and focused its analysis on the status of the employees within the organization, whether they were currently employed by the organization when counsel wished to communicate with them, and whether former employees were alleged to have committed any acts or omissions that might be imputed to the organization or whose statements might constitute an admission under the rules of evidence. The opinion demonstrates that there is no bright-line standard for dealing with these complex issues. As a matter of policy, the ethics committee has concluded that, in most situations, current employees will be considered persons represented by counsel for the purpose of MRPC 4.2. On the other hand, former employees are generally not considered persons represented by counsel for the purpose of the rule. In any event, great care should be taken in any analysis of the decision to contact a current or former employee of an organization represented by counsel in a dispute.

What if a person is not represented by counsel?

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

MRPC 4.3.

This situation typically arises when a lawyer representing a client conducts an investigation to determine whether the client has a valid claim. In Michigan Ethics Opinion RI-39 (Dec 13, 1989), the ethics committee reasoned that during the investigatory stage, the existence of a controversy has not been confirmed by definition; therefore, there would be no lawyer representing another party "in the matter" for the purpose of MRPC 4.2.

However, the opinion concluded that the lawyer must comply with MRPC 4.3. Significantly, that rule does not prohibit the lawyer from engaging another person in discussions aimed at resolving a matter as an alternative to litigation, as long as the unrepresented person understands the lawyer's role in the discussions. Equally significant, even if the lawyer knows that the person or organization is generally represented by another lawyer on other matters, there is no prohibition against the initiation of discussions aimed at resolution of a potential dispute before litigation.

This reasoning was followed in Michigan Ethics Opinions RI-267 (June 5, 1996). The facts in that situation involved a county attorney who was approached by a developer who wanted to discuss the development of some county land subject to condemnation. The county attorney inquired as to his legal responsibilities in meeting with someone not represented by counsel. The opinion took a very common sense approach and indicates that while the county attorney could provide general information, no legal advice could be given concerning the best method for accomplishing the developer's objectives. To the extent that the developer might wish to discuss specific opportunities for developing land within the county, the county attorney should inquire whether the developer, known to

be represented by counsel for certain matters, was in fact represented by counsel for the specific matter under discussion. If so, then the consent of that counsel would have to be obtained before proceeding further with discussions.

When may a lawyer communicate *ex parte* with a judge concerning a pending matter? MRPC 3.5 provides:

A lawyer shall not . . .

(b) communicate *ex parte* with such a person concerning a pending matter, except as permitted by law.

The problem with this rule is that it does not define the phrase "as permitted by law." While there is an ethics opinion dealing with such contact, ethics opinions do not have the force of law. Furthermore, while they are highly regarded, they are not necessarily widely known.

In Michigan Ethics Opinion RI-243 (Oct 5, 1995), a defense lawyer inquired about the propriety of opposing counsel notifying a court agency of a substantive matter concerning the representation and sending a copy of that notification to the presiding judge. In analyzing the situation from the perspective of the judge's duty pursuant to the Michigan Code of Judicial Conduct Canon 3(A)(4), the committee noted that a judge shall not consider *ex parte* communications or "other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding," with certain exceptions. Those exceptions include communications in connection with scheduling, administrative purposes, or emergencies not dealing with substantive matters or issues.

The committee concluded that a letter addressing the substance of a pending matter that is copied to the presiding judge is "improper even if the opposing counsel is contemporaneously sent a copy of the same letter." The opinion notes that MRPC 8.4(c) prohibits a lawyer from engaging in conduct prejudicial to the administration of justice and that subparagraph (e) of that rule prohibits a lawyer from knowingly assisting a judge in conduct that is a violation of the Code of Judicial Conduct. Thus, if the lawyer's conduct in sending a correspondence discussing the substance of a pending matter before the judge would cause a violation on the part of the judge if he were to read it, it is equally a violation of the Michigan Rules of Professional Conduct by the lawyer.

The traditional ways of communicating with a judge concerning substantive matters pending before the bench are by pleading and oral argument only. Accordingly, lawyers should refrain from copying judges on communications regarding matters of substance in cases pending before the bench.

In conclusion, lawyers often communicate with others without analyzing pertinent ethics considerations. While there are only a few cases in which lawyers have been disciplined for violating these rules of conduct, there is always that risk. Recently, a lawyer-witness was subject to discipline for an *ex parte* contact with a presiding judge when he inquired about possible corrective action regarding a substantive error in his testimony. The intent of the lawyer was not malicious, nor was it designed to influence the judge. He was innocently interested in correcting the record, yet he became subject to discipline for violating the rule. Being aware of the standards under which lawyers must conduct themselves is essential to protecting one's license and preserving professionalism. Knowing whom you can communicate with, and under what circumstances, prevents misunderstanding and ensures compliance with the rules of conduct.

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

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## *Probate and Estate Planning Section*

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

### Legislative Report

By [Harold Schuitmaker](#)

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

*The following bills have been introduced:*

**HB 4649****Delivery of Decedent's Cash and Wearing Apparel (Representatives Schroer, Bogardus, Cherry, Baird, et al.)**

The proposed act would authorize a hospital, convalescent or nursing home, morgue, or law enforcement agency holding cash and wearing apparel of a decedent to deliver such property to a spouse, child, or parent of the decedent. It increases the amount of cash that may be delivered under the statute from \$100 to \$500.

This bill has been referred to the Committee on Judiciary.

**HB 5452****Estate Recovery (Representative D. Olshove)**

This proposed act would amend the Social Welfare Act to provide that the amount of medical assistance paid on behalf of a person under the act is not a claim against the estate of the recipient following the death of that recipient. It further provides that the State of Michigan may not impose a lien against real property of a recipient before or after his death to secure the amounts properly paid for medical assistance.

This bill has been referred to the Committee on Human Services and Children.

**SB 80****Michigan Medical Self-Determination Act (Senator J. Berryman)**

This act would allow an individual 18 years of age or older who is of sound mind to execute a declaration to authorize types of medical intervention or the

withholding or withdrawal of medical intervention if the declarant is terminally ill or permanently unconscious and unable to participate in medical treatment decisions.

This bill has been referred to the Committee on Appropriations.

### **SB 119**

#### **Attorney fees to prevailing party (Senator Steil)**

This proposed act provides that the losing party in a civil action pay attorney fees incurred by the prevailing party. It has been referred to the Committee on Judiciary and is in the process of hearing presentations.

### **SB 417 and SB 418**

#### **Abolishment of Doctrine of Adverse Possession (Senators J. Conroy, Young, Bullard, and Cherry)**

These acts, which would abolish the doctrine of securing title to real property by adverse possession, beginning on the effective date of the acts, have been referred to the Committee on Government Operations and the Committee on Judiciary.

### **SB 671**

#### **Michigan Medical Treatment Decisions Act (Senator C. Dingell)**

This act would authorize the making of medical treatment decisions for a patient when the patient is unable to participate in medical treatment decisions and does not have a patient advocate or guardian.

This bill has been referred to the Committee on Judiciary.

*The following is an update on bills previously reviewed:*

### **HB 4226**

#### **Supervision of trustees for charitable purposes (Representatives Matrinez, Baird, and Scott)**

This act would amend MCL 14.253, MSA 26.1200(3). It provides that, unless the governing instrument provides otherwise, a trust is not a charitable trust for the purposes of registration, accounting, and notice until the remainder interest of at least one charitable organization vests in that charitable organization. It excludes hospitals from the exemption.

This bill has been referred to the Committee on Tax Policy.

### **HB 4282 and HB 4283**

#### **Probate Code of 1939 (Representatives Hardman, Reeves, Rison, Garza, and Daniels)**

These acts (tie-barred) would amend MCL 710.60, MSA 27.3178(555.60); MCL 722.22, MSA 25.312(2); and MCL 722.27b, MSA 25.312(7b). They would amend the child custody act to allow grandparents with a natural or an adopted grandchild to seek a grandparenting time order under certain enumerated circumstances. If a circuit court had continuing jurisdiction over the child in question, the grandparent would have to file a motion in that court. When the grandparents sought an order for grandparenting time by filing a motion in a pending divorce, separate maintenance, annulment, etc., the conclusion of that action would not dismiss the grandparents' motion. Filings would be limited to once every two years.

The bills have been referred to the Committee on Family and Civil Law.

### **HB 4384**

#### **Estates and protected individuals code (Representatives Martinez, Brater, Schauer, LaForge, Dennis, Baird, Borardus, Jacobs, and Minore)**

This act would amend EPIC to allow, among other things, a patient advocate to be able to make anatomical gifts.

This bill has been referred to the Committee on Health Policy.

### **SB 378**

#### **Michigan penal code—vulnerable adults (Senators Gougeon, Hamerstrom, Rogers, and McCotter)**

This bill would amend MCL 750.1–.568, MSA 28.191–.836 by adding section 174a, which would provide that a person in a relationship of trust with a vulnerable adult may not knowingly, by deception or intimidation, obtain, use, or attempt to obtain or use the vulnerable adult's money or property for the benefit of any person other than the vulnerable adult with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of that money or property. The punishment for this section is a ten-year felony, a fine of not more than \$5,000, or both.

This bill has been referred to the Committee on Judiciary.

### **SB 393**

#### **Uniform principal and income act (Senator Dingell)**

This proposed act would enact the Uniform Principal and Income Act, which prescribes how receipts and expenditures of trusts and estates are credited and charged between income and principal. This bill would conform to the latest version of the uniform act. It creates a new act and repeals MCL 555.51–.68, MSA 26.79(1)–(18). It has been referred to the Committee on Economic Development, International Trade and Regulatory Affairs.

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## *Probate and Estate Planning Section*

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

# Recent Decisions in Michigan Probate, Trust, and EState Planning Law

By [Hon. Phillip E. Harter](#)

### Wrongful Death—Distribution— Failure to File Claim

[Kubiskey v Munson \(In re Estate of Kubiskey\)](#), 236 Mich App 443, 600 NW2d 439 (1999)

In this wrongful death case, the personal representative filed a petition for leave to settle the case and to distribute \$143,000 of proceeds. The petition identified the persons who might be entitled to a share of the damages, including the respondent, and set forth the relative share each was to receive. The respondent objected to her proposed share (zero) and filed an affidavit with the probate court in which she requested that she be awarded 25 percent of the proceeds. A hearing was held. The respondent presented no evidence at that hearing. Her attorney instead moved to amend her objection to the proposed distribution to request 100 percent of the proceeds since she was the only person who presented a formal claim for damages to the personal representative. The probate court rejected the respondent's argument, reasoning that " `written' " claims for damages were " `not necessary considering the waivers and consents filed after notice of the intended distribution.' " *Id.* at 447. The probate court approved the petitioner's proposed distribution. The respondent appealed.

The court of appeals affirmed the probate court. It first considered *Ketchum v Durbin (In re Durbin Estate)*, 205 Mich App 113, 417 NW2d 261 (1994). That case seemed to establish a bright line rule that no person may be awarded any part of the proceeds of a wrongful death settlement if that person has not filed a formal claim, because of the provisions of §222(f) of the Revised Probate Code (RPC), which provides that failure to present a claim bars that person from making a claim. The court of appeals pointed out that the *Durbin* opinion lacked precedential significance because it was signed by only one judge. Thus, they felt this was an issue of first impression.

In analyzing RPC §222(f), the court of appeals found that it provided a consequence to an interested party's failure to present a claim by barring the party from making claims for damages after the proceeds have been distributed. However, making a claim for proceeds is not the same as receiving a distribution of proceeds. Section 222 does not require that an interested party make a claim to receive a distribution of the proceeds. Therefore, it held that the presentment of a claim for damages is not a prerequisite to receiving a share of the proceeds of a wrongful death settlement under RPC §222.

The court of appeals also upheld the proposed distribution based on the record and the standard that the probate court's determination was not clearly erroneous.

This is an excellent case. It does away with the rule announced in *Durbin*, which resulted in unjust results when individuals failed to follow strict formalities. The trap set by *Durbin* has now been eliminated.

### **Trusts—Breach of Fiduciary Duty— Third-Party Liability**

[Sandweiss v National Bank of Detroit \(In re Estate of Goldman\)](#), 236 Mich App 417, \_\_\_ NW2d \_\_\_ (1999)

The probate court set forth the facts of this trust case as follows:

Alfred H. Goldman died on October 17, 1970. Surviving him were his wife, Francis [sic] Goldman (Abelcop) and a son, Barry A. Goldman. The decedent's Last Will and Testament established two separate Trusts; a Marital Trust and a Family Trust. Only the Marital Trust is at issue in this case.

When Alfred H. Goldman died, Barry A. Goldman became the Trustee of the Marital Trust. The terms of the Marital Trust provided that the income generated by the Trust be distributed to the decedent's surviving spouse during her lifetime but gave the Trustee, Barry A. Goldman the discretion to invade principal if necessary for the accustomed standard of living of the spouse. The Will also gave the surviving spouse the power to appoint the remainder of the Marital Trust by Will and if she failed to do so, the remainder went to the Family Trust.

Barry A. Goldman died in 1975. Since Barry A. Goldman was the beneficiary of the Family Trust, the funds in the Family Trust were to pass to Barry A. Goldman's estate and distributed in accordance with his Last Will and Testament. The surviving spouse of Alfred H. Goldman died on December 6, 1993 without exercising her power of appointment under the Marital Trust. . . .

According to the Petitioners, sometime in the early 1970's, Barry Goldman distributed all of the assets of the Marital Trust to Alfred Goldman's surviving spouse. Francis Goldman in turn created a new Trust naming Barry Goldman and NBD Bank as Co- Trustees. The Petitioners contend that this Trust was funded with the assets of the Marital Trust and that the new Trust enabled the surviving spouse to withdraw all of its assets in violation of the terms of the Marital Trust.

*Id.* at 418–419.

The petitioners were in essence arguing that NBD Bank was liable to them for damages for participating in Barry Goldman's breach of his fiduciary duty as trustee of the marital trust. The petitioners' argument was generally that NBD Bank had a copy of the decedent's will and that it had accepted the funds from the marital trust as trustee knowing that it was defeating the purpose of the marital trust. NBD Bank moved for summary disposition, which the probate court granted. The petitioners appealed.

The court of appeals affirmed the probate court's grant of summary disposition. It pointed out that it could be possible for a third party to be liable if the third party knowingly participated in an enterprise or conspiracy by which a trustee breached his fiduciary duty to the beneficiaries of a trust. However, it concluded that NBD Bank took no affirmative steps to assist Barry Goldman in violating his fiduciary duties and did not profit from the violation. Since the petitioners failed to allege facts from which it might be reasonably inferred that NBD Bank knowingly participated in the alleged breach of fiduciary duty, summary disposition was proper.

The court of appeals also concluded that NBD Bank was not required to file an account for the marital trust since it was not the trustee of the marital trust.

### **Guardianships—Minors— Power of Attorney—Jurisdiction**

[Trudeau v Martin \(In re Martin\)](#), No 214400, 1999 Mich App LEXIS 231 (Aug 20, 1999)

Patrick Martin, father of Zachary, was incarcerated for the murder of Zachary's mother. He executed a power of attorney delegating parental authority over Zachary to his sister, Sherry Andrews. A petition for guardianship of the minor was filed. The probate court dismissed the petition for lack of jurisdiction, concluding that the power of attorney divested the probate court of jurisdiction to consider the petition.

The court of appeals reversed the trial court. It concluded that the probate court obtained jurisdiction over the guardianship proceedings when the petitioners filed their petition since the mother was deceased and the father was incarcerated. Further, Patrick Martin had permitted the child to reside with the petitioners following his mother's death and before executing the power of attorney without providing legal authority for the care and maintenance of the child on his incarceration. Thus, several statutory bases for a minor guardianship had been met.

The court of appeals next addressed whether a power of attorney was sufficient to divest the probate court of jurisdiction over an otherwise valid guardianship petition. It concluded that it was not sufficient. It pointed out that a power of attorney did not address the long-term needs of the child and that a guardianship was appropriate to ensure the minor's well-being. It characterized the power of attorney as an attempt to temporarily transfer the father's authority without any apparent regard in planning for the long-term needs of the child. Thus, the execution of a power of attorney does not divest the probate court of jurisdiction over guardianship proceedings.

### **Personal Representative— Appointment—Jurisdiction—Estate— Wrongful Death Action—Superintending Control**

[Haque v Oakland Probate Judge](#), No 207270, 1999 Mich App LEXIS 236 (Aug

20, 1999)

Haque filed a petition for the commencement of proceedings with the Oakland County Probate Court. The petition indicated that the decedent was a resident of Columbus, Indiana. The petition stated that the decedent left an estate to be administered in Oakland County and specified that the estate was solely a cause of action for wrongful death. The wrongful death action was against Beaumont Hospital, located in Oakland County. The probate court ultimately dismissed the petition for the commencement of proceedings on the basis that Oakland County was not a proper venue in which to open the estate. Haque then filed a complaint for superintending control in the circuit court, which was denied. Haque appealed both actions.

The court of appeals reversed the action of the probate court. It stated the issue to be whether a wrongful death cause of action constitutes an "estate" sufficient to invoke the jurisdiction of the probate court in the county where the cause of action occurred. It analyzed several older Michigan Supreme Court cases as well as the language of the Wrongful Death Act, which provides for the recovery for expenses for which a decedent's estate is liable and for the estate to receive damages for a decedent's conscious pain and suffering before death. It concluded that a wrongful death cause of action does constitute an estate sufficient to invoke the jurisdiction of the probate court in the county where the cause of action accrued.

The court of appeals affirmed the action of the circuit court. It observed that an order appointing, reversing, or denying the appointment of a personal representative is appealable of right to the court of appeals pursuant to MCR 5.801(B). Thus, pursuant to MCR 3.302(D)(2), a complaint for superintending control was inappropriate.

### **Wills—Codicils—Witnesses—Attestation Clauses**

[Stauch v Watmuf \(In re Estate of Clark\)](#), No 208866, 1999 Mich App LEXIS 243 (Aug 31, 1999)

The decedent executed a will in 1985. A second codicil to the will was executed in 1992. A third codicil, which revoked the second codicil, was executed in April 1995. The third codicil was signed by the testator and two witnesses, William Clark and John Stover. The witnesses' signatures were preceded by an attestation clause that stated that the witnesses had witnessed the testator signing his name and that the testator had acknowledged the instrument to be his third codicil.

At a hearing to admit the will, the first codicil, and the third codicil, witness Clark, a brother of the deceased and a residuary beneficiary of the 1985 will, was called to testify. Clark testified that, contrary to the recitations in the codicil's attestation clause, he had not witnessed the decedent signing the document and that no other signatures appeared on the document when he signed it. He acknowledged that the signature was that of the decedent. He also testified that he did not read the document. The other witness was not called to testify. The probate court admitted the three instruments, noting with respect to the third codicil that, though questions were raised by Clark's testimony, it appeared to comply with the statute. The admission of the third codicil was appealed.

The court of appeals stated the issue to be whether the testator's third codicil was properly admitted to probate when the testator's brother—one of the two subscribing witnesses to the codicil—testified against its admission, disavowing the recitations of the codicil's attestation clause. It concluded that the codicil was properly admitted to probate. It first cited RPC §122(1):

A will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will. If the witnesses are competent at the time of signing the will, their subsequent incompetency, from whatever cause, shall not prevent admission of the will to probate, if it is otherwise satisfactorily proved.

The court pointed out that the intent of §122(1) is to validate wills that meet the minimum formalities of this state. It next cited RPC §147(1), which provides that the probate court "[m]ay admit the will of a resident testator to probate on the testimony of 1 of the subscribing witnesses if the witness shall testify that the will was executed in all particulars as required by law." It then pointed out that the only statutory requirement seriously challenged is whether Clark witnessed the testator's acknowledgment of the will. It held that the mere fact that Clark had testified that he did not read the document before signing it and that his brother had not specifically told him that the document was a codicil to his will was insufficient to defeat its admission to probate.


The court of appeals next observed that while Michigan does not require an attestation clause, the presence of such a clause gives rise to a presumption that the will was executed in conformity with the recitations in the clause. It then held that the sworn testimony of a subscribing witness that contradicts the plain language of an attestation clause is not necessarily sufficient to rebut the presumption that the will was properly executed. It noted that the issue was one of fact and cited the Michigan Supreme Court as follows:

"[W]e know of no rule of law which makes the probate of a will depend upon the recollection or even the veracity of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. But if the forgetfulness or falsehood of a subscribing witness can invalidate a will, it would be easy in many cases to use such artifices or corruption as would render the best will nugatory."

368 Mich at 101 (quoting *Abbott v Abbott*, 41 Mich 540, 542, 2 NW 810 (1879)). The court of appeals observed that, in this case, the probate judge, as trier of fact, found that the execution of the codicil appeared to comply with the statute.

This is a case that I believe was decided on a finding of fact based on the credibility of Clark. It should not be read too broadly. If Clark is to be believed, I cannot see how the statutory requirements were met. However, the trial court and the court of appeals seem to be disregarding his testimony especially when he says no other signatures appeared on the document when he signed. In a footnote, the court of appeals points out an interesting reason for questioning the credibility of Clark. It notes that if the third codicil were admitted, the codicil and will would be read together. Therefore, under RPC §122, Clark, as a witness, could be prohibited from taking his residuary devise and limited to what his intestate share would have been.

**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 chair person 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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