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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 [Winter 1997](#) issue of [Michigan Probate and Estate Planning Journal](#)

FROM THE CHAIRPERSON'S DESK

By John H. Martin

Estate Settlement Act

The end of the lame-duck session of the Michigan legislature brought disappointing news. The proposed Estate Settlement Act stalled in the House Judiciary Committee. With the expiration of the current legislature, the Estate Settlement Act bill also died. Ever the optimists, however, your Probate and Estate Planning Council will seek to reintroduce the bill in the new legislature as early as possible in its session that begins in January. There is little or no opposition to the bill in its current form. It has bipartisan backing, so prospects are good for its early passage. Realistically, the effective date cannot be before January 1, 1998, and it may well be several months later.

Court Reorganization

While the Estate Settlement Act is temporarily off center stage, court reorganization has taken the spotlight. Public Act 388 of 1996 mandates the creation of a Family Division within each circuit court and the assignment of judges to the Family Division. Probate judges almost certainly will be assigned to the Family Division. The Family Division will assume sole and exclusive jurisdiction over a number of matters now heard in probate court, including juvenile offenses, name changes, and adoptions. Remaining with the probate courts, which under the Michigan Constitution must exist in every county, are decedents' estates and trust matters. The probate courts will also continue to have jurisdiction over guardianships, conservatorships, protective proceedings, mental health commitments, and developmentally disabled persons, except when such matters are ancillary to a proceeding in the Family Division.

At its October, November, and December meetings, your Probate Council discussed the impact of court reorganization on the general public and on practitioners who appear in the probate courts. At the request of your Council, your chairman has written to members of the Family Court Division Implementation Task Force, the group that will develop guidelines for the preparation of agreements in every circuit that will articulate the plan for the operation of the Family Division in that circuit. Those agreements will actually be developed by the chief circuit judge and the chief probate judge or judges in each circuit. Therefore, letters have also been sent to each of those circuit and probate

judges. The following points were made in our letters:

1. Probate courts consider and apply a unique body of law, including the statutory provisions of the Revised Probate Code, the historic body of equitable principles forming the law of trusts, and the considerable statutory enactments governing persons under guardianship or conservatorship or subject to other forms of disability. Consequently, experienced probate judges ought to be retained in the probate court to assure the continued quality of the adjudication of issues in these areas. In addition, there should be continuity in service to ensure a consistent level of results.
2. Probate court proceedings are different from circuit court litigation. Matters in probate court are time sensitive and hearing intensive. Moreover, there is a significant percentage of *in pro per* proceedings. These factors are additional reasons for the retention of experienced probate judges. They also are reasons for insuring that probate courts are given adequate financial as well as judicial resources so they can offer the public timely hearings and prompt disposition of matters.
3. There is great disparity and circumstances among our counties. We have multijudge probate courts with extremely heavy dockets and single-judge courts with greatly varying case loads. In the single-judge counties, the probate judge may necessarily need to split his or her time between the Family Division and the probate court. The greatly differing circumstances across our state strongly suggest the need for flexibility and the freedom to develop assignments that respond realistically to local variations and needs.
4. Although local circumstances differ, we must also remember that in Michigan, the judicial power "is vested exclusively in one court of justice." Mich Const, article VI, § 1. Practitioners regularly appear in courts in many different counties. It would be unfortunate for the practicing bar and expensive for the public it serves for the differences in implementation plans to result in procedural variations that would cause confusion, inconsistency, and consequent expense and delay. We urge that all implementation plans for the creation of the Family Division and the reorganization of the probate court be consistent with present Michigan Court Rules and discourage diverse local court rules.

It is likely in many circuits that the judges will seek assistance from a number of sources in developing the plan for the operation of the Family Division. Even if an attorney does not expect to practice in the Family Division, the local agreement will have a definite and direct impact on probate court operations. Therefore, let me suggest that this is an excellent time for you to be in touch with your local judges. You may want to offer your assistance in working on the implementation plan. Moreover, you may want to express your views regarding the factors that should be given weight in developing those plans.

I close with a familiar but vital thought: Please express your views to our Council. In addition, remember that you are welcome to attend our regular meetings. A schedule appears below. Attendance at our meetings can benefit your profession and you personally.

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Probate and Estate Planning Section

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

RECENT DEVELOPMENTS AFFECTING BENEFICIARY DESIGNATIONS FOR EMPLOYEE BENEFIT PLANS, IRAS, AND 403(b) ANNUITIES

By Karl W. Schettenhelm, Jr.

The Small Business Job Protection Act of 1996, Pub L No 104-188, and IRS Announcement 95-99, 1995-47 IRB 10, have once again brought to the forefront the need to review your clients retirement plans in the context of their estate plans. Section 1401 repeals special five-year income averaging three years from now. Section 1402 repeals the \$5,000 exclusion from income tax for certain employee benefits. Section 1452 provides for a three-year window during which the income excise tax under IRC 4980A will not apply. Announcement 95-99 provides clarification to a ten-year-old proposed regulation that limits the period during which this type of asset may remain in a qualified plan's tax-free accumulation environment.

This legislative change, coupled with the administrative guidance, provides an excellent and timely opportunity to review your client's current retirement plan. You should remind the client to check the status of his or her beneficiary designation. The method of distribution that the client may select should be revisited. The client may be unaware that his or her retirement plan is exposed to the accumulation excise tax under IRC 4980A. Finally, the client may not have understood that the retirement plan will be subject to federal estate tax just as the client's other assets will be. Unfortunately, retirement plans do not receive a step-up in basis. This means both an income tax and a federal estate tax will apply to this asset. [1]

For many clients, the single largest asset outside of their home is their retirement plan. The proper analysis of how best to preserve this asset in avoiding estate taxes and income taxes—as well as excise taxes—is sometimes overlooked in the estate planning process. *The simple recommendation of a beneficiary designation affects all of these various taxes.*

Notes

1. IRC 1014(c) provides that the step-up in basis rules do not apply to property that constitutes "income in respect of a decedent." All payments under IRC 401(a) and 403(b) as well as simplified employee pensions (SEPs) and IRAs fall into this

category.

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

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Probate and Estate Planning Section

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

ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE

By Steven A. Mitchell

Understanding Michigan's Attorney Discipline System

Very few probate and estate planning practitioners have reason to acquire a detailed understanding of Michigan's attorney discipline system. By the same token, a basic familiarity with the process is every bit as important as understanding sound law office management practices, having substantive proficiency in estate planning, or implementing appropriate measures for safeguarding client property. A general understanding of the discipline system is cheap insurance for the protection of one's license to practice law. In Michigan, a finding of misconduct before the Attorney Discipline Board can be prima facie evidence of malpractice. [1] More and more, litigants are using the grievance process not only as a discovery tool but also as leverage in seeking damages for professional liability.

Further, the process itself is a potential minefield where the unwitting respondent attorney can commit misconduct by virtue of a procedural misstep. For example, a failure to timely respond to a request for investigation pursuant to MCR 9.113 is misconduct itself [2] and may subject the unwitting respondent to discipline.

The State of Michigan has a bifurcated system of discipline that was created by an amendment to the Michigan Court Rules adopted by the supreme court, effective October 1, 1978. The Michigan Supreme Court has responsibility for supervising and disciplining Michigan attorneys. [3] The Michigan Attorney Discipline Board is its adjudicative arm, [4] and the Attorney Grievance Commission is its prosecutorial arm. [5] The Michigan Court Rules governing attorney discipline proceedings are set forth at MCR 9.100 et seq.

Any person may file a grievance against an attorney. In other words, complainants are not limited to clients. Judges, opposing parties in litigation, the grievance administrator, adversarial advocates, even total strangers may file a grievance. The grievance itself is referred to as a "request for investigation." [6]

It is the responsibility of the grievance administrator to process the request for investigation. [7] In accordance with MCR 9.112(C), the grievance administrator may reject the request for investigation on its face or may conduct a full

investigation. Typically, an investigation includes a requirement that the attorney charged with the alleged misconduct, referred to as the respondent, answer the request for investigation in writing pursuant to MCR 9.113.

This is a critical juncture in the process, since the respondent attorney must provide a full and complete disclosure of the facts surrounding the allegations of misconduct. Anything short of full and fair disclosure could be considered misrepresentation and could subject the respondent to a separate allegation of misconduct. [8]

Often, attorney respondents choose to represent themselves at this point in the process without understanding that they lack the objectivity necessary to fulfill the requirements of the Michigan Court Rules. It is next to impossible for one to fulfill the duty imposed by MCR 9.103(C) to cooperate with the grievance administrator to establish the facts surrounding the allegations while at the same time defending oneself as an advocate against charges of wrongdoing. On at least one occasion, this has resulted in discipline for no other misconduct than an "unintentional misrepresentation" in the answer to the request for investigation. [9] In other words, the respondent attorney was cleared of wrongdoing on the substantive allegations but disciplined for his answer to the request for investigation.

A response to a request for investigation must be filed within 21 days of the date of mailing to the respondent. [10] After the response is filed, the grievance administrator may conduct further investigations, place a consenting respondent attorney on contractual probation, close the matter with a letter of admonition, or seek the issuance of a formal complaint. [11] The Attorney Grievance Commission determines the course of action.

Importantly, a letter of admonition is not discipline, and there are generally no consequences to one's license for receiving such a letter. [12] On the other hand, if a formal complaint is issued, a respondent attorney has entered the next phase of the discipline process and must be prepared to formally defend his or her license to practice law.

As its name connotes, a formal complaint subjects the respondent attorney to a more formal hearing process. This process requires the filing of an answer to the complaint within 21 days of service, the presentation of evidence at a public hearing, and a decision by a panel of attorneys, usually volunteer peers of the respondent who typically serve within the county where the respondent attorney practices. [13]

The respondent attorney is entitled to basic due process, [14] including the right to call witnesses and to cross-examine opposing witnesses. Nevertheless, prehearing discovery is very limited. The respondent is required to personally appear at the hearing [15] and, in a contested case, is often called as a witness by the grievance administrator.

Throughout the proceeding, the hearing panel observes the Michigan Rules of Evidence [16] and the general court rules, except as otherwise provided in MCR 9.100 et seq. In other words, to the extent an issue of procedure is not covered in MCR 9.100 et seq., the general court rules prevail. [17]

For many respondent attorneys, a formal discipline hearing occurs in two parts or stages. The initial hearing stage determines whether misconduct has occurred. If after the presentation of proofs the panel concludes by a preponderance of the evidence that misconduct has occurred, [18] then the hearing moves to the

second stage, usually conducted on a subsequent date. [19] In the second stage, the quantum of discipline is determined. During this part of the proceeding, the grievance administrator has an opportunity to proffer evidence in aggravation, including any prior discipline record or other factors that would tend to increase the discipline imposed. The respondent attorney is offered an opportunity to put on evidence in mitigation, such as the absence of a prior discipline record, as well as other factors. [20]

The lowest form of discipline that a respondent attorney can receive if misconduct is adjudged is a reprimand. The next level of discipline is suspension for a minimum period of 30 days up to a term of years. The most severe form of discipline is revocation of one's license to practice law. [21] The different levels of discipline have different ramifications, many of which are not readily apparent to the average practitioner.

Of course, the specter of revocation conjures up visions of unthinkable consequences, but even the attorney whose license has been revoked can petition for reinstatement. [22] However, such a petition cannot be filed until after five full years have passed, and the supreme court has decided that the passage of those years is a minimum period. [23]

Aside from the obvious differences between a reprimand and a period of suspension, there are other consequences flowing from a suspension. A suspended attorney must notify each and every client of the suspension and advise them that they may wish to have their matter handled by other counsel. [24] Obviously, this is a critical distinction for purposes of maintaining one's business, since clients do not have to be notified of a reprimand.

The length of a suspension can also be critical to the future of one's practice. For example, a suspension of up to 179 days results in automatic reinstatement of the license to practice law on the filing of an affidavit of compliance. [25] However, a suspension of a period of 180 days or more requires the respondent attorney to petition the Attorney Discipline Board for reinstatement, triggering yet another formal hearing procedure. During the reinstatement process, the respondent attorney has the burden of showing by clear and convincing evidence that he or she is fit to have the license to practice law restored. [26] In most cases, this is not an easy burden to meet.

Suspension of the license for three years or more requires the respondent attorney to be recertified, including passing the bar exam prior to reinstatement. [27] As one can see, there are suspensions, and there are suspensions.

Under some very limited circumstances, a respondent attorney can receive probation, but this is typically only available when the misconduct is caused by or related to a condition of physical or mental impairment. Not only must the impairment be related causally to the misconduct, but it must also be treatable, and overall, probation must be in the best interest of the public. [28]

Throughout the attorney discipline process, a respondent attorney is entitled to counsel. Some professional liability insurance carriers provide coverage for the reimbursement of legal expenses in connection with defending a grievance, and it is anticipated that other carriers will soon be offering such coverage.

In 1995, over 4,000 requests for investigation were filed, an all time high. [29] Attorneys, like other professionals, are increasingly becoming the object of complaints by clients and other affected members of the public. Understanding the fundamentals of the attorney discipline process can help to make certain that

the right steps will be taken when attorneys are faced with the important challenge of protecting their license to practice law.

Endnotes

1. *Lipton v Boesky*, 110 Mich App 589, 313 NW2d 163 (1981).
2. MCR 9.113(B)(2).
3. Mich Const 1963, art VI, § 5; see also *In re Grimes*, 414 Mich 483, 326 NW2d 380 (1982).
4. MCR 9.110(A).
5. MCR 9.108(A).
6. MCR 9.101(7).
7. MCR 9.109(B)(5).
8. MCR 9.113(A).
9. *In re Murphy*, ADB Case No 93-149-GA (Feb 28, 1995).
10. MCR 9.113(A).
11. MCR 9.114.
12. MCR 9.106(6).
13. MCR 9.115(D), (J).
14. *In re Jaques*, 401 Mich 516, 258 NW2d 443 (1977), *vacated*, 403 Mich 956 and 436 US 952 (1978).
15. MCR 9.115(H).
16. MCR 9.115(I).
17. MCR 9.115(A).
18. MCR 9.115(J)(2).
19. MCR 9.115(J)(2).
20. MCR 9.115(J)(3).
21. MCR 9.106.
22. MCR 9.123.
23. *Grievance Adm'r v August*, 438 Mich 296, 475 NW2d 256 (1991).
24. MCR 9.119(A).
25. MCR 9.123(A).
26. MCR 9.123(B).
27. MCR 9.123(C).
28. MCR 9.121(C)(1).

29. State of Michigan, *Attorney Grievance Commission Annual Report* (1995).

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

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Probate and Estate Planning Section

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

LEGISLATIVE DEVELOPMENTS

By Douglas A. Mielock

HB 4023—REVIEW OF CERTAIN GUARDIANSHIPS (Representative Profit)

HB 4023 amends MCL 330.1626 to require an informal review of a guardianship within five years after the guardian's appointment and at intervals of not more than five years after the initial review if the term of the guardianship exceeds five years.

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

HB 4024—NOTIFICATION OF CHANGE OF LOCATION OF WARD (Representative Profit)

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

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

HB 4025—AMENDMENTS REGARDING JUDICIAL ADMISSIONS (Representative Profit)

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

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

HB 4026—RELIEF FROM ANNUAL REVIEW OF CERTAIN GUARDIANSHIPS (Representative Profit)

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

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

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

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

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

**HB 4113—REGISTRATION OF SECURITIES AND TRANSFER-ON-DEATH
FORM (Representative Alley)**

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

The bill was passed; was signed by the governor on December 3, 1996; and became Public Act 433 of the Public Acts of 1996, with immediate effect.

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

HB 4274 amends Chapter 720 of the Michigan Compiled Laws to provide for the apportionment of expenses a fiduciary or interested persons incur in determining the amount and apportionment of estate taxes.

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

HB 4462—STATE RECOVERY PROGRAM (Representative Nye)

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

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

It has been assigned to the House Human Services Committee.

**HB 4601—MICHIGAN MEDICAL SELF-DETERMINATION ACT
(Representative Wallace)**

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

It has been assigned to the House Health Policy Committee.

**HB 5158—REVISIONS TO THE REVISED JUDICATURE ACT OF 1961
(Representative Nye)**

HB 5158 amends the Revised Judicature Act of 1961 as part of the reformation of the court system in Michigan. It includes provisions for the funding of the courts and the level of judicial salaries.

The bill was passed; was signed by the governor on September 10, 1996; and became Public Act 374 of the Public Acts of 1996, with immediate effect.

HB 5246—BAR TO ESTATE RECOVERY (Representative Olshove)

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

It has been referred to the House Human Services Committee.

HB 5441–5449—REQUIREMENT THAT WILLS, ESTATES, AND DOWER BE GENDER NEUTRAL (Representative Pitoniak)

HB 5441 through HB 5449 amends various parts of the Michigan Compiled Laws that refer to dower to make them gender neutral.

These bills have been referred to the House Judiciary and Civil Rights Committee.

HB 5554—RELEASE OF CASH AND APPAREL TO DECEDENT'S FAMILY (Representative Schroer)

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

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

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

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

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

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

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

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

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

SB 487 repeals the Michigan Uniform Gifts to Minors Act, MCL 554.451–.461, and adopts the Uniform Transfers to Minors Act. The new uniform act is an

improvement over the current Uniform Gifts to Minors Act because it (1) permits any type of property to be transferred to a custodial account for a minor; (2) permits estates, trusts, custodianships, and guardianships to transfer property to the custodian; and (3) allows the custodian to retain the custodial property until the beneficiary attains age 21 (rather than the current limit of age 18).

The bill was passed by the Senate with a recommendation for immediate effect. It has been assigned to the House Judiciary and Civil Rights Committee.

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

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

The bill was passed; was signed by the governor on October 20, 1996; and became Public Act 403 of the Public Acts of 1996, effective October 21, 1996.

SB 1036—TERMINATION OF GUARDIANSHIP FOR MINOR (Senator Gougeon)

SB 1036 amends MCL 700.424c, which provides for the termination of a guardianship for a minor.

The bill was passed, was signed by the governor, and became Public Act 408 of the Public Acts of 1996. Section 2 of the act provides that it takes effect January 1, 1998.

SB 1052—FAMILY COURT DIVISION OF CIRCUIT COURT (Senator Van Regenmorter)

SB 1052 creates a family court division within the circuit court. Both circuit court and probate court judges are allowed to hear cases in the family court division. The new family court division consolidates divorce, custody, support, child abuse, and juvenile cases into one section.


The Senate and the House passed the bill on September 25, 1996. It was presented to the governor on September 26, 1996; he signed it; and it became Public Act 388 of the Public Acts of 1996, with immediate effect.

SB 1059—ESTATE SETTLEMENT ACT (Senator Van Regenmorter)

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

The Senate passed the bill on September 25, 1996, and it was assigned to the House Judiciary and Civil Rights Committee.

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



Standing Committee on Code, Procedure, and Rules, which has drafted the proposed Estate Settlement Act. Doug is a former legal consultant for the Legal Hotline for Older Michigianians and a former instructor at Lansing Community College. Doug is a frequent speaker and author of articles relating to various aspects of estate planning.

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

By Hon. Phillip E. Harter

ADOPTION—PUTATIVE FATHER—TERMINATION OF PARENTAL RIGHTS—SUPPORT

In re Ballard, 219 Mich App 329 (1996)

Respondent and petitioner are the biological parents of this minor. Petitioner filed a petition for a hearing to release parental rights so her child could be placed for adoption. At the time of the hearing, respondent was serving a 10- to 15-year prison sentence that began in August 1994. The minor, Brandon Ballard, was born November 4, 1994. The probate court ordered the termination of respondent's parental rights, and respondent appealed. The court of appeals affirmed.

Respondent first argued that the probate court erroneously determined that he did not provide care or support for the mother or child pursuant to MCL 710.39, MSA 27.3178(555.39) of the Adoption Code, which states in pertinent part:

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIA.

Respondent had sent the mother \$200 in October 1994 during her pregnancy. The court of appeals relied on the recently decided case of *In re Gaipa*, 219 Mich App 80 (1996), which held that the mere payment of money is not the equivalent

of "support." The \$200 payment constituted, at most, a token amount in the context of any promise of continuing support in the judges' opinion. The nominal, strategic payment did not "establish a support relationship." *Ballard*, 219 Mich App at 334 (quoting *In re Barlow*, 404 Mich 216, 229, 273 NW2d 35 (1978)).

Respondent next argued that the probate court erred in determining that the termination of his parental rights was in the best interest of Brandon. He argued that the probate court failed to consider the possibility of custody and care by his mother and stepfather during his incarceration. In rejecting this argument, the court of appeals noted that §§39 and 22 of the Adoption Code make no provision for considering alternate care and custody arrangements by an incarcerated putative father. Section 22(f) specifically directs the court to determine the "best interests of the child" by comparing the adoptive parents and the putative father, not by comparing the adoptive parents with alternative custody provisions arranged by the putative father.

The court of appeals, in a footnote, also distinguished this case from *In re Halbert*, 217 Mich App 607, 552 NW2d 528 (1996), which reversed a termination of parental rights because an incarcerated father did not have the ability to provide support. - Section 39, unlike MCL 710.51(6)(a), MSA 27.3178(555.51)(6)(a), which was controlling in *Halbert*, does not mention "ability" to support but turns solely on whether support is provided, regardless of ability.

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

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