Probate and Estate Planning Section

Michigan Probate and Estate Planning Journal

Volume 17, Winter 1998, No. 2
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The following article was published in the Winter 1998 issue of Michigan Probate and Estate Planning Journal

FROM THE CHAIRPERSON'S DESK

By Patricia Gormely Prince

Tropical Continuing Education

As I generally find that it is easier to learn in nice weather than it is in bad weather, I just returned from the 1998 Mid-Winter Tax and Estate Planning Conference put on by the National Law Foundation in Puerto Rico. Indeed, I came back with a plethora (yes, I do use that word) of ideas and information. I would like to share some of what I learned with you.

Limited Liability Companies and Family Limited Partnerships

These continue to be very attractive vehicles for estate planning purposes. However, the consensus among minds much more learned than mine continues to be that the IRS is going to challenge these at every opportunity that arises. In 1997, numerous private rulings were issued. In particular, Priv Ltr Rul 9736004 (June 6, 1997) deals with LLCs and Michigan law. Of course, just because the IRS does not like a tax-savings device, does not mean we should not recommend it to our clients. However, we should make our clients aware that in setting up a family limited partnership or LLC and taking discounts, it is highly likely that the discounts and perhaps even the entity will be challenged. And the likely cost of challenge should be compared with the potential tax savings. The practice of law just isn't simple anymore, is it?

President Clinton's Budget Speech

The hubbub among the speakers in Puerto Rico was that the president was going to issue a statement on Monday, February 2, 1998, concerning the estate tax. Therefore, on the plane trip home, I pondered what I could do if the tax is repealed (not likely with a Democrat) and remembered that I was still a licensed hair dresser. Feeling better, I watched the news to see what the president had to say about estate tax and the budget discussion, and nothing appeared. However, the next day's *Wall Street Journal* gave the matter a two-sentence mention. Apparently, the president is not fond of QPRTS, family limited partnerships (I imagine it is the discounts again), *Crummey* trusts, and the favorable tax treatment of annuities. Apparently, he is going to propose something legislatively. Like many tax practitioners, I do not count my legislation until it is hatched. However, you should be aware that this type of legislation could go into the

hopper.

Trust Kits

Back in Michigan, there seems to be a plethora (now I'm getting redundant) of companies selling trust kits. Frequently, the class and the kit cost more than it would to have a trust prepared by an estate planning attorney. We would like to make the State Bar aware of the situations where the selling of these trust kits is actually the unauthorized practice of law. If you run across any ads or get any information from clients about trust kits, pass the information on to Ramon F. (Fred) Rolf, the chair of the Ethics, Unauthorized Practice, and Image Committee.

New Council Member

With regret, we accepted the resignation of Carol J. Karr as a Council member. Her term will be finished by Fred Rolf, who will also take over her duties on various committees.

Mike Irish Award

In honor of the late Mike Irish, a much-admired Council member, the Council gives out an annual award. We are currently taking nominees for the 1998 award. It is for a member of the Michigan Bar who has made a difference by his or her services to the Section, community activities, and the like. Prior awardees have been Joe Foster and John Martin. Send nominations to Brian Howe.

The 1997 award winner was Harold Draper. Harold is a former chair of the Section and, even though he is mostly retired, still regularly attends meetings. Harold's attendance at council meetings and past efforts have always been fruitful for all of us. Congratulations Harold!

Annual Probate Seminar

Be sure to check on pages 44–45 in the *Journal* for the list of topics and speakers for the Traverse City and Troy seminars. I think estate planners in particular will find this year's schedule most interesting.

Annual Meeting

The annual State Bar meeting will be held in Lansing this year. We always put on a program on Friday. This year, it will be Friday, September 18, 1997, in the morning. Mary Ann Zito, the chair of that program, is still looking for ideas and speakers. Volunteers accepted.

Further Changes to the Probate Court

As of January 1, 1998, court reform came upon us, ready or not. Not surprisingly, a whole new area of uniformity of practice issues has emerged as the courts and the staff of the various counties attempt to deal with the vast changes. If you have any interesting experiences with the courts during this time, please send your comments to me. We are monitoring how this is all working.

Furthermore, there is a movement afoot to merge the circuit and probate courts. Stay tuned, or even better, attend our meetings. The schedule of meetings is printed below this column.

In addition, while mediation has been with us in probate court for some time, more courts are using this process. Indeed, many courts have "probate" panels for mediation, so a will contest is not mediated by a personal injury lawyer.

If you have a situation that you think can benefit by mediation, suggest it to your judge.

Other alternative dispute resolution methods are being used in probate court, and later in the year we will have an article on alternative dispute resolution.

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Probate and Estate Planning Section

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

ESTATE PLANNING, ADMINISTRATION, AND DRAFTING UNDER THE TAXPAYER RELIEF ACT OF 1997

By Sebastian V. Grassi, Jr.

Introduction: Seven Key Provisions

The ramifications of the Taxpayer Relief Act of 1997, signed into law by President Clinton on August 5, 1997, are extremely far reaching. The act is exceptionally complex and contains more than 280 new Internal Revenue Code sections and more than 820 amendments to the existing Code.

Key provisions of the act that estate planners need to become immediately familiar with include

- the new exclusion for qualified family-owned business interests under IRC § 2033A and its impact on marital deduction formula drafting, the allocation of the generation-skipping transfer (GST) tax exemption, and the need for special trust powers;
- the election available to estates that are currently deferring estate tax under IRC § 6166 to use the new 2 percent interest rate (rather than the current 4 percent rate), provided the election is made before January 1, 1999;
- the new requirement that annual payments from a charitable remainder trust may not exceed 50 percent of the fair market value of the trust (effective for trusts created on or after June 19, 1997) and the need to reform certain existing trusts to qualify for the charitable gift tax deduction;
- the new mandatory 10 percent minimum charitable remainder requirement for all charitable remainder trusts and transfers made after July 28, 1997, and the need to reform certain existing trusts to qualify for the charitable gift tax deduction;
- the criminalization of Medicaid gift planning—"Granny's advisor" now goes to jail;
- the special four-year income tax averaging on Roth IRA rollovers that is available only for rollovers made in 1998; and
- the new rule that "pay all death taxes from the residue of my estate" will no

longer be sufficient to waive the estate tax apportionment rule concerning QTIP property includable in a spouse's estate under IRC § 2044, which requires under IRC § 2207A that the beneficiaries of the QTIP property be responsible for the estate taxes attributable to the inclusion of the QTIP property in the estate of the surviving spouse.

This article provides a brief overview of the estate, gift, and GST tax, fiduciary income tax, capital gains, and IRA changes under the act and provides comments on how these changes affect your clients, your ability to provide legal counsel, and the drafting of estate planning documents.

Article continued in the Winter 1998 issue of the Journal.

Sebastian V. Grassi, Jr., is a partner in the law firm of Grassi & Toering, PLC, in Troy. He is a graduate of Lehigh University (1976) and the University of Detroit School of Law (1979). He is a member of the State Bar of Michigan, the American Bar Association, and the Christian Legal Society. His practice is concentrated in estate planning and wealth preservation, business law, and real estate. He has authored numerous articles for *Michigan Probate and Estate Planning Journal, Estate Planning, The Journal of Taxation, Estates & Trusts*, and the *Michigan Bar Journal*. He is also a frequent speaker for the Institute of Continuing Legal Education and currently serves on its Probate and Estate Planning Advisory Board. In the spring of 1989, at the invitation of the Peoples Republic of China, Mr. Grassi taught international business law to a group of graduate students in Beijing. His visit to China coincided with the historic prodemocracy movement and the tragic Tianamen Square massacre.

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Probate and Estate Planning Section

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A GUIDE TO THE ESTATE SETTLEMENT ACT WITH COMPARISONS TO THE REVISED PROBATE CODE

By John H. Martin

Editor's note: The following outline compares and contrasts the Michigan Revised Probate Code enacted in 1978 with provisions in the proposed Estate Settlement Act (ESA). The ESA has been passed by the Senate and is currently under consideration by the Judiciary Committee of the Michigan House of Representatives. Endorsed by the Michigan Probate Judges Association, the Council of the Probate and Estate Planning Section of the State Bar of Michigan, and the Michigan Bankers Association, the ESA is designed to update and to streamline Michigan's estate settlement process. The proposed ESA represents seven years of discussion, debate, and drafting by the council and other interested practitioners. In November 1997, John H. Martin, immediate past chair of the Council and the reporter of the proposed ESA, used the following outline as his presentation to the House Judiciary Committee about the changes made by, and the benefits of, the proposed legislation. The Council is making the outline available to Section members as a review of the changes and with the request that interested Section members contact their representatives in Lansing to urge the prompt passage of this worthwhile legislation.

INTRODUCTORY COMMENTS

I. The current Revised Probate Code (RPC), which was enacted in 1978, is an imperfect and partial attempt to update the 1939 Probate Code. The RPC added some features of the Uniform Probate Code (UPC) without smoothly integrating them. The proposed Estate Settlement Act (ESA) is a true integration of the UPC with unique and essential features of current Michigan law.

II. The ESA is a product of seven years of drafting, consideration, debate, and redrafting by the Probate and Estate Planning Council augmented by many section members.

A. Participants in the debates and policy-making decisions included sole practitioners, lawyers from small to large law firms, attorneys from the UAW legal services staff, judges of probate, probate registers, and bank trust officers.

B. Senate Bill 209 has been endorsed by the Michigan Probate Judges Association, the Council of the Probate and Estate Planning Section of the State Bar of Michigan (the largest section of the State Bar), and the Michigan Bankers Association.

Article continued in the Winter 1998 issue of the Journal.

John H. Martin is a partner of Warner, Norcross & Judd, in Muskegon. He is the immediate past chair of the Probate and Estate Planning Council of the Probate and Estate Planning Section of the State Bar of Michigan and the reporter and principal drafter of the proposed Estate Settlement Act.

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ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE

By Steven A. Mitchell

Special Concerns in Representing Clients Under a Disability

Probate and estate planning practitioners are often confronted with situations in which they are asked to represent someone who lives with a disability, whether it be minority, mental disability, or some other impairment. In addition, clients who are fully capable of handling their personal affairs may become disabled, at which time their relationship with their lawyer may change significantly, by virtue of the lawyer's ethical responsibilities governing the relationship.

Generally, MRPC 1.14 governs a lawyer's relationship with a disabled client:

> Client Under a Disability.
> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority or mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

On its face, this rule seems clear. Yet within the context of the lawyer-client relationship, it raises significant questions. What constitutes impairment because of mental disability? What information is necessary for the lawyer to formulate a reasonable belief that the client cannot adequately act in his or her own interest? What constitutes a normal client-lawyer relationship with such a client? How can a lawyer enter into a contractual relationship to provide legal services to a prospective client who is impaired by mental disability?

The following hypothetical brings to life some of the issues raised in these questions because it is based on an actual set of circumstances. In attempting to deal in good faith with a client suffering from mental disability accompanied by old age, a lawyer ran afoul of the probate court and the attorney discipline system. Fortunately, the lawyer merely lost the right to be compensated for his services, since the grievance filed against him was dismissed, but it caused him a great

deal of anxiety and no little expense. It illustrates that an attorney must not only take care to protect the rights of a disabled client but also take similar care to ensure the protection of his or her law license.

In May 1995, Ms. Grey contacted Lawyer Smith on behalf of Mr. Brown, her life-long friend and recent companion. Ms. Grey advised Mr. Smith that Mr. Brown was upset because his son had recently taken steps to implement the terms of a revocable trust Mr. Brown had executed two years before, which named his son as trustee. Mr. Brown's son, as trustee, had had himself named the representative payee of his father's Social Security and had placed his father on an allowance. Lawyer Smith arranged for a time to meet with Mr. Brown and Ms. Grey at Mr. Brown's home.

On meeting with Mr. Brown, Lawyer Smith learned that Mr. Brown and Ms. Grey had been friends for a long time and were now in their early 80s, renewing an old friendship after the death of both of their spouses. Mr. Brown was upset that his son had invoked the trustee succession provisions of Mr. Brown's trust without notice to Mr. Brown and had essentially stripped Mr. Brown of his financial independence.

The trust was modest, with liquid assets of about $65,000 and a homestead worth about $55,000. The succession provisions of the trust could be triggered if and when a physician stated in writing that Mr. Brown was incapacitated and could not handle his own business affairs. Mr. Brown stated to Lawyer Smith that he believed that he was capable of handling his financial affairs and that he wanted the lawyer's help to reverse the actions his son had taken.

Lawyer Smith accepted the case and learned that a physician had written a statement indicating that Mr. Brown was unfit. Mr. Smith contacted Dr. Jones, who informed the lawyer that at the time he had issued his statement declaring Mr. Brown incapable of handling his own affairs, he was under the impression that Mr. Brown concurred in his son's assumption of responsibility over Mr. Brown's financial affairs. Dr. Jones indicated to Mr. Smith that if Mr. Brown did not concur, then Mr. Brown should be reevaluated.

Mr. Smith contacted the attorney who had drafted the trust, Mr. Green, and sought to arrange a meeting between Mr. Brown, his son, other family members, and Mr. Green, to discuss Mr. Brown's concerns. At the meeting, Mr. Smith indicated that he was Mr. Brown's legal representative and that he would pursue Mr. Brown's interests as his client made them known to him. Mr. Brown's son insisted that the status quo be maintained regarding his succession as trustee over his father's financial affairs, and Mr. Brown continued to insist that Mr. Smith attempt to reverse the effects of his son's actions.

Mr. Smith explained to Mr. Brown that the trust could be revoked or amended but that to do so, it would have to be established that Mr. Brown possessed the legal capacity to take such action. Mr. Brown acquiesced in having another examination conducted to determine his legal capacity. At this time, Mr. Smith had not formed any conclusive opinions regarding his client's capacity.

In the meantime, Ms. Grey and Mr. Brown married, against the wishes of Mr. Brown's son. The hearing on the appointment of Mr. Brown's son as guardian and conservator was conducted on June 14, 1995. At that time, the probate judge inquired of Mr. Smith regarding his role. Smith responded by indicating that he represented Mr. Brown. There was no additional discussion concerning Mr. Smith's role at that time. It was acknowledged that the issues the court was to determine were Mr. Brown's capacity and the extent to which he would be allowed independence to make decisions regarding his personal affairs relative to his legal capacity.

Mr. Smith met with Mr. Brown at his home on June 21, 1995, and reviewed his role with the client. At that time, Mr. Smith had Mr. Brown execute a written fee agreement providing for Mr. Smith's compensation for services. During Mr. Brown's review of the document and his questions concerning it, it was apparent to Mr. Smith that Mr. Brown understood the nature and effect of the fee agreement. From his research into the issue, Mr. Smith concluded that even though an individual suffers from a mental disability that affects capacity, he or she has the right to secure legal counsel.

Over the course of the next month, discussions were held concerning settlement of the guardianship question. A pretrial conference was held, at which time settlement was discussed, and Mr. Smith advocated Mr. Brown's position at that time. It should be noted that a guardian ad litem had previously been appointed and attended the pretrial conference, along with counsel for Mr. Brown's son, who filed the petition for guardianship. Further settlement negotiations resulted in a settlement being placed on the record in probate court on August 9, 1995. At this hearing, Mr. Smith stated that he was the representative for Mr. Brown.

In the meantime, Mr. Brown had been evaluated by a psychologist, Dr. Johnson, who found Mr. Brown to be disoriented about time and place, concluding that Mr. Brown suffered from severe deficits with respect to short-term memory loss and an inability to follow through on making plans or carrying them out. In addition, Mr. Brown indicated to Dr. Johnson that he was unaware that he was being represented by an attorney, concluding that Mr. Brown did not possess the cognitive capacity to revoke the authority of one person acting on his behalf and to appoint another.

The settlement reached on August 9, 1995, provided for the termination of Mr. Smith's legal services provided to Mr. Brown. However, by early fall, Mr. and Mrs. Brown contacted Mr. Smith, complaining that Mr. Brown's son was not fulfilling the terms of the settlement. Specifically, Mr. Brown's son was not paying Mr. Brown the allowance provided for in the settlement. Mr. Brown indicated that he wanted Mrs. Brown to be appointed his conservator.

Mr. Smith prepared a petition for this purpose and filed it on October 18, 1995. On the same date, Mr. Smith consulted with Mr. Brown and had him sign another fee agreement requesting that Mr. Smith continue to provide legal services on his behalf.

A conference was scheduled with the judge in chambers on November 2, 1995, at which Mr. Smith appeared on behalf of Mr. Brown. The attorney for Mr. Brown's son indicated that the family would like to see Mr. Smith taken off the case, at which time Mr. Smith suggested to the judge that his position be clarified.

Negotiations continued, with no resolution of the guardianship issues. In fact, Mr. Brown's son retained new counsel to pursue his position; and on April 30, 1996, counsel for Mr. Brown's son advised Mr. Smith that the guardian and conservator were terminating Mr. Smith's services on behalf of Mr. Brown. This "termination" was accompanied by an invitation to submit a final statement for legal services to the conservator.

Mr. Smith wrote back to counsel for Mr. Brown's son indicating that Mr. Brown wanted Mr. Smith to remain on the case. At the same time, Mr. Smith filed a petition to the probate court requesting a ruling on Mr. Smith's status.

A hearing was held on this petition on June 20, 1996, at which time the court took the issue under advisement. The judge did note that she was unable to find any cases on point deciding whether a conservator or guardian could terminate an attorney-client relationship that was personal to the ward.

Subsequently, the case was settled with the approval of Mr. Smith, and the settlement order provided for his discharge. The issue of his attorney fees was left unresolved.

In early winter 1996, Mr. Smith filed a petition for approval and payment of attorney fees. The hearing was held on February 28, 1997. The court took the matter under advisement.

At about the same time, Mr. Brown's son filed a grievance against Mr. Smith. Among other things, Mr. Brown's son alleged that Mr. Brown had never lawfully retained Mr. Smith on account of Mr. Brown's incapacity; that Ms. Grey (who had subsequently become Mrs. Brown) had actually retained Mr. Smith; that Mr. Smith had encouraged Mr. Brown to enter into a marriage contract with Ms. Grey, even though Mr. Brown lacked capacity to do so; and that Mr. Smith had unnecessarily continued in the representation of Mr. Brown to maximize fees for his services.

Needless to say, this created a nightmare for Mr. Smith. Not only was he being required to establish justification for his legal fees, but he was also required to defend this challenge to his license by an angry adversary in litigation. Mr. Smith responded to the grievance by providing his account of the facts as best he knew them. In addition, he pointed out to the grievance authorities that he had significantly discounted his fees on account of Mr. Brown's limited financial circumstances. In fact, Mr. Smith had written off a significant portion of his fees to keep them in line with the original estimate that he had provided Mr. Brown. Nevertheless, the foregoing may provide no defense to allegations that a lawyer was not properly retained to represent the interests of a legally incapacitated person.

After taking the matter under advisement in February, the probate court finally issued an opinion in mid-June 1997. At that time, the court recounted the pertinent facts pertaining to Mr. Brown's incapacity, ruling not only that Mr. Brown did not possess the capacity to enter into an attorney fee agreement but also that Mr. Smith was aware of Mr. Brown's cognitive deficits and was on notice that Mr. Brown had no such capacity. The court further noted that at no time did Mr. Smith petition the court to be appointed attorney for Mr. Brown.

Accordingly, the court ruled that the retainer contract between Mr. Smith and Mr. Brown was invalid due to Mr. Brown's incapacity, declining to award Mr. Smith any attorney fees. In passing, the court indicated that a grievance had been considered against Mr. Smith but that it was not pursued because Ms. Grey had informed the guardian ad litem that she was paying Mr. Smith's fees. (In fact, it was established in the grievance proceedings that Ms. Grey had not paid Mr. Brown.)

The grievance administrator accepted Mr. Smith's explanation concerning his actions in representing Mr. Brown. It was concluded that Mr. Smith did not hire himself, that Ms. Grey neither hired nor paid him, that he did not counsel Ms. Grey and Mr. Brown to get married, and that he had not embarked on the representation to generate a fee for himself. On the other hand, Mr. Smith was vaguely cautioned regarding a lawyer's special duties when representing clients under a disability, leaving it to Mr. Smith to familiarize himself with MRPC 1.14.

Perhaps this whole scenario could have been avoided if Mr. Smith had petitioned the court on behalf of Mr. Brown to approve his appointment as counsel in June 1995. However, Mr. Smith did not believe that he required such approval, maintaining that even a mentally impaired person has an individual right to counsel. Whether or not that is true, practitioners must be mindful that courts and the disciplinary authorities will scrutinize such relationships very carefully; and

lawyers should be mindful of the need to obtain approval for the very existence of the relationship, as well as for the steps taken to protect the interests of such a client. While Mr. Smith avoided disciplinary consequences, he was not compensated for the valuable services he provided to Mr. Brown; and he did not escape disciplinary consequences without suffering significant anxiety and expense.

Steve 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) 361-1542.

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LEGISLATIVE REPORT

By Douglas A. Mielock

HB 4649—DELIVERY OF DECEDENT'S CASH AND WEARING APPAREL (Representative Schroer)

MCL 700.103, MSA 27.5103 authorizes 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. HB 4649 increases the amount of cash that may be delivered under this statute from $100 to $500.

Referred to the House Judiciary Committee (April 22, 1997).

HB 5452—ESTATE RECOVERY (Representative Olshove)

HB 5452 amends the Social Welfare Act to provide that the amount of medical assistance paid on behalf of a person receiving medical assistance under the act is not a claim against (1) the estate of the recipient following the death of that recipient or (2) the estate of a deceased spouse who survived the recipient. It also provides that the State of Michigan shall not impose a lien against real property of a recipient before or after his or her death to secure amounts properly paid for medical assistance on behalf of the recipient.

Referred to the House Human Services and Children Committee (January 14, 1998).

SB 80—MICHIGAN MEDICAL SELF-DETERMINATION ACT (Senator Berryman)

SB 80 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.

Referred to the Senate Health Policy and Senior Citizens Committee (January 28, 1997).

SB 209—ESTATE SETTLEMENT ACT (Senator Van Regenmorter)

SB 209 repeals the Revised Probate Code and replaces it with a new Estate Settlement Act.

Passed by the Senate (March 4, 1997). Referred to the House Judiciary Committee (March 5, 1997).

SB 417 and SB 418—ABOLISHMENT OF THE DOCTRINE OF ADVERSE POSSESSION (Senator Conroy)

SB 417 and SB 418 amend MCL 565.101, 600.5801, and 600.5867, and adds MCL 600.5867A to abolish the doctrine of securing title to real property by adverse possession, beginning on the effective date of the acts. SB 417 and SB 418 are tie-barred.

Referred to the House Judiciary Committee (April 22, 1997).

SB 671—MEDICAL TREATMENT DECISIONS (Senator Dingell)

SB 671 authorizes 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.

Referred to the Senate Judiciary Committee (July 10, 1997).

SB 754—MODIFICATIONS TO THE MICHIGAN ESTATE TAX ACT (Senator B. Bullard, Jr.)

SB 754 amends the Michigan Estate Tax Act (MCL 205.240 et seq., MSA 7.591 et seq.) to provide that references in that act to the "Internal Revenue Code" refer to the U.S. Internal Revenue Code of 1986, in effect on January 1, *1998,* thereby incorporating the changes in the state death tax credit brought about by the Taxpayer Relief Act of 1997.

Referred to the Senate Finance Committee (October 14, 1997).

SB 775—TRUSTS AS SHAREHOLDERS OF PROFESSIONAL SERVICE CORPORATIONS (Senator Bouchard)

SB 775 amends the professional service corporation act to expand the class of permitted shareholders of a professional service corporation to include a "trust or split interest trust, in which the trustee and the current income beneficiary are both licensed persons in a professional corporation."

Referred to the Senate Financial Services 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 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 Michiganians 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

Case summaries of new appellate cases, court rules, and statutes affecting the probate court may be found at the Calhoun County Courts Web site at http://courts.co.calhoun.mi.us.

INHERITANCE TAX—WAIVER OF PENALTIES—JURISDICTION

In re Estate of Wagner, 224 Mich App 400, 568 NW2d 693 (1997)

In this case a petition was filed for a redetermination of inheritance taxes. The probate court denied the petition but waived all penalty charges incurred in failing to timely pay taxes. The probate court pointed out that much of the delay that caused the penalties was the result of the Department of Treasury losing the file for 21 months. The Department of Treasury appealed.

The issue presented was whether the probate court exceeded its jurisdiction when it waived the penalty. The court of appeals affirmed the probate court, holding that the probate courts have such jurisdiction pursuant to MCL 205.210, MSA 7.571. They concluded that through the probate courts' power of review, probate courts may review the penalties assessed by the Department of Treasury to determine whether they were properly added or waived, as well as order the cancellation of penalties found on judicial review to have been inappropriate.

CHILD CUSTODY ACT—LIMITED GUARDIAN—JURISDICTION

Walterhouse v Ackley, No 196988, 1997 Mich App LEXIS 347 (Oct 17, 1997)

In September 1986, defendant voluntarily granted plaintiff a limited guardianship of her children. In November 1994, defendant petitioned the probate court to terminate the guardianship. The probate court issued a reintegration order that provided that the guardianship was to terminate September 1, 1995. On May 5, 1995, plaintiff filed a complaint and motion in circuit court for temporary and permanent custody. Defendant filed a motion for summary disposition claiming plaintiff lacked standing to sue for custody. The motion was denied, and after a two-day custody trial, the court awarded custody to plaintiff. Defendant appealed.

The court of appeals reversed the circuit court. They pointed out that §26b of the Child Custody Act, which gives guardians and limited guardians standing to bring child custody actions, became effective December 20, 1990. They concluded that, based on their interpretation of legislative history, the legislature did not intend to have §26b applied retroactively to guardianships established before December 29, 1990. Therefore, the circuit court erred in applying §26b retroactively to a guardianship created before December 20, 1990, and improperly asserted its jurisdiction.

TRUST—QUALIFICATION FOR MEDICAID BENEFITS

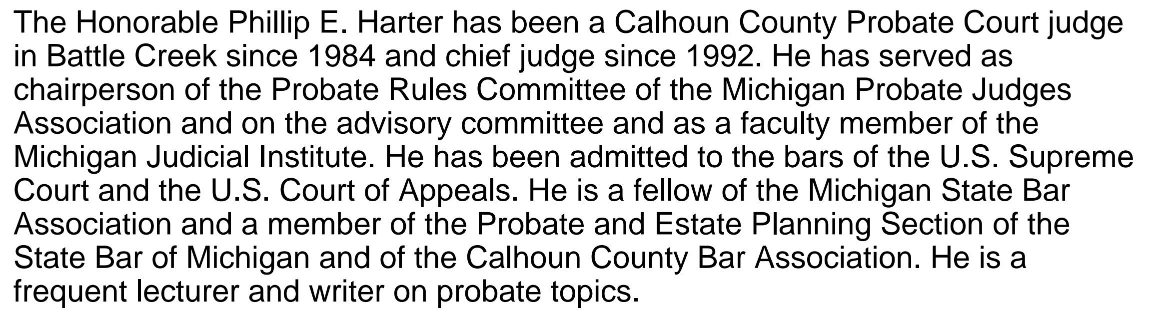
Cook v Department of Social Servs, 225 Mich App 318, 570 NW2d 684 (1997)

Anna Cook was an incompetent adult who resided in a nursing home. In 1977, she and her now-deceased husband established an irrevocable trust that required the trustee to pay all trust funds for the benefit of the grantors. Until early 1995, Anna Cook's nursing home care was paid for out of income and principal from the trust. Anna's guardian began applying only the trust income toward Anna's care and applied for Medicaid to cover Anna's excess nursing home expenses. The Medicaid applications indicated that the trust had a value of $98,000; it also listed a bank account in the name of the trust valued at $18,600. The department denied the application because the trust met the characteristics of a Medicaid Qualifying Trust (MQT), a type of trust the assets of which are countable in determining eligibility. At an administrative hearing, an administrative law judge ruled in favor of the department. A circuit court reversed that decision, and plaintiff-guardian appealed.

The court of appeals reversed the circuit court. It analyzed the legislative history of the Medicaid program in reaching its decision that Anna Cook was ineligible. The Medicaid program was established in 1965. The test for eligibility was essentially a needs-based test with coverage to be denied if the applicant exceeded a certain amount of countable assets. Generally, funds held in an irrevocable trust such as the Cook trust were not countable. In 1986, 42 USC § 1396a(k) was added to the Medicaid statute to define an MQT and establish the circumstances under which the assets of an MQT would be countable in determining eligibility for Medicaid. All parties agreed that Anna would be ineligible if this test were applied to her trust. In 1993, Congress again amended the statute by deleting §1396a(k) and making the criteria for eligibility even stricter under §1396a(d). This amendment only applied to trusts established after August 10, 1993. All parties agreed that §1396a(d) could not apply to this trust.

The issue in this case was whether trusts like the Cook trust, created before August 10, 1993, continue to be governed by the now-deleted §1396a(k). Plaintiff argued that since §1396a(k) was deleted, trusts created before the 1993 amendments should be governed by the common law. The court of appeals rejected this argument, pointing out that Medicaid eligibility is strictly statutory. There is no common law to be revived. Plaintiff next argued that even if §1396a(k) survived the 1993 amendments, it would not apply to the Cook trust because application of the 1986 provisions to a trust established in 1977 would violate the constitutional protection against ex post facto laws. The court of appeals also rejected this argument, pointing out that the constitutional prohibition only applies to criminal or punitive laws.

The court of appeals concluded that the 1986 provisions in §1396a(k) regarding MQTs and Medicaid eligibility remained applicable to irrevocable trusts created on or before August 10, 1993. Because it was undisputed that the Cook trust met the definition of an MQT, the trust assets were countable and Anna was ineligible since she exceeded the $2,000 ceiling for Medicaid eligibility.



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

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DIGEST OF MICHIGAN PROBATE OPINIONS

By Patrick Boland

97-8 Adoption; Grandparent Visitation; Standing; In the Matter of [Adoptee]; Judge Michael J. Anderegg, Marquette County. This case involved a child living with the mother and the stepfather. The mother's motion to terminate parental rights was pending; the paternal grandparents filed a motion for visitation. The court held that §60(3) of the Adoption Code does not give a grandparent standing to seek visitation in adoption cases. Stepparent adoption is not a proceeding in which legal custody of the child is given to a party other than the child's parent; the natural parent still maintains custodial rights. MCL: 722.27b; 722.27b(2)(b); MSA: 25.312(7b); 25.312(7b)(2)(b); 452 Mich 171; 550 NW2d 739.

97-9 Guardian; Sale (Property); In the Matter of [Legally Incapacitated Person]; Judge Michael J. Anderegg, Marquette County. A court-appointed guardian ad litem recommended that the guardian-father be granted authority to sell his ward's future interest in realty. So ordered.

97-10 Claims Against Estate; Conservator; Support; In the Matter of [Legally Incapacitated Person]; Judge Michael J. Anderegg, Marquette County. The wife filed a motion to dismiss her husband's sister as his guardian-conservator and to appoint herself in the same capacity. It was shown that the wife had sold their trailer and used the proceeds; that she had received VA benefits from the husband; that the husband had voluntarily supported her over the past five years; and that the wife had signed a promissory note waiving future interests in any property. Although the probate court has no authority to force a conservator to pay spousal support when an election is made not to do so, the probate court may authorize the conservator to pay legal claims against a protected person's estate, which this claim is. MCL: 700.485(1)(d); MSA: 27.5485(1)(d).

97-11 Motion to Disqualify; Prejudice; In the Matter of Marguerite Bergdahl, Deceased; Judge Michael J. Anderegg, Marquette County. The sole beneficiary under a proposed will moved to disqualify the judge because of prejudice in rushing a matter to trial. The beneficiary had earlier been convicted of larceny against the deceased. Since the beneficiary had been kept informed of all court hearings in the same manner as all the other beneficiaries and had requested and received previous adjournments, there was no demonstration of bias or prejudice that would make it necessary for the judge to disqualify himself; and in the interest

of judicial economy, any such motion would be denied. MCR: 2.003(2); 194 Mich App 134; 486 NW2d 326.

97-12 Adjournment; Discretion; Evidence (Unavailable); Transcript; In the Matter of Marguerite Bergdahl, Deceased; Judge Michael J. Anderegg, Marquette County. The sole beneficiary under a proposed will moved for a second adjournment because she was waiting for the complete transcript to be produced from an earlier criminal trial. Since the court found that the entire transcript from the earlier trial was not material to the subsequent probate trial and that no effort was made to produce relevant portions of the transcript, the court could use its discretion to deny a motion for an adjournment of the probate trial. MCR: 2.503(C).

97-13 Clerical Error (Correction); In the Matter of Seymour Iwrey; Judge Joan E. Young, Oakland County. This case concerned the court's motion to correct a clerical error regarding a money judgment. MCR: 2.503(C).

97-14 Best Interests; Burden of Proof; Concurrent Jurisdiction; Custody Proceedings; Established Custodial Environment; Jurisdiction; Parental Rights (Termination of); Protective Proceedings; In the Matter of [DOB 1-15-88]; Judge Michael J. Anderegg, Marquette County. The mother had been given custody of the child in a circuit court divorce trial; due to later violence and neglect, the court gave temporary custody to the father, who subsequently petitioned the court for a change of custody. Under the local rule on concurrent jurisdiction, the probate court exercised its circuit court powers and applied custody proceeding rules and evidentiary standards to this protective proceeding. The court held that the authorization of the noncustodial parent's petition for custody in a protective proceeding filed under §21 of the Juvenile Code is a sufficient "change of circumstances" to give the noncustodial parent standing to request custody. Because the circuit court created an "established custodial environment" that was later destroyed, with no new custodial environment being established, the petitioner has to show by a preponderance of the evidence that the best interests of the child were met by changing custody. "Best interests" are to be determined pursuant to Child Custody Act factors. MCL: 712A.1; 712A.2(b)(5); 712A.18(1)(b); 712A.18(2); 712A.19a; 712A.21; 722.3; 722.23; 722.27(1)(c); MSA: 25.312(1)(c); 25.312(3); 25.312(7)(1)(c); 27.3178(598.1); 27.3178[598.2(b)(5)]; 27.3178[598.18(1)(B)]; 27.3178[598.18(2)]; 27.3178(598.19a); 27.3178(598.21); MCR: 3.205; 3.205(a); 3.205(c); 5.963(3); 5.965(A)(9); 411 Mich 567; 420 Mich 729; 167 Mich App 90; 198 Mich App 320; 206 Mich App 456; 209 Mich App 587; 309 NW2d 502; 362 NW2d 230; 421 NW2d 585; 497 NW2d 602; 522 NW2d 874; 532 NW2d 205.

97-15 Best Interests; Parental Rights (Termination of); In the Matter of [DOB 1-15-88]; Judge Richard J. Liedel, Otsego County. Pursuant to the father's motion for change of custody, the court examined facts and testimony showing the father's history of abuse. The court found that a statutory basis for terminating the father's parental rights had been shown by clear and convincing evidence. Furthermore, his history of abuse, failure to comply with the Parent Agency Agreement, and the fact that the child preferred adoption were evidence of the best interests of the child being met by terminating the father's parental rights. MCL: 712A.19b; 712A.19b(3); 712A.19(3)(b)(i); 712A.19(3)(c)(i); MCR: 5.974(F); 5.974(F)(3); 48 Mich App 377; 175 Mich App 666; 187 Mich App 644; 199 Mich App 22.

97-16 Change in Circumstances; Established Custodial Environment; Marsh v. Marsh; Judge Michael J. Anderegg, Marquette County. The father claimed that the custodial mother's lack of discipline and vulgar language in front of the children were "changes in circumstances" for which the court could then look at

evidence whether there was an established custodial environment. The court said that these problems existed before the divorce and did not rise to the level of "changes in circumstances"; therefore, the court did not have to consider the question of an established custodial environment, and the father's motion was denied. 198 Mich App 320; 206 Mich App 456; 497 NW2d 602; 522 NW2d 874.

97-17 Testamentary Capacity; Undue Influence; In the Matter of Marguerite Bergdahl, Deceased; Judge Michael J. Anderegg, Marquette County. Two wills were presented for probate, with the later will naming the deceased's attorney-in-fact as the sole beneficiary. Mental capacity to execute a will is presumed, and the contestant failed to meet the burden of proof regarding incapacity. However, when a person with a fiduciary relationship is named as a beneficiary under a will and there are facts showing that the beneficiary had the opportunity to influence the transaction, there is a mandatory inference of undue influence, which the beneficiary must rebut with evidence to the contrary. The beneficiary failed to meet her burden, and the court found that the later will was a product of undue influence. 340 Mich 277; 130 Mich App 493; 343 NW2d 593.

97-18 Appeal; Attorney (Court-appointed); In the Matter of Marguerite Bergdahl, Deceased; Judge Michael J. Anderegg, Marquette County. The proponent of a will that was found to be the product of undue influence requested a court-appointed attorney to appeal the decision. The right of an indigent person to a court-appointed attorney is generally limited to cases in which the government is attempting to take some action that affects a constitutionally protected interest, rather than civil matters in which there is only a property interest at stake. If a court appointed an attorney at the trial court level, one would have to be appointed at the appellate level as well; however, since the court denied the requester's trial court motion for an appointed attorney, the request for an appellate court attorney would also be denied. 422 Mich 758.

97-19 Acceptance-Rejection Theory; Disclaimer (of Property Interest); Fraudulent Conveyance; Nonacceptance; Legislative Intent; Relation Back; Statutory Construction; In the Matter of the Estate of Dorothy M. Ray, Deceased; Judge Milton L. Mack, Jr., Wayne County. A judgment creditor petitioned to prevent a beneficiary (and judgment debtor) from disclaiming his inheritance under the Fraudulent Conveyance Act. The court followed the Acceptance-Rejection Theory, stating that a disclaimer is simply a nonacceptance, that one who disclaims a property interest in an inheritance never had possession of it and therefore could not transfer (convey) it to another. Thus, the Fraudulent Conveyance Act does not apply to a disclaimer of an inheritance. If the Michigan legislature's intent had been to consider a disclaimer a transfer, they could have expressly said so. Similarly, the Michigan Fraudulent Conveyance Act does not mention "disclaimers," as other state statutes have, and the court will not construe the act to apply to them. MCL: 554.871; 554.880(2); 554.881(2); 566.11; 566.17. MSA: 26.1236(871); 26.1236(880)(2); 26.1236(881)(2); 26.881; 26.887. MCR: 2.116(A)(2). 397 Mich 469; 432 Mich 242; 435 Mich 352; 439 Mich 370; 443 Mich 176; 454 Mich 46; 82 Mich App 689; 133 Mich App 107; 196 Mich App 367; 215 Mich App 516; 219 Mich App 456; 348 NW2d 299; 439 NW2d 246; 459 NW2d 279; 483 NW2d 844; 494 NW2d 1; 504 NW2d 635; 546 NW2d 273; 556 NW2d 524; 559 NW2d 639.

97-20 Conflict of Interests; Evidence, Intrinsic; Fiduciary; Fraud; Res Judicata; Statute of Limitations; Trustee; In the Matter of the Estate of James T. Barnes, Sr., Deceased, and of the James T. Barnes, Sr., Revocable Trust Agreement under Date of May 26, 1978; Judge Milton L. Mack, Jr., Wayne County. The deceased's trust held as its main asset the deceased's company's "B" stock, which the deceased had previously pledged as security for a loan agreement with a bank. The son later became a majority shareholder of the

company and was named as fiduciary of the deceased's trust. A subsequent settlement agreement was made between the deceased's company and the banks, in which his son pledged his own "A" and "common" stock as a limited personal guarantee. All this information was disclosed in a 1980 settlement agreement. The company later sold some bank stock at a profit. In 1986, although the son had not disclosed this sale to either the beneficiaries or the court, the beneficiaries, under the belief that the asset of the trust was insolvent, allowed the company to redeem the "B" stock, releasing the son's interest for tax purposes. A trustee must inform beneficiaries of all material facts in connection with a nonroutine transaction that significantly affects the trust estate and the interest of the beneficiaries prior to the transaction taking place. Thus, when there has been a full disclosure of all material facts to beneficiaries, as in the 1980 agreement, there can be no breach of a fiduciary duty. Furthermore, a 17-year-old settlement agreement between the parties is res judicata (and beyond the statute of limitations), and the exclusive remedy for intrinsic fraud is a motion pursuant to MCR 2.612. However, where the trustee fails to disclose material facts, as in the 1986 stock sale, an action for breach of fiduciary duty is valid. Although the action is 11 years old, a fiduciary who secretly profits from his position by failing to make full disclosure will find that, unless he acted in good faith, the statute of limitations will never begin to run. MCL: 700.561(1); 700.819. MSA: 27.5561(1); 27.5819. MCR: 2.116(C)(7); 2.116(C)(10); 2.612(C); 5.117(A). 141 Mich 143; 188 Mich 645; 269 Mich 68; 284 Mich 443; 375 Mich 330; 394 Mich 327; 409 Mich 147; 443 Mich 59; 444 Mich 170; 2 Mich App 660; 147 Mich App 70; 172 Mich App 298; 172 Mich App 509; 213 Mich App 310; 382 NW2d 734; 431 NW2d 492; 432 NW2d 307; 448 NW2d 125; 503 NW2d 435; 507 NW2d 194; 539 NW2d 587.

97-21 Burden of Proof; Constructive Trust; Deeds (Delivery); Deeds (Recording); ***In Praesenti;*** **Trusts (Amendment of);** In the Estate of James P. Barkman, Deceased; Judge Bruce A. Newman, Genesee County. The deceased had originally drafted a revocable trust. He signed a deed purporting to transfer certain real property to himself as trustee of the trust, but the deed was not recorded. The deceased later made a codicil to his will purporting to give the petitioner an option to purchase the property. The respondents refused to honor the petitioner's exercise of the option, stating that the property had been previously transferred to the trust, thus adeeming the option. The petitioner argued that any such transfer was invalid due to a lack of delivery of the deed. The court said that the party relying on the validity of the deed has the burden to prove a valid delivery. Recording the deed is not necessary between the parties and only creates a presumption of delivery, shifting the burden to the party refuting delivery. The decedent's intent, which controlled the case, was clearly to convey a present interest in the land, creating a valid delivery. Regarding the issue of amending a trust, Michigan courts must look to the language of the trust document for amendment procedures, since the legislature has not addressed this by statute. In this case, using a codicil to a will to amend a trust (giving the petitioner an option to purchase) was proper because the trustee was also the settlor and because actual written notice was given by the trustee to the settlor. Finally, when necessary, the court will create, by operation of law, a constructive trust, so that the holder of the legal title will be considered the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. MCL: 565.1; 565.29; 700.22(1)(A). MSA: 26.521; 26.547; 27.5022(1)(A). 192 Mich 584; 198 Mich 487; 262 Mich 223; 281 Mich 137; 294 Mich 487; 311 Mich 608; 321 Mich 630; 330 Mich 635; 337 Mich 344; 352 Mich 652; 383 Mich 394; 442 Mich 38; 83 Mich App 484; 106 Mich App 70; 437 NW2d 178; 497 NW2d 641.

97-22 Legal Parent; Name Change; In the Matter of Tyler Kristan Fiszer and Keegan Jefferson Fiszer, Minors; Judge Michael J. Anderegg, Marquette County. The mother had been made the sole custodial parent of two minor children through a court order that also temporarily terminated the father's visitation rights

during a period for which he was to seek psychiatric counseling. A child's name may be changed by one of the minor's parents if there is only one legal parent available to give consent. Under the circumstances, the father was not an available parent as contemplated by Michigan statute, and the fact that his status might be temporary was of no significance. MCL: 711.1. MSA: 27.3178 (561).

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