

STATE OF THE LAW 2006
PROBATE AND ESTATE PLANNING SECTION

By

Hon. Phillip E. Harter
Chief Judge, Calhoun County Probate Court

I. INTRODUCTION

A. Most of this outline is based on Judge Harter's Annual Review of Michigan Probate and Trust Law Cases, which was presented as part of the Institute of Continuing Legal Education's (ICLE) 46 Annual Probate and Estate Planning Institute.

B. Case summaries of new appellate cases, court rules, and statutes affecting the probate court may be found in the Probate Review Section of the Calhoun County Website which is located at: <http://courts.co.calhoun.mi.us>

II. CASE LAW UPDATE

A. ATTORNEY - ESTATE PLANNING - LEGAL MALPRACTICE -
NEGLIGENCE IN DRAFTING ESTATE PLANNING DOCUMENTS

Sorkowitz v Lakritz, Wissbrun & Associates, P.C., 474 Mich 925; 706 NW 2d 9 (2005)

The Michigan Supreme Court peremptorily reversed the Court of Appeal and reinstated the order of the Oakland Circuit Court granting defendants' motion for summary disposition. In so doing they reaffirmed the principle given in *Mieras v DeBona*, 452 Mich 278 (1996) that a beneficiary may not "use extrinsic evidence to prove that the testator's intent is other than that set forth in the will." While two Justices dissented, the Court has clearly refused to chip away at the *Mieras* rule which gives a great deal of protection from malpractice to estate planning attorneys when they engage in the drafting of estate planning documents.

B. ATTORNEY - ESTATE PLANNING - LEGAL MALPRACTICE -
NEGLIGENCE IN DRAFTING ESTATE PLANNING DOCUMENTS

Sorkowitz v Lakritz, Wissbrun & Associates, P.C., 261 Mich App 642; 683 NW 2d 210 (2004)

Defendants agreed to provide estate planning services to decedents. Plaintiffs contended that such services included tax planning. Plaintiffs alleged that defendants violated their duties and the standard of care, failed to include a Crummey clause and necessary generation skipping tax language in the estate planning documents. Defendants moved for summary disposition under MCR 2.116(C)(8) asserting that, "Michigan law directs that only those who can establish *without the use of extrinsic evidence* that a decedent's intent has been frustrated by an attorney's negligent drafting of estate planning documents having

standing to pursue a legal malpractice action against that attorney.” Plaintiffs had provided the affidavit of an expert attesting that the standard of practice requires that an attorney practicing in the field of estate planning discuss and recommend the use of a Crummey clause, and the failure to include the clause in the irrevocable trust here is unusual and extraordinary. Relying on Mieras v DeBona, 452 Mich 278 (1996), and Bullis v Downes, 240 Mich App 462 (2000) the circuit court granted summary disposition concluding that plaintiffs were unable to establish that the decedents’ intent was frustrated other than by use of extrinsic evidence such as set forth in the expert affidavit. The Court of Appeals reversed the circuit court and remanded.

The Court of Appeals began by explaining the importance of Crummey withdrawal rights to convert what would otherwise be a future interest into a present interest to obtain the benefit of the annual gift exclusion. This is consistent with the donor’s intent to grant a future interest because although the beneficiary is given an unqualified right to withdraw for a limited time, the beneficiary is not expected to exercise that right and almost never does, and to do so is at the peril of incurring the displeasure of, and forgoing future gifts of bequests from, the donor. The use of Crummey clauses has become standard in irrevocable trusts allowing the donor to convert \$10,000 (at the time of these trusts, now \$11,000) per beneficiary into a present excludable interest. The Court of Appeals agreed that if the “four corners” limitation enunciated in Mieras controlled, the grant of summary disposition would have been proper. However, the Court of Appeals distinguished the present case from Mieras v DeBona, 452 Mich 278 (1996) and Karam v Kliber, 253 Mich App 410 (2002). They pointed out that the Mieras and Karam cases were concerned with imposing conflicting duties on the drafting attorney where the interest of the client and the beneficiaries might diverge and with imposing liability based on beneficiary claims that might be inconsistent with the decedent’s intent. In the present case, the only dispute is between the use of tax saving language and the payment of taxes asserted to be unnecessary.

The Court of Appeals in limiting the Mieras line of case protection of the drafting attorney explained the reason and need for such limitation as follows:

In this day and age, when clients go to estate planning experts not only to prepare valid testamentary documents, but also to recommend an estate plan that will minimize the taxes payable, and thus transfer the maximum amount to the donor’s intended beneficiaries at the intended times and intervals, it ignores reality to dismiss legal malpractice cases such as this one based on the fiction that one cannot know the decedent’s intent unless it is apparent within the four corners of the estate planning documents, without regard to common sense and expert opinion on estate planning matters. We should not ignore, as judges, what we know as lawyers and as men and women. It is far more likely that the decedents here intended to minimize the taxes payable upon their deaths than that they were indifferent to the amount of taxes payable, and it is virtually certain that they did not intend to pay more taxes than necessary.

The Court of Appeals held that the Mieras rule is applicable in a dispute between potential beneficiaries concerning the intended distribution of the total estate. The Mieras rule is not

applicable to a claim such as this case where the malpractice action is sought to recover for diminution of the estate caused by the negligence of the defendants who provide estate planning. In this case, the interests of the deceased clients, the estate, and all the beneficiaries are aligned on the same side and there is no danger that drafting attorneys will be wrongly held accountable to a third-party for properly implementing the desires of their clients.

This 2-1 decision is a major dent in the apparent comprehensive shield of protection provided to estate planning attorneys in drafting documents by the Mieras line of cases. It would seem that very little protection will be provided in the future where documents are drafted that omit generally recognized tax saving techniques. It will be interesting to see if the Supreme Court reviews this matter.

C. CLAIMS - SECURITY AGREEMENT - EQUITABLE LEIN –
RECONSIDERATION

In re Estate of Jihad H. Moukalled, Deceased, 269 Mich App 708; 714 NW 2d 400 (2006)

Decedent had borrowed money from Bruce Bakian, petitioner, and executed promissory notes in both his personal capacity and his capacity as president of his business. On April 28, 2000, petitioner and decedent, without the assistance of an attorney, executed a document entitled “Security Agreement,” which provides in relevant part:

This document is a binding agreement that Borrower Jihad H. Moukalled and Great Lakes Color Printers, Inc. collectively can not and will not seek protection under corporate or personal bankruptcy for the following Promissory [s] Notes (see attached notes). If any sums due under these Promissory Notes are not paid upon demand, [] and remain unpaid for more than five (5) days from the date due or demanded Great Lakes Color Printers Inc. and Jihad H. Moukalled agrees to the [sic] following. Liquidation of the following personal and corporate assets will be initiated to full fill [sic] the \$381,000 debt owed to Bruce A. Bakian and Gerald Niester.

CORPORATE: All accounts receivable; Office and Plant Equipment; Any and all corporate funds and investments; Buildings and Property; Inventories.

PERSONAL: Cash (Savings Checking); Stocks; Cash value of Life Insurance; IRA and 401K; Residence and Furnishings at 25171 Rutledge Crossing, Farmington Hills Mi. 48335; Two Vacant lots (Heather Hills); Autos; Boats; Jewelry (Husband/Wife); Art work; Personal Effects; and not excluding any assets or titles, and funds in Mr. Moukalled Wives [s] maiden or married name.

This agreement prevents the sale and liquidation of all corporate and personal holdings with out [sic] the written consent of Bruce Bakian and Gerald Niester. [Brackets in original replaced with parentheses.]

In addition to the promissory notes, the parties attached the legal descriptions of two property lots situated in Heather Hills. On November 10, 2000, decedent killed himself and his family. Petitioner and other creditors filed claims in excess of \$2,000,000 against decedent's estate which had \$312,023.36 in total assets. On November 27, 2000, petitioner filed the document entitled "Security Agreement" with the Register of Deeds which accepted it as an actual financing statement. Petitioner also filed a lis pendens and claim of lien against two vacant lots in Heather Hills.

After a hearing on January 7, 2005, the probate court orally concluded the description in the agreement was adequate to create a security interest. On April 14, 2004, the probate court reversed its position and entered an order denying petitioner's motion for enforcement of security agreement/lien. The court rejected several alternative theories which sought to grant petitioner priority over other creditors, i.e., that the agreement satisfied the statutory requirements for a valid and enforceable security agreement under article 9 of the Uniform Commercial Code (UCC) or alternatively that petitioner was entitled to the lots pursuant to a land contract mortgage, common law contract interest, or an equitable lien. Petitioner moved for reconsideration and the probate court concluded a palpable error occurred when it failed to "liberally" apply the purpose and intent of the parties as required by the UCC, entered an order granting reconsideration and petitioner's motion for enforcement of a security agreement/lien. The probate court reasoned that even if the parties' agreement was not technically sound as required by the UCC, the UCC is still to be liberally construed and applied to promote its purpose and principle. Respondent appealed.

The Court of Appeals first addressed the issue of whether the probate court improperly granted reconsideration. Respondent contended that the motion was procedurally defective because it simply raised the same issues originally presented. The Court of Appeals rejected such argument citing MCR 2.119(F)(3) which provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The plain language of the court rule does not prohibit a trial court from granting a motion for reconsideration even if the motion presents the same issues initially argued and decided. The rule gives the trial court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties. Therefore, a trial court has discretion to give a second chance to look at a matter previously decided.

The Court of Appeals next addressed the issue of whether the UCC could be used to establish a lien against the decedent's real estate. After analyzing the language of the UCC in effect at the time, they concluded that article 9 of the UCC was inapplicable to real estate. Therefore, the probate court erred in using the UCC to establish a lien against the Heather Hills property.

However, the Court of Appeals continued with their analysis to find that there were grounds to assert an equitable lien on the property. They opined that an equitable lien arises from an agreement that both identifies property and evidences an intention that the property will be security for an obligation. An equitable lien cannot be imposed where the proponent has an adequate remedy at law. Generally, equity will create a lien only in those cases where the party entitled to the lien has been prevented by fraud, accident, or mistake from securing that to which he was equitably entitled. The Court of Appeals in this case concluded that the agreement reflected a clear intent by the parties to use an identifiable piece of property, the Heather Hills lots, as security for the promissory notes. But for the parties' mutual mistake of law in preparing an agreement not enforceable under the UCC, petitioner would have been a secured creditor. Additionally, petitioner is the only party who attempted to secure his loans to decedent against his personal assets and there was no showing that petitioner had an adequate remedy at law. Therefore, the Court of Appeals concluded in this case that petitioner had sufficiently demonstrated that he is entitled an equitable lien.

In sum, although the probate court improperly concluded the security agreement was enforceable under the UCC, the Court of Appeals concluded the trial court reached the right result although for the wrong reason. Therefore, the trial court's decision was affirmed.

D. DURABLE POWER OF ATTORNEY - FIDUCIARY DUTY - SELF DEALING

In re Estate of Louisa Cummins, Deceased, 267 Mich App 700; 706 NW 2d 34 (2005)

This case was the result of a remand due to the Court of Appeals' decision, In re Cummin Estate, 258 Mich App 402 (2003). The summary of the original case is provided as follows:

In June 1992, decedent executed a durable power of attorney that conferred on respondent, her daughter, authority to deal with decedent's real estate. Decedent eventually moved into a residential care facility and over the next two years her dementia worsened to the point that she would occasionally fail to recognize family members. She resided in the residential care facility until her death on April 28, 1998.

Respondent and her husband testified that over a period of several years, decedent repeatedly instructed respondent to transfer decedent's real estate to her. Decedent continued to instruct respondent to transfer the property after she moved into the residential care facility. On December 10, 1996, nearly two years after decedent moved into the residential care facility,

respondent, acting as decedent's attorney in fact, transferred decedent's real property to herself by quitclaim deed, reserving a life estate in the property for decedent. After respondent executed the quitclaim deed, respondent rented the property and received \$3,000 in rental payments. On April 14, 2000, she sold the property for \$180,000.

Petitioner, a son, commenced probate on February 25, 2000, and was appointed personal representative of the estate. The personal representative then filed a complaint against respondent (1) alleging respondent converted the estate's assets, (2) demanding an accounting, and (3) requesting a constructive trust over decedent's real and personal property, including the proceeds from the real property.

In its written opinion, the trial court determined that decedent had not been unduly influenced when she executed the power of attorney. The trial court also found that although respondent and her husband credibly testified that decedent wanted respondent to have the property, respondent did not make the transfer until several months after decedent became mentally unsound and engaged in behavior that was inconsistent with merely wanting to fulfill decedent's wishes, such as misleading petitioner concerning the status of the property. Accordingly, the trial court concluded that respondent breached her fiduciary duty, arising from her status as decedent's attorney in fact, to refrain from self-dealing. The trial court held that respondent's transfer of the property to herself created a constructive trust in favor of the estate and that the estate was entitled to the money respondent received from renting and selling the property. The decision was appealed.

The Court of Appeals reversed the trial court concluding that the trial court erred in its legal analysis and because the trial court findings of fact conflict to the extent that they could not apply them to the governing law. The Court first addressed the issue of what law should govern. The Court pointed out that while the Estates and Protected Individuals Code (EPIC) was in effect at the time of the proceeding, it could not be applied because respondent's accrued right as owner of the property would be impaired by invalidating the transaction or imposing a constructive trust. MCL 700.8101(2)(d) would preclude applying MCL 200.1214 to invalidate respondent's transfer of the property. Further, the provisions of the former Revised Probate Code (RPC) dealing with prohibited actions of fiduciaries could not be applied since an attorney in fact was not defined as a fiduciary under the RPC. Therefore, the Court applied common law principles in reaching its decision.

The Court of Appeals held that respondent, as decedent's agent, owed a common-law fiduciary duty to decedent. Such duty would permit an agent to personally engage in a transaction with the principal with the consent of the principal after a full disclosure of the details of the transaction. In the instant case, the trial court erred as a matter of law in failing to acknowledge that an agent may engage in self-dealing if the principal

consents and has knowledge of the details of the transaction. Additionally, the trial court erred as a matter of law by concluding that the passage of time and the change in decedent's mental status affected respondent's authority to transfer the property. The power of attorney that decedent executed was a durable power of attorney and, therefore, was still valid after decedent became incompetent. MCL 700.5501; MCL 700.5502. Accordingly, if decedent consented to the transaction with knowledge of its details, the timing of the transaction does not prevent its enforcement.

We cannot take much from this case since the panel was split. One judge authored the opinion, one judge concurred in the result only, and one judge concurred in part and dissented in part. This would probably have been a good case to not publish.

Upon remand the trial court again held that the proceeds of the sale of decedent's real property by respondent were subject to a constructive trust for the benefit of decedent's estate. The Court of Appeals had held that probate court erred by failing to acknowledge that an agent may engage in self-dealing if the principal consents and has knowledge of the details of the transaction. The Court of Appeals remanded the case to determine whether the probate court concluded that decedent freely consented to the transaction and for the probate court to apply the legal principles given to the facts it determined. The probate court on remand stated in a written opinion.

Respondent and her husband testified at trial decedent had frequently requested respondent to transfer decedent's real estate to herself. This Court finds respondent and her spouse's testimony as to these requests, made prior to decedent's admission into the nursing home, to be credible. However, respondent went on to testify her mother made similar requests after her admission to the care facility due to stroke-induced dementia. This testimony, in light of other testimony at trial which described decedent's deteriorating mental condition, is not credible.....

On December 10, 1996, respondent assigned to herself decedent's real property by quit claim deed, reserving in decedent a life estate. The deed was executed nearly two years after decedent began living in Tendercare, the care facility in Claire, Michigan. The transfer was made many months after decedent was no longer lucid. It is incongruent to suggest decedent was mentally capable to knowingly participate in the details concerning estate planning when she was obviously incompetent. She could not recognize close family members, couldn't feed herself, and could not carry on conversations.

The Court of appeals has opined that an agent may engage in self-dealing if the principal consents and has knowledge of the details of the transaction. The principal herein, decedent, could not have consented to this transfer. Nor did she, at the time, possess the necessary cognitive ability to possess knowledge of the transfer's details. But, when an attorney-in-fact employs a POA months, if not years after her principal has lost nearly all, if not all,

of her mental abilities due to the onset of severe dementia, to enrich herself the transaction cannot stand.

* * *

This Court is fully cognizant that a durable power of attorney is valid after a principal becomes incompetent.... This decedent, at the time the deed was executed by respondent on December 10, 1996, could not freely consent to anything let alone the conveyance of her real property. Simply stated she was totally incompetent and thus incapable of consenting to this transfer with full knowledge of its details [Emphasis added.]

The Court of Appeals affirmed the probate court on this issue. They held that the additional finding supports the conclusion that respondent breached her fiduciary duty to decedent by transferring decedent's property to herself when decedent although she lucidly consented to the transfer generally, never consented to the details of the transfer and was incompetent at the time of the transfer to consent to the details. Decedent was never apprised of the details of the transaction even though she did prior to becoming incompetent, consent to a transfer generally.

The Court of Appeals, however, reversed that part of the probate court's determination that MCL 700.1214 of the Estates and Protected Individuals Code (EPIC) necessitates setting aside respondent's self-dealing since this clearly contravened the law given in the prior Court of Appeals decision. In a footnote, the Court of Appeals panel indicated that they disagreed with the prior lead opinion's conclusion that respondent had accrued or vested rights in the property at issue before EPIC took effect. They agreed with the dissenting opinion of the prior case and they pointed out the rationale given in that case by a divided panel was without precedential value.

It is not clear to what "details" the principal need to consent to validate the action of the attorney-in-fact. It seems clear that the principal while competent instructed the attorney-in-fact to transfer the property to herself. If she made a clear statement to transfer the property and then had a major stroke two days later, would the transfer be impossible because she could never know the details of the transfer? The good news seems to be that EPIC will now clearly cover these situations. MCL 700.1214 provides that a fiduciary may not engage in a transaction such as this unless the governing instrument expressly authorizes such a transaction or unless the transaction is authorized by the court. I still hold my previous opinion that this case never should have been published.

E. WILL - TRUST - ESTATE SETTLEMENT AGREEMENT - GUARDIAN AD LITEM

In re Estate of Loretta Pat Kramek, Deceased, 268 Mich App 565; 710 NW 2d 753 (2005)

This case is very dependent upon the facts as given by the Court of Appeals. Those facts as given are as follows:

Decedent's will provided:

I direct that all real property that I own at the time of my death, in Otsego County, be placed in trust for the use of my children, DAVID KRAMEK and LORRAINE BROWN and their families and anyone they would wish to enjoy it. At the time of the death of the survivor DAVID KRAMEK AND LORRAINE BROWN, the real property in Otsego County would then go to the surviving child/children of DAVID KRAMEK and LORRAINE BROWN, fifty percent (50%) to go to LORRAINE' child/children.

The residue of the estate was divided equally between Kramek and Brown. The will further provided that, if either Kramek or Brown predeceased decedent, their share would go to his or her children, to be held in trust and distributed to each child, fifty percent at age thirty and fifty percent at age thirty-five. Decedent named Kramek as trustee of this trust. The will also nominated Kramek as personal representative. Decedent bequeathed to Katzen \$5.00.

Decedent died on April 7, 2003. On April 14, 2003, Kramek filed an application for informal probate. On April 15, 2003, Kramek, Brown, and Katzen entered into an estate settlement agreement.

On October 2, 2003, Katzen filed a petition for approval and construction of the estate settlement agreement. Katzen also requested that a guardian ad litem (GAL) be appointed to ensure protection of the decedent's grandchildren.

In response, Kramek asserted that the estate settlement agreement did not include the real estate in Otsego County (Otsego Property). He also requested that the GAL be discharged because the children were represented by another attorney, John Mabley, who also represented Brown.

Brown asserted in response that the agreement "contemplates" that the trust for the Otsego property not be created, but rather, that the property be divided between Katzen, Kramek, and Brown equally. Brown asserted that the agreement, "if given effect by this court, " would extinguish the rights of decedent's grandchildren. She asserted that the grandchildren were not represented when the agreement was negotiated and executed. On this basis, Brown requested that the court determine that the provisions of the agreement that affect the Otsego property be held unenforceable. But she requested that the remainder of the agreement be approved.

The trial court permitted the GAL to continue representing decedent's grandchildren. After a hearing, the trial court entered an order approving the agreement as including the Otsego property and holding that provision enforceable. The trial court also entered an order removing Kramek as personal representative.

The Court of Appeals first determined whether MCL 700.3914 or MCL 700.7207 should be applied to the case. They noted that MCL 700.3914 applies when parties enter into an agreement to change, alter, or amend the terms of a will and MCL 700.7207 applies when parties enter into an agreement to change, alter, or amend the terms of a trust. In this case, a trust was not created before decedent's death nor before the settlement agreement was entered into. Therefore, the parties did not modify a trust or the distribution of trust assets with their agreement. They did modify the terms of the will. The Court concluded that MCL 700.3914 would apply and MCL 700.7207 would not apply.

In applying MCL 700.3914, the Court of Appeals rejected the argument that a guardian ad litem (GAL) was required to represent decedent's grandchildren before the parties could execute their agreement. The Court stated that the statute does not require that a representative be appointed before the agreement is executed, but only that a representative be appointed and given notice of the agreement. It is then up to the trial court to determine whether the agreement is "made in good faith and appears just and reasonable." In this case, a GAL was appointed for the minors for the court hearing. The proceedings were therefore in compliance with MCL 700.3914.

The Court of Appeals also rejected the argument that the trial court should not have reviewed extrinsic evidence. The Court opined that extrinsic evidence may be used where there is a latent ambiguity to indicate the actual intent of the parties. In this case the Court of Appeal held that such a latent ambiguity existed.

The Court of Appeals next addressed the issue of the removal by the trial court of the personal representative, Kramek. Kramek objected to his removal because Katzen was not a "party" and could not request removal and there was no basis for removal. The Court rejected the first objection finding Katzen was an "interested person" because she was a party to the settlement agreement. However, the Court did hold that there was no basis for removal. The trial court had removed Kramek because of what it characterized as a conflict of interest. The trial court had opined that the "bickering" would cost the estate money and the appointment of a disinterested personal representative would expedite administration. The Court of Appeals held that while MCL 700.3611 broadly permits the trial court to remove a personal representative if it is "in the best interest of the estate" just because the personal representative contests some issue involving the estate does not meet that standard. The Court characterized resolving the present dispute as a normal function of the probate court. Therefore, Kramek's role as personal representative was not tainted by a conflict of interest merely because he disputed the terms of the settlement agreement. The Court also noted that this particular dispute was handled expeditiously by both the parties and the trial court.

In conclusion, the Court of Appeals affirmed the order approving the estate settlement agreement and reversed the order removing Kramek as personal representative.

III. COURT RULE AMENDMENTS

The following changes were adopted by the Michigan Supreme Court on November 15, 2005 and took immediate effect. The amendments were developed as a result of the State Court Administrative Office's statewide conservatorship review prompted by the Performance Audit of Selected Probate Court Conservatorship Cases by the Michigan Office of the Auditor General and the State Bar of Michigan Probate and Estate Planning Section's Uniformity of Practice Committee's survey of probate court practices.

- A. MCR 5.144(A)(2) was amended to eliminate the ability to close a conservatorship estate because of suspension of a fiduciary unless there are insufficient funds available to hire a special fiduciary, or after notice and hearing and a finding of good cause.
- B. MCR 5.203 (D) was amended to add the financial institution listed on the most recent inventory or account where the fiduciary has deposited funds and any currently serving guardian ad litem to the list required to receive notice when a fiduciary is suspended.
- C. MCR 5.207(A)(4) was added to require an appended copy of the most recent assessor statement showing the state equalized value of property subject to a petition to approve the sale of real estate. A court may order a written appraisal.
- D. MCR 5.302 was amended concerning commencing a decedent estate.
 - (1) MCR 5.302(A) was amended to require the filing of a copy of the death certificate when commencing a decedent estate. If not available, the petitioner may provide alternative documentation of the decedent's death.
 - (2) MCR 5.302(A) was amended to prohibit courts from requiring additional documentation such as information about the proposed personal representative.
 - (3) The requirement of filing a death certificate would seem to not apply to an assignment pursuant to MCL 700.3982.
- E. MCR 5.307 was amended to provide that in calculating the inventory fee, deductions shall be allowed for secured loans on property listed on the inventory, but no other deductions shall be allowed.
- F. MCR 5.404 (A) was added to require the use of an SCAO approved social history form when one is required by the court to be filed with a petition for guardianship of a minor. Such form shall be confidential.

G. MCR 5.409 was amended in several sections.

- (1) MCR 5.409(B)(2) was amended to provide that property the protected person owns jointly or in common with others must be listed on the inventory along with the type of ownership.
- (2) MCR 409(C)(1) was amended to clarify that the fiduciary must serve the account on the interested persons and file the proof of service with the court.
- (3) MCR 5.409(C)(4) was amended to provide that if assets are ordered to be placed in a restricted account, proof of the restricted account must be filed with the court within 14 days of the conservator's qualification or as otherwise ordered by the court. The conservator must file with the court an annual verification of funds on deposit with a copy of the corresponding financial institution statement attached.
- (4) MCR 5.409(C)(5) was amended to provide the requirement to present a financial institution statement to the court when filing the annual conservatorship account. A copy of the corresponding financial institution statement for all liquid assets, dated within 30 days of the end of the accounting period, must be presented to the court to verify assets on hand at the end of the accounting period, unless waived by the court for good cause.
- (5) MCR 5.409(C)(6) was amended to require that the court shall either review or allow conservatorship accounts annually. The court shall either review or allow accounts annually, unless no account is required under MCR 5.409(C)(1) or (C)(4). Accounts shall be set for hearing to determine whether they will be allowed at least once every three years.

IV. LEGISLATIVE UPDATE

A. AMENDMENTS TO ESTATES AND PROTECTED INDIVIDUALS CODE PUBLIC ACT 204 OF 2005

1. Amends various sections of the Estates and Protected Individuals Code (EPIC)
2. Effective: November 10, 2005
3. Summary of substantive changes:

- a. Amends MCL 700.1104(b). The definition of “estate” would include the rights and obligations of the personal representative and trustee to collect from others the amounts necessary to pay claims, allowances, and taxes (as described in sections 3805, 3922, and 7502 of EPIC)
- b. Amends MCL 700.2301. Clarifies that a surviving spouse who receives an intestate share under section 2301 may also exercise the right of election under section 2202. However, the intestate share received by the spouse under section 2301 reduces the sum available to the spouse under section 2202.
- c. Amends MCL 700.2908(2). Provides that a disclaimer of a power of appointment takes effect as of the time the instrument creating the power became effective, if the donee had not exercised the power or immediately after the last exercise of the power, if the donee had exercised the power. The instrument creating the power is construed as if the power expired when the disclaimer became effective.
- d. Amends MCL 700.3715, 700.5423, and 700.7401. Provides that a personal representative, conservator, or trustee can employ an attorney to perform necessary legal services or to advise or assist the personal representative, conservator, or trustee in the performance of administrative duties even if the attorney is associated with the personal representative, conservator, or trustee, and can act without independent investigation upon the attorney’s recommendation.
- e. Amends MCL 700.5202. Provides subject to the rights of a minor older than 14 years, if both parents are deceased or the surviving parent has no parental rights, a parental appointment would become effective when the guardian’s acceptance is filed in the court in which the will containing the nomination is probated, or if the nomination is contained in a nontestamentary instrument, or the testator who made the nomination is not deceased, is filed in a court at the place where the minor resides or is present.
- f. Amends MCL 700.5217. Provides a parental appointment under an unprobated or informally probated will would terminate if the will is later denied probate in a formal proceeding.
- g. Amends MCL 700.7502 (1). Provides that if a personal representative is not appointed for a settlor’s estate within four months after the date of the publication of notice of creditors, a trust is not liable for payment of homestead, family, or exempt property allowances.

4. Comment: These amendments address problems which have been encountered in the operation of the Estates and Protected Individuals Code (EPIC).

B. DISPOSITION OF DEAD BODIES - PUBLIC ACT 299 OF 2006

1. Amends the Estates and Protected Individuals Code to create sections to establish priority and procedure for decisions concerning the disposal of a decedent's body.
2. Effective: July 20, 2006
3. Summary of substantive changes:
 - a. Creates a new section, MCL 700.3206, which establishes who has priority for making funeral decisions for a decedent.
 - b. Creates a new section, MCL 700.3207, which establishes a procedure for resolving disputes concerning the making of funeral decisions for a decedent.
 - c. Creates a new section, MCL 700.3208, which provides a procedure for those not interested under prior sections to challenge presumptions created by the Act in circuit court.
 - d. Creates a new section, MCL 700.3209, which provides protections for a funeral establishment relying on the new Act.
 - e. Amends MCL 700.3614(c) to permit a court to appoint a special fiduciary to make funeral decisions when it is not necessary to open an estate.
4. Comments: This Act solves longstanding problems concerning who can make funeral decisions and jurisdiction when a dispute arises. The Act places jurisdiction within the probate courts, establishes who has priority to make funeral decisions and establishes a procedure to resolve disputes.