MICHIGAN
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APRIL 2023

Probate and Estate Planning

- Uniform Power of Attorney on the horizon
- The evolution and current trends in estate planning
- Surviving spouse property protection
- A primer on proposed regulations to the SECURE Act
- The Probate and Estate Planning Section's EPIC omnibus: Previewing proposed amendments to statutes that impact probate practice

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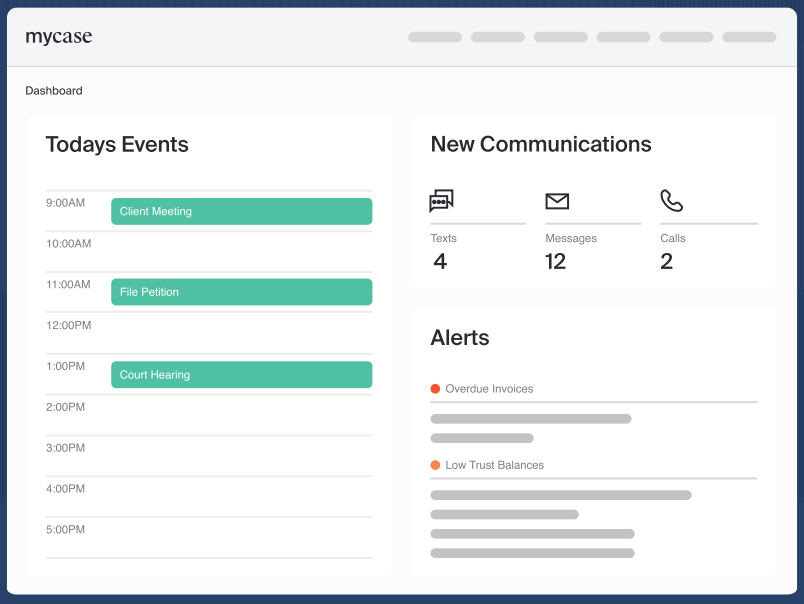

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MICHIGAN
BAR JOURNAL

APRIL 2023 | VOL. 102 | NO. 04

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BAR JOURNAL

APRIL 2023 • VOL. 102 • NO. 04

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The Michigan Bar Journal (ISSN 0164-3576) is published monthly except August for $60 per year in the United States and possessions and $70 per year for foreign subscriptions by the State Bar of Michigan, Michael Franck Building, 306 Townsend St., Lansing, MI 48933-2012. Periodicals postage paid at Lansing, MI and additional mailing offices. POSTMASTER: Send address changes to the Michigan Bar Journal, State Bar of Michigan, Michael Franck Building, 306 Townsend St., Lansing, MI 48933-2012.

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MEMBER SUSPENSIONS
FOR NONPAYMENT OF DUES

The list of active attorneys who are suspended for nonpayment of their State Bar of Michigan 2022-2023 dues is published on the State Bar's website at michbar.org/generalinfo/pdfs/suspension.pdf.

In accordance with Rule 4 of the Supreme Court's Rules Concerning the State Bar of Michigan, these attorneys are suspended from active membership effective Feb. 15, 2023, and are ineligible to practice law in the state.

For the most current status of each attorney, see our member directory at directory.michbar.org.

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FROM THE PRESIDENT

JAMES W. HEATH

Preparing for the unprecedented

Our world changed three years ago. In some ways, it is hard to believe it's been that long already. In other ways, it's almost difficult to believe this "new normal" hasn't always been our way of life. For just a moment, I would like to take us all back though to those first few months after the COVID-19 pandemic and the few months prior it hitting home and shutting down our state in March 2020.

Remember those days before COVID? Looking back, it's almost hard to believe how invincible we believed ourselves to be. Of course, we all saw the devastation happening elsewhere for months and yet most of us went about our daily lives in those days and weeks before the pandemic hit Michigan, never imagining it could impact us.

While many of us were blissfully going about our business not even beginning to imagine the impact this worldwide pandemic would have, the State Bar of Michigan was getting ready.

Preparations officially began on the day after Christmas 2019 when the State Bar of Michigan's former executive director, Janet Welch, and our current one, Peter Cunningham, started brainstorming on how to handle the coronavirus.

The State Bar of Michigan began buying laptop computers, installing Microsoft Teams so we could have virtual meetings, and assessing what it would take to operate remotely and out of office.

Nationwide, many state bars and lawyer referral services — like a lot of other businesses — closed. Of course, the State Bar of Michigan offices closed, but we remained hard at work. The State Bar of Michigan became the one-stop resource for attorneys and information sharing and keeping members updated during the unprecedented challenges we all faced.

We not only sustained our services, though; we also expanded them. In a matter of days, the State Bar of Michigan launched two *brand new* programs to support the needs of our state.

First, the State Bar launched a hotline for residents and recruited a team of 120 attorneys working on a pro bono basis to help answer questions regarding the flood of uncertainties. These concerns covered everything from workplace disputes to landlord-tenant issues. At its height, the hotline received more than 400 calls a day from Michigan residents with nowhere else to turn.

Second, the State Bar of Michigan launched a pro bono helpline for frontline responders created to provide free legal help to Michigan's essential workers. The number-one legal issue handled by this hotline was frontline workers looking to prepare their wills just in case they lost their lives protecting ours.

And as a result of these efforts, the American Bar Association awarded the State Bar of Michigan with its Cindy A. Raisch Award, which recognizes outstanding achievement in lawyer referral services for our response to the COVID-19 pandemic.

These programs speak to the deep dedication of staff and the State Bar's commitment to creating innovative solutions to serve the needs

of Michigan attorney and the public — even in the midst of a crisis.

While it is an honor for the State Bar to receive recognition for its foresight and innovation during the height of the pandemic, our work by no means ends there. Now, three years since the official start of the pandemic in Michigan, you can continue to see the State Bar of Michigan's commitment at work daily.

For instance, the State Bar of Michigan is leading national efforts to help attorneys struggling with addiction, depression, or other wellness issues because the sad fact is that lawyers commit suicide at a rate that is six times higher than the general public. Also, the State Bar of Michigan is working with stakeholders to increase access to justice in civil courts and supporting the work of the Supreme Court's new Commission on Diversity Equity and Inclusion.

Make no mistake about it, COVID-19 challenged all of us in ways we never could have fully predicted. When I look back, I do so with pride knowing that the State Bar of Michigan stepped up. We served without interruption. We provided leadership, answers, and innovative new ideas. We served.

As the State Bar of Michigan's very first president, Roberts P. Hudson, said, "No organization of lawyers can long survive which has not for its primary object the protection of the public."

His words are not only wise; they are the motto of the State Bar of Michigan. Looking back over these last three years, we all should be proud of the work our Bar has done, is doing now, and will do in the future.

IN BRIEF

ANTITRUST, FRANCHISING, AND TRADE REGULATION SECTION

The Antitrust, Franchising, and Trade Regulation Section is hosting a Lunch and Learn on May 4 at noon on Zoom. The event's focus is "Gift Card Use in Franchising" with speakers from the Plante Moran consumer goods practice and the Fahey Schultz Burzych Rhodes business franchise group. Look for signup information in a coming section eblast.

CANNABIS LAW SECTION

Did you know the Cannabis Law Section monthly council meetings begin with an informational Q&A session with Michigan Cannabis Regulatory Agency Director Brian Hanna and members of his staff? You can join these meetings via Zoom; visit connect.michbar.org/cannabis for login information. Also, we will hold a training for all section members at the Kensington Hotel in Ann Arbor on April 20. More details and registration information are coming soon.

GOVERNMENT LAW SECTION

The 23rd annual Government Law Section/Michigan Association of Municipal Attorneys Summer Joint Educational Conference is scheduled for June 23-24 at Crystal Mountain Resort in Thompsonville. The conference will focus on issues related to housing and homelessness, and feature updates on Supreme Court decisions and appellate briefs filed in recent impactful cases. Attendees are also invited to participate in the 10th Annual John Beras Memorial Cup Bocce Tournament on June 24.

LITIGATION SECTION

The Litigation Section is pleased to announce that it will partner with the Criminal Law Section and several other sections on a joint annual meeting up north in September of this year. The section also announced that it will again sponsor the awards dinner for the National Trial Advocacy Competition law school mock trial tournament at the Detroit Athletic Club in October. Finally, the section has agreed to make a significant investment in the Michigan High School Mock Trial Tournament sponsored by the Michigan Center for Civic Education. Questions, inquiries, or concerns about the section can be directed to chair Edward Perdue at eperdue@perduelawgroup.com.

REAL PROPERTY LAW SECTION

Register now for the Real Property Law Academy II on May 10-11 at the Michigan State University Management Education Center in Troy. The academy is being taught by some of Michigan's most respected and experienced Michigan real estate attorneys; it will provide a basic understanding of the fundamental aspects of a real estate practice. It is intended for real estate attorneys and attorneys who encounter real estate issues. To register and learn more about the academy, go to na.eventscloud.com/rplsaii22.

NEWS & MOVES

Have a milestone to announce? Please send your information to News & Moves at newsandmoves@michbar.org.

ARRIVALS AND PROMOTIONS

SIMONNE KAPADIA has joined Collins Einhorn Farrell.

JEREMY MANSON was elected shareholder at Williams Williams Rattner & Plunkett.

MATTHEW MCCANN has joined Moss & Colella as senior appellate counsel.

CODY MOTT has joined the Grand Rapids office of Warner Norcross & Judd as an associate.

LEE T. SILVER, **MICHAEL L. GUTIERREZ**, and **DANIEL J. HATCH** with the Grand Rapids office of Butzel were elected as shareholders.

AWARDS AND HONORS

DOUGLAS C. BERNSTEIN, a partner with Plunkett Cooney, was recognized in the Michigan Lawyers Weekly Hall of Fame Class of 2023.

JAMES C. BRUNO with Butzel was recognized in the Michigan Lawyers Weekly Hall of Fame Class of 2023.

MATTHEW W. CROSS with Plunkett Cooney was recognized in the Michigan Lawyers Weekly Up and Coming Lawyers Class of 2023.

MICHAEL D. FISHMAN with Fishman Stewart was recognized in the 2023 World Trademark Review's WTR 1000: The World's Leading Trademark Professionals.

ERIC FLESSLAND with Butzel was recognized by Michigan Lawyers Weekly on its list of 2023 Go-To Lawyers in construction law.

DAVID M. MOSS with Moss & Colella was recognized in the Michigan Lawyers Weekly Hall of Fame Class of 2023.

SCOTT H. SIRICH with Plunkett Cooney was recognized by Michigan Lawyers Weekly on its list of 2023 Go-To Lawyers in construction law.

JUSTIN W. STEMPLE, a partner with Warner Norcross & Judd, was recognized by MiBiz as its 2023 Dealmaker of the Year.

EVENTS

The **INGHAM COUNTY BAR ASSOCIATION** will host its annual meeting and shrimp dinner on Wednesday, May 17.

IN MEMORIAM

E. JOHN BLANCHARD, P28881, of Haslett, died May 20, 2022. He was born in 1952, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1978.

HARRY P. BUGEJA, P11364, of Farmington Hills, died Dec. 3, 2022. He was born in 1927, graduated from Wayne State University Law School, and was admitted to the Bar in 1956.

JOHN B. COLE, P47155, of Empire, died Nov. 5, 2022. He was born in 1944, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1992.

JOHN R. COON, P31797, of Brunswick, Maine, died Aug. 22, 2022. He was born in 1955, graduated from Wayne State University Law School, and was admitted to the Bar in 1980.

JOHN H. DEMING, P29586, of Grand Ledge, died March 2, 2023. He was born in 1953 and was admitted to the Bar in 1978.

PETER J. DEROSE, P32633, of East Lansing, died Feb. 13, 2023. He was born in 1952, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 1981.

L. STANFORD EVANS, P13246, of Birmingham, died Feb. 21, 2023. He was born in 1932, graduated from Harvard Law School, and was admitted to the Bar in 1956.

NORTON T. GAPPY, P64571, of West Bloomfield, died Feb. 25, 2023. He was born in 1974, graduated from University of Detroit School of Law, and was admitted to the Bar in 2002.

HON. CARL F. GERDS III, P27221, of Eastpointe, died Jan. 28, 2023. He was born in 1952, graduated from University of Michigan Law School, and was admitted to the Bar in 1977.

FREDERICK R. HUBBELL, P15203, of Kalamazoo, died Nov. 10, 2022. He was born in 1933, graduated from University of Michigan Law School, and was admitted to the Bar in 1961.

ZACHARY PHILIP KRZYZANIAK, P76938, of Livonia, died Jan. 21, 2023. He was born in 1986, graduated from Thomas M. Cooley Law School, and was admitted to the Bar in 2013.

STEVEN J. LEBOWSKI, P35112, of Milford, died Feb. 16, 2023. He was born in 1952, graduated from University of Detroit School of Law, and was admitted to the Bar in 1983.

HENRY P. LEE, P16505, of West Bloomfield, died Feb. 10, 2023. He was born in 1941, graduated from Indiana University School of Law, and was admitted to the Bar in 1965.

THOMAS J. NOVACK, P70056, of Westerville, Ohio, died Sept. 9, 2022. He was born in 1960, graduated from Capital University Law School, and was admitted to the Bar in 2006.

THOMAS S. RICHARDS, P19416, of Royal Oak, died Jan. 6, 2023. He was born in 1941, graduated from Detroit College of Law, and was admitted to the Bar in 1969.

DAVID R. SABIN, P19822, of Grayling, died March 2, 2023. He was born in 1937, graduated from Detroit College of Law, and was admitted to the Bar in 1969.

MICHAEL D. SMITH, P20694, of Rochester Hills, died March 11, 2023. He was born in 1945, graduated from Wayne State University Law School, and was admitted to the Bar in 1971.

JOEL V. SOULE, P20800, of Grand Rapids, died Nov. 30, 2022. He was born in 1937, graduated from University of Michigan Law School, and was admitted to the Bar in 1965.

RANDALL M. WOKAS, P22779, of Bethesda, Maryland, died Feb. 21, 2023. He was born in 1945, graduated from Wayne State University Law School, and was admitted to the Bar in 1973.

WILLIAM D. YAHNE, P22604, of Ossineke, died Dec. 23, 2022. He was born in 1940, graduated from Wayne State University Law School, and was admitted to the Bar in 1965.

JANET K. YARLING, P32489, of Livonia, died March 3, 2023. She was born in 1952, graduated from Detroit College of Law, and was admitted to the Bar in 1981.

In Memoriam information is published as soon as possible after it is received. To notify us of the passing of a loved one or colleague, please email barjournal@michbar.org.

PROBATE AND ESTATE PLANNING

BY MARK E. KELLOGG

I am honored and humbled to serve as current chair of the Probate and Estate Planning Section of the State Bar of Michigan. The practice area-specific articles of this issue of the Michigan Bar Journal are provided under the guidance of the Probate and Estate Planning Section. It is my pleasure to have the opportunity to present a brief overview of our section.

Serving with me as officers of the section for the current Bar year are Chair Elect James P. Spica; Vice Chair Katie Lynwood; Secretary Nathan R. Piwowarski; and Treasurer Richard C. Mills. I also want to thank the section members serving on the Probate and Estate Planning Section Council and the various additional committee members responsible for making the section one of the State Bar of Michigan's most active and productive.

The stated purpose of the Probate and Estate Planning Section is enhancing and improving the practice and administration of law pertaining to probate; trust and estate planning and administration; guardianships and conservatorships (including planning alternatives); and tax planning. The section is one of the largest SBM sections with nearly 3,500 members. That number reflects the significance of the various practice areas represented by the section and the needs of the public as it relates to the services our members provide and the quality of benefits and resources made available to our members through the section's activities.

The authors of the well-written articles in this issue of the Michigan Bar Journal discuss the following subjects:

- The proposed new Uniform Power of Attorney Act;
- The evolution of and current trends in estate planning;
- Surviving spouse property protection;
- A primer on proposed additions to the Federal SECURE Act; and
- The Probate and Estate Planning Section's EPIC Omnibus legislation.

The scope and subject matter of these articles will potentially have an impact on — and should be of interest to — all attorneys.

The section's members represent an array of practice specialties as evidenced by its 14 standing committees and 10 ad hoc committees. There are plenty of opportunities to get involved with the section. Active participants and contributors are frequently involved in drafting and introducing potential future laws affecting practice areas associated with probate and estate planning.

The section council meets monthly on a Friday morning at the University Club in East Lansing during the current Bar year. Members may also attend via Zoom by registering online at connect.michbar.org/probate/events/schedule prior to the meeting. Council meetings are open to all section members.

I would also like to mention a vital participant in helping us fulfill the section's mission. The Institute for Continuing Legal Education provides invaluable assistance in planning and organizing the annual Probate and Estate Planning Institute and other programs that we are able to provide as a resource to our members.

If you have never attended the Probate and Estate Planning Institute, I strongly encourage you to try to attend this year. The Institute always provides valuable and timely information on many topics and opportunities for networking with fellow members. The dates for this year's Probate and Estate Planning Institute are May 18-20 at Grand Traverse Resort and Spa in Acme and June 15-16 at the Inn at St. John's in Plymouth.

If you would like to discuss the section's work or consider becoming involved (or increasing your personal involvement) in the section, contact me at mkellogg@fraserlawfirm.com or (517) 377-0890. I look forward to seeing you at various section events throughout the year.

Mark E. Kellogg is the chair of the SBM Probate and Estate Planning Section and shareholder and firm president of Fraser Trebilcock in Lansing. In his more than 30 years of practice, he has focused on the needs of family and closely held businesses and enterprises in areas including business succession, cottage law and succession planning, estate planning, real estate law, contract law, tax law and planning, and non-profit law.

Uniform Power of Attorney Act on the horizon

BY CHRISTINE M. SAVAGE

The Uniform Power of Attorney Act (UPOAA) is a model statute published by the National Conference of Commissioners on Uniform State Laws.[1] It has not been adopted in Michigan, however; in 2022, the UPOAA, incorporating revisions detailed below, was introduced to the state legislature as a bill and is expected to be reintroduced in 2023.[2]

Adopting the UPOAA would let Michigan benefit from the jurisprudence from other states that have enacted it and enable modifications of default provisions to promote consistency with current Michigan law and standards of practice. If adopted, the act would replace durable power of attorney provisions contained in the Estates and Protected Individuals Code.[3]

The UPOAA provides a series of default rules that give broad authority to the agent to act while protecting the principal from fraud, require the agent to financially reimburse the principal if the agent violates the rules, and protect third parties that rely on the power.[4]

APPLICATION OF THE ACT

The act applies broadly to all written records that grant authority to an agent to act on behalf of the principal[5] except:

1. A power to the extent it is coupled with an interest in the subject matter of the power.
2. A power to make health care decisions.

3. A delegation of a parent's or guardian's power regarding care, custody, or property of a minor child or ward.
4. A proxy or other delegation to exercise voting rights or management rights with respect to an entity.
5. A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

The act applies to powers executed prior to enactment and provides that a power executed in Michigan is valid if, when it was executed, complied with requirements for the execution of a power under the law of this state as it existed at the time.[6] As a result, the UPOAA will not invalidate powers executed prior to its enactment as long as those powers were executed in conformance with Michigan's requirements.

DURABILITY

The UPOAA provides that if a power is executed in accordance with the requirements,[7] then it is durable. That means it is not terminated by the principal's incapacity[8] unless the power expressly provides otherwise.[9]

For a power to be durable under current Michigan law, the power must include an affirmative statement that the power is not affected by the principal's subsequent incapacity.[10]

EXECUTION REQUIREMENTS

To be effective under UPOAA, a power must be signed by either the principal or an individual directed by the principal to sign the principal's name in the principal's presence.[11] However, a power signed in this manner is not durable.

To be durable, the power must either be acknowledged by the principal before a notary public or other individual authorized to take acknowledgements or be signed in the presence of two witnesses.[12] An agent nominated in the power cannot act as a witness, but a witness can serve as the notary on the power.[13]

Also, for a power signed by an individual at the direction of the principal to be durable, it must be signed in the presence of two witnesses.[14]

In comparison to the act, current Michigan law requires that a durable power be signed in the presence of two witnesses, neither of whom is the designated agent, or be notarized.[15] The option under the UPOAA permitting a power to be signed only by the principal or at the principal's direction gives individuals the ability to create a power, although not durable, even if they do not have access to witnesses or a notary.

ACCEPTANCE AND DUTIES

The UPOAA provides that unless otherwise stated in the power, an agent accepts the appointment upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance.[16] The act also provides that prior to exercising any authority under a durable power, an agent shall execute an acknowledgement of the agent's duties referred to as an agent acknowledgment.[17]

It is important to recognize that failure to execute an agent acknowledgment does not affect the agent's authority to act, nor does it alter the agent's duties or mitigate the potential liability for breach of duties.[18] An agent does not have the ability to breach fiduciary duty and then claim no liability because an agent acknowledgement was not executed.

The UPOAA breaks an agent's duties into the following categories:

1. Affirmative duties that cannot be waived by the principal:
    a. Duty to act in accordance with reasonable expectations of the principal that are actually known to the agent and, to the extent actually known, act in the principal's best interest.
    b. Act in good faith.
    c. Act only within the scope of authority granted by the principal.
    d. Keep reasonable records of receipts, disbursements, and transactions made by the agent on behalf of the principal.[19]

2. Default rules that can be explicitly waived by the principal:
    a. Act loyally.
    b. Act as not to create a conflict of interest that impairs the agent's ability to act impartially.
    c. Act with the care, competence, and diligence that a prudent person would in dealing with the property of another.
    d. Cooperate with a person that has authority to make health care decisions to carry out reasonable expectations of the principal that are actually known to the agent and, to the extent the expectations are not actually known, to act in the principal's best interest.
    e. Attempt to preserve the principal's estate plan to the extent that the plan is actually known to the agent and preserving the plan is consistent with the principal's best interest based on relevant factors including the value of the principal's property, need for maintenance, minimization of taxes, and eligibility for public benefits.[20]

Unless the power states otherwise, an agent does not have a duty to account unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal.[21] If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account.[22] This limited group given the authority to request

an account is consistent with the premise that a principal with capacity should control the disclosure of financial information.

COAGENTS

The UPOAA allows for the principal to appoint two or more persons to act as coagents. Unless the power provides otherwise, coagents may act independently[23] which gives agents the flexibility to act unilaterally on behalf of the principal. However, it also may cause conflict unless the agents coordinate their efforts and act consistently on matters for the principal.

When appointing coagents who will be authorized to act independently, the issue of liability should be considered. Unless the power provides that coagents are liable for one another's misconduct, an agent who does not participate in or conceal a breach of fiduciary duty is not liable for a breach committed by the other agent.[24] However, if an agent has knowledge of a breach or an imminent breach of fiduciary duty by another agent, the agent is required to notify the principal and, if the principal is incapacitated, take any action reasonably appropriate to safeguard the principal's best interest.[25] If an agent fails to notify the principal or take action, the agent is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken action.[26]

AGENT LIABILITY AND EXONERATION

An agent violating the UPOAA is liable for not only the amount to restore the value of the principal's property to what it was prior to the violation, but also reimbursement of attorney fees and costs paid on the agent's behalf in the defense of conduct constituting or contributing to the violation.[27] An agent is liable for three times the value of the property if the agent embezzles or wrongfully converts the principal's property or refuses to transfer possession of the principal's property to the principal on demand.[28]

A principal has the ability to include a provision in the power to exonerate an agent from liability for breach of fiduciary duty unless it relieves the agent of liability for breach of duty committed in bad faith or with reckless indifference to the purposes of the power or the best interests of the principal or was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.[29]

ACCEPTANCE AND RELIANCE

The UPOAA is designed to protect persons who in good faith accept an acknowledged power. A power is acknowledged if verified before a notary public or other individual authorized to take acknowledgement.[30] It is important to note that protections for persons accepting powers do not apply to unacknowledged powers of attorney.

Protecting a person accepting the acknowledged power in good faith presumes that a signature on an acknowledged power is genuine without actual knowledge[31] that it is not genuine.[32] Further, a third party that in good faith accepts a power or a vintage durable power[33] without actual knowledge that it is void, invalid, terminated, or that the agent is exceeding their authority may rely in good faith on the validity of the power, the validity of the agent's authority, and the propriety of the agent's exercise of authority.[34] Note that this provision applies regardless of whether the agent has executed an agent acknowledgement.

Although a person is not required to investigate whether a power is valid or if the agent's exercise of power is proper, a person asked to accept an acknowledged power may request and rely upon any of the following:

1. An agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power.
2. An English translation if the power contains in whole or in part language other than English.
3. An opinion of counsel as to any matter of law concerning the power if the person requesting the opinion explains the reason for the request in a record.[35]

To discourage people from unnecessarily making routine requests that cause a delay in the agent's ability to act, if a court finds that the reason for the request is frivolous, the person making the request is liable for attorney fees and costs incurred in providing the requested opinion.[36]

LIABILITY FOR REFUSAL TO ACCEPT ACKNOWLEDGED POWERS OF ATTORNEY

In conjunction with the provisions promoting acceptance of powers, the UPOAA also sets forth reasons a person may refuse to accept a power and the penalties for refusal to accept powers. Note that this section only applies to acknowledged powers of attorney.

When presented with an acknowledged power, a person is required to either accept that power or request an agent's acknowledgement or a certification, translation, or opinion of counsel within seven business days after the power is presented for acceptance.[37] Once the agent's acknowledgment or a certification, translation, or opinion is provided, the person shall accept the power within five business days after receipt of the requested information.[38] A person is not required to accept a power if any of the following apply:

1. The person is not required to engage in a transaction with the principal in the same circumstances.
2. Engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law.
3. The person has actual knowledge of the termination of the agent's authority or of the power before exercise of the power.
4. The person's timely request for an agent acknowledgement or a certification, translation, or opinion is refused.
5. The person in good faith believes that the power is not valid,

or the agent does not have the authority to perform the act requested whether or not an agent's acknowledgment or a certification, translation, or opinion has been requested or provided.
6. The person in good faith makes or has actual knowledge that another person has made a report to the adult protective services office stating a belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.
7. The person is a financial institution within the meaning of the Financial Exploitation Prevention Act and the person is delaying or placing a freeze on transactions or assets relative to the principal.[39]

If none of the above apply and a person refuses to accept an acknowledged power, that person is subject to court order mandating acceptance of power and is liable for reasonable attorney fees and costs incurred in any action or proceeding that confirms the validity of the power or mandates acceptance of the power.[40]

In addition, if a person refuses to accept an acknowledged power after having requested and received a certification, translation, or opinion, that person is also liable for reasonable attorney fees and cost incurred in providing the requested certification, translation, or opinion.[41]

SPECIFIC AGENT AUTHORITY

An agent may do the following only if the power expressly grants the agent the authority:

1. Create, amend, revoke, or terminate an inter vivos trust,
2. Make a gift,
3. Create or change rights of survivorship,
4. Create or change a beneficiary designation,
5. Delegate authority granted under the power,
6. Waive the principal's right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan,
7. Exercise fiduciary powers that the principal has authority to delegate,
8. Exercise authority over any electronic communications, and/or
9. Exercise authority over any bank account, securities, or other financial account in a foreign country.[42]

Given the extent of the power that can be specifically granted, the UPOAA states that unless the power provides otherwise, any agent who is not an ancestor, spouse, or descendent of the principal may not exercise authority under a durable power to create in the agent or in an individual to whom the agent owes a legal obligation of support and interest in the principal's property whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.[43] However, the terms of the power may expand or narrow the class of agents subject to this restriction.[44]

GENERAL AGENT AUTHORITY

The general authority granted under the act may be incorporated by citing the section or referring to the descriptive term. General authority that may be granted to an agent includes:

1. Real property.
2. Tangible personal property.
3. Stocks and bonds.
4. Commodities and options.
5. Banks and financial institutions.
6. Operation of entity or business.
7. Insurance and annuities.
8. Estates, trusts, and other beneficial interests.
9. Claims and obligations.
10. Personal and family maintenance.
11. Benefits from government programs or civil or military service.
12. Retirement.
13. Taxes.
14. Gifts.[45]

STATUTORY FORMS

Although not covered in detail in this article, Section 301 of the act includes a statutory form power of attorney. The purpose of the form is to give the public easy access to creating durable powers of attorney. However, individuals should use caution in preparing these important forms without the assistance of counsel.

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The evolution and current trends in estate planning

BY ROSEMARY HOWLEY BUHL

Some time ago, Oldsmobile, the now obsolete division of General Motors, used the advertising slogan "Not your father's Oldsmobile" to highlight the changes the brand had made.[1] This phrase comes to mind often when considering today's estate planning trends. For many practitioners and their clients, estate planning is indeed much different than it was a generation ago.

Estate planning has historically been considered a mysterious process involving documents using antiquated language, signed with formality, and often involving the dreaded probate process. Public knowledge of the probate process is often incorrect and vague — likely a result of scare tactics used to sell trust packages. Beyond wills, estate planning was at times minimal or even non-existent. Informal arrangements with family members, financial institutions, and even medical providers allowed for decisions to be made and issues to be handled. However, due in part to the growing complexity of laws based on privacy and protecting information, the days of informal arrangements have largely ended.

As with all areas of the law, estate planning has evolved, with many factors contributing to this evolution. The recent trend of increasing the federal estate tax exemption — which has risen from $5 million in 2011 to $12.92 million in 2023 — has decreased the necessity for complex trusts in some situations.[2] Longer lifespans, changing family dynamics, and investment trends also contribute to these trends. Estate planning now includes a variety of surrogate decision-making techniques, special needs trusts, and digital assets. The day-to-day practice of an estate planner requires knowledge of more than just wills. It requires knowledge of current investment trends, the ins and outs of governmental

benefits, and even familiarity with the medical and mental health arenas.

This article will discuss several key factors that are changing the face of estate planning based upon my own observations and practice.

IMPORTANCE OF DISABILITY PLANNING FOR DECISIONS DURING LIFE

Estate planning is more than just drafting wills. The trend of living longer, including potential periods of incapacity due to dementia or other medical issues, lends itself to the importance of disability planning. Effective disability planning includes creation of durable power of attorney (DPOA) documents designed to address financial needs and designate health care patient advocates. Further, it is crucial for DPOA documents to be drafted with the individual's specific needs and wishes in mind.

Many people do not realize that a close relationship, even marriage, does not give one person authority over the decisions of another. Also, parental decision-making authority ends when the child reaches age 18.[3] This confusion leads to the need for probate court intervention in situations where an individual becomes unable to execute DPOA documents. In those circumstances, a guardianship or conservatorship may be necessary, a result which may not be desired. In fact, in some situations, appointment of a guardian or conservator limits the decisions that can be made on behalf of the individual. It should also be noted that some medical decisions, such as an involuntary admission to a mental health facility, must be made by the court.[4]

During times of medical crisis or chronic illness, having effective documents that provide adequate authority to the agent is key. Whether it is allowing for government benefit planning on the financial side or allowing for a medical patient advocate to authorize care choices the individual would want, careful drafting is a must.

The current trend is for financial DPOAs to take effect upon signing, allowing agents to assist the principle for convenience purposes, which allows for a smoother transition and has been extremely helpful during the COVID-19 pandemic. While DPOAs do not have expiration dates, it is ideal for a person to revisit those documents every 5-10 years or upon the occurrence of a major life event such as a death, disability, divorce, or marriage.

IMPORTANCE OF BENEFICIARY DESIGNATIONS FOR FINANCIAL ACCOUNTS

An increasing number of banks and financial institutions are allowing (and even encouraging) the use of pay on death (POD) or transfer on death (TOD) designations, which let the account owner to name the beneficiary for the funds. This streamlined process allows for avoiding the probate administration process at the time of death and makes the funds available to the designated beneficiaries once they provide a death certificate and complete necessary forms.

This can be a very efficient method of transferring funds when the overall plan is straightforward, and the beneficiaries are adults suitable to be receiving the funds outright without any strings attached. There are many positive aspects to using POD and TOD designations, but account owners should keep in mind that it is necessary to keep those designations updated if a named beneficiary predeceases and confirm that the designations are correct and on file following any mergers or changes in bank or financial institution ownership.

INCREASED IMPORTANCE OF BENEFICIARY DESIGNATIONS

The shift in retirement planning over the past 40 years has also had a significant impact on estate planning. It is becoming increasingly uncommon for retirees to have traditional monthly pensions. Instead, many retirees rely on 401(k), 403(b), IRAs, and similar accounts to supplement their Social Security income. These individual accounts also come with the flexibility of naming a beneficiary for any funds left at the time of the retiree's death. These beneficiary designations have become increasingly important as a significant amount of wealth is passed though these accounts. It is critical for account holders to accurately complete beneficiary forms, including contingent beneficiaries. It is also important to understand the process each company uses in the event of an unforeseen event such as the death of a beneficiary.

LADYBIRD DEEDS

Another increasingly popular estate planning tool is the ladybird deed. This deed, also called the enhanced life estate deed, allows the grantor to name a contingent grantee while reserving a life estate and lifetime power to convey the property and even divest the interest of the contingent grantee.[5] In layman's terms, a ladybird deed effectively allows an individual to name a revocable beneficiary for real estate. The use of this type of deed also avoids the need for probate administration upon death and is used frequently in Medicaid planning.[6]

The catchy name, coupled with the benefit of avoiding probate, have made this an increasingly familiar technique for some clients. While it has many benefits, it also comes with limitations. The use of ladybird deeds is not a good fit for all families. For some, the desired distribution is too complex to accomplish through this process. As contingent grantees eventually become joint owners, too many owners can lead to myriad problems including handling

existing mortgages, paying carrying costs, and disagreements on a sale. Also, this technique is not ideal for providing for subsequent grantees should one of the named contingent grantees predecease the grantor.

TRENDS IN TANGIBLE PERSONAL PROPERTY

Another changing element of estate planning is the handling of tangible personal property. An interesting issue to consider is the value of tangible personal property, including the value to beneficiaries and value on the open market. Over the past decade or two, there has been a gradual shift in how tangible personal property is viewed, particularly by the heirs. Increasingly, beneficiaries are not interested in most of the decedent's tangible personal property. Whether it's people living longer and beneficiaries not needing the items, differing tastes, or even a change in perspective regarding the importance of items, the trend is clear.

On a pure economic level, the combination of an increasingly disposable society and internet resale sites has made everyday items such as used kitchenware and household items not nearly as marketable as they were previously. Further, the antiques market has also seen a huge decline over the past 20 years.[7] These factors make few trustees or personal representatives interested in holding sales themselves as it may not be worth the time and effort. A growing number of estate sale companies are being established to address the need, with some taking a percentage of the profits and others taking flat payments. In some situations, particularly hoarding conditions, a flat payment is well worth the cost.

The increase in hoarding provides its own set of challenges. Hoarding, which is now considered a medical disorder,[8] often comes to a head shortly before death when the individual's health has declined and unable to manage the situation. Family members, personal representatives, and trustees often must step in and assist during life and following death to deal with the situation. During a person's lifetime, the situation presents a variety of challenges including resistance, denial, increased risk of health issues, and fire danger. In many circumstances, the situation is addressed as a one-time event when in reality it is a disorder likely to reoccur over time. In some situations, it is not until the death of the individual that the mass of items are finally addressed and disposed.

INCREASED USE OF SPECIAL NEEDS OR DISCRETIONARY TRUSTS

Historically, when an individual was determined to have a disability, it was common for family members to omit that person from their estate plans to prevent a loss of government benefits. People recognized the impact an inheritance would have and instead chose to leave the person out or rely on other family members to do the right thing and share with the omitted individual. These informal agreements worked in many situations but as families became more geographically and even emotionally separated, it was clear a different structure was needed.

The Omnibus Budget Reconciliation Act of 1993 (OBRA) led to the widespread use of special needs trusts (SNT).[9] OBRA allowed individuals determined to have disabilities by the Social Security Administration to maintain eligibility for government benefits while having excess assets held in a trust with special restrictions and provided the framework for the creation of SNTs. Working within this framework, estate planning attorneys have crafted documents that allow funds to be protected to supplement government benefits. Thirty years after the change went into effect, the use of special needs trusts is still growing.

In addition, a growing variety of tools are available to persons determined to have disabilities and the options are increasingly focused on the autonomy of the individual. In 2014, the Achieving a Better Life Experience Act was passed, allowing individuals with disability determinations who meet specific criteria to establish funds to help pay for qualified disability expenses.[10] In 2016, a legislative error from OBRA was corrected to allow disabled individuals with the requisite mental capacity to establish his or her own first-party SNT.[11]

These options come at a time when public pressure is focused on providing more freedom and autonomy to individuals with disability determinations. For many years, such a determination would have led to restricted access and lack of control regarding decision making. However, the public perception of what it means to have a disability, whether physical or mental, is evolving to acknowledge potential limitations without the loss of freedoms. High-profile cases such as the Britney Spears conservatorship have brought these issues to the forefront. It is likely that the trend of balancing protections and freedoms will continue to push the envelope for future planning options.

Third-party SNTs are also a useful tool for individuals providing for loved ones with disabilities. Similarly, using third-party discretionary trusts for individuals who have not been determined to have disabilities but face other challenges that make allowing uncontrolled access to funds unwise is on the rise. Addictions to drugs, alcohol, gambling, shopping, or the like are a very real and very common issue many people face. When an individual wants to provide for a loved one with an issue like this, using a discretionary trust can allow for funds to be designated for the individual, but not controlled by that person. This trend is growing as families find SNTs work well for their particular circumstances.

CONTINUED USE OF TRADITIONAL TOOLS

Many of the trends referenced above are used in conjunction with more traditional estate planning tools such as the revocable trust.

It is common to list a revocable trust as a POD- or TOD-designated beneficiary or use a ladybird deed to fund real estate into a revocable trust. While estate planning is evolving, it is not being recreated. In light of unknown changes to the federal estate tax exemption, which is currently structured to be reduced to $5 million (adjusted for inflation) in 2026,[12] proper estate planning may very likely include a comprehensive plan which provides for multiple trusts.

Revocable trusts are still commonly used to provide for the use of assets during the lifetime of the grantor and distribution of assets following death. Revocable trusts allow for consolidated administration, which lets trustees oversee and carry out the wishes of the grantor. Further, in circumstances where there are minor beneficiaries, second marriages, real estate holdings in multiple states, charitable giving, or other more complex situations, revocable trusts are often the most effective estate planning option.

Finally, in some circumstances, a will is the best fit. Preparing a will is typically less expensive than a trust and requires less maintenance prior to death, and some clients are not able or willing to take the necessary steps to create and properly fund a trust. However, unlike a trust which is a private agreement, a will becomes public once it is probated. If privacy is not a major concern, for some clients the best choice is relying on a will and the probate administration process to accomplish their goals.

As with any plan, one size does not fit all, and estate planning is no different. Knowing current trends, recent changes, and available tools allows estate planning practitioners to best meet the needs of their clients.

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Surviving spouse property protection

BY GEORGE M. STRANDER

Spousal property protection on the death of the other spouse, existing outside other societal rules of ownership and inheritance, has existed for millennia, first largely in the disparate group of customs counted as dower and currently, at least in much of the United States, as a surviving spouse's elective share right to take a portion of the decedent's estate even if disinherited in the will. Development at different times in the law surrounding marriage, divorce, and probate have suggested distinct societal philosophies. Here, I outline that historical development, discuss a recent aberration in Michigan's philosophy of spousal property protection, and identify a trend toward a new view in the relevant areas of marriage, divorce, and probate.

MARRIAGE AND FAULT

Marriage, in some form, predates history and has developed in distinct ways across multiple cultures.[1] Beyond the violence of marriage by capture, societies have employed marriage by purchase (with the groom's family supplying to the bride's family a "brideprice") and, typically in more urbanized and class-stratified contexts, marriage with a reciprocal contribution (from the bride's family as dowry.)[2] The wife's retention of some part of the dowry as protection for her and her children on her husband's death may have led to what we know as dower.[3]

In the historical English common law context, which is relevant to the development of surviving spouse property protection law in our country, dower, in general, guaranteed a widow a life estate in one-third of her deceased husband's land acquired during the marriage, and surviving widowers had a somewhat similar right called curtesy.[4] Colonial American law was also influenced by the then-prevailing English view of marriage in general, including the legal concept of coverture (where a married woman's legal existence

was under the cover of her husband) and, given the religious and societal importance of the institution, the basic prohibition on divorce.[5]

In England, outside of church annulment and the determination that a valid marriage had never existed, actions developed for separation and a kind of divorce through Parliament as some form of release from marital union.[6] Both required findings of fault. Separation could be approved based on adultery, violence, sodomy, or heresy and parliamentary divorce at least based on adultery.[7] Also, since the 1285 Statute of Westminster, dower had been conditioned on fault, requiring a widow not to have voluntarily left her husband and engaged in adultery.[8]

These fault-based conditions reflected at least two societal truisms. First, marriage is sacrosanct, and the failure of any marriage was really the failure of one of the parties, and second, the faults identified were contrary to the very foundation of marriage (expressed by marital obligations like fidelity, cohabitation, and support) and were reason to withhold from the faulty spouse the benefits of that institution.

AMERICA, MICHIGAN, AND *VON GREIFF*

Colonial and early American law on inheritance — as well as marriage and divorce — essentially incorporated English law of the time.[9] This law developed in our country over the years and in different ways in different states in response to social and economic changes.[10] Married women eventually gained property rights as well as other rights and coverture was abolished.[11] Wealth became less dependent on land and the inefficiencies regarding alienability of property held in life estate became more acute, and so in many cases dower (often merging with curtesy and becoming mostly gender neutral) morphed into the homestead allowance and fee simple elective share.[12] However, fault in general continued to circumscribe divorce and surviving spouse property rights.[13]

In Michigan, adoption of the Revised Probate Code (RPC) in 1979 confirmed several abandonment-like faults as barring a person from having intestate, elective share, or allowance property rights in relation to a deceased spouse's estate.[14] These provisions have essentially been retained by RPC's successor, the Estates and Protected Individuals Code (EPIC), in terms of surviving spouse status:

> … a surviving spouse does not include:
>
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
> (i) Was willfully absent from the decedent spouse.
> (ii) Deserted the decedent spouse.
> (iii) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.[15]

Traditional Michigan divorce law had generally shadowed these provisions, specifying that desertion by a spouse for a term of two years was grounds to dissolve the marriage.[16] Again, these examples from probate and divorce law focus on faults contrary to very foundation of marriage.

Recently, and in contemplation of EPIC's fault provisions, the Michigan Supreme Court has charted a new path with respect to surviving spouse property rights. In the 2022 case *In re Estate of Von Greiff*, the Court took up the question of what it means for a spouse to have been willfully absent from her spouse for at least one year up to the spouse's passing, and thus denied the rights of a surviving spouse under the aforementioned statute. [17]

The relevant facts of the case are simple: Anne and Hermann were in a strife-ridden marriage; Anne voluntarily left the home in May 2017 and filed for divorce in June 2017. Necessary communications between the two parties' attorneys went on for some time, but from May 2017 on, Anne did not see nor have any direct contact with Hermann, who died (intestate) in June 2018.[18]

On appeal from the Court of Appeals, the personal representative of Hermann's estate (and his daughter from an earlier marriage) argued that Anne should be barred from taking her intestate share of the estate because she had been willfully absent from Hermann for more than a year prior to his death. The Supreme Court ruled that regardless of Anne's physical absence during Hermann's last year, she was not willfully absent pursuant to the statute.[19]

The *Von Greiff* court, following its earlier opinion in the 2018 case *In re Estate of Erwin*,[20] concluded that "a finding of willful absence requires a 'complete physical and emotional absence'" which is evidenced by "acts on behalf of the surviving spouse that for all intents and purposes are inconsistent with the very existence of a legal marriage."[21] Crucially, the *Von Greiff* majority interpreted this standard in the context of interspousal communications as: Are such "communications consistent with a recognition that the legal marriage still exists?"[22] Though physically absent for Hermann's last year, Anne was not emotionally absent since she indirectly participated in communications with Hermann that "recognized the existence of their marriage" — to wit, communications regarding her complaint for divorce from him.

Both *Von Greiff* and *Erwin* represent leaps in the law. First, *Erwin* read "willfully absent" to require emotional absence in addition to physical absence.[23] Second, although *Erwin* concluded that willful absence "results in an end to the marriage for *practical* purposes,"[24] *Von Greiff* keyed on *Erwin*'s reference to "inconsistency with the very existence of a legal marriage" and then read this inconsistency to be with the *fact* that a marriage exists rather than with the basis of the marriage itself.[25]

As mentioned above, the fault conditions regarding surviving spouse property rights (and divorce) historically reflect ways the basis of a marriage could be destroyed and thus someone guilty of one of them could be denied certain protections under the law. Throughout history, these faults — including adultery, desertion, and cruelty — have typically been committed with clear recognition that a marriage existed.[26] In this societal philosophy, the key has been that the *marriage itself* has been attacked and not, *pace Von Greiff*, the *fact* that a marriage exists.[27]

COMMUNITY PROPERTY, NO-FAULT DIVORCE, AND THE CONTRACT MODEL OF MARRIAGE

Beyond an assessment of the consistency of our jurisprudence on fault-based surviving spouse property rights, there are reasons to question the very point of fault in this area of the law. First, while elective share privileges arise in the context of separate marital property rights and serve a purpose as a safety net for a potentially disinherited spouse, this is not the only way to achieve this end. In community property systems, spouses become half owners in all the marital assets by virtue of marriage, eliminating the fear of a surviving spouse becoming destitute through disinheritance; elective share rights are not needed.[28]

Community property has various ancient origins and the form in which it exists today in 10 U.S. states can be traced back as far as medieval Europe and the development of civil law on that continent.[29] Much more so than common law's separate property system, community property sees marriage as a partnership whereby each spouse contributes to, and hence owns, marital assets.[30] There is little question of fault — which arose, for example, in *Von Greiff* — because the spouse's share is, in a sense, already owned and does not face the same hurdles that arise in separate property divorce and elective share.

In comparison to community property, a similar but far more pervasive innovation from earlier times is the rise of no-fault divorce. During the no-fault revolution, in a matter of less than 20 years from the late 1960s to the mid-1980s most states, including Michigan, adopted a version of divorce which allowed one party to file a complaint for dissolution of the marriage without having to find fault with the other spouse.[31] No-fault divorce breaks any lingering connection marriage could have to the ideal that it is an indissoluble union which, if dissolved, can somehow be saved in the eyes

of society by blaming a party's fault.[32] It recasts marriage, once a family- , community- , and society-based alliance, as a (still momentous) merger of individuals in a society which is much more mobile, liberal, and individualistic than before.[33]

The trend of society and the law is to see marriage through the lens of community property and no-fault divorce — as a contract between equals, a partnership that may or may not work in the end — rather than as a religiously and socially protected institution.[34] There are few legal barriers to dissolving a marriage and there is much less reason for a spouse to endure anything close to one of the conditions which is historically a basis for fault divorce — especially prolonged desertion or its kin — and less reason to put up fault-based roadblocks to a surviving spouse's inheritance.[35]

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ENDNOTES

1. Westermarck, *The History of Human Marriage* (New York: Macmillan, 1891).
2. *History of Human Marriage*, pp 383-415 and Anderson, *The Economics of Dowry and Brideprice*, 21 J Econ Perspectives 151, 152-155 (2007) (noting that brideprice dates back to 3000 BCE and dowry to 800-300 BCE, brideprice is still practiced today, most notably in sub-Saharan Africa, and dowry is today quite prevalent in South Asia).
3. *History of Human Marriage*, pp 403-415.
4. Cahn, *What's Wrong About the Elective Share "Right"?*, 53 U C Davis L Rev 2087, 2094-2095 (2020) and Rabinowitz, *Origin of the Common-Law Warranty of Real Property and of the Inchoate Right of Dower*, 30 Cornell L Rev 77, 90 (1944). Dower, which had priority over creditors of the estate, was a financial protection for widows at a time when property was inherited only by blood relatives and thus kept them from becoming a burden on society. See also Turnipseed, *Community Property v The Elective Share*, 72 La L Rev 161, 165 (2011) and Bridges, *Marital Fault as a Basis for Terminating Inheritance Rights: Protecting the Institution of Marriage and Those who Abide by their Vows — 'Til Death do them Part*, 45 Real Prop Trust Est L J 559, 560-561 (2010).
5. Marriage then was not merely a union of two people, it was "a matter of a larger community" and "families used marriage to benefit politically, militarily, and commercially," Brabcova, *Marriage in Seventeenth-Century England: The Woman's Story*, available at <https://www.phil.muni.cz/angl/thepes/thepes_02_02.pdf> [https://perma.cc/SJR9-Z6PB] and Cunningham, *Michigan's Elective Share: An EPIC Failure*, 94 U Det Mercy L Rev 273, 275 (2017). Coverture, whereby a married woman lost many rights to ownership and control of property, was a product of English medieval common law, Beattie, *Married Women's Property: A Medieval Perspective*, Law & History Review <https://lawandhistoryreview.org/article/married-womens-property-a-medieval-perspective/> [https://perma.cc/F7MM-G3SE]. See also Note, *The Impact of Michigan's Common-Law Disabilities of Coverture on Married Women's Access to Credit*, 74 Mich L Rev 76, 78 (1975), quoting Blackstone's famous line from 1 Blackstone, Commentaries on the Laws of England, p 442: "By marriage, the husband and wife are one person in the law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband"). The early Anglican Church took on much of the Catholic Church's Counter Reformation conservatism toward marriage, Foreman, *The Heartbreaking History of Divorce*, Smithsonian Magazine (February 2014), available at <https://www.smithsonianmag.com/history/heartbreaking-history-of-divorce-180949439/> [https://perma.cc/NG75-MAYB]. All websites cited in this article were accessed March 14, 2023.
6. Legal separation was termed *divortium a menso et thoro* (literally, "divorce from table and bed"), *Heartbreaking History of Divorce*, and Parliamentary divorce *divortium a vinculo matrimonii* ("divorce from the bond of marriage"), *M.arriage in Seventeenth-Century England*.
7. Freda, *Women and Parliamentary Divorce in England: From Wife-Sale to the Divorce Act of 1857*, 52 Pravnehistoricke Studie 81, 84 (2022) and *Heartbreaking History of Divorce*.
8. Turtletaub, *Misconduct in the Marital Relation, Adultery as a Bar to Dower*, 13 U Miami L Rev 83, 83 (1958).
9. This incorporated the areas of dower, marriage (including coverture), and divorce, *id.*; Hirsch, "American History of Inheritance Law," essay in Katz, ed, *Oxford Int'l Encyclopedia of Legal History* (Oxford: Oxford Univ Press, 2009); and Lee, *Divorce Law Reform in Michigan*, 5 U Mich J L Ref 409, 410 (1972). Dower existed in Michigan statute as early as 18th century territorial days and was formally recognized in Michigan jurisprudence in *May v Rumney*, ___ Mich ___ (1847), *Michigan's Elective Share: An EPIC Failure*, 94 U Det Mercy L Rev at 309, and Anthony & Lauderman, *The Demise of Dower*, 25 Mich B J 34, 35 (September 2016).
10. "American History of Inheritance Law," pp 236-238 ("[t]he nineteenth century was an age of momentous social and economic change in the United States and, concomitantly, a time of transformation and innovation in American law." Hirsch also draws attention to changes regarding gender discrimination and family life in the 20th century) and Leeson & Pierson, *Economic Origins of the No-Fault Divorce Revolution*, 43 Eur J L Econ 419, 421 (2017) ("In the late eighteenth and early nineteenth centuries, most states moved from divorce by legislative act to divorce by judicial decree").
11. All states had passed a form of anti-coverture Married Women's Property Act (MWPA) by the end of the 19th century, following New York's lead in 1848, McGee & Moore, *Women's rights and their money: a timeline from Cleopatra to Lilly Ledbetter*, The Guardian (August 11, 2014) <https://www.theguardian.com/money/us-money-blog/2014/aug/11/women-rights-money-timeline-history> [https://perma.cc/7R5Y-7NP5]. Michigan's MWPA was passed in a series of three statutes, enacted in 1855, 1911, and 1917, and the last remaining aspects of coverture in our state were abolished through the 1963 Michigan Constitution and the 1974 Equal Credit Opportunity Act, *The Impact of Michigan's Common-Law Disabilities of Coverture*, 74 Mich L Rev at 79-80, 95-96. In the area of women's rights, the 1920 passage of the 19th Amendment, guaranteeing women's suffrage, should also be noted.
12. *Michigan's Elective Share: An EPIC Failure*, 94 U Det Mercy L Rev at 284-286 and *What's Wrong About the Elective Share "Right"?*, 53 U C Davis L Rev at 2097-2098. In the 19th century, widows gained intestate inheritance rights which generally meant dower was used to elect against a disinheriting will, "American History of Inheritance Law," p 237. Michigan introduced a gender-neutral elective share and allowances in 1979 with the Revised Probate Code (*Michigan's Elective Share: An EPIC Failure*, 94 U Det Mercy L Rev at 310-311), and curtesy existed for a short time in 19th century Michigan while Michigan dower famously remained only a widow's right until its statutory abolition in 2017 in the shadow of the US Supreme Court's decision in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015), Meyers, Moseng & Stone, *Dower: Important Protection or Sexist Anachronism?*, 23 Mich Real Prop Rev 5, 6 (1996) and Sheid, *The Death of Dower: Dower's Repeal in Michigan*, unpublished essay (Spring 2017), available at <https://www.law.msu.edu/king/2016-2017/Scheid.pdf> [https://perma.cc/DUG2-DK5B]. In states like Michigan that maintained dower concurrently with the typically higher-yielding elective share, the only theoretical reasons for someone to choose the former boiled down to restricting the alienability of land and avoiding creditors. See "American History of Inheritance Law," p 237 and *The Death of Dower*.
13. *Divorce Law Reform in Michigan*, 5 U Mich J Law Ref at 411, *Marital Fault as a Basis for Terminating Inheritance Rights*, 45 Real Prop Trust Est L J at 562, and 139 ALR 486.
14. MCL 700.290 (repealed).
15. MCL 700.2801(2)(e). One falling under the provisions of the statute loses the right to take a share of an intestate estate (MCL 700.2102), the elective share contrary to the will (700.2202(2)), relief as a pretermitted spouse (i.e., a spouse married after the execution of the will, MCL 700.2301(1)), or the homestead or family allowance and any exempt property (MCL 700.2402, 2403(1), 2404(1)). Others outside of MCL 700.2801(2)(e) who might otherwise be considered a "surviving spouse" or benefit from an estate but who by operation of statute do not, include, in part, "[a]n individual who feloniously and intentionally kills or who is convicted of committing abuse, neglect, or exploitation with respect to the decedent" (MCL 700.2803(1)), "[a]n individual who is divorced from the decedent or whose marriage to the decedent has been annulled" (MCL 700.2801(1)), and "[a]n individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual" (MCL

700.2801(2)(d)).
16. MCL 552.6 (earlier version).
17. *In re Estate of Von Greiff*, ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 161535). This opinion is available for review at <https://www.courts.michigan.gov/4b026a/siteassets/case-documents/uploads/opinions/final/sct/161535_55_01.pdf> [https://perma.cc/W5G2-LVT8].
18. *Id.* at ___; slip op at 3-5.
19. *Id.* at ___; slip op at 16.
20. *In re Estate of Erwin*, 503 Mich 1; 921 NW2d 308 (2018).
21. *In re Von Greiff* at ___; slip op at 12-13.
22. *Id.* at ___; slip op at 13-14.
23. This came from the majority's attempt to distinguish willful absence from desertion. As Justice Viviano's dissent in *Erwin* argues, desertion can still be distinguished from willful absence even if the latter is read only in terms of physical absence. Desertion, though often a leaving, centrally involves the impact of a hostilely disregarding attitude and can be committed by someone who through actions forces the other spouse to leave (sometimes termed "constructive desertion"), *In re Erwin*, 503 Mich at 32-40. See also *Misconduct in the Marital Relation*, 13 U Miami L Rev at 88, in reference to constructive desertion as part of the historical majority rule regarding the application of the Statute of Westminster's bar on dower rights in the United States.
24. *In re Erwin*, 503 Mich at 27.
25. The *Erwin* court refers to 'inconsistency with the very existence of legal marriage' in reference to its discussion of all three fault conditions of MCL 700.2801(2)(e) and goes on in the same discussion to characterize all three conditions as involving "intentional acts that bring about a situation of divorce in practice…" *Id.*, 503 Mich at 15.
26. This should be obvious. In typical cases of willful absence, desertion, or withholding of support required by law, the guilty party clearly recognizes the fact that he or she is married. Likewise, it is difficult to see how interspousal communications when one is willfully physically absent will not also involve this recognition, *In re Von Greiff* at ___; slip op at 4 (Viviano, J., dissenting).
27. It should be noted that about 10 other states have statutory provisions like Michigan's which bar surviving spouse rights based on desertion/absence/abandonment. Some of these laws are more explicit on the issue of physical absence — e.g., Kentucky ("…voluntarily leaves…"; Ky Civ R 392.090(2)), Massachusetts ("…living apart…"; GL c 209, § 36), and New Jersey ("…living separate and apart…", "…ceased to cohabit"; NJSA 3B:8-1).
28. *Community Property v The Elective Share*, 72 La L Rev at 172, 184, 186 ("The community property theory of asset distribution is much more effective at protecting the non-wage-earning spouse, especially during life, as he or she has an immediate property interest in any property deemed earnings during the marriage." Some separate property states (Michigan not among them) have statutorily augmented the estate against which the elective share can take in an effort to improve the system; Turnipseed analogizes this system to "some school child's Rube Goldberg machine trying, in as complex a manner as humanly possible, to solve a problem which community property already solves.") One key difference between community property and separate property regimes is that, a la Goldberg, the latter is plagued by any number of inventive and evolving loopholes that can be used to thwart a surviving spouse from receiving what otherwise would have been received. *Id.*, 72 La L Rev at 179-182.
29. Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted it, and Why Community Property Principles Benefit Women*, 11 U Md L J Race Rel Gend Class 1 (2011). The 10 community property states are Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.
30. *Id.* at 9.
31. *Economic Origins of the No-Fault Divorce Revolution*, 43 Eur J L Econ at 422-423.
32. *Id.* at 421 (explaining how divorce prior to no-fault often involved spouses colluding to 'concoct false evidence of legally accepted grounds for divorce with lawyers and judges going along with the charade').
33. *Id.* at 427-428 (citing the growing economic independence of women from men and the increasing separation of marriage and children as creating efficiency pressure for divorce-law liberalization). See also *Divorce Law Reform*, 5 U Mich J L Ref at 417-18. Gone are the days when husband and wife, if the marriage today is so constructed, were cast into separate roles — i.e., breadwinner and homemaker; even so, when roles were more rigid there was good reason to value the wife's contribution in allowing the husband simply to focus on work, *What's Wrong About the Elective Share "Right"?*, 53 U C Davis L Rev at 2095.
34. *Economic Origins of the No-Fault Divorce Revolution*, 43 Eur J L Econ at 423.
35. *Misconduct in the Marital Relation*, 13 U Miami L Rev at 86.

SECURE-ING RETIREMENT PLANS FOR THE FUTURE

A primer on proposed regulations to the SECURE Act

BY CHRISTOPHER J. CALDWELL AND ROBERT M. HUFF

Note: Most of the regulations addressed in this article are proposed regulations that have not yet been finalized and promulgated. These proposed regulations, which are cited as such in the article endnotes, can also be found at the Federal Register at 87 FR 10504.

On Dec. 20, 2019, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which took effect on Jan. 1, 2020.[1] A little more than two years later, the Internal Revenue Service offered guidance to taxpayers and practitioners by promulgating proposed regulations that interpret the SECURE Act.

Almost exactly three years to the day after the SECURE Act passed, the SECURE 2.0 Act became law on Dec. 29, 2022.[2] However, regulations for SECURE 2.0 are likely a long way off and beyond the scope of this piece save for the occasional parenthetical. Instead, this article focuses on the proposed regulations that emerged from the first SECURE Act,[3] shedding light on the areas of estate planning with retirement assets that are most impacted by the law.

TYPES OF BENEFICIARIES

Practitioners need to understand one foundational concept before delving into the more complex rules of the SECURE Act which took effect in 2020. There are now three classes of beneficiaries — designated beneficiaries (DBs),[4] eligible designated beneficiaries (EDBs),[5] and the *absence* of designated beneficiaries (NoDBs). The different beneficiaries yield different

payout timelines and required minimum distributions (RMDs) discussed below.

DBs are exactly what they sound like: individual (human) beneficiaries designated by the account holder to receive qualified assets from a decedent,[6] though certain trusts also qualify as DBs. EDBs are a subset of DBs comprised of the following: a surviving spouse, a minor child of the account holder (under age 21),[7] a disabled or chronically ill individual, and an individual who is not more than 10 years younger than the account holder (or is older than the account holder.)[8] If there are multiple DBs and at least one of the beneficiaries is not an EDB, the account holder is treated as having DBs but no EDBs.[9]

What about estates and trusts? The answers differ greatly. Estates are not DBs[10] so, accordingly, any plan which names the account holder's estate as the beneficiary is treated the same as if there was no DB at all. Trusts, however, require greater investigation. If a trust does not qualify as a see-through trust, the account is NoDB.[11] Proposed regulations classify see-through trusts as either conduit trusts, which require all account distributions to be paid directly to or for specified beneficiaries,[12] or accumulation trusts, which are all other see-through trusts not categorized as see-through trusts.[13] In determining whether a trust qualifies as a DB or EDB, we must examine the status of trust beneficiaries. Any primary, first-tier beneficiary whose interest is not contingent on the death of another beneficiary is counted for all trusts.[14] For conduit trusts, the examination ends here.[15]

For accumulation trusts, the path is more daunting. We determine the status of a beneficiary who may take solely due to the death of another beneficiary as a secondary beneficiary.[16] For many accumulation trusts, this ends the examination. However, where a secondary beneficiary is deemed to have or actually predeceased the account holder, generally, we must examine the tertiary beneficiaries — those who can take solely due to the death of a secondary beneficiary. Exceptions to counting tertiary beneficiaries include situations where the primary beneficiaries are the account holder's minor children and where all account proceeds must be distributed by the time a beneficiary reaches age 31.[17]

OUTER LIMIT YEAR AND REQUIRED BEGINNING DATES

The most widely publicized change resulting from the SECURE Act is how long beneficiaries may keep inherited retirement assets in inherited accounts, deferring the payment of income tax on distributions. The calculation of the end date, the outer limit year (OLY), contains the most profound tax-planning limitations under the SECURE Act.

The OLY calculation depends on the type of beneficiary and whether the account holder had reached the required beginning date (RBD) prior to death. Generally, the RBD is now the later of the year when the account holder attains age 72 or retires.[18] (One major change from SECURE 2.0: this age is now 73 as of Jan. 1, 2023, and will increase to 75 in 2033.)

NoDBs present the most straightforward rules. If the account holder had a NoDB and died prior to the RBD, all account assets must be distributed outright within five years.[19] If the account holder had NoDB and died following her RBD, the OLY is determined based on the deceased account holder's life expectancy.[20] That's not a typo — the deceased individual's hypothetical life expectancy determines the OLY. This is the aptly named the "at least as rapidly" rule.

DB rules are also rather clear. If the account holder died prior to the RBD, the OLY is in year 10.[21] If, however, the account holder died following the RBD, the OLY is determined by the longer of the deceased account holder's life expectancy or the DB's own life expectancy.[22] If that period is longer than 10 years, however, the OLY is capped at 10 years.[23] In the event that there are multiple DBs, the oldest DB's life is used as the measuring life.[24] There are also certain complications associated with multibeneficiary trusts which we'll discuss in greater detail below.

The regulations for EDBs are more complicated than those above but still offer the most desirable OLY extensions. If an account holder dies before her RBD and her surviving spouse is the sole beneficiary, the surviving spouse may elect to delay the RBD until what would have been the account holder's own RBD.[25] In any event, the OLY for a qualified asset in the hands of a surviving spouse is year 10 following the surviving spouse's own death unless otherwise limited to year five if the surviving spouse dies leaving a NoDB account.[26]

If the EDB is the account holder's minor child, the OLY is the year in which the minor child reaches age 31.[27] This is true regardless of whether the account holder died before or after her RBD.

For EDBs who are not more than 10 years younger than the account holder or are chronically ill or disabled individuals, the OLY is the same as that of a surviving spouse: year 10 following the EDB's own death.[28]

Finally, there are two broad rules that apply among most EDBs. First, in the case of EDBs other than a minor, the EDB may elect to make the OLY year 10.[29] Second, upon the death of an EDB, the OLY for the subsequent beneficiary is year 10 even if the subsequent beneficiary is otherwise an EDB.[30]

REQUIRED MINIMUM DISTRIBUTIONS

After determining the beneficiary's OLY, we must determine whether required minimum distributions (RMDs) must be taken by the beneficiary. As with the OLYs, the character of the beneficiary dictates the RMD determination.

As before, the account holder's surviving spouse can annually recalculate RMDs based on their own life expectancy.[31] However, the deceased account holder's "ghost" life expectancy — calculated as if the account holder hadn't actually died — could be longer than the surviving spouse's life expectancy. In this situation, if the account holder dies after her RBD and the account holder's ghost life expectancy is longer than that of the surviving spouse, the surviving spouse may elect to utilize the account holder's ghost life expectancy in calculating the RMD.[32]

Unlike with a surviving spouse, there is only one RMD rule for a minor child EDB: the minor child must begin taking RMDs upon inheriting the account with the calculated amount based on the minor child's own life expectancy.[33]

RMDs for disabled or chronically ill individuals follow the same rules as those for EDBs not more than 10 years younger than the account holder. For these EDBs, RMDs start immediately and are based on the longer of the beneficiary's own life expectancy or the decedent's life expectancy.[34] Once again, this is true regardless of whether the account holder reached her RBD.

For beneficiaries other than EDBs, the RMD rules are similar though not quite identical. If the account holder died prior to her RBD, no RMDs are required.[35] If the account holder instead died after her RBD, RMDs continue based on the account holder's life expectancy though a DB may utilize their own life expectancy if longer than the account holder's life expectancy.[36]

There was some confusion over whether decedents dying in 2020 and 2021 would give rise to RMDs in those years for certain beneficiaries in their inherited accounts. The IRS cleared up this confusion when it issued Notice 2022-53, which effectively provided a free pass for RMDs not made in 2021 and 2022.

TRUST COMPLICATIONS

While complicated, the regulations detailed above do make sense. The regulations that apply to trusts, unfortunately, are not as friendly. We'll address a few of these provisions.

First, the regulations provide three scenarios regarding powers of appointment (POA). All three look to the status of the POA as of Sept. 30 of the year following the account holder's death even though, in most situations, the POA itself won't be effectuated until the power holder dies. If the power holder exercises the POA, then only appointees of the POA are countable for OLY and RMD purposes.[37] If the power holder restricts the power, only the remaining potential appointees of the POA are countable.[38] If the power holder takes no action with the POA by Sept. 30, then the POA is deemed unexercised and the trust beneficiaries are as provided for in the trust.[39]

But wait! There's a fourth scenario. If the power holder exercises the POA *after* Sept. 30, the appointees are now countable beneficiaries and RMDs are recalculated.[40] Your authors hope the final regulations offer further guidance on POAs.

The proposed regulations also address three trust modification scenarios. First, if a beneficiary is removed by the following Sept. 30, that beneficiary is not counted.[41] Second, if a beneficiary is added by the following Sept. 30, that beneficiary *is* counted.[42] Third, if a beneficiary is added after the following Sept. 30, the new beneficiary is counted and RMDs must be recalculated in an outcome similar to the POA situations above.[43]

Multibeneficiary trusts (MBTs) are addressed separately from the general rules for trusts discussed above. If the MBT splits into separate portions on the account holder's death, each subtrust is evaluated on its own pursuant to the aforementioned rules. If, however, the MBT remains a single trust where the sole beneficiaries are disabled or chronically ill individuals during their lifetimes, the OLY and RMD for the MBT is determined with reference to the oldest EDB.[44]

Despite the confusing provisions, naming a conduit trust as a beneficiary has become much more attractive under the SECURE Act. Conversely, any beneficiary designation naming an accumulation trust must be examined in close detail to ensure that a desired tax deferral opportunity isn't lost as the result of a countable secondary or tertiary beneficiary.

COMMON SITUATIONS AND PLANNING TRAPS

If you find yourself struggling to digest this dense material, we get it. Although we cannot cover all possible scenarios, consider the following common situations and potential planning traps:

Surviving spouse is sole beneficiary

The most common situation has nearly the same outcome as it did in 2019. A surviving spouse can delay RMDs if the account holder dies prior to her RBD and then takes modest RMDs over the surviving spouse's own lifetime. The OLY for the surviving spouse's own beneficiaries is limited by the SECURE Act, but that's not a massive change. This plays out the same way whether the surviving spouse's portion passes outright or via a conduit trust.

But wait! What if the surviving spouse's share is held in an accumulation trust? If the secondary beneficiary isn't an EDB — say, the account holder's adult children — then the DB rules apply to the surviving spouse, stripping the surviving spouse of EDB status.

Adult children as sole beneficiaries

If the account holder died before her RBD, no RMDs are required but the OLY is year 10 after the account holder's death. RMDs are required if the account holder died after her RBD.

Minor children as sole beneficiaries

Very small RMDs are required, then all assets must be distributed when the child attains age 31.

Note that, while an adult child receives an earlier OLY than a minor child, an adult child's ability to avoid RMDs until the entire account is distributed at the end of year 10 may be preferable to the minor child's small RMDs and delayed OLY.

Some adult and some minor children as beneficiaries

As noted above, a plan that designates multiple beneficiaries, but only some of which are EDBs, will be treated as having no EDBs. For example, if the account holder names her minor children and adult children, her minor children will not qualify as EDBs, accelerating the payout of their inherited accounts and thus accelerating taxes due to the inclusion of the adult children as beneficiaries.

Disabled or chronically ill individuals as beneficiaries

The SECURE Act provides very favorable treatment to disabled or chronically ill individuals when they are primary beneficiaries, offering RMDs based on their own life expectancy and an OLY that extends to year 10 following the beneficiary's death. This should be protected whenever possible. That said, the proposed regulations leave many open questions regarding chronically ill and disabled beneficiaries which have been a cause for concern among practitioners; we expect the final regulations to provide more detail in this regard.

An elderly account holder with a disabled or chronically ill beneficiary may want to consider avoiding naming her surviving spouse as the EDB. Recall that upon the death of an EDB, the OLY for a subsequent beneficiary is not longer than year 10. Thus, a disabled or chronically ill individual who could otherwise conceivably enjoy a multidecade stretch will be forced to terminate a plan at the end of year 10 following the surviving spouse's death.

CONCLUSION

We recognize that the above is a slog. However, we hope a distilled look at this area of law inspires you to venture confidently in advising your clients. By understanding the above, you can help secure a bright future for them and their beneficiaries.

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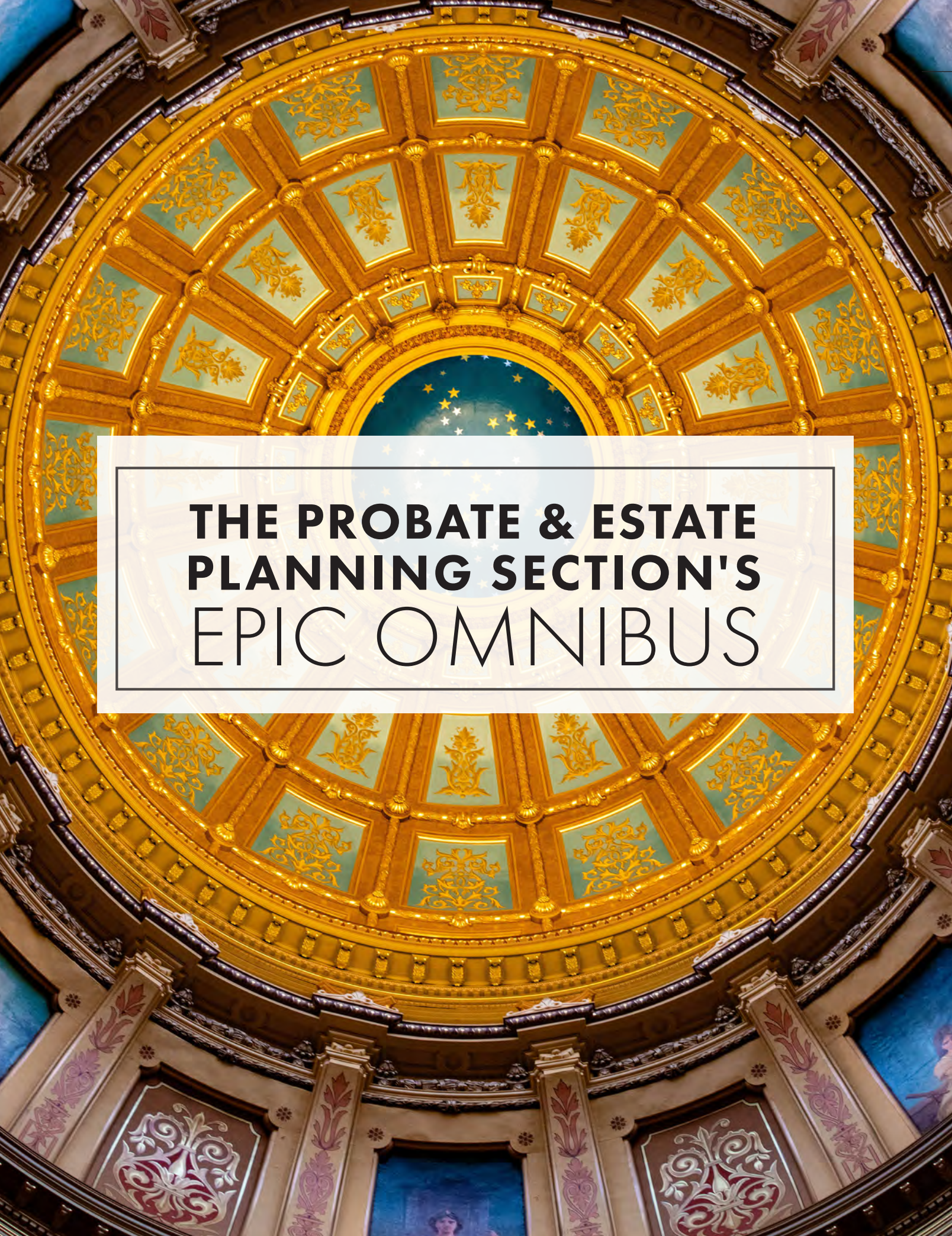
ENDNOTES

1. Godbout, *SECURE Act is Signed into Law*, ASPPA (December 20, 2019) <https://www.asppa.org/news/browse-topics/secure-act-signed-law> [https://perma.cc/6DV8-X2W7]. All websites cited in this article were accessed March 21, 2023.
2. Godbout, *It's Official: SECURE 2.0 Enacted Into Law*, ASPPA (December 30, 2022) <https://www.asppa.org/news/it%E2%80%99s-official-secure-20-enacted-law#:~:text=Capping%20off%20months%20of%20anticipation%20and%20hard%20work%2C,on%20vacation%20in%20St.%20Croix%2C%20U.S.%20Virgin%20Islands.> [https://perma.cc/A445-44QH].
3. The proposed regulations analyzed in this article can be found at *Proposed Regulations Related to Required Minimum Distributions*, 87 Fed Reg 10,504 (February 24, 2022), to be codified at 26 CFR Parts 1 and 54, available at <https://www.govinfo.gov/content/pkg/FR-2022-02-24/pdf/2022-02522.pdf> [https://perma.cc/U8HZ-7QXZ].
4. 26 USC 401(a)(9)(E)(i).
5. 26 USC 401(a)(9)(E)(ii).
6. 26 USC 401(a)(9)(E)(i) and Proposed Reg § 1.401(a)(9)-4(a)(1).
7. Proposed Reg § 1.401(a)(9)-4(e)(3).
8. 26 USC 401(a)(9)(E)(ii).
9. Proposed Reg § 1.401(a)(9)-4(e)(2)(i).
10. Proposed Reg § 1.401(a)(9)-4(a)(4).
11. Proposed Reg § 1.401(a)(9)-4(b).
12. Proposed Reg § 1.401(a)(9)-4(f)(1)(ii)(A).
13. Proposed Reg § 1.401(a)(9)-4(f)(1)(ii)(B).
14. Proposed Reg § 1.401(a)(9)-4(f)(3)(i)(A).
15. Proposed Reg § 1.401(a)(9)-4(f)(3).
16. Proposed Reg § 1.401(a)(9)-4(f)(3)(i)(B).
17. Proposed Reg § 1.401(a)(9)-4(f)(3)(ii)(B).
18. 26 USC 401(a)(9)(C)(i).
19. Proposed Reg § 1.401(a)(9)-3(c)(2) and Proposed Reg § 1.401(a)(9)-3(c)(5)(B).
20. Proposed Reg § 1.401(a)(9)-5(d)(1)(iii).
21. Proposed Reg § 1.401(a)(9)-3(c)(3) and Proposed Reg § 1.401(a)(9)-3(c)(5)(B).
22. Proposed Reg § 1.401(a)(9)-5(d)(1)(ii).
23. Proposed Reg § 1.401(a)(9)-5(e)(2).
24. Proposed Reg § 1.401(a)(9)-5(f)(1)(i).
25. Proposed Reg § 1.401(a)(9)-3(d).
26. Proposed Reg § 1.401(a)(9)-3(e).
27. Proposed Reg § 1.401(a)(9)-5(e)(4).
28. Proposed Reg § 1.401(a)(9)-3(c)(4).
29. Proposed Reg § 1.401(a)(9)-5(d)(2).
30. Proposed Reg § 1.401(a)(9)-3(c)(3).
31. Proposed Reg § 1.401(a)(9)-5(d)(3)(iii).
32. Proposed Reg § 1.401(a)(9)-5(d)(1).
33. Proposed Reg § 1.401(a)(9)-5(e)(4).
34. Proposed Reg § 1.401(a)(9)-5(d)(1).
35. Proposed Reg § 1.401(a)(9)-3(c)(2), (3) and Proposed Reg § 1.401(a)(9)-3(c)(5)(A), (B).
36. Proposed Reg § 1.401(a)(9)-5(d)(1)(ii).
37. Proposed Reg § 1.401(a)(9)-4(f)(5)(i).
38. Proposed Reg § 1.401(a)(9)-4(f)(5)(ii)(A).
39. Proposed Reg § 1.401(a)(9)-4(f)(5)(ii)(A).
40. Proposed Reg § 1.401(a)(9)-4(f)(5)(ii)(B).
41. Proposed Reg § 1.401(a)(9)-4(f)(5)(iii)(B).
42. Proposed Reg § 1.401(a)(9)-4(f)(5)(iii)(C).
43. Proposed Reg § 1.401(a)(9)-4(f)(5)(iv).
44. Proposed Reg § 1.401(a)(9)-5(f)(1)(ii).



THE PROBATE & ESTATE PLANNING SECTION'S EPIC OMNIBUS

Photo by Sarah Brown, State Bar of Michigan

Previewing proposed amendments to statutes that impact probate practice

BY NATHAN R. PIWOWARSKI

For the last two decades, probate practitioners and the public have benefited from Michigan's Estates and Protected Individuals Code (EPIC).[1] This article outlines the EPIC Omnibus, which is the SBM Probate and Estate Planning Section's proposal to update EPIC and its sister statutes that routinely impact probate practice: the Michigan Trust Code,[2] Uniform Transfers to Minors Act,[3] Motor Vehicle Code,[4] and Natural Resources and Environmental Protection Act.[5]

THE PROBATE AND ESTATE PLANNING SECTION AND EPIC OMNIBUS

EPIC, which was enacted in 1998 and took effect in 2000, replaced Michigan's cobbled-together Revised Probate Code.[6] It adapts the Uniform Probate Code (UPC)[7] to Michigan's needs and succinctly articulates the law of wills, decedent estates, trusts, nontestamentary transfers on death, management of incapacitated persons' affairs, and most probate court proceedings.

By 2015, appellate courts had regularly interpreted EPIC and practitioners had had ample opportunity to find potential areas of clarification or enhancement. Further, the Uniform Law Commission had published revisions that improved upon parts of the UPC.

Based on these developments, the Probate and Estate Planning Section Council tasked its Legislation Development and Drafting Committee with reviewing the code and proposing a comprehensive set of amendments. The committee reviewed the code section by section, surveyed appellate cases interpreting it, and canvassed section members. During this process, the committee also identified probate-related statutes outside of EPIC that would benefit from cost-of-living adjustments.

The resulting draft legislation,[8] referred to as the EPIC Omnibus or Omnibus, has been introduced in two sessions of the Michigan Legislature, first as 2018 House Bills 6467, 6468, 6470, and 6471,[9] and then as 2021 House Bills 4898, 4899, 4900, and 4901.[10] The latter package narrowly missed enactment in the final days of the session. Section leaders are optimistic about the package's reintroduction and passage during the current legislative session.

OMNIBUS CHANGES TO EPIC

The Omnibus would change dozens of details in EPIC and its sister statutes, but it would primarily:

1. Update financial thresholds set in the law and subject additional thresholds to periodic inflationary adjustments. The effect of most of these threshold changes is that citizens and lawyers will not have to file probate motions and petitions as often.

2. Create standby guardianship to ensure legally incapacitated individuals are not endangered by a guardianship gap due to their guardians' illness, absence, or death.

3. Clarify and improve notice rules that can impact the administration, modification, and termination of trusts.

4. Enforce attorney rules of professional conduct by voiding inappropriate gifts included in estate planning instruments prepared by lawyers. This is commonly referred to as the Mardigian fix.[11]

5. Modernize trust disclosure rules to allow trusts to be administered on a confidential basis for a limited period.

6. Update patient advocate rules to accommodate the appointment of multiple co-advocates and the increased reliance on nurse practitioners as primary care providers.

7. Make numerous technical fixes and improvements including clarifying ambiguous statutory definitions, clarifying the circumstances under which a court may reopen a decedent estate, adopting modernized versions of "pet trust" and "purpose trust" rules, and confirming that certain Michigan trusts can be used for estate and gift tax planning purposes.

The balance of this article details the first six items on the list above.

INCREASING STATUTORY THRESHOLDS AND IMPOSING INFLATION ADJUSTMENTS

EPIC's drafters recognized that the costs of judicial intervention sometimes outweigh its benefits, so it allows the public to transfer otherwise probated assets without court filings. The section council concluded that the public would benefit by further reducing its reliance on courts to resolve some probate matters. The Omnibus would change the following thresholds:

MCL Section	Description	Current Amount	Proposed Amount
700.3605	Threshold for demanding that the personal representative obtain a bond	$2,500	$25,000
700.3916	Maximum value of unclaimed assets that a personal representative may hold without depositing them to the county treasurer	$250	$1,000
700.3917	Minimum service charge by the county treasurer for holding unclaimed funds	$10	$15
700.3918	Maximum sum that the personal representative may distribute to persons under a disability in a year without appointment of a conservator or protective order	$5,000	$25,000
700.3982	Maximum assets of decedent that may be transferred using a petition and order of assignment (small estate order)	$15,000	$40,000*
700.3983	Maximum personal property that may be transferred using an affidavit of decedent's successor (small estate affidavit)	$15,000	$40,000
700.5102	Maximum payment or delivery to a person for the benefit of a minor without having to appoint a conservator	$5,000	$25,000
700.3981	Release of cash and wearing apparel to a decedent's family members (e.g., funeral homes, police, hospitals, etc.)	$500	$1,000
257.236	Maximum cumulative value of vehicles that the Secretary of State may transfer before the decedent's successors must open an estate	$60,000	$100,000
324.80312	Maximum cumulative value of watercraft that the Secretary of State may transfer before the decedent's successors must open an estate	$100,000	$200,000
554.530	Maximum payment that a personal representative or trustee may transfer to an account under the Uniform Transfer to Minors Act	$10,000	$50,000

** As further adjusted by liens against real estate*

Some thresholds in EPIC, such as those for small estate matters, are already subject to annual inflation adjustments under MCL 700.1210. The Omnibus would subject all of the above thresholds to this annual adjustment.

The section proposed these thresholds in 2019 prior to recent inflationary pressures. The section council is therefore considering further increases to these thresholds as well as those for transferring small estates by petition (under MCL 700.3982) and affidavit (under MCL 700.3983).

CREATING STANDBY GUARDIANSHIP FOR LEGALLY INCAPACITATED INDIVIDUALS

For years, Michigan's Mental Health Code[12] has allowed designation of standby guardians for persons with developmental disabilities.[13] This helps ensure continuity in the protection of vulnerable persons. The Omnibus offers a similar tool for use in guardianships for legally incapacitated adults.

Unlike the Mental Health Code, the Omnibus expressly describes the mechanisms of designation, acceptance, and transition into serving as guardian. The Omnibus would also broadly protect third parties who rely on a standby guardian's representation that she or he has authority to act. The Omnibus proposes numerous coordinating changes to Article V, Part 3 of EPIC[14] by integrating standby guardianship into existing statutory frameworks for parental nominations of guardians in their wills, notices incidents to guardianship proceedings, nominations of and

objections to guardians, and reports on the condition of protected persons.

BRIGHT-LINE RULES TO VOID ETHICALLY IMPERMISSIBLE GIFTS TO LAWYER-DRAFTERS

In re Mardigian Estate concerned a challenge to an estate plan in which the decedent made more than $14 million in gifts to the lawyer-drafter and the lawyer-drafter's family. The Supreme Court ruled that a lawyer-drafter's violation of the Michigan Rules of Professional Conduct did not necessarily void the estate plan. Instead, it ruled that in situations where the lawyer-drafter has drafted self-benefiting governing instruments, those instruments should be evaluated under the law of undue influence.

Under the Omnibus, any part of a governing instrument that directly or indirectly makes a "substantial gift" (that is, one of $5,000 or more) to its lawyer-drafter or persons related to the lawyer-drafter would be void. The proposal would not apply to gifts from the lawyer-drafter's family members to him or her. Nominations to serve as a fiduciary would not constitute substantial gifts under the bill.

REDUCING NOTICE BURDENS ASSOCIATED WITH WIPEOUT BENEFICIARIES AND PERSONS WHO COULD CLAIM THROUGH HOLDERS OF POWERS OF APPOINTMENT

The Michigan Trust Code offers helpful tools for resolving trust-related difficulties including nonjudicial settlement agreements[15] and representation rules.[16] The presence of wipeout beneficiaries — often charities — can prevent effective use of these tools.

The Omnibus seeks to expand these tools' use. The definition of "charitable trust"[17] would be narrowed, applying only to trusts for which the charitable purpose is a "material purpose." The definition of "qualified trust beneficiary"[18] would be similarly proscribed, applying only to those individuals whose benefit is a material purpose of the trust. A wipeout beneficiary may later become a qualified trust beneficiary if there are no remaining qualified trust beneficiaries ahead of them in line. Relatedly, the bills would amend MCL 700.7302 to clarify when the holder of a power of appointment may bind potential appointees under the representation rules.

AUTHORIZING LIMITED NONDISCLOSURE PERIODS FOR TRUSTS

The Michigan Trust Code requires that the trustee "provide beneficiaries with the terms of the trust and information about the trust's property, and ... notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee."[19] This mandate cannot be waived. Therefore, a settlor cannot create a trust (or terms of a trust) that are confidential from its beneficiaries for any meaningful amount of time.

The Omnibus was drafted to recognize that settlors sometimes have sound reasons for keeping a trust agreement, its terms, or information regarding the extent of the trust estate confidential for a meaningful period. The Omnibus would allow a settlor to create a noncharitable trust under which the trustee kept certain "prime disclosure information"[20] confidential from one or more beneficiaries for a nondisclosure period of up to 25 years. This framework acknowledges that it may become impracticable, undesirable, or illegal under other applicable law to avoid disclosure; as such, the trustee (or holder of the right to receive confidential information) could not be held liable for sharing primary disclosure information with the beneficiaries. The only permitted remedy for such a disclosure would be the fiduciary's removal. The trust protectors or other persons who hold the right to receive prime disclosure information during the nondisclosure period would have the same notice and standing rights as qualified trust beneficiaries under trusts without nondisclosure terms.

ADDRESSING COMMON-USE CASES FOR PATIENT ADVOCATE DESIGNATIONS

The Omnibus aims to address evolving needs surrounding patient advocate designations. It would:

1. Address the effect of more than one person serving as advocate by amending MCL 700.5506. It would relieve third parties of inquiring into a co-advocate's authority to act alone. It would also allow a designation to specify the process by which an advocate (or multiple co-advocates) can make decisions.

2. Acknowledge a patient's ability to lay out decision-making principles by amending MCL 700.5507.

3. Allow certain nurse practitioners and physician assistants to certify that the patient is ill enough for the advocate to have authority to serve.

4. Expand the reliance protections afforded medical providers by clarifying that a provider need not confirm that an advocate has complied with the patient's instructions.

CONCLUSION

The EPIC Omnibus should solve practical difficulties that attorneys encounter and offer new planning opportunities. The best way to monitor the efforts to pass this proposal is joining the Probate and Estate Planning Section and either attend its council meetings or read the council meeting minutes at connect.michbar.org/probate/home.

Nathan R. Piwowarski is a shareholder of McCurdy, Wotila, and Porteous in Cadillac practicing in the areas of elder law, estate planning, and estate administration. He is also a title agent and co-owner of Lakeside Title. Piwowarski is a fellow of the American College of Trust and Estate Lawyers, secretary of the SBM Probate and Estate Planning Section, and previously chaired the section's Legislation Development and Drafting Committee.

ENDNOTES

1. MCL 700.1101 *et seq.*
2. MCL 700.7101 *et seq.*
3. MCL 554.521 *et seq.*
4. MCL 257.1 *et seq.*, but more particularly the after-death transfer rules found at MCL 257.236.
5. MCL 324.101 *et seq.*, and more particularly the after-death transfer rules found at MCL 324.80312.
6. 1978 PA 642 (repealed).
7. Available at <https://www.law.cornell.edu/uniform/probate> [https://perma.cc/QF6E-UQKU]. All websites cited in this article were accessed March 10, 2023.
8. In compliance with Article VIII of the Bylaws of the State Bar of Michigan, please note the following: The Probate and Estate Planning Section is a voluntary membership section of the State Bar of Michigan and was comprised of 3,488 members at the time it adopted this public policy position. The Probate and Estate Planning Section is not the State Bar of Michigan and the position it expressed was that of the Probate and Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on these proposals. The Probate and Estate Planning Section has a public policy decisionmaking body with 23 members. On June 10, 2022, the Section adopted its position after a discussion and vote at a scheduled meeting. Seventeen members voted in favor of the Section's position, no members voted against this position, one member abstained, and five members did not vote. For more information regarding the section's public policy positions, visit *Public Policy,* Probate and Estate Planning Section, SBM <https://connect.michbar.org/probate/reports/policy> [https://perma.cc/H82G-BAZT].
9. For the legislative history of this and the other house bills cited for 2018, go to "Bill Search" <http://www.legislature.mi.gov/(S(1fqqwltwfmlysjezoc0ak1p3))/mileg.aspx?page=Bills> [https://perma.cc/66PW-AX2G], select "2017-18" from the drop-down menu for "Legislative Session," and type in the number being searched in the field "Bill Number."
10. For the legislative history of this and the other house bills cited for 2021, go to "Bill Search" <http://www.legislature.mi.gov/(S(1fqqwltwfmlysjezoc0ak1p3))/mileg.aspx?page=Bills> [https://perma.cc/66PW-AX2G], select "2020-21" from the drop-down menu for "Legislative Session," and type in the number being searched in the field "Bill Number."
11. In reference to *In re Mardigian Estate*, 502 Mich 154, 160; 917 NW2d 325 (2018).
12. MCL 330.1001 *et seq.*
13. MCL 330.1600 through MCL 300.1644, particularly MCL 330.1640.
14. MCL 700.5301 through MCL 700.5319.
15. MCL 700.7111.
16. MCL 700.7301 – MCL 700.7305.
17. MCL 700.7103.
18. *Id.*
19. MCL 700.7105(2)(i).
20. "Prime disclosure information" concerning a trust means the fact of the trust's existence, the identity of the trustee, the terms of the trust, or the nature or extent of the trust property, 2021 HB 4898.

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LAW PRACTICE SOLUTIONS

The critical importance of protecting your iPhone passcode

BY JEFF RICHARDSON

We all know that an iPhone passcode is supposed to remain private. However, Joanna Stern and Nicole Nguyen of the Wall Street Journal recently published an alarming story that highlights just how critical this is.[1] I want to describe the problem, then discuss some steps you can take to protect yourself.

THE SCAM

The Wall Street Journal investigation revealed that unauthorized access to a short string of numbers — your iPhone passcode — can unravel your entire digital life. Criminals working in teams around the country have come up with ways to entice victims to unlock their iPhones by typing in their passcodes. Perhaps someone talks to a potential victim in a bar and volunteers to take a picture with the victim's iPhone, pressing the buttons on the side of the iPhone to put it in the mode where it must be unlocked with a passcode instead of FaceID or TouchID. Next, a different criminal watching over a shoulder or taking a video from across the room watches the victim unlock the iPhone with a passcode, thereby learning the code. Finally, the criminals grab the victim's iPhone to steal it.[2]

The consequence of having both your iPhone *and* your passcode stolen are more dire than you probably realize. First, a criminal with your passcode can not only change your code (blocking you from using it even if you recover the phone) but, even worse, that person can change your Apple ID password even without knowing your current password. With a new Apple ID password, the criminal can turn off Find My iPhone.

Think about that. The first thing you would probably think to do if your iPhone was lost — track it with Find My iPhone — becomes impossible almost immediately after your phone is stolen.

The criminals might then use your iPhone and passcode to pay for items using the credit cards in your iPhone wallet or send money to themselves via Apple Cash. Even worse, if you use Apple's built-in tool to store passwords for things like banking, the criminals might access your bank accounts online and transfer money from you to them. Stern and Nguyen learned of many people who had $10,000 stolen from their accounts.[3]

A criminal with your Apple ID password can also easily delete a lot of your information — perhaps most notably, all of your pictures. And if your Apple ID password is changed, the result can be losing access to all of your photos on all of your devices — computers, iPads, etc. — as one of the victims interviewed by Stern and Nguyen described.[4]

Again, I encourage you to read the entire story for more details. If you are not a Wall Steet Journal subscriber, you can read the article in the Apple News app if you subscribe to Apple News+. And whether or not you read the story, I recommend that you watch the excellent video the Wall Street Journal created in conjunction with the article.[5]

STEPS YOU CAN TAKE TO PROTECT YOURSELF

First, keep your passcode private. We all already know this, but perhaps the details of this specific scam will encourage all of us to be more serious about it. Anytime you enter your passcode in public, shield the screen in a way that someone looking over your shoulder cannot see what you are typing. The scam described in the Wall Street Journal article may not work on all iPhones and you may have other protections if your iPhone is subject to mobile device management but play it safe and keep your passcode private at all times.

Law Practice Solutions is a regular column from the State Bar of Michigan Practice Management Resource Center (PMRC) featuring articles on practice, technology, and risk management for lawyers and staff. For more resources, visit the PMRC website at www.michbar.org/pmrc/content or call our Helpline at (800) 341-9715 to speak with a practice management advisor.

Second, consider using a more complex passcode. The default iPhone passcode is six digits. It is possible to change that to only four digits, but you should not do so. In fact, consider doing the opposite: change to more than six digits or a combination of numbers and letters. Apple explains how to use a more complex passcode.[6] That's what I do, and I got used to it very quickly.

Third, be very careful about giving your iPhone to someone else — especially someone you don't know. If you do so and if they hand your iPhone back to you and suddenly you need to enter your passcode, that should be a red flag. It doesn't necessarily mean that person is a criminal; it could just be that your iPhone tried to unlock with their fingerprint or their face and put itself in the mode where a passcode is required. Nevertheless, be safe and treat this as a sign to proceed with caution.

Fourth, you should strongly consider using a third-party password manager instead of Apple's built-in manager — and not only for passwords, but for other information and photos. In light of the recent troubles at LastPass,[7] the only one that I recommend right now is 1Password. The Wall Street Journal story notes that criminals were able to access passwords using Apple's built-in password manager and could also access pictures in the Photos app of items like Social Security cards, passports, driver's licenses, and other confidential documents.[8] A password manager can store not just passwords but also confidential information, confidential photos, confidential documents, and more. Even if a criminal has physical access to your iPhone and the passcode, that person cannot access items in your password manager because they are locked behind a different password.

Fifth, use two-factor authentication (2FA or MFA for multi-factor authentication) when you can, and avoid using a text message as the second form of authentication if you have a choice. When there is a choice, it is much better to use another app like 1Password to store the one-time passcode (one that changes every 30 seconds). I'll be honest: this is a little complicated to set up, especially the first time you do so, but it gets easier every time. And if you have read this far, I suspect that you appreciate the value of security, so the trouble is likely worth it for you. Unfortunately, some banks and institutions don't give you a 2FA option other than text messaging which, of course, offers you no extra protection when the criminal has access to your iPhone.

CONCLUSION

It would not surprise me if the Wall Street Journal article and similar stories of scams like these prompt Apple to make changes to the iPhone that result in some of the methods being used by criminals becoming more difficult or entirely impossible to pull off. Then again, Apple may not do anything because this scam has only impacted a very small percentage of iPhone owners and Apple knows that almost every step taken to increase security can also make life more difficult for iPhone owners in other ways. Plus, even if Apple makes changes, clever criminals may find new workarounds. Fortunately, the steps recommended above can help to protect you regardless of whether Apple or the criminals change approaches.

New Orleans attorney Jeff Richardson founded iPhone J.D., a website dedicated to lawyers who use iPhones, iPads, and related Apple devices, in 2008. Contact him at jeff@iphonejd.com.

ENDNOTES

1. Stern & Nguyen, *A Basic iPhone Feature Helps Criminals Steal Your Entire Digital Life,* Wall Street Journal (February 24, 2023) <https://www.wsj.com/articles/apple-iphone-security-theft-passcode-data-privacya-basic-iphone-feature-helps-criminals-steal-your-digital-life-cbf14b1a>. All websites cited in this article were accessed March 9, 2023.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Apple's iPhone Passcode Problem: Thieves Can Ruin Your Entire Digital Life in Minutes,* Wall Street Journal <https://www.youtube.com/watch?v=QUYODQB_2wQ> [https://perma.cc/7CFM-G4MX].
6. *Use a passcode with your iPhone, iPad, or iPod touch,* Apple Support <https://support.apple.com/en-us/HT204060> [https://perma.cc/GNV4-BEQX].
7. Newman, *Security News This Week: The LastPass Hack Somehow Gets Worse,* Wired (March 4, 2023) <https://www.wired.com/story/lastpass-engineer-breach-security-roundup/> [https://perma.cc/75BC-HYGZ].
8. *A Basic iPhone Feature Helps Criminals Steal Your Entire Digital Life.*

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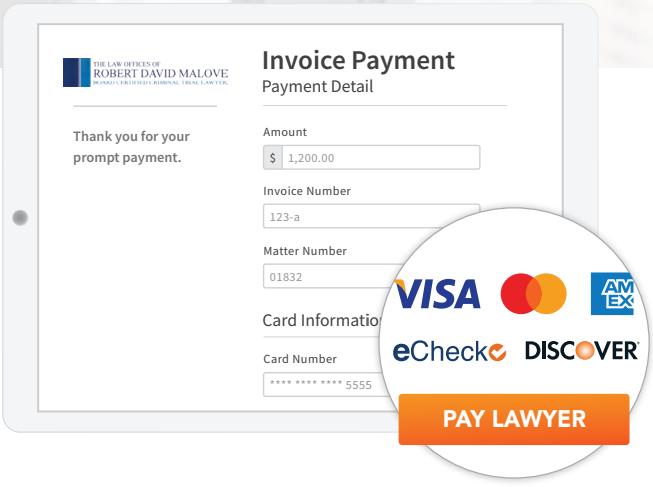

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LIBRARIES & LEGAL RESEARCH

Michigan Supreme Court records and briefs: New access to a historical resource

BY VIRGINIA C. THOMAS

To understand the meaning of specific legislative language, we may review House of Representatives and Senate journals, bill texts, committee and commission reports, hearing testimony, bill analyses, and other sources generated during the lawmaking process.[1] The creation of administrative rules and regulations leaves a similar trail of breadcrumbs.

Case law is a bit different. Judges explain the reasoning of their respective courts in written opinions. Briefs, motions, and other filings submitted by litigants are essential to educating and informing the court in its deliberations. They frame the issues at hand, present legal arguments, and guide the court in applying precedents. Amicus briefs may advance policy-based information that shows the broader impact of the court's opinion on our society. Collectively, these filings are truly a treasure trove that speaks to the development of Michigan common law, case by case.

BACKSTORY

Online availability of state high court records and briefs has expanded in the past 20 years. Westlaw and LexisNexis began selective coverage for Michigan Supreme Court filings in 2000 and other services, including Bloomberg Law, have since included these filings as well. For more than a decade, the Michigan Supreme Court has put on its website records and briefs for current cases granted leave to appeal.[2] Prior to then, the Court distributed print copies of these filings to law libraries across the state designated as repositories for these materials.

As with many historical collections, the records and briefs are practically undiscoverable in print format. No comprehensive or even partial index existed. Repository collections, which were started at different times, varied in scope, completeness, and arrangement.[3] It is doubtful whether there has ever been a single complete collection in the state. A researcher would have to check a specific repository's collection to determine which, if any, filings for a case were available in that library. Therein lies the rub.

The Supreme Court's advances in making current records and briefs searchable and accessible online for free has inspired law librarians and legal researchers to brainstorm ways to do the same for the Court's retrospective filings.

FAST FORWARD TO 2019

Wayne State University's Arthur Neef Law Library is among the academic law library repositories for the Michigan Supreme Court records and briefs. We have maintained a substantial print collection of Court material dating back to 1850. In 2019, the library received a two-year grant from the Institute of Museum and Library Services (IMLS).[4] That grant funded a project that extracted metadata from filings in the Wayne State collection.

Metadata selected for this project include title, date, case name, docket/calendar number, Michigan Reports citation, litigants, and attorneys — all essential elements that help to identify specific filings. The metadata for each filing was entered on a spreadsheet; once the filings were scanned electronically, the corresponding metadata was embedded into them, enabling researchers to identify and retrieve the full text of the filing online.

Our publisher partners, Google Books and LLMC Digital, coordinated the scanning and uploading of images to their respective platforms.[5] Other Michigan academic law library partners shared filings in an effort to make the digitized collection as complete as possible.[6]

PROGRESS TO DATE

A few months after the project was launched, the COVID-19 pandemic took hold. Mandatory facility shutdowns and staff turnover resulted in unavoidable delays. A projected two-year project turned into three. Despite the setbacks, we have made major progress toward our collaborative goal.

Our IMLS grant was extended for a third full year, enabling our team to complete most of the metadata extraction from the Wayne

State collection. The extension, which ran through September 2022, also allowed our team to digitize and upload a significant percentage of filings to Google Books and LLMC Digital. As of this writing, Wayne State has extracted metadata for its entire collection of Michigan Supreme Court case filings from 1850 through 2011, and more than 50,000 filings have been scanned and uploaded to the Google Books and LLMC Digital platforms.

All filings are presented in PDF format, full-text searchable on Google Books, and downloadable at no cost. The filings have also been incorporated into the LLMC Digital collections. Scanning will continue until all filings from which we have been able to extract metadata have been processed.

ARE WE THERE YET?

A funny thing happened as we began working our way through this project. We anticipated finding cases in the Michigan Reports for which there were no filings in the Wayne State collection. Initially, the plan was to ask our academic law library colleagues to loan us filings from their collections. However, we were not prepared for the number of gaps we encountered. Locating, processing, restoring, and returning loaned filings would have disrupted the continuity of the project's workflow.

We've kept a running list of cases missing filings and are figuring out how best to fill in the gaps.

RESEARCH TIPS

Google Books

Google Books, which launched in 2004, provides online access to a "universal collection" of more than 40 million books, journals, and other printed materials.[7] Through its Library Project, Google Books partners with libraries worldwide to make books in the public domain discoverable and "fully available to the public."[8]

- Access Google Books from your web browser by typing "Google Books" into the address bar or by going directly to its homepage at books.google.com.
- Given the huge amount of content in Google Books, it's important to be as specific as possible in devising your search. For example, to find a particular filing or multiple filings from a single case use the docket number, case name, opinion release date, Michigan Reports citation, and/or type of filing as search terms. The advanced search option permits a more targeted search for research concepts, facts, or individuals across multiple cases.[9]
- Google Books provides search support at support.google.com/websearch/answer/9523832 [https://perma.cc/79DC-CRYA].

LLMC Digital

LLMC Digital is a non-profit cooperative of libraries dedicated to preserving legal titles and government documents while making inexpensive digital copies available through its online service.[10] Its more than 500 members include universities, law schools, law firms, courts, and community colleges.

LLMC Digital is primarily a subscription-based product.[11] Several research libraries in Michigan, including the Library of Michigan and law school libraries, may offer mediated onsite or password-protected remote access to the service.

- The LLMC Digital home page is at llmc.com. However, subscribing libraries likely will provide access through their online catalogs.
- The Michigan Supreme Court records and briefs filings can be accessed either through the U.S. States and Territories Collection or a special records and briefs tab.
- Searches are template driven by citation, brief type, party name, and full text.

These new tools have taken some time to build, and the work continues. Even at this stage, we believe they are useful in researching Michigan's rich common law history.

Virginia C. Thomas is a librarian IV at Wayne State University.

ENDNOTES

1. Brown, *Legislative Intent and Legislative History in Michigan,* 30 L Reference Services Q 51 (2011), available at <https://repository.law.umich.edu/librarian/9> [https://perma.cc/7C2F-2UA4]. More recently, the Supreme Court of Michigan also has used corpus linguistics analysis to clarify legislative language, *People v Harris,* 499 Mich 332; 885 NW2d 832 (2016). All websites cited in this article were accessed March 7, 2023.
2. *Briefs,* Mich Supreme Court, Mich Courts <https://www.courts.michigan.gov/courts/supreme-court/briefs/> [https://perma.cc/8E85-NV8X].
3. The Wayne State University Law Library arranged its print collection of records and briefs by Michigan Reports citation. Other repository libraries have used different methods for organizing their collections, e.g., term of court, opinion release date, or calendar/docket number.
4. "The mission of IMLS is to advance, support, and empower America's museums, libraries, and related organizations through grantmaking, research, and policy development," *Mission,* Inst of Museum and Library Services <https://www.imls.gov/about/mission> [https://perma.cc/Y23K-FSK5].
5. Michigan is the fourth state whose retrospective high court records and briefs have been made available online through this initiative.
6. In conjunction with a designee from the Michigan Supreme Court staff, our Michigan academic law library partners also advised on the project.
7. Lee, *15 years of Google Books,* The Keyword, Google (October 17, 2019) <https://www.blog.google/products/search/15-years-google-books/> [https://perma.cc/B3X5-8ZFL].
8. *About the Library Project,* Google Books <https://support.google.com/websearch/answer/9690276?hl=en&ref_topic=9255578> [https://perma.cc/28V7-MTE6].
9. *Advanced Book Search,* Google Books <https://books.google.com/advanced_book_search> [https://perma.cc/KTF3-SW9K].
10. *Mission Statement,* LLMC Digital <https://llmc.com/> [https://perma.cc/Z3Q3-NECG].
11. Though most of its resources are available by subscription, LLMC Digital recently announced its Open Access initiative which offers unrestricted access to select titles, *LLMC Digital Open Access,* LLMC Digital <https://llmc.com/openaccess/search.aspx> [https://perma.cc/9AHR-S49V].

PLAIN LANGUAGE

Some examples from the proposed new Michigan Rules of Evidence

BY JOSEPH KIMBLE

On December 22, 2021, by Administrative Order No. 2021–8, the Michigan Supreme Court established a committee to review the Michigan Rules of Evidence. The order noted that a decade earlier, in 2011, the United States Supreme Court had approved a restyled version of the Federal Rules of Evidence. The Michigan committee was asked to propose revisions to the Michigan rules to conform them stylistically to the federal rules, but without making any substantive changes. The goal of both projects was to make the rules clearer and more consistent throughout, but — again — without changing meaning. The committee delivered its work to former Chief Justice Bridget Mary McCormack on October 8. And the Court approved the rules for publication (with some minor revisions) in March. They are available on the Court's website.[1]

The committee's chair was Timothy Baughman. The other members were the Hon. Timothy M. Kenny, Angela Mannarino, Mary Massaron, Michael Mittlestat, B. Eric Restuccia, and Judith Susskind. I was the style consultant (as I had been on the federal project).

Mr. Baughman had the challenging job of formatting the rules in side-by-side versions, with the current Michigan rule on the left and the parallel federal rule — if there was one — lined up on the right. Any modifications to the federal rule to accommodate substantive differences in the Michigan rules were indicated by strikeovers for deletions and italics for additions. If the Michigan rule had no federal parallel, the Michigan rule was restyled in the same manner as the other rules.

The rules were broken into three groups. Mr. Baughman prepared a clean side-by-side version of each one and sent it to me. Most often, the Michigan and federal rules were substantively the same, so no changes were needed to the federal rule; that is, the proposal was simply to adopt the federal version. If changes were needed to the federal rule because of a substantive difference in the Michigan rule, I suggested the restyled version of the Michigan rule that should be incorporated. That group was then sent to the committee to check for possible unintended substantive changes.

The examples below will give you an idea. This is the form in which they were submitted to the Court. I hope you'll see the improvement at a glance. As I've said in this column before (November 2020 and January 2022) with examples from the current project to restyle the Federal Rules of Bankruptcy Procedure, notice in the first, second, and last examples what a big difference it makes to use more subparts, headings, and vertical lists. These kinds of things should be fairly easy to do in any form of legal drafting (contracts, regulations, bylaws). Why don't we, then? And beyond these structural improvements, you should find more logical organization, shorter sentences, better sentence structure, tighter wording, and so on.

One reminder, though. The current Michigan rule may look poorly drafted compared to the federal rule, but the Michigan rule was probably just following the old federal rule. It was the old federal rule that was not up to stylistic par. To see for yourself, go to the columns for August through November 2009. (Just Google "Plain Language column index.")

ENDNOTE

1. https://www.courts.michigan.gov/49581e/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/proposed-orders/2021-10_2023-03-22_formor_propmre.pdf.

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 37 years. To contribute an article, contact Prof. Kimble at WMU–Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

Rule 408. Compromise and Offers to Compromise.	**Rule 408. Compromise Offers and Negotiations***
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — to either prove or disprove the validity or amount of a disputed claim ~~or to impeach by a prior inconsistent statement or a contradiction~~: (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim. ~~— except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority~~. **(b) Exceptions.** ~~The court may admit this evidence~~ *If this evidence is otherwise discoverable, it need not be excluded merely because it is presented during compromise negotiations. And it need not be excluded if admitted* for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

*Late news: The Court modified this rule slightly.

Rule 606. Competency of Juror as Witness.	**Rule 606. Juror's Competency as a Witness**
(a) At the Trial. [Omitted] (b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(a) At the Trial.** [Omitted] **(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions.*** A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.

Rule 608. Evidence of Character and Conduct of Witness. (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (b) Specific Instances of Conduct. [Omitted]	**Rule 608. A Witness's Character for Truthfulness or Untruthfulness** **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. **(b) Specific Instances of Conduct.** [Omitted]
Rule 610. Religious Beliefs or Opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	**Rule 610. Religious Beliefs or Opinions.** Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.
Rule 706. Court-Appointed Experts. (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness. (b) Compensation. [Omitted] (c) Disclosure of Appointment. [Omitted]	**Rule 706. Court-Appointed Expert Witnesses** **(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert: (1) must advise the parties of any findings the expert makes; (2) may be deposed by any party; (3) may be called to testify by the court or any party; and (4) may be cross-examined by any party, including the party that called the expert. **(c) Compensation.** [Omitted] **(d) Disclosing the Appointment to the Jury.** [Omitted]

IN MEMORY OF

NORTON T. GAPPY

FEBRUARY 16, 1974 - FEBRUARY 25, 2023

To speak of an attorney and his worth is easy, fluid. To speak of attorney Norton T. Gappy and not have a profound, impeccable memory of him is impossible. In so many ways, Norton was a tower of strength, resilient, tenacious and above all, hopeful. He saw things and perspectives much differently than those around him, and any conversation with him dictated that sentiment. He had a passion for righting a wrong without regard to risk or consequence. So insightful and exacting, it only took him moments after listening, to formulate a plan for a solution, no matter how small, complex or intricate, his mind had the ability to flawlessly dissect details and plot the answer.

While he was no stranger to litigation, Norton's experience spanned into the corporate spectrum, representing clients from the transactional level to carrying them through litigation. His perseverance was unrivaled, a wit unmatched,and precocious beyond human understanding.

Yet underneath this "big tough guy mask"(as our daughter described in eulogy) Norton was a selfless, sensitive soul; a little boy, who loved home and family and only home and family. To know him meant thinking that he was the type of a person that could never die, strong in stature, overcoming monumental obstacles many would have succumbed to on the first attempt, let alone fifty.

We are not flawless, Norton no exception, but that was the kind of execution Norton sought and expected. Success has many meanings,chief among them the dedication of a father to want for his daughter all the love he had to give, without hesitation. And he gave all that he had.

At a minimum, he his sorely and deeply missed, but humanity lost a champion, a brilliant mind irreplaceable and inimitable. Norton was a seed the world had not yet before seen. A provider, protector, confidant, friend and treasured man. His knowledge and depth knew no end.

On a personal level, his innocence never left his heart. His heart….

The outpouring of love and grief for Norton is but a small testament to the way he made people feel, joyful and protected. Norton could always, always make you laugh, even in the middle of chaos. He had so many gifts, so much life to live.

Somehow, his presence, his strength, is now more evident and surrounding. Dreams have told the complete story of Norton and his story is that of a supernatural, one of kind, wonderful person who is living eternally.

Rest easy, keep smiling the way you appear in dreams, just as your loved ones will always remember you, as will I, all the days of my life.

–Nazek Gappy

PRACTICING WELLNESS

Why stick with it? A teacher ~~commiserates~~ celebrates

BY TODD DAY

You lawyers are a competitive breed, but *sheesh.*

The bet: Who will burn out first? To be fair, this is the same wager I have among my fellow educators where I have taught as a high school teacher for more than 20 years. Last year, a Bloomberg Law article noted that of the more than 600 lawyers it polled, 52% felt burnout.[1] Meanwhile, the National Education Association highlighted that 55% of educators it surveyed were ready to leave the profession earlier than planned.[2] I don't need to read an article to know this. I feel it in my bones and see it in the faces of my colleagues while they let out a sigh at the lunch table — and our staffroom lunches are full of sighs.

When we start eyeballing our paychecks and scribbling out those job "benefits and drawbacks" lists, sometimes we need a reminder of what brought us to our professions in the first place.

For me, it was the money.

Kidding, of course. The only people who think teachers make lots of money are children, who also believe the Boardwalks and Park Places of the world can really be bought for $400 each. No, there are other reasons for entering my profession.

For example, every day I get to interact with about 150 humans. That's 150 chances to make a difference. What will it be today? Do I get to make them better writers, readers, or speakers? Better yet, how do I help them become *thinkers*? That lost art is slowly frittering away thanks to Zuckerberg's toys and the trendy ChatGPT.[3] As an English, creative writing, and drama teacher, I have my own platform — one where juicy conversations occur daily and kids dig deeper for meaning in the pages of a novel. I listen for the cracking of shells. Kids break out of their shells in spectacular ways each day, standing in front of their peers doing a skit or talking about a difficult topic in small groups. These components are fulfilling, and the stuff that gets me to the next class, the next semester, the next school year.

I crave that throughline of creativity my profession offers in my profession. And your intrinsic motivation is …?

We bump up against two kinds of motivations every day: intrinsic and extrinsic. When staring at the benefits and drawbacks list you stored in your desk, which of those are tangible? The money you can hold in your hand and the certificates that hang on your office walls are extrinsic. Sure, a pat on the back makes you feel good on the inside, but that was a gift from a boss, colleague, or client. The intrinsic is the "you" in all of it. The thing you talk about at the dinner table because it makes your chest puff out.

According to author David Burkus, extrinsic motivation is any reason we do the work other than the joy of doing the work itself.[4] So what brings you joy in your job?

I reached out to several of my lawyer buddies to ask what motivates them. Most responded that the desire to win in litigation was a motivating factor. And I think wrapped up in those sentiments is the bigger-picture view shared by former public defender David Toy when he recalled his days on the job.

> *My motivation as a public defender was almost purely intrinsic because the compensation, career accolades, and emotional taxation were not highlights of the job. On an annual basis, I handled significantly more cases than a retained attorney would handle and made significantly less per case.*

"Practicing Wellness" is a regular column of the Michigan Bar Journal presented by the State Bar of Michigan Lawyers and Judges Assistance Program. If you'd like to contribute a guest column, please email contactljap@michbar.org

Court-appointed attorneys are generally considered the lowest of the low — prosecutors, judges, and police tolerate you; there's a negative public perception of your work for being on the "wrong side" of the law; and even your own clients saw you as a necessary evil and assumed I was part of an unfair justice system designed to generate income and bent on oppression.

It took a lot of mental fortitude and emotional toughness to do the job. Every day, you witnessed lives being torn apart, going to jail, losing livelihoods, and hearing harrowing tales of the devastating impact on the lives of victims and families. It was necessary to form a certain callousness to the trauma you witnessed and the emotional depletion of any given day in order to shield the rest of your life from the long-term effects.

Quickly, it became clear to me that court-appointed attorney work was important work and that I had (most of the time) the stomach for it. I would love to paint a fairy-tale picture of our justice system — eloquent speeches, discovering the crucial piece of evidence, or getting the witness to break — but it just isn't realistic. Caseloads, budgets, timelines, biases, public opinions, and an imbalance of power created a system where I often felt like I was the only thing standing between my client getting chewed up and spit out by the machine or receiving basic and minimal procedural rights.

I was almost always unappreciated most by the clients I worked hard for. Despite this — and despite struggling with internal questions as to my effectiveness or purpose sometimes — the tiny victories always (and immediately) outweighed the negatives. What seemed like small strides could have immeasurable effects on the people I was there to help: talking a judge into less jail time or weekend incarceration to save someone's job; knocking a few bucks off a fine; working for alternative sentencing solutions like substance-abuse counseling or veterans' care; or securing a plea deal so a conviction would not mar someone's entire future because of rash decision as a teenager. Most of the time you were looking out for people's rights, counseling them to make informed decisions, and being the voice for those who just don't know how to get the words out. And every once in a great while, you were able to truly help someone very deserving in an extraordinary way.

As part of the constant struggle that is court-appointed criminal defense, you reach a point where you realize that the work is really important and that someone dedicated, competent, and caring needs to advocate for these defendants. If I didn't do it, there might not be anyone else who will. I was somebody's constitutional right to an attorney, and that meant something.[5]

I think about that in terms of my profession. As new teachers are becoming fewer and farther between,[6] I feel like I do have a hand in the greater good by sticking it out in my job. My work is valued and valuable even though it doesn't always feel that way.

As we cinch up our ties or roll the lint from our skirts, we also need to head into our respective professions with the mindset that change is occurring because of us. Paychecks and politics may find me (once again) picketing at my job but at the end of the day, I find solace in the dog-eared pages of a story that impacts a student's life. That's one of the reasons I do what I do.

Sit back and really look at your lists. Remember what got you to where you are now and what can get lost in the noise along the way. It'll help keep your pilot lights lit because burnout is real.

Bet on it.

Todd Day is a teacher at Brighton High School. He's written a children's poetry book, "Never Play Checkers With a Leapfrog," and "These Stories," a collection of writings.

ENDNOTES

1. Miller-Kuwana and Ouyang, *Analysis: Attorney Well-Being Declines, With Burnout on the Rise,* Bloomberg Law (March 3, 2022) <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-attorney-well-being-declines-with-burnout-on-the-rise> [https://perma.cc/WXP5-NYMC]. All websites cited in this article were accessed March 7, 2023.
2. Jotkoff, *NEA survey: Massive staff shortages in schools leading to educator burnout; alarming number of educators indicating they plan to leave profession,* NEA (February 1, 2022) <https://www.nea.org/about-nea/media-center/press-releases/nea-survey-massive-staff-shortages-schools-leading-educator> [https://perma.cc/GE86-H48M].
3. Mollman, *Unnerving interactions with ChatGPT and the new Bing have OpenAI and Microsoft racing to reassure the public,* Fortune (February 18, 2023) <https://fortune.com/2023/02/18/chatgpt-bing-openai-microsoft-race-to-reassure-public-after-unnerving-ai-interactions> [https://perma.cc/S5AP-JGXG].
4. Burkus, *Extrinsic vs. Intrinsic Motivation at Work,* Psychology Today (April 11, 2020) <https://www.psychologytoday.com/us/blog/creative-leadership/202004/extrinsic-vs-intrinsic-motivation-at-work> [https://perma.cc/K8M6-ZMRA].
5. Author's personal interview with David Toy on February 28, 2023.
6. Goldberg, *As Pandemic Upends Teaching, Fewer Students Want to Pursue It,* New York Times (March 27, 2021), pg A8.

ORDERS OF DISCIPLINE & DISABILITY

SUSPENSION AND RESTITUTION

Deborah A. Bonner, P48031, Detroit, by the Attorney Discipline Board Tri-County Hearing Panel #14. Suspension, 180 days, effective March 4, 2023.[1]

After proceedings conducted pursuant to MCR 9.115, the panel found by default that the respondent committed professional misconduct during her representation of a client in a divorce action by failing to respond to her client's requests for information about her matter, failing to communicate with her client after July 26, 2021, and abandoning her representation of the client.

Based on the respondent's default and the evidence presented at the hearing, the panel found that the respondent neglected a legal matter in violation of MRPC 1.1(c); failed to seek the lawful objective of the client in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness in violation of MRPC 1.3; failed to keep the client reasonably informed about the status of the matter and to comply with reasonable requests for information in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of MRPC 1.4(b); and failed to make reasonable efforts to expedite litigation consistent with the interest of the client in violation of MRPC 3.2. The panel also found that the respondent violated MRPC 8.4(c), and MCR 9.104(1) and (2).

The panel ordered that the respondent's license to practice law be suspended for 180 days, effective March 4, 2023, and that the respondent pay restitution totaling $1,500. Costs were assessed in the amount of $1,887.16.

1. Respondent has been continuously suspended from the practice of law in Michigan since Nov. 10, 2022. Please see Notice of Interim Suspension Pursuant to MCR 9.115(H)(1), issued Nov. 10, 2022, in *Grievance Administrator v. Deborah A. Bonner,* 22-70-GA.

SUSPENSION

Paul Bukowski, P72658, Clinton Township, by the Attorney Discipline Board Tri-County Hearing Panel #101. Suspension, 179 days, effective Feb. 11, 2023.

The respondent and the grievance administrator filed a Stipulation Regarding Misconduct and Sanctions in which the respondent

admitted the factual allegations and allegations of professional misconduct set forth in the formal complaint in its entirety and the parties agreed that misconduct was established. The parties further agreed that the hearing would only relate to the appropriate sanction for the established misconduct.

Based on the parties' stipulation, the panel found the following:

At all times relevant, the respondent was employed by the then Macomb County Prosecutor, Eric J. Smith, as an assistant Macomb County prosecuting attorney. The respondent received several promotions between 2011 and 2015. Beginning in June 2019, he served as chief of the district court unit, supervising 12 assistant prosecutors. The respondent operated a campaign fund known as Campaign to Elect Eric J. Smith from 2012 to 2019. In late August or early September 2016, Smith approached the respondent under the pretense of hiring him as consultant for Smith's potential run for county executive in 2020. In a subsequent conversion, Smith told the respondent that he would give the respondent a check for $20,000, that he wanted the respondent to return $15,000 of the money to him, and that he would allow the respondent to keep $5,000 as a purported consulting fee. In that conversation or another one, Smith told the respondent that he needed money for a pool that was costing him $40,000. The respondent suspected that Smith was converting money from his campaign funds for his personal use, which was illegal. Smith gave the respondent a check dated Sept. 6, 2016, for $20,000 from his campaign fund account made payable to the respondent. The respondent endorsed the check and deposited it into his personal checking account on or around Sept. 8, 2016. On Sept. 9, 2016, the respondent withdrew $15,000 in cash from his account with the intention of giving it to Smith, as Smith had requested, and on Sept. 9, 2016, the respondent handed Smith an envelope containing $15,000 in cash. The respondent retained the $5,000 balance of the $20,000 check as purported

ORDERS OF DISCIPLINE & DISABILITY (CONTINUED)

future consulting work. After September 2016, Smith asked the respondent to lie to the authorities about what had occurred regarding the transaction, but the respondent refused to do so. The respondent was not charged with a crime arising out of the transaction.

Based upon the respondent's admissions and the evidence adduced at the hearing, the panel found that the respondent engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in violation of MRPC 8.4(b); engaged in conduct prejudicial to the administration of justice in violation of MCR 9.104(1) and MRPC 8.4(c); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2); and engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(3).

The panel ordered that the respondent's license to practice law be suspended for a period of 179 days. Costs were assessed in the amount of $2,429.

REPRIMAND (BY CONSENT)

Paul S. Clark, P39164, Ferndale, by the Attorney Discipline Board Tri-County Hearing Panel #65. Reprimand, effective Feb. 16, 2023.

The respondent and the grievance administrator filed a Stipulation for Consent Order of Reprimand and Waiver pursuant to MCR 9.115(F)(5) that was approved by the Attorney Grievance Commission and accepted by the hearing panel. Based upon the respondent's admissions as set forth in the parties' stipulation, the panel found that the respondent committed professional misconduct when a settlement check was presented by a client of respondent for payment against his IOLTA and there were insufficient funds in the IOLTA to cover the check, and when he inappropriately maintained personal funds in his IOLTA while the account also contained client funds. The panel also accepted the representation set forth in the parties' stipulation that the respondent now regularly reconciles his IOLTA and communicates with his accountant before issuing checks so that no more overdrafts issue and that his IOLTA no longer contains personal funds.

Based upon the respondent's admission and the stipulation of the parties, the panel found that the respondent failed to promptly deliver funds that a client or third party was entitled to receive in violation of MRPC 1.15(b)(3); commingled personal funds in a client trust account beyond an amount reasonably necessary to pay financial institution service charges or fees in violation of MRPC 1.15(f); and engaged in conduct that exposed the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(2).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent be reprimanded. Costs were assessed in the amount of $758.30.

THREE-YEAR SUSPENSION (BY CONSENT)

Eric Cameron Hoort, P84656, Zeeland, by the Attorney Discipline Board Ottawa County Hearing Panel #1. Suspension, three years, effective Feb. 17, 2023.

The grievance administrator filed a notice of filing of reciprocal discipline pursuant to MCR 9.120(C) that attached a certified copy of a Disbarment Order issued by the Supreme Court of the State of Washington on Aug. 10, 2021, that disbarred the respondent from practicing law in the state of Washington effective Aug. 17, 2021, in a matter titled *In Re Eric Cameron Hoort,* WSBA #29360, Supreme Court No 202, 017-8.

Contemporaneously with the Notice of Filing of Reciprocal Discipline, the parties filed a Stipulation for Consent Order of Suspension pursuant to MCR 9.115(F)(5). After reviewing the parties' stipulation, the panel communicated its concerns in writing to the parties pursuant to MCR 9.115(F)(5)(c)(ii) and requested that they appear for a status conference to address the panel's concerns. After the status conference was held, the panel issued a notice of intent to reject the stipulation for consent order of discipline and subsequently scheduled a second status conference during

which the parties offered more information and answered further questions from the panel. Shortly thereafter, the parties filed an Amended Stipulation for Consent Order of Suspension which was accepted by the hearing panel.

Based on the certified copy of the order of disbarment issued by the Supreme Court of the State of Washington and the respondent's acknowledgment that he was found to have knowingly violated a temporary order for protection and falsely certified that no disciplinary investigation was pending against him at the time he executed a request to voluntarily resign his license to practice law in violation of Washington Rules of Professional Conduct 8.4(c), (i) and (j) as set forth in the amended stipulation of the parties, the panel found that the respondent committed misconduct as set forth in MCR 9.120(C)(1). The panel ordered that the respondent be suspended from the practice of law in Michigan for three years, effective Feb. 17, 2023. Costs were assessed in the amount of $1,157.72.

179-DAY SUSPENSION WITH CONDITIONS (BY CONSENT)

Andrew J. Paluda, P42890, Royal Oak, by the Attorney Discipline Board Tri-County Hearing Panel #53. Suspension, 179 days, effective June 10, 2022.

The respondent and the grievance administrator filed a Stipulation for Consent Order of 179-Day Suspension with Conditions which was approved by the Attorney Grievance Commission and accepted by the hearing panel. The stipulation contains the respondent's admission that he was convicted by no-contest plea of the felony offense of Operating While Intoxicated, Third Offense, in violation of MCL/PACC Code 257.3256D, in a matter titled *People v. Andrew Joseph Paluda,* Oakland County Circuit Court Case No. 21-278749-FH.

Based on the respondent's admissions and the parties' stipulation, the panel found that the respondent violated a criminal law of a state or of the United States, an ordinance, or tribal law which constituted professional misconduct under MCR 9.104(5).

In accordance with the stipulation of the parties, the hearing panel ordered that the respondent's license to practice law in Michigan be suspended for 179 days effective June 10, 2022, as agreed to by the parties. The panel also ordered that the respondent be subject to conditions relevant to the established misconduct. Total costs were assessed in the amount of $827.68.

2022 ACCESS TO JUSTICE CAMPAIGN RESULTS

The Access to Justice Campaign is a partnership between the State Bar of Michigan, administered by the Michigan State Bar Foundation, to increase resources for nonprofit civil legal aid programs throughout Michigan. In its fourth full year as a centralized effort, the campaign continues to increase donations and engagement, and to meet the rising need for legal representation and assistance.

We are grateful for the support of the legal community who are committed to upholding the right to justice for every Michigan resident.

CIVIL LEGAL AID CHANGES LIVES. THANK YOU FOR SUPPORTING THE ACCESS TO JUSTICE CAMPAIGN.

MICHIGAN CIVIL LEGAL AID AT WORK IN 2021

51,446

Total number of cases closed by civil legal aid programs

"Without legal aid, I would not have known what to do while going through my custody case. As a single mother I could not afford legal representation for myself, but legal aid guided me through the process every step of the way. My attorney was kind and patient with me and always believed in my fight. Coming from a relationship where domestic violence occurred, I never felt like I had to over explain myself. She remained sensitive to mine and my child's trauma and supportive of our recovery. Without legal aid I don't feel the outcome would have gone the way it did, and I am grateful for their help"

– Client helped by legal aid in 2021

59%

Clients helped were people of color

1,698

Veterans helped by legal aid

8,350

Older adults helped by legal aid

98%

Positive outcomes in housing cases**

91%

Positive outcomes in family stability cases**

***When a client was helped or represented by legal aid*

MSBF MICHIGAN STATE BAR FOUNDATION

SBM STATE BAR OF MICHIGAN

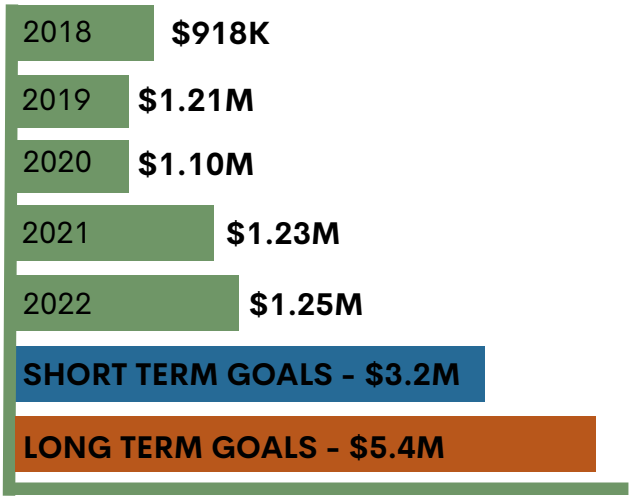
Access to Justice Campaign

For more information about the Access to Justice Campaign, visit:

www.atjfund.org

RESULTS BY THE NUMBERS

DONATIONS TO THE ATJ CAMPAIGN FROM THE LEGAL COMMUNITY



36% Since 2018, donations from the legal community have increased by 36%

47 **LEADERSHIP FIRMS**
Firms of 2 or more attorneys that give a minimum of $300 per attorney

15 Nonprofit civil legal aid programs that participate in the Access to Justice Campaign

PARTICIPATING PROGRAMS

STATEWIDE PROGRAMS
Counsel & Advocacy Law Line
Farmworker Legal Services
Michigan Community Resources
Michigan Elder Justice Initiative
Michigan Immigrant Rights Center
Michigan Indian Legal Services
Michigan Legal Help Program
Michigan Poverty Law Program

REGIONAL PROGRAMS
Center for Civil Justice
Lakeshore Legal Aid
Legal Aid of Western Michigan
Legal Services of Eastern Michigan
Legal Services of Northern Michigan
Michigan Advocacy Program
Michigan Legal Services

669% For every $1 invested in Michigan's civil legal aid services during 2019-2020, the individuals received $6.69 in immediate and long term consequential financial benefits. - *2022 Social Economic Impact and Social Return on Investment Study*

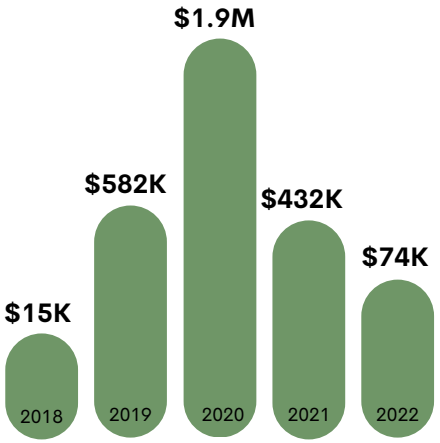
LEGAL AID ELIGIBILITY

1.67M

Number of individuals eligible for civil legal aid because they live below 125% of the federal poverty guidelines

CY PRES AWARDS

Received by the ATJ Campaign



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- Physician and Physician Group Issues
- Regulatory Compliance
- Corporate Practice of Medicine Issues
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MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals in January and July of each year from when the complaint was filed as is compounded annually.

For a complaint filed after Dec. 31, 1986, the rate as of July 1, 2022, is 3.458%. This rate includes the statutory 1%.

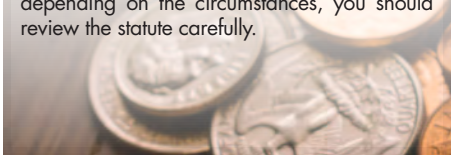
A different rule applies for a complaint filed after June 30, 2002, that is based on a written instrument with its own specific interest rate. The rate is the lesser of:

13% per year, compounded annually; or

The specified rate, if it is fixed — or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see courts.michigan.gov/publications/interest-rates-for-money-judgments.

As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.



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DUTY TO REPORT AN ATTORNEY'S CRIMINAL CONVICTION

All Michigan attorneys are reminded of the reporting requirements of **MCR.9120(A)** when a lawyer is convicted of a crime

WHAT TO REPORT:

A lawyer's conviction of any crime, including misdemeanors. A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or no contest.

WHO MUST REPORT:

Notice must be given by all of the following:
1. The lawyer who was convicted;
2. The defense attorney who represented the lawyer; and
3. The prosecutor or other authority

WHEN TO REPORT:

Notice must be given by the lawyer, defense attorney, and prosecutor within 14 days after the conviction.

WHERE TO REPORT:

Written notice of a lawyer's conviction must be given to **both**:

Grievance Administrator
Attorney Grievance Commission
PNC Center
755 W. Big Beaver Road, Suite 2100
Troy, MI 48084

Attorney Discipline Board
333 W. Fort St., Suite 1700
Detroit, MI 48226

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