

By Hon. Phillip E. Harter

The Estates and Protected Individuals Code (EPIC), Michigan's new probate code, took effect April 1, 2000. As a service to members of the State Bar of Michigan, selected questions and answers regarding EPIC will be published in this column over the next several months. These items are taken from the more than 400 inquiries and responses contained on the EPIC Question and Answer web site at <http://courts.co.calhoun.mi.us>.

You can submit questions regarding EPIC via e-mail to pharter@internet1.net. They will be answered by a panel of experts consisting of probate attorneys, judges, probate registers, and other court staff.

Question

Is an attorney-in-fact operating under a power of attorney prohibited from self dealing?

Answer

An attorney-in-fact in Article V, Part 5 of the Estates and Protected Individuals Code (EPIC) is not defined as a fiduciary but is defined as an agent pursuant to MCL 700.1103(a). However, case law holds that such an agent has a fiduciary duty to the principal and such an agent would not be al-

lowed to engage in self dealing. See *Vanerwall v Midkiff*, 166 Mich App 668; 421 NW2d 263 (1988).

This conclusion is further supported by the fact that MCL 700.1303(1)(j) specifically allows the probate court to require and settle the account of an agent under a power of attorney and Michigan Court Rule 5.125 (C)(31) specifies the interested persons for such a proceeding.

Question

Does a driver who is at fault for the death of a passenger forfeit their rights to the passenger's estate?

Answer

MCL 700.2803 is substantially the same as MCL 700.251 of the Revised Probate Code (RPC). It provides that "an individual who feloniously and intentionally kills the decedent" forfeits certain benefits. Feloniously and intentionally both need to be present for such forfeiture to occur under this section. Intent would therefore be an element in this definition.

While the terms are not defined in the Estates and Protected Individuals Code (EPIC), the statute has been defined by case law over time. Michigan Civil Jury Instruction 174.02

defines "felonious and intentional killing" as follows:

A person commits a felonious and intentional killing if (he / she):

1. *commits an act that causes the death of another and commits the act intending that it results in death or in great and serious bodily injury, or*
2. *knowingly creates a situation that has a very high risk of death with the knowledge that it would probably cause death or great and seriously bodily injury and commits the act that causes the death of another.*

M Civ JI 174.02 further provides that the killing is not felonious if the person committing the act has a valid defense. One such defense is "accident," which is defined by M Civ JI 174.14 as follows:

An accident is anything that happens that is not anticipated, not foreseen and not expected, and takes place without design or intention. ♦

Hon. Phillip E. Harter is a judge in the Calhoun County Probate Court and vice-chairperson of the Probate and Estate Planning Section of the State Bar of Michigan. Judge Harter is a frequent lecturer for ICLE on probate topics and the editor of ICLE's Michigan Guardianship and Conservatorship Handbook.

