MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

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STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

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The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

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From the Chairperson

By Katie Lynwood



Welcome to Spring! Thank you to the journal's editor, Melisa Mysliwiec and the journal committee for ushering us it to this new season with a fresh update and outlook for probate and estate planning legislative and case updates.

It was a busy time at the end of 2024 to close out the year. It was marked by many successes for the Probate and Estate Planning Council ("Council"). The most rewarding aspect of this active time for me as the Chair of the Council was seeing how many of our Council members and committee members stepped up to provide their skills and expertise to achieve the goals set by the Council. The dedication by all of our active contributors continues to inspire me.

In my last Chair's article in the journal's winter edition, I briefly described all of the activities that the Council engages in for the benefit of the members of the Probate and Estate Planning Section ("PEPS") and for the improvement of Michigan's probate and estate planning laws for both Michigan residents and Michigan's attorneys. The Council's two main initiatives are legislation and amicus briefs. These two items that we focus on take up most of our Council's *time* and where we spend the majority of our *financial resources* on behalf of the PEPS.

Within our legislative initiatives, we often create legislative proposals from scratch. There are a number of ways we determine which legislative items to take on for drafting: 1) Michigan lawyers reach out to us with an issue they see in their practice area and suggest that we formulate legislation to improve the process or to clarify the issue, 2) we see what the uniform law commission has created, 3) we see what another state has created, and 4) one of the appellate courts made a ruling that we believe should be addressed in a statute. When we formulate new legislation, we start with big concepts and goals, and, over time, it develops into detailed, intentional language and provisions that can be seamlessly added into existing Michigan statutory law. We typically begin this journey by surveying other states to see if they have a similar statute, and whether that state's laws have successes or pitfalls. Our committees then begin drafting amongst themselves to hash through the details of the language and concepts. Once the committee has a draft of the proposal, they bring it to a monthly council meeting so that the PEPS and Council may provide additional ideas and feedback. Our committees work tirelessly within their small groups, and we are grateful for the time they spend behind the scenes.

In addition to creating and formulating legislation, we are very active in responding to bills sponsored by other groups.

As part of our processes to either propose legislation or respond to other group's legislation, we do all of the following:

- Work with our lobbyist team to discuss strategy
- Create small work groups of lawyers, judges, and other stakeholders to meet with the bill sponsor about the purpose of the bill, suggested revisions, and to answer questions
- Testify at senate and house hearings

We had a very active legislative session in Fall 2024 with our own proposals and responding to proposals we felt strongly about—sometimes we encouragingly supported bills and others we opposed. As the Council works on its own initiatives and responds to others' initiatives, we rely on our lobbyists group, Public Affairs Associates ("PAA"), to guide us through the current political landscape and advise on how best to approach

the issues with certain stakeholders to achieve our desired outcome. We want to avoid spending countless hours of our Council's time or the time and reputation of a legislator who is willing to sponsor our proposals so that it can immediately get rejected by an essential stakeholder.

The PEPS is one of the most active legislative sections of the State Bar of Michigan, and we are able to accomplish this through the support and advice of our lobbyists. Spending countless hours developing impactful legislative initiatives would be fruitless if we could not get it through the finish line—we rely on their insight to navigate the process. The lobbyists also help us determine the best uses of our Council's "political capital," and when we should reserve it for future issues.

The Council and our lobbyists had an especially challenging and busy lame duck session—that spanned from around November 1 through December 23. Council members Nathan Piwowarski, Rick Mills, and I set aside time every week to talk with our lobbyists about pending legislation that impacts the PEPS and whether advocacy was needed to 1) provide feedback to the bill sponsor or sponsoring group or 2) testify in support or against at a hearing. There were also a few proposals in which we needed to create a small ad hoc group within the Council or committees to quickly review a proposal and make a recommendation to the Council as to whether the issue required a public policy vote.

Even with advocacy and lengthy discussions with bill sponsors and other stakeholders, we cannot always make meaningful progress to change a legislative initiative. A significant Guardianship and Conservatorship bill package was initiated by the Attorney General's office along with other related stakeholders that would significantly impact those who serve as guardians and those who are under a guardianship. The Council made it clear that we support the goal of protecting the vulnerable adult population and initiatives that provide for the protection and wellbeing of our elderly population, and because of that, the Council had serious concerns about the guardianship bills and the unintended consequences of those bills. We began taking public policy positions against those bills in early 2023 and continually engaged in both broad feedback to express our concerns along with providing specific feedback including redline comments to provisions in the bills. Countless hours were spent by the chair of the Council's Guardianship, Conservatorship and End of Life Committee, Sandy Glazier, along with other valuable members of a small work group including Kathleen Cieslik, Nathan Piwowarski, Judge Michael McClory, and Judge Milton Mack. Our advocacy included meeting with the bill sponsor, providing detailed feedback, testifying at the Senate committee hearings, and writing a letter to Governor Whitmer to request that she veto the bill if it ended up on her desk for approval. Ultimately, and somewhat to our surprise, the bill did not move out of the lame duck session. Throughout that process of this particular bill package, we were continually mystified as to why our concerns were not being adequately addressed. We also felt that the concerns of the Michigan Probate Judge's Association were not adequately addressed. The PEPS and Michigan Probate Judge's Association are two significant stakeholders that certainly would have something to say about proposals that would have a significant impact on the formation and administration of guardianships and conservatorships in the state of Michigan, and yet, minimal adjustments were made based on our extensive feedback to the bills.

Council's second biggest initiative is the review and engagement with the filing of amicus briefs on behalf of the PEPS. The PEPS routinely receives requests from either a party to a case or from the court to submit an amicus brief on behalf of the PEPS to weigh in on a particular issue of law.

When the Council receives a request for an amicus brief, the Amicus Committee of the Council reviews the request along with the relevant caselaw and statutory law to make a recommen-

dation to the Council as to whether we should approve the filing of a brief, and what position we should take relating to the issue at hand. The Council then engages in an often spirited discussion about whether we file a brief, and what position we believe the appellate court should take in their decision. If a brief is approved, we select the drafter and approve the cost to pay that drafter.

Within the past year and a half, the Council approved the filing of Amicus Briefs in the following cases:

- *In re Estate of Jennifer L Fowler*. We voted in September 2024 to file a brief to ask the Michigan Supreme Court to address issues arising under MCL 700.7605(4), .7606(1), and .3805(3), and what level of creditor protection certain assets have when transferred after death to a revocable living trust including retirement accounts and life insurance.
- *In re Guardianship of Anna-Marie Margaret Bazakis.* We voted in June 2023 to file a brief to ask the Michigan Supreme Court to take a position that 1) Michigan's probate courts are preempted by federal law from requiring that a representative payee create joint accounts to receive funds paid under the Social Security Act, 2) to the extent the *Bazakis* order requires placement of representative payee funds in a joint account, the trial court lacked jurisdiction to do so, and 3) probate courts nonetheless possess the power to require that a guardian who is also serving as representative payee render an account or disclose other documentation in reference to their management of the protected person's funds under the representative payee program, and that further, the probate court may engage in other remedies as to the guardianship for mismanagement of a protected person's representative payee funds.
- *FCB Associates, LLC v City of Ann Arbor*. We voted in October 2024 to file a brief to ask the Michigan Supreme Court to reverse the Michigan Court of Appeals' and Tax Tribunal's decision. In the brief, we argued 1) the Tax Tribunal and the Court of Appeals disregarded MCL 211.27a(7)(a), which unambiguously provides that a transfer of all property, both real and personal, between spouses is not a "Transfer of Ownership," and 2) there is no requirement in either the General property Tax Act of the Uniform Partnership Act that spouses relinquish their rights as spouses under MCL 211.27a(7)(a) when they choose to own real property in a partnership.

It is worthwhile to note that when the Council advocates a certain position on behalf of the PEPS, whether it be for legislative or amicus related activities, we take a vote of the Council members to create a public policy position on behalf of the PEPS. Just because I am the Chair of the Section does not mean that I may take a position that is not consistent with the positions taken by the Council on behalf of the PEPS. I personally may advocate for something as a member of the bar, but I cannot advocate on behalf of the PEPS without a formal public policy position. All of the Council's public policy positions may be found on the PEPS' website.

The Council's two most valuable resources, its members' time and the dues we receive from the membership, support these two main initiatives we engage in every year. We are thankful for the continued support of the PEPS members, and for their time that allows us to be one of the most active and successful sections of the State Bar of Michigan.

Core Concepts from *Connelly*: What Is It All About, and What To Do Now

By J. V. Anderton

On June 6, 2024, the Supreme Court of the United States issued its opinion in *Connelly v United States,*[1] and simultaneously brought some clarity and caused a lot of hand-wringing to the portion of the bar that works with closely-held companies. The key issue in *Connelly* was whether the corporation's obligation to redeem the shares of the majority shareholder after his death was a liability that decreased the value of those shares, with a unanimous court holding that it does not.[2]

Connelly in Detail

Facts and Holding

The facts in *Connelly* are fairly vanilla for a closely-held business. Two brothers, Michael and Thomas, were the only shareholders of Crown C Supply, a building supply corporation in Missouri. Michael owned 77.18% of the shares outstanding, and Thomas owned the remaining 22.82%. The brothers had an agreement that upon the death of either, the surviving brother would have the option to purchase the deceased brother's shares. If the surviving brother declined to purchase, then the corporation was required to redeem the shares. The value was to be determined by an outside appraisal per the contract. To ensure the ability to pay, Crown obtained $3.5 million of life insurance on each of Michael and Thomas.

Michael died in 2013. Thomas declined to purchase the shares, thus requiring Crown to do so. Instead of obtaining an appraisal (as required by the agreement), Thomas and Michael's son agreed that the value of the shares was $3 million (meaning the total value of the operating assets of the company was about $3.86 million, a number which does not appear to be challenged in the opinion). The company then purchased the shares held by Michael's estate, leaving Thomas as the sole shareholder.

Thomas was also the executor of Michael's estate, and filed a Form 706 Estate Tax Return reporting the value of the shares as $3 million. On audit, the IRS took the position that the value of Crown shares needed to include the value of the life insurance proceeds used to pay Michael's estate, but that the value of Crown was not reduced by its obligation to redeem the shares of Michael. Thus, the IRS found that the total value of the Company was $6.86 million, and Michael's share of that was $5.3 million. Thomas took the position that the insurance proceeds should be deducted from the corporation's value because of the requirement to redeem the shares held by the estate (relying on *Blount v Commissioner*, 428 F3d 1338 (11th Cir 2005).

The Supreme Court, in holding against the taxpayer, states that for purposes of calculating the estate tax value of someone's interest in an entity, "the whole point is to assess how much Michael's shares were worth at the time that he died—before Crown spent $3 million on the redemption payment."[3] Additionally, we are told that "[a]n obligation to redeem shares at fair market value does not offset the value of life-insurance proceeds set aside for the redemption because a share redemption at fair market value does not affect any shareholder's economic interest."[4]

Self-Imposed Limits of *Connelly*

The Supreme Court appears to be aware of some of the challenges it is causing and includes at the end of its opinion ways it sees for closely-held businesses to avoid falling into the same trap that snared the Connellys. First, the opinion states that had the Connelly brothers used a cross-purchase agreement, instead of a redemption, the life insurance would have been owned by the other brother and would not have

increased the value of the corporation (and thus increased the value of Michael's interest by the amount of the insurance used to buy his interest).[5] Second, in footnote 2, the opinion states:

> [w]e do not hold that a redemption obligation can *never* decrease a corporation's value. A redemption obligation could, for instance, require a corporation to liquidate operating assets to pay for the shares, thereby decreasing its future earning capacity. We simply reject Thomas's position that all redemption obligations reduce a corporation's net value. Because that is all this case requires, we decide no more.[6]

Planning Options After *Connelly*

Recognize When *Connelly* Applies

The holding in *Connelly*, by its own terms, will not apply to a cross-purchase agreement, whether funded by life insurance or not. Additionally, based on the *dicta* in footnote 2, it would appear that redemption of an interest which is not funded by life insurance, but instead by the liquidation of corporate assets to make the payment(s) to the estate of the deceased shareholder, could fall outside of *Connelly*. Usually the second instance likely has two benefits from an estate tax perspective: 1) the possibility of reducing the value of the corporation on the Form 706 due to the redemption; and 2) no increase in the value of the corporation for life insurance paid to the corporation on the death of the deceased shareholder. It is worth keeping in mind that the *Connelly* court did not view the question before it to be if the value of the life insurance paid to the corporation should increase the value of the corporation (the court seems to take that as a given), the question the court addresses is if the redemption obligation serves as a deduction against the corporation's value to the decedent.

What Are We Planning For?

While *Connelly* is not technically a case about life insurance, the most important planning considerations impacted by the *Connelly* decision all involve life insurance because, by disagreeing with the *Blount* opinion, the highest court in the land tells us (indirectly) that life insurance proceeds will be included in estate tax valuations even if there is a redemption. So, when planning for the death of a principal in a closely-held business, advisors need to consider if life insurance is necessary. Usually, the need for life insurance comes down to one of a few needs that one or more of the principals of the closely-held business want to have addressed: 1) providing liquidity for the principal's estate to ensure quality of life for surviving spouse, kids, heirs, etc.; 2) providing liquidity for the principal's estate to deal with an expected estate tax liability within nine months of death; or 3) providing liquidity to ensure the remaining principals of the closely-held business do not have to have the surviving spouse, kids, heirs, etc. of the deceased principal meddling in the affairs of the business, and the buy-out (whether redemption of cross-purchase) can be completed quickly. If none of those conditions are at issue in the specific situation a practitioner is advising on, careful thought should be given to if life insurance is necessary. For example, if an entity is owned by father and son, and the entity is worth a million dollars in total, and neither father nor son has any worries about a taxable estate, and all members of the family are comfortable with steady employment, unless family dynamics on the death of either father or son require an immediate buy-out of the interest, a payment over time would likely be fine. Alternatively, if a large entity is owned by mother and daughter, and the value of the entity is in excess of $100 million, and both mother and daughter have significant liquid assets outside of the business such that paying the estate tax on either's death is not a material concern, life insurance in that situation is likely more of an investment vehicle than a real funding mechanism for the buy-out.

What To Do When Life Insurance Is Necessary

If after going through the above analysis, it is determined that an immediate buy-out is necessary and neither the company nor its principals are likely to have the liquidity to make that happen without life insurance, advisors have a number of options to review, including: 1) cross-purchase with insurance; 2) split dollar arrangements; 3) life insurance LLC; and 4) collateral assignment of life insurance. Before looking briefly at each option, practitioners are well advised to recall some of the tax rules of life insurance in the closely-held business setting.

A Few Closely-Held Business Life Insurance Tax Rules

Proceeds of a life insurance policy are generally exempt from income taxes under Sec. 101 of the Internal Revenue Code (IRC). However, for corporate-owned policies on the life of an employee issued after August 17, 2006, the proceeds are only fully exempt from income taxation if various notice requirements of IRC 101(j) are satisfied. Another trap for practitioners is the transfer for value rules (IRC 101(a)(2), which if triggered will cause the proceeds to be taxable. These rules apply if a life insurance policy is transferred for valuable consideration, except if the transfer is to the insured (i.e., you buying the policy somebody held on your life), to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer (note that shareholder to shareholder transfers for those not active in the business are not exempted by this section). IRC 101(a)(2)(B).

Cross-Purchase With Life Insurance

As set forth in the *Connelly* opinion, a cross-purchase, with or without life insurance, will not have the adverse tax consequences triggered in *Connelly*. Thus, a cross-purchase arrangement may be ideal when feasible. The problem with cross-purchase arrangements is that if there are more than a few shareholders, the number of policies, and ensuring proper administration and premium payment of those policies can be a challenge. This is because if there are N owners, it will require N*(N-1) policies for each owner to have a policy on every other owner (e.g., if there are seven owners, there will need to be 42 policies (7*6 = 42)). Additionally, if the owners are not the same ages, the younger owners will be paying more for the policies on the older owners. Lastly, if the entity at issue is a corporation, and there is a need to re-configure the ownership of policies based on changes in shares owned, it is possible that the transfer for value rules could be triggered.

Split Dollar Life Insurance Arrangements

A split dollar arrangement occurs when both the business and the owner split the premium payments on a policy. While once popular, these arrangements have become less effective after the 2003 regulations. Under these regulations there are two different tax treatments depending on who owns the policy. If the corporation owns the policy (or the employee owns the policy, but only has rights to insurance protection), the value of the current life insurance protection and other benefits available to the insured employee is current taxable income to the insured employee. For all other arrangements, the entity's contribution towards the premium is treated as a below market loan to the insured employee under IRC 7872, including deemed interest if there is not sufficient interest charged as part of the arrangement. The deemed interest is then treated as employer compensation to the employee.[7]

Life Insurance LLCs

A more popular vehicle in recent years has been a separate (side-car) life insurance LLC, which is taxed like a partnership. Usually, the members are required to contribute capital in amounts necessary to pay their share of the premium on the policies insuring the lives of the oth-

er owners. Those contributions are tracked as capital contributions. Then, upon death, the insurance proceeds are specially allocated to the members who contributed to the premiums on that policy, in proportion to their contributions, so that the members can then execute a cross-purchase of the deceased owner's interest in the main operating entity. Additionally, because of the life insurance LLC, it is presumed that all members should be able to reconfigure ownership in the policies without worries of the transfer for value rules. Importantly, in Rev. Proc. 2022-3, the IRS stated they will no longer provide a ruling on whether life insurance LLCs (or partnerships) count as partnerships for tax purposes and will allow the avoidance of the transfer for value rules. Additionally, others have concerns if the special allocation of life insurance proceeds would meet the requirements for substantial economic effect and be respected by the IRS.

Collateral Assignment of Life Insurance

The last concept is a collateral assignment of the life insurance, where each insured pays for his/her own policy but then collaterally assigns the policy and its proceeds to the other owners of the entity (in proportion to their ownership interests) in exchange for their obligations to buy the ownership interest of the owner. This has the advantage of each person paying for their own policy (so younger owners are not disadvantaged as in a standard cross-purchase), and if any person leaves the ownership group, the collateral assignment(s) can be released without concern about triggering the transfer for value rules.

Conclusion

Hopefully the above provides advisors with an understanding of the *Connelly* case and the Supreme Court's opinion, as well as a few approaches to consider when advising clients on a go-forward basis. This is a very challenging and evolving area of law, with corporate and partnership law concerns, income tax and estate tax rules, and managing interpersonal relationships between co-owners. Advisors who do not work in this area on a regular basis would do well to do a complete refresh on the rules when looking into the situation. With luck, this article will serve as a jumping off point for the advisor when looking to refamiliarize him/herself with the rules.

Notes

1. 602 US 257 (2024).
2. At least on these facts. But see footnote 2 of the opinion and then commence wringing your hands.
3. *Id.* at 258.
4. *Id.* at 265. Not to derail us from the topic, but query how to square that with valuation discounts for lack of control.
5. *Id.* at 267.
6. *Id.*
7. Treas. Reg. 1.7872-15.



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Attorney as Fiduciary

By Diane Kuhn Huff

The new statute prohibiting substantial gifts to the drafting attorney specifically allows a provision appointing the attorney as a fiduciary.[1] In addition, for those who attended the 2024 Probate and Estate Planning Institute, Amy K. Kanyuk of McDonald & Kanyuk PLLC, in Concord, New Hampshire, presented an insightful presentation of the ethical considerations when the lawyer acts as a fiduciary.[2] These two events in 2024 cause us to consider whether we, as the drafting attorney can, or should, nominate ourselves as the fiduciary in our clients' estate planning documents, Further, what are the Michigan ethical rules we must be mindful of when naming ourselves as the fiduciary?

Although there is no ethical rule that specifically prohibits the drafting attorney from being named as the fiduciary, there are several ethical rules to consider. The drafting attorney must consider the ethical rules of competence,[3] fees,[4] communication,[5] conflict of interests,[6] rendering candid advice,[7] responsibilities regarding law-related services,[8] and solicitation.[9] There is one Michigan ethics opinion addressing whether a lawyer can be named as the personal representative or trustee of a client's documents, which discusses conflicts of interest and the prohibition against soliciting the appointment.[10]

Let's consider these rules in a typical client meeting where the attorney and client are discussing who to name as fiduciary.

As an advisor, the lawyer is required to render candid advice and may refer to other "considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[11] The comments to the rule indicate that the lawyer is not expected to give advice until asked by the client. Certainly, when discussing who to name as fiduciary, the attorney and client will be discussing whether there is a family member capable of acting as fiduciary or whether a professional trustee is recommended or preferred. Under this rule, there is no prohibition against discussing whether the attorney can or will act as fiduciary. "[P]resumably, that is the very reason for the client visiting and consulting with the lawyer to begin with."[12]

However, a lawyer is prohibited from "[soliciting] professional employment from a person the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[13] "Solicit" includes contact in person, but does not include general advertising. *Id*. Thus, general information on the attorney's website or brochure that the attorney will act as a fiduciary is allowed. Also allowed is a discussion *when the client initiates the inquiry* on whether the attorney will act as fiduciary. However, when asked, the attorney must still communicate alternative options to the client thoroughly "to permit the client to make informed decisions ...."[14] The client should have sufficient information to participate intelligently in decisions concerning the lawyer acting a fiduciary, including a discussion on alternatives to the lawyer as fiduciary,[15] and an opportunity for the client to seek the advice of independent counsel.[16]

It bears mentioning that the attorney as fiduciary must be competent as a fiduciary in administering estates.[17] Different levels of competency may be required for estates that are distributed outright versus estates that remain in trust for beneficiaries. Although acting as a fiduciary does not require a law degree, it is a law-related service for which the lawyer is bound by the rules of professional conduct.[18]

The lawyer needs to be particularly aware of any conflicts of interest with any of the beneficiaries or creditors of the estate. Another potential conflict is if the lawyer hires its law firm to represent the lawyer-fiduciary in administering the

estate. All potential conflicts of interest must be disclosed, discussed, and consented to by the client.

Other items to note:

1. As the fiduciary, the lawyer may not necessarily charge the same fees as when billing as an attorney, and the fees should be disclosed and discussed. The lawyer as fiduciary may want to hire paralegals or assistants to handle ministerial tasks, such as paying bills, notifying creditors, and other administrative tasks to make the endeavor profitable.
2. Only an individual or corporation authorized to exercise trust powers under the Banking Code may act as a fiduciary in Michigan. The corporation must be a bank, or "specifically authorized to act as fiduciary in this state by another statute of this state."[19] This writer is unaware of another Michigan statute that authorizes a corporation that is not a bank to act as fiduciary. Therefore, the attorney must be named as the fiduciary, not the law firm. Successor fiduciaries are recommended in the event the attorney is retired or otherwise unwilling or unable to act. At a minimum, include a provision describing who has authority to nominate the successor fiduciary.
3. Discuss thoroughly whether the beneficiaries will have authority to remove the attorney-fiduciary with or without cause.
4. The lawyer will want to confirm whether his or her professional liability insurance covers the lawyer when acting as a fiduciary.
5. The lawyer-fiduciary will want the estate to provide a bond for the protection of the fiduciary and the estate. Discuss the bond and cost with the client.
6. Discuss fully any exculpatory language to protect the trustee.

For more information on the Attorney as Fiduciary, see these documents and on-demand seminar located on the website for the Institute of Continuing Legal Education: "The Lawyer as Fiduciary: Ethical Considerations in Acting as Personal Representative or Trustee," seminar and materials by Amy K. Kanyak, McDonald & Kanyak PLLC, Concord, New Hampshire. Sample Engagement Letters—When Lawyer Is Named Trustee, submitted by Catherine A. Jacobs and Mark J. Harder. The documents and on-demand seminar may be found at www.ICLE.org.

Notes

1. MCL 700.1216(2).
2. *See* 2024 Probate and Estate Planning Institute materials by Amy K. Kanyuk, McDonald & Kanyuk, PLLC, Concord, New Hampshire, "The Lawyer as Fiduciary."
3. MRPC 1.1 Competence.
4. MRPC 1.4 Communication.
5. MRPC 1.5 Fees.
6. MRPC 1.7 Conflict of Interest: General Rule; and MRPC 1.8 Conflict of Interest: Prohibited Transactions.
7. MRPC 2.1 Advisor.
8. MRPC 5.7 Responsibilities Regarding Law-Related Services.
9. MRPC 7.3 Solicitation.
10. RI-291 (April 23, 1997).
11. MRPC 2.1 Advisor.
12. RI-291 (April 23, 1997).
13. MRPC 7.3 Solicitation.
14. MRPC 1.4 Communication.
15. *See* Comments to MRPC 1.4 Communication.
16. MRPC 1.8(a) Conflict of Interest: Prohibited Transactions.
17. MRPC 1.1.
18. MRPC 5.7 Responsibilities Regarding Law-Related Services.
19. MCL 487.11105. *See also*, *Dice v Zimmerman*, No 342608 (Mich Ct App July 30, 2019) (unpublished).



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Case Summaries

By Sandra D. Glazier

In Re Donald F Clark Trust;[1] A Beneficiary Can't Be a Slayer When the Decedent Dies of Natural Causes[2]

The principal goal when interpreting a statute is to give effect to the legislative intent expressed in the applicable statute. Michigan has adopted what is commonly referred to as a "slayer statute."[3] The expressed intent of that statute is to deny a devisee who feloniously and intentionally kills a decedent from benefiting from the decedent's estate. While the residuary beneficiary ("Mooney") under the Donald F. Clark Trust ("Trust") was charged with solicitation of murder, the decedents he allegedly solicited to have murdered ("Elaine" and "Donnie") both died of natural causes, and the charges against Mooney were dropped when the witness ("Blackhawk"), who would testify to the solicitation, died before Mooney could be tried on the charges. When the beneficiary doesn't actually cause the decedent's death, and isn't convicted of having feloniously and intentionally killing the decedent or found, under a preponderance of the evidence, to have feloniously and intentionally killed the decedent, the "slayer statute" won't apply.

Facts

Donald Clark ("Clark"), as grantor, established an irrevocable trust (the "Trust") for his own benefit and that of his wife, Elaine. Following Clark's death, Elaine was the sole beneficiary entitled to discretionary distributions from the Trust. Following her death their son, Donnie, was slated to be the beneficiary, but Donnie predeceased Elaine. That left Mooney (who had acted as trustee of the Trust until he was removed in 2018 due to conflicts of interest) as the sole surviving residuary beneficiary.

While this matter has made a number of trips to the Michigan Court of Appeals on various issues (see *In re Donald F. Clark Trust: The Potential Import of the Intent Behind the Creation of a Joint Account*, LISI Estate Planning Newsletter #2977 (Aug 15, 2022), the focus of this article is on the slayer statute and the impact the discretionary powers contained in the Trust had relative to claims made by Elaine's agent under a durable power of attorney following Elaine's death.

The Trust contained language that reflected the grantor's concern about Elaine's ability to manage her finances and the grantor's desire to provide "maximum flexibility" to the trustee in providing financial assistance to Elaine during her lifetime, while at the same time protecting the assets of the Trust from Elaine's creditors and others. The trustee was also empowered to consider other resources available to Elaine so that the trustee could administer the Trust in Elaine's best interest when exercising the discretion provided to the trustee under the terms of the Trust.

Clark died in December 2017 and Donnie passed away in August 2021. Following Donnie's death, Hofacer became Elaine's agent under a durable power of attorney. Through negotiations between the Trustee and Hofacer, a monthly stipend of $4,500 was paid for Elaine's benefit to assist in addressing Elaine's needs. When the level of care she required increased, the Trustee increased the stipend amount in May 2022 to $7,500 per month. In addition, the Trust directly paid some of the expenses relating to maintenance of Elaine's home. In a petition before the probate court, the Trustee requested that certain attorney fees be paid by the Trust, including $25,000 owed to the law firm ("Plunkett Cooney") that had represented Elaine in prior appellate proceedings and $11,000 in delinquent fees owed to the attorney who drafted the Trust ("Myles"). Mooney objected to payment of fees to Plunkett Cooney and requested that additional fees be paid to his attorneys. No one object-

ed to payment of Myles' fees. Nonetheless, the probate court reserved its judgment on whether, and to what extent, any of the attorneys should be paid out of the Trust.

Following Elaine's death (in December 2022), Mooney petitioned to remove the trustee and terminate the Trust. Hofacer objected and contended there were issues that remained outstanding. She sought $46,000 for services she rendered as Elaine's agent under the durable power of attorney, payment of her own attorney's fees, payment of a retroactive monthly stipend to Elaine of $4,500 back to the date Donnie died (as opposed to when the Trustee agreed to provide a monthly stipend), and contended that Mooney should be barred from receiving any benefits as the residuary beneficiary of the Trust because he had been charged with solicitation of murder. As a consequence, Hofacer alleged the "slayer statute" should operate to bar him from receiving the benefit of his devise under the Trust.

Mooney had been charged with soliciting the murder of Elaine and Donnie and had been bound over for trial on two counts of solicitation of murder. However, the matter never went to trial. At the preliminary exam on the charges, Blackhawk testified that he had two telephone conversations with Mooney during which Blackhawk informed Mooney that he was Clark's illegitimate son and that Clark wanted him to inherit a portion of his estate. Blackhawk further testified that Mooney indicated he would help Blackhawk receive his inheritance if Blackhawk would kill Elaine and Donnie. Rather than attempting to kill Elaine or Donnie, Blackhawk contacted the police. It is undisputed that both Elaine and Donnie died of natural causes. When Blackhawk died before the trial took place, the charges against Mooney were dismissed.

The trustee testified that he stayed in regular contact with Elaine and exercised his discretion when making (and increasing) distributions from the Trust for Elaine's benefit. He further indicated that he never hired Hofacer or her attorney on behalf of the Trust.

The probate court ordered the trustee to pay the fees due Myles and Plunkett Cooney, denied payment of any fees to Hofacer or her attorney, and determined that the "slayer statute" didn't apply to the facts presented. This appeal followed.

Analysis

Elaine was not the grantor of the Trust. The Trust apparently contained spendthrift provisions as well as provided the trustee with broad discretion to determine the extent to which Elaine's expenses should be paid with Trust assets. Elaine also had assets in her own right, including multiple bank accounts, a retirement account and real property. Hofacer's time sheets reflected the services she rendered were personal to Elaine and were not rendered on behalf of the Trust. As such, any claim Hofacer might have had (if any) for services rendered would be one against Elaine's estate as opposed to the irrevocable trust created by Clark for her benefit. Further, because distributions from the Trust were subject to the trustee's broad discretion, no basis for payment of a retro-active stipend was found to exist.

The central issue to be address in this article is the extent to which, if any, the "slayer statute" applied to the facts presented. The appellate court found that:

> [t]he slayer statute, contained within MCL 700.2803, "is derived from the common-law rules that one who commits a murder cannot benefit by his or her criminal act and that no devisee can take under the will of a testator whose death has been caused by the criminal act of the devisee." The statute "provides that a devisee who 'feloniously and intentionally' kills a decedent forfeits all benefits from the decedent's estate[,]", and states in pertinent part:
>
> > (1) An individual who feloniously and intentionally kills or who is convicted of committing abuse, neglect, or exploitation with respect to the decedent forfeits all benefits under this article with respect to the decedent's estate, in-

> cluding an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer or felon disclaimed his or her intestate share.
> (2) The felonious and intentional killing of the decedent does all of the following:
> (a) Revokes all of the following that are revocable:
> (i) Disposition or appointment of property made by the decedent to the killer in a governing instrument.
> * * *
> (5) A killer's or felon's wrongful acquisition of property or interest not covered by this section must be treated in accordance with the principle that a killer or felon cannot profit from his or her wrong.
> (6) . . . With respect to a claim of felonious and intentional killing, in the absence of a conviction, the court, on the petition of an interested person, shall determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes the individual as the decedent's killer for purposes of this section. [MCL 700.2803.]

The language in MCL 700.2803(1) is plain and unambiguous. Two actions trigger the statute's application: (1) a felonious and intentional killing, or (2) a conviction of abuse, neglect, or exploitation of the decedent. It is undisputed that neither has occurred in the present case. It is undisputed that Elaine and Donnie died of natural causes and thus there was no felonious or intentional killing. And although Mooney was bound over on two charges of solicitation of murder, the charges were dismissed. Mooney was not convicted of abuse, neglect, or exploitation of Elaine or Donnie. Therefore, the slayer statute does not apply.[4]

Hofacer argued that the statute should be broadly construed and should include not only someone who is found criminally accountable for feloniously and intentionally killing someone, but also to a co-conspirator. Both the probate and appellate court disagreed.

Comment

While it is often said that fact can be stranger than fiction, when interpreting statutes that are unambiguous, the most reliable evidence of legislative intent is the plan language of the statute.[5] Here, where the "slayer statute" is unambiguous as to its application, it must be given its intent as written. It may be important to remember that the statute contemplates that a wrongdoer may not have to be criminally charged and convicted. The statute provides a remedy if it can be shown by a preponderance of the evidence that the individual would have been found criminally accountable for the felonious and intentional killing of the decedent and such a finding will conclusively establish the beneficiary as the decedent's killer for purposes of the "slayer statute". Since both Elaine and Donnie died of natural causes, there was no way that Mooney could be proven to have feloniously and intentionally killed either of them; hence the "slayer statute" cannot operate to deprive him of his residuary devise under the Trust (no matter how bad an actor he might ultimately have been proved to be).

In Re Geraldine M. Hardy Revocable Trust;[6] Interpreting Grantor Intent[7]

When administering a trust, issues may arise that require interpretation. When that occurs, the settlor's intent may be of tantamount importance. Much like contracts and wills, intent is generally "gauged from the trust document itself, unless there is ambiguity."[8]

There are two types of ambiguity, latent and patent. "A latent ambiguity exists where the lan-

guage and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning." On the other hand, "[a] patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language." The presence of an ambiguity "requires a court to look outside the four corners of a will in order to carry out the testator's intent." "Accordingly, if a will evinces a patent or latent ambiguity, a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rule of construction." "Where there is no patent or latent ambiguity in the provisions of a will [or trust], the intention to be ascribed to the testator is that intention demonstrated in the will's plain language."[9]

In *In re Geraldine M. Hardy Revocable Trust,*[10] the issue of intent may be complicated by the fact that the Trust was established through judicial proceedings at a time when it was alleged that the settlor lacked sufficient capacity to do so on her own.

Facts

Geraldine Hardy, a psychiatrist, had no children. In 1977, she created a trust that named the Medical University of South Carolina (MUSC) as its sole beneficiary for the stated purpose of establishing a chair in her name to address the study of psychiatry of women. Geraldine funded her trust with $10. It appears she intended to ultimately fund the trust through the use of a pour-over will, but no such will was ever located.

Geraldine stopped practicing medicine in 2006 and later surrendered her medical license. In 2010, her niece, Pamela, discovered that her aunt was suffering from dementia and was living in hoarder conditions. Sometime thereafter Laura Kystad (Kystad) was appointed Geraldine's conservator and guardian. Kystad petitioned the probate court for authority to restate Geraldine's trust (Trust) in order to fulfill Geraldine's intention and desire to fund a substantial gift to the medical school. Kystad informed the court that she believed Geraldine lacked testamentary capacity, but that Geraldine nonetheless continued to express her desire to fund the educational pursuits of women in medicine. In the petition, Kystad requested that the terms of the Trust be restated to (1) provide for Geraldine's support during her lifetime, (2) provide for her heirs at law, (3) reduce or eliminate federal estate tax, and (4) grant the MUSC monies for the advancement of women in medicine. Whether the above stated goals matched Geraldine's intentions remains to be seen.

In regards to the petition, the court appointed a guardian ad litem (GAL). The GAL reported that every time she visited Geraldine, without prompting, Geraldine indicated that

> I worked hard all my life, I've earned all of this money and I want all of it to go to this university to pay for women to get through medical school. I don't think I owe a penny to any of my relatives, I don't want them to get anything.[11]

The proposed restatement provided that when Geraldine died the Trust would be divided into two fractional share trusts, (1) one for Geraldine's heirs at law and (2) the other for MUSC. The formula utilized to determine the fractional share each trust was to receive would essentially only provide MUSC with that amount which was required to reduce the amount of estate tax owed at the time of Geraldine's death to zero or the least amount possible under the facts and circumstances then presented.

At the time of the hearing on the petition in 2012, Geraldine's estate approximated $10 Million. Counsel for MUSC requested that any amendment provide MUSC with a minimum of $5 Million upon Geraldine's death. Pamela's counsel responded that Geraldine was otherwise healthy and the support she required over perhaps the next 10 to 15 years might reduce the value of the Trust over that period. The court noted that administrative expenses could also reduce the value of the Trust. In addition, changes in the tax code might also significantly reduce the amount available to fund MUSC's trust

share. MUSC's counsel argued that in approving the proposed restatement, "the probate court was transferring its discretion 'to Washington, D.C. to figure out what the university [was] going to get.'"[12] Nonetheless, MUSC agreed on the record to accept the proposed restated terms for the Trust and the probate court authorized execution of the restatement on Geraldine's behalf utilizing the reduce to zero fractional share provision. MUSC did not appeal.

When Geraldine died in 2018, the estate tax exemption then in effect would have resulted in MUSC receiving nothing under the formula contained in the restated trust. MUSC filed a petition requesting that the probate court reform or otherwise void the restatement under MCL 700.7415 and MCL 700.7412. Pamela requested that the trust shares be funded based upon the reduce to zero formula. The court found that the Trust was ambiguous and that as a result the calculation of each trust share should take into consideration the 2012 (as opposed to the 2018) federal tax exemption amount. It did not address MUSC's petition to reform or otherwise void the restatement. Geraldine's heirs at law (Pamela and Jerome) appealed.

Analysis

While other issues were addressed in the appellate decision, such as the impact of a stay granted by the appellate court upon the probate court's ability to approve the sale of real estate, this article's focus is upon whether the Trust was ambiguous and the extent to which modification might now be sought.

On appeal, the court found that the Trust wasn't ambiguous. It held that the terms at issue unambiguously provided that

> [t]he Family Trust shall consist of a fractional share of the Trust Assets. The numerator of the fraction shall equal the largest value of the Trust Assets that can pass free of federal estate tax by reason of the unified credit and the credit for state death taxes . . . allowable to [Settlor's} estate, after [enumerated reductions] . . . . The denominator of the fraction shall equal the value of the Trust Assets as finally determined for federal estate tax purposes.
>
> ***
>
> …the phrase "the largest value of the Trust Assets that can pass free of federal estate tax" more clearly contemplates a future determination, because assets could not pass into the Family Trust until the settlor died.
>
> For the language to be ambiguous, it would have [to] support two different meanings: (1) that the numerator of the fraction for determining the value of the Family Trust is the amount that will be able to pass free of estate tax when the settlor dies; or (2) that the numerator is the amount that would pass free of estate tax if the settlor died at the time the trust was executed. Even if the future-tense meaning of "shall" were disregarded in favor of the mandatory/must meaning, Article III would still derive the numerator from "the largest value . . . that can pass free of the federal estate tax." There is no language in the 2012 restated trust that fixes the numerator as the value that would pass free of the federal estate tax if Dr. Hardy died in 2012. Thus, the language supports only the first meaning. The court erred in finding ambiguity and in resolving the issue in MUSC's favor.[13]

However, because the probate court failed to address MUSC's petition for reformation, the matter was remanded to the probate court for further proceedings and a determination of whether reformation is appropriate.

Comment

MCL 700.7415 provides that

> [t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[14]

The Reporter's Comments to MCL 700.7415 indicate that while this section authorizes refor-

mation of a trust, it doesn't address resolving ambiguities through interpretation. Instead, interpretation of ambiguities is to occur pursuant to MCL 700.1302(b)(v) and (vi). The Reporter's Comments to UTC §415 provides that

> [r]eformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent.[15]

The appellate court determined that the funding formula wasn't ambiguous. Reformation due to mistakes in expression or inducement is different.

> A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.[16]

Typically, reformation is sought when the settlor executed an instrument that for one reason or another didn't comport with the settlor's intent. Here, however, the language which MUSC seeks to reform is language imposed by the court (an error of which is typically addressed via appellate processes).

The other basis upon which MUSC sought relief was pursuant to MCL 700.7412. That statute provides, in pertinent part, that

> (1) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.
>
> (2) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the settlor's stated purpose or, if there is no stated purpose, the settlor's probable intention.
>
> (3) If a trust is terminated under this section, the trustee shall distribute the trust property as ordered by the court.[17]

This statute is based on UTC §412. The options provided for in the statute aren't mutually exclusive. However, given the record made at the time of the restatement, it would be hard to argue that a change in the exemption amount wasn't anticipated in 2012, when the court authorized the restatement. The stronger argument, given the anticipated testimony by the GAL, might be that Geraldine never intended to benefit her niece and nephew and only intended to benefit MUSC. But might the court find that MUSC's petition, in actuality, represents a collateral attack on the 2012 court order (from which no appeal was taken) or that MUSC is estopped from now challenging the terms having agreed to the court's restatement in 2012?

Whether MUSC is found to be estopped from now challenging the terms is likely another issue that the court will have to grapple with on remand (and perhaps subsequent appeal). However, even if MUSC is estopped from now challenging the funding provisions, given the charitable provisions of the Trust, could the Michigan attorney general raise the issue and urge the court to modify the trust, in order to distribute the trust property, in whole or in part, in a manner consistent with the settlor's general charitable intent?

This case may help to highlight the potential benefit of depositing wills for safekeeping with the appropriate probate register or the need to otherwise take steps to properly safeguard one's will. Its unlikely that a client would go through the effort and expense of drafting a charitable trust without having the contemplated pour over will in place. It was only because the will could not be located that the court authorized amendment of the Trust in 2012, with the same apparently being intended as the mechanism for funding of

the charitable bequest, since a conservator can't create a will for a ward, but, procedurally, can request that the court establish or modify a trust.

In re Guardianship of AMS;[18] A Court Is Not Absolved of Its Duties to Analyze Who Has Priority of Appointment Even When the Actions of Guardian with Priority May Be Questionable[19]

While Michigan has not adopted the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (UGCOPAA), it has incorporated many of the concepts contained within that uniform act. Among the important concepts set forth in both the uniform act and Michigan's statute is the priority of appointment provided to various family members and nominated surrogates when a guardian needs to be appointed to act for the benefit of a legally incapacitated adult. Therefore, before a family member can be removed and replaced with a professional guardian, the court must first find that (1) the individual with priority was not competent, suitable and willing to serve (or continue to serve) as a guardian, and (2) there are no other statutorily listed persons with priority who are competent, suitable and willing to serve. Even when the probate court focuses on the incapacitated adult's welfare, the failure to analyze the suitability and availability of persons holding priority status before removing an individual with priority in favor of appointing a public administrator is reversable error.

Facts

AMS had two daughters, Theresa and Kristin, both of whom separately petitioned the probate court for the appointment of a guardian for their mother. Theresa and Kristin each requested that she alone be appointed their mother's guardian. Instead, the probate court appointed AMS's spouse, Thomas, as her guardian. Immediately following his appointment, Thomas relocated AMS to a nursing home and instructed the staff to limit her daughters' visitation rights. Theresa filed a petition to modify or terminate the guardianship, with a stated preference for modification. She alleged that Thomas was uncooperative with family visitation and had effectively alienated AMS from her family. The boxes on the form petition reflecting a request for termination, removal, or appointment of a new guardian were not checked. In addition to filing the petition for modification, Theresa sent a letter to the court indicating that she wished to pursue full guardianship over her mother and that she didn't trust others with her care. She requested that even if the court didn't appoint her as her mother's guardian, she still wished that the court appoint a guardian for her mother. This letter was not served on Thomas or her mother.

In response to the Petition to Modify the Guardianship that was filed, the court appointed a guardian ad litem ("GAL"). The GAL's report indicated that Thomas was unresponsive to the GAL's efforts to contact him and demonstrated a concerning lack of cooperation during the initial guardianship proceedings. Ultimately, Thomas permitted the GAL to visit with AMS. When the GAL visited AMS, the GAL was able to verify that she was in a secure environment and that her needs were being addressed. The GAL also confirmed that Thomas had instructed the facility to restrict visits unless he provided prior approval. The GAL recommended that the court mandate that visits by AMS's children be permitted or, in the alternative, that it appoint a qualified guardian following a hearing to ascertain the individual most suitable for providing for AMS's necessary care and protection. The court set the matter for hearing and a notice for hearing on the Petition was sent via first class mail to Thomas, AMS, AMS's daughters and AMS's sister. It appears that AMS was not personally served with the Petition (or Theresa's letter).

At the hearing, Thomas' counsel indicated that Thomas was now willing to permit AMS to have visitors and had only limited visitors at the outset to permit AMS to settle into her new environment. Theresa testified that her ability to vis-

it her mother had been limited and in response to questions by Thomas' counsel, she confirmed she was looking for a modification in the guardianship to eliminate any visitation restrictions. Thomas' counsel indicated to the court that he was not prepared for a removal hearing, and if the court was headed down that path that a hearing on that issue should be scheduled for a later date following discovery. The court responded that it would decide the appropriate solution and that it would be ruling on whether Thomas should be removed. The GAL deferred to the court's discretion.

At the conclusion of the hearing, the court removed Thomas and appointed a professional guardian. It found

> [w]hat is very clear to me is there has been an obstruction of visitation by the guardian, and I'm extremely concerned about that. The Guardian ad Litem has been clear in the . . . appointment, that he had with [AMS], that she wants to see these people who are represented by the petitioner, and it was extremely hard for [the GAL] to be able to even speak with [AMS], which the Court finds to be inappropriate and not . . . acceptable. So, the Court is appointing Steve Wixson as the guardian for, and on behalf of, [AMS]. And . . . Mr. Wixson will take a look at what the actions have been, what [Thomas'] strengths are, and then if return of the guardianship is appropriate with [Thomas], we'll take a look at it. But, there's no way that this is appropriate, what is going on. And I appreciate the fact that the petition was filed and we need to have some level of dignity here. And that has not happened. And with that, that is the order of this Court.[20]

This appeal ensued during which Thomas argued that he was removed without proper notice and that the court failed to conduct the proper statutory analysis before appointing a professional guardian.

Analysis

The appellate court held that the failure of personal service on AMS and the failure to conduct an analysis of the statutory factors required before a person without priority could supplant the appointment of a person with priority were reversible errors.

While MCL 700.5310(2) provides that

> "any other person interested in the ward's welfare may petition for an order removing the guardian, . . . modifying the guardianship's terms, or terminating the guardianship. A request for this order may be made by informal letter to the court or judge." MCL 700.5311 mandates certain notice requirements for the removal of a guardian:
>
> (1) In a proceeding for the . . . removal of an incapacitated individual's guardian, other than the appointment of a temporary guardian or temporary suspension of a guardian, or to designate a standby guardian or change the designated standby guardian, *notice of hearing must be given to each of the following*:
>
> (a) The ward or the individual alleged to be incapacitated and that individual's spouse, parents, and adult children.
>
> (b) A person who is serving as the guardian or conservator or who has the individual's care and custody. [Emphasis added.]

Furthermore, "[n]otice must be served personally on the alleged incapacitated individual.[21] Waiver of the need for personal service on the incapacitated individual can only occur if that individual actually attends the hearing (which AMS did not) or informed the GAL or another visitor appointed by the court that they were waiving notice of the hearing (which also didn't occur). Moreover, the Petition that was sent via first class mail to AMS only referenced the potential modification of the terms of the guardianship (and not Thomas' removal). It was the court that shifted the focus of the hearing from modification to removal. Even though the GAL's report reflected the potential for removal (as did Theresa's letter), neither was found to absolve the court from its responsibility to make sure AMS was personally served with proper notice that removal was possible before a hearing to remove Thomas was convened.

Because a lack of proper service wasn't the only error found to have occurred, the appellate court also addressed the analysis required before a public administrator could be appointed. While there are certainly instances when an individual would be better served by a professional guardian, it remains important that courts follow the statutorily mandated analysis required before such an appointment occurs.

In analyzing this issue, the appellate court recognized that while Michigan's statute

> provides some provisions governing removal of a guardian, it "does not set forth a specific standard for removal of a guardian." "[T]o remove a guardian under MCL 700.5310, the probate court must find that the guardian is no longer *suitable* or willing to serve." (emphasis added). The applicable standard is a preponderance of the evidence. As for what a "suitable" guardian entails, this Court explained that "[t]he EPIC thus makes clear that the guardian's focus of concern must be on the ward, that decisions made on behalf of the ward must be in the interests of the ward and not the guardian, and that the guardian must be qualified to achieve the purposes set forth in EPIC." Additionally, since "a 'suitable' guardian is one who is qualified and able to provide for the ward's care, custody, and control," "it logically follows that particularly relevant evidence would include (1) evidence on whether the guardian was still qualified and able, and (2) evidence on whether the guardian did, in fact, satisfactorily provide for the ward's care, custody, and control in the past."[22]

Here, while the court's emphasis was clearly on AMS and it articulated significant concerns regarding the restrictions Thomas placed upon the family's ability to visit her and the difficulties encountered by the GAL in being able to contact Thomas, the court failed to address the issue of suitability or whether there were other persons with priority who were suitable and willing and able to act before Thomas was removed and a public administrator appointed to act in his stead. Both daughters had sought appointment as their mother's guardian and AMS apparently also had a sister that the court might have found to be suitable (and perhaps willing to act) each of whom would have had priority of appointment over that of a public administrator.

Both MCL 700.5313(2) and (3) provide lists of individuals who have priority for a guardianship, including "[a] person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in this state or another state," MCL 700.5313(2)(a); "[t]he legally incapacitated individual's spouse," MCL 700.5313(3)(a); and "[a]n adult child of the legally incapacitated individual," MCL 700.5313(3)(b). Pursuant to MCL 700.5313(4), if none of the individuals "designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106." However, before the court may appoint a professional guardian under MCL 700.5106(1), the court must engage in the following analysis:

> (2) The court shall only appoint a professional guardian or professional conservator as authorized under subsection (1) if the court finds on the record *all of the following*:
>
> (a) The appointment of the professional guardian or professional conservator is in the ward's, developmentally disabled individual's, incapacitated individual's, or protected individual's best interests.
>
> (b) There is no other person that is competent, suitable, and willing to serve in that fiduciary capacity in accordance with section 5212, 5313, or 5409. [MCL 700.5106(2) (emphasis added).][23]

Comment

Guardianships and conservatorships have been under attack, but the need for appropriate substitute decision makers remains.

UGCOPAA Section 309 provides that

> (a) Except as otherwise provided in subsection (c), the court in appointing a guardian for

an adult shall consider persons qualified to be guardian in the following order of priority:

(1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in another jurisdiction;

(2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a power of attorney;

(3) an agent appointed by the respondent under [a power of attorney for health care];

(4) a spouse [or domestic partner] of the respondent; and

(5) a family member or other individual who has shown special care and concern for the respondent.

(b) If two or more persons have equal priority under subsection (a), the court shall select as guardian the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent, the extent to which the person and the respondent have similar values and preferences, and the likelihood the person will be able to perform the duties of a guardian successfully.

(c) The court, acting in the best interest of the respondent, may decline to appoint as guardian a person having priority under subsection (a) and appoint a person having a lower priority or no priority.

(d) A person that provides paid services to the respondent, or an individual who is employed by a person that provides paid services to the respondent or is the spouse, [domestic partner,] parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as guardian unless:

(1) the individual is related to the respondent by blood, marriage, or adoption; or

(2) the court finds by clear-and-convincing evidence that the person is the best qualified person available for appointment and the appointment is in the best interest of the respondent.

(e) An owner, operator, or employee of [a long-term-care institution] at which the respondent is receiving care may not be appointed as guardian unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.[24]

Therefore, it appears that Michigan's statute may be more restrictive of the court's ability to appoint a professional guardian than would be the case under UGCOPAA (other than with regard to the burden of proof involved), but the comments to UGCOPAA Section 309 may nonetheless be instructive. Those comments provide in pertinent part that:

[s]ubsection (b) provides the court with a framework for selecting among persons with equal priority. This framework is especially important given the collapse of the detailed family hierarchy into a single category in subsection (a)(4) for the spouse or domestic partner with all other family members and others who have shown special care and concern for the respondent having equal priority under subsection (a)(5). Under subsection (b), a court shall choose the best qualified person when selecting among those with equal priority. In determining who is best qualified, the court should consider the potential guardian's relationship with the respondent, the potential guardian's skills, the expressed wishes of the respondent, the extent to which the potential guardian and the respondent have similar values and preferences, and the likelihood that the potential guardian will be able to successfully perform the duties of a guardian, including the ability to periodically visit the adult subject to guardianship. Thus, whether a person is best qualified depends, in large part, on the quality of their relationship with the respondent. Since surrogate decision makers typically make the decisions for others that they would want made for themselves, requiring the court to consider the extent to which the potential guardian and the respondent share values and preferences increases the likelihood that the selected guardian will make the decision the individual subject

to guardianship would have made if able. See Nina A. Kohn, Matched Values & Preferences: A New Approach to Selecting Legal Surrogates, 22 SAN DIEGO L. REV. 399 (2015).

Consistent with respecting the wishes of the individual and appointing a person who understands the adult's values and preferences, *courts should resist the temptation to appoint a professional guardian simply because it is difficult to choose among family members and friends. While a professional guardian avoids the need to select between family members who are feuding or who are otherwise in disagreement, appointment of a professional is likely not to be consistent with the adult's wishes. The extensive literature on surrogate decision-making shows that people typically prefer to have decisions made by close family members. See id. In addition, appointment of a professional guardian comes at significant financial cost to the adult.*[25]

Annotations to MCL 700.5107 remind us that in *In re Guardianship of Gerstler*[26] the Michigan appellate court emphasized that the order of priority set forth in MCL 700.5313 and .5409 must not only be followed, but before appointing a professional guardian the court must also find that that the appointment of a professional guardian is in the incapacitated or protected individual's best interests *and* there is no other person that is competent, suitable and willing to service in that fiduciary capacity.

While priority is (and should often be) given to persons designated by the individual in duly executed powers of attorney and/or designations of patient advocate documents, there may be times when the appointment of such individuals (or family members) may be found by the court to be inappropriate. When this occurs, it remains important for the court to analyze the statutory parameters required for the appointment of another, whether that be a family member or professional when attempting to fashion the best options for individuals who are found to be in need of surrogate decision makers and to fashion remedies that are the least restrictive in nature and recognize any retained abilities of the incapacitated.

Notes

1. *Hofacer v Cook (In re Donald F Clark Tr)*, No 366592 (Mich Ct App Jan 16, 2025) (unpublished).
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3. MCL 700.2803.
4. *Hofacer, supra* at *14-16. Internal citations omitted.
5. *Hofacer, id*. citing *South Dearborn Envtl Improvement Ass'n, Inc v Department of Envtl Quality*, 502 Mich 349, 360-361, 917 NW2d 603 (2018).
6. *Kystad v Melton (In re Geraldine M Hardy Revocable Tr)*, Nos 363892, 368301 (Mich Ct App Jan 29, 2025) (unpublished).
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8. *In re Kostin*, 278 Mich App 47, 53, 748 NW2d 583 (2008).
9. *In re Geraldine M Hardy Revocable Tr*, supra at *6-7.
10. *Id.*
11. *Id.* at *3.
12. *Id.* at *4.
13. *Id. at* * 7-9. Internal citations omitted.
14. MCL 700.7415. See also UTC §415.
15. Reporter's Comments, UTC §415.
16. *Id*.
17. MCL 700.7412.
18. *Seabrook v Office of Midland Pub Guardian (In re Guardianship of AMS)*, No 372183 (Mich Ct App Feb 10, 2025) (unpublished).
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20. *Id*. at *4-5.
21. *Id*. at *8.
22. *Id*. at *10-11. Internal citations omitted.
23. *Id*. at *13-14. Emphasis added.

24. UGCOPAA Section 309.

25.Comment to UGCPPAA, Section 309, pp.93-94. Emphasis added.

26. *In re Guardianship of Gerstler,* 324 Mich App 494, 922 NW2d 168 (2018).



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Probate Litigation Report: ERISA, Divorce and Waiver

By David L. J. M. Skidmore

Introduction

Consider the following hypothetical. In a marriage, the first spouse owns an employer-issued insurance policy, annuity, and/or pension, which is subject to the Employee Retirement Income Security Act of 1974[1] ("ERISA"). The first spouse designates the second spouse as the beneficiary of such benefit plans. Subsequently, the couple is divorced. Under the divorce judgment, the second spouse waives all rights in the first spouse's employee benefit plans.

At the death of the first ex-spouse, it is discovered that the pre-divorce beneficiary designation in favor of the second ex-spouse is still in effect, because the first ex-spouse failed to execute a new beneficiary designation after entry of the judgment of divorce. Who is entitled to ownership of the asset—the second ex-spouse who remains designated as the beneficiary, or the first ex-spouse's estate because of the waiver under the judgment of divorce? This article will answer that question under both Michigan caselaw and Sixth Circuit federal caselaw.

Michigan Caselaw

Current Michigan caselaw handles this fact pattern as follows. ERISA governs the enforceability of the beneficiary designation in this situation and recognizes the beneficiary designation as valid, even though contrary to the divorce judgment. Because ERISA preempts conflicting state law, Michigan law cannot change the beneficiary of the retirement account, and so the retirement account proceeds must be paid to the ex-spouse as the designated beneficiary. Once the proceeds are in the hands of the ex-spouse, however, the proceeds are no longer subject to ERISA and become subject to Michigan law. Under Michigan law, the ex-spouse designated as beneficiary may not retain the proceeds because of the waiver under the judgment of divorce and must instead remit the proceeds to the estate of the deceased ex-spouse.

However, pre-ERISA Michigan caselaw reached a different conclusion. In *Daugherty v Wickes Corp*,[2] at decedent's death, his ex-wife was still designated as the beneficiary of his profit-sharing plan. The couple's judgment of divorce provided that neither party "shall hereafter have any right, title or interest to the proceeds of any ... contract of ... retirement" held by the other. The trial court awarded the plan proceeds to the decedent's estate. On appeal, the Michigan Court of Appeals agreed that the "contract of retirement" provision in the judgment of divorce applied to the profit-sharing plan. Nonetheless, the appellate court ruled that the ex-wife was still entitled to the proceeds of the plan because the decree simply vested complete ownership of the plan in the decedent and left him free to dispose of those proceeds in any manner he saw fit. "[A] change of beneficiary can be accomplished only by procedures which are in substantial compliance with the provisions of the plan itself."[3] Because the decedent had not accomplished a beneficiary change consistent with the plan terms after the divorce, the original beneficiary designation governed.

Following enactment of ERISA in 1974, the modern rule began to appear in *Thomas v City of Detroit Ret Sys*.[4] While employed by the city of Detroit, decedent participated in an annuity savings fund offered by his employer and designated his then-wife as the beneficiary. When decedent and wife were divorced, the judgment of divorce provided that the parties would retain their respective pension benefits, free of any claim by the other. At decedent's death, the ex-wife was still designated as the beneficiary, and she filed suit against the retirement system to compel payment of decedent's annuity fund to her. Decedent's estate was permitted to intervene. The

trial court granted summary disposition for decedent's estate, finding that the pension provision in the judgment of divorce covered decedent's annuity fund. On appeal, the Michigan Court of Appeals affirmed. "Because the divorce decree at issue in this case awarded the decedent his pension benefits 'as [his] exclusive property, free and clear of any claim by [plaintiff],' plaintiff was not entitled to the proceeds of the fund after his death, even though she remained the named beneficiary of the fund."[5] (Subsequent Michigan decisions would require that the plan proceeds be paid to the ex-spouse designated beneficiary, who would then be required to remit the proceeds to decedent's estate.)

The *Thomas* court expressly declined to follow the holding of *Daugherty*. "We do not believe that Daugherty was correctly decided."[6] "[The] reasoning of *Daugherty* is unpersuasive. We believe that language in a divorce decree awarding one party the proceeds of a fund 'free and clear' of any claim by that party's spouse – such as the language in the instant divorce judgment—operates to void a designation listing the spouse as the beneficiary. To hold otherwise would be to contravene the clear language of the degree and thereby frustrate the expressed intent of the parties who signed it."[7] In subsequent decisions, Michigan's appellate courts have continued to reject *Daughterty*.

The same basic fact pattern was presented in *MacInnes v MacInnes.*[8] There, the Michigan Court of Appeals applied an analysis similar to the ruling of *Thomas*. "Even where ERISA preempts state law with respect to determining beneficiary status under an ERISA-regulated benefits plan, ERISA does not preempt an explicit waiver of interest by a nonparticipating beneficiary of such a plan."[9]

In *Moore v Moore*,[10] decedent named his wife as the beneficiary of his employer-provided life insurance policy and pension death benefit. Decedent and his wife were then divorced. Under the parties' consent judgment of divorce, each party's interests in the other's life insurance policies or pension benefits were terminated. At decedent's death, however, ex-wife was still designated as the beneficiary of decedent's insurance and pension benefits, which were both paid to the ex-wife as a result. Decedent's estate then moved for post-judgment relief in the original divorce proceeding, which was denied by the circuit court. On the estate's appeal, the Michigan Court of Appeals reversed. "Here, the question is not whether a plan administrator should be required to determine whether someone other than the named beneficiary is entitled to the proceeds of an ERISA plan, but whether ERISA mandates that a named beneficiary who has expressly waived her right to those proceeds in a consent judgment of divorce should be allowed to retain those funds. We hold that a named beneficiary to an ERISA benefits plan who has expressly waived an interest in that plan in a consent judgment of divorce is not entitled to retain those benefits."[11]

In *Sweebe v Sweebe*,[12] the Michigan Supreme Court took up this recurring fact pattern. There, under the judgment of divorce, each spouse waived all rights in insurance policies owned by the other spouse. At the death of the ex-husband, he owned an employer-provided life insurance policy, and he had not changed the designated beneficiary after entry of the divorce judgment, so the ex-wife remained designated as beneficiary. Consistent with ERISA, the plan administrator paid the insurance proceeds to the ex-wife as the designated beneficiary. The personal representative of the ex-husband's estate then filed suit to enforce the insurance waiver. The circuit court ruled that ERISA preempted the waiver, holding for the ex-wife as the designated beneficiary. The Michigan Court of Appeals reversed, holding that the waiver was enforceable and directing the ex-wife to pay the insurance proceeds to the ex-husband's estate.

The Michigan Supreme Court agreed to hear the case. The supreme court initially evaluated whether the ex-wife had waived her rights in the proceeds of the retirement accounts, under the

following standard: "Waiver is a mixed question of law and fact. The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact."[13] The court agreed that the ex-wife had waived her rights.

The supreme court next considered whether the ex-wife's waiver barred payment of the proceeds to the ex-wife, concluding that the answer was negative. "In general, ERISA's preemption provision states that ERISA supersedes all state laws that relate to an employee benefit plan. Therefore, under ERISA preemption, Michigan law cannot affect ERISA's determination of the proper beneficiary. ERISA provides that a plan administrator must distribute the proceeds of an insurance policy to the named beneficiary. [Michigan courts] cannot undermine [a person's] status as the [designated] beneficiary."[14] In other words, the Michigan law of waiver could not affect determination of the beneficiary, because ERISA alone governed that matter and preempted conflicting state law.

However, the supreme court went on to conclude that ERISA did not preempt enforcement of the waiver after distribution of the proceeds to the designated beneficiary. ERISA's preemption provision does not preclude "a named beneficiary from waiving the proceeds from a life insurance policy" under a judgment of divorce.[15] "[A] valid waiver is not preempted by ERISA and should be enforced ...."[16] "[W]hile a plan administrator must pay benefits to the named beneficiary as required by ERISA, this does not mean that the named beneficiary cannot waive her interest in retaining those proceeds."[17] "Once the proceeds are distributed, the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds."[18] "[A]fter the plan administrator distributed the proceeds as required by ERISA, a claim could then be filed against the named beneficiary alleging that she waived her right to retain the proceeds."[19]

Therefore, the Michigan Supreme Court affirmed the Court of Appeals ruling. "We conclude that the benefits were properly paid to [ex-wife] under ERISA, but [ex-wife] has no legal right to retain the proceeds under the waiver provision in the judgment of divorce. [Ex-wife] must pay an amount equal to the insurance proceeds to the decedent's estate, which will then distribute the proceeds according to the decedent's will or the laws of intestacy."[20]

In *Brown v Wright*,[21] the Michigan Court of Appeals emphasized that the terms of a judgment of divorce were enforceable under Michigan contract law. "Plaintiff's action seeks to enforce a divorce judgment. Defendant and [decedent]'s divorce judgment explicitly extinguishes defendant's right to retain the insurance proceeds as the designated beneficiary under the Metropolitan Life policy. The divorce judgment is enforceable in contract, ... and defendant's retention of the insurance proceeds, in contravention of the divorce judgment, constitutes a breach of that judgment."[22]

In *Reed Estate v Reed*,[23] the Michigan Court of Appeals focused further on the legal standard governing whether a valid waiver had occurred. "It is generally accepted by a majority of courts 'that waivers of beneficiary rights are possible under ERISA-governed plans. [B]ecause 'ERISA is silent on the issue of what constitutes a valid waiver of interest,' the courts must turn to federal common law and state law to fill the gap.'"[24] "The issue to be addressed is 'whether there is proof of a specific termination of the rights in question or, stated differently, whether a waiver by a designated beneficiary of an ERISA-regulated benefits plan was explicit, voluntary, and made in good faith.'"[25] "[W]hen we are evaluating whether the waiver is effective in a given case, we are more concerned with whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than with any magic language contained in the waiver itself. Michigan courts have defined 'waiver' as the voluntary and intentional relinquishment of a known right."[26]

The *Reed* court also considered whether the validity of a waiver was affected by the fact that the divorce judgment was entered upon the defendant's default, concluding that it did not. "[Defendant] had knowledge and notice of the proceedings and their intended outcome and routinely failed to act or respond. This course of conduct evidenced her intention to waive any rights."[27]

The Michigan Court of Appeals has recognized the possibility that the parties to the judgment of divorce could enter into a post-judgment agreement that overrides the waiver in the divorce judgment. In *In re Adams*,[28] the appellate court affirmed the probate court's ruling that decedent's ex-wife had waived her rights in decedent's ERISA insurance policy under the couple's consent judgment of separate maintenance and was therefore required to tender the proceeds to decedent's estate upon receipt. However, the appellate court ruled that the probate court had failed to consider the ex-wife's argument that she and the decedent had entered into a new agreement, after the consent judgment, under which they would maintain each other as designated beneficiaries of their insurance policies. "[A] valid agreement reached after entry of the judgment of separate maintenance would potentially change the outcome of the case."[29]

In *In re Lett Estate*,[30] decedent designated wife as beneficiary of his employer-provided insurance policy. Subsequently, the couple divorced. The judgment of divorce extinguished each party's interests in the other party's insurance. The judgment also required ex-husband to make payments to ex-wife for his share of debt secured by ex-wife's pre-marital property, and to obtain new insurance with ex-wife as beneficiary to secure payment of such debt. After entry of the judgment of divorce, ex-husband (1) failed to obtain a new insurance policy for the benefit of ex-wife; (2) failed to make payments on his debt to ex-wife; and (3) removed ex-wife as beneficiary of his preexisting insurance policy. When ex-wife initiated contempt proceedings for non-payment, ex-husband suddenly got caught up on his debt to ex-wife. At that time, ex-husband also designated ex-wife as the beneficiary of his preexisting insurance policy (the same one he had removed her from, post-divorce). Ex-husband subsequently paid in full his debt ($28,500) to the ex-wife, but he did not thereafter remove her as the beneficiary of his insurance policy. At ex-husband's death, ex-wife still remained designated as his beneficiary. There was litigation between decedent's estate and ex-wife as to entitlement to the insurance proceeds of $120,000. The probate court ruled that the ex-wife had waived her rights in this particular insurance policy and ordered that the insurance proceeds be paid to decedent's estate.

On appeal, the Michigan Court of Appeals reversed. "The only bases [the personal representative of decedent's estate] alleged to 'void' [decedent's] postdivorce designation of [ex-wife] as the sole beneficiary of [decedent's] life insurance policy were the language in the judgment of divorce and MCL 552.101 ... which require[d] the trial court to determine the rights of each spouse to any contract of life insurance on the life of the other spouse... But the plain language of MCL 552.101[31] does not affect [ex-husband's] post-judgment actions, and the plain language of the judgment merely cancelled any interest [ex-wife] may have had in any insurance on [decedent's] life at the time the judgment was entered. Because neither the judgment of divorce nor MCL 552.101 prohibited [decedent] from naming [ex-wife] as his beneficiary after the judgment was entered, and because [the personal representative] alleged no other basis to void [decedent's] beneficiary designation—such as fraud, severe stress, or mutual mistake of fact—the probate court erred by not granting [ex-wife's] motion for summary disposition under MCR 2.116(C)(8)."[32]

In *Estate of Patrick v Freedman*,[33] the surviving ex-wife was only entitled to a portion of the retirement plan of the deceased ex-husband under their divorce judgment. Ex-husband did not change the beneficiary designation prior to his

death. The plan administrator paid all retirement plan proceeds to ex-wife, which she retained. Decedent's estate filed suit against surviving ex-wife for breach of contract (i.e., the consent judgment of divorce), and the trial court granted summary disposition for estate.

On appeal, the surviving ex-wife argued that the divorce judgment allowed the decedent to choose whether to take no action (in which case ex-wife would remain the beneficiary of his retirement plan) or to make a new beneficiary designation (in which case ex-wife would be removed as beneficiary of his retirement plan).[34] The Michigan Court of Appeals rejected this argument. Under Michigan statute, MCL 552.101(4)(a), the parties' divorce judgment was required to "determine all rights ... of the husband and wife in and to ... [a]ny vested pension, annuity, or retirement benefits..." The surviving ex-wife's argument presumed that the divorce judgment had failed to determine her rights in his retirement plans, by leaving it an open question. However, failing to determine ex-wife's interest in decedent's retirement plan would have been contrary to MCL 552.101. "A general rule of construction presumes the legality and enforceability of contracts."[35]

The divorce judgment went into some detail explaining that if an ex-spouse failed to remove the other ex-spouse as designated beneficiary of a retirement benefit plan, then ERISA would require the plan proceeds at death to be paid to the ex-spouse as designated beneficiary under the plan documents, and ERISA would preempt any contrary terms in the divorce judgment. Under that situation, "any provision in the Judgment of Divorce terminating the other party's interest in any work related benefit ... is of no effect."[36] Nonetheless, each ex-spouse agreed that his or her rights in the other's retirement benefit plans were being extinguished under the divorce judgment: "Except as otherwise stated herein, each party shall retain exclusively any retirement benefits to which they are or shall become entitled to due to their employment, and any claim thereto by the other as beneficiary or otherwise is extinguished."[37]

In this case, the divorce judgment's terms regarding employee benefit plans included the following: "[I]t shall be the responsibility of the parties and not the attorneys to affirmatively submit necessary documentation to the plan administrator to change beneficiaries to effectuate the intent of the Judgment. The parties hereby forever release, discharge and hold harmless their respective attorneys from such undertakings."[38] The ex-wife argued that her rights in decedent's employment benefit plans would not be extinguished unless the decedent "affirmatively submit[ted] necessary documentation to the plan administrator to change beneficiaries to effectuate the intent of the Judgment." The appellate court rejected the argument that this language required the decedent to make a new beneficiary designation in order to effectively extinguish the ex-wife's interest in the plan.[39] It is not entirely clear from the decision what the appellate court thought this language meant; perhaps it merely signified that if a new beneficiary designation was to be made, then it would be the responsibility of the litigant who owned the plan rather than the litigant's divorce attorney.

ERISA also has an anti-alienation provision that is violated whenever a state court orders the plan administrator to pay the plan proceeds to someone other than the designated beneficiary. Such a situation was present in *Estate of Meadows v Meadows*.[40] There, the Michigan Court of Appeals reversed the trial court for ordering the plan administrator to pay the proceeds to a party other than the designated beneficiary: "[W]here the trial court's orders directing that ... pension proceeds [payable to ex-wife as designated beneficiary] be paid [instead] to the [deceased ex-spouse's] estate's counsel's trust account [as a sanction for ex-wife fraudulently disposing of real property contrary to terms of divorce judgment,] resulted in the transfer of the legal interest in the pension proceeds to a third party, this violated ERISA's antialienation provision and the

trial court's ... order denying [ex-wife's] motion for relief from judgment should be reversed."[41]

Federal Caselaw Applicable to Michigan

Federal caselaw on this question has evolved significantly over time. In *McMillan v Parrot*,[42] the Sixth Circuit held that ERISA preempted not only a state court divorce judgment contrary to the retirement plan documents, but also state law (Kentucky) regarding whether a waiver had occurred under the terms of the state court divorce judgment. Under the facts of that case, decedent's ex-wife was still designated as the beneficiary of decedent's retirement plans at his death. At the trial court level, the district court "denied summary judgment for [ex-wife] and dismissed her claim to the other half of the plan proceeds, ruling that she had waived her rights as beneficiary by the divorce settlement."[43]

The Sixth Circuit reversed. "The district court appears to have based its decision on state law. This we believe was incorrect" due to ERISA preemption.[44] The Sixth Circuit interpreted ERISA to require that the plan proceeds be paid to the designated beneficiary: "[T]he documents [i.e., the beneficiary designations] control, and those name [ex-wife]."[45] The Sixth Circuit further held that federal, not state, law governed the waiver question, and that the ex-wife had not effectively waived her interest under the divorce judgment. "[T]o be effective, the waiver must specifically refer to the spouse's rights as beneficiary in an ERISA plan. ... The waiver provision in [the parties'] divorce settlement, however emphatic, does not specifically refer to [ex-wife's] interest as beneficiary of these ERISA plans."[46]

The Sixth Circuit's muscular view of ERISA preemption continued in *Metro Life Ins Co v Pressley*.[47] At decedent's death, the proceeds of decedent's employer-provided insurance were claimed both by decedent's ex-spouse (still designated as beneficiary), who had waived all rights to decedent's insurance under the judgment of divorce, and decedent's estate. The insurance company brought an interpleader action in the U.S. District Court for the Eastern District of Michigan. The district court granted the ex-spouse's motion for summary judgment, awarding the plan proceeds to the ex-spouse and ruling that the Michigan statute requiring judgments of divorce to determine a wife's rights in her husband's life insurance policies, MCL 552.101(2), was preempted by ERISA. The Sixth Circuit affirmed, relying on the holding in *McMillan v Parrot.*[48]

In *Hendon v El Dupont De Nemours & Co*,[49] the wife designated her husband as the beneficiary of her employee benefit plans. Subsequently, the couple divorced, and the divorce judgment provided that the ex-husband's rights in the ex-wife's employee benefit plans were extinguished. The ex-wife died weeks after entry of the judgment of divorce. At her death, the ex-husband remained designated as the beneficiary of her employee benefit plans. The plan administrator paid the proceeds to ex-husband. Ex-wife's estate sued the ex-husband and the plan administrator in state court (Tennessee) for breach of contract and conversion. The defendants removed the case to federal court pursuant to ERISA, where both defendants moved for summary disposition, which was granted by the district court in favor of the ex-husband. ERISA preemption was found not only as to the divorce judgment provisions related to the employee benefit plans, but also as to the state court claims for breach of contract and conversion.

On appeal, the Sixth Circuit affirmed. "[A]lthough [decedent's estate] casts [its] claims in state law terms, [its] suit is at bottom a challenge to the beneficiary determination for [decedent]'s ERISA-qualified plans, and this court has repeatedly ruled that the designation of beneficiaries has a connection with or reference to an ERISA plan, preempting state law."[50] "[B]ecause of our previously articulated rule of pre-emption in cases involving disputed beneficiary designations, we hold that the district court did not err in finding that [the estate]'s state law claims were pre-empted by ERISA."[51]

In *Cent States, Se & Sw Areas Pension Fund v Howell*,[52] wife filed for divorce from her husband in Michigan state court, which entered a preliminary injunction to maintain the status quo. After entry of the preliminary injunction, the husband changed the beneficiary of his employer-provided life insurance plan from his wife to his three children from a prior marriage. Then the husband died, resulting in the dismissal of the divorce action. The insurance company that administered the ERISA policy brought an interpleader action in federal court to determine who the policy proceeds should be paid to—wife or children. The district court ruled that the children were entitled to the policy proceeds, because ERISA preempted the state court's preliminary injunction.

On appeal, the Sixth Circuit initially ruled that "the district court correctly concluded that the domestic relations court's order was preempted by ERISA."[53] Then the appellate court considered the wife's argument that she was entitled to imposition of a constructive trust over the policy proceeds because of husband's wrongdoing (violation of the preliminary injunction). The appellate court concluded that "once the benefits of an ERISA employee welfare benefit plan have been distributed according to the plan documents, ERISA does not preempt the imposition of a constructive trust on those benefits."[54] The case was remanded to the district court for consideration of "whether the equities are such that the district court should impose a constructive trust on the ERISA plan proceeds for the benefit of" wife.[55]

Since the Michigan Supreme Court rendered its decision in *Sweebe v Sweebe*,[56] federal courts in Michigan have generally followed its reasoning. In *Brown ex rel Estate of Sanger v Wright*,[57] the U.S. District Court for the Eastern District of Michigan was the first Michigan-based federal court to consider the question, after issuance of the *Sweebe* ruling. There, the personal representative of decedent's estate filed suit in Michigan state court against decedent's ex-wife, alleging that ex-wife had waived her rights in decedent's employer-provided life insurance policy under the couple's judgment of divorce and stating claims including breach of contract. The ex-wife removed the action to federal court and raised the defense of ERISA preemption. There, the decedent's estate moved to remand the case to Michigan state court on the ground that her state claims were not preempted by ERISA.[58]

The district court referenced the *Sweebe* decision with approval: "In a recent case, the Michigan Supreme Court provided a thorough analysis of whether state law claims can be used to challenge a plan beneficiary's right to keep the proceeds of an ERISA plan. Faced with facts that closely resemble those present in this matter, the Court held that 'while a plan administrator is required by ERISA to distribute the proceeds from a plan to a named beneficiary, the named beneficiary can then be found to have waived the right to retain the distributed proceeds.'"[59]

Ex-wife argued that the estate's state law claims were preempted "because the plan administrator has not yet distributed the plan proceeds," citing *Metro Life Ins Co v Pressley*[60] and *McMillan v Parrott*.[61] Rejecting this argument, the district court ruled that *Pressley* and *McMillan* stood for the proposition that the ex-spouse/designated beneficiary was entitled to receive (rather than retain) the plan proceeds (overlooking *Pressley*'s holding that ERISA preempted state law of waiver). "In both cases, the Sixth Circuit found that the former spouse, as the beneficiary of the plan, was entitled to receive the proceeds of the plan. This is not the issue presented here. [Personal representative] concedes that [ex-wife] is entitled to receive the proceeds of [decedent]'s life insurance policy under the terms of the plan. The question presented here is whether [ex-wife] is entitled to keep those proceeds."[62] Ultimately, the district court followed the *Sweebe* rule: "Causes of action challenging a beneficiary's right to keep ERISA plan proceeds [once distributed] do not interfere with the administration of the ERISA plan. They deal only with the rights of the plan beneficiary and, there-

fore, do not 'relate to' the ERISA plan."[63] Accordingly, finding that ERISA preemption was not implicated, the district court granted the motion to remand to Michigan state court.

An interesting procedural issue arose in *Terry v Metro Life Ins Co.*[64] This case presented the classic fact pattern under consideration, except that the ex-spouse beneficiary failed to participate in the litigation (i.e., she never answered the complaint, filed an appearance, or responded to any other filing in the matter). The district court ruled that the insurance policy proceeds were properly payable to the ex-spouse beneficiary, but that decedent's estate was entitled to imposition of a constructive trust over the insurance policy proceeds. Accordingly, the district court ordered the insurance company to pay the proceeds to the Court's registry for the benefit of ex-spouse beneficiary and gave ex-spouse beneficiary 30 days to make a claim to the proceeds. If no claim was made by ex-spouse beneficiary within 30 days, then the Court ruled that it would enter judgment for decedent's estate and release the funds to decedent's estate.[65]

In *Metropolitan Life Ins Co v Flusty*, 545 F Supp2d 624 (ED Mich 2008), decedent's ex-wife remained designated as the beneficiary of his employer-provided life insurance policy at his death, notwithstanding the parties' judgment of divorce extinguishing ex-wife's rights in decedent's insurance policies. It was undisputed that ex-wife was entitled to have the insurance benefits paid to her. "The law in the Sixth Circuit is clear: the Plan administrator must pay the named beneficiary on an ERISA-regulated plan the plan benefits."[66] The only question was whether ex-wife was entitled to retain the benefits, once distributed. The district court noted that *Sweebe* governed ex-wife's right to retain the benefits. Ex-wife unsuccessfully attempted to distinguish her case (involving a default judgment of divorce, after the decedent was defaulted) from *Sweebe* (involving a consent judgment of divorce), but the district court disagreed: "This Court rejects [ex-wife]'s attempt at distinguishing between a consent judgment and a default judgment. ... [Ex-wife] cannot now contend that she should not be bound by the language in the judgment of divorce, a judgment that she sought and obtained."[67]

Ex-wife also argued that her waiver under the divorce judgment was not "explicit" as required by *Sweebe*. Again, the district court disagreed. "'Explicit' means that the divorce decree is not completely silent on the issue of insurance proceeds.'"[68] "[T]he Court finds that under Michigan law [ex-wife] explicitly waived her right to any of the [d]ecedent's life insurance proceeds when she obtained a divorce judgment that 'extinguished' any rights she had in her then husband's life insurance policies."[69] Accordingly, the district court granted summary judgment to decedent's estate on its cross-claim against ex-wife.

Over time, federal decisions considering this fact pattern have generally abandoned consideration of the federal common law of waiver in favor of Michigan state law of waiver. Hence, in *Union Sec Ins Co v Alexander*, the U.S. District Court for the Eastern District of Michigan ruled: "'[W]hether a named beneficiary who waives her right to life insurance proceeds pursuant to a judgment of separate maintenance or divorce may retain the funds 'is a state law issue governed by the Michigan Supreme Court decision in *Sweebe v Sweebe*.'"[70]

Conclusion

This is an extremely common fact pattern. The sheer volume of these cases is notable, and it is likely that the probate litigation practitioner will eventually be retained by either a decedent's estate or an ex-spouse in a feud over ERISA plan benefits. There is something rather poignant about all these divorced persons leaving their ex-spouses designated as beneficiaries on their benefit plans.

Does this caselaw have any relevance for the decedent who leaves his ex-spouse designated as beneficiary of a non-ERISA benefit plan? Po-

tentially yes. Without ERISA, there is no federal statutory requirement that the benefits be paid in accordance with the most recent beneficiary designation. The ex-spouse who has waived all rights in the benefit plan under a divorce judgment might not be entitled to receive or retain the benefits after the death of the plan participant. However, if the plan documents require payment to the ex-spouse designated beneficiary, then the same waiver analysis would apply, supporting the duty of the ex-spouse to remit the benefits upon receipt to the decedent's estate.

Notes

1. 29 USC 1001 *et seq*.
2. 9 Mich App 305, 156 NW2d 581 (1967).
3. *Daugherty*, supra, 9 Mich App at 317.
4. 246 Mich App 155, 631 NW2d 349 (2001).
5. *Thomas*, supra, 246 Mich App at 161-162.
6. *Id.* at 159.
7. *Id.* at 160.
8. 260 Mich App 280, 286, 677 NW2d 889 (2004).
9. *MacInnes*, supra, 260 Mich App at 286, quoting *Melton v Melton*, 324 F3d 941, 945 (7th Cir 2003).
10. 266 Mich App 96, 700 NW2d 414 (2005).
11. *Moore*, supra, 266 Mich App at 98.
12. 474 Mich 151, 712 NW2d 708 (2006).
13. *Sweebe*, supra, 474 Mich at 173.
14. *Id.* at 154-155 (internal citations omitted).
15. *Id.* at 152.
16. *Id.* at 156.
17. *Id*.
18. *Id*.
19. *Id.* at 159.
20. *Id*.
21. No 285509, 2009 WL 2952682 (Mich Ct App Sept 15 2009) (unpublished).
22. *Brown*, supra, 2009 WL 2952682 at *1 (affirming trial court's grant of plaintiff estate's motion for summary disposition, ordering that defendant turn over insurance proceeds to plaintiff estate).
23. 293 Mich App 168, 174, 810 NW2d 284 (2011).
24. *Reed*, supra, 293 Mich App at 174, quoting *MacInnes v MacInnes*, 260 Mich App 280, 287, 677 NW2d 889 (2004), quoting *Melton v Melton*, 324 F3d 941, 945 (7th Cir 2003).
25. *Id.* at 174, quoting *MacInnes v MacInnes*, 260 Mich App 280, 287, 677 NW2d 889 (2004).
26. *Id*.
27. *Id.* at 181.
28. No 307033, 2012 WL 5258296 (Mich Ct App Oct 23 2012) (unpublished).
29. *Id.* at *3 (remanding for further proceedings).
30. 314 Mich App 587, 887 NW2d 807 (2016).
31. As of the date of this decision, MCL 552.101 provided: "Each judgment of divorce or judgment of separate maintenance shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the husband in which the wife was named or designated as beneficiary, or to which the wife became entitled by assignment or change of beneficiary during the marriage or in anticipation of marriage. If the judgment of divorce or judgment of separate maintenance does not determine the rights of the wife in and to a policy of life insurance, endowment, or annuity, the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates. However, the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice, by or on behalf of the insured or the estate of the insured, 1 of the heirs of the insured, or any other person having an interest in the policy, of a claim under the policy and the divorce." Subsequently, the statute was substantially revised, effective March 22, 2017.
32. *Lett*, supra, 314 Mich App at 590, 596.
33. No 324438, 2016 WL 555859 (Mich Ct App Feb 11 2016) (unpublished).
34. *Id.* at *5.
35. *Id.* at *6.
36. *Id.* at *2.
37. *Id*.
38. *Id*.
39. *Id.* at *5.
40. 2019 WL 637289, * 10 (Mich Ct App Feb 14, 2019) (unpublished).
41. *Meadows*, supra, 2019 WL 637289 at *10.
42. 913 F2d 310 (6th Cir 1990).
43. 913 F2d at 311.
44. *Id*.
45. *Id.* at 312.
46. *Id.* (reversing denial of ex-wife's motion for summary judgment and on rehearing remanding for further proceedings).
47. 82 F3d 126 (6th Cir 1996).
48. 913 F2d 310 (6th Cir 1990).
49. No 96-6233, 1998 WL 199824145 (6th Cir 1998) (unpublished).
50. *Hendon*, supra, 1998 WL 199824145 at *3.
51. *Id*.
52. 227 F3d 672 (6th Cir 2000).

53. *Id.* at 678.
54. *Id.* at 678-679.
55. *Id.* at 679.
56. 474 Mich 151, 712 NW2d 708 (2006).
57. 511 FSupp2d 850 (ED Mich 2007).
58. *Id* at 850
59. *Id* at 852, quoting *Sweebe v Sweebe*, 474 Mich 151, 160, 712 NW2d 708 (2006).
60. 82 F3d 126 (6th Cir 1990).
61. 913 F2d 310 (6th Cir 1990).
62. *Id.* at 853 (internal citations omitted).
63. *Id*.
64. No 09-13759, 2010 WL 3805761 (ED Mich Sep 23 2010) (unpublished).
65. *Id.* at *4. Accord *Hillman v Russell*, No 1:07-cv-1197, 2008 WL 1453633, *2 (WD Mich Apr 10 2008) (unpublished).
66. *Id.* at 627-628.
67. *Id.* at 629.
68. *Id*.
69. *Id.* at 630.
70. 2011 WL 5199918 (ED Mich Nov 2 2011), quoting *Metro Life Ins Co v Flusty*, 545 F Supp 2d 624, 628 (ED Mich 2008).



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2025 Legislative Update

By Howard H. Collens and Nathan R. Piwowarski

Introduction

The legislative update in the Summer 2024 issue of the *Michigan Probate & Estate Planning Journal* focused on the Probate and Estate Planning Section's legislative initiatives. This update recaps the 2023-2024 legislative session and summarizes the bills introduced in the first four months of the new 2025-2026 session.

Public Acts

Uniform Partition of Heirs Property Act

The Uniform Partition of Heirs Property Act, enacted in Michigan as **Public Act 215 of 2024** (HB 4924)[1] amends MCL 600.3304 and introduces a new chapter to the Revised Judicature Act. It is designed to protect co-owners of inherited property from abusive or speculative partition actions that might force a sale against their will. The act:

1. Provides specific procedures and protections for partition actions involving heirs' property;
2. Ensures fair market value assessments of the property;
3. Grants co-owners the right to buy each other out before the property is sold on the open market;
4. Gives the party who has requested a partition by sale the option to buy out the other owners only after the persons not requesting the sale have had an opportunity to exercise their options; and,
5. Requires a sale, if necessary, to be conducted in a commercially reasonable manner.

These protections apply only to "heirs property," which satisfies all the following traits:

1. It is not the subject of a joint ownership agreement;
2. One or more of the co-tenants acquired title from a relative; and,
3. There is a qualifying concentration of ownership—either (a) at least 20 percent of the fractional interests are owned by relatives, (b) at least 20 percent of the fractional interests are held by individuals who acquired title from a relative, or (c) at least 20 percent of the co-owners are relatives.

The act became effective on March 28, 2025. This proposal was an initiative of the Probate and Estate Planning Section.

Assisted Reproduction and Surrogacy Parentage Act

Public Act 24 of 2024 (HB 5207) established the Assisted Reproduction and Surrogacy Parentage Act and repealed the Surrogate Parenting Act.[2] The act authorizes commercial surrogacy agreements. Its eight sister bills modify the rules for establishing parentage in Michigan. The nine-bill package likely deserves significant treatment beyond what can be provided here—this article is limited to the package's direct impact on probate practice.

Public Act 27 of 2024[3] (2023 HB 5210) amends section 2114 of EPIC to address intestate succession rights for children conceived through assisted reproduction or surrogacy. It clarifies that these children are recognized as heirs of their intended parents, if specific legal criteria are met. These principles apply regardless of the child's age or whether the parent has died, provided a court establishes parentage. The act deleted language establishing the presumption of parentage of a child born to married parents. Finally, the new act provides a different treatment of situations where a natural parent has not openly treated a child as their own. Under prior law, inheritance from or through a child by either natural parent *or that parent's rela-*

tives ("kindred") was precluded if the natural parent had not openly treated the child as theirs or had refused to support the child. Now, in cases where the natural parent has not openly treated the child as theirs or has refused to support them, inheritance from or through the child is precluded for that parent or *the child's* relatives. 2024 PA 27 took effect on April 1, 2025. The Section supported this legislation.

Changes to Penalty for Failure to File a Property Transfer Affidavit

Public Act 97 of 2024[4] (SB 0175) amended the General Property Tax Act to increase the fines imposed for a new owner failing to timely file a property transfer affidavit within 45 days of the transfer of ownership. The penalty rate remains $5 per day. The penalty for a buyer whose property is owned and occupied by the owner as a principal residence remains $200. For all others, the maximum fine increases to $4000. The penalty is a lien against the property if the property is still owned by the person who failed to submit the property transfer affidavit. If the property subsequently transfers to another owner who does properly file the property transfer affidavit, the unpaid penalty becomes a personal obligation of the person who failed to file.

Real Estate Instrument Fraud—Definition and Penalties

Public Acts 154 and 155 of 2024[5] (HB 5598 and 5599) strengthen Michigan's laws against fraudulent real estate conveyances, imposing stricter penalties and expanding the scope of prohibited activities. Under prior law, it was a crime to procure or record an instrument designed to mislead a person as the grantor's identity. The crime now includes conveyances intended to deceive another person as to the veracity of the document, as well as any document intended to defraud the owner of real estate or the owner of an interest in real estate.

One Time Tax Credit for Organ Donation

Public Act 156 of 2024[6] (HB 4361) amends the Income Tax Act to create a one-time tax credit for unreimbursed live organ donation expenses incurred during the tax year, the year prior, or the year after the live organ donation. The credit is up to $10,000. Verification of the expenses must be submitted. The types of expenses that may be reimbursed include travel, lodging, lost wages, or childcare expense.

Taxation of Converted Entities

Public Act 177 of 2024[7] (SB 1050) amends the Income Tax Act. Under this technical act, the Income Tax Act now requires that a person who converted an entity to an LLC be treated as a corporation for purposes of the act unless that converted entity was a disregarded entity for Federal income tax filing purposes *and* its regarded owner was treated as a corporation for state and federal income tax purposes.

Name Change Procedures

Public Act 229 of 2024[8] (HB 5300) and **Public Act 230 of 2024**[9] (HB 5303) modify the rules governing name changes. Of some note to probate practitioners are the lightened procedural and substantive burdens an applicant bears when applying for a name change.

Notable Pending Bills

Transfers of Agricultural Land to Foreign Entities

Senate Bill 10 of 2025[10] as well as **HB 4233** and **HB 4234**[11] would restrict the transfer of agricultural land to foreign entities. The bill aims to protect Michigan's agricultural resources by placing limitations on foreign ownership or control of farmland within the state. Senate Bill 10 was referred to the Senate Committee on Government Operations. House Bills 4233 and 4234 were referred to the House Committee on Government Operations.

Patient Advocates' Power to Withdraw Life-Sustaining Treatment

Senate Bill 33 of 2025[12] would remove the statutory restrictions on a patient advocate's ability to withdraw life-sustaining treatment for a pregnant patient. This bill had been introduced during the prior legislative session.[13] This bill was referred to the Senate Committee on Housing and Human Services and has been favorably reported out of Committee.

Personal Information and Physical Safety Protections for Judges, Their Families, and Household Members

Senate Bill 82 of 2025[14] would create the Judicial Protection Act to permit a judge to request that a public body or person remove the judge's or the judge's family's personal identifying information. The public body or person receiving the request would have to remove already posted personal information within five business days of receiving the request. The act would include an enforcement mechanism allowing the judge or judge's family member to bring a civil action if the public body or person did not comply with a request for the information to be removed. The act enumerates exceptions to its application. This bill has passed the Senate and is currently referred to the House Judiciary Committee.

Elder Exploitation

1. A reintroduced set of loosely related bills aims to expand protections and resources available to elders and vulnerable adults.
2. **Senate Bill 111 of 2025**[15] would amend the Revised Judicature Act to create a new form of personal protection orders that are tailored to situations in which a vulnerable or elderly person is being exploited or harassed. Unlike existing PPOs, which focus on contact between the petitioner and respondent, the proposed elder PPOs would allow the court to enjoin the respondent from harming the petitioner or their property. These proceedings would be held in circuit court, but they would be transferred to probate court when the person entitled to protection is already under the protective jurisdiction of the probate court.
3. **Senate Bill 112 of 2025**[16] would amend the Michigan Penal Code to expand the definition of "racketeering" to include obtaining or using or attempting to obtain or use a vulnerable adult's money or property through fraud, deceit, misrepresentation, coercion, or unjust enrichment.
4. **Senate Bill 113 of 2025**[17] would amend the Michigan Penal Code to make it easier to institute or continue criminal charges for fraudulently using a vulnerable adult's money or property, even after the victim has died. It also would allow the court, when imposing penalties, to aggregate the value of all properties appropriated before and after the victim's death.
5. Finally, **Senate Bill 114 of 2025**[18] would authorize counties to create multidisciplinary teams to combat vulnerable adult abuse.

This package of bills was favorably reported out of the Senate Civil Rights, Judiciary, and Public Safety Committee and is now being considered by the Senate as a whole.

Legal Notice Publication Fees—Removal of Sunset for CPI Adjustment

SB 147 of 2025,[19] if enacted, would permanently allow for inflation adjustments to maximum publication fees. Without SB 147, the statute's CPI adjustment provision expires on March 1, 2025. This bill has been referred to the Senate Civil Rights, Judiciary, and Public Safety Committee.

Uniform Premarital and Marital Agreements Act

Senate Bill 160 of 2025[20] is a reintroduced version of **Senate Bill 809 of 2024**,[21] which would adopt a materially modified version of the "Uniform Premarital and Marital Agreements Act" in Michigan. This legislation aims to standardize the enforcement of premarital (prenuptial) and marital (postnuptial) agreements, providing clear guidelines for their validity and execution. Notably, the proposal significantly alters the uniform act so that the controversial *Allard* decision[22] would remain good law. SB 809 crossed over to the House by the end of the 2024 legislative session. The Probate and Estate Planning Section opposes this bill as drafted. The bill was developed and supported by the Family Law Section. This bill has been referred to the Senate Civil Rights, Judiciary, and Public Safety Committee.

Freeze of Taxable Value for Primary Residences of Certain Senior Citizens

Senate Bill 192 of 2025[23] would exempt from tax the primary residence of a person with modest income, who has (1) attained the age of 63and who has continuously used the property as their primary residence for at least the immediately preceding 10 years, or (2) who has continuously used the property as their primary residence for at least the immediately preceding 30 years. The total gross income of the individual and all the members of the individual's household can collectively be no greater than $40,000. Notably, the exemption would apply to a property that is the person's "primary residence," as opposed to their "principal residence." Relatedly, the occupant would need not be the owner; instead, certain close family members could own the property. This bill has been referred to the Senate Committee on Insurance, Finance, and Consumer Protection.

Transfer-of-Ownership Rules

As usually is the case, the Legislature is considering bills concerning Michigan's complex transfer-of-ownership ("uncapping") rules. **House Bill 4110 of 2025**[24] aims to better educate prospective real estate buyers of their likely tax burden after the property's taxable value "uncaps." It would require that a seller disclosure statement identify what the property's yearly tax burden would be, based on its current assessed value. **House Bill 4014 of 2025**[25] would expand the "close family" uncapping exemption to include grandparents, sons-in-law, and daughters-in-law in-law transferees. HB 4110 has been referred to the House Committee on Regulatory Reform. HB 4014 has been passed by the House and referred to the Senate Committee on Finance, Insurance, and Consumer Protection.

Unitrust Act (Conversion)

House Bill 4033 of 2025[26] is the reintroduced unitrust conversion bill, House Bill 5110 of 2023.[27] HB 4033, which would create the "Unitrust Act," aims to provide fiduciaries with the flexibility to manage trusts by converting traditional income trusts into unitrusts and vice versa. This conversion allows for a more predictable distribution to beneficiaries by setting a fixed percentage of the trust's value as the annual payout, rather than relying solely on income generated by the trust's assets. The act would require that the trustee give at least 30 days' notice to the qualified trust beneficiaries before converting a trust. If no qualified trust beneficiary objects within this period, the trustee may engage in the conversion. This bill had progressed to the Senate by the end of the prior session and, as of this writing, is set for an early-in-session committee hearing. The Probate and Estate Planning Section developed and supported this bill. HB 4033 has been referred to the House Judiciary Committee.

Uniform Statutory Rule Against Perpetuities

A technical piece of estate planning legislation, **House Bill 4034 of 2025,**[28] offers clarifying amendments to the Uniform Statutory Rule Against Perpetuities. This bill was also considered in the prior session as HB 4864 of 2023.[29] HB 4034 has been referred to the House Judiciary Committee.

Homestead Property Tax Credit Financial Thresholds

House Bill 4088 of 2025[30] would provide inflation adjustments to a key financial threshold for the property tax credit that some may claim on their Michigan income tax returns. The "Homestead Property Tax Credit" is calculated by comparing the property taxes assessed against the total household resources of the claimant.

In addition to residency and a "total household resource" requirement, the taxable value of the homestead upon which the taxpayer makes the claim must be under a statutory ceiling. The CPI-adjusted statutory ceiling for 2024, for example, is $160,700. This bill would increase the pre-CPI-adjusted base for this ceiling to $196,500. This bill has been referred to the House Finance Committee.

Jury Procedures

A legislative package, **2025 HBs 4091**,[31] **4092**,[32] **4093**,[33] and **4094**,[34] would eliminate local jury boards, change administrative aspects of the jury selection process, as well as substantive courtroom practice, including the rules governing disqualification of potential jurors on account of their protected status or a prior criminal conviction. These bills have been referred to the House Judiciary Committee.

Tax Tribunal Procedures

Two bills would update the Tax Tribunal's rules. **House Bill 4098 of 2025**[35] would authorize the Tribunal to hold electronic hearings. **House Bill 4099 of 2025,**[36] tie-barred to **HB 4098,**[37] would permit electronic tax tribunal hearings under the Open Meetings Act. These bills have both passed in the House and have been referred to the Senate Committee on Finance, Insurance, and Consumer Protection.

For More Information

Those interested in tracking bills' progress may navigate to http://www.legislature.mi.gov. The Michigan Legislature website offers a bill search feature for the current and past legislative sessions. It is also possible to set email alerts for legislative topics of interest through the Legislature's free notification service at https://www.legislature.mi.gov/Account/SignUp.

The Probate and Estate Planning Section's public policy positions are published at http://connect.michbar.org/probate/reports/policy.

Notes

1. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-4924.
2. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-5207.
3. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-5210.
4. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-SB-0175.
5. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2024-HB-5598; https://www.legislature.mi.gov/Bills/Bill?ObjectName=2024-HB-5599.
6. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-4361.
7. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2024-SB-1050.
8. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-5300.
9. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-5303.
10. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0010.
11. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4233; https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4234.
12. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0033.

13. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0033.
14. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0082.
15. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0111.
16. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0112.
17. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0113.
18. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0114.
19. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0147.
20. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0160.
21. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2024-SB-0809.
22. *Allard v Allard*, 318 Mich App 583, 899 NW2d 420 (2017) addressed the enforceability of premarital agreements and the extent to which such agreements can limit a trial court's equitable discretion under Michigan law.
23. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-SB-0192.
24. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4110.
25. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4014.
26. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4033.
27. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-hB-5110.
28. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4034.
29. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-4864.
30. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4088.
31. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4091.
32. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4092.
33. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4093.
34. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4094.
35. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4098.
36. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4099.
37. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4098.



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SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

All Section Members Are Welcome

Date	Place
June 13, 2025	University Club, Lansing
September 12, 2025*	University Club, Lansing

*Annual Meeting

Each meeting starts with the Committee on Special Projects at 9:00 a.m., followed by the meeting of the Council of the Probate & Estate Planning Section, except for the Annual Meeting of the Section, which is held in September. At the Annual Meeting, the Committee on Special Projects will start at 9:00 a.m., followed by the Annual Meeting of the Section at approximately 10:00 a.m., which will then be followed by the September Council meeting.

Remote participation is available by Zoom. If you intend to dial-in, please register in advance. Links can be found on the Section's website at https://connect.michbar.org/probate/events/schedule.