

# MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

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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.

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria. Manuscripts and letters should be sent to Nancy L. Little, Managing Editor, *Michigan Probate and Estate Planning Journal*, Bernick, Radner, Ouellette & Little, P.C., 2400 Lake Lansing Rd., Ste. F, Lansing, MI 48912, (517) 371-5361, fax (517) 371-1211, e-mail [nlittle@borpc.com](mailto:nlittle@borpc.com).

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## From the Desk of the Chairperson

By Amy N. Morrissey



I'm writing this column, my final as Chair of the Section, on the heels of the 55<sup>th</sup> Annual Probate & Estate Planning Institute in Acme. While each seminar that our Section co-sponsors with ICLE is an exceptionally valuable learning opportunity, my favorite is the

Institute. It is the culmination of a year's activity, a reflection on the year's legislation and case law, a discussion of current activities, and forward-looking thoughts about changes we may anticipate in our profession. But more than that, whether you attend in Plymouth or Acme, it is an opportunity to meet other practitioners from around the state and to hear about their practices and experiences.

This year, a new Membership Committee was created for the Section. Its mission is to strengthen relations with Section members, encourage new membership, and promote awareness of and participation in Section activities. The Committee has far exceeded my expectations for its first year. An event in furtherance of this mission was held in May at the offices of Smith, Haughey, Rice & Roegge in Traverse City. This well-attended event is anticipated to be the precursor of more networking events. Through this outreach, and the Section's "join a committee" link, the active participation of Section members in the work of the Section has increased. There are many opportunities for member involvement in the Section.

While the work accomplished is significant, there is always much to be done. The Section continues to monitor legislation concerning fiduciary access to digital assets, probate appeals, and domestic asset protection trusts. We continue work on modernizing Michigan's law in several areas, including increased planning opportunities for our clients and matters of succession

as it relates to artificial reproductive technology. The Section also continues to work to further education of the public through the efforts of the Section's Citizen's Outreach Committee.

I'd like to thank all of the individuals with whom I have had the opportunity to work over the past year—council members, committee members, section members, our partners in education and advocacy, and every individual who works to further the mission and the efforts of the Section. I'm confident that this good work will continue with the incoming leadership.

I look forward to seeing you in the Fall as we hold our Section Annual Meeting and resume our regular Section meetings on Saturday, September 12, 2015 at the University Club of Michigan State University in Lansing.

## Binding Third Parties in Probate Court: “Proceedings” Verses “Civil Actions”

By Alan A. May and Tracy L. Feliksa

Can the fiduciary of an estate or trust under the jurisdiction and supervision of the probate court bind a non-party of interest using a “proceeding” as distinguished from a “civil action” filed in the probate court?

The authors have tried to bind insurance companies for personal protection insurance (“PIP”) benefits under the Michigan No-Fault Act using a “*Petition to Allow Account of Fiduciary*.” Some fiduciary fees incurred by the estate of protected individuals are considered allowable expenses under Michigan’s no-fault law.<sup>1</sup> When settling annual accounts of fiduciary with the probate court, the authors have requested an order for payment of such fees by the responsible insurance carrier. In such cases, the insurer is listed as an interested party, is served a copy of the petition and the account, and is given notice of the hearing regarding the account. Using this form of pleading (“*Petition to Allow Account of Fiduciary*”), the author has successfully obtained orders against insurance companies for payment of certain fiduciary fees owed to the estate.

Recently, when one an insurer who was so served failed to object to the author’s account or to appear at the hearing on the matter, the judge allowed the account, but he cautioned that there might not be personal jurisdiction over the third-party insurance company. Other judges have adjourned the hearing and asked the author to plead the claim against the insurer using a “Complaint” in probate court rather than a “Petition”. Still other judges have allowed the claim to be brought in a petition against the insurer, separate from the fiduciary’s “*Petition to Allow Account*.” Which pleading practice is correct?

### Probate Court Jurisdiction: Proceedings Verses Civil Actions

With few exceptions, the probate court has *exclusive* jurisdiction over proceedings that con-

cern a guardianship, conservatorship, or protective proceeding.<sup>2</sup> Exclusive jurisdiction extends also to proceedings to “require, hear, or settle the accounts of a fiduciary... .”<sup>3</sup> Additionally, the probate court is given *concurrent* jurisdiction to (among other things) “hear and decide a contract proceeding or action by or against an estate, trust, or ward.”<sup>4</sup> The policy for granting concurrent jurisdiction to the probate court is stated right in the statute itself: “The underlying purpose and policy of this section is *to simplify the disposition* of an action or proceeding involving a decedent’s, a protected individual’s, a ward’s, or a trust estate *by consolidating* the probate and other related actions or proceedings in the probate court.”<sup>5</sup> (Emphasis added).

Certain actions over which the probate court has concurrent jurisdiction, if they are brought in the probate court, *must* be titled as civil actions and commenced by filing a Complaint. One such action is “any action against another commenced by a fiduciary or trustee.”<sup>6</sup> A fiduciary’s action on behalf of a protected individual’s estate for fiduciary fees claimed under Michigan’s No-Fault Act fits this definition. This court rule requiring such actions to be brought as a civil action if brought in the probate court seems to restrict the statute’s stated goal of “simplifying disposition” and “consolidating” the probate and other related actions or proceedings in the probate court. While a *Petition* to allow an account of a fiduciary and a *Complaint* against a No-Fault insurer can both be brought in the probate court, they certainly are not *consolidated* if one must be brought as a “proceeding” using a *Petition* and the other must be brought as a “civil action” using a *Complaint*.

Indeed, the rule defining the parties who are interested in a *proceeding* for the examination of a fiduciary’s account, seems to contemplate that third parties such as no-fault insurers will be



parties to such proceedings. MCR 5.125(C)(6) states in part, “The persons interested in a proceeding for examination of an account of a fiduciary are the: ... (h) in all matters described in this subsection (6), any person whose interests would be adversely affected by the relief requested, including a claimant or an *insurer* or surety who might be subject to financial obligations as a result of the approval of the account.” (Emphasis added).

Disharmony between statutory expansion of the probate court’s jurisdiction and a court rule was at issue in *Spears v NBD Bank, NA (In re Gordon Estate)*, 222 Mich App 148, 564 NW2d 497 (1997). A caretaker’s Petition against a decedent’s estate for allowance of a disputed claim was dismissed because the action was not brought by use of a Complaint as mandated by the court rule MCR 5.101(C). At the time, a statute existed allowing such a claim to be brought by either a Petition or a Complaint. To resolve the conflict, the court looked to whether the court rule or the statute at issue violated any jurisdictional issues or substantive legislative policy consideration. Because it found no such violation, the court held that the court rule governed the procedure to be followed by a claimant upon his claim being disallowed by a personal representative.<sup>7</sup>

At the time of the court’s decision, the purpose for the probate court’s current jurisdiction as stated in the applicable statute was “to simplify the probate of estates and the disposition of actions or proceedings involving estates of decedents, estates of wards, and trust estates *by having* the probate and other related actions or proceedings in the probate court,”<sup>8</sup> (emphasis added). Contrast this to the current statute which substitutes the words “by having” with “by consolidating.”<sup>9</sup> Using today’s more clearly defined policy for consolidation, the court might well find that the requirement imposed by MCR 5.101(C) to use a Complaint undermines the legislative goal of simplifying the settlement of estates. If a fiduciary must use a civil action and a Complaint

to recover fiduciary’s fees *owed to* an estate but a separate proceeding and a Petition to allow fiduciary fees *owed by* an estate, then there is not really consolidation.

### Due Process and Civil Procedure Considerations

Despite the requirements of MCR 5.101(C), it is the authors’ experience and caselaw suggests that *Petitions* for fiduciary fees against no-fault insurers are regularly entertained by the probate court. However, a fiduciary bringing such a Petition should be cautious of due process considerations. The rules applicable to civil actions in circuit court are applicable to civil actions filed in the probate court.<sup>10</sup> And unlike commencement of a *proceeding*, commencement of a *civil action* requires proper service of a summons and Complaint (aka “service of process”).<sup>11</sup>

Due Process considerations require that notice be properly served upon a party before that party can be subject to personal jurisdiction.<sup>12</sup> Thus, a fiduciary bringing an action against a third party in probate court using a *Petition* rather than a *Complaint*, runs the risk of dismissal of their claim for lack of jurisdiction due to insufficient process and service of process.<sup>13</sup> Certainly, however, if a no-fault insurer substantively responds to a fiduciary’s petition for fees in its first motion or responsive pleading, then dismissal based on personal jurisdiction, insufficient process, or insufficient service of process is waived.<sup>14</sup>

Notice to meet the demands of Due Process also requires proper pleading. If a fiduciary is asking in the Petition for an Order against an insurer for payment of all or part of a fiduciary’s fees, something more than just a demand for judgment must be made to meet the general rules of pleading.<sup>15</sup> “[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.” *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317, 503 NW2d 758 (1993), citing 1

Martin, Dean & Webster, *Michigan Court Rules Practice*, p 186.

If a fiduciary is going to bring claim against an insurer in the same petition as the fiduciary's *Petition to Allow Account*, all claims should be properly pled in the petition.

The rule to be deduced from the authorities is that an annual or a final account of an executor or administrator is conclusive as to all matters which are before the court and are adjudicated in its allowance, but the order of allowance is not final or conclusive and does not constitute an adjudication in matters which were not before it upon the accounting and which were not considered by the court or passed upon in allowing the account of the executor of the estate.<sup>16</sup>

A Petition that includes a claim against an insurer for payment of fiduciary fees should reference the No-Fault contract under which the claim is made and reference the portion of the Michigan No-Fault Act under which payment of the fiduciary fees are claimed.

Besides personal jurisdiction and process issues, differences in the court rules applicable to civil actions in the probate court and probate proceedings can impact the parties' rights. For example, discovery in probate court proceedings is limited to "matters raised in any petitions or objections pending before the court."<sup>17</sup> Whereas discovery for civil actions in probate court is broader.<sup>18</sup> There is also caselaw to support the idea that necessary joinder rules of general civil actions for do not apply to proceedings by petition in probate court.<sup>19</sup>

Additionally limitations in the probate court as to a right to a jury trial on certain issues is important in the context of actions against no-fault insurance providers for payment of fiduciary fees. The determination of the reasonableness of attorney fees in probate court is generally a matter solely within the discretion of the probate court, without right to jury trial on the matter.<sup>20</sup> But the question of whether fees are reasonable and necessary under the Michigan No-Fault Act<sup>21</sup> is generally one of fact for a jury.<sup>22</sup>

### ***In re Estate of Shields***

In *Shields v State Farm Mut Auto Ins Co (In re Estate of Shields)*, 254 Mich App 367, 656 NW2d 853 (2002), a conservator of a minor's estate filed a "*Petition for Payment of Fees*," after the conservator's annual account had already been heard and approved. The conservator specifically cited Michigan no-fault caselaw to support his claim that State Farm Insurance Company was responsible for the conservator's attorney fees incurred to file his first annual account of conservatorship. State Farm argued that (1) fees claimed were not covered PIP benefits under Michigan no-fault law, (2) the probate court lacked jurisdiction, and (3) the venue was improper because the Conservator should have filed a civil Complaint in *circuit* court instead of filing a Petition in probate court. The lower court found that the conservator's attorney fees related to the filing of the final account were a covered PIP benefit, and the fees were necessary and reasonable.<sup>23</sup>

The Michigan Court of Appeals reversed the lower court and found that the fees were not allowable expenses for the purposes of PIP benefits because the conservator in this case had not been appointed for reasons related to the auto accident.<sup>24</sup> (The conservator had been appointed because the protected individual was a minor, who had settlement proceeds in need of protection). However, the court determined that the probate court clearly had subject matter jurisdiction to determine State Farm's liability for the conservator's legal fees.<sup>25</sup> Michigan grants exclusive jurisdiction to settle the accounts of a fiduciary,<sup>26</sup> and concurrent jurisdiction to "hear and decide a contract proceeding or action by or against an estate, trust, or ward."<sup>27</sup>

While the court agreed that the probate court had subject matter jurisdiction over the claim, it also did not take issue with the fact that the claim against State Farm was brought by a filing a petition in the probate court and not by filing a complaint in the probate court.<sup>28</sup> Presumably,

the court of appeals in *Shields* did not raise the personal jurisdiction issue resulting from insufficient process because State Farm waived that argument by not raising it in their first responsive pleading or motion.<sup>29</sup> Clearly once State Farm filed their response, notice of the claim against them was established. And State Farm's argument that the action should have been filed as a Complaint in *circuit court* was too broad, ignoring the exclusive and concurrent jurisdiction given to the probate court under Michigan law. Thus, in *Shields*, both the lower court and the court of appeals did not take issue with the form of the action (a Petition proceeding) brought by a fiduciary against another (State Farm), ignoring (or at least not commenting on) the court rule requiring such an action to be brought by Complaint, if filed in the probate court.

### Conclusion

The probate court clearly has subject matter jurisdiction to hear claims by a fiduciary against insurance companies for payment of fiduciary fees owed to an estate. However, if such a claim is brought in probate court, the fiduciary should be mindful of the court rule requiring that it must be brought as a civil action using a Complaint. The use of a Complaint rather than a Petition is in tension with the legislative policy of simplifying disposition of estates and consolidation in the probate court of related proceedings and actions regarding estates. Unless the issue of personal jurisdiction is raised by the respondent, the courts often will entertain these actions brought through a petition proceeding in the probate court rather than through a civil action in the probate court. However, until and unless the court rule is changed to conform more closely to the stated legislative policy, the safest course is to bring the action according to the court rule—through a civil action in probate court. If however, the fiduciary proceeds by bringing the action through his *Petition to Allow Account of Fiduciary*, the petition should be drafted to address the due process concern of providing notice “rea-

sonably calculated” to apprise the insurance company of the action.<sup>30</sup> At a minimum, the petition should reference the protected individual's particular insurance contract and the Michigan No-fault Act section under which the fiduciary is claiming fiduciary fees.

### Notes

1. *May v Auto Club Ins Ass'n (In re Estate of Carroll (On Remand))*, 300 Mich App 152, 174, 832 NW2d 276 (2013).
2. MCL 700.1302(c).
3. MCL 700.1302(d).
4. MCL 700.1303(1)(i).
5. MCL 700.1303(3).
6. MCR 5.101(C)(1).
7. *Spears v NBD Bank, NA (In re Gordon Estate)*, 222 Mich App 148, 155, 564 NW2d 497 (1997).
8. MCL 700.22 (repealed by 1998 PA 386, Eff. Apr 1, 2000, MCL 700.8102).
9. MLC 700.1303(3).
10. MCR 5.101(C).
11. MCR 2.101 and 2.102-2.105.
12. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314 (1950).
13. MRC 2.116(C)(1), (2), and (3). See also *Holliday v Townley*, 189 Mich App 424, 426, 473 NW2d 733 (1991).
14. MCR 2.116(D)(1).
15. MCR 2.111(B)(1).
16. *Macenzie v Union Guardian Trust Co*, 262 Mich 563, 586, 247 NW 914 (1933).
17. MCR 5.131(B).
18. MCR 2.302(B).
19. See *Brown v Townsend (In re Brown)*, 229 Mich App 496, 501-502, 582 NW2d 530 (1998) and *Jensen v Rusiecki (In re Estate of Rusiecki)*, No 266145, 2007 Mich App LEXIS 1507 (June 12, 2007) (unpublished).
20. See *In re Estate of Baird*, 137 Mich App 634, 637, 357 NW2d 912 (1984); *In re O'Neill Estate*, 168 Mich App 540, 543, 425 NW2d 133 (1989); and *In re Krueger Estate*, 176 Mich App 241, 248, 438 NW2d 898 (1989).
21. MCL 500.3107(1)(a).
22. *Kallabat v State Farm Mut Auto Ins Co*, 256 Mich App 146, 151, 662 NW2d 97 (2003).
23. *In re Estate of Shields*, Chippewa County Probate

Court, File No. 00-24420-CV: “Petition for Payment of Attorney Fees and Costs,” “Response to Petition for Payment of Attorney Fees and Costs,” Petitioner’s “Memorandum,” “Brief in Support of State Farm Insurance Company’s Response to Petition for Payment of Fees and Costs,” and “Order” dated October 5, 2001. Query: How far can the words “related to” be stretched? The author leaves this for a future discussion).

24. *Shields v State Farm Mut Auto Ins Co (In re Estate of Shields)*, 254 Mich App 367, 370, 656 NW2d 853 (2002) (“...the conservatorship here, and its related costs, did not ‘arise out of’ the accident for which respondent was obligated to provide PIP benefits.”)

25. *Id.* at \*369.

26. MCL 700.1302 (d).

27. MCL 700.1303 (1)(i).

28. *In re Estate of Shields*, Chippewa County Probate Court, File No. 00-24420-CV: “Petition for Payment of Attorney Fees and Costs.”

29. MCR 2.116(C)(1), (2), and (3).

30. Consideration should be given to the idea that, a Respondent’s Due Process rights may be greater if served with a Petition rather than a Complaint. For example, there may be more time to respond to a Petition rather than a Complaint (“A written Response or objections may be served *at any time* before the hearing or at a time set by the court.” MCR 5.108(E)). Emphasis added.



Alan A. May practices in the areas of probate litigation, probate administration, and estate planning. Vice president of the firm, he specializes in guardianships and conservatorships. Until 2001, Mr. May practiced under the firm name of May & May, PC. He serves

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sion. He is a member of the State Bar of Michigan and the District of Columbia Bar. An avid author in the field of probate law, Mr. May also has been a lecturer and instructor for ICLE, the Michigan Trial Lawyers Association, Wayne State University, and Oakland University.



Tracy L. Feliksa is an associate with Kemp Klein Law Firm in Troy, Michigan practicing probate law focusing on trusts, decedents’ estates, guardianships, conservatorships, and fiduciary issues. Tracy has a particular interest in elder financial abuse issues, and she

enjoys working with and advocating for elderly clients. Tracy graduated from Western Michigan University Cooley Law School magna cum laude. While in law school Tracy served as an assistant editor on law review, advocated in court for clients of the Family Law Assistance Project, and provided pro-bono legal assistance in the “Service to Soldiers” and “Immigration Outreach” programs. Her interest in probate matters developed before attending law school during her years working as a senior paralegal in the areas of estate planning, elder planning, probate, real property, and tax resolution. Tracy also has an undergraduate degree in engineering and seven years professional engineering experience.



## Florida's Elective Share for the Surviving Spouse and Its Impact on Non-Florida Beneficiaries

By Raymond A. Harris

Florida recently surpassed New York as the third most populous state in the country behind California and Texas.<sup>1</sup> Everyone is familiar with the term “snowbird,” and many Michigan estate planning attorneys have clients who live in Florida for at least part of the year. However, the increasing number of people declaring Florida as their permanent residence presents traps for the unwary due to Florida's treatment of the elective share for the surviving spouse.

Compared to Michigan, Florida has a very broad elective share scheme. Whereas Michigan residents can disinherit their spouse by using joint property, beneficiary designations, and revocable trusts,<sup>2</sup> it is much more difficult to disinherit a spouse in Florida.

This article will briefly explore the history and operation of Florida's elective share, and the impact that it can have on beneficiaries who reside outside of Florida.

### Background

In 1975, Florida abolished dower and curtesy for surviving spouses. In their place, Florida law provides that the surviving spouse of a Florida resident has the right to a share of the estate of the decedent, known as the “elective share.”<sup>3</sup> The elective share is expressly for the purpose of caring for the surviving spouse. There is no distinction made between a surviving husband and a surviving wife. The elective share is an amount equal to 30 percent of the elective estate.<sup>4</sup> The elective share is in addition to homestead, exempt property, and family allowances.<sup>5</sup>

There are nine categories of assets that compose the elective estate:<sup>6</sup>

- 1) The decedent's probate estate. This includes all property that is subject to estate administration in any state.
- 2) Joint bank accounts, pay on death and transfer on death accounts, and Totten

trusts.

- 3) The fractional interest in property held in joint tenancy and tenancy by the entireties (other than accounts and securities).
- 4) Revocable trusts and revocable transfers.<sup>7</sup>
- 5) Certain irrevocable transfers by the decedent.
- 6) The net cash surrender value of life insurance policies immediately before the decedent's death.
- 7) Pensions and retirement plans.
- 8) Transfers made within one year of the decedent's death, including certain gifts.
- 9) Irrevocable transfers to “elective share” trusts.

Because the assets that comprise the Florida elective estate are so broad, it is helpful to illustrate what is not included. Florida law excludes the following from the elective estate:<sup>8</sup>

- 1) Irrevocable transfers of property made by the decedent before October 1, 1999, and irrevocable transfers made on or after October 1, 1999 but before the date when the decedent married the surviving spouse.
- 2) Transfers of property for which the decedent received adequate compensation.
- 3) Transfers of property made by the decedent with the spouse's written consent.
- 4) Proceeds of an insurance policy on the decedent's life, however payable, in excess of its net cash surrender value.
- 5) Life insurance on the decedent's life maintained under a court order.
- 6) The decedent's half of community property.

- 7) Property that the decedent held in a qualifying special needs trust for the surviving spouse on the date of the decedent's death.
- 8) Property included in the decedent's gross estate for federal estate tax purposes solely because the decedent possessed a general power of appointment.
- 9) Property that constitutes the protected homestead of a decedent whether held by the decedent or by a trust at the decedent's death.

Additionally, each spouse can waive his or her right to the elective share through antenuptial and post-nuptial agreements.<sup>9</sup>

The decedent may specify in his or her will or trust how the elective share is paid to the surviving spouse. Absent such a provision, the order in which property is used to satisfy the share is provided by statute.<sup>10</sup> First, property that passes to the surviving spouse is used to satisfy the elective share. If those assets are insufficient to satisfy the elective share, then the balance is apportioned among the recipients of remaining elective estate assets in the following classes:<sup>11</sup>

**Class 1:** The decedent's probate estate and any revocable trusts created by the decedent.

**Class 2:** Property held in joint bank accounts; pay on death and transfer on death accounts; joint tenancy and tenancy by the entireties; property that passes by beneficiary designation; and previously transferred property.

**Class 3:** All other property interests in the elective estate other than protected charitable interests.

### Example

Assume that a Michigan resident ("Grantor") creates a valid estate plan consisting of a pour-over will and revocable living trust. Grantor and spouse, his second wife, then move to Florida and declare Florida as their domicile. Grantor passes away after two years without ever updating his estate planning documents. Approxi-

mately six months prior to Grantor's death, he gifted \$50,000 each to each of his two adult children. Both children reside in Michigan and are not descendants of spouse.

Following Grantor's death, spouse sends proper notification to the personal representative of her intent to take her elective share. The gifts to the children would fall into category 8 of the elective estate assets and Class 2 of the contribution order. Under the Florida elective share statutes, the children could be liable for contribution if the elective estate is not sufficient. Though practical problems exist for the personal representative to establish that the children have sufficient minimum contacts with Florida to grant personal jurisdiction over them under its long arm statute,<sup>12</sup> the personal representative would be able to file suit in Michigan against them. The spouse would also be able to pursue contribution if the personal representative decided that it would be impractical to do so.<sup>13</sup>

If the personal representative or spouse did file suit in Michigan, the children would most likely argue that Florida's laws do not apply to non-residents who received valid gifts from the decedent outside of Grantor's probate estate. While an analysis of the conflict of laws between Michigan and Florida is beyond the scope of this article, the children could be mired in litigation even if they do ultimately prevail.

This problem could have been avoided had Grantor updated his documents after he changed his domicile to Florida. His revised documents could have specified how the elective share would be paid to his spouse. Grantor also could have created an elective share trust for his spouse or executed a postnuptial agreement. Finally, Grantor could have simply made a joint gift with his spouse to each of the children, which then would have excluded the gifts pursuant to Fla. Stat. 732.2045(c).

### Conclusion

Florida's broad elective share for the surviving spouse can cause unintended consequenc-

es, especially for practitioners familiar with Michigan's comparatively narrow elective share for a surviving spouse. Michigan attorneys whose clients move to Florida should encourage those clients to update or revise their documents to meet their goals while minimizing the impact of Florida's elective share on beneficiaries. This would be especially crucial in second-marriage situations where the surviving spouse might be more likely to pursue out of state beneficiaries for contribution.

### Notes

1. <http://www.census.gov/newsroom/press-releases/2014/cb14-232.html>.
2. MCL 700.2202; *Soltis v First of America Bank—Muskegon*, 203 Mich App 435; 513 Nw2d 148 (1994).
3. Fla. Stat. 732.201.
4. Fla. Stat. 732.2065.
5. Fla. Stat. 732.2105.
6. Fla. Stat. 732.2035(1)-(9).
7. Property held in a revocable trust will not be included in the surviving spouse's elective estate if at the decedent's death: (1) the property was held as a trust asset at all times between October 1, 1999 and date of decedent's death; (2) the decedent was not married to surviving spouse when the property was transferred to the trust; and (3) the property was a non-marital asset immediately prior to decedent's death. FS 732.2155(6).
8. Fla. Stat. 732.2045(1)(a)-(i).
9. Fla. Stat. 732.702.
10. Fla. Stat. 732.2075(1).
11. Fla. Stat. 732.2075(2).
12. The Florida Supreme Court case *Venetian Salami Co v Parthenais*, 554 So2d 499 (1989) is the primary authority for determining when a non-resident would be subject to Florida's long arm statute.
13. Fla. Stat. 732.2145(4).



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## From the Probate Litigation Desk: Fifteen Years of MCL 700.2503 and “Writings Intended as Wills”

By David L.J.M. Skidmore

### Introduction

Effective April 1, 2000, Michigan enacted MCL 700.2503 (entitled “Writings intended as wills, etc.”). The statute provides as follows:

Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

- (a) The decedent’s will.
- (b) A partial or complete revocation of the decedent’s will.
- (c) An addition to or an alteration of the decedent’s will.
- (d) A partial or complete revival of the decedent’s formerly revoked will or of a formerly revoked portion of the decedent’s will.

According to the Reporter’s Comment, MCL 700.2503 “represents a liberalization of the rules governing the recognition of a document as a will or as a writing having testamentary effect.”<sup>1</sup> The Michigan Court of Appeals has described the statutory purpose as follows: “[T]he purpose of the statute is to permit a probate court to overlook technical deficiencies in what clearly stands as a clear, accurate, written statement of the decedent’s testamentary intent.”<sup>2</sup> The Michigan statute is based nearly verbatim on Section 2-503 of the Uniform Probate Code (entitled “Harmless error”).

Over the past 15 years, the Michigan Court of Appeals has construed and applied MCL 700.2503 in eight decisions. This caselaw has considered whether the statute’s clear and convincing evidence standard has been satisfied in particular cases, and what types of evidence may be offered by the proponent of a document under the statute. The caselaw has considered

whether documents reflected testamentary intentions, and whether such intentions were certain or final enough to be enforced. The caselaw has considered whether non-will legal instruments (a trust amendment; a quitclaim deed) could qualify as a document intended as a will or will-related document under the statute. And the caselaw has considered whether various types of defects in will formalities could be overlooked under the saving power of the statute. This article will review Michigan caselaw construing and applying MCL 700.2503 since April 1, 2000.

### ***Korean New Hope Assembly of God v Haight (In re Estate of Smith), 252 Mich App 120, 651 NW2d 153 (2002)***

The *Estate of Smith* decision stands for the principle that the proponent of a defective instrument under MCL 700.2503 may offer extrinsic evidence of testamentary intent.

On April 19, 1999, Kilyon Lee Smith executed her last will. On April 20, 1999, Smith met with her church pastor and his wife. At that meeting, Smith wrote a document in her own handwriting and in the Korean language. The English translation of the handwritten document was: “I want to donate \$150,000 to God in order to build a church. 1999/04/20 Lee, Kilyon (deacon).”<sup>3</sup> The pastor and his wife apparently did not sign the document as witnesses. On May 1, 1999, Smith died.

Smith’s church (standing in for devisee God) petitioned to have the handwritten document admitted to probate as a holographic codicil to Smith’s last will. The beneficiaries under Smith’s will opposed the petition, arguing that the document was not testamentary in nature because it “made no reference to death, a prior will, its effective date, or the intent of Smith that it become effective upon her death, nor was it physically attached to a will.”<sup>4</sup> Instead, the beneficiaries



argued that the document merely expressed a present intent to make a gift that Smith failed to complete during her lifetime.<sup>5</sup>

The beneficiaries moved for summary disposition on the ground that there was no genuine issue as to any material fact, because the handwritten document failed to express any testamentary intent. The church acknowledged “that, on its face, the document at issue fail[ed] to reflect an intent on the part of Smith that the document constitute[d] a testamentary instrument[.]” However, the church argued that the probate court should consider extrinsic evidence as to Smith’s testamentary intent, asserting “that such testamentary intent could be proved with regard to Smith’s creation of the document at issue, including information that Smith was well aware of her imminent death at the time that she created the document.”<sup>6</sup>

The probate court ruled that the handwritten document was not testamentary in nature, and that extrinsic evidence was not admissible to establish testamentary intent. “The probate court concluded that, on its face, the document at issue was not a testamentary instrument;” that the document could not be admitted to probate; and “that extrinsic evidence [would be] relevant only if the document [were] admitted into probate.”<sup>7</sup>

The Michigan Court of Appeals reversed, holding that extrinsic evidence was admissible to establish testamentary intent under either MCL 700.2502 (based on UPC 2-502) or 700.2503 (based on UPC 2-503). Under its holographic codicil theory, the church as proponent should have been allowed to offer extrinsic evidence of testamentary intent, based on the terms of MCL 700.2502(3): “Intent that a document constitutes a testator’s will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator’s handwriting.” Alternately, the church as proponent should have been allowed to offer clear and convincing evidence, including extrinsic evidence, that the handwritten document was intended to constitute a codicil under MCL

700.2503. “[B]y failing to allow for the admission of extrinsic evidence, the court deprived petitioner of the opportunity to make such a showing.”<sup>8</sup>

***In re Cameron Trust, No 257306 (Mich App Nov 29, 2005) (unpublished)***

The *Cameron Trust* decision recognized that MCL 700.2503, by its terms, is limited to wills and will-related documents and does not extend to trusts.

During his lifetime, Bruce D. Cameron created his revocable trust by executing his trust agreement. Cameron subsequently executed his first amendment to the trust agreement. He later made handwritten edits to the trust amendment, changing both the designated successor trustee and the distribution scheme for the named remainder beneficiaries. The probate court enforced the handwritten edits to the trust amendment, and the adversely affected beneficiary appealed.

The Michigan Court of Appeals rejected the appellant’s argument that the “clear and convincing evidence” standard of MCL 700.2503 applied to the handwritten edits to the trust amendment. “That statute applies only to wills. ... Because the Cameron Trust is not a will, MCL 700.2503 does not apply.”<sup>9</sup>

***In re Estate of Berg, No 268584 (Mich App Aug 29, 2006) (unpublished)***

In *Estate of Berg*, MCL 700.2503 preserved a will that failed to comply with the attestation requirements of MCL 700.2502(1). This decision also reflected the use of extrinsic evidence by the document proponent to satisfy the “clear and convincing evidence” standard of MCL 700.2503.

At her death, Shirley Berg left a will dated June 13, 2003. Marilyn Silverstein, the beneficiary under Berg’s prior will but not under the 2003 will, objected to the admission of the 2003 will to probate on various grounds. The probate court granted summary disposition to the proponent of the 2003 will, dismissing Silverstein’s objections.

On appeal, Silverstein argued in part that the

probate court had erred by admitting the 2003 will to probate, because the instrument had not been properly witnessed. The Michigan Court of Appeals agreed that one witness's signature on the 2003 will was defective. "[Witness] Mr. Schulte testified that he signed the will at a separate location [than Ms. Berg's execution] and that he never met or saw Ms. Berg."<sup>10</sup> However, the appellate court ruled that the 2003 will's failure to comply with MCL 700.2502(1) was not fatal to the will's admission to probate, because the instrument qualified as a document intended as a will under MCL 700.2503.

The proponent's evidence consisted entirely of extrinsic evidence—namely, the testimony of the scrivener of the 2003 will. Notably, according to the opinion, the scrivener of the 2003 will—one "Mr. Gracely"—was a non-lawyer engaged in the unauthorized practice of law. Mr. Gracely testified

that Ms. Berg called Mr. Gracely [the scrivener] in June 2003 and told him that she wanted to update her will or complete her estate planning documents. Ms. Berg further explained to Mr. Gracely that she wanted Sue Thomas to be her personal representative and that she wanted to leave her 50 percent of her estate. Ms. Berg also specified that she wanted to leave 50 percent of her estate to the same charities as provided in her previous will. Ms. Berg specifically told Mr. Gracely that she did not want to execute a prior will that included Ms. Silverstein because she had not heard from Ms. Silverstein in two years. Mr. Gracely made the requested changes, and Berg reviewed and approved them one or two days before she executed the will.<sup>11</sup>

"Mr. Gracely's testimony constitutes clear and convincing evidence that Ms. Berg intended for the June 13, 2003, will to be her last will and testament."<sup>12</sup>

***In re Estate of Smoke, No 273114 (Mich App Dec 18, 2007) (unpublished)***

The decision in *Estate of Smoke* reflected reluctance by the courts to deem a document lack-

ing a signature to be the decedent's will.

Clark T. Smoke died on May 3, 2003, survived by his son Timothy, his brother Robert, and his sister Mary. Smoke left a 1977 will that devised his estate (comprised primarily of real property) to his siblings, other than a \$1,000 devise to son Timothy (who was a young child when the will was made). Brother Robert submitted the 1977 will for probate. Son Timothy objected to admission of the 1977 will to probate, on the grounds that Smoke sent letters to his siblings and (now adult) son shortly before his death, in which he expressed a testamentary plan contrary to that in the 1977 will.

Timothy proffered two letters written by Smoke, both of which reflected a dispute between Smoke and his siblings over certain jointly owned real property. The first letter was dated October 14, 2001 and addressed to Smoke's siblings Robert and Mary. In this letter, which was unsigned, Smoke stated: "I am getting older and I want to avoid any problems of being able to devise my share of the 152 acres to my son, Tim Smoke, if I should expire unexpectedly." The second letter was dated May 8, 2002 and addressed to Timothy. In this letter, which was signed only "Dad," Smoke stated, "So, if the land passes to you upon my death be smart, and don't cave into pressure to unload the land for peanuts."<sup>13</sup>

The probate court observed that the purpose of MCL 700.2503 "is to permit a probate court to overlook technical deficiencies in what clearly stands as a clear, accurate, written statement of the decedent's testamentary intent."<sup>14</sup> Applying this construction of the statute, the probate court found that the letters failed to constitute "a clear, accurate, written statement of the decedent's testamentary intent." In particular, the probate court emphasized "the fact that the two letters with purported testamentary effect did not contain decedent's signature, so it was highly unlikely that either of them were intended to carry out the decedent's testamentary wishes."<sup>15</sup> The probate court "found that the lack of signature fatally undermined respondent's reliance

on them as testamentary instruments, because MCL 700.2503 was not intended to remedy such a glaring void in a will's formation."<sup>16</sup>

The Michigan Court of Appeals ruled that that probate court had not erred by declining to admit the letters to probate under MCL 700.2503, although it declined to rule that the statute could never save a will that lacked a signature. "Although we are not in a position to speculate that every document must always bear a signature to be acceptable as a will, the probate court's analysis and ultimate conclusion was amply supported by an examination of the letters presented in this case."<sup>17</sup>

The appellate court simply found that the letters did not reflect certainty as to Smoke's testamentary intentions. "Both letters speak of the demise of the property to respondent from a future, sometimes conditional, perspective."<sup>18</sup> The appellate court agreed that the letters seemed to reflect that Smoke was reconsidering the testamentary scheme set forth in his 1977 will, but such vague reconsideration was insufficient for the letters to constitute a will, without any certainty regarding Smoke's new testamentary plan. "[T]he proponent of the document must demonstrate that the document itself represents a valid and more recent testamentary instrument. ... In other words, it is not enough that a document reflects the decedent's intent to someday make changes to his will, or that it hints that the decedent has long abandoned the intent embodied and formalized in the will, or even that it expresses the decedent's regret about ever making the will in the first place."<sup>19</sup>

***In re Estate of Windham, No 287937 (Mich App Jan 26, 2010) (unpublished)***

The decision in *Estate of Windham* rested on the key distinction between an intention to make a will (enforceable under MCL 700.2503) and an intention to make a draft of a will (not enforceable under MCL 700.2503).

Esther Vera Windham executed her last will on January 17, 2003, under which she devised

her estate to her son, Edward Floyd. She left the original of the will with her attorney and received a copy of the will. Subsequently, Windham made handwritten changes on her copy of the will, by which she crossed out Edward Floyd as sole devisee and wrote in her daughter, Teresa Carr, as sole devisee. Windham died on January 18, 2006.

Daughter Teresa offered the marked-up copy of the will as a purported revocation of the will. The probate court declined to give testamentary effect to the handwritten changes to the will copy, and Teresa appealed. Based on the record, the Michigan Court of Appeals found that the evidence was insufficient to clearly and convincingly show that Windham intended the handwritten changes to be a revocation of the will.

The handwritten changes included comments apparently directed to the attorney-scribener who Windham expected to implement the changes. "These comments appear to relate to Windham trying to organize her thoughts regarding how she wanted the will to read and how she was going to explain the family dynamic and her reasoning for her devise to the person who was going to revise her will. Hence, these comments suggest that she lacked testamentary intent when she marked up her copy of the original January 17, 2003, will and was thinking of this marked-up copy as a draft. Mere drafts of wills are inadmissible to probate."<sup>20</sup>

In fact, Windham had historically revised her estate planning documents in just this way—by making notes on her copies, then giving the notes to her attorney. Therefore, "the trial court did not clearly err by finding that there was not clear and convincing evidence that the marked-up copy of the January 17, 2003, will was a testamentary document resulting in a revocation."<sup>21</sup>

***In re Gentile Trust, No 289809 (Mich App Oct 21, 2010) (unpublished)***

The Michigan Court of Appeals ruled in *In re Cameron Trust*, supra, that MCL 700.2503 only applied to wills or will-related documents, not

trusts. In the *Gentile Trust* decision, the Court of Appeals ruled that a trust amendment could be given effect as a will revocation under MCL 700.2503.

During his lifetime, Samuel Gentile created a revocable trust. Under his first trust amendment dated January 2007, Gentile named John Carlesimo as the sole trust beneficiary. Gentile also had a will that named Carlesimo as the beneficiary of his estate. Under his second trust amendment dated January 1, 2008, Gentile named John Graybill as the sole trust beneficiary, revoking Carlesimo's beneficial interest in the trust. However, Gentile took no separate action to revoke his devise to Carlesimo under his will. Gentile died on January 4, 2008.

The validity of the second trust amendment was litigated by Carlesimo and Graybill. Following trial, the jury determined that the second amendment was valid, and the probate court entered judgment giving effect to the jury's verdict.

Subsequently, Graybill petitioned the probate court for a determination that the second trust amendment operated to revoke Gentile's will to the extent it named Carlesimo as the beneficiary of Gentile's probate estate. The second trust amendment provided that, upon Gentile's death, all the rest residue and remainder of Trust property and estate, including any accumulations and any estate outright of Grantor Samuel Gentile, shall be awarded to John Graybel [sic] of Alaska, and any right, claim or interest that John Carlesimo may have to any of the assets, estate, residue, Trust or accumulations of any kind attributable to Samuel Gentile, shall be terminated and held for naught, and all of said property right, title and interest shall be distributed to John Graybel [sic] of Alaska.<sup>22</sup>

Following an evidentiary hearing, the probate court determined that there was clear and convincing evidence that Gentile intended to leave all of his property (both trust and non-trust assets) to Graybill, and that the second amendment "was intended to effectuate that intent and to revoke any bequests, gifts and appointments

in favor of John Carlesimo."<sup>23</sup> Carlesimo appealed.

The Michigan Court of Appeals held that the probate court did not err in finding that Gentile intended to leave all of his property (trust and non-trust) to Graybill. "[T]he evidence clearly showed that it was the decedent's understanding and intent that when he died, all of his property was to go to Graybill, whether held in trust or not, and that Carlesimo was not to receive anything."<sup>24</sup> The appellate court implicitly concluded that Gentile's intention to leave all of his property to Graybill was automatically tantamount to Gentile's intention to revoke gifts to Carlesimo under his will. That conclusion seems problematic.

First, the record reflected that Gentile may not have even known that Carlesimo was named as the beneficiary under his will. "[I]t appears that the decedent was unaware that Carlesimo was also the named beneficiary in his will, or did not understand the difference between his trust and his will."<sup>25</sup> If Gentile, when he signed the second amendment, did not know that Carlesimo was named as beneficiary under his will, then it is difficult to imagine how Gentile could have specifically intended that the second amendment should revoke the gift to Carlesimo under his will.

Moreover, the record reflected that Gentile's attorney, who drafted the second amendment, did not intend for the second amendment to have any effect on Gentile's will. The appellate court dismissed that fact by stating that only Gentile's intention mattered. "Carlesimo relies on testimony by Nielson [attorney-scrivener] that the second amendment to the trust was not intended to amend or change the decedent's will. However, Nielsen was referring to his own understanding of the purpose of the trust amendment, not the decedent's intent or understanding of the document."<sup>26</sup>

The difficult aspect about the *Gentile Trust* decision is that it seems to dispense with the express statutory requirement that the decedent specifically intended the document to constitute a will revocation, in favor of a general intention



that a specific person not receive any gift upon death through any conceivable means.

***In re Estate of Southworth, No 297460 (Mich App July 5, 2011) (unpublished)***

In *Estate of Southworth*, the Michigan Court of Appeals ruled that a deed could be given effect as a will alteration under MCL 700.2503.

Prior to 2005, Helen Kahle Southworth made her last will, designating Adrian College as the primary beneficiary. In February 2005, Southworth consulted an attorney for estate planning assistance. “The decedent advised that she had a will drafted, but wanted to make one change regarding the disposition of her property. Specifically, the decedent wanted [Charles] Russell to receive her home and the accompanying 160 acres, but retain a life estate for herself.”<sup>27</sup> Russell was Southworth’s longtime friend and neighbor.

Accordingly, the attorney prepared a quitclaim deed “as requested by the decedent.”<sup>28</sup> On February 15, 2005, Southworth executed the deed at her attorney’s office, in the presence of the attorney. Southworth took the original deed with her. She did not deliver the deed to Russell or tell him about the deed. Instead, she put it in her safe at her home, together with her will. The deed was not recorded during her lifetime. It was found in the safe after Southworth died on March 1, 2009.

After Southworth’s death, Russell and Adrian College litigated who owned the residence and 160 acres. “The probate court granted [Russell]’s motion for summary disposition, holding that [Russell] presented clear and convincing evidence that the decedent intended the undelivered deed to be an addition to or alteration of her will in accordance with MCL 700.2503.”<sup>29</sup> The college appealed.

The Michigan Court of Appeals affirmed the probate court’s judgment, based primarily on the affidavit of Southworth’s attorney. “[The attorney] was advised by the decedent that she had a will, but wished to make one change to the disposition of her property. Specifically, she wanted to

convey the residence and acreage to [Russell]. In accordance with that wish, a quitclaim deed was prepared conveying the subject property to [Russell], and the deed at issue was stored with the decedent’s will.”<sup>30</sup>

By way of commentary, *Southworth Estate* seems to have been wrongly decided by both the probate and appellate courts. Southworth told her attorney that she wanted to make a lifetime conveyance of real property to Russell, reserving only a life estate in herself. Accordingly, the attorney drafted a deed making a lifetime conveyance of real property to Russell and reserving a life estate. An inter vivos conveyance by deed (effective during lifetime) is fundamentally different than a testamentary conveyance (effective upon death).

Based on the decision, there was little evidence in the record that Southworth wanted to make a testamentary gift to Russell. While Southworth did say she wanted to make one change to her will, that statement coming from a layperson likely meant, “I want to make a lifetime conveyance of certain real property to Russell, which will change how much Adrian College receives under my will.” The decision is problematic.

***In re Leach, No 304688 (Mich App Oct 16, 2012) (unpublished)***

The *Leach* decision stands for the principle that the probate court should hold an evidentiary hearing when there are contested issues of material fact, as well as the interplay between testamentary capacity and testamentary intent.

Marian T. Leach executed two documents on her death bed, which purported to gift certain real property to Keith M. Storm, effective upon Leach’s death. After Marian died, Keith petitioned to admit the documents to probate under MCL 700.2503. Jeremy Storm and Derek Storm opposed Keith’s petition.

The parties filed competing summary disposition motions. The probate court granted Keith’s motion (finding that the documents had “testamentary intent”) and denied Jeremy and Der-

ek's motion (finding that the existence of factual questions regarding their objection to Keith's petition precluded summary disposition). Jeremy and Derek appealed.

The Michigan Court of Appeals held that the probate court erred by granting Keith's summary disposition motion. First, the probate court had failed to apply MCL 700.2503's "clear and convincing evidence" standard to Keith's petition. Second, the fact questions that the probate court identified with regard to Jeremy and Derek's objection were equally germane to Keith's petition. "[T]here were no witnesses, decedent was suffering from chronic congestive heart failure and mitral valve disease; the documents were executed on the eve of decedent's death while she was in hospice care and they were drafted by [Keith], by beneficiary."<sup>31</sup>

Alluding to the probate court's distinction between testamentary capacity and testamentary intention, the Court of Appeals noted that the decedent's possession of capacity was relevant to the decedent's possession of intention. "[R]egardless of whether a finding as to capacity is distinct from a finding of intent, the questions raised by the probate court concerning decedent's capacity were similarly relevant to whether decedent had testamentary intent."<sup>32</sup>

The appellate court remanded the case for an evidentiary hearing. "[T]he probate court should have held an evidentiary hearing to address the unresolved questions of fact surrounding the execution of the documents, which in turn would have allowed the court to determine whether there was clear and convincing evidence that Leach intended the documents to be her will."<sup>33</sup>

### Conclusion

The fundamental requirement for application of MCL 700.2503 is that the proponent put forth "a document or writing added upon a document." As noted by the Reporter's Comment, the statute "does not apply to testamentary instructions in or on other media, such as an audiotape or videocassette."<sup>34</sup> As the legal profession and society

generally transition from paper-based to electronic and digital-based documents, it seems all but certain that future Michigan caselaw applying MCL 700.2503 will confront the meaning and boundaries of what constitutes a "document" for purposes of the statute.

### Notes

1. J. Martin and M. Harder, *Estates and Protected Individuals Code with Reporters' Commentary Section 700.2503*, Reporter's Comment (ICLE 2014).
2. *In re Estate of Smoke*, No 273114 (Mich App Dec 18, 2007) (unpublished).
3. *In re Estate of Smith*, 252 Mich App at 121.
4. *Id.* at 122.
5. *Id.* at 122.
6. *Id.* at 122.
7. *Id.*
8. *Id.* at 125-126 (reversed and remanded).
9. *In re Cameron Trust* at \*4-5 (affirming judgment of probate court).
10. *In re Estate of Berg* at \*4.
11. *Id.* at \*5-6.
12. *Id.* at \*6 (affirming judgment of probate court).
13. *In re Estate of Smoke* at \*2.
14. *Id.* at \*6.
15. *Id.* at \*7.
16. *Id.*
17. *Id.*
18. *Id.* at \*8.
19. *Id.* at \*6 (affirming judgment of probate court).
20. *In re Estate of Windham* at \*3-4.
21. *Id.* at \*3 (affirming judgment of probate court).
22. *In re Gentile Trust* at \*17-18.
23. *Id.* at \*3 (internal quotation omitted).
24. *Id.* at \*19.
25. *Id.* at \*18.
26. *Id.* at \*19.
27. *In re Estate of Southworth* at \*2.
28. *Id.*
29. *Id.* at \*3.
30. *Id.* at \*8.
31. *In re Leach* at \*3.
32. *Id.* at \*4.
33. *Id.* \*4-5 (reversed and remanded).
34. J. Martin and M. Harder, *Estates and Protected Individuals Code with Reporters' Commentary Section 700.2503*, Reporter's Comment (ICLE 2014).



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## Rebutting the Presumption of Natural Parentage in Michigan

By Nicholas Papisifakis

### Introduction

Many probate attorneys operate under the mistaken belief that a child always has an opportunity to prove that an individual is his or her biological father if there is the means to do so. However, according to the Michigan Court of Appeals, parents of children born during a marriage are considered the presumptive parents, and the children of that marriage do not have standing to challenge the presumption of natural parentage. The Court of Appeals decision, *Estate of Casey v Keene*, 306 Mich App 252, 856 NW2d 556 (2014), effectively shut the door on the ability of a child born during a marriage to rebut the presumption of natural parentage. The court held that the presumption can only be overcome in a challenge made by the presumptive parent, and the ability to make such a challenge perishes with the death of the presumptive parent. Thus, rebutting the presumption of natural parentage under the Estates and Protected Individuals Code ("EPIC"), MCL 700.2114, only lies with the presumptive parent, and the children of that marriage have no standing to challenge the presumption. Essentially, the *Casey* decision served as confirmation that the rules for rebutting the presumption of parentage were the same as those under the Revised Probate Code ("RPC").

### Rebutting Natural Parentage Under the RPC

Under the RPC, which has been superseded by EPIC,<sup>1</sup> former MCL 700.111 provided the methods by which the parent and child relationship was established, and it provided in relevant part:

(1) For all purposes of intestate succession, a child is the heir of each of his or her natural parents notwithstanding the relationship between the parents except as otherwise provided by [MCL 700.110].

(2) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for all purposes of intestate succession.

\* \* \*

(3) Only the person presumed to be the natural parent of a child under subsection (2) may disprove any presumption that may be relevant to the relationship, and this exclusive right to do so terminates upon the death of the presumed parent.

(4) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the natural father of that child for all purposes of intestate succession if any of the following occurs:

(a) The man joins with the mother of the child and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act.

(b) The man joins with the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the birth of the child.

(c) The man and the child have borne a mutually acknowledged relationship of parent and child that began before the child became age 18 and continued until terminated by the death of either.

(d) The man has been determined to be the father of the child and an order of filiation establishing that paternity has been entered as provided in the paternity act, [MCL 722.711 to 722.730].

The Michigan Court of Appeals, in *Fuglseth v Quintero (In re Quintero Estate)*, 224 Mich App 682, 569 NW2d 889 (1997), interpreted former MCL 700.111 in relation to intervenors who asserted that they were the decedent's children as the result of an extramarital affair between their mother and the decedent. The *Quintero* court af-



firmed the probate court's decision to deny the intervenors an evidentiary hearing to establish the decedent's paternity through the procedures set forth in MCL 700.111(4). *Id.* at 686. The court ruled that because the presumed father was not present to disprove the presumptive paternity, and the presumed mother was precluded from disproving the presumed father's paternity because she was bound by the divorce judgment that named the intervenors as her and the presumed father's children, the intervenors lacked standing to sue under MCL 700.111. *Id.* at 689, 701.

The court analyzed MCL 700.111 and found that subsections (1) through (4) were "arranged in a logical and methodical sequence." *Id.* The Court explained that subsection (3) states who can rebut the presumption of paternity set forth in subsection (2), and subsection (4) provides avenues to establish who should be "considered" a parent where no "natural" or "presumed" parent exists. *Id.* at 694. The court made it clear that subsection (4) only applies when the presumption of paternity has been overcome, the intervenors had no independent standing to disprove the presumption of paternity, and thus, they may not avail themselves of subsection (4). *Id.* at 694, 700. Therefore, under the RPC's version of the statute, children born during a marriage did not have standing to challenge whether their presumptive father was, in fact, their biological father.

### Rebutting Natural Parentage Under EPIC

Under EPIC, MCL 700.2114 provides the methods by which the parent and child relationship may be established for the purposes of intestate succession, and it provides, in pertinent part:

(1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the fol-

lowing manners:

(a) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession.

(b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:

(i) The man joins with the child's mother and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.

(ii) The man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child's birth.

(iii) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.

(iv) The man is determined to be the child's father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(v) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956

PA 205, MCL 722.711 to 722.730.

(vi) The man is determined to be the father in an action under the revocation of paternity act.

\* \* \*

(5) Only the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent.

The Court of Appeals, in *Casey*, interpreted MCL 700.2114 in the context of rebutting the presumption of natural parentage under EPIC. In *Casey*, the decedent and his wife had two children during their marriage. *Casey Estate*, 306 Mich App at 254-255. A petition for probate was filed by these children, and it was subsequently challenged by individuals who alleged that the decedent was their biological father as a result of an extramarital affair between their mother and the decedent. *Id.* at 255. The challengers alleged that the decedent and their mother had an extramarital affair while their mother was married to their presumed father, the man listed as their father on their birth certificates. *Id.* The challengers' presumptive father died in 1966, and they did not seek to establish paternity until after the decedent's death. *Id.*

The *Casey* court interpreted the language of MCL 700.2114. In doing so, the court explained that under MCL 700.2114(1)(a), it is clear that the parents of children born during a marriage are presumed to be the natural parents of those children. *Casey Estate*, 306 Mich App at 560-561. The court further explained that subsection (1)(b) then provides that, "[i]f a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage," a man can still be considered the child's natural father for purposes of intestate succession if any of the five methods under the statute are satisfied. *Id.* at 561. However, the court ruled that in order for subsection (1)(b) to come into play, subsection (1)(a) (the presumption of parentage) must be overcome. *Id.*

The court emphasized that the Legislature's use of the word "if" at the start of subsection (1)(b) is critical and sets forth the alternative conditions on which the rest of the subsection is premised, thus concluding that subsection (1)(b) does not apply if the presumption of parentage is not rebutted. *Id.* The court held that the plain language of MCL 700.2114(5) provides the exclusive means by which the presumption of natural parenthood set forth in MCL 700.2114(1)(a) may be overcome, "and it specifies that the *only* person holding the right to challenge the presumption is the presumptive natural parent, and the right to attempt to overcome the presumption ends when the presumed parent is deceased." *Id.* at 562. Thus, the court ruled that the challengers did not have standing to disprove the presumption, and that their already deceased father listed on their birth certificates held the exclusive right to disprove the presumption that they are his natural children.

### Effect of the *Casey* Decision Going Forward

Given that the *Casey* decision was the first case in which the court addressed whether a child born during a marriage has standing to challenge presumptive parentage under EPIC, the decision has a resounding effect on probate litigation going forward. While it was widely recognized under former MCL 700.111 that the children born during a marriage did not have standing to challenge the presumption of parentage, the Legislature changed the language of MCL 700.111, leaving many practitioners with the belief that the outcome could be different under MCL 700.2114.

The main difference between former MCL 700.111 and current MCL 700.2114 is the arrangement of the provisions regarding the presumption of paternity. MCL 700.111 arranged the presumption of parentage provision as subsection (2), followed by subsection (3), limiting the pool of individuals who could challenge the presumption of parentage. Subsection (4) of MCL 700.111 then provided the methods of proving

paternity when no presumed father existed.

In contrast, MCL 700.2114 arranges the presumption of parentage provision under subsection (1), which contains provisions (a) through (c). Those who disagree with the outcome of the *Casey* decision point to the language of subsection (1) providing, “[t]he parent and child relationship may be established in any of the following manners,” as the key indicator that children born during a marriage do have standing to challenge the presumption of paternity. Such language is absent in former MCL 700.111. The dissenters argue that subsection (1)(a) is but one method under subsection (1) to establish the parent and child relationship, and that subsection (1)(a) need not be rebutted in order for the court to use the methods set forth under subsection (1)(b). As a policy argument, those who oppose the *Casey* analysis also argue that, in light of advances in technology, particularly DNA testing (see MCL 700.2114(b)(v)), the Legislature purposely rearranged the presumptive parent provision and placed it within subsection (1), which relaxed the requirement that the presumption of natural parentage be rebutted before using the methods of proving paternity under subsection (1)(b)(i)-(vi).

As evidenced by the *Casey* decision, the Michigan Court of Appeals rejected any notion that the Legislature was allowing children born during a marriage to have standing to challenge the presumption of parentage. Instead, the *Casey* decision served to clarify any contention over whether the changes between former MCL 700.111 and MCL 700.2114 had any effect on challenging paternity when natural parentage is presumed. Going forward, the probate courts will continue to operate under the view that if a child is born during a marriage, those are his or her presumptive parents, and the child has no standing to challenge such a presumption.

## Notes

1. *In re Estate of Adolphson*, 403 Mich 590, 593, 271 NW2d 511 (1978) (“Determinations of heirs are to be governed by statutes in effect at the time of death, and an adoption statute in effect at the time of death is controlling.”) (citation omitted).



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## Medical Malpractice Claims—Unrecognized Estate Assets

By Ronda Little

Studies report that 195,000 people die in the United States every year due to preventable in-hospital medical errors. This statistic does not include non-fatal injuries or errors that happen outside of the hospital.<sup>1</sup> Most medical malpractice cases are never identified and pursued resulting in the loss of a valuable estate asset. Probate attorneys are in a unique position to identify potential malpractice claims and advise clients regarding their options. When meeting with a family after a serious injury or death, consider the following:

- 1) **Autopsy:** If there are serious questions regarding the medical care in a death case, have an autopsy performed. Sometimes this will require that the family privately pay, but a careful autopsy is essential to understanding why a person died and whether it could, and should, have been prevented. For example, consider a case involving the death of a previously healthy 84-year old. She went into the emergency room with hypoxia and severe shortness of breath. She was diagnosed with pneumonia and admitted. Approximately 24 hours later, she was found dead. The cause of death was listed as likely cardiac arrhythmia. The family decided to have a private autopsy performed. The autopsy revealed that the patient had blood clots throughout her lungs (pulmonary emboli). Based on the microscopic analysis, it was clear that the clots had been present for some time and would have been detected with appropriate lung imaging.
- 2) **Common Malpractice Scenarios:** While there are infinite possibilities, some reoccurring cases involve the most common causes of death, including heart attack and cancer.

**Heart Attacks:** Most heart attacks can be prevented with timely diagnosis and treatment of the underlying coronary artery disease. However, in some cases, warning signs are ignored and a cardiac work-up is never pursued. In other cardiac cases, proper testing is performed but misinterpreted. In one case, a 47-year-old man died of a heart attack several months after undergoing a reportedly “normal cardiac thallium scan.” Expert review of the scan revealed it was not normal but grossly abnormal and indicative of multi-vessel disease.

**Cancer:** In cancer cases, opportunities for earlier diagnosis and treatment have been missed due to a failure to perform needed testing, or due to abnormal test results being lost or not acted on. A pending case involves the death of a 57-year-old woman due to a physicians’ assistant dismissing her concerns regarding a dark stripe on her thumbnail. He assured her it was nail fungus, when it was actually melanoma. Due to the delay in diagnosis, there was widespread metastasis and death. In another recent case, a primary care physician failed to advise a man of his markedly abnormal prostate-specific antigen (PSA) levels resulting in a several-year delay in diagnosis and treatment.

Other cancer cases involve a misdiagnosis of cancer when none exists. Consider the case of a woman who was advised that the results of a breast biopsy were positive for cancer. Due to her family history of breast cancer, she decided to undergo a bilateral mastectomy. When pathology from the mastectomy failed to reveal any evidence of cancer, she was told the biopsy must have removed all of the cancer. Exam of the breast biopsy tissue by a breast pathologist revealed that she never had cancer.



- 3) **Certainty Not Required:** The probate attorney does not have to decide whether a case exists, rather he/she needs to decide whether a potential case exists and then arrange for appropriate further investigation.
- 4) **Compensation for Families:** The death of a spouse or a parent can be financially devastating. While there are caps in medical malpractice cases on the recovery of non-economic losses, i.e., loss of society and companionship, there are no caps on economic losses. Under the Wrongful Death Act, families can fully recover the value of the decedent's lost wages, benefits, and services. Also, in a non-death case, family members who provide attendant care can recover fully for the value of the care provided. Such recoveries can make a tremendous difference in the lives of the survivors/injured parties.
- 5) **Opportunity for Answers:** Many families have questions surrounding a death. Investigation into the care, regardless of the outcome, often provides needed answers.
- 6) **Opportunity to Improve Care:** Pursuit of malpractice cases often improves care for other patients. Health care providers who have to answer for their mistakes are less likely to make those same mistakes again. Policies and procedure change for the better.
- 7) **Decision to Investigate/What Is Required:** If a decision is made to investigate a potential medical malpractice/wrongful death claim, the personal representative will need to meet with the medical malpractice attorney. If warranted, medical records of the decedent will be obtained and reviewed by the attorney and/or medical experts. If qualified experts support the case, and the attorney believes the case can be success-

fully pursued, suit will be filed. *Note that only a court-appointed personal representative has standing to file and maintain an action on behalf of an estate. Any other individual—no matter how closely related to the decedent—has no standing to do so.*

If there is not a basis to proceed, the file will be closed. In either setting, the family generally does not pay an attorney fee unless there is recovery and most law firms advance the costs of investigation.

- 8) **Timing:** Generally, for an adult, a medical malpractice action must be brought within two years of the date of malpractice or within six months of the date that the plaintiff knew, or should have known, of the potential claim. If the patient dies, before the statute of limitations expires, the claim survives by law and may be brought by the personal representative under the savings provision. While it is beyond the scope of this article to discuss computation of the statute of limitations in the medical malpractice/wrongful death context, it is important to know that appointment of a personal representative will impact filing deadlines under the savings provision, and it may be desirable in some cases to delay the appointment so as to extend the time for filing suit.

Most families are not compensated for the injuries caused by substandard care. When meeting with clients after a death, don't forget to evaluate potential medical malpractice claims as they may be the most valuable estate asset and the only way a family can financially survive a death.

#### Notes

1. "In Hospital Deaths from Medical Errors at 195,000 per Year USA." *Medical News Today*. N.p., 9 Aug. 2004. Web.



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Ronda graduated from Michigan State University with high honors in 1989, and she graduated cum laude from Wayne State University Law School, where she served on the *Wayne Law Review* and was awarded the Order of the Coif.

## The Search for the Lady Bird Deed

By Kary C. Frank

A number of years ago a Florida friend and I were discussing his estate plan, and he told me how his Florida attorney had used a Lady Bird deed as a component in his planning. Being unfamiliar with the term, I did some research to determine what exactly a Lady Bird deed is, and I found that the more formal term for a Lady Bird deed was an enhanced life estate deed. For purposes of the article, the terms “enhanced life estate deed” or “Lady Bird deed” are loosely described as a conveyance of real property with a reservation of a life estate and the power to sell, mortgage, etc. See Michigan Title Standard 9.3 (6th ed), which is on point and sanctions the Lady Bird transfer.

Ultimately, I created a few alternative models for my personal formbook. I also sent one of the first enhanced life estate/Lady Bird deeds to the Institute of Continuing Legal Education (ICLE) for its formbook. Certainly there were a number of lawyers who were familiar with the Lady Bird deed, but it was not commonly used in Michigan. Since then there have been numerous articles and seminar presentations on Lady Bird deeds and their usefulness. However, this is not a commentary on the usefulness of the Lady Bird deed; it is a search for the deed’s origin and history.

It seems that, at least in everyday lawyer terminology, “Lady Bird deed” has been progressively replacing the nomenclature of enhanced life estate deed, or *Life Estate with Power to Convey Fee*.<sup>1</sup> You have only to look at the title of past seminars on the subject.<sup>2</sup> Even a couple of Michigan court cases reinforce this point. See the 2013 Michigan Tax Tribunal decision, *Ander-son v Township of Chocoday*, in which the court stated, “The 2009 instrument is commonly referred to as a “Lady Bird” deed.”<sup>3</sup> The statement was noted with the following footnote, “The name comes from the mechanism that President Lyndon Johnson used to pass property to his wife,

“Lady Bird” Johnson on his death. Some lawyers call these ‘enhanced life estate’ deeds.”<sup>4</sup>

Also see *In re Tobias Estates*, an unpublished Michigan Court of Appeals case decided May 10, 2012, which reviews the requirements of a Lady Bird deed. In that case, the court states, “A ‘Lady Bird’ deed is a nickname for an enhanced life estate deed. It is named after Lady Bird Johnson, because allegedly President Johnson once used this type of deed to convey some land to Lady Bird.”<sup>5</sup>

Even before reading the preceding cases, I thought it would be interesting to find the first Lady Bird deed and have it published in the *State Bar Journal* or one of the appropriate section journals as a historical document. After all, it was a somewhat clever real estate transaction document, purportedly created by a former President of the United States.

I started the search by contacting the Lyndon B. Johnson Library in Austin, Texas, where I spoke with Claudia Anderson, the supervisory archivist of the library. Ms. Anderson told me that she had never heard of a Lady Bird deed. While explaining to her the relationship of this type of deed to the former president, she searched for the term on the Internet. She said the search approached 100,000 hits. Our discussion and the search results piqued her interest, and she volunteered to see what she could find and get back to me.

Ms. Anderson subsequently contacted me and said that the deputy director of the library had talked to members of the family and with the financial administrators of Mrs. Johnson’s estate. No one was aware of the term Lady Bird deed. She was unable to find any information on Johnson-family land transfers that used a Lady Bird deed, although she thought that there had been life estate transfers from Lady Bird Johnson to the United States Park Service involving

a portion of the Johnson Ranch. These transfers would have been in Gillespie and Blanco Counties.

I next contacted title companies in the counties where the Johnson Ranch is located looking for title search help. The first examiner I worked with was Sharon Jung, Manager of Fredericksburg Titles, Fredericksburg, Texas. She seemed quite interested in helping me find the first Lady Bird deed.

After some searching she found a deed from Claudia (Lady Bird) Johnson and her daughters to the United States of America reserving a life estate in the grantors. I was hopeful that this might be the deed I was looking for; however, Ms. Jung e-mailed me a copy of the deed, and, after review, I found that it was a typical life estate deed, which did not reserve the power to sell (a key component of the Lady Bird deed).

Next, I contacted Linda McMMain at Guardian Title with offices in Blanco and Johnson City asking for her assistance. She was familiar with the life estate deeds that the former first lady had signed. During the conversation, she said she seemed to remember reading that the Lady Bird deed had nothing to do with Lady Bird Johnson; and, if she could remember the source, she would let me know.

Within a couple of weeks she e-mailed me an article from the *Estate Planning Developments for Texas Professionals*. The January 2011 article, written by Gerry W. Beyer, Professor of Law at Texas Tech University School of Law and Kerri M. Griffin, Comment Editor of the *Estate Planning and Community Property Law Journal* of Texas Tech University School of Law, was an introductory article about the usefulness of Lady Bird deeds.

Before addressing the reasons for using Lady Bird deeds, the authors gave the following background information:

Many people think that the “Lady Bird” deed became known as such because President Johnson once used this type of deed to transfer property to his wife, Lady Bird Johnson. In reality,

the first Lady Bird deed was drafted by Florida attorney Jerome Ira Solkoff around 1982, nearly ten years after the death of President Johnson. In his elder law book and lecture materials, Solkoff used a fictitious cast of characters with the names Linton, Lady Bird, Lucie, and Lynda in examples explaining the usefulness of this new type of deed, and the names became associated with the deed. Jerome’s son, Scott Solkoff, jokes that the Lady Bird deed “could easily have become known as ‘the Genghis Khan deed.’”<sup>6</sup>

Of course, I then contacted Professor Beyer, who confirmed the article. Using WestlawNext, he also e-mailed me the following section from the 2014-2015 edition of West’s Florida Practice Series, *Elder Law with Jerome Ira Solkoff, Esq. and Scott M. Solkoff, Esq.*, Chapter 9: Titling Assets to Avoid Probate and Joint Ownership of Realty.

**§ 9:53. “Lady Bird” life estate deeds—Life estate deed to convey future title to heirs**

One could convey future title to the heirs by deed, keeping control of the property. The remaindermen obtain title immediately upon the death of the life estate owner without surrogate court proceedings. This form of deed has been popularly labeled the “Lady Bird” deed due to author Jerome Ira Solkoff’s writings and lectures using a fictitious cast of characters to illustrate the facility of the deed form. Author Jerome Ira Solkoff created the “Lady Bird” deed form in 1982 and it is now in common use in Florida and throughout the United States.

**Example:**

Lyndon and Lady Bird, his wife, grantors, to Lyndon and Lady Bird, his wife, grantees, a life estate, without any liability for waste, with full power and authority in them to sell, convey, mortgage, lease and otherwise dispose of the property described below in fee simple, with or without consideration and without joinder by the remaindermen, and to keep absolutely any and all proceeds derived therefrom. Further, the grantors reserve the right to change remaindermen at any time without consent of remainder-



men. Upon death of the life tenants, title shall be in Lucy and Lynda, joint tenants with rights of survivorship.<sup>7</sup>

Obviously, Professor Beyer was very helpful. Without his article, who knows if I would have come across Jerome Solkoff?

I then attempted to contact Jerome Solkoff, who is now retired and was unavailable. I did eventually talk with Scott Solkoff, who has a Florida estate planning and elder law practice and is now co-author of the current edition of the Elder Law portion of West's Florida Practice Series.

Scott informed me that the term "Lady Bird deed" was essentially an unintended outgrowth of his father Jerome's contributions to continuing legal education as an estate planning and elder law attorney in Florida. Around 1992, Jerome authored the first edition of the Elder Law portion of West's Florida Practice Series. In an effort to keep the Florida practitioners somewhat entertained while presenting the concepts of the enhanced life estate deed, he used a cast of characters including Lyndon Johnson and Lady Bird Johnson as grantors, grantees.

A few days after I talked to Scott, Jerome Solkoff did call me and reiterated the story. He also said that around 1982, he had contacted three Florida title companies and presented the enhanced life estate type of transfer for approval by the title companies. Later when asked by West Publishing to provide examples of such a transfer in the first edition of the Elder Law book, he came up with the characters as illustrations. As he remembers, the Medicaid example he first used was Ozzie and Harriet as grantors with David and Ricky as remaindermen.<sup>8</sup> So from that publication the term "Lady Bird deed" began. And as far as Claudia T. Johnson, Luci Baines Johnson, and Lynda Bird Johnson Robb having used a life estate deed to transfer property to the United States Park Services, it is pure coincidence.

In the 1962 John Ford film, *The Man Who Shot Liberty Valance*, Ransom Stoddard (the man who everyone thought shot Liberty and who

built a career on that reputation), tells a young reporter the true story of who shot Liberty Valance. At the end, the young reporter looked at the editor of the paper (who had also been listening to the story) in anticipation. The editor took the transcript and ripped it into pieces saying, "When you have a choice of printing the truth or the legend—print the legend."

So, when a client is signing a "Lady Bird deed," and he asks how the deed got the unusual name, you can say, "the *legend* is that President Johnson drafted the first Lady Bird deed."

### Notes

1. Standard 9.3 of the Michigan Title Standards (6th ed).
2. *Drafting Ladybird Deeds* (State Bar of Michigan, 9th Annual Solo & Small Firm Institute, September 20, 2012) Contributor: Douglas G. Chalgian, and *Drafting Ladybird Deeds* (ICLE, Drafting Estate Planning Documents, 17th Annual, 01/24/08) Contributor: Harley D. Manela.
3. *Anderson v Township of Chocoday*, No 433005 at \*6 (Mich Tax Tribunal Dec 18, 2013) (unpublished).
4. *Anderson*, supra, page 6 n 3.
5. *In re Tobias Estates*, No 304852 at \*9-10, (Mich App May 10, 2012) (unpublished).
6. Gerry W. Beyer & Kerri M. Griffin, *Lady Bird Deeds: A Primer for the Texas Practitioner*, Est. Plan. Devel. for Tex. Prof., Jan. 2011, at 1 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736862](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736862)
7. 14 Fla. Prac., Elder Law § 9:53 (2014-2015 ed.)
8. Characters from *The Adventures of Ozzie and Harriet*, family sitcom 1952-1966.



Kary C. Frank practices law in Rockford and Big Rapids, Michigan. He is a member of the real estate and probate sections of the State Bar. He is on the ICLE real property board of advisers. Mr. Frank is a contributor to the ICLE form bank and how to kits. He has

served as a moderator for the State Bar convention and has been published in *The Sporting News*. A copy of this article was archived in the "Reference File" at the LBJ Presidential Library, Austin, Texas, by the supervisory archivist (2015).

## Recent Decisions in Michigan Probate, Trust, and Estate Planning Law

By Hon. Phillip E. Harter

### Medicaid—Estate Recovery—Notice— Due Process

***In re Estate of Keyes, No 320420, 2015 Mich App LEXIS 774 (Apr 16, 2015)***

In 2007 the legislature amended the Michigan Social Welfare Act. This amendment required the Department of Community Mental Health (Department) to establish a Medicaid estate recovery program that would not be implemented until approved by the federal government. The federal government did not approve Michigan's program until July 2011. Esther Keyes was admitted to a nursing home in April 2010 and began receiving Medicaid benefits. In May 2012, Robert Keyes filled out a Medicaid application form and acknowledged that the estate was subject to Medicaid recovery. This form was filed as a part of the annual redetermination. Esther Keyes died in January 2013, and the Department sought recovery against her estate. When the estate disallowed the expense, the Department filed suit against the estate, seeking to recover about \$110,000. The amount represented all Medicaid benefits paid from the time of the initial enrollment in 2010.

The estate moved for summary disposition pursuant to MCR 2.116(C)(10), contending that the Department could not recover because the Department did not notify Esther Keyes of the possibility of estate recovery when she enrolled in Medicaid. The trial court determined that the Department had failed to notify recipients "at the time of enrollment," as the act required. It also determined that this failure violated the estate's due process rights. It therefore granted summary disposition in favor of the estate.

The Department appealed. The court of appeals began its opinion by observing that the es-

tate recovery act applied only to Medicaid recipients who began receiving benefits after September 30, 2007. It then cited the relevant portions of MCL 400.112g(3) as follows:

(3) The department of community health shall seek appropriate changes to Michigan Medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community mental health shall seek approval from the federal centers for medicare and medicaid regarding all the following:

(a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(i) and (ii) of title XIX.

(b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.

(c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.

(d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that may be pursued to contest actions taken under the Michigan medicaid estate recovery program.

(e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. *At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship.* The department of community health shall develop a definition of hardship ....

(f) The circumstances under which the department of community health may review requests

for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet definition of hardship developed by the department of community health.

(g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.

....

(7) The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered.

(Emphasis added.)

The estate contended that MCL 400.112g(3)(e) requires the Department to provide an estate recovery notice to individuals when they enroll in Medicaid for long-term care. The Department contended that this language is part of a subsection that requires it to seek guidance from the federal government and, because MCL 400.112g(7) does not mirror this language, the act did not require it to notify Esther Keyes about estate recovery when she enrolled in Medicaid. The court of appeals found that the timing provision of MCL 400.112g(3)(e) did not apply in this case. The court stated that subsection (3)(e) is part of the larger subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions. In this case, the estate did not assert that the Department failed to seek approval from the federal government concerning the estate recovery notice. Rather, the estate asserted that it did not personally receive a timely notice. The court of appeals observed that the act contains a second provision concerning notice, and this provision has different language. MCL 400.112g(7) provides that “[t]he department of community health shall provide written information to individuals seeking medicaid eli-

gibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program.” When the legislature includes language in one part of a statute that it omits in another, the court of appeals presumes that such an omission was intentional. The court of appeals therefore found that subsection (7) applies to the estate’s case because the estate alleged that Esther Keyes did not receive sufficient notice of estate recovery. Subsection (7)’s language is similar to that of subsection (3)(e), but there is one major difference—timing. Subsection (3)(e) states “at the time an individual enrolls in Medicaid,” while subsection (7) states that the Department must provide a notice when an individual “seek[s] Medicaid eligibility.” The court of appeals believed that the distinction in enrolling Medicaid and seeking Medicaid eligibility was determinative. Esther Keyes enrolled in Medicaid in April 2010, which is after September 30, 2007. She did not receive notice of estate recovery because the federal government had not approved a notice pursuant to subsection (3)(e). In May 2012, Robert Keyes filed a “Medicaid Application Patient of Nursing Facility” form on Esther Keyes’ behalf. This form included a notice about estate recovery. Her previous enrollment did not change the fact that Robert Keyes sought Medicaid eligibility on her behalf by filling out an application in 2012. And, as part of that application, the Department did provide written materials explaining and describing estate recovery and warning that some of Esther’s estate could be subject to estate recovery. The court of appeals then found that the trial court erred because the Department sufficiently notified Esther that her estate would be subject to estate recovery. MCL 400.112g(7) allows the Department to engage in estate recovery when the individual sought Medicaid benefits after being provided with a notice regarding estate recovery. In this case, Robert Keyes sought Medicaid benefits on Esther’s behalf in 2012, after the Department had provided him with proper notice regarding estate recovery.

The trial court also determined that applying



the Medicaid recovery act would violate Esther Keyes' right to due process because she did not receive notice of estate recovery at the time that she enrolled, as required by MCL 400.112g. Again, the court of appeals indicated that MCL 400.112g does not require notice at the time of enrollment. Further, the court believed the trial court decision improperly confused statutory notice issues with the notice issues involved in due process. In this case, the court found that the estate was personally appraised of the Department's action seeking estate recovery, and it had the opportunity to contest the possible deprivation of its property in the circuit court. It received both notice and a hearing, which is what due process requires. The court of appeals reversed and remanded to the trial court for further proceedings consistent with its opinion.

What may we take from this case? First, the fact that the estate was not given a notice when an initial Medicaid application is made is no defense to estate recovery if notice is given during a subsequent redetermination. Second, it is unclear as to whether the court is specifically holding that in such a case all Medicaid benefits received are subject to recovery. I believe that the best interpretation of this case is that they are not and the recovery should be limited to Medicaid benefits received after notice. Hopefully, on remand, the trial court will so limit the recovery and the court of appeals will affirm that decision. If all Medicaid benefits are, in fact, subject to recovery, the lack of the initial notice would seem to violate what I believe most would consider principles of fundamental fairness and due process.



Hon. Phillip E. Harter, formerly a judge with the Calhoun County Probate Court, Battle Creek, joined Chalgian & Tripp Law Offices, Battle Creek as "of counsel" in January 2011. He was chairperson of the Michigan Supreme Court Task Force on Guardianships and Conservatorships and a member of the Michigan Supreme Court bar examination staff (1976-1991). He is currently a member of the Calhoun County Bar Association, a fellow of the Michigan Bar Foundation, and a member of the Bar of the U.S. Supreme Court. Judge Harter is a past chairperson of the State Bar of Michigan Probate and Estate Planning Section, a former chairperson of the Probate Law Committee, and a former chairperson of the Probate Rules Committee of the Michigan Probate Judges Association. He reviews cases for the *Michigan Probate and Estate Planning Journal* and has lectured at ICLE's Annual Probate and Estate Planning Institute for many years.

## Legislative Report

By Harold G. Schuitmaker

3715a, 3723, 5423, 5501a, and 7912a (for a more exhaustive description, see the last issue of the *Michigan Probate & Estate Planning Journal*).

### Public Acts of Interest

Legislation that affects real property and exceptions to uncapping are often overlooked by Probate and Estate Planning practitioners.

### Exceptions to Uncapping Taxable Value

2014 PA 310 amends MCL 211.27(a)(7) adding sections (t) and (u).

MCL 211.27a(7)(t)—“Beginning December 31, 2014, a transfer of residential real property if the transferee is the transferor’s or the transferor’s spouse’s mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance.”

MCL 211.27a(7)(u)—“Beginning December 31, 2014, for residential real property, a conveyance from a trust if the person to whom the residential real property is conveyed is the settlor’s or settlor’s spouse’s mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance.”

### House Bill 4075, 2015 PA 39

The fee for tax certification on warranty seeds, land contracts, and condominium master deeds increases from \$1.00 to \$5.00, effective July 1, 2015.

### Proposed Legislation

Senate Bill 270 clarifies that Probate Court has jurisdiction over guardianship and conservatorship protective orders—MCL 700.1101 et seq would be amended to include new sections 5301 and 5402a.

House Bill 4072 would adopt the uniform fiduciary access to digital assets act. MCL 700.1103 et seq. would be amended to add sections

### 2015 Cost of Living Adjustments

Year	Decedent has no descendants, but does have a surviving spouse	All of the decedent's descendants are the spouse's descendants	One or more of the decedent's descendants are not the spouse's descendants	None of the descendants are the spouse's descendants
2000	\$150,000 + 3/4 intestate estate	\$150,000 + 1/2 intestate estate	\$150,000 + 1/2 intestate estate	\$100,000 + 1/2 intestate estate
2001	\$161,000 + 3/4 intestate estate	\$161,000 + 1/2 intestate estate	\$161,000 + 1/2 intestate estate	\$107,000 + 1/2 intestate estate
2002	\$165,000 + 3/4 intestate estate	\$165,000 + 1/2 intestate estate	\$165,000 + 1/2 intestate estate	\$110,000 + 1/2 intestate estate
2003	\$168,000 + 3/4 intestate estate	\$168,000 + 1/2 intestate estate	\$168,000 + 1/2 intestate estate	\$112,000 + 1/2 intestate estate
2004	\$172,000 + 3/4 intestate estate	\$172,000 + 1/2 intestate estate	\$172,000 + 1/2 intestate estate	\$115,000 + 1/2 intestate estate
2005	\$177,000 + 3/4 intestate estate	\$177,000 + 1/2 intestate estate	\$177,000 + 1/2 intestate estate	\$118,000 + 1/2 intestate estate
2006	\$183,000 + 3/4 intestate estate	\$183,000 + 1/2 intestate estate	\$183,000 + 1/2 intestate estate	\$122,000 + 1/2 intestate estate
2007	\$188,000 + 3/4 intestate estate	\$188,000 + 1/2 intestate estate	\$188,000 + 1/2 intestate estate	\$126,000 + 1/2 intestate estate
2008	\$194,000 + 3/4 intestate estate	\$194,000 + 1/2 intestate estate	\$194,000 + 1/2 intestate estate	\$129,000 + 1/2 intestate estate
2009	\$201,000 + 3/4 intestate estate	\$201,000 + 1/2 intestate estate	\$201,000 + 1/2 intestate estate	\$134,000 + 1/2 intestate estate
2010	\$201,000 + 3/4 intestate estate	\$201,000 + 1/2 intestate estate	\$201,000 + 1/2 intestate estate	\$134,000 + 1/2 intestate estate
2011	\$204,000 + 3/4 intestate estate	\$204,000 + 1/2 intestate estate	\$204,000 + 1/2 intestate estate	\$136,000 + 1/2 intestate estate
2012	\$210,000 + 3/4 intestate estate	\$210,000 + 1/2 intestate estate	\$210,000 + 1/2 intestate estate	\$140,000 + 1/2 intestate estate
2013	\$215,000 + 3/4 intestate estate	\$215,000 + 1/2 intestate estate	\$215,000 + 1/2 intestate estate	\$143,000 + 1/2 intestate estate
2014	\$218,000 + 3/4 intestate estate	\$218,000 + 1/2 intestate estate	\$218,000 + 1/2 intestate estate	\$145,000 + 1/2 intestate estate
2015	\$221,000 + 3/4 intestate estate	\$221,000 + 1/2 intestate estate	\$221,000 + 1/2 intestate estate	\$145,000 + 1/2 intestate estate

Year	MCL 700.2402 Homestead Allowance	MCL 700.2404 Exempt property	MCL 700.2405 Family allowance (maximum lump sum without court order)	MCL 700.3982, 3983 Maximum value of estate to qualify as a small estate
2000	\$15,000	\$10,000	\$18,000	\$15,000
2001	\$16,000	\$11,000	\$19,000	\$16,000
2002	\$17,000	\$11,000	\$20,000	\$17,000
2003	\$17,000	\$11,000	\$20,000	\$17,000
2004	\$17,000	\$11,000	\$21,000	\$17,000
2005	\$18,000	\$12,000	\$21,000	\$18,000
2006	\$18,000	\$12,000	\$22,000	\$18,000
2007	\$19,000	\$13,000	\$23,000	\$19,000
2008	\$19,000	\$13,000	\$23,000	\$19,000
2009	\$20,000	\$13,000	\$24,000	\$20,000
2010	\$20,000	\$13,000	\$24,000	\$20,000
2011	\$20,000	\$14,000	\$24,000	\$20,000
2012	\$21,000	\$14,000	\$25,000	\$21,000
2013	\$21,000	\$14,000	\$26,000	\$21,000
2014	\$22,000	\$14,000	\$26,000	\$22,000
2015	\$22,000	\$15,000	\$27,000	\$22,000

Year	Termination of Uneconomic Trust (MCL 700.7414(1))
2011	\$68,000
2012	\$70,000
2013	\$72,000
2014	\$72,000
2015	\$74,000



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## Ethics and Unauthorized Practice of Law

By Fred Rolf, Josh Ard, and  
Victoria A. Vuletich

### Best of...

We have written the Journal's ethics column for a number of years and are now riding off into the sunset. A team of "young" lawyers will begin writing the column for the next issue. We have been honored to write this column.

What follows are a compilation of columns on topics that are still timely and a piece on law practice succession planning by Victoria.

### Investment Advice

A continuing problem is the sale of inappropriate investment products to the elderly. Be especially careful when your client was referred to you by an investment advisor and the very same advisor has recommended a specific investment product. This product may or may not be an appropriate investment for your client. Alternatively, when asked by a client for the name of a CPA or investment advisor, provide the client with two or more names.

### Preventing Will and Trust Controversies

Our clients come to us for estate planning, wills, trusts, powers of attorney, etc. When they die, they expect their estate plans to be followed. Not infrequently, you may be asked to create an estate plan that provides for more or less to family members of the same generation.

Failure to receive an equal gift, outright inheritance, disinheritance or not being named as a fiduciary can create hurt feelings and often anger among family members. These feelings and money issues create a fertile ground for litigation. Most clients desire to avoid litigation among their family members. The Michigan Trust Code has codified Michigan law regarding interorem clauses. Michigan law enforces interorem clauses only if the contestant did not

have a reasonable basis to file a contest. What is "reasonable" in a particular family dispute can be difficult to define. In our collective experiences courts often seem to go out of their way to find reasonable cause for contesting the estate plan. Consider providing a mandatory mediation clause in your will or trust where appropriate. Also, consider a conditional specific gift to a disgruntled beneficiary. The specific gift would be conditional on the beneficiary signing a receipt agreeing to arbitration or mediation.

### Preventing Malpractice Claims

Brian Frueling wrote an article for the *New Jersey Law Journal* (April 2009) titled, "Strategies to Avoid Attorney Ethics Complaints and Survive a Probe."

Without fail the largest and most avoidable area of complaint is an attorney's failure to communicate with his client. We are in a service business and results are definitely important. But communicating with the client is often times more important than the result especially in the context of ethics complaints. I would estimate that 75 percent of the disgruntled clients were upset because they couldn't get in touch with their attorney.

### Ethical Issues with Elderly Clients

As estate planners we have all witnessed the changing demographics in America. The U.S. population is becoming older and this older population faces a wide range of distinct legal issues. Our older clients face issues such as understanding and qualifying for various governmental benefits, implications of a second marriage, planning for unique health and living concerns and diminished capacity. Lawyers are also asked to review tax planning, client's medical treatment and become involved after the fact with financial abuse.

When meeting with older clients it is not unusual to discover the entire family in the conference room. We must carefully evaluate the situation and be conscious of the underlying prin-

ciple that we are representing the older client. Much common sense and good listening skills are required when working in this multi-generational setting. Attorneys, when working with older clients must be attuned to whether the client's decision-making capacity is impaired. Several years ago at the 39th Annual Probate Institute, Lauren M. Underwood presented an excellent article on client competency/capacity. In the article, the following factors were listed when evaluating capacity of our clients:

- The client's ability to articulate the reasoning behind his or her decision.
- The client's knowledge of what assets they own in the approximate value of those assets.
- The client's ability to appreciate the consequences of his or her decision.
- The irreversibility of any decision.
- The fairness of any decision. (Is someone in the family being benefited to the detriment of others?)
- The consistency of any decision with other lifetime commitments made previously by the client.

### Legal Fees

Estate planning fees and Medicaid planning fees are governed by the Michigan Rules of Professional Conduct and State Bar of Michigan ethics opinions. MRPC 1.5 (a) governs fees and states: "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when after viewing all facts a lawyer of ordinary prudence would be left with the definite and firm conviction that the fee is in excess of a reasonable fee." Factors to be considered in determining the reasonableness of the fee includes the following:

- 1) The time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal service properly;
- 2) The likelihood that taking the client will

preclude other employment by a lawyer;

- 3) The fee customarily charged in the locality for similar legal services;
- 4) The amount involved and the results obtained;
- 5) The time limitations imposed by the client or by the circumstances;
- 6) The nature and length of the professional relationship with the client;
- 7) The experience, reputation and ability of a lawyer or lawyers performing services; and
- 8) Whether the fee is fixed or contingent.

Fee disputes can often be avoided by using a fee agreement!

### Succession Planning

How many lawyers have made concrete preparations for their law practices in the event of a disability or death? When Victoria Vuletich was the State Bar of Michigan's Ethics Counsel, she regularly received calls from alarmed law office staff confronted with a well-intentioned spouse, asking if funds could be withdrawn from the client's trust account. Consideration should be given to designating an attorney who can assist in transitioning the law practice. A good law practice transition plan could include files for the following tasks:

- Passwords to email, banking and client management accounts.
- Location of passwords to internal accounting programs, for example voice-mail.
- Passwords to location of calendaring programs along with the tickling features alerting due dates and court dates.
- Office lease, office equipment and furnishings details.
- Bank account files.
- Malpractice carrier policy and contact

information.

- Account files for telephone utilities, website social media computer programs, etc.

Creating a transition plan checklist can be accomplished without a large expenditure of time or money. A law practice succession plan can save angst for your family, staff, and other attorneys.



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Victoria A. Vuletich has a private practice counseling lawyers on legal ethics and practice development matters, and is also a professor at Cooley Law School. Her co-columnists, Josh Ard and Fred Rolf, are esteemed Michigan estate planning attorneys and she is grateful for their legal knowledge and client centered approach to practice.

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## SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

<b>Date</b>	<b>Place</b>
September 12, 2015*	University Club, Lansing

\*Annual Meeting

Meeting of the Committee on Special Projects (CSP) begins at 9:00 a.m. with the Council meeting to follow.

All members of the Section are welcome to attend meetings of the CSP and the Council.