MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

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From the Chairperson

By Nathan R. Piwowarski

Chair's Note: It is Time to Prepare for the Coming Wave of Generative Artificial Intelligence.

A week after her husband's death, a widow steps into your office carrying a folder she has not yet had the strength to open. A man seeks your help because his mother's dementia is worsening and his family can no longer manage care at home. A family convenes a meeting with you, asking whether there is any lawful way to get their father into a Medicaid bed without dissipating his life savings. None of these people is primarily looking for a drafter. They are looking for discernment. For steadiness. For someone who can hear both what they are saying and what they cannot yet bear to say aloud. They need a trustworthy guide through a frightening legal ordeal.

That is why this moment in technology matters so much to trust and estate lawyers.

Over the last two decades, we have already lived through several transformations that once felt revolutionary and now seem ordinary: document assembly, cloud-based practice management, online form banks, electronic execution, videoconferencing. Before those came word processing. Before that, the typewriter. Each new tool was received with the usual mix of excitement and suspicion. Each was greeted by some as liberation and by others as decline. And then, in time, each simply became part of the furniture of legal practice.

The next technological wave is different not because lawyers are unused to change, but because of its speed, scope, and ambition. Generative artificial intelligence now powers general tools like ChatGPT, Claude, Grok, and Gemini, as well as legal products like Lexis Protégé, Westlaw CoCounsel, Harvey, and Spellbook. If you have not yet taken these tools seriously, you should. And if your last encounter with AI was a chatbot a year ago, you may be startled by what it can now do: compare drafts, summarize records, extract information from disordered files, organize large bodies of material, and move through digital tasks with eerie independence.

My point is not that AI will replace trust and estate lawyers. It is that trust and estate lawyers must become competent users of AI while deliberately deepening the human capacities the profession will need even more as certain work becomes easier to automate: judgment, advice, accompaniment, and mentorship.

This moment tempts us toward two lazy responses. The first is breathless enthusiasm: the promise that if we simply embrace AI, our old inefficiencies and frustrations will melt away. The second is reflexive dismissal: the comforting assurance that our work is too human, too intimate, too emotionally entangled, ever to be meaningfully touched by AI. Both responses fail the people who sit across from us at some of the hardest moments of their lives.

What this moment demands instead is discernment. We must soberly ask what blend of technological competence and human wisdom the public should expect from us.

On the technological side, the answer should not be controversial. Our duty of professional competence has never been fixed in amber. It has always evolved alongside the tools of our trade.[1] A lawyer in 1995 who refused to learn word processing was not preserving a noble principle. She was clinging to an inferior tool and serving clients less well because of it. The same is true now. Competent practice increasingly includes understanding what modern AI tools can do, where they are useful, where they are brittle, and how best to supervise their output.

In trust and estate practice, that usefulness is not theoretical. A carefully supervised AI system may help compare multiple drafts of a trust

agreement, flag inconsistencies across estate planning documents, or sift through a bulky intake file and surface the questions a lawyer needs to ask next. Used well, such tools can reduce friction, save time, and clear away some of the underbrush. They can give us back more of the one thing law practice always seems to consume too quickly: attention.

But only if we remain clear about what these tools cannot do.

A large language model may draft a trust agreement that appears polished, plausible, and technically sound. It may generate language smooth enough to lull an inexperienced user into complacency. What it cannot do is look at a family and sense that the proposed successor trustee has neither the temperament nor the relational capital to survive the role. It cannot perceive that an apparently elegant plan will, in administration, become a slow-motion disaster. It cannot quietly tell a client that the child volunteering to serve is already exhausted, or that the "responsible" beneficiary is also the one most likely to dominate everyone else. It cannot grasp that a trust may be validly drafted and yet unequal to the emotional, financial, or practical burdens it is meant to carry.

That gap in judgment is not incidental. In our field, it is foundational.

The law can authorize a fiduciary appointment; it cannot make that appointment wise. A drafting tool can assemble a document; it cannot tell whether real human beings will be able to live inside the structure it creates. The difference between a legally valid plan and a workable one is often the difference between peace and catastrophe. Much of the value of a seasoned trust and estate lawyer lies in perceiving that difference early enough to do something about it and then having the courage to call it out.

AI is compressing, and in some cases already absorbing, much of what lawyers have historically treated as the technical core of practice: research, drafting, and analysis. What remains is distinctly human: the lawyer's ability to advocate, to advise, and to accompany.[2] This formulation fits trust and estate practice unusually well. Our clients often do not come to us merely for answers. They come for guidance through grief, incapacity, conflict, guilt, fear, obligation, and uncertainty. They need someone who can stand beside them while decisions are made under pressure and in sorrow. Accompaniment is central to our work.

That subsumption brings me to the part I feel most deeply about.

For generations, young lawyers acquired sound judgment through the repetitive, unglamorous work that marked the early years of practice: research memos, first drafts, document review, file organization, issue spotting. This work was formative, forcing younger lawyers to sit with facts and law long enough for patterns to emerge. It gave them room to make mistakes in relatively low-stakes settings. It trained the eye and ear.

Generative AI now threatens to strip away much of that training ground. When software can produce a first draft in minutes, summarize a stack of records, or answer a research question cheaply and quickly, firms will be tempted to bypass the apprenticeship that gradually transformed junior lawyers into seasoned ones. The economic temptation is obvious. So is the professional danger. We may yet create a generation of lawyers who are efficient, polished, and technologically fluent, but undertrained where it matters most.

Those of us who have practiced for ten, fifteen, or twenty years possess something that did not arrive all at once and cannot be conjured with a prompt. We have learned, often the hard way, to distinguish between technical correctness and practical soundness. We know that a document may comply with the statute and still fail in the hands of an actual family. We know that fluency can conceal shallowness. We know that confidence is not the same thing as wisdom. We know how often plans come apart not because the law was misunderstood, but because

people were.

Our obligation to younger lawyers—and to the clients who will one day depend on them—thus has at least two parts.

First, we must teach technological discernment. Junior lawyers should not be Luddites. But neither should they become credulous operators of systems that produce plausibly fluent answers with unnerving confidence (and sometimes overconfidence). They must learn to interrogate output, verify propositions, detect omissions, and ask the central question of the AI era: not whether a document sounds right, but whether it is in fact valid, effective, and fit for purpose.[3]

Second, we must bring younger lawyers into the high-judgment parts of practice. They need to observe client meetings. They need to see grief in the room, tension between siblings, the small hesitations that reveal what no intake form will ever reveal. They need to observe how experienced lawyers redirect a plan away from future disaster, not by citing a statute, but by recognizing character, fear, pride, exhaustion, and love. They need proximity to the human material of this work, because no tool can teach what it does not understand.

That kind of formation is slow. It is frequently inefficient. As Amy Tripp once told me, "the best way a new lawyer can learn is to spend countless unbillable hours observing you interact with clients." If we refuse to invest those hours, we should not be surprised when the next generation inherits the law's newly advanced machinery—and lacks the judgment to wield it wisely.

So I offer both an encouragement and a challenge.

The encouragement is this: trust and estate lawyers have weathered prior technological waves. We have repeatedly adapted to new technologies without surrendering the heart of our profession. Each useful advance has carried with it the possibility of more time for the consequential questions of complicated human relationships, mortality, and legacy.

The challenge: this wave is broader, faster, and more destabilizing than those that came before it. We cannot responsibly ignore it. But neither can we permit it to hollow out the very capacities that make our work worth doing. The task before us is not merely to adopt new tools. It is to use them wisely while strengthening the habits of judgment, practical wisdom, and mentorship on which the future of our specialty depends.

We can expect organizations like the Institute of Continuing Legal Education to offer excellent training opportunities. But our Section owes its members something more, something directly connected to our unique work. To that end, the Section has created the Committee on the Appropriate Use of Artificial Intelligence and Other Emerging Technologies in Trust and Estate Practice, chaired by Joe Viviano. We invite you to participate in this committee as we adapt this technology to our clients' needs.

Notes

1. "To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter.…" Michigan MRPC 1.1, Comment, "Maintaining Competence." *See also* Ethics Opinion RI-381, available at https://www.michbar.org/opinions/ethics/numbered_opinions/RI-381.

2. A formulation that I credit to the legal industry analyst, Jordan Furlong, in his Substack essay, "Advocate, Advise, and Accompany," (Feb 22, 2024), available at https://jordanfurlong.substack.com/p/advocate-advise-and-accompany.

3. Another apt turn of phrase from Mr. Furlong. See "The Newest Lawyer Competence: Quality Control" (Dec 7, 2023), available at https://jordanfurlong.substack.com/p/the-newest-lawyer-competence-quality.

Multistate Competence, Authorized Practice, and Conflict of Laws in Regions of Uniformity: A Case Study under the Uniform Trust Code

By James P. Spica

Author's Synopsis: A lawyer licensed to practice in State A who is providing legal services in that state to a client who has good reason to seek the advice of someone knowledgeable about the law of State A in particular may be required by State A's conflict of laws rules, to evaluate aspects of the law of State B. If the lawyer is not admitted to practice in State B, the attendant ethical risk of her advising the client about (or based on) the law of State B is not unauthorized practice but breach of the duty of competence—the risk that the lawyer is not sufficiently familiar with the relevant law of State B. That risk is mitigated in any case, by modern technology, including ready electronic access to much of the law of every state. But it is dramatically mitigated if States A and B have both enacted uniform-law provisions on the matter at issue along with the standard (i.e., "uniform") acknowledgement of the need to "promote uniformity;" for that congruity is capable of translating competent knowledge of the law of State A on the matter at issue into competent knowledge of the same department of the law of State B. And if in connection with the same representation, the client can benefit from that translation of knowledge above and beyond the answer to the conflicts question that occasioned it, the lawyer has no "ethical" obligation to play dumb—to affect, that is, to disown her acquisition of knowledge.

This Article deduces the preceding propositions from authority applicable to a hypothetical consultation involving two states that have enacted the Uniform Trust Code. Any uniform act would do for demonstration purposes, but the UTC is convenient for having its own conflict of laws apparatus. And any two UTC states would do, provided each has enacted the proper subset of UTC provisions implicated in the hypothesized consultation more or less in the form promulgated by the Uniform Law Commission as well as something recognizable as the standard uniformity mandate described above. Michigan and Ohio meet those conditions and are adopted here as the illustrative pair without any attempt to identify the (presumably numerous) other pairs of UTC states that qualify.

I. Introduction

A lawyer "conducting activities in the lawyer's home state,"[1] providing legal services, that is, while physically located[2] in a state in which the lawyer is licensed to practice,[3] on behalf of a client who has good reason to seek the advice of someone knowledgeable about the law of the lawyer's home state in particular, may be required by the home state's conflict of laws rules,[4] to evaluate aspects of the conflicts rules or local law[5] of a state in which the lawyer is *not* admitted to practice.[6] To that extent, the ethical risk of the lawyer's advising the client about (or based on) the law of the "non-admitted" state[7] is not unauthorized practice[8] but breach of the duty of competence[9]—the risk that "the lawyer [does not have] adequate familiarity with the relevant law."[10] That risk is mitigated in any case, by modern technology, "including ready electronic connection to much of the law of every state."[11] But it is dramatically mitigated if the home state and non-admitted state involved have both enacted the same uniform law concerning the matter at issue, including that law's standard (i.e., *uniform*) acknowledgement of "the need to promote uniformity … with respect to [that] matter among States that enact [the uniform law in question];"[12] for that congruity is capable of translating the lawyer's competent knowledge of the law of the home state on the matter at issue into competent knowledge of the same department of the law of the non-admitted state.[13] And if in connection with the same representation,[14] the client can benefit from that translation of knowledge *above*

and beyond the answer to the conflicts question that occasioned it, the lawyer has no "ethical" obligation to play dumb—to affect, that is, to disown such knowledge.[15]

This Article deduces the preceding propositions from authority applicable to a hypothetical consultation involving two states that have enacted the Uniform Trust Code (UTC).[16] Any uniform act would do for demonstration purposes, but the UTC is convenient for having its own conflict of laws rules.[17] If we were instead to choose, for example, the Uniform Statutory Rule Against Perpetuities (USRAP),[18] we should have to assume that neither of the enacting states involved in the demonstration has another statute displacing relevant common law conflicts rules[19] and that the superior courts of both states agree in their interpretation of those rules[20]—we should have, in other words, to stipulate *accidental* uniformity of conflicts rules; for the USRAP has no provision indicating what law governs remoteness of vesting[21] in case, for example, a power of appointment *p*, which is granted by the terms of a trust *T*, is exercised, the validity of *T* is governed by the law of State A, the donee of *p* is domiciled in different State B, and the nonvested interest purportedly created by the exercise is too remote (i.e., is liable to vest later than is permitted) under the local law of State A but not that of State B or *vice versa*.[22] In that case, determining the substantive validity of the exercise requires a choice of law[23] that the USRAP does not make.[24] By contrast, a court in a UTC state that has to make a choice of law on a matter of the validity, construction, or administration of a trust,[25] will follow *the UTC*—because the UTC explicitly *makes* those choices.[26]

It is also true that any two UTC states would do for purposes of our demonstration,[27] provided each has enacted the proper subset of UTC provisions implicated (in the hypothesized consultation)[28] more or less in the form promulgated by the Uniform Law Commission (ULC)[29] as well as something recognizable as the "promote-uniformity provision"[30] of UTC section 1101.[31] Michigan and Ohio meet those conditions[32] and are adopted as our illustrative pair[33] without any attempt to identify the (presumably numerous) other pairs of UTC states that qualify.

II. Mooted Facts and Localized Thesis

The couple we shall call "Clients" are Michigan residents who—we shall initially say (with intentional vagueness)—need to restate or amend the terms of a certain trust, *T*, which they formed pursuant to Ohio law at a time—on or after January 1, 2007[34]—when they resided in Ohio. The *T* trust instrument says that *T* can be amended or revoked by Clients, and Clients now want to give *T* a Michigan orientation in certain respects, which (they are prepared to expect) may recommend a change of governing law. So, they consult a Michigan attorney. That attorney, Lawyer, warns Clients that she may not be able to advise them without consulting Ohio counsel; for while the *T* trust instrument says nothing about the method(s) *by*, or the purpose(s) *for which T* can be amended or revoked, it explicitly designates Ohio law to govern the trust's validity, construction, and administration,[35] and (as she is careful to emphasize) Lawyer is *not* licensed to practice law in Ohio.[36] If she is engaged by Clients (Lawyer explains), her initial inquiry will be whether she can, without engaging in unauthorized practice of law[37] or breaching her duty to provide competent representation,[38] prepare a restatement or amendment of the terms of *T* that (possibly) changes governing law to that of Michigan *without consulting Ohio counsel*.

Of course, Clients could make that inquiry unnecessary by promptly encouraging Lawyer to associate Ohio counsel in the matter.[39] But they do otherwise: they would prefer, they tell Lawyer, that, if possible, she should handle the matter alone. It is argued in what follows that that *is* possible, that on plausible, alternative interpretations of the mooted facts,[40] Lawyer can, without engaging in unauthorized practice of law or breaching her duty of competence, prepare a valid restatement or amendment of the terms of

T that designates Michigan law to govern the validity, construction, and administration[41] of the result and that she can do that, on each interpretation, without consulting Ohio counsel.

III. Preliminary Specifications

A. "Restate or Amend"

Of course, someone could set out to "restate" the terms of a trust without having any intention of *amending* those terms, as when, for example, translating a trust instrument from one language to another, or petitioning a court to declare the terms of a trust because the trust instrument is lost. But our casual association of the verbs "restate" and "amend" in the expression "need to restate or amend …"[42] is meant to suggest alternative *means* rather than alternative ends—it is meant to suggest that Clients may have a couple of different ways of dealing with a particular problem rather than that they may have a couple of different problems. So, we assume that Clients are interested in the possibility of *restating* the terms of *T* as a particular means of *amending* at least some of those terms: the choice, as they conceive it, concerns merely the *extent* of the document that Lawyer prepares for them and the number of operative trust instruments left standing after that document is executed.

B. A Sense of Place

We have not said whether Lawyer communicates with Clients regarding *T* when Clients and she are physically located in Ohio, when Lawyer is physically located in Michigan and Clients in Ohio, or when they are all physically located in Michigan. We need not oversimplify by plumping for the latter situation *tout court*: it will suffice for us to assume merely that Clients' residence in Michigan makes it possible for them (1) to make the latter situation (in which Lawyer communicates with Clients regarding *T* when they are all physically located in Michigan) the norm, any instance of either of the other two situations being strictly "temporary" within the meaning of rule 5.5(c) of the Model Rules of Professional Conduct (MRPC),[43] and (2) to arrange, if Lawyer requests it, to execute documents *in Michigan*.

C. Conflicts (if any) Nondisciplinary

We also have not adduced, and will assume away any possible difference between the rules of professional responsibility (concerning unauthorized practice of law, competence, or anything else) applicable to lawyers admitted in Ohio, on the one hand, and those applicable to lawyers admitted in Michigan, on the other. In the absence of such a difference, it is not "necessary to have a choice-of-law rule to determine which specific provision of two … arguably applicable *and inconsistent* lawyer-code provisions should apply."[44] We can therefore assume that Lawyer's "initial inquiry" concerning her representation of Clients[45] does not involve a choice of law concerning *professional discipline*.[46]

IV. Alternative Interpretations

A. Alternative Interpretation 1

We have not said *why* Clients "need" to restate or amend the terms of *T* and (possibly) change governing law.[47] It may be that they are now (or are expecting soon to be) *domiciliaries*[48] as well as residents of Michigan[49] and suppose that domiciliary status requires (or is conveniently evidenced by) trust naturalization. Or it may be that, though they are now (and expect to remain) domiciliaries of Ohio,[50] they ultimately want *T* to be administered in (and otherwise subject to the local law of) Michigan because of the current or expected future locations of the intended beneficiaries, trustee(s), and trust asset(s).[51] As stated, these candidate explanations are mutually exclusive,[52] but we can embrace aspects of both—and build the neatest possible interpretation from Lawyer's point of view as Clients' Michigan counsel—if we assume that Clients have no present intention or concern that would foreseeably require *T* ever to be recognized as an express trust by an Ohio court: on this "Interpre-

tation 1," let us say, Clients have moved "lock, stock, and barrel" (as the gunnery figure has it) to Michigan with the intention of dwelling, indefinitely, in the suburb of Detroit in which (for the nonce at least) all of the intended objects of Clients' bounty happen to reside.

We can add signally to Interpretation 1's *neatness*—again, from Lawyer's point of view as Clients' Michigan counsel—by also assuming (1) that Clients are, and have been since *T*'s inception, the trustees of *T* and (2) that in light of Clients' motivation (whatever it is exactly) for giving *T* a Michigan orientation, (a) the trouble of protectively retitling or redirecting any assets that Clients are *aware* of having titled or directed to themselves as trustees of *T* and of executing one-sentence codicils republishing their respective pour-over wills is "worth the candle" (as the lucubratory figure has it) and (b) Lawyer can recommend—and Clients are willing—that the terms of *T* be *restated* in full.[53]

But the statement that Clients "need" to restate or amend the terms of *T*[54] is semantically as well as factually ambiguous. It may mean that to achieve a certain set of their objectives (on a given understanding of the surrounding circumstances), Clients *should* (i.e., *are well advised to*) restate or amend the terms of *T* (Sense 1). Alternatively, it may mean that to achieve a certain set of their objectives (on a given understanding …), Clients *understandably wish to* restate or amend the terms of *T* (Sense 2). As used in Sense 1, the predicate "need(s) to …" is appropriate only when there is no question of the subject's or subjects' not being able to do what is "need[ed]," as when someone says (of an alert, sober person who is in good health), "He needs to sit up straight." In Sense 1, that is, "need(s) to …" implies "*can* …" in the sense "[t]o be able; to have the power or capacity."[55] As used in Sense 2, "need(s) to …" is at least *consistent with* the idea, and, indeed, may *imply* that the subject's or subjects' ability to do what is "need[ed]" is doubtful, as when someone says (even of an alert, sober person who is in good health), "He'll need to jump twenty-seven inches vertically."

If we take (as we *do* in Interpretation 1) "Clients … need to restate or amend [the terms of *T*]" in Sense 1, it is simply *given* that the trust described in the *T* trust instrument, viz., *T*, was validly created and is currently revocable; for in Sense 1, "need(s) to …" implies "*can* …,"[56] and Clients cannot restate or amend a trust that is either nonexistent or irrevocable.[57] On this interpretation, we can imagine, for example, that Clients have a recent letter (dated *after* the execution of the *T* trust instrument) from a lawyer licensed to practice in Ohio (who happens to be the current Chair of the Estate Planning, Trust, and Probate Law Section of the Ohio State Bar Association) that clearly states that *T* is a valid, *revocable* trust under Ohio law.

B. Alternative Interpretation 2

If, on the other hand, we take "Clients … need to restate or amend [the terms of *T*]" in Sense 2, the questions whether *T* is valid and, if so, *revocable* may be open; for in Sense 2, "need(s) to …" need not imply "*can* … ."[58] In that case (i.e., on this "Interpretation 2"), Clients *do not* have any communication from Ohio counsel like the letter involved in Interpretation 1;[59] perhaps they avow that they "just always *assumed*" that *T* was revocable in light of the declaration to that effect in the trust instrument[60] and that *T* was *valid* in light of the considerable fee they paid Ohio counsel to help them create the thing. We will assume that *T* would be a valid, revocable trust if the local law of Michigan governed the meaning and effect of *T*'s terms from inception, but Lawyer will not be able to use *Michigan* law to determine *directly* even that *T* was "validly created"[61] if we also assume (as we *do* in Interpretation 2) that the *T* trust instrument was executed somewhere outside of Michigan at a time when (1) Clients (and any trustee of *T* other than Clients)[62] had neither a residence nor a place of business in Michigan and (2) there was no property subject to the terms of *T* located in Michigan.[63] We can further complicate things—from Lawyer's point

of view as Clients' Michigan counsel—by assuming that Clients reasonably regard the trouble of protectively retitling or redirecting the assets titled or directed to the trustees of *T* as practically prohibitive (assuming *T* is valid and revocable).[64] And to make Interpretation 2 otherwise *messy* where Interpretation 1 is "neat[],"[65] we can assume that though Clients' motivation (whatever it is exactly) for giving *T* a Michigan orientation is compelling,[66] it leaves open distinct possibilities that an Ohio court could one day be asked to affirm or nullify the terms of *T* as amended.

V. Analysis of Interpretation 1

Interpretation 1 is liable to deprive the mooted facts of their unauthorized-practice-or-competence interest by making effective amendment of the terms of *T* under Ohio law all but indifferent. Clients are reliably informed (on this Interpretation)—by someone *other than Lawyer*—that *T* is a valid revocable trust under Ohio law, but they currently have no reason to expect that it will ever be more important for *T* to be recognized as such by a court *in Ohio* than by a court in any other state that is not Michigan; and they are willing to republish their pour-over wills and protectively retitle or redirect assets that they are *aware* of having titled or directed to themselves as trustees of *T*.[67] That means that Clients' objectives (whatever they are exactly) in restating or amending the terms of *T* can all but handily be met by Lawyer's simply engineering a new, *T-substitute* revocable trust that is valid under Michigan law and that designates Michigan law to govern the new trust's validity, construction, and administration.[68] The only *T*-related risk to which that tack leaves Clients exposed is that there may be assets titled or directed to the trustee(s) of *T* of which Clients are unaware—either because they've forgotten something or because, without Clients' knowledge, assets have been (or later will be) contributed to *T* by someone other than Clients.

If Clients reasonably regard that risk as negligible, Lawyer can afford to be agnostic about whether the restatement that she prepares[69] will be valid *qua amendment* (of the terms of the existing trust *T*) under Ohio law so long as the restatement alternatively creates a valid revocable trust under the law of Michigan. And happily, as we shall see, the fact that the restatement might (for preference) amend the terms of *T*, a revocable trust created pursuant to Ohio law that designates Ohio to provide "governing" law, does not prejudice the question whether the restatement might *alternatively* create a contingently independent, revocable trust pursuant to Michigan law.[70]

A. Ohio Law Governs the Validity of an Initial Amendment of the Existing Trust *T*

As far as a UTC state like Michigan or Ohio is concerned, the validity of the restatement that Lawyer prepares for Clients *as an amendment of the terms of the existing trust T* is a question (as between Michigan and Ohio at least) of Ohio law; for (1) the *T* trust instrument explicitly designates Ohio law to govern *T*'s validity and construction[71] and (2) UTC section 107(1) provides:

> The meaning and effect of the terms of a trust are determined by … the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.[72]

Now, it is possible that Michigan is "the jurisdiction having the most significant relationship to the matter"[73] of the validity of the restatement *qua* amendment of the terms of *T*.[74] This might be owing to Clients' motivation (whatever it is exactly) for giving *T* a Michigan orientation[75] and might be especially likely to the extent Clients, *qua* trustees of *T*, own directly (i.e., without an entity wrapper) land located in Michigan; for though the legislative history[76] of UTC section 107 indicates that "[t]he settlor is free to select the governing law *regardless of … whether [the trust property] consists of real or personal property*,"[77] deference to the law of the situs of land is a pervasive feature of common law choice-of-

law rules,[78] and Michigan courts employ the interpretive presumption that a minimum change is to be effected by legislation in a common law area.[79]

But it is *not* possible, in any case, that the *T* trust instrument's designation of Ohio law is "contrary to a strong public policy of [Michigan regarding] the matter"[80] of the validity of the restatement that Lawyer prepares *qua amendment* (of the terms of *T*) because Ohio has enacted the same UTC provision regarding amendment of revocable trusts, as part of its general enactment of the UTC, that Michigan has enacted as part of *its* general enactment of the UTC: "The settlor may revoke or amend a revocable trust … if the terms of the trust do not provide a method, by any method manifesting clear and convincing evidence of the settlor's intent … ."[81] And both states have enacted similar exhortations (of their respective judicatures) to multistate uniformity in interpretation of UTC provisions.[82] There cannot be contrariety without difference.[83] So, as far as Michigan's public policy is concerned, the "unless …" condition of UTC section 107(1)[84] is inapplicable in this case, and (as between Michigan and Ohio at least) Ohio law therefore governs the validity of the restatement that Lawyer prepares *qua* amendment of the terms of the existing trust *T*.[85]

B. But Michigan Law Governs the Alternative Creation of a *T*-Substitute Revocable Trust

But though the "restatement" that Lawyer prepares for Clients is intended—for *preference*, just in case there *are*, after all, *T* trust assets of which Clients are unaware[86]—to amend the terms of the existing trust *T* (which trust was created pursuant to Ohio law and designates Ohio to provide "governing" law), *if* the restatement should come to be examined[87] for its capacity *alternatively* to create an independent trust of the same description as *T as "restated,"* there is no ordering principle of choice of law according to which the validity of the creation of the putatively independent trust must be determined under Ohio law.[88] And there is, of course, no reason why a dispositive instrument cannot condition alternative means of effecting a given disposition on alternative contingencies.[89]

1. UTC section 403

Michigan Trust Code (MTC) section 7403 provides: "A trust not created by will is validly created if its creation complies with [among alternative, potential validating references] the law of *the jurisdiction in which the trust instrument was executed*."[90] And by hypothesis, Clients can execute the restatement that Lawyer prepares for them (presumably in Michigan) in Michigan.[91] Since Lawyer can (i.e., it is within her competence *to*) make sure that the restatement describes a trust that complies with Michigan's requirements for the creation of a revocable trust,[92] the contemplated restatement of the terms of *T* that designates Michigan to provide governing law[93] will describe a revocable trust that may be "validly created," according to Michigan law, as of the date of the restatement, *regardless* of whether the restatement does or does not constitute a valid amendment of the terms of the existing trust *T* under Ohio law.[94]

Clients' willingness to republish their pour-over wills and protectively retitle or redirect *T* trust assets of which they are *aware* will do the rest[95] in conjunction with (something like) the following provision of the "restatement."

> Settlors provisionally intend that this Restatement will amend and state anew the complete terms of the revocable trust that they created on [date of execution of *T* trust instrument] ("Date 1") pursuant to Ohio law ("Original Trust"). They expect that that intention ("Provisional Intention") will be realized based on their understanding (1) that this Restatement would constitute a valid amendment of the Original Trust if its validity as such were determined under Michigan law, by virtue of its compliance with a particular provision of the Uniform Trust Code ("UTC") that has been enacted in Michigan[96] as part of

Michigan's general enactment of the UTC and (2) that the same UTC provision has likewise been enacted in Ohio.[97] This Restatement also complies, however, independently, with the requirements under Michigan law for the *creation*, as of the date hereof ("Date 2"), of the trust described herein.[98] In accordance with the Provisional Intention, the trust described herein shall be known, in any case, as "Clients' Trust dated Date 1." But Clients do not intend that the efficacy of this Restatement in achieving the dispositive and administrative purposes that it expresses should be limited—by the Provisional Intention—to whatever validity this Restatement may have under Ohio law *as an amendment of the Original Trust*. Therefore, to the extent, if any, that this Restatement does not cause any asset currently held by Clients as trustees of the Original Trust to become subject to the provisions of this Restatement (as opposed to the provisions of the Original Trust instrument), Clients hereby revoke the Original Trust and transfer the asset in question to themselves as trustees of Clients' Trust dated Date 1 as the trust that is, *in that case*, hereby separately created on Date 2 pursuant to Michigan law.

2. A Dismissible Objection

It might be objected that the "catchline"[99] of Michigan's enactment of UTC section 403, which reads, "Trusts created in *other* jurisdictions,"[100] restricts MTC section 7403's application to trusts created in states *other than* Michigan, whereas (1) the plan is for Clients to execute the restatement that Lawyer prepares for them (presumably in Michigan) *in Michigan*[101] and (2) according to the argument above, it is the validity of the creation, not of *T*, but of the contingently separate *T-substitute trust*, originating pursuant to Michigan law, on Date 2,[102] that MTC section 7403 is supposed to confirm.

The response to this objection is that catchlines are not included in legislative bills in Michigan[103] (they are supplied by the Legislative Service Bureau (LSB) *after* enactment),[104] and generally "[h]eadings and titles may not be used in construing a statute … unless they are contained in the [enrolled bill] … as adopted."[105] Furthermore, *this* catchline is just (verbatim) the heading that accompanies section 403 in the uniform act,[106] while there is nothing in the text of, or the official Comment to UTC section 403 to prevent or discourage the section's application to trusts created in the enacting state,[107] and the Comment tells us that "[s]ection 403 is comparable to Section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places,"[108] *including, explicitly, the law of the enacting state*.[109] So, the heading parroted by the LSB catchline[110] is simply a misnomer—one eschewed, by the way, in Ohio in favor of, "Validity of nontestamentary trusts."[111] The catchline should thus be ignored, and, thanks to MTC section 7403, the restatement that Lawyer prepares for Clients will succeed *at least*[112] as the creation of a substitute revocable trust (having the terms of *T* as "restated") to which Clients transfer the assets of *T* of which they are aware.[113]

C. Change to, or Designation of Michigan for Governing Law

1. Administration

Whether the restatement that Lawyer prepares succeeds as an amendment of the terms of *T* (because it happens to comply with the requirements for that sort of thing under Ohio Law)[114] or merely as the creation of a new revocable trust *substitute* for *T*[115] (because the restatement complies with the requirements for *that* sort of thing under *Michigan* law),[116] the fact that the trustees of *T* (i.e., Clients)[117] are Michigan residents[118] is "a sufficient connection"[119] with Michigan for Lawyer's restatement's designation of Michigan (or a place *in* Michigan) as the trust's "principal place of administration" within the meaning of UTC section 108[120] to determine judicial jurisdiction[121] and that the local law of Michigan will govern the trust's adminis-

tration.[122]

2. Validity and Construction

And whether the restatement that Lawyer prepares succeeds as an amendment of the terms of *T* or merely as the creation of a new revocable trust *substitute*, there are neither too many contacts[123] with Ohio nor too few with Michigan for the restatement to *designate* Michigan to provide law governing validity and construction[124] (in addition to administration[125]). That is because according to the legislative history of UTC section 107(1),[126] viz., the ULC Comment to the section,[127] contacts do not matter:

> Paragraph (1) [of UTC section 107] allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. *The jurisdiction selected need not have any other connection to the trust.* The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime.[128]

a. The "Strong Public Policy" Override

Whether Lawyer's restatement's designation of Michigan to provide governing law will be "*controlling*"[129] in a given situation, however, depends on the matter at issue; for, as we have seen,[130] a settlor is free to designate governing law "*unless* the designation … is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue."[131] And we cannot suppose "that all questions of validity[, for example,] will be determined by the same [local] law"[132]: "What state has the most significant relationship with the trust [in question] may depend upon the particular ground of invalidity."[133] It is possible, therefore, that *in spite of* Clients' having moved (according to Interpretation 1) "lock, stock, and barrel" to Michigan at or near the time of the restatement's execution,[134] Ohio (or some other state that is not Michigan) will be "the jurisdiction having the most significant relationship to [some] matter"[135] that comes up under the terms of the restatement, perhaps many years after the restatement is executed.[136]

i. Strong Public Policies

We have already seen that if that matter is covered by the UTC or some other uniform act that both Michigan and Ohio (or the other non-Michigan state in question) have enacted, it is unlikely that Lawyer's restatement's designation of Michigan law will be "contrary to a strong public policy of [Ohio (or the relevant, other non-Michigan state) regarding that] matter."[137] Indeed, such contrariety is fairly unlikely in any case. A strong public policy, it has been said, is based in "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[138] The examples concerning trusts provided in the *Restatement (Second) of Conflict of Laws* (Restatement of Conflicts) include policies against donative provisions that encourage divorce or criminal activity,[139] disinherit spouses,[140] or prefer charities disproportionally to near relations.[141] On the other hand, the Restatement tells us that "*[n]o such strong policy is involved* in rules against perpetuities or rules against accumulations [of income] or rules as to indefiniteness of beneficiaries."[142]

The latter statement is perhaps no longer credible (assuming that it *was* credible when the Restatement of Conflicts was drafted) with regard to a state that currently wants to *enforce* any of the rules mentioned.[143] But the many states that have *thrown off* such rules (*since* the Restatement of Conflicts was drafted) have certainly *not* done so because they wish to *discourage* the vesting of transferred future interests,[144] or regular distributions of trust income,[145] or the creation of trusts for the benefit of definite or definitely ascertainable beneficiaries[146]: a state's *abrogation* of a rule against remoteness of vesting, accumulations of income, or noncharitable purpose trusts represents a recognition, not of a strong public policy, but of the *absence* of such

a policy.[147] It is unlikely, therefore, that a "strong public policy" regarding remoteness of vesting, for example, should ever be found to have arisen between two rule-against-perpetuities-*reforming* states like Ohio[148] and Michigan.[149]

ii. Override Ineradicable

But unlikely as it is that the contemplated restatement's designation of Michigan law will eventually be found to be contrary to a strong public policy of Ohio (or another interested, non-Michigan state) regarding some matter,[150] we cannot entirely rule that out, and if it should occur, the matter in issue would be governed by Ohio law (or the law of the other non-Michigan state in question),[151] which means that Lawyer's restatement's designation of Michigan to provide governing law is only *presumptively* controlling. But that is not to say that Lawyer's restatement is thus *wanting*; for the *T* trust instrument's designation of Ohio to provide governing law[152] is likewise only presumptively controlling: *any* designation of governing law described in UTC section 107(1) is subject to the section's "strong public policy" override.[153]

b. A Dismissible Objection

It might occur to someone, however, to question that. UTC section 107 is, after all, part of an articulated system, a "trust code," made up primarily of rules of construction[154] or "default" rules[155] that "can be overridden in the terms of the trust."[156] And *in* that system, "[t]he provisions [that are] *not subject to override* [by the terms of the trust] are scheduled in Section 105(b),"[157] *which contains no reference or allusion to UTC section 107*.[158] So, why (our hypothesized questioner continues) should we not read a designation that says (as such designations sometimes *do*), "This [restatement] shall be construed and administered, and the validity of each trust hereunder shall be determined, in accordance with the laws of the State of Michigan, *without giving effect to that State's conflict of laws principles*"[159] as a *waiver* of MTC section 7107(a)'s "strong public policy" override[160] that is *authorized* by MTC section 7105(2)?[161]

The answer, of course, is that on our questioner's reading of UTC section 105, that section is self-defeating. Section 105 is evidently meant to distinguish the "default" provisions of the UTC,[162] which "can be overridden in the terms of the trust,"[163] form *mandatory* provisions that, thanks to section 105, are "*not* subject to override."[164] But if (as our questioner would have it) section 105 *itself* is a default provision, *there can be no mandatory provision* in the UTC; for in that case, it is available to a settlor to waive section 105(b)'s enforcement of any of the provisions cited or alluded to in section 105(b)—*reductio ad absurdum*. And a reading that renders a statutory provision absurd in the sense of its being *self-defeating* is decidedly to be shunned,[165] even if it means "that words which are in the statute are ignored or words which are not there are read in."[166] Hence, UTC section 105(b) is no doubt to be read as if it says, "The terms of a trust prevail over any provision of *Articles 2 through 10 of* this [Code] except …,"[167] exempting the *apparatus* that composes Article 1. And that makes UTC section 107(1)'s "strong public policy" override[168] ineradicable.

D. The Upshot on Interpretation 1

But again, that is not a defect of the restatement that Lawyer prepares for Clients under Interpretation 1: that restatement's designation of Michigan to provide governing law is every bit as good as the *T* trust instrument's designation of Ohio for that purpose.[169] So, if Clients are prepared to regard the risk that there may be assets titled or directed to the trustee(s) of *T* of which Clients are unaware as negligible,[170] then *given* that *T* is a valid, revocable trust under Ohio law,[171] that Clients are willing to republish their pour-over wills and protectively retitle or redirect trust assets of which they are *aware*, and all of the other assumptions that inform Interpretation 1,[172] Lawyer can prepare a restatement of the terms of *T* that will meet Clients' "need" *re-*

gardless of its effectiveness *qua* amendment under Ohio law.[173] And that means that Lawyer can assist Clients without engaging in unauthorized practice of law, without breaching her duty of competence, and without consulting Ohio counsel.[174]

VI. Analysis of Interpretation 2

On Interpretation 2, however, the restatement or amendment that Lawyer prepares for Clients has to be valid as such under Ohio law because Clients reasonably regard the trouble of protectively retitling or redirecting the *T* trust assets as prohibitive (assuming *T* is valid and revocable) and they have reason to expect that an Ohio court could one day be asked to affirm or nullify the terms of *T* as amended.[175]

A. The Threshold Questions of *T*'s Validity and Revocability

Interpretation 2 also leaves open the questions of whether *T* is valid and, if so, *revocable*[176]—so as to be subject to amendment.[177] We know that the *T* trust instrument provides that *T* can be amended or revoked by Clients.[178] The threshold questions, then, are whether that is a provision of a valid trust, and if so, whether it (i.e., that provision) is effective.[179]

1. Ohio Law Governs the Validity and Revocability of *T*

As a lawyer licensed to practice in Michigan, Lawyer is certainly authorized and competent to ask how a Michigan court would answer those questions. And we know that a Michigan court would refer them both (as between Michigan and Ohio at least) to Ohio law; for, again,[180] (1) the *T* trust instrument explicitly designates Ohio law to govern *T*'s validity and construction[181] and (2) UTC section 107(1) provides that that designation is controlling "unless [it] is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.[182] And again,[183] it is possible that Michigan is "the jurisdiction having the most significant relationship to the matter[s]"[184] of the validity and revocability of *T*.[185] But it is *not* possible that the *T* trust instrument's designation of Ohio law is "contrary to a strong public policy of [Michigan regarding those] matter[s]"[186] because Ohio has enacted the same UTC provisions regarding trust creation[187] and revocability,[188] as part of its general enactment of the UTC, that Michigan has enacted as part of *its* general enactment of the UTC.[189] And, again, both states have enacted similar exhortations (of their respective judicatures) to multistate uniformity of interpretation.[190] Since there cannot be contrariety without difference,[191] UTC section 107(1)'s "strong public policy" override[192] is inapplicable, and (as between Michigan and Ohio at least) Ohio law therefore governs the validity and revocability of *T*.[193]

2. Conflict of Laws and the *Local* Necessity of Legal Cosmopolitanism

Now, Lawyer has neither engaged in unauthorized practice of law nor breached her duty of competence in reasoning—and in enabling herself, by research, to reason—in this way[194] to the conclusion that *according to Michigan law*, Ohio law governs the validity and revocability of *T*. Like Michigan's other conflict of laws rules, MTC section 7107(a)[195] is part of *Michigan's law*.[196] And though like other choice-of-law rules, section 7107(a) is *jurisdiction* selecting, in the sense that it points *directly* not to a rule of decision (on the matter in issue) but to a *state*, "a territorial unit having a distinct general body of law,"[197] *regardless* of the content of any of the rules comprised by that body of law,[198] its application—especially the determination whether the law of a designated state "is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue"[199]—may require a comparison of the content of the local laws of interested states.[200] Thus, conflict of laws rules are liable to provide a *domestically* motivated instance of the general necessity that

> a lawyer conducting activities in the lawyer's home state may advise a client about the law

> of another state, a proceeding in another state, or a transaction there, *including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there*. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law.[201]

And, of course, there are two factors that contribute enormously to Lawyer's ability to achieve "adequate familiarly,"[202] with the relevant Ohio law. One is technology: "Modern communications, including ready electronic connection to much of the law of every state, makes concern about a competent analysis of a distant state's law unfounded."[203] The other is that Michigan and Ohio are both UTC states that have legislatively acknowledged "the need to promote uniformity of the law with respect to the [UTC's] subject matter."[204]

3. The Leverage of Uniformity in Answering the Threshold Questions

That commitment in principle to uniformity inevitably leverages the knowledge of the UTC that a lawyer gains from the particular enactment(s) of that code in the state(s) in which the lawyer is licensed to practice. And this is illustrated by Lawyer's analysis of the threshold questions about the validity and revocability of *T*;[205] for *en route* to the conclusion that a Michigan court would refer those questions to Ohio law,[206] Lawyer has learned that at least as to matters as rudimentary as trust creation and revocability, to know the local law of Michigan is to know the local law of Ohio because, again, Ohio has enacted the same UTC provisions regarding trust creation and revocability, as part of its general enactment of the UTC, that Michigan has enacted as part of *its* general enactment of the UTC,[207] and both states have enacted similar exhortations (of their respective judicatures) to multistate uniformity of interpretation.[208] So, by knowing that *T* would be a valid, revocable trust if the local law of Michigan governed the meaning and effect of *T*'s terms from inception,[209] Lawyer knows that *T* is a valid, revocable trust under the local law of Ohio.

Because Clients' motivation (whatever it is exactly) for giving *T* a Michigan orientation is compelling,[210] Lawyer's deployment on Clients' behalf, of her knowledge of the local law of Ohio concerning trust creation and revocability (which Lawyer deployed or obtained in determining that according to Michigan law, Ohio law governs those matters with respect to *T*) no doubt "arise[s] out of or [is] reasonably related to [Lawyer's] practice in [Michigan]"[211] within the meaning of MRPC rule 5.5's permissive authorization for Lawyer to "provide legal services on a temporary basis in [Ohio]."[212] And that makes sense; for Lawyer's using her knowledge in this way "do[es] not create an unreasonable risk to the interests of [Lawyer's] clients [i.e., Clients], the public or the courts,"[213] and an "ethical" prohibition on Lawyer's doing so, if there *were* one, "could seriously inconvenience [C]lients [if] [r]etaining [Ohio] counsel [should, for example,] cause … delay and expense and … require [C]lient[s] to deal with unfamiliar counsel."[214] So, Lawyer can, without engaging in unauthorized practice of law or breaching her duty of competence, advise Clients not only that a Michigan court would find that (as between Michigan and Ohio at least) the validity and revocability of *T* are questions of Ohio law[215] but that an Ohio court would find the same[216] and that *T is* a valid, *revocable* trust under Ohio law.[217]

B. The Validity of the Restatement or Amendment That Lawyer Prepares

A straightforward adaptation of the preceding analysis[218] will likewise yield that Lawyer can, without engaging in unauthorized practice of law or breaching her duty of competence, advise Clients not only that a Michigan court would find that (as between Michigan and Ohio at least) the validity of the restatement or amendment of the

terms of *T* that Lawyer prepares is a question of Ohio law but that an Ohio court would find the same and that the restatement or amendment that Lawyer prepares will be (as is needful)[219] valid as such under the local law of Ohio as well as the law of Michigan.

1. Ohio Law Governs

As a lawyer licensed to practice in Michigan, Lawyer is certainly authorized and competent to ask how a Michigan court would answer the question whether the restatement or amendment of the terms of *T* that Lawyer prepares for Clients is valid as such. And we know that (as between Michigan and Ohio at least) a Michigan court would refer that question to Ohio law because, again,[220] (1) the *T* trust instrument explicitly designates Ohio law to govern *T*'s validity and construction[221] and (2) under UTC section 107(1), that designation is presumptively controlling.[222] It is possible that Michigan is "the jurisdiction having the most significant relationship to the matter"[223] of the validity of the restatement or amendment.[224] But it is *not* possible that the *T* trust instrument's designation of Ohio law is "contrary to a strong public policy of [Michigan regarding that] matter"[225] because Ohio has enacted the same UTC provision regarding amendment of revocable trusts, as part of its general enactment of the UTC, that Michigan has enacted as part of *its* general enactment of the UTC.[226] And both states have enacted similar exhortations (of their respective judicatures) to multistate uniformity of interpretation.[227] Since there cannot be contrariety without difference,[228] UTC section 107(1)'s "strong public policy" override[229] is inapplicable in this case, and (as between Michigan and Ohio at least) Ohio law therefore governs the validity of the restatement or amendment that Lawyer prepares for Clients.[230]

2. The Leverage of Uniformity Again

But *en route* to that conclusion, Lawyer has learned that as to the "method"[231] by which "[t]he settlor may . . . amend a revocable trust,"[232] to know the local law of Michigan is to know the local law of Ohio because, again, Ohio has enacted the same UTC provisions regarding amendment of revocable trusts, as part of its general enactment of the UTC, that Michigan has enacted as part of *its* general enactment of the UTC,[233] and both states have enacted similar exhortations (of their respective judicatures) to multistate uniformity of interpretation.[234] So, by knowing that she can prepare a restatement or amendment of the terms of *T* that would be valid as such if the local law of Michigan governed the meaning and effect of *T*'s terms from inception,[235] Lawyer knows that she can prepare a restatement or amendment of the terms of *T* that will be valid as such under the local law of Ohio.

Because Clients' motivation (whatever it is exactly) for giving *T* a Michigan orientation is compelling,[236] Lawyer's deployment on Clients' behalf, of her knowledge of the local law of Ohio concerning amendment of revocable trusts (which Lawyer has deployed or obtained in determining that according to Michigan law, Ohio law governs that matter with respect to *T*) no doubt "arise[s] out of or [is] reasonably related to [Lawyer's] practice in [Michigan]"[237] within the meaning of MRPC rule 5.5's permissive authorization for Lawyer to "provide legal services on a temporary basis in [Ohio]."[238] And that makes sense because Lawyer's using her knowledge in this way does not threaten the interests of clients, the public, or the courts that MRPC rule 5.5 aims to protect[239] and an "ethical" prohibition on Lawyer's doing so, if there *were* one, would therefore expose Lawyer's clients to unnecessary risk of serious inconvenience.[240] So, Lawyer can, without engaging in unauthorized practice of law or breaching her duty of competence, advise Clients not only that a Michigan court would find that (as between Michigan and Ohio at least) the validity of the restatement or amendment that Lawyer prepares is a question of Ohio law[241] but that an Ohio court would find the same[242] and that the restatement or amendment of the terms of *T* that Lawyer prepares will

be valid as such under the local law of Ohio as well as the law of Michigan.[243]

C. Change to Michigan for Governing Law

1. Administration

We have already seen that under UTC section 108(a),[244] the designation (in the restatement or amendment that Lawyer prepares for Clients) of Michigan (or a place *in* Michigan) as *T*'s principal place of administration will determine judicial jurisdiction and that the local law of Michigan governs *T*'s administration if either (1) a trustee of *T* has a principal place of business or residence in Michigan or (2) all or part of the administration of *T* occurs in Michigan.[245] We have not assumed in Interpretation 2 that Clients are trustees of *T*.[246] If they are not, "a sufficient connection"[247] will have otherwise to be established.

2. Validity and Construction

As we have also seen, there are neither too many contacts with Ohio nor too few with Michigan for the restatement or amendment that Lawyer prepares to *designate* Michigan to provide governing law.[248] Whether that designation will be "*controlling*"[249] in a given situation, depends ineradicably on the matter at issue[250]: it is possible that Ohio (or some other state that is not Michigan) will be "the jurisdiction having the most significant relationship to [some] matter"[251] that comes up under the terms of the restated or amended trust,[252] and in that case, the law of Ohio (or of the other interested, non-Michigan state) may govern the matter.[253] But that is not a defect of the restatement or amendment that Lawyer prepares; for *any* designation of governing law described in UTC section 107(1)[254] is subject to the section's "strong public policy" override,[255] and Lawyer's restatement or amendment's designation of Michigan to provide governing law is therefore every bit as good as the original *T* trust instrument's designation of Ohio for that purpose.[256]

VII. Conclusion

What matters most on both of our alternative Interpretations[257] of the mooted facts is the confluence of Clients' having a good reason to seek the advice of someone knowledgeable about the law of Michigan in particular[258] and a UTC choice-of-law rule. On Interpretation 1, the independence of the place-of-execution reference in MTC section 7403[259] allows Lawyer to prepare a restatement of the terms of *T* that will meet Clients' "need" *regardless* of the restatement's effectiveness under the local law of Ohio[260] and, thereby, makes Ohio law (and the possibility of consulting Ohio counsel) practically irrelevant.[261] Interpretation 2 requires that the restatement or amendment that Lawyer prepares be valid as such under the local law of Ohio, but the process of *deducing* that requirement *under MTC section 7107(a)*[262] (that is, from the point of view of a *Michigan* court), and of testing that section's "strong public policy" override[263] in particular, exemplifies the *domestic* necessity that "a lawyer conducting activities *in the lawyer's home state*"[264] can, without engaging in unauthorized practice of law, "advise a client about the law of another state …, including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there."[265] For as *both* of our Interpretations demonstrate, it may be that the "lawyer's home state['s]"[266] conflict of laws rules[267] require nothing less.[268]

To that extent, the ethical risk of the lawyer's "advis[ing] a client about the law of another state …, including conducting research in the law of the other state …"[269] is not unauthorized practice of law but breach of the duty of competence[270]—the risk that "the lawyer [may not have] adequate familiarity with the relevant law."[271] That risk is generally mitigated by technology—"including ready electronic connection to much of the law of every state."[272] But it is dramatically mitigated if the home state and non-admitted

state[273] involved have both enacted the same uniform law concerning the matter at issue, including that law's "promote-uniformity provision."[274] In our hypothetical case,[275] it is thus mitigated by Michigan and Ohio's both being UTC states that have enacted standard UTC provisions on the matters at issue and legislatively acknowledged "the need to promote uniformity of the law with respect to the [UTC's] subject matter."[276]

That congruity fairly translates (our hypothetical Michigan) Lawyer's knowledge of Michigan law on the matters at issue into knowledge of the same departments of Ohio law. Indeed, the knowledge of Ohio law that Lawyer obtains on Interpretation 2, just *en route* to the conclusion that *under MTC section 7107(a)*, a Michigan court would find (as between Michigan and Ohio at least) the revocability of *T* and the validity of the restatement or amendment that Lawyer prepares to be questions of *Ohio law*[277] is sufficient for Lawyer to advise (Lawyer's hypothetical) Clients that an Ohio court would find the same[278] and that the restatement or amendment that Lawyer prepares, including its designation of Michigan to provide governing law, will be valid in Ohio as well as Michigan.[279] And happily for Clients, Lawyer has no "ethical" obligation to affect to disown such knowledge.[280]

Notes

1. Restatement (Third) of the L. Governing Lawyers § 3 cmt. e (A.L.I. 2000) (quoted *infra* text accompanying note 201).

2. "[J]urisdictional limitations on practice applicable to lawyers are primarily a function of . . . the *territory* of the one or more jurisdictions in which the lawyer is admitted." *Id.* cmt. b (emphasis added).

3. *See id.* cmt. a ("The state in which a lawyer is admitted is referred to herein as the lawyer's home state.").

4. "Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state." Restatement (Second) of Conflict of Laws *§ 2* (A.L.I. 1971). A state's conflict of laws rules comprise (1) rules concerning jurisdiction over matters involving what are, in respect of the *lex fori*, *foreign* elements, (2) rules concerning recognition of foreign judgments, and (3) choice-of-law rules. *See id.* cmt. a; Adrian Briggs, The Conflict of Laws 1 (2d ed. 2008); Symeon C. Symeonides, American Private International Law 16 (2008); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933), *reprinted in* David F. Cavers, The Choice of Law: Selected Essays, 1933–1983, at 3, 35 (1985).

5. The "local law" of a given state is that state's *domestic* or *intestine* law: "The 'local law' of a state is the body of standards, principles and rules, *exclusive of its rules of Conflict of Laws*, which the courts of that state apply." Restatement (Second) of Conflict of Laws § 4(1) (emphasis added); *see id.* § 222 cmt. e; *id.* ch. 9, topic 2, intro. note.

6. Instances of this involving the "strong public policy" override of settlor autonomy in the choice of law under Unif. Tr. Code § 107(1) (Unif. L. Comm'n 2010) are described *infra* Sections V.A, VI.A–B.

7. Use of the attributive participial adjective "non-admitted" to denote a state in which a given lawyer is not admitted to practice is borrowed from *The ACTEC Commentaries on the Model Rules of Professional Conduct*. *See, e.g.*, Am. Coll. of Tr. & Est. Couns., ACTEC Comments. on the Model Rules of Pro. Conduct 211 (6th ed. 2023) [hereinafter ACTEC Commentaries] ("Even though authorized by MRPC 5.5 to provide services in a non-admitted jurisdiction, the lawyer . . . .").

8. I.e., "unauthorized practice of law" within the meaning of Model Rules of Pro. Conduct r. 5.5 (A.B.A. 2005).

9. I.e., the duty to provide "competent representation" within the meaning of *id.* r. 1.1. "Even though authorized by MRPC 5.5 to provide services in a non-admitted jurisdiction, the lawyer remains subject to all other ethical provisions of the MRPC. In particular, pursuant to MRPC 1.1 (Competence), the lawyer must provide competent representation regarding the laws and rules applicable in the non-admitted jurisdiction." ACTEC Commentaries, *supra* note 7, at 211 (referring to Model Rules of Pro. Conduct (A.B.A. 2005) as "MRPC").

10. Restatement (Third) of the L. Governing Lawyers § 3 cmt. e (A.L.I. 2000) (quoted *infra* text accompanying note 201).

11. *Id.* (quoted *infra* text accompanying note 203).

12. Unif. Tr. Code § 1101 (Unif. L. Comm'n 2010) (quoted verbatim *infra* note 82).

13. *See infra* Section VI.A.3, B.2.

14. I.e., the matter about which the client has good reason to seek the advice of someone knowledgeable about the law of the home state in particular. *See supra* text accompanying notes 1–6.

15. *See infra* notes 214, 240 and accompanying text.

16. Unif. Tr. Code (Unif. L. Comm'n 2010).

17. Comprising Unif. Tr. Code §§ 107, 108, 403. *See infra* Parts V–VI.

18. Unif. Statutory Rule Against Perpetuities (Unif. L. Comm'n 1990).

19. Precedent being subordinate to legislation as a source of law. *See, e.g.*, Restatement (Second) of Conflict of Laws *§ 6(1)* (A.L.I. 1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."); *accord* Briggs, *supra* note 4, at 3 ("[L]egislation must not supervene to forbid application of foreign law.").

20. "To the extent that they are embodied in common law rules, Conflict of Laws rules are as subject to change by the courts as are other common law rules." Restatement (Second) of Conflict of Laws § 5 cmt. c. (Of course, "common law" is used here simply to denote judge-made law: in this sense, "common law [is] contrasted with *statute law*" so that "equity is just another form of common law." A.W.B. Simpson, *The Common Law and Legal Theory, in* Oxford Essays in Jurisprudence 77, 77 (A.W.B. Simpson ed., 2d series 1973) (emphasis added).)

21. "It would have been better had [the rule against perpetuities] been called the Rule against Remoteness." John C. Gray, The Rule Against Perpetuities § 2 (Roland Gray ed., 4th ed. 1942).

22. At common law, the choice of law between that of State A and that of State B on these facts would depend on the nature of the power *p*. *See* Restatement (Second) of Conflict of Laws *§* 274 (providing alternative references for "substantial validity" of exercise of trust-spawned power to appoint movables if power is "general" but otherwise pointing to "law which determines the validity of [power-spawning] trust"); *see also id.* cmt. b (indicating that substantial validity of exercise depends, e.g., on whether future interests created thereby may vest too remotely). *Cf.* Unif. Powers of Appointment Act § 103(2) (Unif. L. Comm'n 2013) (providing unique reference to law of donee's domicile regardless of power's nature).

23. *See* James P. Spica, *Alien Powers: Powers of Appointment, "Dogma," and the Pure Theory of Jurisdiction-Selecting Choice of Law*, 97 Tul. L. Rev. 1047, 1049–51 (2023).

24. *See* Unif. Statutory Rule Against Perpetuities *passim* (Unif. L. Comm'n 1990).

25. Common law choice-of-law analysis assumes that every legal question concerning an express trust is allocable to one (and only one) of these three categories. *See, e.g.*, Restatement (Second) of Conflict of Laws ch. 10, topic 1, intro. note ("[L]ocation of the movables at the time of the creation of the trust . . . is ordinarily unimportant in determining issues as to the validity or the administration of the trust or the construction of the . . . trust instrument."). As to a given trust, all three categories may be governed by the law of the same state or each by the law of a different state and they may change, together or severally, over time. *See, e.g.*, Wilmington Tr. v. Wilmington Tr., 24 A.2d 309, 314 (Del. 1942) (finding settlor of trust created in New York intended change of law governing administration to effect change of law governing construction).

26. *See supra* notes 17, 19 and accompanying text. *See generally infra* Parts V–VI.

27. I.e., the demonstration foretold *supra* text accompanying note 16.

28. Described *infra* Part II.

29. With "[t]he insertion or deletion of a few words in the statute[, "[a] state legislature—or a state bar association or other interest group—"]can create a wholly new rule with the stroke of a pen." Thomas P. Gallanis, *The Dark Side of Codifying U.S. Trust Law*, 49 ACTEC L.J. 283, 305 (2024) (comparing American Law Institute restatements and uniform laws as instruments of reform).

30. As uniform law provisions like UTC section 1101 (quoted *supra* note 12) are dubbed in Gregory A. Elinson & Robert H. Sitkoff, *When a Statute Comes With a User Manual: Reconciling Textualism and Uniform Acts*, 71 Emory L.J. 1073, 1078 (2022) ("[W]hen a legislature enacts a Uniform Act unmodified, the statute's promote-uniformity provision *directs* courts . . . .").

31. *See supra* note 12 and accompanying text.

32. *See infra* Parts V, VI.

33. *See infra* Part II.

34. January 1, 2007 being the effective date of Ohio's enactment of the UTC. *See* Ohio Rev. Code Ann. § 5806.02(A) (being Ohio's version of Unif. Tr. Code § 602(a) (Unif. L. Comm'n 2010)) ("Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This division does not apply to a trust created under an instrument executed before January 1, 2007.").

35. *See supra* note 25.

36. "Under MRPC 5.5, a lawyer engaged in a multi-jurisdiction practice necessarily offers limited services in jurisdictions in which the lawyer is not admitted to practice law [and may, therefore,] need to obtain the client's informed consent to do so." ACTEC Commentaries, *supra* note 7, at 211 (citing Model Rules of Pro. Conduct r. 1.2(c) (A.B.A. 2005)).

37. As described in Model Rules of Pro. Conduct r. 5.5.

38. Within the meaning of *id.* r. 1.1. *See supra* note 9.

39. "A lawyer admitted in another . . . jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction . . . in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter." Model Rules of Pro. Conduct r. 5.5(c)(1).

40. Specified *infra* Part IV.

41. *See supra* note 25.

42. *See supra* Part II.

43. "A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services *on a temporary basis* in this jurisdiction that . . . ." MODEL RULES OF PRO. CONDUCT r. 5.5(c) (emphasis added).

44. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 5 cmt. h (A.L.I. 2000) (emphasis added).

45. *See supra* text accompanying notes 37–38.

46. "In general, traditional choice-of-law principles, such as those set out in the Restatement Second of Conflict of Laws, have governed questions of choice of law in *nondisciplinary* litigation involving lawyers." RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 1 cmt. e (emphasis added).

47. *See supra* Part II.

48. Lawyers have evidently *nouned* the adjective "domiciliary": "domiciliary is both adjective ('of or pertaining to domicile') *and noun ('one belonging to a domicile')*." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 196b (1987) (emphasis added). (There is no evidence of this usage in, for example, THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 593c (C.T. Onions ed., 3d ed. with rev. etymologies & addenda 1973) (being entry for "domiciliary").)

49. Assuming that Clients were previously domiciliaries of Ohio, the supposition that they are now domiciliaries of Michigan would involve that as far as the state of the forum is concerned, Clients (1) have capacity to acquire a "domicil of choice," RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. a (A.L.I. 1971), and (2) have made (or intend to make) Michigan "the center of [their] domestic, social and civil life," *id.* § 12 (defining "home"). *See id.* § 13 ("In applying its rules of Conflict of Laws, the forum determines domicil according to its own standards.").

50. "In principle one can be *resident* in two [states] at once, but to avoid the inadmissible result of . . . two domiciles of choice, . . . the residence requirement [for domicile] identifies the principal residence if there is more than one contender." BRIGGS, *supra* note 4, at 25 (emphasis added); *accord* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 20.

51. These are contacts (or "connecting factors," *see infra* note 123) relevant to the determination of whether a state has a substantial relation to a trust and, perhaps, even the *most significant* such relation as to the matter at issue for choice-of-law purposes at common law. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. b–c.

52. *See* BRIGGS, *supra* note 4, at 25 (quoted *supra* note 50) (pronouncing possibility of one's simultaneously having two domiciles of choice "inadmissible").

53. As opposed to *amended* in part. *See supra* Section III.A.

54. *See supra* Part II.

55. THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 274a (C.T. Onions ed., 3d ed. with rev. etymologies & addenda 1973). This is "[t]he current sense" of "can" used "with [an] infinitive, as [an] auxiliary of predication," *id.*, the analogous use of "may" in that sense being "obsolete except archaic," *id.* at 1221b. Thus, "[i]t is one thing to assert of an event that it is possible that it will occur, but another to claim that it *could* occur." M.R. AYERS, THE REFUTATION OF DETERMINISM: AN ESSAY IN PHILOSOPHICAL LOGIC 38 (1968) (emphasis added). And in the latter case, "sometimes the *can* [or *could*] will be the *can* [or *could*] . . . of legal or other *right*." J.L. Austin, *Ifs and Cans*, 42 PROC. OF THE BRIT. ACAD. 109 (1956), *reprinted in* J.L. AUSTIN, PHILOSOPHICAL PAPERS 153, 161 (1961). Thus, saying that someone *should* or *would be well advised to* do something is analogous to saying that she *ought* to do it; for "*ought* implies *can*," AYERS, *supra*, at 126.

56. *See supra* note 55 and accompanying text.

57. *See, e.g.*, UNIF. TR. CODE § 602(c) (UNIF. L. COMM'N 2010) (describing methods by which "[t]he settlor may revoke or amend a *revocable* trust" (emphasis added)). *Cf. id.* § 411 (describing methods by which "[a] noncharitable irrevocable trust may be *modified or terminated*" (emphasis added)).

58. *See supra* Section IV.A.

59. *See supra* Section IV.A.

60. *See supra* Part II.

61. MICH. COMP. LAWS § 700.7403 (being UNIF. TR. CODE § 403) (quoted *infra* note 63).

62. We need not assume in *this* interpretation (i.e., Interpretation 2) that Clients are trustees of *T*. *Cf. supra* Section IV.A.

63. *See* MICH. COMP. LAWS § 700.7403 ("A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of a jurisdiction [in] which, at the time of creation . . . [t]he settlor was domiciled [or] had a place of abode . . . , [a] trustee was domiciled or had a place of business . . . [or] [a]ny trust property was located.").

64. This might be due either to the number *or to the nature* of trust assets. Retitling shares in a closely held, federally chartered, regional bank, for example, could involve the trustee(s) in negotiations with organs of the Federal Reserve System. *See, e.g.*, 12 U.S.C. § 1841(b) (defining "company" for purposes of Bank Holding Company Act to include certain express trusts).

65. *See supra* Section IV.A.

66. In the sense that Clients have good reason to seek the advice of someone knowledgeable about the law of Michigan in particular. *See supra* text accompanying notes 47–51.

67. *See supra* Section IV.A.
68. *See supra* note 41 and accompanying text.
69. *See supra* text accompanying note 53.
70. *See infra* Section V.B.
71. *See supra* Part II.
72. Unif. Tr. Code § 107(1) (Unif. L. Comm'n 2010). *See* Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1)); Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107). *See also* Restatement (Second) of Conflict of Laws *§ 6(1) (*A.L.I. 1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.").
73. Mich. Comp. Laws § 700.7107(a); Ohio Rev. Code Ann. § 5801.06(A).
74. *See supra* Section IV.A.
75. *See supra* text accompanying notes 47–51.
76. *See infra* note 127 and accompanying text.
77. Unif. Tr. Code § 107 cmt. (Unif. L. Comm'n 2010) (emphasis added).
78. *See, e.g.*, Restatement (Second) of Conflict of Laws § 281 (A.L.I. 1971) (indicating that validity of exercise of trust-spawned power to appoint land is determined by the law that would be applied by courts of the situs). *See generally id.* ch. 10, topic 2, intro. note. "The courts of the state of the situs [of land] will usually apply [that state's] local law." *Id.*
79. *See Nation v. W.D.E. Elec. Co.*, 563 N.W.2d 233, 236 (Mich. 1997) ("[S]tatutes in derogation of the common law . . . will not be extended by implication to abrogate established rules of common law."). This canon is entrenched in the common law. *See Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304–05 (1959) ("[N]o statute is to be construed as altering the common law[] farther than its words import."); *Heaney v. Borough of Mauch Chunk*, 322 Pa. 487, 490 (1936) ("Statutes in derogation of the common law must be construed strictly and only such modification of the law will be recognized as the statute clearly and definitely prescribes."); Rupert Cross, Statutory Interpretation 43–44 (John Bell & George Engle eds., 3d ed. 1995) ("The presumption is for a minimum change to be effected by legislation in a common law area."); Kent Greenawalt, Statutory and Common Law Interpretation 119 (2013) ("Among other substantive canons . . . statutes that alter the common law should be strictly construed."). But, of course (*see supra* note 19), the canon is liable to be displaced by statute. *See* Unif. Statute & Rule Constr. Act § 18(c) (Unif. L. Comm'n 1995) ("The presumption that a civil statute in derogation of the common law is construed strictly does not apply to a statute of this [State].")
80. Mich. Comp. Laws § 700.7107(a); Ohio Rev. Code Ann. § 5801.06(A).
81. Ohio Rev. Code Ann. § 5806.02(C) (being Ohio's version of Unif. Tr. Code § 602(c)). *See* Mich. Comp. Laws § 700.7602(3) (being Michigan's version of Unif. Tr. Code § 602(c)) ("The settlor may revoke or amend a revocable trust . . . [i]f the terms of the trust do not provide a method . . . [and] [i]f the trust is created pursuant to a writing, by another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust."). (The quotation of the Ohio statute that this note tags (in the text) and that of the Michigan statute that this note *contains* both omit language concerning the possibility that the terms of the trust "provide a method [of amendment]" because we have assumed that the *T* trust instrument says nothing about the method(s) by which *T* can be amended or revoked. *See supra* Part II.)
82. *See* Ohio Rev. Code Ann. § 5811.01 ("In applying and construing Chapters 5801. to 5811. of the Revised Code, a court may consider the need to promote uniformity of the law with respect to the subject matter of those chapters among states that enact the uniform trust code."); Mich. Comp. Laws § 700.1201(d) ("This act [including *id.* § 700.7602] shall be liberally construed and applied to . . . make the law uniform among the various jurisdictions, both within and outside of this state."). *See also* Unif. Tr. Code § 1101 ("In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.").
83. Difference (between potentially applicable local laws) is *necessary* to trigger UTC section 107(1)'s "strong public policy" override but, of course, it is not sufficient: "obviously the mere fact that foreign and domestic law *differ* on some point *is not enough to invoke the exception*. Otherwise in every case of an actual conflict the court of the forum state would choose its own law; there would be no law of conflict of laws." *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 847 (7th Cir. 1999) (Posner, C.J.) (emphasis added) (interpreting common law public-policy override of contracting parties' autonomy in choice of law).
84. *See supra* note 72 and accompanying text.
85. *See* Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1), quoted *supra* text accompanying note 72).
86. *See supra* text accompanying note 67.
87. Owing, say, to the omission of some formality that is not required under the local law of Michigan but (unbeknown to Clients and Lawyer) *is* required under that of Ohio.
88. That is true at common law. *See* Restatement (Second) of Conflict of Laws § 270 cmt. e (A.L.I. 1971) (indicating that "all questions of validity [need not] be determined by the same law"). And it is argued *infra* Sections V.B.1–2 that it is true under the UTC.
89. Think, for example, of the formerly standard provision in pour-over wills that disposed of the residue (for preference) to the trustee(s) of the testator or testatrix's re-

vocable trust but then incorporated the terms of that trust (as they existed as of the date of the will) in case it should turn out for any reason that the trust was not in existence on the date of the testator or testatrix's death.

90. Mich. Comp. Laws § 700.7403 (emphasis added) (being Unif. Tr. Code § 403 (Unif. L. Comm'n 2010)) (quoted at length *supra* note 63). *See also* Ohio Rev. Code Ann. § 5804.03 (being Unif. Tr. Code § 403).

91. *See supra* Section III.B.

92. Viz., Mich. Comp. Laws §§ 700.7105(2)(a), .7401, .7402, .7602(1).

93. *See supra* Section IV.A.

94. *See* Mich. Comp. Laws § 700.7403 (quoted in part *supra* text accompanying note 90 and at length *supra* note 63).

95. *See supra* text accompanying notes 67–69.

96. A note for Lawyer's file will indicate that Clients refer here to Mich. Comp. Laws § 700.7602(3)(b) (being Michigan's version of Unif. Tr. Code § 602(c)(2) (Unif. L. Comm'n 2010)).

97. A note for Lawyer's file will indicate that Clients refer here to Ohio Rev. Code Ann. § 5806.02(C) (being Ohio's version of Unif. Tr. Code § 602(c)(2)).

98. A note for Lawyer's file will indicate that Clients refer here to Mich. Comp. Laws §§ 700.7401, .7402. *See supra* note 92 and accompanying text.

99. Within the meaning of the Legislative Council Act, 1986 Mich. Pub. Acts 268. *See, e.g.*, Mich. Comp. Laws § 4.1108(d) ("The [legislative service] bureau shall . . . [p]repare catchlines, indexes, and tables for the public and local acts of each session of the legislature.").

100. Mich. Comp. Laws § 700.7403 (emphasis added) (being Unif. Tr. Code § 403 and bearing catchline quoted in text).

101. *See supra* note 91 and accompanying text.

102. *If* and to the extent that the restatement that Lawyer prepares for Clients does not constitute a valid amendment of the terms of the existing trust *T* under Ohio law. *See supra* Section V.B.1.

103. This feature of the legislative process in Michigan is not universal: "Headings are not voted upon by Parliament, *but they are included in the Bill* and form part of the text entered on the Parliament Roll." Cross, *supra* note 79, at 131 (emphasis added).

104. *See* Mich. Comp. Laws § 4.1108(d) (quoted *supra* note 99).

105. Unif. Statute & Rule Constr. Act *§ 13 (*Unif. L. Comm'n 1995).

106. *See* Unif. Tr. Code § 403 (Unif. L. Comm'n 2010) (bearing heading, "Trusts created in other jurisdictions"). *Cf. supra* text accompanying note 100.

107. *See* Unif. Tr. Code § 403; *id.* cmt.

108. *See id.* cmt.

109. *See* Unif. Prob. Code § 2-506 (Unif. L. Comm'n 2010) ("A written will is valid if executed in compliance with *Section 2-502 or 2-503* or if its execution complies with the law at the time of execution of the place where the will is executed . . ." (emphasis added)); *see also* Mich. Comp. Laws § 700.2506 (being Unif. Prob. Code § 2-506 and referring to Michigan's enactments of *id.* §§ 2-502, 2-503).

110. *See supra* text accompanying notes 100, 106.

111. *See* Ohio Rev. Code Ann. § 5804.03 (being Unif. Tr. Code § 403 and bearing heading quoted in text).

112. *If* the restatement that Lawyer prepares does not constitute a valid amendment of the terms of the existing trust *T* under Ohio law. *See supra* Section V.B.1.

113. *See supra* Section V.B.1.

114. *See supra* Section V.A.

115. *See supra* notes 112–13 and accompanying text.

116. *See supra* Section V.B.

117. *See supra* Section IV.A.

118. *See supra* Part II.

119. Unif. Tr. Code *§ 108(a) (*Unif. L. Comm'n 2010) ("Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration . . . ."); *see* Mich. Comp. Laws § 700.7108(1) (being Michigan's version of Unif. Tr. Code *§ 108(a))*; Ohio Rev. Code Ann. *§ 5801.07(A) (*being Unif. Tr. Code *§ 108(a)*).

120. Unif. Tr. Code *§ 108*(a) ("[T]erms of a trust designating the principal place of administration are . . . controlling if a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction or . . . all or part of the administration occurs in the designated jurisdiction.").

121. "Under the Uniform Trust Code, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit . . . . It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction." *Id. § 108 cmt.* (As to the relevance of the cited Comment to Michigan or Ohio's enactment of UTC section 108, see *infra* note 127.)

122. "[T]ransfer of the principal place of administration will normally change the governing law with respect to administrative matters." Unif. Tr. Code *§ 108 cmt*. If the restatement that Lawyer prepares constitutes a valid amendment of the terms of *T* under Ohio law, the confluence of the facts that "the rights of the beneficiaries are [currently] subject to the control of [Clients as] settlor[s], and [that] the duties of the trustee[s], including the duties to inform and report . . . are owed exclusively to [Clients as] settlor[s]," Ohio Rev. Code Ann. *§ 5806.03(A) (being Ohio's version of* Unif. Tr. Code *§ 603(b)), presumably dispenses with the need for the notice to beneficiaries that would otherwise be required under Ohio's version of UTC section 108(d). See* Ohio Rev. Code Ann. *§ 5801.07(*D) (being Ohio's version of Unif. Tr. Code *§ 108(d) ("The*

trustee shall notify the current beneficiaries of a proposed transfer of a trust›s principal place of administration not less than sixty days before initiating the transfer.").

123. I.e., "connecting factors," "[p]oints of contact [that] connect an individual or an event to a system of . . . law." Briggs, *supra* note 4, at 20.

124. *See supra* text accompanying note 41.

125. *See supra* Section V.C.1.

126. I.e., the legislative history of the UTC section that is quoted *supra* text accompanying note 72.

127. "[T]he Comments to any Uniform Act, may be relied on as a guide for interpretation." Unif. Tr. Code § 106 cmt. (Unif. L. Comm'n 2010) (citing *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code) and *Yale Univ. v. Blumenthal,* 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act)). *See also* Elinson & Sitkoff, *supra* note 30, *passim*; Harry Wilmer Jones, *Statutory Doubts and Legislative Intention*, 40 Colum. L. Rev. 957, 970 (1940). For the proposition that unenacted Comments to *the UTC* in particular constitute persuasive authority, see, for example, *Farina v. Janet Keenan Hous. Corp.*, 335 A.3d 537, 550 n.3 (D.C. 2025) ("While these comments to the UTC are not part of the D.C. Code, they are persuasive authority that we have previously looked to as "helpful" in interpreting the related code provisions."); *Brown v. Amidan*, 579 P.3d 1075, 1081 n.7 (Utah Ct. App. 2025) ("Because the legislature has not adopted the UTC's official comments, they are not binding. However, they do serve as persuasive authority in our interpretation of the Utah Uniform Trust Code."). And for the proposition that decisions of foreign courts interpreting a given uniform act should be considered by courts in states that have enacted that act, see, for example, *Turpening v. Howard*, 671 N.W.2d 567, 568–69 (Mich. Ct. App. 2003) (indicating that foreign precedent is persuasive in interpretation of Uniform Probate Code provisions); Power Press Sales Co. v. MSI Battle Creek Stamping, 604 N.W.2d 772, 776 (Mich. Ct. App. 1999) (indicating same regarding Uniform Commercial Code); Robert S. Summers, *Statutory Interpretation in the United States*, *in* Interpreting Statutes: A Comparative Study 407, 427–28 (D. Neil MacCormick & Robert S. Summers eds., 1991).

128. Unif. Tr. Code § 107 cmt. (emphasis added). This is a departure from the common law. *See, e.g.*, Restatement (Second) of Conflict of Laws *§ 270* (A.L.I. 1971) ("An inter vivos trust of interests in movables is valid if valid . . . under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust . . . ."); *id. § 278 ("The validity of a trust of an interest in land is determined by the law that would be applied by the courts of the situs.")*.

129. Unif. Tr. Code § 107(2) (emphasis added) ("[I]n the absence of a controlling designation in the terms of the trust . . . ."). *See* Mich. Comp. Laws § 700.7107(b) (being Unif. Tr. Code § 107(2)); Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

130. *See supra* text accompanying note 72.

131. Unif. Tr. Code § 107(1) (emphasis added). *See* Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1)); Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

132. Restatement (Second) of Conflict of Laws § 270 cmt. e.

133. *Id. See also* Unif. Tr. Code *§ 106 ("The common law of trusts . . . supplement*[s] [the UTC], except to the extent modified by [the UTC] or another statute of this State.").

134. *See supra* Section IV.A.

135. *See supra* note 131 and accompanying text.

136. As might be the case if, for example, contrary to Clients' present expectations (according to Interpretation 1), *see supra* Section IV.A, the trustee(s) eventually come to own directly (i.e., without an entity wrapper) land located in Ohio. *See supra* notes 75–79 and accompanying text.

137. Mich. Comp. Laws § 700.7107(a); Ohio Rev. Code Ann. § 5801.06(A). As to the "unlikel[ihood]" described in the text, see *supra* notes 80–81 and accompanying text.

138. *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.) (concerning choice of law in contract dispute).

139. *See* Restatement (Second) of Conflict of Laws § 269 cmt. i (A.L.I. 1971).

140. *See id.* § 270 cmt. e.

141. *See id.*

142. *Id.* § 269 cmt. i (emphasis added).

143. *See, e.g.*, Stewart E. Sterk, *Rethinking Party Autonomy in Trust Law,* 97 Tul. L. Rev. 1097, 1099–1100 (2023) ("Many of the differences that led settlors to choose the law applicable to their trusts simply did not exist when the Second Trusts Restatement was drafted. Every jurisdiction had a rule against perpetuities. Trust settlors could not insulate their own assets from creditor claims; spendthrift provisions in self-settled trusts were unenforceable . . . ."); Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts,* 67 Vand. L. Rev. 1769, 1817–18 (2014) (indicating that "constitutional perpetuities ban[]" of state like North Carolina or Nevada may yield such state, relative to constitutionally unconstrained, perpetuities-reforming state, most significant relationship to matter of remoteness of vesting within meaning of UTC section 107 or common law strong-public-policy override of settlor autonomy in choice of law).

144. *See, e.g.*, Unif. Statutory Rule Against Perpetuities § 1(a)(1) (Unif. L. Comm'n 1990) (validating in-

terests that would be valid under common law rule against perpetuities).

145. *See, e.g.*, Unif. Principal & Income Act § 301(a) (Unif. L. Comm'n 2008) ("An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.").

146. *See, e.g.*, Unif. Tr. Code §§ 105(b)(3), 404 (Unif. L. Comm'n 2010) (requiring that "trust and its terms be for the benefit of its beneficiaries," excepting, presumably, pet and other noncharitable purpose trusts grudgingly permitted by UTC sections 408 and 409). *Cf. id.* §§ 408, 409 (allowing limited performance of pet and other noncharitable purpose trusts). (A noncharitable purpose trust is a noncharitable express trust lacking definite or definitely ascertainable beneficiaries. *See, e.g.*, *id.* § 409(1) (Unif. L. Comm'n, amended 2018). *See generally* Paul Matthews, *The New Trust: Obligations without Rights?*, *in* Trends in Contemporary Trust Law 1 *passim* (A.J. Oakley ed., 1996).)

147. *See* James P. Spica, *Power Tools for Choice of Law on Trust Validity*, 59 Real Prop. Tr. & Est. L.J. 179, 214–15 (2024).

148. *See* Ohio Rev. Code Ann. § 2131.08 (effecting "wait-and-see" liberalization of rule against perpetuities (RAP)).

149. *See* Mich. Comp. Laws § 554.93 (abrogating RAP as to movables held in trusts of specified vintage). As already noted, the situation may be different as between a RAP-reforming state like Michigan or Ohio and a state that currently wants to *enforce* a RAP. *See supra* note 143 and accompanying text.

150. *See supra* Section V.C.2.a.i.

151. *See* Mich. Comp. Laws § 700.7107(b) (being Unif. Tr. Code § 107(2) (Unif. L. Comm'n 2010)) ("The meaning and effect of the terms of a trust are determined . . . [i]n the absence of a controlling designation in the terms of the trust, [by] the law of the jurisdiction having the most significant relationship to the matter at issue."); *see also* Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

152. *See supra* Part II.

153. And in this respect, UTC section 107(1) codifies common law. *See, e.g.*, Restatement (Second) of Conflict of Laws § 270 (A.L.I. 1971) ("An inter vivos trust of interests in movables is valid if valid . . . under the local law of the state designated by the settlor . . . provided that . . . the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship.").

154. In the sense of "devices that *attribute* intention to *individual* donors in particular circumstances on the basis of *common* intention." Restatement (Third) of Prop.: Wills & Other Donative Transfers § 11.3 cmt. a (A.L.I. 2003).

155. "The Uniform Trust Code is primarily a default statute." Unif. Tr. Code art. 1 gen. cmt.

156. *Id.*

157. *Id.* (emphasis added).

158. *See* Unif. Tr. Code § 105(b). *See also* Mich. Comp. Laws § 700.7105(2) (being Michigan's version of Unif. Tr. Code § 105(b)); Ohio Rev. Code Ann. § 5801.04(B) (being Ohio's version of Unif. Tr. Code § 105(b)).

159. The language quoted in the text is taken verbatim (though emphasis has been added) from a trust instrument, drafted by an attorney licensed to practice in Michigan, that the author reviewed in July of 2025.

160. I.e., the "unless . . ." clause of Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1), quoted *supra* text accompanying note 72).

161. *Id.* § 700.7105(2) (being Michigan's version of Unif. Tr. Code § 105(b)) ("The terms of a trust prevail over any provision of this article except . . . .").

162. *See supra* note 155.

163. *See supra* note 156 and accompanying text.

164. Unif. Tr. Code art. 1 gen. cmt. (emphasis added) (quoted *supra* text accompanying note 157).

165. "[I]n the construction of a statute, [the court is] to adhere to the ordinary meaning of the words used . . . unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance." Cross, *supra* note 79, at 16 (quoting *Becke v. Smith* (1836) 2 M&W 191 at 195 (Parke, B.)).

166. *Id.*

167. *Cf.* Unif. Tr. Code § 105(b) ("The terms of a trust prevail over any provision of this [Code] except . . . ."). *Cf. also* Mich. Comp. Laws § 700.7105(2) (being Michigan's version of Unif. Tr. Code § 105(b)); Ohio Rev. Code Ann. § 5801.04(B) (being Ohio's version of Unif. Tr. Code § 105(b)).

168. UTC section 107 being found in Article 1 of the UTC. *See* Unif. Tr. Code § 107. *See also* Mich. Comp. Laws § 700.7107 (being Unif. Tr. Code § 107 and being found in Part 1 of MTC).

169. *See supra* text accompanying note 153; *see generally supra* Section V.C.2.a.

170. *See supra* text accompanying note 69.

171. On Interpretation 1. *See supra* text accompanying notes 56–57.

172. *See supra* Section IV.A.

173. *See supra* Section V.B–C.

174. *See supra* Part II.

175. *See supra* Section IV.B.

176. *See supra* text accompanying note 58. Again, Clients cannot restate or amend a trust that is either nonexistent or irrevocable. *See supra* note 57 and accompanying

text.

177. "A power of revocation includes the power to amend." UNIF. TR. CODE § 602 cmt. (UNIF. L. COMM'N 2010); *accord* RESTATEMENT (THIRD) OF TRUSTS *§ 63 cmt. g (*A.L.I. 2003).

178. *See supra* Part II.

179. At common law, the latter question would be just whether the provision is sufficient to overcome the presumption that (that is, to displace the rule of construction according to which) an express trust is *irrevocable*. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 330(1) (A.L.I. 1959) ("The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power.")

180. *See supra* Section V.A.

181. *See supra* Part II.

182. UNIF. TR. CODE § 107(1) (UNIF. L. COMM'N 2010) (quoted *supra* note 72). *See* MICH. COMP. LAWS § 700.7107(a) (being UNIF. TR. CODE § 107(1)).

183. *See supra* Section V.A.

184. MICH. COMP. LAWS § 700.7107(a).

185. To the extent, for example, the trustee(s) of *T*, *qua* trustee(s), own(s) directly (i.e., without an entity wrapper) land located in Michigan. *See supra* notes 75–79 and accompanying text.

186. MICH. COMP. LAWS § 700.7107(a).

187. Viz., OHIO REV. CODE ANN. §§ 5801.04(B)(1) (being UNIF. TR. CODE § 105(b)(1) (UNIF. L. COMM'N 2010)), 5804.01 (including UNIF. TR. CODE § 401), 5804.02 (including UNIF. TR. CODE § 402), 5806.02(A) (being Ohio's version of UNIF. TR. CODE § 602(a)).

188. Viz., *id.* § 5806.02(C) (being Ohio's version of UNIF. TR. CODE § 602(c)).

189. *See* MICH. COMP. LAWS §§ 700.7105(2)(a), .7401, .7402, .7602(1), (3).

190. *See supra* note 82.

191. *See supra* note 83 and accompanying text.

192. I.e., the "unless . . ." clause of MICH. COMP. LAWS § 700.7107(a) (being UNIF. TR. CODE § 107(1), quoted *supra* text accompanying note 72).

193. *See id.*

194. I.e., as described *supra* Section VI.A.1.

195. MICH. COMP. LAWS § 700.7107(a) (being UNIF. TR. CODE § 107(1)).

196. *See supra* note 4.

197. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 (A.L.I. 1971).

198. *See, e.g.*, Cavers, *supra* note 4, at 9 ("The conflicts rule indicates in which jurisdiction the appropriate law may be found. . . . Not until its admission for that purpose does the content of that law become material.").

199. MICH. COMP. LAWS § 700.7107(a).

200. *See supra* Sections V.A, VI.A.1.

201. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 3 cmt. e (A.L.I. 2000) (emphasis added). *Accord* ACTEC COMMENTARIES, *supra* note 7, at 212 ("With the adoption of paragraph (c)(4) of MRPC 5.5, a transactional lawyer, in the circumstances described in that paragraph, may provide . . . legal counsel regarding the laws of a non-admitted jurisdiction.").

> For example, a Chicago lawyer providing estate counseling for Illinois clients is likely to find multiple occasions to analyze and opine on the laws of Wisconsin, Iowa, Indiana, and Michigan regarding titling, tax, and similar issues. In addition, the Chicago lawyer may need to prepare deeds and other documents according to the laws of one or more of these jurisdictions. Provided the Chicago lawyer otherwise complies with paragraph (c) [of MRPC rule 5.5], the lawyer's legal services regarding the surrounding non-admitted jurisdictions would constitute practicing law in those jurisdictions on a "temporary basis."

Id. at 214.

202. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 3 cmt. e.

203. *Id.*

204. OHIO REV. CODE ANN. § 5811.01 (quoted *supra* note 82). *See* MICH. COMP. LAWS § 700.1201(d) (quoted *supra* note 82).

205. *See supra* Section VI.A.1.

206. *See supra* text accompanying note 193.

207. *See supra* notes 187–89 and accompanying text.

208. *See supra* note 190 and accompanying text.

209. I.e., without regard to the change of governing law (from Ohio's to Michigan's) that is to be effected by the restatement or amendment that Lawyer prepares. *See supra* text accompanying notes 60–61.

210. *See supra* note 66 and accompanying text.

211. MODEL RULES OF PRO. CONDUCT r. 5.5(c)(4) (A.B.A. 2005).

212. *Id.* r. 5.5(c).

213. *Id.* r. 5.5 cmt. 5. *See also* ACTEC COMMENTARIES, *supra* note 7, at 217 (indicating that avoidance of these risks is "fundamental[]" to MRPC rule 5.5's regulation of multijurisdictional practice); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 3 cmt. b (A.L.I. 2000) (indicating that "the need to provide effective and efficient legal services to persons . . . with interstate legal concerns" moderates regulation of multistate practice by lawyers).

214. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 3 cmt. e.

215. *See supra* Section VI.A.1.

216. Because Ohio, like Michigan, has enacted UTC section 107(1) as part of its general enactment of the UTC. *See supra* Sections V.A, VI.A.1.

217. *See supra* notes 205–09 and accompanying text.

218. I.e., the analysis in Section VI.A.

219. *See supra* note 175 and accompanying text.

220. *See supra* Sections V.A, VI.A.1.

221. *See supra* Part II.

222. *See* Unif. Tr. Code § 107(1) (Unif. L. Comm'n 2010) (quoted *supra* text accompanying note 72); Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1)); Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

223. Mich. Comp. Laws § 700.7107(a); Ohio Rev. Code Ann. § 5801.06(A).

224. To the extent, for example, the trustee(s) of *T*, *qua* trustee(s), own(s) directly (i.e., without an entity wrapper) land located in Michigan. *See supra* notes 75–79 and accompanying text.

225. Mich. Comp. Laws § 700.7107(a); Ohio Rev. Code Ann. § 5801.06(A).

226. *See* Ohio Rev. Code Ann. § 5806.02(C) (quoted *supra* text accompanying note 81) (being Ohio's version of Unif. Tr. Code § 602(c)); Mich. Comp. Laws § 700.7602(3) (quoted *supra* note 81) (being Michigan's version of Unif. Tr. Code § 602(c)).

227. *See supra* note 190 and accompanying text.

228. *See supra* note 191 and accompanying text.

229. I.e., the "unless . . ." clause of Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1), quoted *supra* text accompanying note 72).

230. *See id.*

231. Ohio Rev. Code Ann. § 5806.02(C) (quoted *supra* text accompanying note 81) (being Ohio's version of Unif. Tr. Code § 602(c)).

232. *Id.*

233. *See supra* note 226 and accompanying text.

234. *See supra* note 227 and accompanying text.

235. *See supra* note 209.

236. *See supra* note 210 and accompanying text.

237. Model Rules of Pro. Conduct r. 5.5(c)(4) (A.B.A. 2005).

238. *Id.* r. 5.5(c).

239. *See supra* note 213 and accompanying text.

240. *See supra* note 214 and accompanying text.

241. *See supra* Section VI.B.1.

242. Because Ohio, like Michigan, has enacted UTC section 602(c) as part of its general enactment of the UTC. *See supra* notes 225–26 and accompanying text.

243. *See supra* notes 231–35 and accompanying text.

244. *See supra* Section V.C.1.

245. *See* Ohio Rev. Code Ann. *§ 5801.07(A) (being* Unif. Tr. Code *§ 108(a) (*Unif. L. Comm'n 2010), quoted in part *supra* note 120).

246. *See supra* note 62 and accompanying text.

247. Ohio Rev. Code Ann. *§ 5801.07(A) (being* Unif. Tr. Code *§ 108(a), quoted* in relevant part *supra* note 119).

248. *See supra* Section V.C.2.

249. Unif. Tr. Code § 107(2) (Unif. L. Comm'n 2010) (emphasis added) ("[I]n the absence of a controlling designation in the terms of the trust . . . ."). *See* Mich. Comp. Laws § 700.7107(b) (being Unif. Tr. Code § 107(2)); Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

250. *See supra* Sections V.C.2.

251. Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1)); Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

252. As might be the case to the extent, for example, the trustee(s) come to own directly (i.e., without an entity wrapper) land located in Ohio. *See supra* notes 75–79 and accompanying text.

253. *See* Mich. Comp. Laws § 700.7107(b) (being Unif. Tr. Code § 107(2)) ("The meaning and effect of the terms of a trust are determined . . . [i]n the absence of a controlling designation in the terms of the trust, [by] the law of the jurisdiction having the most significant relationship to the matter at issue.") . *See also* Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

254. Unif. Tr. Code § 107(1) (quoted *supra* text accompanying note 72). *See also* Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1)); Ohio Rev. Code Ann. § 5801.06(A) (being Unif. Tr. Code § 107).

355. I.e., the "unless . . ." clause of Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1), quoted *supra* text accompanying note 72).

356. *See supra* Section V.D.

257. Described *supra* Part IV, analyzed *supra* Parts V and VI, respectively.

258. *See supra* note 66 and accompanying text.

259. Mich. Comp. Laws § 700.7403 (quoted *supra* note 63) (being Unif. Tr. Code § 403).

260. *See supra* Sections V.B–D.

261. *See supra* Part V.

262. Mich. Comp. Laws § 700.7107(a) (discussed *supra* Sections VI.A.1, B.1).

263. I.e., the "unless . . ." clause of Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1), quoted *supra* text accompanying note 72).

264. Restatement (Third) of the L. Governing Lawyers § 3 cmt. e (A.L.I. 2000) (emphasis added) (quoted *supra* text accompanying note 201).

265. *Id.*

266. *Id.*

267. In Lawyer's case, Mich. Comp. Laws § 700.7107(a) (being Unif. Tr. Code § 107(1)). *See supra* Sections V.A, VI.A.1, B.1.

268. *See supra* note 200 and accompanying text.

269. Restatement (Third) of the L. Governing Lawyers § 3 cmt. e (quoted *supra* text accompanying notes 201, 265).

270. Within the meaning of MRPC rule 1.1. *See supra* note 9.

271. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 3 cmt. e (quoted *supra* text accompanying note 201).

272. *Id.* (quoted *supra* text accompanying note 203).

273. *See supra* note 7.

274. *See supra* note 30. *See generally supra* Part I.

275. *See supra* Parts II–III, Section IV.B.

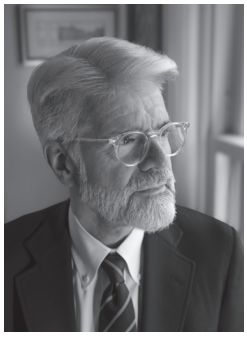
276. OHIO REV. CODE ANN. § 5811.01 (quoted *supra* note 82). *See* MICH. COMP. LAWS § 700.1201(d) (quoted *supra* note 82).

277. *See supra* Sections VI.A.1, B.1.

278. Because Ohio, like Michigan, has enacted UTC section 107(1) as part of its general enactment of the UTC. *See supra* Sections VI.A.1, B.1.

279. *See supra* Sections VI.B.2., C.

280. *See supra* notes 214, 240 and accompanying text.



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Beyond Probate Avoidance: Strategic Uses of Ladybird Deeds in Modern Estate Planning*

By Emily M. Sullivan and Gregg A. Nathanson

Introduction

The ladybird deed has long been considered a simple, low-cost estate planning tool. It creates a unique combination of present and future interests that allows the grantor to retain control over real property during the grantor's lifetime while facilitating an automatic non-probate transfer to one or more designated beneficiaries upon the grantor's death. Michigan cases have unambiguously affirmed the ladybird deed's validity as "a means to forgo the probate process"[1] while reserving to the grantor "the rights to sell, commit waste, and almost everything else."[2] However, a recent case suggests that ladybird deeds may be vulnerable to challenges based on oral agreements the grantor did not intend to be binding. This article examines recent case law developments and provides practical guidance for practitioners to ensure their clients receive the benefits that a ladybird deed provides as part of a well-thought-out estate plan.

I. Defining Characteristics of a Ladybird Deed

In Michigan, the ladybird deed is created by common law with no statutory basis.[3] The life estate reserved by the grantor in a ladybird deed is enhanced by an unrestricted power to convey the real property during the grantor's lifetime.[4] This power gives the grantor complete discretion to occupy, use, encumber, or sell the property without notice to or consent by the remainder beneficiary.[5]

Standard 9.3 of the Michigan Land Title Standards refers to the grantor's interest under a ladybird deed as a "life estate with power to convey."[6] It characterizes the lifetime power to convey the property as a power of appointment under Michigan's Power of Appointment Act.[7] In a ladybird deed, typically the grantor is both the donor and the donee of the power of appointment. Thus, Standard 9.3 provides:

> The holder of a life estate, coupled with an absolute power to dispose of the fee estate by inter vivos conveyance, can convey a fee simple estate during the lifetime of the holder. If the power is not exercised, the gift over becomes effective.[8]

For advocates of plain English drafting, the examples provided in Standard 9.3 illustrate how a ladybird-type conveyance may be drafted using less obtuse language. For example, a conveyance to Minnie Mouse "for her lifetime, to do with as she pleases, but on her death, if not previously disposed of, the property shall be divided equally between Mickey Mouse and Donald Duck" is a valid gift to Mickey and Donald when Minnie dies.[9] The use of straightforward language can avoid ambiguity. In practice many drafting attorneys often cite Standard 9.3 in ladybird deeds to affirm the intent to create an enhanced life estate or ladybird deed.

II. Recent Caselaw: The Grantor's Power and Limitations

Recent case law affirms the grantor's unfettered discretion to deal with property during the grantor's lifetime. However, practitioners should be aware that while a ladybird deed protects against third-party claims that contradict the deed's plain language, it may not shield a grantor from enforcement of an oral promise to convey title as compensation for services rendered.

A. The Grantor's Unfettered Discretion to Deal with the Property During the Grantor's Lifetime

Conservatorship of Greer, an unpublished opinion, affirmed the grantor's unfettered discretion to deal with property subject to a ladybird deed during the grantor's lifetime.[10] The case in-

*This article is an updated version of "Ladybird deeds: Key features and uses," by Emily M. Sullivan and Gregg A. Nathanson, that originally appeared in the January 2024 issue of the *Michigan Bar Journal.*

volved a series of ladybird deeds that conveyed a married couple's home upon their deaths.[11] The first ladybird deed provided that if the property was not conveyed before their deaths, title would transfer to the couple's longtime caregiver.[12] The husband died and a conservator was appointed for the wife. The conservator executed a second ladybird deed transferring the house on the wife's death to the couple's living trust instead of the caregiver.[13]

The caregiver challenged the subsequent ladybird deed, arguing the conservator had no authority to dispose of the protected individual's real property.[14] In response, the conservator sought summary disposition based on the unrestricted power to transfer the property that the grantor retained under the first ladybird deed. Moreover, the conservator argued, because a lifetime conveyance could extinguish the caregiver's interest entirely, the caregiver had no standing to challenge the conveyance.[15]

The probate court granted summary disposition in favor of the conservator.[16] In affirming the probate court, the Court of Appeals held that the powers reserved by the grantor in the first ladybird deed allowed the grantor to deal with the property as if the grantor had remained the sole owner. This included the power to change the identity of the remainder beneficiary without the existing remainder beneficiary's approval.[17]

Moreover, execution of the second ladybird deed was not a disposition of the protected individual's real property that required the probate court's approval.[18] The second ladybird deed did not change the grantor's interest in the property. Under both deeds, the grantor retained a life estate coupled with an unrestricted power to convey the property during the grantor's lifetime.[19] The second ladybird deed merely changed the identity of the remainder beneficiary. Therefore, the conservator's execution of the second ladybird deed was not a disposition of the protected individual's real property and did not require the probate court's approval.[20]

Greer restricts the ability of a ladybird deed's remainder interest holder to challenge the grantor's lifetime actions concerning the property. In the court's view, a ladybird deed does not give the remainder beneficiary an enforceable interest in the property until the grantor's death.[21] Rather, the remainder beneficiary "has no interest in the property until after the death of the grantor."[22] Therefore, the grantor's actions are not subject to challenge by the remainder beneficiary.[23]

Challenges to ladybird deeds are not limited to standing issues. Subsequent conveyances exercising the power of appointment reserved by the grantor in a ladybird deed have been challenged on the grounds that the power was improperly exercised.[24] At common law, a power of appointment could not be properly exercised without an express statement referring to the power.[25] The Powers of Appointment Act provides two circumstances in which a power of appointment may be exercised by a later conveyance without a specific reference to the power of appointment. First, a specific reference to the power of appointment is not required if the interest conveyed could only be transferred by exercise of the power of appointment.[26] Second, an explicit reference to the power of appointment is not required if the intent to exercise the power was apparent from the circumstances surrounding the instrument's drafting and execution.[27] Even if not required, drafters of conveyances following a ladybird deed can further solidify the grantor's authority and reduce the potential for disputes by clearly stating that the grantor is exercising the power to convey reserved in the prior ladybird deed. For example:

> This deed is being given pursuant to a Power to Convey reserved in [warranty/quit claim] deed recorded on [date] in liber [number] page [number], [County] Records.

B. Protection Against Contradictory Oral Claims

Two recent Michigan Court of Appeals cases have dealt with ladybird deeds in the context of

promissory estoppel. At first blush, the cases appear to arrive at contradictory holdings. However, we believe the holdings can be reconciled as described in our analysis below.

In *Hebert v. Hebert*, the Court of Appeals held that promissory estoppel cannot be used to contradict a recorded ladybird deed.[28] In that case, the grantor executed a ladybird deed conveying property to his granddaughter upon his death.[29] After the grantor died, his son sued, claiming that the grantor and the remainder beneficiary orally promised the property to the son as his inheritance.[30]

The Court affirmed summary disposition for the remainder beneficiary, extending the principle that "no action for promissory estoppel may lie when an oral promise expressly contradicts the language of a binding contract" to written instruments conveying an interest in real property.[31] The Court echoed the trial court's observation that allowing such claims would "really undermine the Lady Bird deed mechanism seriously."[32]

In contrast, in *Wagner v. Wagner*[33] the grantor's former daughter-in-law moved in to care for the grantor after the grantor was injured in a car accident.[34] The grantor allegedly made an oral promise: help me, and I'll leave you the house. In June 2018, the grantor executed a ladybird deed naming her son and the former daughter-in-law as remainder beneficiaries.[35]

When the relationship soured, the grantor executed a new ladybird deed in December 2019. The second ladybird deed revoked the former daughter-in-law's interest and named the grantor's friend as the new remainder beneficiary.[36] The grantor then sued to evict the former daughter-in-law. The former daughter-in-law counterclaimed for breach of contract and promissory estoppel.[37] The jury found that the grantor breached her oral agreement and that the former daughter-in-law had reasonably relied on the grantor's promise by providing years of caregiving.[38] The trial court rescinded the 2019 deed and reformed the 2018 deed to remove the ladybird deed language and transfer the property directly to the former daughter-in-law.[39] The Court of Appeals affirmed. It held that specific performance was an appropriate remedy for breach of an oral agreement to convey real property, even though the statute of frauds normally requires such agreements to be in writing.[40]

The grantor promised to "leave" the former daughter-in-law the house. Yet the trial court revoked the 2019 ladybird deed and reformed the 2018 deed to remove the ladybird language, effectively converting a promise to transfer the home at death into a present transfer during the grantor's lifetime. One possible explanation is that specific performance was the only practical remedy. If the grantor's estate lacked sufficient funds to compensate the former daughter-in-law for years of unpaid caregiving, the court may have concluded that awarding her the house was the only way to make her whole. The effect of the court's ruling was to convert a promise to transfer at death into a present transfer during the grantor's lifetime.

On first reading, *Wagner* and *Hebert* appear to reach opposite conclusions about whether promissory estoppel can defeat a ladybird deed. Part of the distinction lies in whether there was consideration for the deed. In *Wagner*, the remainder beneficiary provided years of caregiving services, and in exchange, the grantor promised to leave her the house. In *Hebert*, the deed was a gratuitous transfer where the plaintiff provided no consideration and had no vested interest. The plaintiff was a stranger to the deed asserting a secret side deal that contradicted what the recorded instrument stated. His claimed reliance (allegedly directing the grantor to deed the property to the granddaughter instead of himself) was illusory because the plaintiff had no authority over the grantor's property in the first place.

Wagner is also distinguishable from *Greer*. In *Greer*, the disinherited caregiver challenged the grantor's right to change the deed, which is precisely what the ladybird deed reserved the power to do. In *Wagner*, the caregiver was not

challenging the grantor's power to convey; she was enforcing the underlying oral contract that induced her to provide services. The claim did not arise from the ladybird deed's limitations on the remainder beneficiary's rights, but from the grantor's breach of an independent agreement supported by detrimental reliance.

C. Protection From Creditor Claims Under MUVTA

Another recent decision, *Estate of Gloria Jean Taulbee v Amy Lynn Taulbee*, provides additional support for the ladybird deed as an established common-law estate planning device. In that case, the personal representative attempted to set aside a ladybird deed under the Michigan Uniform Voidable Transactions Act (MUVTA), MCL 566.31 et seq. The decedent executed a ladybird deed transferring her home to her daughter.[41] At the time of the decedent's death, her estate was insolvent and unable to pay credit card debts. The personal representative argued that the deed was a fraudulent transfer that rendered the decedent insolvent by transferring substantially all of the grantor's assets.[42]

The Court of Appeals affirmed summary disposition for the grantee, holding that the personal representative failed to establish a voidable transfer under either MCL 566.34 or MCL 566.35.[43] With respect to actual fraud under MCL 566.34(1)(a), the court analyzed the statutory "badges of fraud" and found that most weighed against fraudulent intent: the deed was publicly recorded on the same day it was executed; the decedent continued to pay her bills until her unexpected death; and the daughter testified that the decedent's motivation was a "standard family inheritance," not an attempt to avoid creditors. Although some factors (the transfer was to an insider, for no consideration, and involved substantially all of the debtor's assets) favored finding fraud, these alone were insufficient to meet the creditor's burden of proof. The Court concluded the ladybird deed was an established estate planning device that was not designed to defraud creditors.[44]

The Court also rejected the personal representative's voidable transfer argument under MCL 566.35(1), reasoning that the decedent was not rendered insolvent by the mere execution of the ladybird deed.[45] Because the decedent retained a life estate with the unrestricted power to sell, mortgage, or otherwise encumber the property, she could have satisfied her creditors during her lifetime.[46] The Court's reasoning affirms that a ladybird is not a present transfer. It is an estate planning device that takes effect only upon the grantor's death.

III. Uses of Ladybird Deeds in Estate Planning

One of the primary advantages of a ladybird deed is its simplicity. If a client owns a home and no other significant assets, a ladybird deed is all that is required to transfer title upon the client's death. Another attractive quality of a ladybird deed is the ability to bypass probate. A ladybird deed is a nonprobate transfer under MCL 700.6101.[47] If the grantor does not convey the property during his or her lifetime, title to the property subject to a ladybird deed will immediately pass to the designated beneficiary upon the grantor's death without the need for probate.

A ladybird deed can preserve a client's eligibility for Medicaid benefits.[48] Medicaid imposes strict asset limits on long-term care benefits.[49] For 2026, a single nursing home Medicaid applicant must have no more than $9,950 in countable assets.[50] For married couples, the community spouse can have a maximum of $162,660 in countable assets.[51] An applicant who attempts to fall within the asset limits by disposing of property for less than fair market value in the five years preceding the application will be subject to a penalty period during which Medicaid will not cover the cost of long-term care. Because the grantor retains unrestricted rights to the property, a conveyance by ladybird deed is not a disposition for purposes of Medicaid.[52] Property transferred by ladybird deed is also not included within the

grantor's estate and, as a result, not vulnerable to recovery under current Medicaid rules.[53]

Practitioners should consider whether a ladybird deed alone is sufficient or whether a more comprehensive plan is needed. If the remainder beneficiary receives means-tested government benefits such as Medicaid or Supplemental Security Income, inheriting property outright through a ladybird deed could disqualify them from those benefits. In such cases, the practitioner should consider naming a special needs trust as the remainder beneficiary instead of the individual.

A ladybird deed allows the grantor to retain more control over the property as opposed to a deed where third parties are added to the title as joint tenants. If the grantor is a joint tenant, the property cannot be sold or mortgaged without the consent of all joint tenants. Moreover, the grantor may be liable to the other joint tenant(s) for waste or the reasonable rental value of the property. Because both the grantor and joint tenant have a present ownership interest, the property will be vulnerable to both parties' creditors.

Many practitioners recommend promptly recording the ladybird deed to provide notice of the grantor's intent and satisfy the delivery and acceptance requirements for valid conveyance of real property. However, at least one court has held that a lengthy delay between execution and recording of a deed does not affect the validity of the conveyance.[54] In that case, the grantors executed a deed to themselves as trustees of their living trust.[55] The grantors instructed their attorney to record the deed only if the grantors died simultaneously. The court held the grantors did not place a condition upon the delivery of the deed, but rather delivered the deed to themselves as trustees of their living trust.[56] A deed takes effect upon delivery, not at the time of recording. Therefore, the conveyance to the couple's trust was valid despite the long delay between the deed's execution and its recording.[57]

Ladybird deeds, like all estate planning devices, are not without pitfalls. The immediate transfer of title to the beneficiary upon the grantor's death can result in unintended consequences. In a Minnesota case, the grantor died; a few days later, the house burned down.[58] The remainder beneficiary was not an insured under the homeowner's policy.[59] The court held that there was no insurance coverage since the remainder beneficiary became the owner immediately upon the grantor's death.[60] To avoid this outcome, clients should add the remainder beneficiary as an additional insured to their homeowner's policy.

Whether preparing a ladybird deed or transferring title to a client's living trust, it is important to use the correct legal description. Refer to the client's owner's policy of title insurance or the last recorded deed. If neither is available, obtain a current title commitment. Relying solely on an assessor's or tax-legal description may lead to problems if the tax-legal description differs from the legal description in the last recorded deed.

The remainder beneficiary of a ladybird deed still receives an interest in real property, even if that interest is contingent and not presently enforceable against the grantor. All real property interests held by a judgment debtor (including future interests) are subject to claims by the creditor. Therefore, the remainder beneficiary's interest will be subject to execution, levy, and sale. As a practical matter, the remainder beneficiary's interest is unlikely to attract the interest of creditors. The value of the interest would be difficult to determine, and the grantor could divest the remainder beneficiary's interest and defeat their creditor claims by a subsequent conveyance.

For many homeowners, the simplicity of a ladybird deed is an appealing alternative to a more expensive will or trust. It may also tempt homeowners to draft the ladybird deed themselves. Self-drafting increases the likelihood of mistakes that will cause the conveyance to be invalid or fail to capture the grantor's full intent. For example, an unartfully drafted ladybird deed may create a life estate and a remainder interest without reserving the grantor's power of appointment. Additionally, an inexperienced drafter may fail

to appreciate the potentially significant impact of making individual remainder beneficiaries joint tenants versus tenants in common.

IV. Tax Benefits of Delaying Transfer of Title

A ladybird deed provides several tax benefits. If the property is the grantor's principal residence, the grantor may retain the principal residence exemption.[61] Because the conveyance to the remainder beneficiary is not effective until the grantor's death, it is not a transfer of ownership for the purposes of uncapping the property's taxable value.[62] It is important to file a property transfer affidavit at the time of recording and claim an exemption from uncapping.[63] Under the current form of property transfer affidavit, check the exemption for "transfer of that portion of a property subject to a life lease or life estate (until the life lease or life estate expires)."[64] Also, the property's taxable value will not uncap on the grantor's death if residential property is transferred to certain family members.[65]

The remainder beneficiary will receive a step up in basis that will reduce the taxable gain realized on a subsequent sale.[66] A "step up in basis" refers to the adjustment in the cost basis of an inherited asset to its fair market value on the date of the decedent's death.[67] Since the grantor is both the donor and the donee of the power of appointment contained in the ladybird deed, the property will be included in the grantor's estate for tax purposes.[68] The beneficiary acquires the property from the decedent "by reason of death," thereby satisfying the second requirement to receive a step up in basis.[69] Therefore, little or no taxable gain should result from a sale of the property promptly after the death of the grantor.

Conclusion

A thoughtfully drafted ladybird deed can be a powerful estate planning device. The grantor can retain control over the real property during the grantor's lifetime. Recent caselaw has curtailed the remainder beneficiary's ability to challenge the grantor's lifetime actions. Upon the grantor's death, the property will automatically transfer to the designated remainder beneficiary without the need for probate. For these reasons, ladybird deeds are an attractive estate planning tool and are often used in conjunction with wills, trusts, and other estate planning devices.

Notes

1. *In re Conservatorship of Greer*, No 359531, slip op. at 7 (Mich Ct App Jan 19, 2023) (per curiam); *In re Estate of Rasmer*, 501 Mich 18, 44 n18, 903 NW2d 800 (2017).
2. *Bill & Dena Brown Tr v Garcia*, 312 Mich App 684, 687 n.2, 880 NW2d 269 (2015).
3. *Padgett v Taulbee*, No 369545, slip op at 21 (Mich Ct App Dec 18, 2024) (per curiam).
4. *Bill & Dena Brown Tr*, 312 Mich App at 687 n2 (citing *In re Tobias Estates*, No 304852 (Mich Ct App May 10, 2012) (per curiam)).
5. *Black's Law Dictionary* 503 (10th ed 2014) (defining "ladybird deed" as "[a] deed that allows a property owner to transfer ownership of the property to another while retaining the right to hold and occupy the property and use it as if the transferor were still the sole owner").
6. Michigan Land Title Standards (6th ed), Standard 9.3.
7. MCL 556.112.
8. Michigan Land Title Standards (6th ed), Standard 9.3.
9. *Id*.
10. *In re Conservatorship of Greer*, No. 359531, slip op. at 2.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*. at 3.
16. *Id*. at 6.
17. *Id*. at 8.
18. *Id*. at 10.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*. at 12 n.5.
24. *In re Tobias Estate*, No 304852 (Mich Ct App May 10, 2012) (per curiam).
25. *Id*. at 11.
26. MCL 556.114.
27. *Id*.
28. *Hebert v Hebert*, No 372281 (Mich Ct App Dec 23,

2025) (per curiam).
29. *Id*. at 2.
30. *Id*. at 3.
31. *Id*. at 11.
32. *Id*. at 4.
33. *Wagner v Wagner*, No 366772 (Mich Ct App June 13, 2024) (per curiam).
34. *Id*. at 1.
35. *Id*. at 2.
36. *Id*.
37. *Id*.
38. *Id*. at 3.
39. *Id*.
40. *Id*. at 10.
41. *Padgett v Taulbee*, No 369545 (Mich Ct App Dec 18, 2024) (per curiam).
42. *Id*. at 2.
43. *Id*. at 10.
44. *Id*. at 11.
45. *Id*. at 15.
46. *Id*.
47. MCL 700.6101.
48. MCL 400.112h.
49. Michigan Department of Health and Human Services, *Bridges Eligibility Manual,* BEM 400 (Jan 13, 2026).
50. Michigan Medicaid Eligibility: 2026 Income & Asset Limits, https://www.medicaidplanningassistance.org/medicaid-eligibility-michigan/ (last visited Feb 23, 2026).
51. Michigan Medicaid Eligibility: 2026 Income & Asset Limits, https://www.medicaidplanningassistance.org/medicaid-eligibility-michigan/ (last visited Feb 23, 2026).
52. MCL 400.112h.
53. *Id*.
54. *Chakmak v Koss*, No 359169 (Mich Ct App Jan. 12, 2023) (per curiam).
55. *Id*.
56. *Id*.
57. *Id*.
58. *Strope-Robinson v State Farm Fire & Cas Co*, No 20-1147 (8th Cir Feb 5, 2021).
59. *Id*.
60. *Id*.
61. MCL 211.7cc.
62. Michigan State Tax Commission, *Transfer of Ownership Guidelines* 18 (Feb 25, 2025).
63. MCL 211.27a(10).
64. Michigan Department of Treasury, Form L-4260, Property Transfer Affidavit.
65. MCL 211.27a(7)(s).
66. 26 USC 1014(a)(1).
67. *Id.*
68. 26 USC 2041(a)(2).
69. 26 USC 1014(b)(9).

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Case Summaries

By Sandra D. Glazier

In re Conservatorship of DLW;[1] Conservatorship Accounting Start Date and Expenditures that Qualify as Being for the Support, Education, Care, or Benefit of the Protected Individual or a Dependent[2]

Michigan's Estates and Protected Individuals Code ("EPIC") provides that

> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.
>
> (4) The court may appoint a conservator in relation to the estate and affairs of an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment.[3]

EPIC also provides that "[l]etters of conservatorship are evidence of transfer of all of the protected individual's property, or the part of that property specified in the letters, to the conservator."[4]

The issue of when the initial accounting period commences (and as a result the beginning value for purposes of the initial accounting is determined) and what expenses may be paid on behalf of the protected individual or their dependents was addressed in *In re Conservatorship of DLW*.

Facts

Dr. Wendy Webster-Jackson ("Wendy") was appointed conservator for her father, Donald, on September 29, 2021, as a result of a Petition for appointment of a conservator filed on July 19, 2021. Wendy utilized the value of her father's Chase bank account on the date her letters of authority were issued on the inventory filed with the court as well as for determining the beginning balance for her First Annual Account. The value of the Chase account as of the date her letters of authority were issued was $4,761.89, but the beginning balance on the account statement that covered the date her letters of authority were issued reflected $5,189.89. Wendy also asserted that her father had an interest in certain real estate that was titled in the name of Donald's deceased parent.

The account filed reflected that Wendy utilized conservatorship assets to pay real estate taxes on the property titled to Donald's deceased parent as well as utilities incurred at the property, and cash withdrawals portrayed as an allowance for Donald's wife. The GAL raised issues in her report to the court regarding Wendy's lack of receipts and substantiating evidence and contended that the payment of real estate taxes and utilities for property not titled to Donald as well as the provision of an allowance for his spouse were inappropriate expenditures. The GAL also contended that the account utilized the wrong value for the Chase account, thereby failing to account for the discrepancy between the beginning balance on the statement and the starting value used by Wendy on the inventory and first account.

Wendy testified that her father, his wife and

her sister resided at the home titled to Donald's deceased parent and Wendy accounted for all transactions relating to the Chase account from and after the date upon which her letters of authority were issued.

The probate court ruled the value used on the inventory for the Chase account was incorrect and that Wendy, as conservator, should not have expended conservatorship assets to pay the property taxes on property that wasn't titled to Donald. Wendy appealed.

Analysis

The appellate court held that the probate court erred in requiring an inventory value on a date different than the date on which the letters of authority were issued. It also held that the probate court erred in disallowing the real estate taxes and utilities for property occupied by Donald, simply because title to the property was not in his name as well as in disallowing an allowance paid for the benefit of Donald's wife, who was his dependent.

The appellate court found that

> "[l]etters of conservatorship are evidence of transfer of all of the protected individual's property, or the part of that property specified in the letters, to the conservator." Pursuant to MCR 5.402(D), "[a]fter entering an order appointing a fiduciary, the court must issue letters of authority after an acceptance of appointment is filed, and if ordered, the filing of the fiduciary's bond." "Letters of authority shall be issued after the appointment and qualification of the fiduciary" and "[i]f bond is ordered, the letters shall be issued after proof of bond has been filed with the court, unless otherwise ordered." Furthermore, "[b]efore receiving letters, a conservator must qualify by filing with the appointing court a required bond and a statement of acceptance of the duties of the office." "By accepting appointment, a conservator submits personally to the court's jurisdiction in a proceeding relating to the estate that may be instituted by an interested person."
>
> Reading these provisions together, it is evident that legal title over the protected individual's property is not actually transferred to the conservator until the letters of conservatorship are issued and that the conservator is therefore not responsible for the value of the inventoried property until that date. The probate court in this case made an error of law in ruling otherwise. This legal error clearly affected the probate court's decision to reject [Wendy]'s inventory and accountings, and we therefore vacate the probate court's order and remand for further proceedings applying the proper starting date for the determination of the initial inventory.[5]

While there appears to have been some confusion regarding the status of title for various parcels for which expenses were paid with conservatorship assets, the appellate court held the issue of title was irrelevant to the analysis of whether expenses were properly paid. While the appellate court cited various statutes, the outcome essentially hinged on MCL 700.5425 (which is based on UPC §5-424) and MCL 700.5407 (which is based on UPC §5-407).

MCL 700.5425 provides that

> [a] conservator may expend or distribute estate income or principal without court authorization or confirmation for the support, education, care, or benefit of the protected individual or the protected individual's dependents in accordance with the following principles:
>
> * * *
>
> (b) The conservator shall expend or distribute money reasonably necessary for the support, education, care, or benefit of the protected individual or a dependent with due regard to all of the following:
>
> (i) The estate size, the conservatorship's probable duration, and the likelihood that the protected individual, at some future time, may be fully able to be wholly self-sufficient and able to manage business affairs and the estate.
>
> (ii) The accustomed standard of living of the protected individual and the dependents.
>
> (iii) Other money or sources used for the

protected individual's support.

(c) The conservator may expend estate money for the support of an individual legally dependent on the protected individual and others who are members of the protected individual's household who are unable to support themselves and who are in need of support.

* * *

(e) In discharging a responsibility conferred by court order or this part, a conservator shall implement the principles described in section 5407(1) to the extent possible.[6]

MCL 700.5407(1) provides that

[t]he court shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure. Accordingly, the court may authorize a protected individual to function without the consent or supervision of the individual's conservator in handling part of his or her money or property, including authorizing the individual to maintain an account with a financial institution. To the extent the individual is authorized to function autonomously, a person may deal with the individual as though the individual is mentally competent.[7]

The appellate court held that the probate court erred when it determined that the challenged payments were inappropriate based solely on how the property was titled as opposed to analyzing whether the payments fell within the standards set forth in MCL 700.5425. If the property taxes are found to have been expended for "the support, education, care, or benefit of the protected individual or a dependent" then, on remand, they should be allowed.

Comment

While Wendy failed to supply "receipts" at the request of the GAL, she was ultimately able to supply records documenting the real estate tax payments and copies of cancelled checks for services rendered on Donald's behalf by home-care agencies and to a gentleman who provided housecleaning and landscaping services that were reflected on the accountings. While some courts don't audit and require the submission of receipts and invoices, it remains important to remember that interested persons can ask to review such records, making maintenance of the same an important conservator responsibility.

The need to establishing a record that reflects how expenses incurred are for the "support, education, care or benefit of the protected individual or their dependent" remains important. Here, the property appears to be what is commonly referred to as "heirs' property."[8] It appears that following Donald's parent's death, no one probated title to the property but at all times relevant to this matter, Donald, his wife and at least one of his children utilized the property as their residence and home.

While not pertinent to the appellate (or probate) court's analysis, generally real property devolves to the persons to whom the property is devised by the decedent's last will (and in the case of intestate succession) to the decedent's heirs, subject to homestead allowance, family allowance, exempt property, a surviving spouse's elective share, expenses of administration and the rights of creditors.[9] In this instance, it appears that Donald had a beneficial interest in the property, but it wasn't that interest that was deemed determinative of whether, or to what extent, the conservator could use conservatorship assets to pay expenses relating to the property.

What will be determinative, on remand, will be the extent to which Wendy can establish that the payments benefited Donald or otherwise provided for his (or a spouse and child who were dependent upon him for their) support and care and, therefore, expended for Donald's benefit. Since Donald, his spouse and child lived at the property for which the taxes were paid (and the failure to pay such taxes could result in their inability to continue to reside there), and the property is likely "heirs' property," establishing that

payment of the taxes provided Donald (and his dependents) with a benefit shouldn't be difficult.

Whitton v Hopkins;[10] Identifying the Client and Defining the Scope of Representation Is Important[11]

Some states apply a fiduciary exception to the attorney-client privilege that essentially results in an attorney for the fiduciary also owing duties to the underlying estate. Michigan and some other jurisdictions do not. When one is seeking to bring a malpractice claim against the attorney for a fiduciary, it may be important to understand whether the fiduciary exception will apply in order to determine if a beneficiary or successor fiduciary will be considered a real party in interest.

The Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege ALR provides in pertinent part that:

> [t]he common law recognizes an exception to the attorney-client privilege called the "fiduciary exception:" when a trustee obtains legal advice related to the exercise of fiduciary duties, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.

The fiduciary exception to the attorney-client privilege stems from a principle of English trust law that requires a trustee to comply with a beneficiary's request to produce all legal advice that the trustee has obtained on matters concerning administration of the trust.

The fiduciary exception to attorney-client privilege does not apply to attorney-client communications of a fiduciary who seeks legal advice to protect his or her own individual interests, rather than to guide the fiduciary in performance of his or her duties to a beneficiary.

The fiduciary exception to the attorney-client privilege, with respect to communications between a trustee and the trust's attorney, is based on the theory that when a trustee seeks legal advice in executing his or her fiduciary duties, he or she is acting ultimately on behalf of the beneficiaries of the trust and, accordingly, cannot cloak his or her actions from them, the attorney's real clients.

The "fiduciary exception" to the attorney-client privilege provides that the privilege cannot be invoked by a trustee of a trust against the beneficiary of a trust where the legal advice was obtained to guide trust management, given that trustees are tasked with providing beneficiaries with information regarding the management of the trust.[12]

In the recent case of *Whitton v Hopkins*, the Michigan Court of Appeals reviewed the terms and scope of engagement to arrive at the conclusion that beneficiaries, the clients individually, and the estate and trust were not real parties in interest with regard to a claim of legal malpractice because the attorneys had been retained to represent the trustees in their fiduciary capacity. Clearly identifying the capacity in which a client is represented and the scope of the engagement can be important to determining who the real party in interest may be when claims of malpractice are asserted, particularly in a jurisdiction that does not generally apply the fiduciary exception to the privilege.

Facts

Robert Whitton died in July 2015. He was survived by his siblings, Richard, Eddie, and Susan. Robert had founded TheraMatrix Services, Inc ("TMX") a company that provided physical therapy referral services to unionized employees in the auto industry. Robert left behind a sizable estate. Before he died, he executed a Will that nominated Richard and Eddie as his co-personal representatives. His interest in TMX had been funded to his revocable trust (the "Trust"), of which Richard and Eddie had been nominated as his co-successor trustees. Richard, Eddie, and Susan were equal beneficiaries under Robert's estate plan.

Following Robert's death, Richard and Eddie also became co-CEOs of TMX.

Richard and Eddie engaged Michael Witzke ("Witzke") of McDonald Hopkins ("MH") to represent them regarding the administration of Rob-

ert's estate and Trust. That engagement letter was addressed to Richard and Eddie as trustees of the Trust. The scope of the engagement was to help them with specific matters relating to administering the estate and Trust.

During the first three years of trust administration, Richard and Eddie each took more than $1 million in compensation from TMX. They did not seek input from Witzke in doing so. Instead, they sought input from TMX's long time accountant at UHY. The accountant also advised them that they could take an annual fiduciary fee equal to one percent of the value of the Trust. Witzke warned them that any trustee fees had to be reasonable.

In 2016, Richard and Eddie entered a new contract for providing referral services to Chrysler employees. Because Richard and Eddie had developed the contacts at Chrysler after Robert died, the accountant advised them that they could set up a new business, which they would then personally own, to provide the referral services to the Chrysler employees. The accountant referred Richard and Eddie to different counsel (Rudzewicz), who was not associated with Witzke or MH to represent them and form the new entity (ERW). Witzke (and Latiff, who also worked at MH), during their representation of Richard and Eddie on another matter, learned that the brothers had formed ERW, it was in the same business as TMX, and they were not sharing the proceeds of that business with their sister. Witzke advised Richard and Eddie that such actions could constitute a breach of their fiduciary duties and expose them to liability.

It was alleged that Richard and Eddie withdrew nearly $4 million in profits from ERW.

In late 2016 or early 2017, Eddie contacted his sister and offered to buy-out her interest in the Trust for $2 million. Susan rejected the offer. Her attorney then reached out to Witzke and requested information. When all the information requested was not provided (specifically information regarding distributions made to Eddie and Richard), Susan filed a petition to have her brothers removed as trustees of the Trust and requested that an independent trustee be appointed. That petition did not refer to ERW. The reasons stated in support of her request to remove her brothers as co-trustees were (1) the effort to buy her out of her interest in the Trust, (2) her brothers' compensation from TMX, and (3) UHY's failure to respond to requests for financial documents.

At a hearing on the Removal Petition held in August 2020, testimony was presented indicating that during the five years since Robert had died, Susan had only received a total of $90,000 in distributions from the Trust, of which $60,000 was to address phantom income attributable to the Trust.

After hearing how much Richard and Eddie had received in compensation for acting as CEOs of TMX and the additional amounts received in fiduciary fees, the court found they had breached their fiduciary duties and removed them and appointed an attorney, Nirenberg, as successor trustee of the Trust. Ultimately, Nirenberg's position was changed to that of a special fiduciary and he was granted control over management of the Trust's assets, including TMX. Apparently, all three siblings were unhappy with what they felt were "substantial" fees charged by Nirenberg and all three siblings ultimately reached a settlement.

In November 2021, Richard and Eddie, individually, as co-personal representatives of the estate, and as co-trustees of the Trust (collectively the "Plaintiffs"), sued Witzke, Latiff, and MH (collectively the "Defendants") for malpractice. The Defendants filed notice of a nonparty at fault naming UHY.

Plaintiffs' expert (Carney) opined that once Defendants became aware of ERW, they had a duty to independently investigate whether it was an asset of the Trust and, if Richard and Eddie did not cooperate, they should have withdrawn as counsel. Carney further opined that Latiff breached the standard of care when he failed to cite MCL 700.7817(v) to the court at the removal

hearing. That statute provides a trustee with the power to employ professionals and "act without independent investigation upon such a person's recommendation."[13] Carney testified that Latiff should have argued that Richard and Eddie did not breach their duties when setting their compensation and fiduciary fees because they relied on the advice of the UHY accountant and they were allowed to act on such advice. When cross examined, Carney did not know if a different result would have occurred had Latiff made that argument. Carney testified that he believed the appointment of Nirenberg resulted in additional unnecessary fees that could have been avoided had the brothers not been removed from their fiduciary positions.

Defendants moved for partial summary disposition. They argued, in part, that certain claims were time barred and that the Trust and estate did not have standing because they lacked an attorney-client relationship with Defendants. They also argued that in light of Carney's testimony, Plaintiffs could not establish causation, which is a necessary element of a legal malpractice claim. The probate court granted Defendants' request for partial summary disposition and this appeal ensued.

Analysis

Causation

In order to prevail on a legal malpractice claim, the Plaintiffs had to prove four elements:

(1) the existence of an attorney-client relationship;
(2) negligence in the legal representation of the plaintiff;
(3) that the negligence was the proximate cause of an injury; and
(4) the fact and extent of the injury alleged.

The first element correlates with the duty element of a traditional negligence claim because the existence of the attorney-client relationship gives rise to a duty as a matter of law.

Duty is any obligation the defendant has to the plaintiff to avoid negligent conduct. In negligence actions, the existence of duty is a question of law for the court.

In legal malpractice actions, a duty exists, as a matter of law, if there is an attorney-client relationship. Whenever an attorney is retained in a cause, it becomes his implied duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management thereof.

The second element requires proof that the attorney breached a professional standard of care, in other words, did not act as attorney of ordinary learning, judgment or skill would have under similar circumstances. One of my former partners always asks me "what would a 'C' attorney (as opposed to an "A" attorney) have done?" To establish a breach of the standard of care, expert witness testimony is generally required to establish the applicable standard of care.

Next the plaintiff must essentially prove the "case within the case," meaning that the plaintiff "would have been successful in the underlying matter but for the attorney's malpractice."[14] Otherwise stated, that the attorney's malpractice was the proximate cause of the plaintiff's damages. In proving this element, the plaintiff cannot rely on speculation and conjecture. "Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred."[15] This is often the most difficult element to prove.

In the instant matter, the evidence indicated that Defendants warned Richard and Eddie that they might be deemed to have breached duties if it were determined that through their efforts and establishment of ERW they were usurping opportunities from TMX. While Richard and Eddie contend that the attorneys' warnings should have been more detailed and adamant, Plaintiffs failed to establish that they would have acted any differently had Defendants done so. Moreover, issues relating to the establishment of ERW or that through it the brothers engaged in the same

business as TMX (thereby diverting business opportunity away from the Trust), did not form the basis for the court's grant of Susan's petition to remove them as personal representatives and co-trustees of the Trust. The existence of ERW and the monies received by the brothers as a result thereof were not raised in the petition to remove them or the testimony presented. Rather, the basis for their removal was their compensation from TMX, the fiduciary fees taken and their failure to provide information to Susan, who was an interested party in the Trust's administration.

The failure to raise a particular defense, such as Richard and Eddie's right to rely upon the accountant's advice pursuant to MCL 700.7817(v), is generally viewed as a matter of trial strategy. In addition, Plaintiffs would need to show that the failure to raise the defense was a proximate cause of their damages. Here, the probate court removed them for a breach of trust with regard to duties owed Susan. In doing so, the court reviewed the statutory guidelines and the terms of the Trust in making its decision to remove them from their fiduciary roles. To establish that utilization of the defense that they reasonably relied upon the advice of the accountant and doing so should not have been held to have breached any duties owed Susan, would have required expert testimony. Carney's testimony failed to establish the level of causation required to prevail and, therefore, summary disposition was appropriate.

Real Party in Interest

Generally, an attorney can only be held liable for negligence that harms his or her client.

However, Michigan law recognizes some limited exceptions to this rule. For instance, named estate beneficiaries may, in some circumstances, bring a malpractice action against the attorney who drafted a testamentary document, even though those beneficiaries do not have an attorney-client relationship with that attorney. However, this exception is narrow and exists because of the low risk of conflicts of interest as well as a lack of any other available remedy. In general, "[t]here has been a reluctance to permit an attorney's actions affecting a nonclient to be a predicate to liability because of the potential for conflicts of interest that could seriously undermine counsel's duty of loyalty to the client."[16]

Since the facts in Whitton fall outside of the limited exception stated above,

> [a]n action must be prosecuted in the name of the real party in interest. … A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. The rule requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim that is asserted in the complaint.[17]

Prior to enactment of Michigan's Estates and Protected Individuals Code ("EPIC") and the Michigan Trust Code ("MTC"), the Michigan Revised Probate Code ("RPC") indicated that "without obtaining a court order, a fiduciary of an estate may employ counsel to perform necessary legal services in behalf of the *estate*…".[18] That language was revoked and is not included in EPIC or the MTC. Following enactment of EPIC and the MTC, the Michigan Court Rules were amended to provide that "[a]n attorney filing an appearance on behalf of a fiduciary shall represent the *fiduciary.*"[19] Once EPIC and the MTC were adopted, MCL 700.3715(1)(2) (relating to retention of an attorney by a personal representative), MCL 700.7817(w) (relating to retention of an attorney by a trustee), and MCL 700.5423(2)(z) (relating to retention of an attorney by a conservator), contained essentially identical language regarding engagement of an attorney by a fiduciary. As a result, the appellate court looked to *Estate of Maki v Coen*[20] to help determine to whom the attorney's duties were owed when retained by a personal representative or a trustee in their fiduciary status. *Maki* involved a conservator's retention of counsel, but given the similarities in the applicable statutes, the *Whitton* court found *Maki* clarified that when a conservator, personal representative, or trustee engages counsel to represent them, and provide services

and assistance in their fiduciary capacity, the attorney only represents the fiduciary and not the ward, estate, or trust.

While the Plaintiffs recognized the import of the *Maki* decision, they argued that the language contained in the engagement letter between Richard, Eddie, and Defendants, reflected the work to be performed under that engagement was on behalf of the estate and Trust. In order to determine if that claim had merit, and thereby caused Defendants to owe a duty to the estate and Trust and not just the fiduciaries, the court was required to analyze the language of the agreement, because

> the duty imposed on the attorney for purposes of a legal malpractice action is limited to the agreed-upon scope of representation.
>
> …
>
> A fee [or retainer] agreement between an attorney and a client is a contract. Therefore, a fee or retainer agreement … is subject to the law of contracts." "[A]n attorney and a client are free to contract as they see fit, and courts must enforce contracts as written unless they are in violation of law or public policy.[21]

The July 17, 2015 engagement letter was directed to "Mr. Eddie Whitton, Trustee" and "Mr. Richard E. Whitton, Trustee." It stated it was *regarding* the estate and Trust. It indicated "[w]e appreciate the opportunity to act as your legal counsel regarding the estate and trust matters of Robert E. Whitton under the terms set forth in this letter."[22] Later, in a letter dated September 14, 2015, Witzke sent a letter to his clients, in their fiduciary capacities, to summarize the duties and services the Defendants would perform (essentially the scope of the engagement). That letter provided in pertinent part that

> "[the law firm] will help you (a) identify all the assets in the estate for estate tax purposes, both probate and non-probate, (b) identify all debts, claims and administration expenses to be paid; (c) prepare a Federal Estate Tax return; (d) prepare all court filings and estate income tax returns; and (e) assist you with the transfer of assets."[23]

Neither Richard nor Eddie, in their individual capacities, engaged Witzke, Latiff or MH as their attorneys regarding the administration of the estate or the Trust, nor did the estate or the Trust itself engage any of the Defendants. The engagement letter, and scope of the engagement defined in a subsequent letter, established that the Defendants' duties were owed to Richard and Eddie in their fiduciary capacities and not to the estate or Trust (or them individually). The damages sought related to additional fees incurred by the estate and Trust due to Eddie and Richard's removal as fiduciaries, and as such were damages to the estate and/or Trust, not to them as fiduciaries. There was nothing in the opinion that indicated that Richard or Eddie were required to pay the estate or Trust any of Nirenberg's fees as an element of a surcharge.

Consequently, the court determined that because the Defendants represented Richard and Eddie only in their fiduciary capacities, they could not in their individual capacities assert a claim, nor could the Trust or estate assert a claim of malpractice against Defendants, because Plaintiffs were not the real parties in interest and the appellate court found that the probate court properly dismissed the legal malpractice claims.

Comment

An analysis of the *Whitton* opinion reflects that despite Michigan's statutory regime (and applicable court rule) that essentially opt out of the fiduciary exception to the attorney client privilege, language contained in the engagement letter (and any modifications thereto) may result in duties being owed to an estate or trust, so care in drafting and the words utilized remain important.

Consider, perhaps including language along the following lines:

> "We will be representing you in your capacity as Personal Representative of the decedent estate and as Successor Trustee of the revocable trust dated _____. We will not be representing you in your individual capacity nor will we be

representing any other interested parties."

One might also wish to consider recommending that the client retain other counsel, should they seek advice regarding their rights as a beneficiary in either matter.

Defining the scope of the engagement can be as important when engaging in estate planning, litigation, or estate and trust administration. Once a definition of the matter or matters for which representation has been engaged, one might also wish to include language along the following lines:

> "The Firm has been engaged to represent you in your fiduciary capacity with regard to the above referenced Matter. The Firm has not undertaken or accepted an engagement to represent you individually, nor has the Firm undertaken representation with regard to any reporting responsibilities under the Corporate Transparency Act or to file or prepare any tax returns on behalf of the Trust or any entities controlled thereby.
>
> The scope of this engagement may be enlarged, diminished and/or otherwise modified, from time to time. Any modification to the scope of engagement must, however, be defined in separate writings that are intended to supplement this engagement letter. Such writings may include, but not be limited to, emails that specifically acknowledge a modification to the scope of the engagement. However, a separate engagement is required on any matters relating to compliance with the Corporate Transparency Act and this engagement may not be modified to simply include representation relative thereto."

Also consider "bookending" the representation. When representation concludes, consider sending a written communication that reflects that the representation has concluded. If the attorney is uncomfortable indicating that a matter is closed, consider perhaps indicating that all tasks undertaken by the Firm have been completed. Doing so may prove helpful in establishing the date upon which the statute of limitations for a claim began to run.

In re Douglas M Ladney 1992 Trust;[24] Simon Says Exercise Power of Appointment with Formalities of a Deed[25]

Wikihow.com reports that

> Simon Says is a fun game that helps in exercising listening skills. This game is fairly easy, but it can quickly turn into a challenge, especially if playing in a large group. Although this game goes by many names worldwide, the fun, basic rules tend to remain the same.
>
> ***
>
> Gather your group of players.
>
> Simon Says is a simple and fun game played by children all over the world. Although Simon Says is normally reserved as a children's activity, people of all ages can play and enjoy the game. Normally, all the players in Simon Says remain standing for the duration of the playing round. However, you could also play sitting down.
>
> Within your group of players, designate one person to be Simon. Whoever is chosen to be Simon will then stand in front of and face the rest of players in the group.
>
> Understand the role of Simon.
>
> Simon is the leader and commander of the group of listeners. Simon gives commands to the group of listeners. Simon's commands can be given in two different ways: beginning a command by saying, "Simon says…" or simply stating the command.
>
> ***
>
> This variation of the game involves the listeners counting their own personal strikes when they incorrectly obey or don't obey a command. Simon can set a number of strikes (three strikes, five strikes, etc.), or strikes ….[26]

In *In re Douglas M Ladney 1992 Trust,* Marguerite Ladney ("Marguerite") was "Simon." As the grantor of a Trust for the benefit of her son, Douglas (the "Trust"), she gave the commands by setting forth the conditions under which her son, Douglas, could exercise a power of appointment over half the residue of the Trust that

remained at his death. The failure to follow the rules established meant that any attempt at exercise of that power would fail. Essentially a single "strike" and the intended beneficiaries of that attempted exercise of the power would lose.

Facts

The Trust contained a "General Power-Effective on Death" that provided Douglas with a general power of appointment over half of the assets remaining at his death. Douglas had no children who survived him, but he was survived by three siblings. The Trust provided that

> [o]n the death of [Douglas] prior to complete distribution of the trust assets, up to one-half the remaining trust assets shall be distributed as [Douglas] may direct in an instrument executed by [Douglas] *with all of the formalities of a deed* and delivered to the Trustee prior to the death of [Douglas].[27]

In the alternative, if Douglas had no issue who survived him, any assets not distributed pursuant to the exercise of the power of appointment were to be distributed to Marguerite's then-living issue, per stirpes.

Shortly before his death, Douglas executed a Will that disinherited his siblings and attempted to exercise the power of appointment granted him over half the assets of the Trust in favor of various friends, neighbors, caregivers and charities. The Will was not notarized. Michigan's statute relative to the execution of deeds requires that a deed be notarized.

The personal representative of Douglas' estate (the "PR") requested that the trustee pay half of the Trust assets to Douglas' estate. The trustee refused and sought a declaratory judgment that Douglas' failure to exercise the power of appointment with all the formalities of a deed meant that the exercise was of no effect. The PR argued that any technical defects in the Will relating to the exercise should be overlooked via application of the "harmless error" rule and that the terms of the Trust violated public policy. The PR also argued that Marguerite's general intent was to grant Douglas a general power of appointment and that intent should not be invalidated simply because of an irregularity in execution. The probate court found that the Trust did not violate public policy and that the "plain language of the [grantor's] directives and intent governed the interpretation of the Trust"[28] such that the attempted exercise of the power of appointment by Douglas in his Will was of no effect.

This appeal ensued.

Analysis

MCL 565.8 provides in pertinent part that

> Deeds executed within this state of lands, or any interest in lands, shall be acknowledged before any judge, clerk of a court of record, or notary public within this state. The officer taking the acknowledgment shall endorse on the deed a certificate of the acknowledgment, and the true date of taking the acknowledgment, under his or her hand.[29]

Since Douglas' Will was not notarized (or acknowledged before a judge or clerk of a court of record), it did not meet the "formalities of a deed."

The appellate court held that the probate court did not err in refusing to give effect to the attempted exercise of the power of appointment under Douglas' Will even though the Will was otherwise valid. In doing so it found that

> [w]hen interpreting language in a trust, our primary goal is "to determine and give effect to the trustor's intent." "Interpretation begins with an examination of the trust language, and if there is no ambiguity, the trust terms are interpreted according to the plain and ordinary meaning." Importantly, when interpreting the language in a trust, we must 'read a trust as a whole, harmonizing its terms with the intent expressed, if possible.
>
> Here, appellant incorrectly argues that [Douglas] had a general power of appointment not subject to the conditional language in Section 3.2 because Sections 3.2 and 3.3 of the Trust are not inconsistent. The Trust's unambiguous lan-

guage in Section 3.2 granted [Douglas] a power of appointment to distribute half of the Trust's assets upon death if he executed an instrument with all the formalities of a deed. The ordinary meaning of [grantor]'s reference to "all the formalities of a deed" required [Douglas] to distribute the Trust's assets in an instrument that met the requirements for a valid deed. Under MCL 565.8, "[d]eeds... shall be acknowledged before any judge, clerk of a court of record, or notary public within this state." Moreover, as appellee estates, under MCL 565.201(1)(c),

> [a] register of deeds shall not receive for recording an instrument executed after October 29, 1937 unless the instrument complies with each of the following requirements:
>
> ***
>
> (c) The name of any notary public whose signature appears on the instrument is legibly printed, typewritten, or stamped on the instrument and appears on the same page near the signature of the notary public.

Thus, in order for the Will to be executed with all the formalities of a deed it must be acknowledged before a judge, clerk, or notary public, i.e., it had to be notarized. However, appellant concedes that the Will was not notarized. Therefore, the Will failed to satisfy Section 3.2 of the Trust, which was a specific condition set forth by [grantor] limiting how [Douglas]'s power of appointment could be carried out. Because we must give meaning to the [grantor]'s clear directives, the Estate is not entitled to half of the Trust's assets because the Will was not executed with all the formalities of a deed, as required by Section 3.2 of the Trust.[30]

The appellate court also held that the "harmless error" rule did not apply here because it was not the validity of the Will that was at issue. The Will itself was not being challenged. The issue was rather whether the exercise contained in the Will met the specific parameters set forth in the Trust for a valid exercise of the power of appointment.

Comment

Whether one analogizes conditions placed upon the exercise of a power of appointment as being akin to the orders given by Simon in a game of "Simon Says" or those related to the game of "Mother May I," what is clear is that the failure to comply with limitations or parameters placed upon the exercise by the grantor can be fatal.

Historically, the exercise of a power of appointment under a Will generally required that the testator specifically reference the power it wished to exercise. This was intended to avoid inadvertent exercise. While it was clear which power of appointment Douglas wished to exercise, it was not Douglas' intent that controlled. Rather, it was Marguerite's. She specifically specified that in order to exercise the power of appointment, Douglas needed to do so with the formality of a deed and that the applicable instrument be delivered to the trustee prior to his death. Douglas failed to conform his exercise to either of those prerequisites to the exercise and as a result his efforts were of no effect.

Powers of appointment can be an important and effective estate planning tool in providing flexibility to estate planning documents. It may be important to therefore consider whether the grantor does or does not wish to make it easy to exercise such a grant. Conditions, such as whether the approval of an adverse or non-adverse party, may be required. Other parameters for the exercise may also be established. Whether the planner represents the grantor or the party to whom a power of appointment has been granted, addressing and following the rules established for the exercise remains important.

In re Wessels Family Trust;[31] The Importance of Determining Grantor Intent[32]

The importance of grantor intent has been addressed in a number of cases covered in LISI articles written by this author over the past year. This issue arose again in *In re Wessels Fam-*

ily Trust when the Michigan appellate court held that the probate court erred when it failed to conduct an evidentiary hearing to resolve disputed facts regarding the grantor's intent before approving final distribution of trust assets. While clear and careful drafting can help to avoid the need for court intervention, when such disputes arise the importance of attempting to ascertain grantor intent cannot be overstated.

Facts

George R. Wessels and his wife, Carol, established the Wessels Trust (the "Trust") on July 22, 2002. Each was a primary beneficiary, trustee and had the exclusive right to disbursements during their respective lifetimes. Upon the last grantor's death, the Trust was to be divided into equal but separate trusts for each of their then living children (George T., Scott, David and Lynn) to be distributed outright, but if any child was to die with issue surviving them, their children were to receive their parent's share in trust.

Following George's death, Carol amended the Trust twice. There was no dispute regarding Carol's authority to amend the Trust after George died.

In 2007, Carol amended the Trust (the "First Amendment") to revoke §2.4 of the Trust to include a provision to address advancements (whether as the result of a gift or loan) that she wanted accounted for in determining a beneficiary's share before final distribution. That section provided that a grantor

> "may leave a Schedule of Prior Distributions" and instructs that the "Schedule is binding upon Trustee." However, the trust instrument contains no language requiring the Schedule to be executed by a signed and notarized document or some other express method.[33]

The First Amendment also revoked and replaced §2.5 relating to the final distribution of Trust assets. In doing so, Carol restated the final distribution plan originally contained in the Trust but added that the value of a 75-acre parcel known as the Klug-Lincoln Parcel should be credited against Scott's share at a value of $137,000.

In 2010, Carol amended the Trust (the "Second Amendment") to again revise §2.5. In doing so she provided that the residue of the Trust was to be distributed with Scott and Lynn to each received a 1/4th share, while George T., David and four named grandchildren were to each receive a 1/12th share. Section 2.5 of the Second Amendment made no mention of the Klug-Lincoln Parcel.

Following Carol's death, Lynn became the successor trustee of the Trust. A Schedule of Prior Distributions (the "Schedule") listed two prior distributions ($10,000 to Scott and $100,000 to George T.) and the respective dates of acknowledgment, but a column that was labeled for grantor's initials was blank. While the final page of the Schedule reflected Carol's signature, the area following her signature (formatted to be completed by a notary) was left blank. Apparently, the schedule also had other internal inconsistencies relating to dates written on it.

When it came time to complete administration of the Trust, the trustee circulated a draft Plan of Distribution that reflected that $50,000 would be credited against George T's share (based upon her rationalization that applying a $100,000 credit would create a shortfall in Trust assets), and credited $137,200 (for the Klug-Lincoln Parcel) and $10,000 against Scott's share. Lorene Wessels (as trustee of the Scott and Lorene Wessels' Trust) objected. She asserted that the Plan of Distribution did not comport with the terms of the Trust as amended. She claimed that George T's share should be credited for the full $100,000 listed on the Schedule and the value of the Klug-Lincoln Parcel shouldn't be attributed to Scott's share because the Second Amendment deleted that provision. George T. objected to both Lorene and Lynn's proposed Plans of Distribution. He claimed that Schedule should not be relied upon because there was no evidence presented regarding the validity of the distributions identified in the Schedule.

Despite requests by Lorene for the probate court to conduct an evidentiary hearing to address the disputes and resolve grantor intent, the probate court refused and summarily addressed the issues. In doing so it indicated the only issue in dispute was whether the two amounts reflected on the Schedule should be respected. It found the Trust was a discretionary trust and, therefore, the Trustee had the discretion to reduce the $100,000 reflected on the Schedule to $50,000, if the Schedule were deemed to be valid. However, it then held that no evidence had been presented regarding the legitimacy of the numbers reflected on the Schedule and the Schedule didn't indicate whether the amounts reflected gifts or loans and because no date was reflected on the Schedule, it was no more than a "random arbitrary list."[34]

In addition, the probate court found that the language in the amendments was unambiguous and established that the grantor intended for the value of the Klug-Lincoln Parcel be credited against Scott's share. In doing so the court relied on Carol's use of the phrase

> "revoke the first paragraph of Section 2.5 Distribution to Family in its entirety" to revoke and replace the original § 2.5. In contrast, the Second Amendment used the phrase "amended to read as follows …." According to the probate court, the differing language used in the First and Second Amendments showed that the settlor only intended to make changes and additions to the amended § 2.5 without fully revoking it. Consequently, the probate court concluded that the Second Amendment did not revoke the portion of the First Amendment that credited the value of the Klug-Lincoln Parcel to Scott Wessels's share.[35]

This appeal ensued.

Analysis

The appellate court found that the probate court erred when it held that because the Trust was a "discretionary trust" the trustee could essentially ignore the residuary dispositive provisions. In doing so the appellate court found that while "[o]missions and inconsistencies on the face of the Schedule raise[d] questions regarding its validity that cannot be resolved without an evidentiary hearing,"[36] if the Schedule were deemed to reflect grantor's intent, then the trustee would be bound to distribute the residue in accordance with the terms of the Trust.

The appellate court noted that

> [t]he Wessels Trust states that the [grantors] "may leave a Schedule of Prior Distributions" and instructs that the "Schedule is binding upon Trustee." However, the trust instrument contains no language requiring the Schedule to be executed by a signed and notarized document or some other express method. Given that there was no particular manner in which the settlor was required to execute the Schedule, there are questions of fact whether the document provided to the probate court was a valid and enforceable Schedule. The document could be characterized as a poorly executed Schedule with scrivener's error, an unexecuted draft, or even a fraudulent document drafted by someone other than the settlor.[37]

The appellate court also found that the probate court erred when it failed to conduct an evidentiary hearing relative to the validity of the Schedule and grantor intent. In doing so it held that

> [r]esolution of the issues on appeal involves the interpretation of a trust instrument, which presents a question of law that this Court reviews de novo. To resolve a dispute concerning the meaning of a trust, a court's objective is to ascertain and give effect to the intent of the settlor. The same general rules that apply to judicial review of a will apply to judicial review of trust documents. "Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust." However, if an ambiguity in the trust exists, the probate court "must look outside the document to determine the settlor's intent, and it may consider the circumstances surrounding the creation of the trust

> and the general rules of construction."
>
> An ambiguity can be either patent or latent. "A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language." "A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning."[38]

As to whether grantor intended to have the value of the Klug-Lincoln Parcel credited against Scott's share, that involved an interpretation of §2.5 of the Trust. The appellate court found that

> given the state of the record, the multiple proffered explanations for what was meant by the parties and what various documents mean, § 2.5 is ambiguous and, therefore, the probate court erred by relying solely on the language of the trust to ascertain the settlor's intent regarding the Klug-Lincoln Parcel.
>
> Section 2.5 was amended twice after the original trust instrument was executed. In the First Amendment, the [grantor] stated that she revoked the original § 2.5 in its entirety and replaced it. The amended § 2.5 restated the [grantor]'s plan for the final distribution of trust assets, but added that the trustee shall value the Klug-Lincoln Parcel at $137,000 and credit it to Scott Wessels's share of the remaining trust assets in the final distribution. In the Second Amendment, the [grantor] stated that "Article Two, Section 2.5 shall be amended to read as follows," then changed the final distribution to give Scott Wessels and Lynn Molter each a 1/4 share of the final distribution and to give the other two children and four listed grandchildren each a 1/12 share of the final distribution. Thereafter, the Second Amendment restated Subsections (a) through (e) from the First Amendment and deleted Subsection (f) from the First Amendment. The Second Amendment made no mention of the Klug-Lincoln Parcel.[39]

The court also found that while the probate court's interpretation was reasonable, it was but one interpretation that might be reached and

> … the language used in the Second Amendment is imprecise and susceptible to more than one interpretation. After the Second Amendment states "Article Two, Section 2.5, shall be amended to read as follows" the amendment proceeds to entirely restate Subsections (a) through (e) from the First Amendment. Then, the Second Amendment states that it deleted Subsection (f). Given that the Second Amendment entirely restates § 2.5 and its subsections without mentioning the Klug-Lincoln Parcel, it is also a reasonable interpretation to conclude that the portions of the First Amendment that were not restated in the Second Amendment were intentionally omitted or deleted from the Wessels Trust. The trust is susceptible to either construction and is, therefore, patently ambiguous.[40]

The appellate court remanded the matter for an evidentiary hearing on the validity of the Schedule and grantor's intent whether to credit the value of the Klug-Lincoln Parcel against Scott's share of the final distribution. In doing so, it also indicated that the probate court might benefit from the evaluation of extrinsic evidence (including, but not limited to, two deeds that addressed the ownership of the Klug-Lincoln Parcel) and its evaluation of credibility of witnesses in resolving the issues in dispute.

Comment

Clear drafting and statements of intent can be helpful in avoiding disputes. If certain formalities or restrictions are desired by the client with regard to the manner in which a trust may be amended, the manner in which documentation of gifts or loans intended to be treated as advancements must occur, list dispositions are to be made or powers of appointment exercised, clearly state so in the operative governing instrument.

MCL 700.2109[41] addresses "advancements". It provides that

> (1) If an individual dies intestate as to all or a portion of his or her estate, property the decedent gave during the decedent's lifetime to an in-

dividual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only under either of the following circumstances:

(a) The decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement.

(b) The decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(2) For purposes of subsection (1), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.

(3) If the recipient of property advanced fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

MCL 700.2109 mirrors UPC §2-109. The commentaries to UPC §2-109, indicate (in part) that

[t]o be an advancement, the gift need not be an outright gift; it can be in the form of a will substitute, such as designating the donee as the beneficiary of the intestate's life-insurance policy or the beneficiary of the remainder interest in a revocable inter-vivos trust.

Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during the donor's lifetime be deducted from the donee's share of the donor's estate, the donor may either execute a will so providing or, if he or she intends to die intestate, charge the gift as an advance *by a writing* within the present section.

This section applies to advances to the decedent's spouse and collaterals (such as nephews and nieces) as well as to descendants.

Computation of Shares – Hotchpot Method. This section does not specify the method of taking an advancement into account in distributing the decedent's intestate estate. That process, called the hotchpot method, is provided by the common law. The hotchpot method is illustrated by the following example.

Example: G died intestate, survived by his wife (W) and his three children (A, B, and C) by a prior marriage. G's probate estate is valued at $190,000. During his lifetime, G had advanced A $50,000 and B $10,000. G *memorialized both gifts in a writing declaring his intent that they be advancements*.

Solution. The first step in the hotchpot method is to add the value of the advancements to the value of G's probate estate. This combined figure is called the hotchpot estate.

In this case, G's hotchpot estate preliminarily comes to $250,000 ($190,000 + $50,000 + $10,000). W's intestate share of a $250,000 estate under Section 2-102(4) is $200,000 ($150,000 plus 1/2 of $100,000). The remaining $50,000 is divided equally among A, B, and C, or $16,667 each. This calculation reveals that A has received an advancement greater than the share to which he is entitled; A can retain the $50,000 advancement, but is not entitled to any additional amount. A and A's $50,000 advancement are therefore disregarded and the process is begun over.

Once A and A's $50,000 advancement are disregarded, G's revised hotchpot estate is $200,000 ($190,000 + $10,000). W's intestate share is $175,000 ($150,000 plus 1/2 of $50,000). The remaining $25,000 is divided equally between B and C, or $12,500 each. From G's intestate estate, B receives $2,500 (B already having received $10,000 of his ultimate $12,500 share as an advancement); and C receives $12,500. The final division of G's probate estate is $175,000 to W, zero to A, $2,500 to B, and $12,500 to C.[42]

It is noteworthy that nothing in the Wessels Trust (or in MCL 700.2109 or UPC §2-109) indicates that the writing must be notarized, dispo-

sitions contained in the writing initialed, or even that the writing be dated or signed.

Unlike the provisions relating to treatment of writings to reflect an intent to treat a gift as an advancement, when it comes to dispositions of tangible personal property via a separate writing MCL 700.2513 provides

> [w]hether or not the provisions relating to a holographic will apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be either in the testator's handwriting or signed by the testator at the end, and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.[43]

The comment to UPC §2-513 notes that the only requirement for such a writing is that it be signed by the testator (and even that requirement might be waived in a jurisdiction (such as Michigan) that has adopted the harmless error rule).[44]

Interestingly, the *Annotation* to MCL 700.2513, contained within the Reporter's Comments, indicates that some unpublished Michigan appellate cases have relied upon MCL 700.7602(3) to find that memorandums relating to the disposition of personal property may constitute a valid amendment to a trust, when the trust includes a provision that would recognize a written statement to dispose of tangible property. Utilizing that statutory authority, the formalities associated with a writing under MCL 700.2513 may not apply because MCL 700.7602(3)(a) only requires that the mechanism utilized only "*substantially* comply with a method provided in the terms of the [revocable] trust."[45] If a revocable trust does not expressly provide a method then MCL 700.7602(3)(b) provides that it must be reflected in a writing manifesting clear and convincing evidence of the grantor's intent to revoke or amend the trust or, if the trust was an oral trust, by any method manifesting clear and convincing evidence of the grantor's intent.[46]

It may be important to note that a grantor's powers with regard to revocation, amendment or distribution of trust property may be exercised by an agent under a durable power of attorney, but only to the extent expressly authorized by the terms of the trust or the power of attorney.[47] A conservator or plenary guardian of the grantor may also be able to exercise such powers if authorized by the trust and approved by the court.[48] Therefore, it could be helpful to indicate in the trust instrument (and, where applicable any amendments thereto) whether an agent or representative of the grantor is (or is not) authorized to amend, revoke or otherwise direct the distribution of trust property differently from what was provided by trust (or any amendments) as executed by the grantor in their own right. The same consideration might also apply with regard to whether a power of substitution contained in an irrevocable trust might be exercisable by an agent on behalf of the grantor. There may be planning reasons why a grantor might want an agent to be able exercise a power of substitution reserved to the grantor (but not to amend or revoke a revocable trust or the disposition of tangible property), but those considerations go beyond the scope of this article.

When it comes to amending (as opposed to restating) a trust, language reflecting whether the amendment is intended to amend or revoke and replace an entire section (or a particular paragraph with the remainder of the section remaining in place), can help to provide clarity.

In the case of *In re Wessels Family Trust,* it appears that unless the probate court, on remand, finds that the Schedule wasn't executed by the grantor or was not otherwise intended to reflect her intent that the sums specified be treat-

ed as an advancement, the trustee will be obligated to distribute the residue according to the "Hotchpot Method" provided by common law in the absence of evidence of grantor intent to the contrary. The probate court will then also need to resolve whether the grantor intended the value of the Klug-Lincoln Parcel be credited to Scott's share of the residue, based not only upon the four corners of the Trust, but also extrinsic evidence of grantor intent.

In re EMV, Minor;[49] Third-Party Custody and/or Guardianship after the Death of One of the Child's Parents[50]

When a minor child's parent dies, typically the surviving parent attains full legal and physical custody without the need for court proceedings. However, this may not be the case when the surviving parent's custodial rights have been terminated or suspended or the child is left in the custody of another without authority to make medical decisions for the child.

Facts

Dwight Vandrunen ("Dwight") and Renee Johnson ("Renee"), who were never married, had a child together in December 2010 ("EMV"). Beginning in 2013 Dwight and Renee became embroiled in a near-constant litigious custody battle over EMV. Initially both parties were awarded joint legal and physical custody, but in 2015 the court awarded Dwight sole legal and physical custody and Renee was awarded supervised parenting time. In March 2016 her right to engage in supervised parenting time with EMV was suspended. In October 2016 she was granted joint legal custody and a mixture of supervised and unsupervised parenting time with EMV. By 2020, her parenting time was again restricted to two supervised visits and one phone call each week. In 2021 Dwight and his sister, Heather, obtained a PPO against Renee after she unlawfully entered Dwight's home. In 2022, Renee was charged with assault and battery involving an incident that occurred during her supervised parenting time with EMV. Throughout all of the above, Renee continued to unsuccessfully move for sole legal and physical custody of EMV and increased parenting time. Dwight repeatedly alleged that Renee abused alcohol, had anger-management issues, and experienced mental health issues. The court ordered Renee to abstain from alcohol and drug use beyond her prescription medications and to engage in mental health treatment.

In 2023, Matthew and Elizabeth, who were EMV's maternal aunt and uncle, petitioned the court seeking guardianship over EMV. The petition alleged that Dwight had left town, EMV was residing with relatives, and that the child had a chronic medical condition that required her to take daily medication and have IV infusions every four to six weeks. The petition also alleged that Dwight was a danger to himself and others. Following a DHHS investigation, and against Renee's objections, the court granted Matthew and Elizabeth guardianship over EMV.

In January 2024, the court terminated the guardianship because EMV wanted to live with Dwight (and had been living with him for a couple of weeks). Renee opposed the termination and again unsuccessfully sought custody of EMV. Shortly after the guardianship was terminated, Dwight died.

In February 2024, Matthew and Elizabeth filed a new petition for guardianship and another DHHS investigation ensued. The report filed by DHHS reflected that EMV did not want to see or live with her mother, whom she had not seen since December 2022 and had not communicated with since June 2023. Renee sought sole legal and physical custody following Dwight's death, which was denied by the family court judge, sighting the then pending guardianship proceedings. The probate court temporarily appointed Matthew and Elizabeth as EMV's guardians.

In April 2024, the child's paternal aunt ("Heather") and uncle ("Michael") petitioned to be appointed her guardian. DHHS did a further inves-

tigation and reported that the child wanted to live with her paternal aunt and uncle and did not want to live with or have contact with her mother. Matthew and Elizabeth were supportive of the child's choice.

The court conducted an evidentiary hearing and also met with the child in-camera.

At the hearing, the child's paternal and maternal aunts and uncles all opposed an award of custody to Renee. Renee's brother, Matthew, testified that while he had initially paid for Renee's legal representation in the custody proceedings, they stopped providing such assistance when Renee's mental health declined and the child no longer wanted to live with her. Elizabeth and Matthew supported the (re)establishment of a guardianship. Heather and Michael testified that they could and would ensure that all of the child's needs were met and that she wasn't ready to have a relationship with Renee.

Renee denied having anger or substance abuse issues or that she ever attempted suicide, despite evidence to the contrary. She acknowledged that she took medication for her mental health issues but she did not believe she needed counseling.

The probate court acknowledged that when there is a custody dispute between a parent and a third party, the court must presume that the child's best interests will be served by awarding custody to the parent *unless* clear and convincing evidences establishes the contrary. The court placed the burden of proof on Heather and Michael to demonstrate, by clear and convincing evidence, that awarding custody to Renee was not in the child's best interests.

The court found that EMV's established custodial environment was with her paternal aunt and uncle and not Renee. The court then reviewed the best interest factors and found, by clear and convincing evidence, that Heather and Michael should be awarded custody and that Renee's request for legal and physical custody should be denied. The court then terminated the temporary guardianship of Matthew and Elizabeth over EMV and awarded sole legal and physical custody to Heather and Michael. The issue of Renee's parenting time was reserved until she began counseling. Renee appealed.

Analysis

Renee contended that

> the trial court erred by: (1) failing to apply a mandatory requirement, under MCL 722.26b, that a surviving parent be awarded custody; (2) requiring defendant to prove her parental fitness; (3) admitting the PPOs as evidence; (4) committing child abuse and forcing the child to suppress her feelings toward defendant; and (5) excluding defendant from medical decision-making.[51]

She claimed the trial court violated her fundamental rights with regard to her child and erred in requiring her to prove that she was a fit parent.

The appellate court disagreed.

The trial court did not find that Renee was an unfit parent. Rather it found that the evidence presented during the evidentiary hearing established, by clear and convincing evidence, that awarding custody of EMV to Renee was not in the child's best interests. This was not an application of a presumption that favored third parties over the rights of a parent.

Renee then contended that MCL 722.26b stood for the proposition that upon Dwight's death the child was required to be with the surviving parent; however, that is not what the statute says. While there is a presumption that custody should be awarded to the surviving parent, it is a rebuttable presumption that can be overcome by clear and convincing evidence that custody with the surviving parent does not serve the child's best interests.

Here, the appellate court found that the trial court properly applied the burden of proof and presumption. Extensive testimony presented during the evidentiary hearing established that awarding custody of the child to her mother, Renee, would not serve the child's best interests. Every best interest factor favored the child's paternal aunt and uncle, with whom the child was

bonded and had an established custodial environment. While Renee cared about the child and had attempted to see her, the child did not want to live with Renee and the child had not seen Renee for over two years.

With regard to Renee's claim that trial committed child abuse by awarding custody of EMV to her paternal aunt and uncle, the appellate court held that Renee failed to demonstrate that placing the child outside of a parent's care was abuse or neglect by any party, let alone the court. The record reflected that the child's aunts and uncles all had a positive relationship with the child and were able to properly care for her.

Lastly, with regard to Renee's claim that excluding her from decision-making regarding the child's medical care constituted child endangerment and violated Renee's parental rights, the appellate court found that the trial court properly considered EMV's best interests, including her health and medical needs before granting sole legal and physical custody to the child's paternal aunt and uncle. There was no evidence that her medical needs had been neglected; to the contrary, the child's health was shown to have improved since her visits with her mother stopped.

Comment

Mandatory awards of custody to a parent (or equally between parents) can undercut a child centered approach that focuses on the child's best interests. Children are not property subject to a possessory interest.

While a presumption may exist that when one parent dies the other will receive custody, that presumption may be rebutted on a third party's showing, by clear and convincing evidence, that the same would not be in the child's best interest.

While it remains important to understand and protect a parent's constitutional rights to parent their children, it is also important when applying the presumption that favors the parent and their constitutional rights, that the presumption not trump the need to focus on the best interests of the child when a third party is able to meet the high burden of proving by clear and convincing evidence that it would not be in the child's best interest to award custody to the parent.

When Dwight died, Renee was only entitled to exercise supervised visitation with the child. His death did not miraculously enhance Renee's ability to safely parent EMV. Renee's parental rights were not terminated. From the evidence presented, it appears the court could have found Renee to be an unfit parent while she continued to engage in substance abuse and failed to properly address her mental health issues by refusing to engage in counseling. In the instant case, if Renee engages in mental health therapy and abstains from substance abuse, she may regain parenting time and, potentially, custody.

Young v Kashat;[52] Issues Relating to Specially Devised Real Estate[53]

In Michigan, the issue of whether the devisee (as opposed to the estate of the decedent whose will purports to devise an interest in real property) is a real party entitled to bring a quiet title action was addressed in *Young v Kashat.* The Michigan appellate court held that the devisee was indeed a real party in interest, such that the trial court's grant of a motion for summary disposition was in error.

Facts

Ohla Young ("Ohla") was the personal representative of her deceased grandmother, Olena Kislomed's ("Olena") estate. Olena's will provided, in pertinent part, that "I hereby give, devise and bequeath to my daughter Ohla Young, my home located at 37387 Curwood Dr., Sterling Heights, Michigan" (the "Property"). The Property was the only asset of Olena's estate.

Ohla's daughter, Lisa Marie Kashat ("Lisa"), lived at the Property with Olena from June 2006 through Olena's death on September 21, 2006. She continued to live there after Olena's death.

Ohla was appointed personal representative of Olena's estate on October 10, 2006. On De-

cember 1, 2006, Ohla allegedly signed a quit-claim deed that purported to transfer the Property from the estate to Ohla and Lisa with rights of survivorship. That deed was notarized on December 19, 2006.

In 2024, Ohla filed a complaint in the Macomb County Circuit Court seeking to quiet title to the Property. The complaint alleged common law and statutory slander of title by Lisa, conversion and sought to evict Lisa from the Property. The complaint also alleged that Lisa committed insurance fraud for which Ohla sought recovery under her conversion claim.

In response, Lisa moved for summary disposition claiming that the court lacked personal and subject matter jurisdiction, the claim was barred as a result of the statute of limitations, and that Ohla had failed to state a claim upon which relief could be granted. She also claimed that Ohla, individually, was not a proper party to bring the action and that the matter was one that was within the sole jurisdiction of the probate court. Ohla responded that she was a proper party because the Property had been bequeathed to her under Olena's will. She also requested that the court permit her to amend her complaint to allege fraud.

The trial court granted Lisa's motion for summary disposition finding that Ohla, in her individual capacity, was not the real party in interest. In doing so, the court relied upon Ohla's admission that if the deed was found to be fraudulent the Property would return to Olena's estate. Ohla appealed.

Analysis

Whether a party has standing or is a real party in interest are questions of law which the appellate court reviews de novo. The same is also true with regard to whether the circuit court had subject matter jurisdiction with regard to Ohla's complaint.

In reliance on Michigan's Estates and Protected Individuals Code ("EPIC")[54] the appellate court found that Ohla, in her individual capacity, was indeed a real party in interest who was entitled to bring a quiet title action. This holding was premised upon MCL 700.3101, which provides in relevant part that:

> "Upon an individual's death, the decedent's property devolves to the persons to whom the property is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, disclaimer, or other circumstances affecting devolution of a testate estate, or in the absence of testamentary disposition, to the decedent's heirs or to those indicated as substitutes for them in cases involving disclaimer or other circumstances affecting devolution of an intestate estate, subject to homestead allowance, family allowance, and exempt property, to rights of creditors, to the surviving spouse's elective share, and to administration."[55]

The court also found that MCL700.3101 was

> "consistent with the common-law rule that title to real estate passes upon death to the heirs or devisees. It is for this reason that heirs or devisees are considered proper parties to litigation involving the deceased's real estate.
>
> [Olena's] will established that [Ohla] was the devisee of the Property. A real party in interest is one who is vested with the right of action on a given claim …. Further, devisees are proper parties to litigation concerning a decedent's real estate. Consequently, the trial court erred when it determined [Ohla] was not a real party in interest with respect to her claims involving the Property."[56]

The appellate court reversed the summary disposition and remanded the matter to the trial court to consider the jurisdictional issues raised by the parties without limiting the circuit court's ability to consolidate the matter with any related cases in either the probate or circuit court. On remand Ohla can renew her motion to amend her complaint to allege fraud; however, a footnote in the appellate decision notes that the appellate court's determination that Ohla is a real party in interest does not prevent the trial court from determining that summary disposition is appropri-

ate on other grounds and that an amendment would be futile.[57]

Comment

The Reporter's Comment to MCL 700.3101 provides additional guidance. It reflects, in pertinent part, that

> The rules in this section were previously a function of the Michigan common law. This section clearly states that transfers at death are subject to statutory allowances, creditors rights, the spousal elective right, and the need for and expenses of administration. As under English common law, Michigan, from time immemorial, has held that at the instant of death the title to real estate passes by operation of law to the heirs or by will to the devisees. Legal title to personal property passes, on appointment, to the personal representative, but the passing of title dates back to the time of death. The personal representative holds title to personal property for the benefit of the heirs or devisees of the estate. Under this §3101, there now is no distinction between real and personal property with regard to passage of title at the owner's death. Either proof of intestacy accompanied by a determination of heirs or, in the alternative, admission of a will to probate, without administration, may be sufficient to evidence devolution of title. A third-party purchaser, however, may want assurance that claims, including taxes, are paid or time barred and that there is no possibility of a spouse asserting a right to an elective share and no possibility of a spouse or child claiming an exemption or allowance.[58]

MCL 700.3709, relating to the duties of the personal representative and possessions of the estate goes on to provide that:

> Except as otherwise provided by a decedent's will or by this section, a personal representative has a right to, and if necessary for purposes of administration, shall take possession or control of, the decedent's property, except that real property or tangible personal property may be left with or surrendered to the person presumptively entitled to that property unless or until, in the personal representative's judgment, possession of the property will be necessary for purposes of administration. A personal representative's request for delivery of property possessed by an heir or devisee is conclusive evidence, in an action against the heir or devisee for possession of that property, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of, or to determine the title to, property.[59]

The Reporter's Comment to MCL 700.3709, further provides that

> The first sentence of this section both grants authority and states a duty. The personal representative is given discretion to take control of all of the decedent's assets or to surrender possession to the ultimate beneficiary. But the personal representative must take possession and control of assets that are necessary for proper administration.
>
> Section 3709 is based on UPC §3-709. This section reflects an assumption that it may be undesirable to disrupt the possession of assets by those presumptively entitled to receive them. The personal representative, however, is given conclusive authority to decide whether the personal representative needs to possess the asset.
>
> The mandate to 'pay taxes on … the estate in the personal representative's possession' is a clear statement that the personal representative has responsibility to file tax returns and pay from estate assets (subject to the apportionment provisions in MCL 700.3920–.3923) income, gift, estate, real, and personal property (and possibly other) taxes.
>
> MCL 700.3952 and .3953 authorize an interested person to petition for a settlement (closing)

order after one year from the appointment of the original personal representative.

RPC §601 gave a fiduciary the right to possess all property of the estate and required that possession be taken 'except as otherwise provided in this act.' RPC §165 also addressed possession of the estate by a personal representative. Under RPC §§166 and 602, an heir or a devisee of real property could obtain possession from the fiduciary by court order when certain conditions were satisfied.[60]

Essentially, a devisee takes title of real property at the decedent's death, subject to defeasement or divestment of their interest as may be required to address claims and charges of administration.

Additionally, MCL 700.3901 addresses what happens in the absence of property being administered as part of a decedent's estate. It provides that:

In the absence of administration, the decedent's heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. A devisee may establish title by the probated will to devised property. An individual entitled to property by homestead allowance, exemption, or intestacy may establish title to the property by proof of the decedent's ownership, the decedent's death, and the individual's relationship to the decedent. A successor takes subject to charges for administration, including the creditors' claims and the surviving spouse's and dependent children's allowances, and subject to the rights of others resulting from abatement, retainer, advancement, or ademption.[61]

In the instant case, while it appears that Olena's will was admitted to probate, thus permitting Ohla to establish title to the devised property, more may nonetheless be required for title to ultimately pass to Ohla (hence, perhaps, Ohla's admission that if the quit claim deed is set aside, the Property will revert to the probate estate). This result appears to be supported by the Reporter's Comment to MCL 700.3901, which provides, in pertinent part, that

This section is substantially identical to UPC §3-901. … [t]his provision is consistent with the common-law rule that title to a decedent's property passes to their heirs and devisees at their death. … This section, however, specifically describes how a successor may establish ownership without prior probate administration. Under prior law and this provision, an intestate estate may secure evidence of title to real estate in Michigan, without probate proceedings, by securing a determination of heirs; obtaining a release of the lien for Michigan estate tax,…; and waiting for the statute of limitations on claims against the estate to expire. If the decedent died testate, the will must be admitted, the lien for estate tax be released, and the limitations period on claims be expired.

The comment to UPC §3-901 says, "[t]his section adds little to [UPC §3-101] except to indicate how successors may establish record title in the absence of administration."

If heirs are to take the decedent's assets without administration, there needs to be not only a determination that the decedent died intestate but also a determination of heirs. A determination of heirs, of course, is not simply a statement identifying the surviving spouse, if any, and those lineal ascendant, descendant, or collateral relatives who survive the decedent. It must also stipulate the amounts or proportions each is entitled to receive under MCL 700.2102,.2103 and under any other rules of Article II that may apply. If there is a will, it may not be sufficient simply to admit it to probate. If the decedent owned assets that were not specifically devised, the successors may need affidavits or other documentation to establish whether, to whom, and with what assets exemptions and allowances were paid and what assets were allocated to the residuary beneficiaries.[62]

Nonetheless, in this case, despite the fact that title may end up returning to the decedent's probate estate, in the event the quit claim deed is set aside, Ohla remains a real party in interest.

In this regard, the annotation to MCL 700.3901 indicates that:

> [t]he real parties in interest in an action to quiet title are the decedent and the decedent's successors, not the decedent's estate. *Ross v Tousignant*, No 302458 (Mich Ct App Oct 23, 2012) (unpublished).[63]

Another issue that parties sometimes forget about, when it comes to specifically devised real estate interests, is MCL 700.2607[64] (and MCL 700.7112, which makes the provision of MCL 700.2607 applicable to real property specifically devised under a trust instrument).

MCL 700.2607 provides in pertinent part that

> A specific devise … passes subject to any mortgage or other security interest existing on the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

Therefore, a general provision contained within a will or trust which reflects that the decedent's debts and obligations should be paid as an administrative expense will not generally apply with regard to specifically devised real estate. When it comes to specifically devised real estate, the devisee will be held to be responsible for the payment of any mortgage or other security interests to the full extent that the same existed and was secured against the property as of the date of death, without a right of reimbursement or payment by the estate, unless the operative instrument specifically indicates the decedent's intent that the devisee receive that property free and discharged of such obligations.

Care is, therefore, required when drafting (and interpreting the implications of) a specific devise of real estate in order to effectuate a decedent's true intent.

Notes

1. *In re Conservatorship of DLW*, No 373297 (Mich Ct App Oct 20, 2025) (unpublished).

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3. MCL 700.5401(3) & (4). *See also* UPC §5-401.

4. MCL 700.5420(1). *See also* UPC §5-420.

5. *Id*. at *17-18. (Internal citations omitted.)

6. *Id*. at *19-20, (citing MCL 700.5425.)

7. *Id*. at *21, (citing MCL 700.5407(1)).

8. Wikipedia defines heirs' property as "property that is passed between generations of family members without the involvement of local probate courts, without a will or formal estate strategy." https://en.wikipedia.org/wiki/Heir_property.

9. *See* MCL 700.3101 and UPC §3-101. *See also* MCL 700.3901and UPC §3-901.

10. *Whitton v Hopkins*, No 364842 (Mich Ct App Sept 30, 2024) (unpublished).

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12. *Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege*, 47 ALR 6th 255, § 4 (2009) (internal citations omitted).

13. MCL 700.7817(v).

14. *Whitton,* at *20.

15. *Id.* at *20.

16. *Muvrin v Cooper*, No 357566 at *4-5 (Mich Ct App Aug 11, 2022) (unpublished).

17. *Whitton,* at *10-11 (internal citations omitted).

18. MCL 700.543.

19. MCR 5.117(A).

20. *Estate of Maki v Coen*, 318 Mich App 532, 899 NW2d 111 (2017).

21. *Whitton,* at *16 (internal citations omitted).

22. *Id*. at *17.

23. *Id*. at *17-1.

24. *In re Douglas M Ladney 1992 Tr*, No 372414 (Mich Ct App Dec 10, 2025) (unpublished).

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26. "Simon Says game, "https://search.yahoo.com/search?p=simon+says+game.

27. *Id*. at *1-2.

28. *Id*. at *3.

29. MCL 565.8.

30. *In re Douglas M Ladney 1992 Tr*, at *5-6.

31. *In re Wessels Family Tr*, No 373990 (Mich Ct App

Oct 24, 2025) (unpublished).

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33. *Id*. at *10.

34. *Id*. at *11.

35. *Id*. at *14-15.

36. *Id*. at *9.

37. *Id*. at *10.

38. *Id.* at *6-7. (Internal citations omitted.)

39. *Id*. at *13-14.

40. *Id*. at *15.

41. *See* UPC §2-109.

42. Comment to UPC §2-109 at pp. 53-55, Uniform Probate Code (last amended or revised in 2019), with comments through Jan 21, 2025.

43. MCL 700.2513. *See* UPC §2-513.

44. *See* UPC comment to §2-513 at p. 157. *See also*, UPC §2-503 and MCL 700.2503.

45. MCL 700.7602(3)(a). *See* UPC §2-513. (Emphasis added.)

46. MCL 700.7602(3)(b).

47. MCL 700.7602(5).

48. MCL 700.7602(6).

49. *In re EMV,* Nos 374795, 374796 (Mich Ct App Dec 17, 2025) (unpublished).

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51. *In re EMV* at *6.

52. *Young v Kashat*, No 373554 (Mich Ct App Feb 9, 2026) (unpublished).

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54. MCL 700.1101 *et seq*., and, in particular, MCL 700.3101. *See also*, UPC §3-101.

55. *Young v Kashat, supra* at *5-6.

56. *Id*. at *6-7. (Internal quotes and citations omitted.)

57. *Id*. at fn. 3.

58. Reporter's Comment to MCL 700.3101.

59. MCL 700.3709. *See also* UPC §3-709.

60. Reporter's Comment to MCL 700.3709.

61. MCL 700.3901. *See also* UPC §3-901.

62. Reporter's Comment to MCL 700.3901. (Internal citations omitted.)

63. ICLE, EPIC with Reporter's Commentary, Annotation to MCL 700.3901.

64. *See also* UPC §2-607.

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Probate Litigation Report: The Testamentary Exception to Attorney—Client Privilege in Joint Representation Situations

By David L. J. M. Skidmore

Introduction

Under Michigan law, in a will contest, the attorney-client privilege does not apply to communications between decedent and counsel regarding decedent's testamentary intentions, to the extent that such counsel drafted a will or similar document executed by decedent (the "Testamentary Exception"). In one of my recent cases, the estate-planning documents at issue (a trust and several deeds) had been prepared by counsel who jointly represented both decedent and decedent's spouse. After decedent died, his children from his first marriage brought suit contesting the validity of his trust and deeds. In that litigation, contestants (decedent's children) sought discovery of an estate-planning attorney's file for the joint representation of decedent and his spouse, which the spouse opposed. Hence, the Court was confronted with the question of whether the Testamentary Exception applied to privileged material arising from the joint representation of decedent and decedent's spouse. This article will address the background of the Testamentary Exception, the parties' arguments, and the Court's ruling in the case study under discussion.

Attorney-Client Privilege

The attorney-client privilege attaches "to confidential communications by the client to his adviser which are made for the purpose of obtaining legal advice."[1] "The purpose of the privilege is to permit a client to confide in his counselor, knowing that such communications are safe from disclosure."[2] "The attorney-client privilege applies to all confidential communications, regardless of whether they are written or oral, so long as they are made for the purpose of obtaining legal advice or rendering professional services."[3] The Michigan Supreme Court "has … been inclined for obvious reasons to give a somewhat liberal interpretation to … the common law rule as to privileged communications between attorney and client.… Doubtless such interpretation is essential to a proper protection of the rights of the client."[4]

The attorney-client privilege continues in force when one attorney represents two or more clients regarding the same legal matter. "[W]hen two persons employ a lawyer as their common agent, their communications to him as to strangers will be privileged[.]"[5] "The attorney-client privilege protects joint client communications from discovery by third parties."[6]

The attorney's duty to maintain client confidences is based not only on Michigan evidence law but also the Michigan Rules of Professional Conduct. "Except when permitted under paragraph (c), a lawyer shall not knowingly … reveal a confidence or secret of a client …."[7] "The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege … in the law of evidence and the rule of confidentiality established in professional ethics. The client-lawyer privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. … The confidentiality rule applies to confidences and secrets as defined in the rule. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."[8] "After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6."[9] "If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (b)(1) [of Rule 1.6] requires the lawyer to invoke the privilege when it is applicable."[10]

Under Michigan law, discovery of privileged matters is not allowed. "Parties may obtain dis-

covery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors …."[11]

Testamentary Exception to Attorney-Client Privilege

Initially, the attorney-client privilege survives the death of the client.[12] The Testamentary Exception represents a limitation on the applicability of attorney-client privilege after the death of the client, but it is merely an exception to a rule which otherwise remains in force.

Where the attorney drafted a will or similar instrument executed by the client, then after the death of the client, the attorney-client privilege does not prevent the scrivener attorney from testifying to communications with the client in a lawsuit challenging the validity of the will or other instrument. This exception to attorney-client privilege has been recognized by three foundational Michigan cases:

- *In re Loree's Estate.*[13] The attorney drafted a will for the client. The client signed the will. After the client's death, there was a will contest lawsuit. The Michigan Supreme Court ruled that the attorney who drafted the will could testify in the will contest regarding attorney-client communications related to preparation of the will at issue. "The great weight of the authorities and the text-writers is that communications between attorney and client during the preparation of a will are not privileged."[14]
- *Warner v Kerr.*[15] The attorney drafted a deed for the client. The client signed deed. After the client's death, there was a deed contest lawsuit. The Michigan Supreme Court ruled that the attorney who drafted the deed executed by the deceased client could testify in the deed contest "with reference to the drafting of the deed."[16] "Under these circumstances the rule of privilege between attorney and client does not apply."[17]
- *Eicholtz v Grunewald.*[18] The attorney drafted wills and codicils for husband and wife, which were signed by the couple. After the death of husband and wife, there was litigation over an alleged oral agreement by the couple to make binding reciprocal wills. The Michigan Supreme Court ruled that the attorney-client privilege did not preclude the drafting attorney from testifying under the rule from *In re Loree's Estate*. "Attorney Belcher who drafted both wills and both codicils is a subscribing witness to each of the four instruments. He could testify to what he learned as a subscribing witness."[19]

Case Study: Factual and Procedural Background

In 2014, "Decedent" and "Spouse" were married; it was Decedent's second marriage and Spouse's third. When Decedent and Spouse were married, Decedent had estate planning and disability planning documents in place, which dated back to his first marriage. Five years after their marriage, Decedent and Spouse were thinking about estate planning and disability planning. From roughly 2019 to 2021, "Original Counsel" jointly represented Decedent and Spouse regarding estate planning and disability planning and drafted proposed documents for the couple. However, neither Decedent nor Spouse ever executed any of the documents drafted by Original Counsel.

Subsequently, Decedent and Spouse terminated Original Counsel's services and retained "Substitute Counsel" regarding estate planning and disability planning. On December 21, 2021, Decedent and Spouse executed the documents prepared by Substitute Counsel.

On December 19, 2024, Decedent died. Following Decedent's death, his "Children" from his

first marriage petitioned the Barry County Probate Court to invalidate Decedent's estate planning documents prepared by Substitute Counsel. Spouse opposed the Petition.

All of Decedent and Spouse's executed estate planning and disability planning documents were produced in discovery. Substitute Counsel's file was also produced in discovery, and it contained Original Counsel's draft estate planning and disability planning documents for Decedent and Spouse (again, never signed).

Despite already possessing Original Counsel's draft documents, the Children served a document production subpoena upon Original Counsel's firm, seeking production of "[a]ny and all documents, records, and correspondence in the possession of [the firm and/or Original Counsel] pertaining to the legal representation of [Decedent and/or Spouse]."

In response, Original Counsel apparently asked the Children to obtain a Stipulation by which both parties consented to production of his joint file for Decedent and Spouse. The Children requested such a Stipulation from Spouse. By their proposed Stipulation, the Children asked Spouse to waive her attorney-client privilege with Original Counsel's firm: "Therefore, the parties stipulate to waive the attorney client privilege between [Spouse and/or Decedent] and [Original Counsel's firm]."

Spouse opted not to waive such privilege or sign the Stipulation. Consequently, Original Counsel's firm did not produce its file to the Children, who then moved to compel Original Counsel's firm to produce its file for Decedent and Spouse, despite the fact that Spouse had not waived her attorney-client privilege.

Case Study: Parties' Arguments and Court's Ruling

The Children argued that Original Counsel's file was discoverable under the Testamentary Exception. They argued that Spouse had acted improperly and engaged in gamesmanship by failing to sign the proposed Stipulation waiving her attorney-client privilege. They argued that the Court must therefore waive Spouse's attorney-client privilege for her and order production of Original Counsel's file.

Spouse raised four arguments against production of Original Counsel's file. First, Spouse argued that Michigan law did not obligate Spouse to waive her attorney-client privilege, or authorize the Court to waive Spouse's privilege for her. According to the U.S. Supreme Court: "Consistent with the underlying purposes of the attorney–client privilege, these [attorney-client privileged] communications must be protected against compelled disclosure."[20]

Second, Spouse argued that the Testamentary Exception only applied to executed wills or similar instruments, and there were no such documents in Original Counsel's file. The Children cited the traditional Michigan decisions applying the Testamentary Exception, all of which reflected that the Exception was limited to cases where the client signed the will/deed drafted by the attorney; the client died; after the client's death, the validity of the executed will/deed was contested; and the Court permitted the scrivener's testimony related to the executed will/deed at issue. Here, Original Counsel's drafts were never signed, and so the Testamentary Exception did not apply to Original Counsel's file.

The Testamentary Exception reflects the belief that "after [the client's] death, where all the parties are claiming under him, the principal reason for the privilege of secrecy no longer exists."[21] A client who signs a will must expect that the executed will is going to become known to his survivors after his death, when the will is given effect. If a survivor claims that the executed will does not reflect the deceased client's testamentary intentions, then is it more likely that the decedent would want (1) confidentiality maintained as to what he said to his attorney who drafted the executed will; or (2) confidentiality waived, so that the attorney's knowledge of the client's wishes in relation to the executed will may be heard? Michigan law says the latter.

The Testamentary Exception does not extend to privileged materials between attorney and client, where the representation resulted in no estate-planning documents being executed. A client would have no expectation of unsigned legal documents being shared with his survivors. The attorney who drafts an estate-planning document that the client chooses not to sign is not the best judge of the client's testamentary wishes. Where the client moves on to a second attorney and signs alternate documents on a later date, there is no reason to believe that the first attorney (who has exited the stage) has any basis for knowledge of the client's state of mind at execution of the later documents. Therefore, Spouse argued, the facts of the present case did not give rise to the Testamentary Exception.

Third, Spouse argued that even if the Testamentary Exception applied, it would only apply to the privileged communications between Original Counsel and Decedent, not to the privileged communications between Original Counsel and Spouse. Original Counsel jointly represented both Decedent and Spouse. His file extended to both Decedent and Spouse. Decedent was deceased; Spouse was living. As a joint client of Original Counsel, Spouse had the right to assert attorney-client privilege, and she had done so.

Fourth, Spouse argued that the Children were overreaching because they already possessed all of Original Counsel's draft documents. Therefore, the Children were able to argue that Decedent's testamentary intent was reflected in Original Counsel's documents and not Substitute Counsel's documents. The Children were apparently seeking attorney notes and attorney-client correspondence that were shielded by both Decedent and Spouse's attorney-client privilege. Where a couple jointly meets with their attorney, it is not possible to produce the attorney's notes in such a way that waives the one spouse's privilege but maintains the other spouse's privilege. Where the attorney sends a letter to the couple who are his joint clients, it is not feasible to produce the letter in such a way that protects one spouse's privilege but waives the other spouse's privilege. Therefore, Spouse argued that the Children were not entitled to the discovery they sought.

In a bench ruling and without drafting a written opinion, the Barry County Probate Court denied the Children's motion to compel production of Original Counsel's file, finding that Spouse's attorney-client privilege prohibited such discovery.

Conclusion

The Testamentary Exception applies only to a certain fact pattern which was not present in the case study under discussion. If Decedent had executed the documents drafted by Original Counsel, then Spouse still could have asserted privilege as to communications between Original Counsel and his joint clients, Decedent and Spouse. Michigan courts have never applied the Testamentary Exception to compel disclosure of attorney testimony over the objection of a living joint client. Going forward, practitioners confronted with the potential application of the Testamentary Exception should determine who counsel represented and who besides a decedent could invoke privilege. Finally, it would be helpful if Courts confronted with cases involving the Testamentary Exception would clarify whether the Exception overrides not only the attorney-client privilege but also ethical limitations on disclosures by counsel.

Notes

1. *Yates v Keane*, 184 Mich App 80, 83, 457 NW2d 693 (1990) (internal citation omitted).
2. *Id*.
3. Ronald S. Longhofer, *Michigan Court Rules Practice* § 501.2.2 (4th Ed 2019).
4. *Lindsay v Lipson*, 367 Mich 1, 5, 116 NW2d 60 (1962).
5. *Iafrate v Warner Norcross & Judd, LLP*, 335 FRD 378, 381 (ED Mich 2020) (applying Michigan law as to attorney-client privilege issue).
6. *Id.* at 382. *Also see Fox v Massey-Ferguson, Inc*, 172 FRD 653, 670 (ED Mich 1995) ("[C]ommunications between joint clients and their attorneys are privileged in

any action between one or all of the clients and a third person[.]") (internal quotation omitted; applying federal common law of evidence).

7. MRPC 1.6(b)(1).
8. Official Comment, MRPC 1.6.
9. *Id*.
10. *Id*.
11. MCR 2.302(B)(1).
12. *Lorimer v Lorimer*, 124 Mich 631, 638–39, 83 NW 609 (1900).
13. 158 Mich 372, 122 NW 623 (1909).
14. 158 Mich at 377.
15. 216 Mich 139, 184 NW 425 (1921).
16. 216 Mich at 145.
17. *Id* at 145-146.
18. 313 Mich 666, 21 NW2d 914 (1946).
19. 313 Mich at 672. Also see *MFS & Co LLC v Caterpillar, Inc*, Docket No 09-14063, 2010 WL 11549935 at *3 (ED Mich Sep 20 2010) (unpublished), citing *Eicholtz v Grunewald*, supra, 313 Mich 666 ("The Michigan Supreme Court found an exception to the attorney-client privilege in the context of a will contest action, where the attorney was a subscribing witness to the instruments contested. … The Court did not hold … that on death of a person, all privileges held expire as well.").
20. *Upjohn Co v United States*, 449 US 383, 395 (1981). Accord *In re Hicks*, 252 SW3d 790, 793 (Tex App, 2008) (holding that trial court abused its discretion by compelling party "to sign an authorization to release privileged information that would waive his attorney-client privilege").
21. *Eicholtz v Grunewald*, 313 Mich at 672.

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Legislative Update—Michigan's 103rd Legislature Thus Far

By Howard H. Collens and Nathan R. Piwowarski

This Michigan legislative update covers a period running from January 1, 2025, to April 1, 2026. A longer version is being published in the conference materials for the Institute for Continuing Legal Education's 66th Annual Probate and Estate Planning Institute.

The Michigan Legislature operates in two-year cycles. Unpassed bills expire at the end of a two-year session. Unpassed bills need to be reintroduced to begin anew. As of this writing, the Legislature is two thirds of the way through its 103rd session, which runs from 2025 through 2026. While few bills on any topic have become law—and diminishingly few trust- and estate-related bills—several progressed far enough to have a good chance at passing in the session's latter months. Throughout the article, we identify whether the Probate and Estate Planning Section (PEPS) and/or Elder Law and Disability Rights Section (ELDRS) have adopted public policy positions concerning legislation.

Public Acts

Marketable Record Title Act Revision (2025 PA 13/HB 4524)

Public Act 13 of 2025 (HB 4524)[1] again revises the Marketable Record Title Act (MRTA), MCL 565.101 et seq. Public Act 13's effective date was August 13, 2025.

The MRTA provides the mechanism by which interests in Michigan real property are extinguished when not preserved within the statutory look-back periods. This latest act makes five categories of substantive changes to the MRTA.

First, new MCL 565.101a adds statutory definitions—most notably, "person" expressly includes trusts and trustees, resolving any ambiguity about whether trust-held property falls within the MRTA's framework. The definition of "mineral interest" excludes oil, gas, sand, gravel, limestone, clay, and marl, which continue to carry a 40-year look-back period. Second, the Act formally bifurcates look-back periods: 20 years for mineral interests, 40 years for all other interests. Third, and most significantly for conveyancing practice, revised MCL 565.102(3) establishes that an instrument in the chain of title "purports to divest" an interest only if it actually creates the divestment, or—for instruments recorded after March 28, 2019—specifically references by liber and page or other county-assigned unique identifying number the previously recorded instrument that created the interest. General "subject to" language without specific reference numbers no longer constitutes a divestment in the chain of title.

Fourth, revised MCL 565.103 creates a two-year grace period from the effective date of new MCL 565.105a within which holders of pre-root-of-title interests that would otherwise be extinguished may record a saving notice of claim. Notably, this latest grace period does not apply to interests that became void before March 29, 2019, or that have expired or terminated on their own terms.

Fifth, new MCL 565.105a directly addresses two recurring practice problems: (a) a deed that conveys property "subject to" an interest but includes a statement that the reference is solely for the purpose of limiting the warranty—and does not create, preserve, or continue the interest—is NOT an effective saving notice; the Act provides model disclaimer language for this purpose; and (b) a deed recorded after March 28, 2019 that uses blanket "subject to easements and restrictions of record" language without specific liber/page references is *not* effective to create, preserve, or continue any recorded easements or restrictions.

There are several practice implications:

- The law's two-year grace period is

running. Holders of pre-root-of-title interests have until August 13, 2027, to record a proper notice of claim under MCL 565.103. Advise clients with historic easements, restrictions, mineral interests, or other claims predating the root of title to audit those interests and file saving notices if necessary.

- Adopt a more detailed approach to preserving interests in deeds: the blanket "subject to easements and restrictions of record" language in deeds recorded after March 28, 2019, no longer preserves those interests. Instead, deeds should reference specific exceptions by liber/page or unique county identifier, or use the new MCL 565.105a warranty-limitation disclaimer when the intent is only to limit warranty, not to preserve an interest: "The references to the exceptions to title by liber and page or other county-assigned unique identifying number in this instrument are for the sole purpose of limiting the warranty or covenant of title, as applicable, in this instrument and do not create, preserve, or continue the interest, claim, or charge under 1945 PA 200, MCL 565.101 to 565.108."[2]
- Trust-held property is expressly covered. The statutory definition of "person" in newly created MCL 565.101a includes trustees. Personal representatives conveying estate property and trustees distributing or selling trust assets must apply the revised Act's standards.
- Coordinate with title underwriters. Contact title company representatives to understand how PA 13 changes their underwriting standards for estate and trust conveyances—particularly for post-March 2019 instruments with general subject-to language.

Medicaid Sunset Extension for County Medical Care Facilities (2025 PA 45/HB 4726)

Public Act 45 of 2025 (HB 4726)[3] amends the Social Welfare Act to extend the sunset provision governing the county maintenance of effort rate for Medicaid reimbursements at county-owned long-term care facilities.[4] Under prior law, the limitation was scheduled to expire; PA 45 extends it to December 31, 2030, or until MDHHS adopts a new reimbursement system, whichever is sooner. For each subsequent county fiscal year, the maintenance of effort rate may not increase by more than $1.00 per patient day.

County medical care facilities are county-operated nursing care institutions that serve as an important component of the Medicaid-funded long-term care infrastructure. The extension preserves the status quo without changes to eligibility, benefit levels, or rate formulas.

Medical Certification of Death Records (2026 PAs 3 and 4/2025 HBs 4077 and 4078)

Public Act 3 of 2026 (2025 HB 4077)[5] and Public Act 4 of 2026 (2025 HB 4078)[6] revise the Public Health Code's death record certification framework. They narrow the definition of "attending physician" for certification purposes to be the physician in charge of the decedent's care for the illness or condition that caused death—not merely any attending physician. For institution deaths, the certifying physician may be the attending physician, the attending's authorized representative, the chief medical officer of the institution, or a pathologist.

This package also dramatically expands county medical examiner jurisdiction: a county ME must now investigate any death where the individual died without medical attendance by a physician within the one year immediately preceding death. Before enactment, there was a 48-hour standard. This will substantially increase ME referrals, particularly for individuals who have not recently seen a physician.

This latter change may sometimes delay the

issuance of death certificates and prompt client questions regarding ME involvement. Attorneys may need to advise clients that an ME's involvement does not imply wrongdoing and is now required by law.

The acts were signed by the Governor on March 18, 2026.

Notable Pending Bills

The Legislature's 2025–2026 session carries forward the trust reform agenda that has been a Probate and Estate Planning Section legislative priority for several years: HB 4033 and HB 4034 have passed the House unanimously and await Senate action. Three additional Section-sponsored bills address discrete trust and estate topics and remain in the House Committee on Judiciary. Guardianship and conservatorship remain hot topics, with the Legislature seeing reintroduced proposals from the Elder Abuse Task Force, along with new bills to recognize supported decision-making and create elder protection orders analogous to personal protection orders.

Trust and Estate Administration

HB 4033: Uniform Fiduciary Income and Principal Act (Passed House)

House Bill 4033 of 2025[7] would implement Michigan's version of Article 3 of the Uniform Fiduciary Income and Principal Act (UFIPA), creating a comprehensive statutory framework for unitrust elections. This proposal is tied-barred to HB 4034, discussed in the next section. HB 4033 is a reintroduction of HB 5110 from the 2023–2024 session, which passed the House but stalled in the Senate. The bill passed the current House unanimously. The bill has been referred to the Senate Committee on Civil Rights, Judiciary, and Public Safety.

A unitrust distributes a fixed percentage of the trust's total value (the "unitrust amount") rather than the traditional net income. This addresses the fundamental tension between modern total-return portfolio management and traditional income/principal accounting that has disadvantaged income beneficiaries of growth-oriented trusts under the current Uniform Principal and Income Act (UPIA).

Under HB 4033, a trustee would be able to: (1) convert an income trust to a unitrust by adopting a written unitrust policy and providing at least 30 days' notice to qualified trust beneficiaries, trust directors, and persons with power to appoint or remove trustees; (2) convert a unitrust back to income trust administration; or (3) adjust the unitrust percentage or methodology. Beneficiaries who object may seek court review, but the court may not reverse the trustee's decision solely because it would have decided differently (imposing an abuse of discretion standard). As is the case with much of the Michigan Trust Code, under this act, the trust's own terms would prevail over the act. Charitable remainder annuity trusts and pooled income funds are excluded.

For trusts that qualify for special tax benefits—including annual gift tax exclusion trusts, Qualified Subchapter S Trusts (QSSTs), estate/gift tax marital deduction trusts, generation skipping transfer (GST) tax exempt trusts, and trusts with inclusion ratios less than one—the unitrust rate must fall between three and five percent, and the calculation period must be the calendar year. These constraints protect the tax benefits that depend on the trust's income-distribution character.

In anticipation of this bill's passage, practitioners should consider the following:

- Review all existing trust instruments for income/principal administration provisions. Trusts drafted under the current UPIA may merit re-evaluation under UFIPA's default rules. Their existing income distribution language may interact unexpectedly with the new statutory defaults.
- Assess existing trusts with total-return tension, particularly those holding significant growth assets, as candidates for unitrust elections. The statute would

give trustees a clear pathway for conversion without court approval in many cases.
- Update trust drafting forms to address UFIPA default rules, specify client-appropriate unitrust rates, and include opt-in/opt-out provisions. For special tax benefit trusts, confirm the three-to-five-percent rate constraint is reflected in the instrument.
- Advise trustees that the trustee's duty of impartiality will be evaluated against the new statutory standard; trustees managing trusts under the current UPIA should consult with counsel to confirm compliance with the new Act.

HB 4034: Uniform Statutory Rule Against Perpetuities: Second Powers Exemption (Passed House)

House Bill 4034 of 2025[8] would make a narrow, targeted amendment to Michigan's Uniform Statutory Rule Against Perpetuities (USRAP), MCL 554.73 et seq. This proposal is tied-barred to HB 4033, discussed in the previous section. The bill has passed the House and has been referred to the Senate Committee on Civil Rights, Judiciary, and Public Safety.

The bill would not extend Michigan's 90-year vesting period generally. Rather, it creates an exemption for a specific scenario: an interest or power of appointment created by a "second power" under the Personal Property Trust Perpetuities Act (PPTPA) is exempted from the existing rule that traces the creation date back to the date of the original contribution.

Under current USRAP, a nonvested interest arising from a previously funded trust is deemed "created" when the original contribution was made, which can cause perpetuities problems when powers of appointment are exercised over dynasty trust assets, because the second power's exercise date is not recognized as a new creation date. HB 4034 eliminates this relation-back result for second powers under the PPTPA. A "second power" is a nonfiduciary, nongeneral (special) power of appointment over personal property held in trust (other than a presently exercisable general power) created by the exercise of a "first power" or a "second-order fiduciary power."

The bill's potential practice impacts are as follows:

- The bill would benefit trust structures using layered powers of appointment under the PPTPA. Currently, a second power's interest could be traced back to the original contribution date, creating perpetuities risk. After HB 4034, the second power's exercise date controls.
- Practitioners drafting dynasty trusts using the PPTPA's separate perpetuities framework will want to update trust instruments to reference the revised MCL 554.73 once enacted.
- The 90-year default vesting period is unchanged. Michigan remains less competitive than perpetuity-free jurisdictions for pure dynasty trust planning.

HB 4408: Powers of Appointment Modernization (In Committee)

House Bill 4408 of 2025[9] proposes modernization of Michigan's statutory framework governing powers of appointment. Michigan's current provisions have not been comprehensively updated to reflect the Uniform Powers of Appointment Act (UPOAA), promulgated by the Uniform Law Commission in 2013. The PEPS Section championed related technical amendments in prior sessions.

Practitioners who draft trust instruments with powers of appointment should review the bill text for changes to: (a) exercise by blanket clause (whether a residuary clause exercises a nongeneral power without specific reference); (b) anti-lapse rules for powers; (c) creation standards;

and (d) applicability to powers created before the effective date.

HB 4523: Revisions to Michigan Trust Code's Non-Waivable Provisions, Including Limitations on No-Contest Clauses (In Committee)

House Bill 4523 of 2025[10] proposes three changes to the Michigan Trust Code, modifying or clarifying whether certain statutory rules may be drafted around.

While most of the MTC's statutory defaults may be trumped by a trust instrument's provisions, Section 7105 sets those where the Code's terms prevail. If enacted, the bill would alter 7105 in two ways. First, it would confirm that a trust instrument may not eliminate the power of a court to appoint a person to enforce a trust under Section 7408 (pet trusts) or Section 7409 (honorary trusts). Second, it would eliminate the statutory limitation on no-contest clauses. The bill would also amend Section 7110 to make clear that a trust instrument creating an undisclosed trust may give the holder of a nondisclosure correlative right or a protection power the same rights as a qualified trust beneficiary; but, it would underscore that the instrument may modify those rights.

The elimination of the MTC's restrictions on no-contest clauses would broadly impact their use in drafting, as well as their application in probate litigation.

Guardianship and Conservatorship

HB 4632, HB 4633, HB 4634, HB 4635, HB 5404: Elder Abuse Task Force (EATF) Guardianship and Conservatorship Reform Package (In Committee) (PEPS Opposes)

This reintroduced four-bill package—2025 House Bills 4632,[11] 4633,[12] 4634,[13] and 4635[14]—would overhaul Michigan's guardianship and conservatorship appointment procedures and standards under EPIC Article V. The four bills are tie-barred to each other. The proposed changes cover dozens of statutory provisions, but can be described in broad brushstrokes:

- HB 4632 revises appointment requirements and procedures in protective proceedings. If adopted, it would affect the evidentiary threshold for guardianship petitions, required petition content, and the role of capacity evaluations.
- HB 4633 addresses guardian, conservator, and guardian ad litem duties, with particular emphasis on guardians' and conservators' post-appointment reporting obligations to the interested persons and court.
- HB 4634 amplifies the least-restrictive-means standard for protective appointments. It would require that petitioners document why less restrictive alternatives (supported decision-making, representative payees, limited guardianship, durable powers of attorney) are insufficient. This mirrors the principles of the 2021 proposed federal Guardianship Accountability Act.
- HB 4635 addresses temporary and emergency guardian and conservator appointments and removal procedures.

House Bill 5404 of 2025 would:

- Require that a person nominated to serve as a *professional* guardian or conservator submit to a criminal background check. This is a precaution already required by many probate courts as to all nominees, rather than only professional fiduciaries.
- Eliminate the requirement that a professional guardian establish and maintain a schedule of visitation so that an individual associated with the professional guardian who is responsible for the ward's care visits the ward within three months after the professional guardian's appointment and not less than once within three months after

each previous visit.

- In place of the existing, brief, provision concerning visitation, describe in fuller terms how a professional guardian or conservator may use staff and outside professionals for support work while under the guardian's active, direct supervision. Under this proposal, their staff may gather information about the ward or protected individual and make recommendations, but the professional guardian cannot hand off actual decision-making authority on core matters, particularly financial decisions and informed-consent decisions, e.g. medical, mental health, placement, or care-planning decisions. The bill preserves the separate delegation authority the fiduciary may already have under EPIC Sections 1510 and 5103.
- Amend Section 5310 to make clear that the court must follow the original statutory order of priority when appointing a successor guardian.
- Strip out Section 5310(3), which allows a court to limit its consideration of serial guardianship modification filings.
- Revise Section 5313 to expand the prohibition on appointing guardians who financially benefit from providing services to the protected individual. It would add paid caregivers to the list of disqualified nominees. Interestingly, this may inadvertently disqualify family members who are being paid to provide caregiving services through MI Choice Waiver and similar programs.
- Amend Section 5313 (as to guardians' appointment) and Section 5409 (as to conservators' appointment) to require that the court make suitability findings on the record, and list a series of suitability factors.
- Require that all letters of guardianship and letters of conservatorship expire no later than 15 months after their creation.

The package responds to a state and national reckoning over guardianship abuse, fueled by high-profile cases and reports documenting that guardianship can become a permanent, total deprivation of civil liberty with limited oversight. As was the case in the 102nd Legislature, the PEPS opposes HBs 4632-4635 as drafted. The PEPS's Guardianship, Conservatorship, and End of Life Committee has been actively engaged with the Legislature on acceptable terms for this reform.

None of the bills have had activity beyond referral to the House Judiciary Committee. HB 5404 is tie-barred to HBs 4633, 4634, and 4635.

HB 4727 and HB 4728: Professional Guardian and Conservator Licensure (Second Reading) (PEPS Opposes as drafted)

House Bill 4727[15] and House Bill 4728[16] of 2025 would impose a licensure requirement for professional guardians and conservators, that is, individuals who are compensated and serve multiple protected individuals. HB 4727 would amend EPIC to require licensure. HB 4728 would create the licensing framework under the Occupational Code, establishing qualification standards, training requirements, background checks, and grounds for suspension or revocation.

The PEPS opposes these bills as currently drafted. Concerns include: (1) the definition of "professional" may sweep in attorneys and other professionals who serve in fiduciary capacities incidentally, creating redundant licensing requirements on top of existing bar admission and professional regulation; (2) the Occupational Code framework may not be well-suited to the distinct nature of fiduciary obligations already governed by EPIC and supervised by probate courts; and (3) compliance costs may not be calibrated to the size and nature of the professional fiduciary market in Michigan.

Those representing or serving as professional guardians or conservators should closely track the bills as they progress. In particular:

- Attorneys serving as professional guardians or conservators should carefully review the definition of "professional" in the bills' text if they advance. An attorney regularly serving as guardian or conservator for multiple unrelated clients may be subject to licensure requirements distinct from bar admission requirements.
- Professional fiduciary businesses should track these bills. The licensure requirements would impose compliance costs and initial licensure timelines.
- Practitioners who refer clients to professional guardians should anticipate that the pool of available professional guardians may at least temporarily contract if licensure requirements are burdensome.

The PEPS's opposition means further amendments are more likely.

These proposals are tie-barred to each other. They were reported from the House Committee on Judiciary and have been referred to the House floor for second reading. The House has not voted on the bills as of April 1, 2026.

HB 4677: Supported Decision-Making Agreements (Second Reading) (PEPS Opposes as drafted; ELDRS Supports)

House Bill 4677[17] of 2025 would create a statutory framework for supported decision-making agreements (SDMAs) as a formal alternative to guardianship for adults with intellectual, developmental, or cognitive impairments who retain the ability to make decisions with support. Under an SDMA, the individual designates one or more supporters who assist without supplanting the individual's legal authority. Approximately 20 states have enacted SDMA legislation.

The PEPS opposes the bill as drafted, citing concerns about confusion in healthcare and financial settings regarding who holds legal decision-making authority, inadequate safeguards when the individual's capacity to consent to the SDMA itself is questionable, and insufficient third-party reliance guidance.

If enacted, practitioners will need to counsel clients with intellectual or developmental disabilities about whether an SDMA is preferable to or complementary with a durable power of attorney. The bill may create a defense against guardianship petitions where an existing SDMA provides a less restrictive alternative. Attorneys serving healthcare and financial institutions should also closely follow the proposal, given its third-party reliance provisions.

HB 4677 has been reported from the House Committee on Judiciary and has been referred to second reading. It is currently awaiting House floor vote.

SB 585 and SB 586: Protected Individual Residence; Appraisal and Statement of Reasons (Passed Senate) (PEPS Opposes both bills as drafted; ELDRS Opposes SB 585 with Recommended Amendments; ELDRS Supports SB 586)

Senate Bill 585[18] of 2025 would require that before a guardian change a protected individual's primary residence, a licensed real estate appraiser must perform an appraisal of that residence. The companion bill, Senate Bill 586[19] of 2025 would require that the guardian submit to the court a written statement of the reasons for the proposed relocation before it occurs.

The PEPS opposes these bills as currently drafted. It has expressed concern that the mandatory appraisal requirement in SB 585 lacks an emergency or exigent circumstances exception, imposing a procedural burden that is disproportionate in situations where relocation is consensual, urgently needed, or where the residence has no meaningful market value. The Section, in its public policy statement, expressed support for appropriate court oversight of guardian

conduct, and its belief that existing EPIC provisions provide a more flexible mechanism. The Section received substitute versions in January 2026; the Section's Guardianship, Conservatorship, and End of Life Committee found no basis to change the opposition position.

We suggest that practitioners consider the following in light of these bills:

- Even before enactment, it is best practice for guardians proposing to relocate their ward to document the basis for the decision in writing and obtain a property appraisal or comparative market analysis. This creates a record against potential challenges regardless of whether the bills are enacted.
- If the bills are enacted, practitioners should confirm whether the adopted versions ultimately impose the appraisal requirement only on owner-occupied real property.
- If the bills are enacted, practitioners should confirm whether failure to comply creates grounds for guardian removal or surcharge.

Both bills passed through the Senate and have been transmitted to the House. They have been referred to House Committee on Judiciary. Substitute versions (SB 585 S-1; SB 586 S-3) were circulated as of January 2026.

HB 4676 and HB 4729: Mental Health Guardianship; Least Restrictive Means (Second Reading) (PEPS Opposes HB 4676 as drafted; ELDRS Supports HB 4676)

House Bill 4676[20] of 2025 would strengthen the least-restrictive-means standard for mental health guardianship under the Mental Health Code. HB 4729[21] would change the mental health guardian appointment procedures. If these bills become law, petitioners for mental health guardianship would need to demonstrate that less restrictive alternatives (voluntary treatment, representative payees, psychiatric advance directives, supported decision-making) are insufficient, and that a developmental disability guardianship is necessary.

HB 4729 is tie-barred to 2025 HB 4728, which would create a licensing framework for professional guardians and conservators. Both have been reported out of committee and referred to second reading. The House has not yet taken a floor vote.

HB 5404: Professional Guardian and Conservator Reforms, HB 5739, and HB 5740: Additional Guardianship Modifications (In Committee)

House Bill 5739[22] of 2026 would drastically reduce the conditions under which the court may waive the requirement that a conservator obtain a bond. It would also impose closer judicial review of the conservator's management of home sale proceeds. House Bill 5740[23] of 2026 would, among other things, require that a guardian report to the court if it discovers or gains control of more than $25,000 of the protected individual's funds. These recently-introduced bills are tie-barred to each other and have been referred to the House Committee on Families and Veterans.

HB 4959: Fee for Professional Guardian and Conservator (Second Reading)

House Bill 4959[24] of 2025 is a companion to the professional guardian and conservator licensure package (HB 4727 and HB 4728). Where HB 4728 creates the substantive licensing framework under the Occupational Code, HB 4959 establishes the fee structure for obtaining and maintaining a professional guardian or professional conservator license. The bill adds a new section to the State License Fee Act (1979 PA 152), specifying the fees to be charged to license applicants and licensees under the new framework.

HB 4959 was reported from House Committee on Families and Veterans with H-1 substitute and referred to second reading. The House has not taken a floor vote as of April 1, 2026.

HB 4696 and HB 4697: Guardianship Assistance Act: Definition of Relative and Eligibility for Payments (Second Reading)

House Bills 4696[25] and 4697[26] of 2025 would amend the Guardianship Assistance Act (GAA), 2008 PA 260, which provides state-funded financial assistance to relatives who assume legal guardianship of related children who cannot safely return to their parents and who would otherwise enter or remain in foster care. The GAA functions as an alternative to the foster care system for kinship caregivers who are willing to take on permanent legal responsibility for a child through guardianship proceedings under EPIC rather than through formal adoption.

HB 4696 modifies the definition of "relative" in MCL 722.872 to expand the class of persons who may qualify as a relative caregiver for GAA eligibility purposes. The current definition is limited to specific enumerated relationships (grandparent, aunt, uncle, sibling, and certain others). The expanded definition would permit a broader circle of kinship caregivers to access guardianship assistance payments. HB 4697 revises the eligibility criteria in MCL 722.874 for guardianship assistance payments consistent with the redefined relative class. The bills are tie-barred to each other.

Both bills were reported from House Committee on Families and Veterans and have advanced to second reading.

Elder and Vulnerable Adult Protection

SB 111, SB 112, SB 113, SB 114: Elder Abuse Task Force (EATF) Elder and Vulnerable Adult Protection Package (Passed Senate) (ELDRS Supports)

This four-bill package, passed unanimously by the Senate, would create a suite of new elder protection mechanisms. Senate Bill 111[27] of 2025 would create a new category of personal protective order specifically for exploitation or abuse of elderly or vulnerable adults. Unlike existing domestic-violence-focused PPOs, the new elder PPO allows courts to address financial exploitation, control of assets, isolation, and manipulation—tools that existing PPOs do not contemplate.

Senate Bill 112[28] of 2025 would expand Michigan's RICO statute to include embezzlement from vulnerable adults as a predicate offense, making RICO's treble damages and attorneys' fee provisions available in civil actions arising from financial exploitation.

Senate Bill 113[29] of 2025 would enhance criminal penalties for embezzlement from vulnerable adults and allow criminal proceedings to continue after the victim's death, closing the gap where exploiters have escaped accountability when victims died before prosecution was completed.

SB 114 authorizes counties to establish multidisciplinary teams (MDTs) to coordinate investigation and response to vulnerable adult abuse, bringing together law enforcement, APS, healthcare providers, legal professionals, and social services.

The Senate unanimously adopted these bills, which have been referred to the House Committee on Judiciary.

HB 4362 and SB 456: Missing Senior and Vulnerable Adult Alert Program (Passed House)

House Bill 4362[30] of 2025 and its companion, Senate Bill 456[31] of 2025, would establish a statewide missing senior and vulnerable adult alert program modeled on the Amber Alert system for missing children. When a senior or vulnerable adult with a cognitive impairment (such as dementia) goes missing and is at risk of harm, law enforcement may activate public alerts through broadcast media, highway signs, and wireless emergency alerts. While primarily a law enforcement tool, practitioners advising guardians and families of individuals with dementia should inform clients of this program if enacted.

HB 4362 passed the House and has been referred to the Senate Committee on Health Policy.

HB 5387: Missing Senior and Vulnerable Adult Alert: Veterans Extension (Passed House) (ELDRS Supports)

House Bill 5387[32] of 2025 would change the definition provision of the Missing Persons Reporting Act, MCL 28.712, to include certain veterans who are at risk within the population that may trigger a missing senior or vulnerable adult alert. The existing alert framework (addressed in companion bills HB 4362 and SB 456 discussed above) targets seniors and vulnerable adults with cognitive impairments such as dementia. HB 5387 extends that framework to cover veterans at risk, recognizing that veterans experiencing cognitive decline, traumatic brain injury, or related service-connected conditions may go missing under circumstances that warrant public alert activation.

HB 5387 passed the House nearly unanimously (100–2) with immediate effect and has been transmitted to the Senate Committee on Veterans and Emergency Services.

Healthcare Decision-Making and Patient Advocates

HB 4418, HB 4419, and HB 4734: Patient Surrogate Authority (Senate Committee of the Whole) (PEPS Opposes HB 4418 and 4419 as drafted)

House Bills 4418[33] and 4419[34] of 2025 address an alleged gap in Michigan's healthcare decision-making framework: the absence of a patient surrogate statute. Michigan, unlike most states, does not have a statute authorizing a hierarchy of family surrogates to make healthcare decisions for an incapacitated patient who has no advance directive and for whom no guardian has been appointed, creating a common and serious practical problem at hospitals, nursing facilities, and hospices.

HB 4418 (S-3) would add new Part 6 to EPIC Article V, creating the patient surrogate framework. A patient who has not designated a patient advocate and for whom no guardian is appointed can designate a surrogate through any means of communication (including oral communication to a health professional). If no designation is made, a statutory hierarchy applies. In priority order, surrogates are: (1) a court-appointed guardian serving in good standing; (2) an agent under a durable power of attorney; and then, if none of the above are reasonably available: (3) spouse (unless pending divorce, separate maintenance, or annulment, or absent one year before the decision); (4) adult child; (5) domestic partner residing with patient 12+ months; (6) parent; (7) adult sibling; (8) person residing with patient 12 or more months (non-domestic partner); (9) an adult showing special care and concern for the patient who is familiar with the patient's values and is available and willing. When multiple members of the same priority class are available, they must select a single surrogate by majority vote.

Persons subject to a PPO involving the patient, or against whom a criminal action is pending for vulnerable adult abuse/exploitation or domestic violence, are ineligible to serve as surrogate. Surrogates who are not related by blood, marriage, or adoption cannot be owners, operators, or employees of the treating facility (absent no other available surrogate).

A surrogate's powers would be circumscribed compared to patient advocates: a surrogate may not withhold or withdraw life-sustaining treatment. Before acting, the surrogate must sign an acceptance of authority, which is placed in the patient's medical record. If a surrogate acts for more than seven days, the surrogate must provide written notice to the patient's family.

House Bill 4734[35] would amend the Social Welfare Act (MCL 400.66h) to update the list of authorized consent providers for incapacitated patients, replacing the current "nearest relative" and similar categories with: the patient's patient advocate designated under EPIC; a court-appointed guardian under EPIC Article V; or a surrogate designated under new Part 6. This removes the "nearest relative" as an authorized

consenting party under the Social Welfare Act.

HB 4419 provides good-faith immunity for providers who comply with or decline to comply with a claimed surrogate's decision, and creates civil liability ($1,000 or actual damages, plus fees) for intentional violations of Part 6, and liability ($2,500 or actual damages, plus fees) for fraudulent interference with a patient advocate designation.

If enacted, this legislation would reduce the need for a guardian's appointment. Not only would practitioners need to consider using this alternative before seeking a guardian's appointment: they would also need to explain to the court why a surrogate's designation was insufficient.

HB 4418 and HB 4419 are tie-barred; HB 4734 is tie-barred to HB 4418. They have passed the House, and been reported out of committee and referred to the Senate's Committee of the Whole.

SB 33: Patient Advocate: Life-Sustaining Treatment for Pregnant Patients (Passed Senate)

Senate Bill 33[36] of 2025 would modify the existing statutory restriction in MCL 700.5507(2) that prohibits a patient advocate from authorizing the withholding or withdrawal of life-sustaining treatment from a pregnant patient. This bill passed in the Senate and has been referred to the House Committee on Health Policy.

SB 482: Michigan Medical Treatment Decisions Act (In Committee)

Senate Bill 482[37] of 2025 proposes a comprehensive Michigan Medical Treatment Decisions Act that could create a unified statutory framework for healthcare decision-making in Michigan. The MTDA does not supplant the special roles that patient advocate designations, non-opioid directives, and other advance directive documents already play, and instead creates a framework for family healthcare surrogates in absence of those directives. The bill has been referred to the Senate Committee on Health Policy and Human Services.

Electronic Execution of Governing Instruments

HB 5289 and SB 811: Remote Notarization Identity Verification (In Committee)

Michigan enacted permanent remote online notarization (RON) authority in 2020 under MCL 55.261 et seq., and practitioners have relied on it for primarily real estate closings, and occasionally estate planning documents and other instruments. House Bill 5289[38] and Senate Bill 811[39] are companion bills addressing the same two sections of the Michigan Law on Notarial Acts (MCL 55.286c and 55.286d). They would require that, if the notary does not personally know the person seeking the notary's services, the notary must obtain documentation of the person's identity before the remote notarization session and again verify their identity during the session.

HB 5289 sits in the House Committee on Regulatory Reform. SB 811 was referred to the Senate Committee on Regulatory Affairs.

HB 5658 and HB 5659: Remote Notarization by Attorneys and Financial Institutions (In Committee)

House Bill 5658[40] of 2026 would create two additional lanes for remote online notarization (RON), in addition to the remote platforms, which in practice have benefited few outside the mortgage lending industry. It would permit a qualifying notary to use ordinary communication technology (e.g., Zoom-style video) plus a paper-and-return workflow. To be eligible to use this lane, the notary must be either:

- A Michigan-licensed attorney, or a notary working in the course of employment under that attorney's direction and supervision (but not an attorney who is also an employee or authorized agent of a financial services provider such as a bank, credit union, mortgage

lender, or title company); or,

- An employee or authorized agent of a financial services provider, but only if (i) the director of the Michigan Department of Insurance and Financial Services (DIFS) determines the technology is necessary to record documents with a register of deeds during a declared state of emergency or public health order, and DIFS promulgates emergency rules implementing that determination.

The core procedural requirements for non-vendor notarizations would be as follows:

- Live AV connection—simultaneous sight-and-sound interaction among signer, witnesses, and notary.
- Recording—audio-video recording of the entire notarial act, retained as a notarial record.
- ID verification—if the signer is not personally known to the notary, the signer and witnesses must present satisfactory evidence of identity during the video conference.
- Location/nexus—the signer must affirmatively represent they are physically in Michigan, or outside Michigan if the record (a) is for filing with or relates to a matter before a Michigan court, governmental entity, or official, or (b) involves Michigan property or a transaction substantially connected to Michigan.
- Lack of known out-of-state limit—if the signer is outside Michigan, the notary must have no actual knowledge that signing is prohibited where the signer is located.
- Tamper-evident signatures—signatures must be affixed in a manner rendering subsequent changes tamper evident.
- Wet-ink (or equivalent) follow-up—the signer (or designee) must transmit a legible copy of the entire signed record to the notary by fax, mail, or electronic means within two business days of signing, regardless of how it was originally signed.
- Notary completes the act—upon receiving the legible signed copy, the notary notarizes per § 27 and transmits the notarized record back to the signer.

It is easy to foresee innocent errors and difficulties in complying with these requirements. But the new section would create a presumption in favor of compliance, which could only be rebutted upon a showing that the notary or signer *intentionally* failed to comply.

A document notarized under this law could be witnessed via communication technology if at least one witness is a qualifying notary. The official date and time of the notarial act would be when the notary witnesses the signature via the communication technology, rather than when the paper copy is received. Absent an express prohibition in the notarized record, a record signed under the proposed section would be able to be signed in counterparts.

Taken alone, this bill would not preempt the formality requirements governing wills (something that HB 5701 *would* do, as discussed below). House Bill 5659[41] of 2026 would amend the Michigan Power of Attorney Act to authorize the execution of powers of attorney using audiovisual communication technology, allowing principals, witnesses, and notaries to participate remotely rather than in person.

This bill works with HB 5658 to reinstate remote witnessing and remote notarization. It is intended to incorporate these processes into the recently enacted Power of Attorney Act.

It is anticipated that there will be an additional bill that opens EPIC to reinstate remote witnessing.

HB 5658 and HB 5659 were referred to the House Committee on Judiciary.

HB 5701: Electronic Signatures for Wills and Other Governing Instruments (In Committee)

House Bill 5701[42] of 2026 would authorize electronic signatures in the execution of wills and potentially other estate planning documents. Michigan's current will execution statute, MCL 700.2502, requires that a will be in writing, signed by the testator, and signed by at least two witnesses within a reasonable time after witnessing either the signing or the testator's acknowledgment.

If HB 5701 advances, practitioners will need to understand whether electronic execution satisfies all current will validity requirements or only some. Remote execution tools may become available for homebound or hospitalized clients, but the specific platform and identity-verification requirements will govern practical use. Watch for whether the bill extends to powers of attorney, patient advocate designations, and trust instruments—each has independent execution requirements under Michigan law.

The PEPS is exploring alternative electronic will legislation that addresses the concerns surrounding proposals like this one.

Elder Caregiver Arrangements

SB 266 and HB 5405: Personal Service Agreements (In Committee) (PEPS Supports SB 266; ELDRS Supports both bills)

Championed by the ELDRS, Senate Bill 266[43] and House Bill 5405[44] of 2025 would create safe harbors for the recognition of personal service agreements (or caregiver agreements) without causing the care recipient to suffer Medicaid divestment penalties. SB 266 was referred to the Senate Committee on Health Policy. HB 5405 sits in the House Committee on Health Policy. The authors speculate that these bills may receive fresh attention in light of the recent Court of Appeals opinion, *Estate of Brown v Department of Health & Human Servs*, which invalidated Michigan's administrative rules deeming personal care contracts divestments under all but the most narrow of circumstances.[45]

HB 5214: Family Caregiver Income Tax Credit (In Committee)

House Bill 5214[46] of 2025 would amend the Income Tax Act to create a Michigan individual income tax credit for eligible family caregivers who incur out-of-pocket expenses providing care for an elderly or disabled family member. The credit targets unpaid or undercompensated family caregivers and is distinct from the personal service agreement framework (SB 266/HB 5405), which addresses formally compensated caregiving arrangements. A family member compensated under a PSA likely would not qualify for this uncompensated-caregiver credit. The bill sits in the House Committee on Insurance.

Real Estate and Taxation

HB 4014: Property Tax Uncapping Exemption: Lineal Descendant Transfers (Passed House) (PEPS Supports with Recommended Amendments)

Under MCL 211.27a, the transfer of ownership of Michigan real property generally triggers "uncapping": the taxable value resets to the state equalized value (SEV) in the year following the transfer. The existing close-family exception applies only to a subset of family transfers and has definitional limits that exclude some common estate planning scenarios. House Bill 4014[47] of 2025 would create a broader uncapping exemption for transfers of property from parents to lineal descendants as well as grandparents. The House passed this bill with immediate effect. It has since been referred to the Senate Committee on Finance, Insurance and Consumer Protection.

SB 819: Interspousal Entity Transfers: Uncapping (In Committee)

Senate Bill 819[48] of 2026 would clarify the property tax uncapping treatment under MCL

211.27a of transfers of ownership interests in entities (LLCs, partnerships) that hold real property between spouses. The scope of the interspousal exemption as applied to entity interest transfers—rather than direct real property ownership—is not clearly settled under current law, with inconsistent application by local assessing officers and the Michigan Tax Tribunal. This bill has been referred to the Senate Committee on Finance.

HB 5235 and HB 5236: Homestead Definition: Trust-Held Property (Income Tax Credit) (In Committee)

House Bill 5235[49] and House Bill 5236[50] of 2025 would modify the definition of "homestead" for purposes of the Michigan homestead property tax credit to include property held in trust. Under current law, it apparently is unclear whether a primary residence held in a revocable trust qualifies as the claimant's "homestead" for credit purposes because the trust, rather than the individual, holds title. The bills sit in the House Committee on Property Tax.

HB 4079 and HB 4080: Special Assessment Deferment Program (Passed House)

House Bill 4079 [51] of 2025 modifies the income eligibility cap for Michigan's special assessment deferment program under MCL 211.7gg, raising the threshold to expand access. House Bill 4080[52] of 2025 reinstates the deferment program itself, which had lapsed. Together, these tie-barred bills restore and modernize a program that allows qualifying homeowners—primarily elderly and low-income—to defer special assessment payments (for local infrastructure improvements such as road paving, sewer, or water service) until the property is transferred or the owner dies. The bills have passed the House with bipartisan support; Senate passage is reasonably likely.

HB 5152 and HB 5153: Tax Foreclosure Surplus Distribution (In Committee) (PEPS Opposes)

These bills are designed to address the exploitative purchase of real estate that is the subject of the property tax foreclosure process under the General Property Tax Act. House Bill 5152[53] of 2025 would require that any sale of property after a foreclosure notice is recorded is invalid unless the seller signs a plain-language "Notice of Rights" informing them they are waiving rights to redemption, occupancy, and any potential surplus proceeds. House Bill 5153[54] of 2025 would make the statutory right of redemption and the right to surplus proceeds non-assignable after the foreclosure notice is recorded—except through testate or intestate succession. A person with a recorded interest obtained after the foreclosure notice cannot redeem the premises.

HB 5152 and HB 5153 are tie-barred and are under consideration in the House Committee on Economic Competitiveness.

The PEPS opposes these bills for several reasons. The primary concern: the non-assignability provisions in HB 5153 are overbroad and would eliminate legitimate assignments of redemption rights and surplus proceeds in situations where the property owner wishes to transact voluntarily. Additional concerns include the treatment of ladybird deeds and the treatment of a mortgagor's estate when death occurs after the foreclosure notice.

Premarital and Marital Agreements

SB 160: Uniform Premarital and Marital Agreements Act (Passed Senate) (PEPS Opposes)

Senate 160[55] of 2025 would adopt a modified version of the Uniform Premarital and Marital Agreements Act (UPMAA) in Michigan, replacing the current patchwork of common-law rules, the Michigan Marriage Act's sparse provisions, and case law (including *Allard v Allard*, 318 Mich

App 583, 899 NW2d 420 (2017)) that currently govern premarital and marital agreements. The bill is a successor to SB 809 from the 2023–2024 session.

The Family Law Section has promoted SB 160's adoption. Its version would enshrine *Allard* in statute. The PEPS opposes this approach, which increases uncertainty regarding premarital agreements' ultimate enforceability.

The bill currently sits in the House Committee on Judiciary.

Retirement Systems and Special Needs Trusts

HB 4657, HB 4658, HB 4659, HB 4660: Special Needs Trusts as Beneficiaries of Michigan Public Retirement Systems (In Committee) (PEPS Supports; ELDRS Supports)

Under current Michigan law, the designation of a special needs trust (SNT) as a beneficiary of a Michigan public retirement system benefit is restricted, ambiguous, or not clearly authorized under the four separate governing statutes. This gap creates planning problems for families with a beneficiary who has disabilities.

Each of these bills—developed by the ELDRS—would authorize the designation of a special needs trust as a participant's beneficiary: HB 4657[56] of 2025, as to MCL 38.1501 et seq. (state police), HB 4658[57] of 2025 as to MCL 38.801 et seq. (judges), HB 4659 [8] of 2025 as to MCL 38.1 et seq. (general state employees' retirement system), and HB 4660[59] of 2025, as to MCL 38.1301 et seq. (public school employees). The PEPS supports these bills.

Nursing Home Regulation

SB 412: Electronic Monitoring in Nursing Home Residents' Rooms (In Committee)

Senate Bill 412 of 2025[60] would amend the Public Health Code to make a framework for the installation and use of electronic monitoring devices (cameras and audio recording) in nursing home residents' rooms for safety monitoring purposes. Key issues addressed include who may authorize monitoring (resident, guardian, or family member); consent requirements from roommates who share the space; notice requirements to nursing facility staff; permissible use of recordings (including as evidence in abuse investigations); and privacy protections. The proposal sits in the Senate Committee on Health Policy and Human Services.

Vehicle and Personal Property at Death

HB 4674: Vehicle Registration Renewal for Deceased Owner's Vehicle (Passed House)

Under current Michigan law, the death of a vehicle's registered owner creates an immediate practical problem: the registration cannot be renewed in the decedent's name after death, which can result in the vehicle becoming unregistered and unlawful to operate during estate administration—even with a personal representative appointed.

House Bill 4674[61] of 2025 would amend the Motor Vehicle Code to allow next of kin (and presumably a personal representative or successor trustee) to renew the vehicle registration of a deceased owner under specified circumstances. The bill also modifies procedures applicable when a vehicle lessee dies during the lease term.

The bill passed the House and currently sits in the Senate Committee on Transportation and Infrastructure.

Where to Find Public Policy Positions and a Disclaimer

The Probate and Estate Planning Section's public policy positions are published at http://connect.michbar.org/probate/reports/policy. The Elder Law and Disability Rights Section's public policy positions are published at https://connect.michbar.org/elderlaw/reports/publicpolicy. These sections are not the State Bar of Michigan itself, but rather Sections whose members

choose voluntarily to join, based on common professional interest.

The authors volunteer with various legislative drafting committees of the Probate and Estate Planning Section of the State Bar and Elder Law and Disability Rights Section of the State Bar. The opinions expressed in this paper are theirs, and do not represent a public policy position of the State Bar or these sections.

Notes

1. https://www.legislature.mi.gov/Bills/Bill?ObjectName=2025-HB-4524.
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Howard H. Collens, founding member of Collens Estate Law, focuses his practice on contested and uncontested probate and trust administration, guardianships and conservatorships, estate planning, and elder law. He is a member of the State Bar of Michigan's Elder Law and Disability Rights Section (ELDRS) and the ELDRS's legislative committee, and is serving in his second stint as a member of the ELDRS's Council. Mr. Collens is also a member of the State Bar of Michigan's Probate and Estate Planning Section (PEPS) and serves on the PEPS's Legislative Development and Drafting Committee.

Nathan R. Piwowarski practices in the areas of elder law, estate planning, and estate administration at the law firm of McCurdy, Wotila, and Porteous, P.C., with offices in Cadillac and Reed City. He is a fellow of the American College of Trust and Estate Counsel. A member of the Probate and Estate Planning Section of the State Bar of Michigan, Mr. Piwowarski has served as an officer, council member, and chair of its Legislative Development and Drafting Committee and Committee on Special Projects. He currently serves as the Section's chairperson. He previously served on the Elder Abuse Task Force. Mr. Piwowarski is a licensed title agent and the co-owner of Lakeside Title, LLC, a title company serving northwest Lower Michigan.

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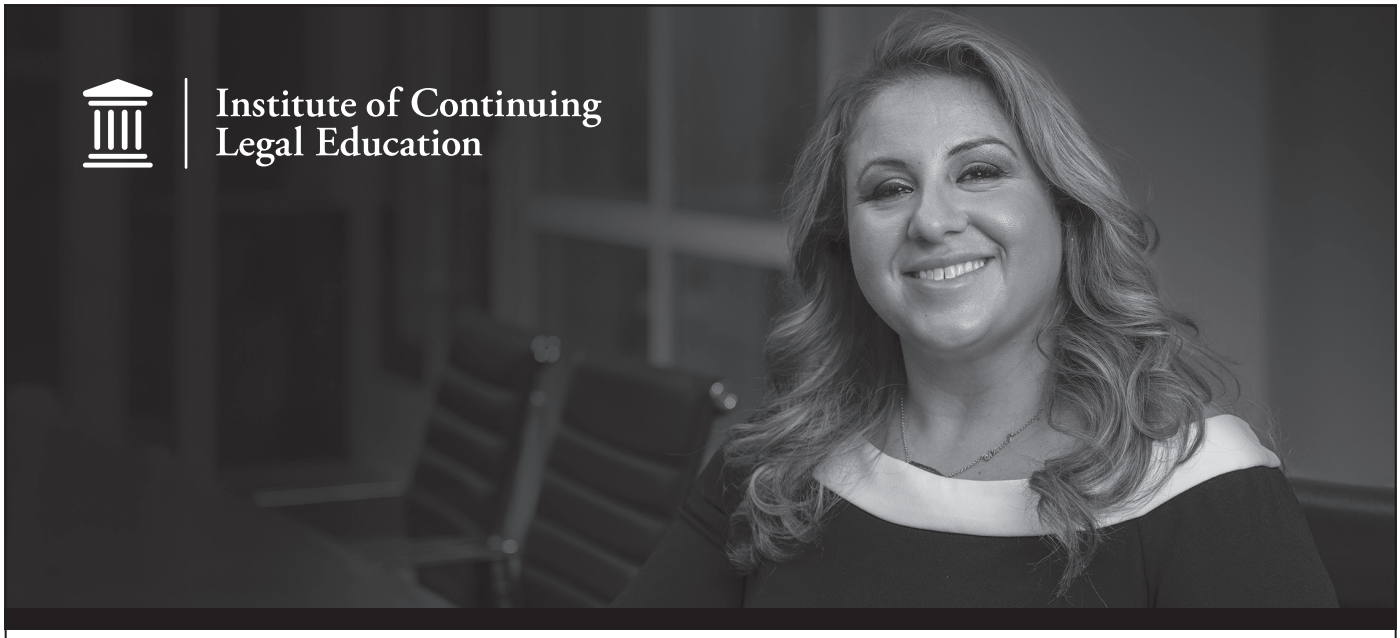

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All Section Members Are Welcome

Date	Place
June 12, 2026	University Club, Lansing
September 11, 2026*	University Club, Lansing

*Annual Meeting

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

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