MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

Vol. 45 • Summer 2026 • No. 3

TABLE OF CONTENTS

Featured Articles:

STATE BAR OF MICHIGAN

1935

STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

Subscription Information

The *Michigan Probate and Estate Planning Journal* is published three times a year by the Probate and Estate Planning Section of the State Bar of Michigan, with the cooperation of the Institute of Continuing Legal Education, and is sent electronically to all members of the Section. Lawyers newly admitted to the State Bar automatically become members of the Section for two years following their date of admission. Members of the State Bar, as well as law school students, may become members of the Section by paying annual dues of $35. Institutions and individuals not eligible to become members of the State Bar may subscribe to the *Journal* by paying an annual $25 subscription. The subscription year begins on October 1 and is not prorated for partial years. Subscription information is available from the State Bar of Michigan, Journal Subscription Service, 306 Townsend Street, Lansing, MI 48933-2012, (517) 372-9030. A limited number of copies of prior issues of the *Journal* are available beginning with Fall 1988, Volume 8, Number 1, for $6 each, plus $2 for postage and handling. Copies of articles from back issues cost $7 per article. Copies of the *Journal* beginning with Fall 1995, Volume 15, Number 1, are available online at https://connect.michbar.org/probate/reports/publications.

Editorial Policy

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

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria and receipt of a properly executed author release form. Author guidelines are available at https://connect.michbar.org/probate/reports/publications. Manuscripts and letters should be sent to Rebecca K. Wrock, Managing Editor, *Michigan Probate and Estate Planning Journal*, Varnum LLP, Ann Arbor, MI, (734) 372-2914 or rkwrock@varnumlaw.com.

Citation Form

Issues through Volume 4, Number 3 may be cited [Vol.] Mich Prob & Tr LJ [Page] [Year]. Subsequent issues may be cited Michigan Prob & Est Plan J, [Issue], at [Page].

Section Web Site

http://www.michbar.org/probate/

Michigan Probate and Estate Planning Journal

Rebecca K. Wrock, Managing Editor
Varnum LLP
101 N Main St, Ste 525
Ann Arbor, MI 48104
(734) 372-2914
Email: rkwrock@varnumlaw.com

Michigan Probate and Estate Planning Journal
Vol. 45 • Summer 2026 • No. 3

TABLE OF CONTENTS

From the Chairperson

By Nathan R. Piwowarski

Chair's Note: Private Planning in an Era of Declining Public Trust

Lawyers in our field spend much of their professional lives building private arrangements. We draft trusts intended to avoid court administration, powers of attorney intended to make guardianship unnecessary, and succession plans intended to move property within families and businesses without public scrutiny. Social scientists sometimes refer to this work as "private ordering."

While private ordering often reflects an aversion to relying upon government, it nonetheless depends upon sustainable, trustworthy public institutions and legal culture. Deed funding a trust is only effective if it can be preserved and recognized inside of a public land records system. A client signing an estate plan this year assumes that signatures, acknowledgments, entity records, and chains of title will remain retrievable and trustworthy decades from now, when no one who participated in the signing is available to vouch for them. Trusts' settlors and beneficiaries can protect their privacy because banks routinely rely on certificates of trust describing an instrument they will never read—a willingness that rests on judicially enforced reliance protections on one hand, and liability for wrongful rejection on the other.

Recent events demonstrate what happens when these assumptions prove inaccurate. In November 2024, the computer systems of my home county, Wexford County, Michigan, were attacked. The Register of Deeds discovered that about ten years of index data was destroyed, and over 3,000 recorded instruments were lost. Within a year, all but 59 documents had been retrieved—including through document requests to law firms, lenders, and title companies that regularly record documents with the Register. During the months the Register was rebuilding its computer systems and chasing down missing instruments, most parties lost the ability to buy, sell, transfer, or borrow against Wexford County real estate. Having a recent title search on file, or storing backup copies of instruments became surprisingly (and disconcertingly) important.[1]

While ransomware attacks a record's availability, deed theft and notary fraud attack records' trustworthiness. Earlier this month, a federal judge in Detroit sentenced an employee of the Wayne County Treasurer's Office and the director of a housing nonprofit for a scheme that diverted about one hundred Detroit properties, with an estimated value of $6.4 million, through bribery, forged quitclaim deeds, fabricated identification, and false notarizations. Their scheme did not operate outside the legal system. It appropriated the system's own badges of legitimacy: deeds regular on their face, notarial certificates, and entries in official county records. The forged documents worked because honest people ordinarily believe those badges of authenticity.[2]

That ordinary belief is what makes our system affordable and efficient. Registers, title insurers, lenders, and courts cannot independently verify every acknowledgment in a chain of title. And they do not have to. But each forged deed and false certificate erodes that arrangement. This in turn prompts institutions to impose more safeguards: more identification requirements, more affidavits and indemnities, longer underwriting, deeper suspicion of powers of attorney and remote execution, more matters pushed into court because parties want the assurance of an order. Fraud taxes every transaction that comes after it. This tax falls hardest on parties who do not have the financial means and sophistication to complete ever-lengthening lists of trust-building requirements.

But even high-sophistication estate planning depends on high-trust public institutions and culture. We are now able to prepare trusts that remain confidential from their beneficiaries, relying on the assumption that there will be effective remedies available after a decades-long nondisclosure period ends. We can establish delicate long-term ownership and governance arrangements in trust, operating, and shareholder agreements that sit only in private-practice attorneys' and accountants' offices—relying on their document retention practices, document security rules, and fidelity to the rules of professional conduct to ensure that these documents remain available long after their creators' retirement or death.

The institutional failures described above were acute. But the chronic malaise is broader: the high-trust culture on which private ordering depends is eroding on several fronts. Using the legal system costs more than it once did, in fees, in delay, and in endurance, and for many families a single contested matter becomes a reason to distrust courts for a generation. Public regard for the system has thinned as well; Gallup measured Americans' confidence in the judicial system at thirty-five percent in 2024, a record low, and twenty-four points below where it stood in 2020.[3] Record systems, public and private, have repeatedly proven vulnerable to fraud and ransomware attacks. And there are the intangibles that I see in my practice and hear about at Section events: atomized families, lack of confidence in lawyer-drafters, and declining inclination to give institutions or family members the benefit of the doubt—all of which translate into more probate litigation.

Probate and estate planning attorneys should simultaneously resist and prepare for this decline in public trust and institutional trustworthiness. Resistance means keeping our own work worthy of the faith others place in it and defending the public systems that make private arrangements durable. Preparation, on the other hand, treats friction, suspicion, service outage, and instrument challenges as foreseeable conditions. These principles can be applied in our clients' plan designs, in our routine daily practice, and in our collective work as a Section.

In plan design. Draft plans that can be verified, reconstructed, and contextualized. A conveyance is not finished when the deed is mailed to the register; it is finished when it has been received, recorded, correctly indexed, and returned, and when the recorded instrument—not just the execution copy—is preserved somewhere durable. Client files should keep the evidence most likely to matter later: proof of identity, observations informing your conclusions regarding capacity and undue influence, confirmation that funding was completed, the reasons for an unusual disposition. Clients should be counseled to consider redundant storage of key instruments (such as documentation that beneficiary designations were accepted by asset custodians), including with their nominated fiduciaries. Plan design should anticipate attacks built on identity theft and instrument forgery, especially when the underlying mechanisms (corporate governing documents and trusts) are private by design. These precautions could be as simple as advising a client to register for deed fraud alerts, or as ornate as subjecting vacant land or an unoccupied home (the two most popular targets of deed fraud) to modest encumbrances that would increase the risk and friction associated with targeting the property and decrease the chance that an attempted fraud occurs without notice to its victims.[4]

In daily practice. Treat the notarization as the consequential legal act that it is: no convenience justifies acknowledging a signature outside the notary's presence, lending a stamp, or completing a certificate on someone's assurance that the named signer signed. Verify consequential or unexpected instructions through a channel already known to your firm: a telephone number on file, not a reply to the email that delivered the instruction. Train staff to escalate the recognizable warning signs, including new contact information, manufactured urgency, and directions arriving only through a relative or caregiver. Guard the firm's own credentials, because letterhead, e-recording accounts, notary stamps, and signature files let a fraudster leverage our credibility. Because unfounded fraud allegations are themselves corrosive to our culture of trust, allege fraud only when clearly grounded in fact. These habits protect our clients and, over time, will help rehabilitate our profession's trustworthiness.

As a Section. The institutions upon which private planning depends often encounter one another only after something has gone wrong. Registers of deeds see defective instruments and notices of *lis pendens*. Title professionals encounter near-misses, as when a criminal refuses to use a trusted remote notary service selected by the title agent. Banks see disputed powers of attorney and trust certificates. Judges observe conflicts that could not be resolved privately. Law enforcement deals with the small subset of cases that can be investigated and prosecuted. Each institution sees only part of the picture, and usually only after harm has been done.

The Probate and Estate Planning Section, by contrast, has the special competence of designing legal arrangements that remain trustworthy, predictable, and legible even decades after they were created. We should offer that expertise at an institutional level. We can help develop improved tools for authenticating instruments, preserving records, responding proportionately to suspicion, correcting errors, and maintaining continuity when ordinary systems fail. Some examples might include:

- Developing practices that make legitimate instruments easier to authenticate without making every transaction an investigation, as Michigan did most recently through the certification procedures of the Uniform Power of Attorney Act.
- Establishing best practices for our members concerning document preservation. While the recently created interim administrator requirements (commonly referred to as "Rule 21")[5] reduce the risk that an estate plan held by a lawyer is lost on account of that lawyer's death, disability, or retirement, they do not ensure that the instruments are preserved in the first instance. These practices will only grow in importance as the public increasingly relies on digitally signed and stored instruments. Whether through statutes, rules, or best practices, we can provide guidance on durable electronic formats, whether and how to preserve metadata and executed originals, identification of authoritative versions of instruments, and responsible custody of instruments intended to operate for decades.
- Building shared protocols for preventing and remedying institutional failures, especially cybersecurity events like the ransomware attack on Wexford County.
- Offering continuing legal education on the design of long-term confidential arrangements like undisclosed trusts.
- Reinforcing informal professional norms encouraging prompt correction of recording and drafting errors, responsible preservation and transfer of client files, candid disclosure of execution problems, and care in ensuring that allegations of fraud or incapacity are well grounded before they are made.

Private ordering will not flourish long if its undergirding public institutions fail. Our collective and individual conduct will help decide whether our institutions receive—and deserve—the trust they need to keep our clients' private arrangements effective across time, incapacity, death, technological change, and disagreement.

Notes

1. *One Year Later: Wexford Co. Reflects on Cyberattack*, Cadillac News (Nov. 2025), https://www.cadillacnews.com/news/one-year-later-wexford-co-reflects-on-cyberattack/article_10d82c72-c97a-482d-be52-4a39f5c7d828.html; Wexford County Register of Deeds, recovery notice, https://wexfordcounty.org/?page_id=488. Recording of new documents resumed in late February 2025; in-person searching resumed April 15, 2025; online search was restored in late July 2025. At the one-year mark the office reported 59 documents still unrecovered, out of more than 3,000 initially missing from the window between August 14 and October 30, 2024. More recently, the nation of Romania suffered a similar ransomware attack on its land title system. *See Hacker Wipes European Country's Entire Land Registry Database, Paralyzing Real-Estate Market*, Cybernews (July 20, 2026), https://cybernews.com/security/hacker-deletes-romanian-land-registry-database/.

2. Press Release, U.S. Attorney's Office, Eastern District of Michigan, *Former Wayne County Treasurer's Office Employee, Local Non-Profit Director Both Sentenced in Connection with Bribery Conspiracy* (July 2026), https://www.justice.gov/usao-edmi/pr/former-wayne-county-treasurers-office-employee-local-non-profit-director-both; *2 Convicted in Wayne Co. Federal Bribery Case Sentenced*, The Detroit News (July 2, 2026), https://www.detroitnews.com/story/news/local/michigan/2026/07/02/2-convicted-wayne-co-federal-bribery-case-sentenced/90782939007/.

3. Gallup, *Americans Pass Judgment on Their Courts* (Dec 17, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx.

4. The Michigan Notary Association maintains a county-by-county list of free deed-fraud-alert services at https://www.michigannotaryassociation.org/deed-fraud-alert/.

5. Rule 21 of the Supreme Court Rules Concerning the State Bar of Michigan (ADM File No. 2020-15). FAQs and resources: https://www.michbar.org/For-Members/Rule-21/.

Planning with Retirement Assets for Blended Families: Can the Surviving Spouse Have Their Cake and the Children Eat It Too?

By Amy Morrissey

Planning for retirement accounts in blended families presents unique challenges. For many clients, retirement accounts, particularly qualified employer plans and IRAs, are among their largest asset class. Because retirement accounts are structured to pass at the account owner's death by beneficiary designation—often outright to individual beneficiaries rather than through trusts—they often operate outside the client's will or revocable trust. This structure is shaped largely by the income tax rules governing distributions from tax-deferred vehicles. In blended families, these rules can create conflicts among competing objectives. Clients must be made aware of obligations under the law to provide a surviving spouse with plan assets; they often must balance the interests of a surviving spouse and children from prior marriage; and they must consider factors such as beneficiary access to, and control of, retirement accounts.

One common issue that arises in planning for blended families is accidental disinheritance of children from a prior marriage. The traditional "everything to spouse, then to children" planning that is the common strategy in first marriages fails most often in blended marriages, especially in the retirement account context in which spouses are "favored" beneficiaries and the default beneficiary in qualified plans. Spouses are considered the most favored beneficiaries of retirement accounts because of rules that allow for spousal rollover of retirement accounts and the use of the "Uniform Lifetime table"[1] to compute required minimum distributions (RMD)[2] under the Internal Revenue Code (IRC). These RMD rules allow for maximum tax deferral and potential tax minimization by a surviving spouse. The spouse-beneficiary is an attractive option.

The core problem in the blended family is the loss of control at the death of the first spouse when the surviving spouse is the outright beneficiary. The surviving spouse may roll over, spend, or redirect assets away from the deceased account owner's children and may leave the remainder of retirement account assets to their own children or a new spouse. Albeit the spouse may remain beneficiary of the deceased account owner's retirement account and not take ownership of the account, yet the surviving spouse may designate beneficiaries other than the deceased account owner's intended beneficiaries to receive the account upon the surviving spouse's death. An account owner's original contingent beneficiary designations generally become moot upon the account owner's death if the primary beneficiary survives, absent plan rules that provide otherwise. Ensuring that a client's objectives are met may require planning with a trust, which will be discussed in this article.

The Employee Retirement Income Security Act of 1974 (ERISA),[3] as amended by the Retirement Equity Act of 1984 (REA)[4] creates automatic safeguards for spouses to ensure that they are not left without financial support after the plan participant passes away.[5] Pension plans must pay vested participants in the form of a Qualified Joint and Survivor Annuity[6] (QJSA), meaning the participant receives a stream of payments, and if they die first, the surviving spouse continues to receive a lifetime annuity.[7] If a vested participant dies before they start receiving retirement benefits, the plan must pay a survivor annuity to the surviving spouse in the form of a Qualified Preretirement Survivor Annuity[8] (QPSA).

A participant cannot waive the QJSA or name someone other than the spouse as beneficiary unless the spouse provides written, notarized consent. While a surviving spouse has these rights to benefit in the deceased spouse's plan, the surviving spouse may consent to waive these rights. Plan administrators will refuse to accept a designation that does not provide the federally mandated minimum benefits in the qualified plan, or in the alternative, that lacks spousal consent. Employer plans ensure that beneficiary designation forms contain a description of spousal rights and data fields for necessary consents.

The spousal rights conferred by ERISA do not extend to individual retirement accounts (IRAs), whether traditional or Roth. While IRA contracts may render the surviving spouse the default beneficiary if the account owner does not affirmatively designate a beneficiary, the account owner may choose to designate individuals or entities other than their spouse as beneficiary of part or all the IRA. One option for qualified plan participants who are separated from service and would like to designate persons other than a spouse as beneficiary without the necessary spousal consent is to transfer ("rollover") the balance of an employer plan to an IRA. However, if a client is actively employed, the rollover is not a present option.

Planning with retirement accounts in blended families became more complicated with the introduction of the Setting Every Community Up for Retirement Enhancement Act of 2019,[9] known as the SECURE Act. The SECURE Act eliminated the stretch IRA for most non-spouse beneficiaries, importantly for adult children of a retirement account owner, replacing it with a ten-year distribution period.[10] Even minor children of the account owner have a limited stretch.[11] A surviving spouse beneficiary is considered an "eligible designated beneficiary" (EDB) enabling the spouse to receive options that were available pre-SECURE Act.[12] And the surviving spouse is provided with enhanced benefits with the introduction of SECURE 2.0 Act of 2022.[13]

Section 327 of SECURE 2.0 "*allow[s] a surviving spouse to elect to be treated as the deceased employee for purposes of the required minimum distribution rules*."[14] Section 327 became effective in 2024 for account owners dying after 2023.[15] Why is Section 327 helpful to a surviving spouse when a surviving spouse may simply roll over the retirement account to an account in the spouse's name? Section 327 is beneficial to a surviving spouse who has not attained age 59½, the age at which withdrawals no longer include a 10% early withdrawal penalty. A surviving spouse who has not attained age 59 ½ and who remains the beneficiary of a deceased spouse's retirement account may take withdrawals without penalty and yet will be treated as the account owner for purposes of the RMD rules. This means that the surviving spouse may delay RMDs until the date on which the deceased spouse would have been required to begin RMDs, may use the Uniform Lifetime table to compute RMDs, and may annually recalculate RMDs using the spouse's life expectancy,[16] further extending deferral when compared with non-spouse beneficiary payout methods.

The implication of Section 327 may be a reduction in the number of spousal rollovers as Section 327 addresses a primary goal of the rollover—the application of the Uniform Lifetime table[17] for computation of RMDs. If spousal rollovers occur with reduced frequency, the implication for blended families is the potential increase in accidental disinheritance of an account owner's intended beneficiaries upon the surviving spouse's death. If the surviving spouse remains the beneficiary of the deceased account owner's inherited account, the proper allocation of assets upon the surviving spouse's death is dependent on the surviving spouse's affirmative designation of the assets. If no such designation is in place, the allocation of assets will default to the plan agreement or IRA contract. In rare circumstances, the remaining account assets will pass to designated contingent beneficiaries of the account owner. More often, the assets pass to the surviving spouse's estate or under a default beneficiary provision in the plan or account agreement, potentially to the surviving spouse's own family members.

Income tax timing drives much of the planning with retirement accounts. If the surviving spouse is the favored beneficiary from an income tax perspective, how can a retirement account owner take advantage of the tax benefits inured from designating a spouse, but maintain some level of control over the disposition of the assets to increase the likelihood that the account owner's other intended beneficiaries, such as the account owner's children from a prior relationship, may also benefit from the same assets? One possibility is a trust.

The critical characteristic of a trust receiving retirement account assets intended to benefit a spouse who is to be treated as an eligible designated beneficiary (EDB) is that the trust must be a conduit trust for and in relation to the surviving spouse. The surviving spouse will be treated as the "sole" beneficiary of the conduit trust, which is what is necessary to achieve EDB status. A significant feature of a conduit trust is that any withdrawals by the trustee must be passed through the trust to the spouse-beneficiary immediately. Therefore, at a minimum, any RMDs will be distributed from the account annually. The disadvantages of a conduit trust in the blended family context are the loss of the ability to accumulate assets in the trust and thus, the loss of asset protection from spouse reallocation as to the amount distributed. While the spouse is the lifetime beneficiary of the conduit trust, naming the conduit trust still requires spousal consent for qualified plan designations per ERISA rules.

While an accumulation trust—one that does not mandate distribution of RMDs and other withdrawals from the retirement account to the spouse—may be utilized, the spouse-beneficiary will *not* be treated as an EDB. Therefore, the abbreviated distribution period will result in income trapped in the trust and taxed at higher tax rates. Yet, the accumulation trust offers protection from redirection, divorce and remarriage, and dissipation and the negative tax ramifications may be a necessary tradeoff.

The account owner-grantor of any trust for a surviving spouse must consider a plethora of other trust structure matters:

- whether additional distributions are permitted from the trust,
- whether the spouse may serve as trustee,
- whether the trustee is constrained by an ascertainable standard or medical or financial hardship requirements in making distributions if the goal is preservation for children of the prior relationship,
- whether the trustee must consider other resources of the spouse,
- whether the trustee has the power to adjust or convert to a unitrust,
- the trustee's authority regarding tax distributions,
- whether the spouse should have a limited power to appoint the assets among certain individuals or entities at death, and
- the spouse's mandate to elect Section 327 treatment if such election is required.

Unless the trust instrument directs otherwise, the trustee has a duty to act impartially among beneficiaries.[18] The trust must contain clear directives as to purposes for which distributions may be made to best address the account owner's goals.

It is challenging to determine if a trust for the surviving spouse's lifetime, whether a conduit or an accumulation trust, will accomplish the account owner's goals. Because the surviving spouse is treated as the sole beneficiary of a conduit trust for purposes of determining designated beneficiary status, the conduit trust must address the Section 327 issue raised earlier in this article. That is, the grantor should describe any intent or expectation that the spouse must elect to use the Uniform Lifetime table, if an election is required by the spouse (if the account owner dies after their required beginning date). Section 327 provides that the surviving spouse, not the trustee, is the proper party to make the election.[19] If the account owner dies before their required beginning date, a surviving spouse may also elect withdrawals under the ten-year rule.[20]

If the trust is a conduit trust, the spouse will receive all the account assets if the spouse survives the account owner for the requisite ten years.

Finally, if retirement accounts are designated at the death of the account owner to a trust for a surviving spouse, the account owner's children will need to wait until the spouse dies to receive an inheritance, if anything of substance remains. This is a perennial problem with any asset class when planning with spousal trusts.

Another planning strategy that may accomplish the account owner's goals of providing for a spouse and children within the same account is a split beneficiary designation. An account owner may allocate their plan or IRA assets among their spouse (outright or conduit trust) and children (also direct or in trust) in specific percentages. Again, ERISA spousal requirements must be considered to ensure either percentage requirements are met or appropriate waivers are in place. With this type of designation, not only is there consideration of all intended beneficiaries, but there is also tax diversification immediately upon the account owner's death. This strategy removes the dependence on a surviving spouse who receives "all" of the retirement account to act in a timely and proper manner to designate new beneficiaries, and it avoids situations in which the surviving spouse is incapacitated and cannot act or dies shortly after the account owner and has failed to act.

Prior to the passage of SECURE 2.0, it was essential that separate shares were created on the beneficiary designation form for each beneficiary to receive separate share treatment.[21] Separate share (or separate account) treatment in a retirement account means that when there are multiple beneficiaries, each beneficiary is treated as having their own distinct, independent share of the account for or calculating distributable net income (DNI) under Sections 661 and 662 and for determining each beneficiary's status as a designated beneficiary or eligible designated beneficiary.[22] It remains important that separate shares are created timely after the account owner's death by dividing the retirement account into multiple inherited IRAs by December 31 of the year following the account owner's death.[23] This is of particular importance for mixed beneficiary classes such as spouses and adult children of the account owner.

The Final Regulations for the SECURE Act provide a new path to establishing separate share treatment when a single trust for multiple beneficiaries is named the beneficiary of the retirement account. If a single trust for multiple beneficiaries is designated as the beneficiary of the retirement account, the Final Regulations allow for separate account treatment in determining RMDs for beneficiaries of a trust if the IRA is "immediately divided upon death" of the account owner, i.e., split into separate inherited IRA accounts by December 31 of the year following the account owner's death.[24] Additionally, to qualify the trust beneficiaries for separate share treatment, there are three requirements: 1) the (administrative) trust must terminate, 2) the separate interests of the trust beneficiaries must be allocated to separate shares (or subtrusts), and 3) there cannot be any discretion in the trustee as to the allocation of account proceeds among the various shares.[25] Except in the context of planning with an Applicable Multi-Beneficiary Trust (AMBT) for disabled or chronically ill individuals,[26] it is important to comply with these requirements if certain trust beneficiaries are eligible designated beneficiaries (such as a surviving spouse) and others are "ordinary" designated beneficiaries (such as adult children of the account owner) in order for each beneficiary's status as a designated beneficiary or eligible designated beneficiary to be determined independently.

An alternative approach to the use of a trust for spouse or a split beneficiary designation to accomplish a client's goals may be to designate the spouse as the beneficiary of the retirement accounts and equalize the spousal interest with life insurance or other non-retirement assets for the children of a prior relationship. This approach may appear simple but introduces valuation risk and may fail if asset classes perform differently over time. Further, faulty asset titling may give rise to elective share issues, and if the account owner becomes incapacitated, there is an added burden on an agent under power of attorney to decide from which accounts to withdraw funds to cover the account owner's long-term care without disrupting the estate plan.

Marital agreements are one method of ensuring that marital expectations for inheritance of retirement accounts are met. However, even marital agreements may be insufficient to accomplish the client's goals due to issues of compliance with terms of the agreement, whether by omission or changes in asset values. Further, waivers of ERISA rights are only sufficient to accomplish the elimination of spousal rights if a spouse executes the necessary consents after the parties are married.[27] Plan administrators are not bound by marital agreements directing assets away from a spouse or by state court judgments awarding qualified plan assets to persons other than a spouse, except in the context of qualified domestic relations order (QDRO) in a divorce matter.[28] ERISA plan benefits pass according to ERISA and the plan documents, not according to conflicting state probate or family-law statutes.[29]

Some practitioners have suggested the use of irrevocable beneficiary designations as a means of addressing marital expectations. From an estate planning perspective, making a retirement account beneficiary designation irrevocable is generally inadvisable. Many retirement beneficiary forms are already inflexible or poorly tailored. If a designation is irrevocable, the account owner cannot correct drafting issues later and may inadvertently fail to provide for contingencies. An irrevocable designation gives the beneficiary a vested interest in the retirement account. With an irrevocable designation in place, it may prove challenging for the account owner to transfer a retirement account between custodians. Changed circumstances such as incapacity, creditor issues, and a change in family structure cannot be addressed when an irrevocable designation is in place, and the ability to respond to future changes in the law are curtailed. The irrevocable designation may reduce the ability to coordinate with other assets in the estate plan as asset values fluctuate. The issues that an irrevocable designation seeks to address are normally solved by naming a trust as beneficiary and retaining revocability until death.

While many married individuals wish to rely on trusting the surviving spouse to "do the right thing" and while many surviving spouses are willing to comply, accidental disinheritance may still occur. As described above, incapacity and untimely death impede such good intentions. Another obstacle is that stepchildren are not recognized as "children" under plan documents. Plan documents can define who is a "child" for purposes of default beneficiary status and often do not include stepchildren unless they are adopted by the account owner. Failure to affirmatively designate the deceased spouse's children from a prior marriage (not adopted by the surviving spouse) will likely result in disinheritance of such children.

It cannot be overstated that particular attention must be given to beneficiary designation forms. The designation itself must adequately plan for contingencies. For one, proper designations allow a surviving spouse to redirect assets to the account owner's children by disclaimer.[30] While active "redirection" is prohibited by Federal and state law,[31] the existence of contingent beneficiaries affirmatively designated by the account owner will result in qualified allocation to the contingent beneficiaries upon a disclaimer by the surviving spouse.[32]

Practitioners must also consider the interplay between beneficiary designations and Michigan's elective share rule. Michigan law allows a surviving spouse to take a statutory portion of the estate regardless of the terms of a will.[33] Retirement account beneficiary designations are nonprobate transfers. They typically do not pass by will; for circumstances in which the account owner fails to affirmatively designate a beneficiary, default rules typically name a surviving spouse and descendants, often in succession, as beneficiaries. It is possible to disinherit a spouse using nonprobate transfers. Unlike states that use an "augmented estate" concept to pull revocable trust assets back into the elective share calculation, Michigan does not have a broad augmented-estate statute. This is why a fully funded revocable trust coupled with direct beneficiary designations have traditionally been considered a viable way to reduce or eliminate a spouse's statutory elective share.

Attempting to disinherit a spouse by naming children as retirement beneficiaries may not fully eliminate spousal claims. As discussed, ERISA requirements must be addressed. Further, statutory allowances for the surviving spouse may still need to be satisfied if non-retirement assets pass through a revocable living trust. Under the Estates and Protected Individuals Code, a surviving spouse is generally entitled to a homestead allowance,[34] a family allowance,[35] and an exempt property allowance.[36] Michigan's law generally makes assets of a revocable trust recoverable after the settlor's death to the extent the probate estate is inadequate to satisfy expenses of administration, funeral and burial expenses, enforceable claims of creditors, and *statutory rights and allowances of the surviving spouse and children*.[37]

Practitioners may consider using a decision tree or checklist when planning for clients in blended families in which retirement accounts are a significant asset class to:

- □ Confirm all beneficiary designations post-marriage.
- □ Evaluate elective share exposure (MCL 700.2202)
- □ Coordinate ERISA spousal consent for employer plans
- □ Determine appropriate structure: Outright vs. trust beneficiary
- □ If a trust is desired, address trust provisions:
  - Conduit trust (for EDB status) vs. accumulation trust (for protection)
  - Duty of impartiality
- □ Consider split-beneficiary or parallel planning strategy
- □ Evaluate disclaimer flexibility
- □ Prioritize competing objectives to determine the appropriate structure:
  1. What level of financial security does the surviving spouse require?
  2. To what extent must assets be preserved for children?
  3. How much control is the client willing to relinquish?
  4. What income tax outcomes are acceptable?

Retirement accounts are uniquely disruptive in blended family planning. Their governing rules—contractual transfers, tax-driven distribution requirements, and limited post-death control—do not align naturally with traditional estate planning structures. The primary risk is not complexity, but misalignment. Absent deliberate coordination, the surviving spouse may receive unintended control, children may be disinherited, beneficiaries may be heavily taxed, and the client's dispositive intent may fail entirely.

Notes

1. Treas. Reg. 1.401(a)(9)-9.
2. IRC 401(a)(9).
3. Codified as 29 USC 1001-1381 and scattered sections of the Internal Revenue Code, including IRC 401(a)(9) (Eff. Sept 2, 1974).
4. Pub L No 98-397, 98 Stat 1426 (1984).
5. 29 USC 1055, 1056.
6. Treas. Reg. 11.401(a)-11.
7. *Id*.
8. IRC 401(a)(11).
9. Pub L No 116–94, 133 Stat 3137 (2019).
10. IRC 401(a)(9)(H)(i), as added by SECURE Act § 401, Pub L No 116-94, Div. O, 133 Stat 3137 (2019.)
11. IRC 401(a)(9)(E)(ii)(II).
12. IRC 401(a)(9)(E)(ii)(I).
13. Division T of the Consolidated Appropriations Act, 2023 (Pub L No 117-328, 136 Stat 4459 (2022)).
14. Senate Report No. 117-142, at 114 (2022), En-

hancing American Retirement Now Act (EARN Act)

15. IRC 401(a)(9)(B)(iv).
16. Prop. Treas. Reg. 1.401(a)(9)-5(d)(3)(iv) (issued July 19, 2024, REG-103529-23).
17. Treas. Reg. 1.401(a)(9)-9.
18. MCL 700.1212, 700.1507, 700.7801, 700.7802(1), 700.7803.
19. IRC 401(a)(9)(B)(iv).
20. Treas. Reg. 1.401(a)(9)-3.
21. IRC 663(c).
22. *Id*.
23. Treas. Reg. 1.401(a)(9)-8(a).
24. *Id*.
25. Treas. Reg. 1.663(c)-3.
26. IRC 401(a)(9)(H)(iv); Prop. Treas. Reg. 1.401(a)(9)-4(f)(5).
27. 26 USC 417(a)(2).
28. 29 USC 1056(d)(3)(A).
29. *Egelhoff v Egelhoff*, 532 US 141 (2001).
30. MCL 700.2902; IRC 2518.
31. *Id*.
32. IRC 2518.
33. MCL 700.2201 *et seq*.
34. MCL 700.2402.
35. MCL 700.2403.
36. MCL 700.2404.
37. MCL 700.7605 (emphasis added).

Amy Morrissey is an attorney with the Mitzel Law Group PLC. She concentrates her practice in trust and estate planning and administration, with a focus on planning for retirement benefits. Amy has also served as a mediator in trust and estate matters. Amy is a Fellow of the American College of Trust and Estate Counsel and a past Chair of the Probate and Estate Planning Section of the State Bar of Michigan, of which she continues as a member. She has also chaired the Washtenaw County Bar Association Estate Planning, Probate, and Trust Law Section and the Washtenaw Estate Planning Council, and served on the Advisory Board for the Institute of Continuing Legal Education (ICLE). Amy has been involved in legislative drafting efforts in Michigan and has worked on committees to improve the practice of law for her fellow attorneys and enhance client outcomes. Her legal work continues to be recognized among her peers and leading legal publications, including being named a Super Lawyer in Michigan since 2009. A frequent lecturer and author for ICLE, Amy has spoken on many estate planning and administration topics, including estate planning for retirement benefits, a dynamic area of the law. Amy is active in her community, particularly her faith community at St. Thomas the Apostle Catholic Church in Ann Arbor. She has served on the Advisory Board for the Housing Bureau for Seniors and the Charitable Giving Committee for the Washtenaw Community College Foundation.

The Delaware Tax Trap as a Basis Planning Tool: Formula Exercises of Special Powers of Appointment Under Michigan Law

By Julius S. Moss

The Delaware Tax Trap has traditionally been viewed as a transfer-tax hazard to be avoided. However, in the current estate tax environment the rule may provide a valuable basis-planning opportunity. Internal Revenue Code 2041(a)(3) causes property subject to certain powers of appointment to be included in the gross estate of a powerholder when the power is exercised in a manner that creates another power of appointment capable of postponing vesting or suspending absolute ownership beyond the perpetuities period applicable to the original power. Although such estate inclusion historically represented an undesirable tax result, it may now be advantageous where a powerholder possesses unused federal estate tax exclusion and the inclusion of the value of the trust assets in the powerholder's estate produces a corresponding adjustment in income tax basis under Internal Revenue Code 1014.

This article examines the historical origins of the Delaware Tax Trap and its modern application as a basis-planning technique. Particular attention is given to the use of formula provisions that limit the exercise of a special power of appointment to the maximum amount that may be included in the powerholder's gross estate without generating federal or state estate tax liability. This article reviews the federal tax framework governing powers of appointment, analyzes Michigan's statutory treatment of powers of appointment and its statutory opt-out from the anti-Delaware-tax-trap rule, and evaluates practical drafting considerations associated with formula exercises designed to maximize basis adjustment while minimizing transfer-tax cost. A case study illustrates circumstances in which the technique may be appropriate, and a sample codicil provision is included as an appendix.

Introduction

For decades, estate planning focused primarily on removing assets from a client's taxable estate. In 1986, the federal estate tax unified credit sheltered only $500,000 from estate tax.[1] Although that amount increased to $600,000 in 1987, it remained unchanged for more than a decade.[2] Although the exclusion later rose gradually, estate planners spent much of the past forty years working in an environment where many moderately wealthy families faced potential federal estate tax exposure. As a result, irrevocable trusts, family limited partnerships, valuation discount strategies, and other transfer-tax planning techniques were routinely used to keep future appreciation out of a beneficiary's gross estate.

Today's estate planning landscape is very different. Beginning with the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Congress introduced portability, allowing a surviving spouse to use a deceased spouse's unused exclusion amount.[3] Although originally enacted as a temporary provision applicable to decedents dying after December 31, 2010, portability was made permanent by the American Taxpayer Relief Act of 2012.[4] The Tax Cuts and Jobs Act of 2017 temporarily doubled the basic exclusion amount, leading practitioners to prepare for its scheduled sunset at the end of 2025 and the resulting reduction in the exemption.[5] Instead, Congress enacted the One Big Beautiful Bill Act of 2025, establishing a permanent federal estate, gift, and generation-skipping transfer tax exemption of $15 million per individual, indexed for inflation beginning in 2027.[6] As a result, a married couple may shield more than $30 million from federal estate taxation through the combined use of the exclusion amount and portability.[7]

Although the current exemption regime has significantly reduced, and in many cases eliminated, federal estate tax exposure for many families, it has also brought a different concern into sharper focus. Historically, irrevocable trusts were frequently established to remove appreciating assets from the transfer-tax base while federal estate tax exemptions were comparatively modest. Those trusts often achieved their transfer-tax goals, but their income tax consequences may be less favorable. Assets held in irrevocable trusts that are not included in a decedent's gross estate retain their historical income tax basis and, absent a basis adjustment under IRC 1014, may generate substantial capital gains tax upon sale.[8] Modern estate planning therefore increasingly requires practitioners to balance traditional transfer-tax minimization against opportunities to obtain a basis adjustment under IRC 1014.[9]

At the same time, the history of the federal transfer tax demonstrates that exemption amounts, tax rates, and other fundamental features of the transfer-tax system may change significantly over time. The anticipated sunset of the Tax Cuts and Jobs Act, followed by enactment of the One Big Beautiful Bill Act, illustrates how rapidly the planning landscape can shift.[10] Estate planners must evaluate techniques under current law while preserving flexibility for future tax regimes. Strategies that permit post-mortem adjustments based on the law and facts existing at a beneficiary's death may be especially valuable when future exemption amounts and tax policy remain uncertain.

One technique receiving increased attention is the so-called "Delaware Tax Trap."[11] Historically, practitioners viewed the Delaware Tax Trap mainly as a drafting hazard arising from certain exercises of powers of appointment.[12] Under IRC 2041(a)(3), however, the exercise of a power of appointment in a manner that creates another power of appointment capable of extending the applicable perpetuities period beyond that measured from the creation of the original power may cause the appointed property to be included in the powerholder's gross estate.[13] Although estate inclusion was traditionally considered undesirable, it may be beneficial when the powerholder has enough unused federal estate tax exclusion to absorb the included property without estate tax liability. Because the value of property included in a decedent's gross estate generally receives a corresponding income tax basis adjustment under IRC 1014, the Delaware Tax Trap may convert what was historically viewed as an adverse estate tax consequence into a meaningful basis-planning opportunity.[14]

Despite growing interest in this technique, one practical question remains: how much property should be subjected to estate inclusion? A complete exercise of a special power of appointment may be appropriate in some circumstances, but in others it may unnecessarily consume available transfer-tax exclusion or even produce federal estate tax liability. Conversely, an exercise over too little property may fail to achieve the full basis-planning opportunity presented by IRC 1014. This article examines how a formula exercise of a special power of appointment may address that practical challenge by calibrating estate inclusion to the tax law and factual circumstances existing at the powerholder's death.

History and Development of the Delaware Tax Trap

The Delaware Tax Trap has its origins in the common-law relation back doctrine governing powers of appointment, which generally treated the exercise of a power of appointment as relating back to the creation of the original power rather than constituting a new transfer by the powerholder.[15] Under that doctrine, the validity of interests created through the exercise of a power of appointment ordinarily was measured from the date the original power was created.[16] Courts and legislatures nevertheless recognized that certain successive exercises of powers of appointment could effectively circumvent that principle by creating a new perpetuities period, thereby frustrating the purposes of the Rule Against Perpetuities.[17]

To prevent this result, Congress enacted the statutory predecessors to IRC 2041(a)(3) and 2514(d).[18] Those provisions generally impose federal estate or gift tax consequences when the exercise or release of a power of appointment creates another power that, under applicable local law, may postpone the vesting of an interest in property or suspend the absolute ownership or power of alienation of the appointive property beyond the perpetuities period measured from the creation of the original power.[19] Congress thereby treated the creation of such a successive power as the exercise of sufficient dominion and control to justify federal transfer tax consequences.[20]

This distinction is significant because property subject to a general power of appointment is includible in the powerholder's gross estate under IRC 2041(a)(2).[21] By contrast, the value of property subject only to a special (or nongeneral) power of appointment ordinarily is not includible absent another provision of IRC 2041.[22] Accordingly, the planning strategy discussed in this article arises not from the existence of a general power of appointment, but from the intentional exercise of a special power of appointment in a manner that satisfies the requirements of IRC 2041(a)(3).[23]

For decades, estate planners generally viewed IRC 2041(a)(3) as a trap for the unwary.[24] An inadvertent exercise of a power of appointment satisfying the statutory requirements could unexpectedly cause estate inclusion and the imposition of federal transfer taxes. Consequently, many states, including Michigan, enacted legislation specifically designed to prevent the inadvertent application of the rule, and practitioners routinely drafted powers of appointment to avoid triggering its provisions.[25] As discussed below, however, the dramatic expansion of the federal transfer-tax exclusion has fundamentally altered that perspective, transforming what was once viewed as a drafting hazard into a potentially valuable basis-planning technique.

The Delaware Tax Trap as a Basis Planning Tool

The modern basis-planning appeal of the Delaware Tax Trap is straightforward: if a powerholder can intentionally cause appointive property to be included in his or her gross estate under IRC 2041(a)(3), and if that inclusion does not generate federal estate tax, the included property receives a basis adjustment under IRC 1014 without an adverse federal estate tax result.[26] The difficulty is not identifying the potential benefit. The difficulty is determining how much appointive property should be subjected to estate inclusion.

That determination generally cannot be made with precision when the exercise instrument is prepared. The powerholder's remaining applicable exclusion amount, the value of the powerholder's own taxable estate, the value and basis of the appointive property, the availability of portability, and the applicable federal or state transfer-tax regime may all change before death. A complete exercise of the power may be appropriate in some circumstances, but it may also cause more property than necessary to be included in the powerholder's gross estate. Conversely, an exercise over a fixed dollar amount or fixed fractional share may fail to fully utilize the available basis-planning opportunity.

As a result, the more difficult drafting question is not whether the Delaware Tax Trap can be used to obtain a basis adjustment, but how the exercise should be structured to calibrate estate inclusion to the powerholder's circumstances at death. A formula exercise of a special power of appointment provides one potential solution by allowing the amount of appointive property included in the powerholder's gross estate to be determined by reference to the tax law and factual circumstances existing at the powerholder's death, rather than by reference to values or assumptions fixed when the exercise instrument is executed.

Formula Exercises as a Flexible Planning Technique

The intentional exercise of a special power of appointment to trigger the Delaware Tax Trap need not always be accomplished through a formula provision. In some circumstances, a complete exercise of the power over all appointive property may best accomplish the client's planning objectives. In other situations, however, uncertainty regarding the value of the appointive property, the powerholder's taxable estate, available deductions, portability, or the applicable exclusion amount at death may make a formula exercise a more appropriate alternative. Rather than requiring the powerholder to predict future values or future tax law, a properly drafted formula exercise permits the amount of property subjected to estate inclusion to be determined based upon the facts and tax law existing at the powerholder's death.

Formula provisions have long been a staple of sophisticated estate planning.[27] Practitioners routinely employ formula clauses to implement marital deduction planning, fund credit shelter trusts, maximize charitable deductions, and allocate generation-skipping transfer tax exemption.[28] A formula exercise of a special power of appointment simply applies the same drafting philosophy in a different context. Instead of determining how estate assets are allocated among trusts or beneficiaries, the formula determines the portion of the appointive property that should be included in the powerholder's gross estate under IRC 2041(a)(3).

The established use of formula clauses in other estate-planning contexts does not, however, mean that such provisions are immune from challenge. In *Wandry v. Commissioner*, the Tax Court respected a defined-value gift of limited liability company interests notwithstanding a subsequent determination that the interests had a value greater than that initially reported by the taxpayers.[29] The Internal Revenue Service did not appeal the decision but subsequently issued an Action on Decision expressly declining to acquiesce in the result.[30] Although *Wandry* arose in the gift-tax context and involved a materially different formula provision, the decision and the Internal Revenue Service's subsequent nonacquiescence counsel against assuming that a formula provision will necessarily produce its intended federal tax consequences merely by virtue of its form.[31] Rather, careful attention should be given both to the operative terms of the formula and to its implementation and administration. Those considerations are particularly relevant to the formula exercise discussed here, which depends upon the valuation of the appointive property and the determination and funding of the appointed portion following the powerholder's death.

Although the precise terms of a formula exercise will necessarily vary depending upon the governing instrument and the client's planning objectives, the underlying drafting philosophy should remain consistent. Rather than attempting to predict future asset values, future tax law, or the powerholder's financial circumstances, the exercise should be drafted to adapt to the facts and law that exist at the powerholder's death. In many respects, a formula exercise of a special power of appointment represents the application of well-established formula drafting principles to the unique context of IRC 2041(a)(3).

First, the formula should define the appointed portion by reference to the desired tax result rather than by reference to a fixed dollar amount or fractional share. A fixed-dollar exercise may underutilize the available exclusion if asset values appreciate, while an exercise over all appointive property may inadvertently cause estate inclusion in excess of the amount necessary to accomplish the intended basis-planning objective. By defining the appointed portion as the largest amount that may be included in the powerholder's gross estate without generating federal estate tax liability, the exercise automatically adjusts to the applicable exclusion amount, the value of the powerholder's estate, and the value of the appointive property as finally determined at death. This approach preserves the central objective of the planning strategy by maximizing the available income tax benefit without creating an otherwise avoidable transfer tax liability.

Second, the formula should account for all relevant transfer-tax considerations rather than focusing exclusively on the federal estate tax. Although Michigan presently imposes no separate estate tax, the powerholder may later become domiciled in a jurisdiction that does, or the Michigan transfer-tax regime may change before the powerholder's death.[32] Accordingly, the exercise should be drafted broadly enough to consider applicable federal and state estate taxes, available deductions, credits, portability, and any elections that affect the ultimate transfer-tax calculation. Likewise, because these determinations frequently depend upon values that are not finally established until completion of the estate tax administration process, the appointed portion should be determined by reference to values as finally determined for transfer-tax purposes, including adjustments that result from audit or other final determination.

Finally, the exercise should distinguish between the amount of property to be included in the powerholder's gross estate and the particular assets comprising that amount. The formula determines the value of the appointed portion. A separate provision may authorize the fiduciary to determine which assets will satisfy that amount. Granting the fiduciary discretion to allocate assets on a non-pro rata basis permits the appointed portion to be funded with assets that have the greatest unrealized appreciation or other favorable income tax characteristics, thereby maximizing the aggregate basis adjustment potentially available under IRC 1014 without increasing the value of the property included in the gross estate. At the same time, the exercise should make clear that the fiduciary's discretion is limited to the selection and allocation of assets and does not alter the value of the appointed portion as determined under the formula itself.

Taken together, these drafting principles provide flexibility at multiple levels. The formula adapts to the tax law and the powerholder's circumstances at death; the valuation provisions accommodate subsequent adjustments made during estate administration; and the fiduciary's funding authority allows the basis-planning objective to be achieved using the assets that produce the greatest potential income tax benefit.

Although the use of formula clauses is well established throughout estate planning, the author has identified no published authority specifically addressing the use of a formula exercise of a special power of appointment to intentionally trigger IRC 2041(a)(3) while limiting estate inclusion to the powerholder's remaining available transfer-tax exclusion. The author is also unaware of any published Internal Revenue Service guidance, including private letter rulings, revenue rulings, or other administrative pronouncements, or any reported judicial decisions that directly analyze this planning technique. Accordingly, the discussion that follows is intended to illustrate the application of established legal principles governing powers of appointment, formula drafting, and estate inclusion under IRC 2041(a)(3). It is not intended to suggest that the specific drafting approach discussed herein has been expressly approved or rejected by the Internal Revenue Service or the courts.

Assume that the powerholder is the current beneficiary of an irrevocable trust holding assets with a fair market value of $15 million and an aggregate income tax basis of $4 million. Under the terms of the trust, the powerholder holds a presently exercisable special power of appointment that may be exercised in a manner sufficient to satisfy the requirements of IRC 2041(a)(3).[33] At the powerholder's death, the powerholder's probate and nonprobate assets, exclusive of the trust property, have a combined value of $5 million. After taking into account all allowable deductions, credits, portability, elections, and the applicable federal and state transfer tax regimes, the powerholder may safely include an additional $10 million in their gross estate without generating any federal or state estate tax liability.

If the powerholder elects not to exercise the special power of appointment, the trust assets remain outside of the powerholder's gross estate. While this result preserves the original transfer-tax structure, the trust assets retain their historical income tax basis of $4 million. Assuming the trust assets are sold shortly after the powerholder's death for their then fair market value of $15 million, the trust or its beneficiaries would recognize approximately $11 million of long-term capital gain. Assuming a combined federal long-term capital gains and net investment income tax rate of 23.8%, the resulting federal income tax liability would approximate $2.62 million, exclusive of any applicable state income taxes.

Conversely, if the powerholder exercises the special power of appointment over the entirety of the appointive property in a manner sufficient to trigger IRC 2041(a)(3), all $15 million of trust assets become includible in the powerholder's gross estate.[34] Assuming only $10 million of remaining applicable exclusion is available, the inclusion of the additional $5 million would generate approximately $2 million of federal estate tax. Although the entire trust would receive a basis adjustment, the incremental income tax benefit attributable to the additional $5 million of estate inclusion would arguably not justify the corresponding transfer tax cost.

A properly drafted formula-based exercise of the power produces a more balanced result. Rather than exercising the power over all appointive property, the powerholder exercises the special power only with respect to that portion of the trust having a value equal to the largest amount that may be included in the powerholder's gross estate without generating federal or state estate tax liability. Under these facts, the formula limits the exercise to $10 million of trust property, while the remaining $5 million passes under the governing instrument as property that is not subject to the exercise of the power.

Assume further that the fiduciary exercises the authority granted under the exercise instrument to satisfy the appointed portion with the trust assets having the greatest unrealized appreciation. The trust consists of an $8 million closely held business having a basis of $500,000, investment real estate holdings valued at $4 million having a basis of $750,000, and marketable securities valued at $3 million having a basis of $2.75 million. By allocating the closely held business and $2 million of the real estate to the appointed portion, approximately $8.75 million of unrealized appreciation receives a basis adjustment. Assuming an immediate sale and a 23.8% federal capital gains tax rate, the resulting basis adjustment eliminates approximately $2.08 million of potential federal capital gains tax liability, while avoiding any federal or state estate tax. A pro rata allocation of trust assets would produce a substantially smaller basis adjustment and correspondingly smaller income tax savings.

This example illustrates that the principal benefit of the formula-based exercise of the special power lies not merely in limiting the amount of estate inclusion, but in coordinating the amount included with the fiduciary's ability to select the assets that produce the greatest unrealized appreciation. The formula determines the maximum value that may be included without transfer tax, while the fiduciary's funding discretion determines how that value can be used to maximize the available income tax benefit.

Implementing a Formula Exercise Under Michigan Law

The planning concepts discussed above are driven principally by federal transfer-tax law. Their implementation also requires careful consideration of the governing state's law that relates to powers of appointment and perpetuities. As discussed in Section II, IRC 2041(a)(3) expressly conditions estate tax inclusion upon whether the newly created power of appointment "under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power."[35] Therefore, estate planners must analyze both the federal tax consequences of the exercise and the governing state's law to determine whether the intended result can be achieved.

Michigan's Powers of Appointment Act of 1967, MCL 556.111 et seq., provides the statutory framework governing the creation, exercise, release, and interpretation of powers of appointment.[36] The Act recognizes the distinction between general and special powers of appointment and generally gives effect to the donor's intent as expressed in the instrument that creates the power.[37] As with any exercise of a power of appointment, the estate planner must first determine that the governing instrument authorizes the contemplated exercise and that the exercise otherwise complies with the requirements imposed by the enabling instrument and applicable Michigan law.

Particular attention should be given to Michigan's treatment of the Delaware Tax Trap. Unlike many jurisdictions that rely solely upon common-law perpetuities principles, Michigan has enacted a statutory rule that specifically addresses the extension of trust duration through the exercise of powers of appointment.[38] MCL 554.92(1) provides that the permissible period applicable to a trust is not extended merely because a power of appointment is exercised in further trust or because the exercise creates another power of appointment.[39] In practical terms, the statute is intended to prevent the inadvertent extension of the applicable perpetuities period that would otherwise trigger the federal estate inclusion provisions of IRC 2041(a)(3).[40]

Importantly, MCL 554.92(2) permits the statutory limitation to be waived in the instrument that exercises the first power of appointment.[41] Specifically, the statute provides that subsection (1) "does not apply" where "the instrument exercising the first power … expressly declares that subsection (1) does not apply" or, in the case of a nonfiduciary power, "otherwise clearly indicates that the donee of the first power intends to spring the so-called Delaware tax trap."[42] This language is particularly noteworthy because the Michigan Legislature expressly acknowledges the Delaware Tax Trap by name and provides a statutory mechanism through which a powerholder may intentionally preserve the possibility of triggering IRC 2041(a)(3) estate inclusion.[43]

Once the exercise instrument has been drafted to expressly invoke the exception provided by MCL 554.92(2), the estate planner may then determine whether it is appropriate to incorporate the flexible drafting principles discussed in the preceding section. Depending upon the client's dispositive and tax-planning objectives, the exercise may include: (i) a formula that limits the amount of appointive property included in the powerholder's gross estate (ii) provisions that direct that the formula be determined using values as finally established for federal and state transfer-tax purposes; (iii) authority for the fiduciary to satisfy the appointed portion using selected trust assets rather than a pro rata allocation; and (iv) other tax-sensitive provisions that address generation-skipping transfer tax allocation, valuation adjustments, and related administrative matters. Although each of these provisions serves a distinct purpose, collectively they create an exercise of the special power capable of adapting to the tax law and the powerholder's circumstances that exist at death while implementing the intended basis-planning strategy.

Appendix A contains one example of a testamentary instrument that implements the principles discussed in this article. The sample form is intended solely as an illustrative drafting aid and should not be viewed as a universal solution. The appropriate exercise of a special power of appointment will necessarily depend upon the governing instrument, the powerholder's dispositive objectives, the applicable state law, and the federal and state transfer-tax environment existing at the powerholder's death. Nevertheless, the principles reflected in the sample form demonstrate one method by which an estate planner may implement the planning strategy described in this article by intentionally triggering the Delaware Tax Trap while limiting the amount of appointive property that is included in the powerholder's gross estate to achieve the desired basis-planning objective.

Conclusion

The Delaware Tax Trap is no longer merely a drafting hazard to be avoided. In the appropriate circumstances, it may serve as an effective basis-planning technique when implemented through a carefully drafted exercise of a special power of appointment. By combining a formula provision that limits the amount of property included in the powerholder's gross estate with appropriate drafting provisions addressing valuation, fiduciary asset selection, and Michigan's statutory framework, practitioners may maximize the available basis adjustment under IRC 1014 while avoiding unnecessary transfer-tax liability. Although each exercise must be tailored to the governing instrument, the client's objectives, and the applicable tax environment, the principles and illustrative form accompanying this article provide one framework for implementing this planning strategy in practice.

Notes

1. Tax Foundation, *Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916–2014* (updated 2024) (Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916-2014).
2. *Id*.
3. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3302–05 (2010) (codified as amended at IRC 2010(c)).
4. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303(a), 124 Stat. 3296, 3302–05 (2010).
5. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11061, 131 Stat. 2054, 2091–94 (2017) (amending IRC 2010(c)(3) to temporarily double the basic exclusion amount).
6. One Big Beautiful Bill Act, Pub. L. No. 119-21, § 70106 (2025) (amending IRC 2010(c), 2505(a), and 2631(c)).
7. *Id*.
8. IRC 1014; Rev. Rul. 2023-2, 2023-16 I.R.B. 664.
9. Richard W. Nenno, *Getting a Stepped-Up Income-Tax Basis and More by Springing—or Not Springing—the Delaware Tax Trap the Old-Fashioned Wa*y, 40 Tax Mgmt Ests, Gifts & Tr J 215 (2015).
10. Evan D. Feder, *The Sun Will Not Set: The One Big Beautiful Bill*, Farrell Fritz (July 9, 2025), https://www.farrellfritz.com/insights/tax-tracker/the-sun-will-not-set-the-one-big-beautiful-bill/ (last visited June 26, 2026).
11. George F. Bearup, J.D., *The Delaware Tax Trap*, Greenleaf Trust (Jan. 28, 2026), https://greenleaftrust.com/missives/the-delaware-tax-trap/ (last visited June 26, 2026).
12. Nenno, supra note 9, at 215–16.
13. IRC 2041(a)(3); 26 CFR (“Treas. Reg.”) 20.2041-3(e).
14. IRC 1014; Treas. Reg. 1.1014-1; Nenno, supra note 9, at 215–18.
15. Nenno, supra note 9, at 215–18.
16. *Id*.
17. *Id*.
18. *Id*.
19. IRC 2041(a)(3), 2514(d); Treas. Reg. 20.2041-3(e), 25.2514-3(d).
20. *Id*.
21. IRC 2041(a)(2), (3); Treas. Reg. 20.2041-1(b)(1), (c), 20.2041-3(e).
22. *Id*.
23. *Id*.
24. Bearup, *supra* note 11.
25. James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 Real Prop Tr & Est LJ 673, 676–79 (2009).
26. IRC 1014, 2041(a)(3); Treas. Reg. 1.1014-1, 20.2041-3(e).
27. Barbara A. Sloan, *Variations on Traditional Marital/Credit Shelter Funding Techniques after EGTRRA*, in 38th Annual Heckerling Institute on Estate Planning, ch. 9 (2004).
28. *Id*.
29. *Wandry v Commissioner*, TC Memo 2012-88, at 20.
30. *Wandry v Commissioner*, TC Memo 2012-88; IRS Action on Decision 2012-04, 2012-46 I.R.B. 543 (Nov. 13, 2012), nonacq.
31. *Id*.
32. *See* H.B. 4237, House Fiscal Agency Analysis (Mich 2021).
33. *See* IRC 1014, 2041(a)(3); Treas. Reg. 1.1014-1, 20.2041-3(e).
34. *Id*.
35. IRC 2041(a)(3); Treas. Reg. 20.2041-3(e).
36. MCL 556.111 et seq.
37. MCL 556.114, 556.115, 556.122, 556.123.
38. MCL 554.92(1).
39. *Id*.
40. Spica, *supra* note 23, at 678–80.
41. MCL 554.92(2).
42. *Id*.
43. *Id*.

Julius S. Moss is a shareholder and director at Bowerman, Ford, Clulo & Luyt, P.C., in Traverse City, Michigan. His practice focuses on estate planning, including advising individuals and families on wealth transfer and succession planning, as well as counseling business organizations and business owners on a variety of legal matters. He serves on the Board of Directors of the Grand Traverse Area Estate Planning Council and was selected to the 2026 Michigan Super Lawyers Rising Stars list.

APPENDIX A

Illustrative Formula Exercise of a Special Power of Appointment Intended to Trigger IRC § 2041(a)(3)

FIRST CODICIL TO LAST WILL AND TESTAMENT
OF [TESTATOR NAME]

Introductory Clause. I, [TESTATOR NAME], do hereby make, publish and declare this to be my First Codicil to my Last Will and Testament, dated __________.

FIRST

Addition of a New Article. I hereby amend my Last Will and Testament, dated ___________, by adding a new article [Article #], which shall read as follows:

[Article #]: Exercise of Power of Appointment. I hereby exercise, to the extent herein provided, the power of appointment granted to me under Section ___ of Article ___ of the [POWER GRANTING TRUST NAME] TRUST, dated_______, (the "***Trust***"). For purposes of this exercise, the term "***Appointive Property***" shall mean all property subject to such power of appointment at my death, consisting of the remaining assets of the Trust then subject to such power, including any additions thereto and any undistributed income, as finally determined in accordance with the terms of the Trust.

1. Formula Exercise of Power of Appointment. I appoint that portion of the Appointive Property (the "***Appointed Portion***"), determined as of the date of my death and as finally determined for federal estate tax purposes, equal in value to the largest amount which can be included in my gross estate without resulting in any federal or applicable state estate tax liability by reason of my death, after taking into account my applicable exclusion amount under Internal Revenue Code §2010 (including any deceased spousal unused exclusion amount available to my estate), the value of all property includible in my gross estate for federal estate tax purposes other than the Appointive Property, and all allowable deductions, credits, and elections available to my estate. It is my intent that the Appointed Portion shall be includible in my gross estate for federal estate tax purposes, including pursuant to Internal Revenue Code §2041(a)(3), but that the amount so included shall not exceed the amount that can pass free of federal estate tax. The Appointed Portion shall be determined based on values as finally determined for federal estate tax purposes, including any adjustments on audit, and the amount of the Appointed Portion shall be adjusted, and assets reallocated, as necessary to conform to such final determinations and to carry out the intent of this provision. Notwithstanding the foregoing, this power of appointment shall not be exercised to the extent it would result in any federal or state estate tax liability, and any purported exercise in excess of the amount permitted under this Section shall be void ab initio, with such excess property passing as if not appointed.

2. Selection and Allocation of Assets. My Personal Representative shall have sole and absolute discretion, to the extent permitted by applicable law, to determine which assets or fractional interests comprising the Appointive Property shall be allocated to satisfy the Appointed Portion described in Section 1, and to allocate values among such assets for that purpose. In exercising such discretion, my Personal Representative may select assets in a non-pro rata manner and may disproportionately allocate assets with unrealized appreciation or other favorable income tax characteristics to the Appointed Portion, with the objective of maximizing the aggregate adjustment in income tax basis under Internal Revenue Code §1014. All determinations made by my Personal Representative in good faith shall be final, binding, and conclusive on all persons, and no fiduciary shall have any duty to diversify, equalize, or make pro rata allocations among beneficiaries with respect to the selection or valuation of assets used to satisfy the Appointed Portion. Notwithstanding the foregoing, such discretion shall apply solely to the selection and allocation of assets used to fund the Appointed Portion and shall not affect the determination of the value of the Appointed Portion, which shall be governed exclusively by Section 1.

3. Creation of Separate Trust Shares. The Appointed Portion shall be divided, as of my death, into separate equal shares so as to provide one share for each then-living child of mine and one share for each deceased child of mine who leaves issue then living, such issue to take, per stirpes, the share their parent would have taken if living. Each such share shall be held as a separate trust (each, an "***Appointed Trust***") and shall be administered and distributed in accordance with the provisions set forth herein. For purposes of administration, each Appointed Trust shall have one or more current beneficiaries (each, a "***Primary Beneficiary***"), consisting of (i) a child of mine who is living at my death, or (ii) in the case of a deceased child, such deceased child's then-living issue, per stirpes. The interests created pursuant to this Section are intended to constitute newly created beneficial interests arising from the exercise of the power of appointment described above, and not a continuation of interests under the instrument creating such power.

4. General Powers of Appointment; Intentional Triggering of IRC §2041(a)(3).

a. Grant of General Power of Appointment. With respect to each Appointed Trust created pursuant to Section 3, each Primary Beneficiary of such trust shall hold, immediately upon my death, a presently exercisable general power of appointment, exercisable during such beneficiary's lifetime or at death, to appoint all or any portion of the principal and undistributed income of such trust to or for the benefit of such beneficiary, such beneficiary's estate, the creditors of such beneficiary, or the creditors of such beneficiary's estate, in such manner and proportions as such beneficiary may appoint by written instrument delivered to the Trustee during such beneficiary's lifetime or by such beneficiary's Last Will, codicil, or other testamentary instrument specifically referring to this power of appointment.

b. Exercise by Person under Legal Disability. If a Primary Beneficiary is under a legal disability, such power of appointment may be exercised on behalf of such beneficiary only by a duly appointed conservator, guardian, or other fiduciary authorized to act with respect to the beneficiary's financial affairs under applicable law. For purposes of this instrument, a person shall be considered under a "legal disability" if such person is a minor or is otherwise legally incapable of managing his or her financial affairs or property interests under applicable law.

c. Intent to Create Powers Described in IRC §2041(a)(3). It is my specific intent that the exercise of the special power of appointment herein subjects the Appointed Portion to, and creates, one or more additional powers of appointment (including the presently exercisable general powers described herein) within the meaning of Internal Revenue Code §2041 and MCL 554.92, and that such powers may be validly exercised so as to postpone vesting or suspend absolute ownership of the property subject thereto beyond the period that was permissible under the instrument creating the original power of appointment, such that the Appointed Portion shall be treated as subject to a power described in Internal Revenue Code §2041(a)(3). Accordingly, notwithstanding any provision of the instrument creating the original power of appointment, each Appointed Trust shall be subject to a new period governing vesting and the permissible duration of interests therein, measured from my death, to the maximum extent permitted by applicable law, and the powers granted to each Primary Beneficiary herein may be exercised in a manner that extends or postpones the period for vesting of any interests in such trust.

d. Michigan Statutory Opt-Out (MCL 554.92). Pursuant to MCL 554.92(2), I expressly declare that MCL 554.92(1), also known as the "anti-Delaware-tax-trap provision" of the Michigan Personal Property Trust Perpetuities Act, shall not apply to any future interest created by the exercise of the power of appointment herein or by the exercise of any power of appointment created hereby, and it is my intent that this instrument clearly indicate my intention to "spring" the Delaware tax trap within the meaning of MCL 554.92(2). This Section shall be interpreted and administered in a manner that effectuates the inclusion of the Appointed Portion in my gross estate for federal estate tax purposes under Internal Revenue Code §2041(a)(3).

5. Administration of Trust.

a. Income. The Trustee shall pay to or apply for the benefit of the Primary Beneficiary so much or all of the net income of such beneficiary's Appointed Trust, in convenient installments, as the Trustee deems advisable.

b. Discretionary Invasion of Principal. The Trustee may pay to or apply for the benefit of the Primary Beneficiary such amounts of principal of such beneficiary's Appointed Trust as the Trustee, in its sole discretion, deems necessary or desirable from time to time for the Primary Beneficiary's health, education, support, and maintenance in reasonable comfort, taking into consideration, to the extent the Trustee deems advisable, any other income or resources of the Primary Beneficiary known to the Trustee.

c. Exercise of Power; Default of Appointment. Upon the death of a Primary Beneficiary, the remaining principal and undistributed income of such beneficiary's Appointed Trust shall be distributed to or for the benefit of such person or persons, in such manner and proportions, as such Primary Beneficiary may appoint by a valid exercise of the general power of appointment described in Section 4. In default of an effective exercise

Appendix A-3

of such power, the remaining property of such Appointed Trust shall be administered and distributed in accordance with Section 6.

6. Default Trusts for Descendants Trusts. To the extent any property of an Appointed Trust is not effectively appointed pursuant to Section 5(c), such property shall be distributed to or held for the benefit of the then-living issue of the deceased Primary Beneficiary, per stirpes, and each share allocated to such issue shall be held as a separate trust (each, a "***Descendant's Trust***") and administered as follows:

a. Income/Discretionary Invasion of Principal. The Trustee shall pay to or apply for the benefit of the beneficiary so much or all of the net income of such beneficiary's Descendant's Trust, in convenient installments, as the Trustee deems advisable. In addition to income, the Trustee may pay to or apply for the benefit of the beneficiary such amounts of principal of such beneficiary's Descendant's Trust as the Trustee, in its sole discretion, deems necessary or desirable from time to time for the beneficiary's health, education, support, and maintenance in reasonable comfort, taking into consideration, to the extent the Trustee deems advisable, any other income or resources of the beneficiary known to the Trustee.

b. Distribution of Principal to Grandchild. Subject to subsection (a), the Trustee shall distribute the principal of each Descendant's Trust to the beneficiary as follows: one-third (1/3) of the principal upon the beneficiary attaining age thirty (30), one-half (1/2) of the remaining principal upon attaining age thirty-five (35), and the balance upon attaining age forty (40); *provided, however*, that the Trustee may, in its discretion, delay any such distribution for a period not exceeding five (5) years if the Trustee determines, based on reasonably foreseeable circumstances, that such delay is in the best interests of the beneficiary. Notwithstanding the foregoing, the Trustee may accelerate distributions of principal at any time, in whole or in part, if the Trustee determines such distribution is advisable.

c. Distribution upon Death. Upon the death of a beneficiary prior to the complete distribution of such beneficiary's Descendant's Trust, the remaining principal and undistributed income shall be distributed to such beneficiary's then-living issue, per stirpes, or in default thereof, to my then-living issue, per stirpes.

7. Trustees of Trust Created Hereunder. Each trust created pursuant to this instrument shall constitute a separate trust and shall be administered by a Trustee. The Trustee of each such trust, and the provisions governing the appointment, removal, resignation, and succession of Trustees, shall be determined in accordance with the provisions of the [TESTATOR TRUST NAME] TRUST established under that certain Trust Agreement dated ________________, as in effect at my death, which provisions are hereby incorporated by reference as if fully set forth herein; *provided, however*, that such incorporation shall apply solely to fiduciary provisions relating to Trustees and shall not incorporate any dispositive provisions of such trust. To the extent necessary to give effect to the foregoing, references in such incorporated provisions to the trust under such Trust Agreement shall be deemed to refer to the trusts created hereunder.

Appendix A-4

8. Generation-Skipping Transfer Tax Allocation and Planning. My Personal Representative shall have the authority, as permitted by applicable law, to allocate my available generation-skipping transfer tax exemption, within the meaning of Internal Revenue Code §2631, to all or any portion of the Appointed Portion, or to refrain from making such allocation, in such manner as my Personal Representative determines advisable. In exercising such authority, my Personal Representative may make such allocations on a non-pro rata basis and may allocate exemption differently among trusts, shares, or specific assets or interests therein. In making such determinations, my Personal Representative may take into account the relative benefits of income tax basis adjustment under Internal Revenue Code §1014, estate tax inclusion, and generation-skipping transfer tax planning, including the potential for future appreciation of particular assets, differences in tax basis, and the overall tax efficiency of my estate plan. My Personal Representative may allocate generation-skipping transfer tax exemption to some assets or trusts and not to others, and may create or preserve differences in inclusion ratios among trusts or shares. It is my intent that my Personal Representative be afforded maximum flexibility to coordinate estate tax inclusion and generation-skipping transfer tax planning in a manner that is most advantageous under the circumstances existing at my death, and no allocation (or failure to allocate) shall be required to equalize or achieve uniform tax results among beneficiaries. All determinations made by my Personal Representative in good faith shall be final, binding, and conclusive on all persons.

SECOND

Ratification of Will as Amended. I hereby ratify and reaffirm my Last Will and Testament as herein modified, amended and supplemented by this First Codicil as if such Last Will and Testament were set out here in full and do incorporate it by this reference thereto, and do hereby ratify and declare my Last Will and Testament as amended, modified and supplemented as my Last Will and Testament.

Testimonium Clause. I, [TESTATOR NAME], the Testator, sign my name to this document on ___________, 2026. I certify under penalty for perjury under the law of the state of Michigan that the statements in this document are true; that this document is my Codicil; that I sign it willingly or willingly direct another to sign for me; that I execute it as my voluntary act for the purposes expressed in this Codicil; and that I am eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

____
[TESTATOR NAME]

We, _______________ and ________________, the witnesses, sign our names to this document, and we certify under penalty for perjury under the law of the state of Michigan that all of the following statements are true: the individual signing this document as the Testator executes the document as [his/her] Codicil, signs it willingly or willingly directs another to sign for [him/her], and executes it as [his/her] voluntary act for the purposes expressed in this Codicil; each of us, in the Testator's presence, signs this Codicil as witness to the Testator's signing; and, to the best of our knowledge, the Testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

Appendix A-5

Witness

Witness

Appendix A-6

Case Summaries

By Sandra D. Glazier

Packaging Corporation of America Thrift Plan for Hourly Employees v Langdon;[1] Federal Law Controls the Disposition of ERISA Plan Benefits Following Divorce[2]

While many states have statutorily addressed what happens when a former spouse remains the named beneficiary of a deceased participant spouse's retirement benefits, federal law will control when the plan at issue falls within the confines of the Employee Retirement Income Security Act of 1974 ("ERISA").

The US Supreme Court determined in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*,[3] that ERISA

> obligates administrators to manage ERISA plans "in accordance with the documents and instruments governing" them, …; requires covered pension benefit plans to "provide that benefits … may not be assigned or alienated,"…; and exempts from this bar qualified domestic relations orders (QDROs), …[4]

The Supreme Court also recognized that a Plan may permit a beneficiary to

> submit a "qualified disclaimer" of benefits as defined under the Tax Code, which has the effect of switching the beneficiary to an "alternate . . . determined according to a valid beneficiary designation made by the deceased."[5]

It may be important to remember that any attempt to disclaim cannot attempt to direct where the disclaimed interest will go.[6] As a result, it is important that a named beneficiary understand the express provisions of the plan as to where disclaimed interest will go should a qualified disclaimer be presented to the plan administrator.

It is against the backdrop of Kennedy that one might analyze the result in *Packaging Corporation of America Thrift Plan for Hourly Employees v. Langdon, et al* ("*PCA*"). In *Kennedy* the Supreme Court held that

> ERISA requires "[e]very employee benefit plan [to] be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), "specify[ing] the basis on which payments are made to and from the plan,". The plan administrator is obliged to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]," and ERISA provides no exemption from this duty when it comes time to pay benefits. On the contrary, § 1132(a)(1)(B) (which the Estate happens to invoke against DuPont here) reinforces the directive, with its provision that a participant or beneficiary may bring a cause of action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." The Estate's claim therefore stands or falls by "the terms of the plan," a straightforward rule of hewing to the directives of the plan documents that lets employers "'establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits.'" (ERISA's statutory scheme "is built around reliance on the face of written plan documents"). The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: "simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." And the cost of less certain rules would be too plain. Plan administrators would be forced "to examine a multitude of external documents that might purport to affect the dispensation of benefits," and be drawn into litigation like this over the meaning and enforceability of purported

waivers. The Estate's suggestion that a plan administrator could resolve these sorts of disputes through interpleader actions merely restates the problem with the Estate's position: it would destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court.[7]

Importantly, the Supreme Court reiterated its holding from *Egelhoff v Egelhoff,*[8] where the Court had held that ERISA preempts state law and creates a bright line requirement that the plan administrator follow the plan's documents in distributing benefits. As a result, state laws that may govern the disposition of retirement benefits following the participant's divorce will not modify the plan's administrator's obligation to distribute ERISA plan benefits strictly in accordance with the provisions of the plan.

In *PCA,*[9] the Court alluded to the fact that Wisconsin law, following a divorce, would eliminate the non-participant former spouse's interest in the Plan. While Wisconsin is a community property state, in Michigan, MCL 552.101 (1) and (2) provide, in pertinent part, that

> [e]ach judgment of divorce or judgment of separate maintenance shall determine all rights of the [non-participant spouse] in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the [participant spouse] in which the [non-participant spouse] was named or designated as beneficiary, or to which the [non-participant spouse] became entitled by assignment or change of beneficiary during the marriage or in anticipation of marriage. If the judgment of divorce or judgment of separate maintenance does not determine the rights of the [non-participant spouse in and to a policy of life insurance, endowment, or annuity, the policy shall be payable to the estate of the [participant spouse] or to the named beneficiary if the [participant spouse] so designates. The company issuing the policy is discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice, by or on behalf of the insured or the estate of the insured, 1 of the heirs of the insured, or any other person having an interest in the policy, of a claim under the policy and the divorce.[10]

It is not uncommon for a judgment of divorce or separation (and/or a qualified or eligible domestic relations order ("QDRO" or "EDRO") entered as a result of that judgment), to define the rights of the non-participant and/or participant spouse following divorce. The judgment, settlement agreement and/or related order(s) may include language that reflects a waiver by the non-participant spouse of any right to the participant's plan benefits, whether as a beneficiary or otherwise to the extent not specifically assigned to him or her under the judgment or order. Such language might reflect something akin to the following:

> Pension, Annuity and Retirement Benefits. Except as otherwise specified in the Settlement Agreement (which is incorporated herein in this Judgment), each of the parties shall receive their respective interests in any pension, annuity, retirement benefit, accumulated contributions in pensions, annuity or retirement system, and individual retirement accounts, free and clear of any right, claim, title or interest of the other party may have heretofore had or may now have therein by virtue of being the beneficiary, contingent or otherwise.
>
> The parties agree that if, due to omission or commission by either party, or disability of either party prior to implementation and satisfaction of the entire terms of the Judgment or incorporated Settlement Agreement, the other party does not receive an asset or other benefit that he or she was intended to receive under the terms of the Judgment or Agreement, the person or entity that receives or holds that asset or benefit shall do so in a constructive trust for the benefit of the party who was the intended recipient of that asset or benefit under this Judgment or Agreement. This clause shall be binding on the party's respective estates, heirs, beneficiaries and assigns.

The question raised in *PCA* is whether state law, or waiver language contained in a judgment or settlement agreement, will be sufficient to eliminate a former spouse's interest as a designated beneficiary of an ERISA plan when the participant fails to submit a change of beneficiary form. According to the Seventh Circuit, the holding reached in *PCA*,[11] appears to indicate "no."

Facts:

Carl Kleinfeldt ("Kleinfeldt") participated in PCA's Hourly Employee Retirement Plan (the "Plan"). The Plan was an ERISA plan, and its documents indicated that:

> "You should keep your beneficiary designation and your beneficiary's address up to date. *To do so, contact the PCA Benefits Center*…or you can update your beneficiaries on line."
>
> In the absence of a valid beneficiary or if the designated party predeceases the participant, the Plan disburses the proceeds to the participant's spouse or estate, in that order. If a beneficiary survives the participant but dies before receiving distribution, the proceeds accrue to the beneficiary's estate.[12]

Kleinfeldt had designated his wife, Dená Langdon ("Langdon"), as his beneficiary under the Plan following their marriage in 2006. The parties divorced on September 21, 2022. Coincident with their divorce a QDRO was entered which allocated a portion of Kleinfeldt's Plan benefits to Langdon. The plan administrator segregated Langdon's share from Kleinfeldt's, and distributed the same to Langdon.

On October 4, 2022, Kleinfeldt attempted to remove Langdon as the primary beneficiary of his share of the Plan benefits. He directed his secretary to send a fax to the PCA Benefits Center and requested that the Plan "'remove [his] former spouse'" from his 'health, vision[,] and dental insurance and as beneficiary from [his] 401k, pension[,] and life insurance accounts.'"[13] The fax also asked that the Plan provide Kleinfeldt with any forms that may be required to effectuate his intention to eliminate Langdon as a beneficiary.

Kleinfeldt died on January 16, 2023.

The Plan did not provide its administrator with discretion over "legal questions under the Plan,"[14] nor did the Plan ever attempt to make a determination of whether Kleinfeldt had substantially complied with the terms of the plan when he faxed a request to the PCA Benefits Center to remove Langdon as his beneficiary.

Even though Wisconsin law revoked any interest Langdon may have had in Kleinfeldt's share of the Plan following entry of the Judgment of Divorce, the Plan initially contacted Langdon and informed her she was entitled to receive Kleinfeldt's share of the Plan following his death as his designated beneficiary. However, then Kleinfeldt's estate inquired into the account and submitted a Claim Initiation Form seeking distribution of Kleinfeldt's share of the Plan benefits. PCA denied the claim. The Estate appealed arguing that the October 4 fax removed Langdon as the primary beneficiary. In the meantime, Langdon submitted her own claim form requesting distribution of the benefits to her. PCA initiated an interpleader action and litigation over the rightful owner of the benefits ensued. The trial court determined that Scholz (who was named as the contingent beneficiary of Kleinfeldt's Plan benefits was a necessary party to the proceedings, and added her as a party to the proceedings). The trial court ruled in favor of Scholz's estate[15] because she had survived Kleinfeldt and was named the contingent beneficiary of his Plan benefits based upon Kleinfeldt's substantial compliance with the procedure required to remove Langdon as beneficiary. Langdon appealed.

Analysis:

While there are cases that have held that substantial compliance was sufficient to result in a change in beneficiary under ERISA, here the appellate court held Kleinfeldt's fax did not constitute substantial compliance despite the fax having been sent to the PCA Benefits Center. In the cases cited in the *PCA* opinion, when substantial compliance was found to exist, each of the participants had actually submitted a change of beneficiary form as required under the terms of the plan, but those forms contained either an error or some deficiency in the preparation of the form or the participant complied with the instructions provided by the plan administrator but the administrator made a mistake in the instructions provided.

While there are also cases that have recognized that a former spouse can waive rights to a plan, the existence of such a waiver does not obligate an ERISA plan administrator to act in accordance with such a waiver if it does not comport with the provisions of the plan. ERISA's focus is, instead, on "simple administration, avoiding double liability [for plan administrators], and ensuring that beneficiaries get what's coming quickly, without folderol essential under less-certain rules."[16] There is, however, an exemption when a state's "slayer statute" applies. This may be because if the "slayer statute" applies, the beneficiary is deemed to have predeceased the participant. Slayer statutes represent a recognized exception to ERISA's pay-the-designated beneficiary rule.

In *PCA*, the appellate court acknowledged that the fax sent to the Benefits Center unequivocally evidenced Kleinfeldt's intention to remove Langdon and change his beneficiary designation. However, the appellate court found that the Plan did not permit a participant to change their beneficiary designation merely by sending a fax containing a request that a change be made; moreover, his request for the forms necessary to effectuate the change reflected Kleinfeldt's understanding that something more was required and he did nothing more to effectuate the change.

Comment:

While a participant's estate or contingent (designated or default) beneficiary may have a cause of action that seeks imposition of a constructive trust against a former spouse who received ERISA benefits despite waiver provisions provided by state law or in a Judgment, Settlement Agreement or prenuptial agreement, if resolution of the claim does not occur within nine months from the date of the participant's death or the benefits are deposited with the court in an interpleader action, adverse income tax consequences may result. The ability to obtain stretch benefit payouts may be lost. This could be of particular consequence if the default or contingent beneficiary is a minor child of the participant or a disabled or chronically disabled eligible designated beneficiary. Generally, the plan beneficiary needs to be determined (and the benefits transferred to the beneficiary or a trust share or account for their benefit) within a specified period, generally by September 30 of the year following the participant's date of death. As a consequence, if this does not timely occur (or interpleader occurs), the former spouse who remained named as the designated beneficiary (or a current spouse who waived the right to receive benefits under a prenuptial agreement) may incur income tax consequences associated with those benefits (even if they are later determined not to be entitled to the same) because they were named or considered the beneficiary under the plan as of the participant's date of death and they did not exercise a qualified disclaimer of the interest within nine months of the participant's date of death.[17]

Whether the court will leave the tax consequences with the former spouse when fashioning a remedy under a constructive trust theory, or reduce the amount to be paid as damages to the intended beneficiary, might be a risk that a former spouse might wish to avoid. A qualified disclaimer by the designated former spouse beneficiary might protect that former spouse from unintended income tax consequences.

When a participant is married at the time of his or her death, ERISA (and the plan) will likely mandate that benefits be paid to a surviving spouse. A waiver in a prenuptial agreement will not impact an ERISA plan administrator's obligation to pay the benefits to the surviving spouse. After the parties wed, it will be important that the spouse execute a spousal waiver and that the same be provided to the plan administrator prior to the participant's death. The failure to do so, may result in the same consequences discussed above when a change of beneficiary is not effectuated following the participant's death.

The importance of participants reviewing and addressing their designated beneficiaries on ERISA plans cannot be overstated. When a former spouse remains the designated beneficiary of such plan benefits following a divorce (or when a waiver was contained in a prenuptial or antenuptial agreement but no qualified waiver was executed following the date the parties wed), it may be important for that spouse to review their options with an attorney and qualified tax advisor so that a qualified disclaimer might be effectuated within the nine-month window following the participant's death and for the designated beneficiary to understand who will be entitled to receive the benefits under the plan following a qualified disclaimer.

In re Estate of Jerome E. Sizick;[18] Protective Orders May Help to Avoid Impoverishment of a Community Spouse and Qualify an Institutionalized Spouse for Medicaid Benefits[19]

Michigan's Supreme Court recently noted that "Medicaid assists over 2.6 million Michiganders, including 168,000 seniors and three in five nursing home residents."[20]

> Established in 1965, Medicaid is a joint federal and state program through which the federal government reimburses states for a portion of the cost of medical care for low-income individuals who are aged, blind, disabled, or in a family with dependent children. "Each participating State develops a plan containing reasonable standards … for determining eligibility for and the extent of medical assistance." … "State Medicaid plans must comply with requirements imposed both by [Title XIX of the Social Security Act] . . . and by the Secretary of Health and Human Services [HHS]." These state plans must meet the federal minimum-standard threshold for eligibility but can be more expansive at the state's discretion.
>
> ***
>
> "Because spouses typically possess assets and income jointly and bear financial responsibility for each other, Medicaid eligibility determinations for married applicants have resisted simple solutions. Under the original Medicaid rules, married couples had to either spend down their assets or legally divorce to access the program's benefits. Congress added spousal protection from impoverishment to the Medicaid program in the Medicare Catastrophic Coverage Act of 1988 (MCCA). The MCCA protections address the Medicaid program's treatment of certain institutionalized spouses' income and resources, allowing a community spouse to keep a portion of the institutionalized spouse's income instead of having to apply it to care costs. …However, the MCCA authorizes courts to grant relief from the standard community spouse allowance by providing that if a court has entered an order against the institutionalized spouse for monthly income for the support of the community spouse, the community spouse allowance determined by the state agency or an administrative hearing process must not be less than the amount of monthly income ordered by the court.[21]

In *In re Est. of Sizick,*[22] the Michigan Supreme Court addressed whether and to what extent a probate court could issue a protective order pursuant to MCL 700.5401(3) that might avoid the impoverishment of a community spouse while also permitting an institutionalized spouse to qualify for Medicaid. The core issue was whether a probate court could consider whether Medicaid benefits would be available to a protected individual before a determination of eligibility for such benefits has been made. The Michigan Supreme Court held it could.

Facts:

Janet and Jerome Sizick were married for more than 60 years. During their marriage Jerome had been employed at General Motors as an hourly employee. Janet had been a stay-at-home mom. At age 82, Jerome was hospitalized and thereafter discharged to a nursing home. In May 2021, his health care insurance was terminated and he was then required to privately pay for his care.

On May 28, 2021, before Jerome applied for Medicaid, Janet petitioned the probate court for a protective order under MCL 700.5401(3). She alleged that, as a result of dementia, Jerome was unable to manage his property and business affairs effectively, she was dependent upon him for her support and care, and a protective order which would transfer his property and income to her was necessary for her support. At a hearing held in June 2021, Janet testified that Jerome's monthly income was comprised of $1,748.50 from Social Security (of which $148.50 was deducted to cover his Part B Medicare premium) and $1,351.29 from a General Motors pension. She also identified her own income stream, her estimated monthly expenses, and estimated calculations of Jerome's patient-pay amount should he qualify for Medicaid coverage.

The probate court found that clear and convincing evidence established that Jerome was unable to manage his property and business affairs effectively due to physical illness and mental deficiency, and that Janet was his dependent who was in need of money for her support and care, and that a protective order was therefore necessary and appropriate. It entered an order awarding Janet all of Jerome's assets (as support) and ordered him to pay her $2,318 per month as additional support. The Michigan Department of Health and Human Services (DHHS) appealed. Jerome's application for Medicaid was denied on the basis that his countable assets exceeded resource limits, and he appealed that administrative decision.

Following a remand from the Michigan Court of Appeals and an additional evidentiary hearing, the probate court again granted the same relief, retroactive to the date of its original opinion. DHHS again appealed and the appellate court again affirmed in part, vacated in part, and remanded the matter for further proceedings. In the intervening period, Jerome and Janet died. At his death, Jerome owed the nursing home facility $125,231.

Ultimately, Jerome's estate sought leave to appeal to Michigan's Supreme Court, which was granted.

Analysis:

MCL 700.5401 provides that

> 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.[23]

If both factors set forth in MCL 700.5401 are established by clear and convincing evidence, then, "the probate court may enter a protective order directing the transfer of assets or payment of support as long as 'the transaction is in the protected individual's best interests.' MCL 700.5408(2)."[24]

Prior Michigan appellate cases appeared to indicate that consideration of Medicaid and patient pay amounts before the submission of a Medicaid application was problematic and prohibited after a Medicaid eligibility determination had been made.[25] Therefore, in holding that the probate court could properly consider whether Medicaid benefits would likely be made available to a protected individual prior to an eligibility determination when issuing a protective order under MCL 700.5401(3), the Michigan Supreme Court overturned the decision *In re Estate of Norbert,*[26] which had held that the probate court could not consider Medicaid related circumstances in determining whether to grant a protective order and support for a community spouse when the institutionalized spouse was not then receiving such benefits and was awaiting an eligibility determination. In doing so, the Michigan Supreme Court found that the restrictions imposed by the court in *Norbert* were not supported by the language of the applicable statute or Michigan's Bridge's Eligibility Manual (BEM) which contains governing policies that cover the methodology for calculating the standard community spouse allowance and provides for a judicial mechanism for relief from the default amount.[27]

The Michigan Supreme Court held that the probate court must carefully consider both spouse's respective interests and needs. It explained that

> "a finding that money is needed for a spouse entitled to support from the protected individual requires consideration of the requesting spouse's needs and resources as well as the protected individual's needs and circumstances." While we acknowledge that *Vansach* involved an institutionalized spouse who had already received a Medicaid-eligibility determination, we do not think that this question turns on whether DHHS has acted on a party's Medicaid application. Rather, the proper analysis under MCL 700.5401(3)(b) requires consideration of each individual's foreseeable support needs, including whether they are—or will be—eligible for Medicaid benefits.[28]

The Court went on to find that:

> [g]iven the existence of a clearly defined methodology for accurately determining whether an individual will be eligible for Medicaid, *see generally* BEM 400, the requirement that such a determination already be made in order for the probate court to consider it is arbitrary. By restricting the probate court's analysis to "the [Medicaid-related] circumstances as they actually exist" when a protective order is requested, *[Norbert*], 335 Mich App at 123, *[Norbert]* undermines the MCCA's protections against impoverishment for community spouses. *See Wisconsin Dep't of Health & Family Servs*, 534 US at 480 (explaining that the MCCA was enacted "to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance"). Specifically, *[Norbert]* only allows courts to consider Medicaid-related circumstances if the institutionalized spouse's nonexempt assets are already diminished to the point that the institutionalized spouse is under the eligibility threshold for Medicaid. Therefore, the MCCA's judicial mechanism allowing assets transferred via court order to be excluded from an institutionalized spouse's eligibility determination is effectively nullified. *See* BEM 402; 42 USC 1396r-5(d)(5).
>
> We are not persuaded by DHHS's contention that overturning *[Norbert]* will allow anyone, regardless of income, to obtain a protective order of spousal support and force taxpayers to pay for nursing-home care through Medicaid. The approach articulated in *Vansach* requires the probate court, in assessing MCL 700.5401(3)(b), to evaluate both spouses' ongoing support needs and consider each of their relative financial circumstances, including whether the community spouse has sufficient assets and income to support themselves. *Vansach*, 324 Mich App at 395-396. A finding of need is foreclosed if the community spouse seeks support only to maintain a certain standard of living. *See id*. at 397-398 ("[E]ven with the enactment of the spousal-impoverishment provisions, Medicaid provides no guarantee that a community spouse will enjoy the same standard of living—even if reasonable rather than lavish by some lights—that he or she

> enjoyed before the institutionalized spouse entered a nursing home.") (quotation marks and citation omitted). The availability of Medicaid benefits is only one of many considerations that are relevant under MCL 700.5401(3)(b), which also requires consideration of the couple's assets, their interests in those assets, and their respective incomes.
>
> Because *[Norbert]* was wrongly decided, we overrule it. We further hold that the correct analysis under MCL 700.5401(3)(b) requires consideration of both spouses' ongoing and foreseeable support needs, see *Vansach*, 324 Mich App at 395-396, including whether Medicaid benefits will be available to the institutionalized spouse under DHHS's clearly defined eligibility parameters.[29]

Comment:

Given the restrictive limits imposed for Medicaid qualification, when one spouse resides in a nursing home and the other remains at home with the potential for impoverishment, counsel may wish to consider whether seeking a protective order that includes an award of assets and/or a monthly stipend as means of support might be merited.

While different states have different rules, it may be important to note that MCL 700.5401 was patterned after UPC §5-401, and many states have provisions within their probate codes that permit the issuance of a protective order without the requirement for appointment of a conservator.

In re Robert W. Ashcraft Trust;[30] Award of Attorney Fees in Trust Disputes Is an Exception to the American Rule[31]

Michigan generally follows what is commonly referred to as the "American Rule" when it comes to awarding attorney fees. Therefore, in order to obtain an award of attorney fees one must fall within one of the exceptions to the "American Rule" such as those specifically provided for by statute, court rule, as a result of acts of bad faith or pursuant to the terms of an applicable instrument. Essentially, the "American Rule" provides that each party to a lawsuit is responsible for payment of their own legal fees regardless of who wins. This is in contrast to the "English Rule" that generally requires the loser to pay the reasonable attorney fees incurred by the winning party.

While Michigan's common law provided an exception to the "American Rule" when a beneficiary might request that the court award him attorney fees to the extent it is established that the efforts enhanced, preserved or protected trust property,[32] since MCL 700.7904 codified this common law exception the issue had only been addressed in unpublished opinions until now.

Recently, the Michigan Court of Appeals issued a published opinion in *In re Robert W. Ashcraft Trust*[33] addressing the issue.

Facts:

Initially Susan Nazem ("Susan") and William Ashcraft ("Bill") were the Co-Trustees of the Robert W. Ashcraft Trust (the "Trust"). The Trust provided the beneficiaries with the power to remove a trustee with or without cause by majority vote. Susan was removed as a Co-Trustee by a vote of the majority of the Trust's beneficiaries in November 2021. Following a petition by Susan to challenge her removal, that removal was confirmed by the probate court on January 12, 2022. It may be noteworthy that while the ability to remove Susan by majority vote with or without cause was provided for by the terms of the Trust, that vote was precipitated by Robert Ashcraft and Bill's discovery that Susan had failed to pay the property taxes for certain Trust property (the "cottage").

When the cottage was sold in May 2022, the proceeds were deposited into a Trust account. In August 2022 a proposed Plan of Distribution (the "Plan") was circulated to the beneficiaries. The Plan proposed that Susan's share be reduced by the sum of $35,137.50 (of which $3,937.50 pertaining to fees related to the defense of Susan's initial petition challenging her removal as a Co-Trustee and $31,200 represented what was alleged to be the fair market rent for Susan and her daughter's use of the cottage over a period of 39 months). Susan filed a petition with the probate court challenging the Plan. Prior to dissemination of the Plan, Bill had not provided written or oral notice of an intent to charge Susan's share with rent or attorney fees.

After discovery, the court conducted an evidentiary hearing and found that Susan had breached her fiduciary duties by using the cottage (and permitting her daughter to use it) without payment of rent to the Trust for a period of 55 days. The court then ordered that Susan be surcharged for two months rent in the amount of $1,600, in addition to $812.50 in dispossession fees, and $3,937.50 for attorney fees incurred in defending against Susan's original petition challenging her removal as a Co-Trustee of the Trust. As a consequence, the court ordered that Susan's share be reduced by the sum of $6,350 (as opposed to the $35,137.50 sought in the challenged Plan).

On May 29, 2024 and again on July 29, 2024, Susan filed additional petitions seeking payment of her attorney fees and costs under MCL 700.7904(1). She claimed that her fees should be paid by the Trust because her previous petitions protected the Trust from her "brothers' 'unclean hands' and that equity demands her attorney fees be paid if her brothers' attorney fees were also being paid by the Trust."[34] The court denied her request.

Susan appealed.

Analysis:

In 2010, the Michigan Legislature enacted MCL 700.7904(1). It provided in pertinent part that

> In a proceeding involving the administration of a trust, the court, as justice and equity require, may award costs and expenses, including reasonable attorney fees, to any party who enhances, preserves, or protects trust property, to be paid from the trust that is the subject of the proceeding.[35]

Michigan's Estates and Protected Individuals Code (EPIC) also provides that attorneys fees may be assessed as a remedy when a breach of trust is found to have occurred.[36]

When a probate court awards attorney fees, an appeal of such an award is subject to review under an abuse of discretion standard.[37]

In *In re Robert W. Ashcraft Trust,*[38] the court looked to published cases that predated enactment of EPIC, as well as unpublished cases that followed enactment of MCL 700.7904(1) in analyzing whether the petitions filed by Susan sufficiently benefited the estate to extent that the denial of her request for payment of fees by the Trust might be deemed reversible error.

In the prior case of *Becht v. Miller,*[39] the fiduciary had maliciously hidden assets and beneficiaries objected to her final accounting when it allegedly omitted $40,000 in bonds and the court found that she was indebted to the estate in the sum of $30,000. In that instance, the Michigan Supreme Court found the challenge by the beneficiaries benefited the entire trust and the beneficiaries' fees could be paid from trust property because they were necessary to avoid fraud, laches or negligence. However, that court went on to opine that

> [a] doctrine which permits a decedent's estate to be so charged, should, however, in our opinion, be applied with caution and its operation limited to those cases in which the services performed have not only been distinctly beneficial to the estate, but became necessary either by reason of laches, negligence, or fraud of the legal representative of the estate.[40]

Another case, *In re Temple Marital Trust,*[41] related to a petition to partition property which was later held to be invalid. In that matter, the petitioner alleged its fees should be paid from the trust's property because they were incurred to uphold the grantor's original intent. The appellate court disagreed finding that the litigation only benefited the petitioner's share of trust property.

Even when fees might be awarded because they benefited the trust estate as a whole, the court is not mandated to do so. In the unpublished opinion of *In re Edward and Elaine Jaye Trust*[42] the court held that "MCL 700.7904(1) does not require an award of attorney fees and expenses from trust property whenever a party 'enhances, preserves, or protects trust property.'"[43] "Instead, MCL 700.7904(1) simply authorizes a probate court to exercise its discretion when doing so may be appropriate 'as justice and equity require.'"[44]

As a consequence, the court in *In re Robert W. Ashcraft Trust*[45] found that

> When interpreting MCL 700.7904(1) by its plain language, it is clear that the Legislature's intent was to provide an exception to the "American Rule" of attorney fees in cases of trust administration. The plain language of the statute includes the word "may," which places the decision to award attorney fees in the discretion of the court. The word "may" is permissive. As the standard of review for such a decision is an abuse of discretion, violating the statute would necessarily be an abuse of the trial court's discretion.
>
> In *Becht*, the efforts of the petitioner and her attorney uncovered nearly $40,000 of trust property in the form of war bonds, which had been improperly hidden by the executrix of the estate. The Michigan Supreme Court determined that this was a distinctly beneficial effect to the entirety of the estate, and the Court limited its decision to award costs and fees to conduct positively affecting the entire estate rather than one interested individual, or a limited group of individuals. *Becht* clearly provides that courts must be careful in charging a decedent's estate and should only do so in cases when a distinct benefit has been provided to the whole trust, such as avoiding "laches, negligence, or fraud."
>
> This case is distinguishable from *Becht*, because appellant failed to show that her actions benefited "the entire estate." [Susan] argues that she illuminated improper conduct by the Ashcraft brothers and preserved Trust property from undue depletion, thus benefiting the Trust. The trial court disagreed and found on the record that [Susan's] actions did not meet the threshold of MCL 700.7904(1) for enhancing, preserving, or protecting Trust property when it denied her petition for attorney fees. The trial court further opined that "it's not a classic case where your efforts found property that was not in the Trust and was brought back into the Trust or you found some misappropriation of some other action that was taken by the Trustee, that enhanced or preserved the entire property."
>
> [Susan] further contends that she is entitled to attorney fees because she enforced the settlor's original intent of equal distribution, but this alone is insufficient to establish that she actually enhanced, preserved, or protected Trust property. In *Temple*, the petitioner similarly argued that he was entitled to attorney fees because his litigation held the respondents to the original terms of the trust. This Court, citing *Becht*, ruled that the petitioner had not shown that he enhanced or preserved the value of the estate. The *Temple* Court further opined that "petitioner had failed to establish an error committed by the trial court," and was thus unable to overcome the American Rule of attorney fees. The trial court in the instant case was similarly within its discretion to deny the petition for attorney fees and costs under the plain meaning of the statute. Even if a petitioner demonstrates that they have enhanced, preserved, or protected trust property, the plain language of "as justice and equity requires" indicates that the Legislature intended to provide probate courts full discretion in granting or denying attorney fees under MCL 700.7904(1). As [Susan] failed to establish a violation of the statute, or any other error or abuse of discretion, she is not entitled to relief.[46]

Comment:

Depending on the facts and circumstances presented, litigation to invalidate a transaction or instrument, when the presumption of undue influence exists may be an instance when a challenger might be entitled to an award of attorney fees. When probable cause exists to challenge estate planning documents and one beneficiary primarily incurs the costs of bringing the challenge that is ultimately found by the court to have been necessary to the determination of who the proper beneficiaries are, or perhaps determine the extent of an alleged marital devise, grantor intent, whether certain claims should be disallowed and/or the proper distribution of Trust and Estate assets, an award of reasonable fees may be proper if the results of the challenge end up benefitting the entire estate and/or other beneficiaries whose interests rise with the tide.

In general, Bogert, Trusts and Trustees, §871, provides another theory for an award under what is commonly referred to a common fund doctrine. Bogert provides that:

> "[i]n exercising its discretion in these matters the court will consider whether the plaintiff or other party was successful in obtaining the relief requested or in defending or conserving the trust estate, for example, by protecting the trust against an unjust claim. The court may also consider whether the successful party benefitted or enhanced the trust estate in deciding whether his attorneys' fees should be awarded from the trust estate. These considerations are sometimes expressed as the common fund doctrine or the substantial benefit rule, either of which allows the successful party reasonable attorneys' fees.[47]

In *Merkel v. Long,*[48] the Michigan Supreme Court allowed the award of attorney fees under the "common fund doctrine," when it found that the resolution of the rights of all persons, which benefited the Trust as a whole, as opposed to specific rights of just one beneficiary, and permitted settlement of the case to the benefit of all beneficiaries with a degree of finality could appropriately be paid by the Trust.

One must be careful, however, not to include a request for fees incurred that were of a personal nature, such as those relating to a particular beneficiary's right to tangible personal property or a specific devise or claim that only benefits that beneficiary.

Another factor in considering whether to seek an award of attorney fees might be its impact on a taxable estate. The Internal Revenue Code (IRC) at § 2053(a)(2) permits the deduction of administrative expenses (which includes attorney fees and costs deemed reasonable and necessary to the administration of the estate and/or trust). When a taxable estate for federal (or perhaps even state) estate taxes is involved, the filing of a petition seeking an award of reasonable fees may not only provide a benefit to the beneficiary but may result in a reduction of estate taxes owed.

26 CFR 20.2053-1, Treas. Reg. 20.2053-1, in general addresses the deductibility of bona fide expenses, indebtedness and taxes of administering the estate and trust. In subparagraph (b)(3)(i) thereof it provides in pertinent part, that:

> If a court of competent jurisdiction over the administration of an estate reviews and approves expenditures for … administration expenses, claims against the estate, or unpaid mortgages (referred to in this section as a "claim or expense"), a final judicial decision in that matter may be relied upon to establish the amount of a claim or expense that is otherwise deductible under section 2053 and these regulations provided that the court actually passes upon the facts on which deductibility depends…..It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest.

26 CFR 20.2053-1, Treas. Reg. 20.2053-1, paragraph (b)(3)(iii), further provides, in pertinent part that:

> (iii) Consent decree. A local court decree rendered by consent may be relied on to establish the amount of a claim or expense that is otherwise deductible under section 2053 and these regulations provided that the consent resolves a bona fide issue in a genuine contest. Consent given by all parties having interests adverse to

that of the claimant will be presumed to resolve a bona fide issue in a genuine contest. Any amount meeting the requirements of this paragraph (b)(3)(iii) is deductible to the extent it actually has been paid or will be paid, subject to any applicable limitations in this section.

Further, 26 CFR 20.2053-1, Treas. Reg. 20.2053-1, paragraph (b)(3)(iv), provides, in pertinent part that:

(iv) Settlements. A settlement may be relied on to establish the amount of a claim or expense (whether contingent or noncontingent) that is otherwise deductible under section 2053 and these regulations, provided that the settlement resolves a bona fide issue in a genuine contest and is the product of arm's-length negotiations by parties having adverse interests with respect to the claim or expense. A deduction will not be denied for a settlement amount paid by an estate if the estate can establish that the cost of defending or contesting the claim or expense, or the delay associated with litigating the claim or expense, would impose a higher burden on the estate than the payment of the amount paid to settle the claim or expense. Nevertheless, no deduction will be allowed for amounts paid in settlement of an unenforceable claim. For this purpose, to the extent a claim exceeds an applicable limit under local law, the claim is deemed to be unenforceable. However, as long as the enforceability of the claim is at issue in a bona fide dispute, the claim will not be deemed to be unenforceable for this purpose. Any amount meeting the requirements of this paragraph (b)(3)(iv) is deductible to the extent it actually has been paid or will be paid, subject to any applicable limitations in this section.

In addition, 26 CFR 20.2053-3, Treas. Reg. 20.2053-3, paragraph (c)(1) provides that:

(c) Attorney's fees—(1) Attorney's fees are deductible to the extent permitted by §20.2053-1 and this section. Further, the amount of the fees claimed as a deduction may not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate, the law and practice in the jurisdiction in which the estate is being administered, and the skill and expertise of the attorneys.

Further, CFR 20.2053-3, Treas. Reg. 20.2053-3, paragraph (d)(3) provides that:

(3) Expenses incurred in defending the estate against claims described in section 2053(a)(3) are deductible to the extent permitted by §20.2053-1 if the expenses are incurred incident to the assertion of defenses to the claim available under the applicable law, even if the estate ultimately does not prevail. For purposes of this paragraph (d)(3), "expenses incurred in defending the estate against claims" include costs relating to the arbitration and mediation of contested issues, costs associated with defending the estate against claims (whether or not enforceable), and costs associated with reaching a negotiated settlement of the issues.

In *Smith v Khouri,*[49] the Michigan Supreme Court fine-tuned a multi-factor approach for determining a "reasonable attorney fee," which appears analogous to the "reasonableness" standards utilized in interpretation and application of 26 CFR 20.2053-3, Treas. Reg. 20.2053-3. As a consequence, when the court finds that fees incurred benefited the estate or trust as a whole, the court will need to then determine their "reasonableness" by engaging in an analysis of that starts with:

a. determining the fee customarily charged in the locality for similar legal services; and

b. then multiply this fee by the *reasonable* number of hours expended in the case.

The *Estate of Gill v. Comm'r of Internal Revenue,*[50] a Tax Court Memo dated January 9, 2012, supports the proposition that to the extent the fees and costs incurred by the beneficiary were "essential to the proper administration and settlement" of the estate and trust they may be treated as an allowable administrative expense under IRC 2053.

IRC 2053 (a) compels a two-part test for deductibility of expenses for federal estate tax purposes. The expense must be one of the four types of expenses specifically enumerated in the statute and it must further be "allowable by the laws of the jurisdiction under which the estate is being administered." IRC 2053(a). IRC 2053(a)(2) goes on to provide that the value of the taxable estate shall then be reduced by administration expenses (which is defined to include attorney fees). Therefore, attorney fees incurred by a beneficiary which are determined by the court to have been essential to the proper administration and settlement of the estate may be deemed deductible if deemed reasonable. It is, therefore, important that the court analyze the fees and expenses incurred by the beneficiary in order to determine the: (i) character of the services, (ii) essential nature of service provided to the settlement and administration of the Trust and Estate, and (iii) finally the reasonableness thereof.

While fees may not always be permitted in jurisdictions that follow the American Rule, it remains important to analyze whether an exception exists and the extent to which a petition for award of reasonable fees under a "common fund" or other exception to the American Rule might apply and provide a sufficient benefit to merit pursuit.

In re Guardianship of GJB;[51] Termination of Guardianship upon Sufficient Recovery from a Brain Injury Is Possible[52]

Some argue that there is no "off ramp" from a guardianship, once one has been granted. *In re Guardianship of GJB* demonstrates that is not necessarily true.

Facts:

GJB suffered a traumatic brain injury (TBI) when she slipped and fell in a parking lot. GJB had two children; one lived in Michigan the other in Washington. Following the accident, GJB moved in with her daughter (Lisa), who lived in Michigan and Lisa was appointed GJB's guardian and conservator.

About two years after the fall, Lisa sent a text to her brother expressing how overwhelmed she was feeling at the time. She indicated that she was burned out, depressed and was suffering from suicidal ideations. She wrote that she was shouldering the burden (physically and financially) of caring for their mother, with no relief in sight. Apparently, the son shared these texts with his wife, Alana, who was a lawyer in Washington, and Alana filed a petition to be appointed GJB's guardian and conservator to serve in Lisa's place. Lisa responded by filing a competing petition to terminate the guardianship and conservatorship because "GJB had largely recovered from her injury."[53] Attached to Lisa's petition was a letter from GJB's longtime medical provider. That letter indicated that the medical provider was of the opinion that GJB no longer suffered from any condition that would limit her ability to make independent decisions. In response, Alana supplemented her petition by supplying the court with a letter from a neuropsychologist that opined that "GJB met diagnostic criteria for mild vascular dementia but could still make her own medical decisions."[54]

At a hearing on the competing petitions, the court heard testimony from GJB and Lisa. Apparently, Alana offered no testimony or other witnesses for the court's consideration. At the conclusion of the hearing, and after closing arguments were made by both Lisa and Alana, the court ruled from the bench and terminated the guardianship and conservatorship. It indicated that it "placed a 'great deal of weight' on GJB's testimony, finding that GJB possessed a high level of competency."[55]

Alana moved for reconsideration, which was denied and this appeal ensued.

Analysis:

On appeal, Alana argued that the court erred in terminating the guardianship and conservatorship because it did not consider medical evidence or hold an evidentiary hearing; however, the record is clear that the court did conduct an evidentiary hearing before rendering its decision.

Both Alana and Lisa agreed to utilize the procedure proposed by the court for conducting the hearing; having done so, Alana could not then harbor an escape parachute to avoid its outcome. During the hearing, Alana did not call any witnesses and did not move to admit or authenticate any medical reports or other documentary evidence for the court's consideration. She did, however, cross examine both GJB and Lisa.

The appellate court noted that:

> An individual is incapacitated if she "is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the *extent of lacking sufficient understanding or capacity to make or communicate informed decisions*." MCL 700.1105(a). The trial court may appoint a guardian if it finds that (1) the individual is incapacitated, and (2) the "appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual." MCL 700.5306(1). *The trial court "shall grant a guardian only those powers and only for that period of time as is necessary to provide for the demonstrated need of the incapacitated individual*." MCL 700.5306(2). For a conservatorship, the following conditions must be met:
>
> (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. [MCL 700.5401].
>
> The trial courts use the same procedures to terminate a guardianship or conservatorship as it uses to establish appointment. MCL 700.5310(4); MCL 700.5431. The findings for a guardianship and conservatorship must be proven by clear and convincing evidence. MCL 700.5306(1); MCL 700.5406(7).[56]

Based upon the evidence presented, the court determined that GJB no longer needed a guardian or conservator and terminated both.

Comment:

It remains important to remember that when a petition is filed to modify or terminate a guardianship, conservatorship or protective order, the burden remains on the petitioner or other interested persons (and not on the protected or incapacitated individual) to demonstrate that the statutory requirements, as well as the continued need for such provisions, remain applicable and to do so through the presentation of clear and convincing evidence. The burden will only shift to the respondent/protected individual if the petitioner (or interested person) has met their burden of proof. A mere diagnosis of dementia generally is not sufficient to warrant appointment of a guardian or conservator. Additional evidence demonstrating that such a diagnosis has resulted in the individual being unable to make informed decisions or manage their finances and assets is also required. Conditions that may have led to the need for protective proceedings may improve or be eliminated over time. Protective measures continue to need to be fashioned to be the least restrictive required; sometimes that means none of those previously ordered by the court need to remain in place.

Whether Lisa or GJB filed the petition to terminate, Alana bore the burden of convincing the court that the need for the guardianship and conservatorship remained. Here, even though the report of the neuropsychologist supplementally filed by Alana was not admitted into evidence, that report indicated that GJB was capable of making her own medical decisions. Therefore, even had the report been admitted into evidence, it would likely have buttressed the court's finding that GJB possessed a high level of competency and no longer required a guardian. Unfortunately, the opinion is scant or lacking detail as to GJB's ability to manage her financial affairs other than to reflect that the court found her to have a high level of competency.

In re Estate of Charla Brown;[57] While States Develop Plans for Administering and Applying Medicaid Those Plans Must Be Consistent with Federal Statutes[58]

Michigan's Supreme Court recently noted that "Medicaid assists over 2.6 million Michiganders, including 168,000 seniors and three in five nursing home residents."[59]

> Established in 1965, Medicaid is a joint federal and state program through which the federal government reimburses states for a portion of the cost of medical care for low-income individuals who are aged, blind, disabled, or in a family with dependent children. "Each participating State develops a plan containing reasonable standards … for determining eligibility for and the extent of medical assistance." … "State Medicaid plans must comply with requirements imposed both by [Title XIX of the Social Security Act] … and by the Secretary of Health and Human Services [HHS]." These state plans must meet the federal minimum-standard threshold for eligibility but can be more expansive at the state's discretion.[60]

Michigan's Department of Health and Human Services' (DHHS) *Bridges Eligibility Manual 405* (BEM), in effect in 2021, required "a written person[al] care contract before services are provided or they are deemed to [be] provided for free by relatives or divestment if services provided [were] paid for."[61] Unless those agreements meet all of the requirements set forth in the BEM, they are considered a transfer for less than fair market value. The BEM requires mandatory treatment as a divestiture (as opposed to establishing a rebuttable presumption) when services are rendered under circumstances that do not meet all of the requirements set forth in the BEM. While DHHS must submit its state plan (MSP) to the Centers for Medicare and Medicaid Services (CMS), the federal entity in charge of administering Medicaid, it does not have to submit the BEM to CMS. The MSP did not define "less than fair market value" or set forth personal-care and homecare service contract requirements that had to be met to avoid divestment. However, the BEM defined divestment to mean

> the transfer of a resource . . . by a client or his spouse that are all the following:
> •Is within a specified time . . . .
> •Is a transfer for less than fair market value . . . .
> •Is not listed under transfers that are not divestment in this item.[62]

The BEM then went on to list transfers that are not a divestment as "including 'transfers for another purpose,' such as 'transfers exclusively for a purpose other than to qualify or remain eligible for [Medicaid assistance].'"[63] In addition, the BEM specifically addressed personal-care contracts and provided that

> "Personal Care and Home Care contracts/agreements shall be considered a transfer for less than fair market value unless the agreement meets all of the following [requirements,]" including: (1) a notarized written contract, executed before the commencement of the services; and (2) a written recommendation received from the applicant's physician before the services begin stating that the services are necessary. BEM 405, p 8.[64]

Historically, if a family member provided and was paid for services in the hopes of avoiding or delaying the need for nursing home care, but did not meet the requirements set forth above, a divestment penalty would be assessed when the individual could no longer be cared for at home, entered a nursing home and applied (and otherwise qualified) for Medicaid. Following the published Michigan Court of Appeal's decision in *Brown*[65] that may no longer be the case.

Facts:

In 2019, Charla Brown (Charla) had triple bypass surgery that resulted in her being hospitalized for almost two months before being admitted to a nursing home. Later that year, against medical advice, she elected to return home to be cared for by her husband (Harold), daughter (Lynette) and a family friend (Loreen). They provided care for Charla for two years before she was re-admitted to a nursing home where she later died.

Testimony indicated that while Charla was home, she was weak, could not walk, and she required assistance getting in and out of a wheelchair as well as assistance with activities of daily living, such as personal care, incontinence, bathing, dressing, medication, meal preparation and eating. Pursuant to an oral agreement, Harold and Charla paid Lynette a total of $45,758.64 and Loreen $10,668.75. Initially, Loreen was paid at a rate of $15 per hour, but after one year that rate was increased to $20 per hour. In most months, Lynette was paid $1,000 per month to care for Charla (which she did from noon to 9 p.m. daily), but in four months when both Harold and Charla needed care, she received more.

Around the time when Charla needed to be re-admitted to a nursing home, Harold met with an elder-law attorney, and it was at that point that he learned about the DHHS policy requiring a physician statement and written and notarized personal care contracts.

Charla's doctor then provided a letter that indicated

> Since approximately June 2019, [the decedent] has required assistance with virtually all activities of daily living including personal care, mobility, transportation, continence care, bathing, dressing, laundry, medication management, food preparation, feeding, and housekeeping in order to maintain a safe and healthy living space. But for the provision of such assistance, she would require a Skilled Nursing Facility . . otherwise known as a "nursing home."[66]

The parties then entered into written personal care contracts, specifying the tasks, duties, rate of compensation and indicated that the contracts were retroactively effective as of the date that Charla left the nursing home in 2019. Thereafter, Charla applied for Medicaid Assistance for Long-Term Care.

DHHS determined that Charla was eligible, but only after a penalty period of 5 months elapsed, "because you or your spouse transferred assets or income for less than their fair market value in the amount of $54,427.39."[67] It based that decision on BEM 405, p.8, which stated that

> "Personal Care and Home Care contracts/agreements shall be considered a transfer for less than fair market value unless the agreement meets all of the following [requirements,]" including: (1) a notarized written contract, executed before the commencement of the services; and (2) a written recommendation received from the applicant's physician before the services begin stating that the services are necessary.[68]

Charla requested an administrative hearing, but by the time the hearing occurred, she died. Her estate (Estate) asserted that BEM 405, regarding personal-care contracts

> did not comport with federal and state contract and Medicaid law because it created an irrebuttable presumption of divestment based on the agreement's form instead of reviewing whether the transfer was for: (1) greater than fair market value, or (2) purposes other than Medicaid qualification.[69]

The administrative hearing officer affirmed DHHS's decision imposing a divestment penalty period, despite acknowledging that the Estate "had a persuasive argument that the Petitioner was not trying to qualify for [Medicaid] but was trying to avoid a residential placement."[70] Nonetheless it found that

> Department policy in BEM 405 requires a written person[al] care contract before services are provided or they are deemed to [be] provided for

free by relatives or divestment if services provided [were] paid for. The contract with the Petitioner's husband and his daughter was signed ... after services were provided .... There was no written contract with [Loreen] as required by Department policy in BEM 405. In addition, the Petitioner has to be in the home and not in a rehab facility or nursing home in order for payment of personal care services. Lastly, a treating physician has to write a letter stating that personal care services were recommended or required to keep the Petitioner in the home and out of residential care or nursing facility before services were provided. The Petitioner's treating physician did not sign a letter recommending personal care services until August 26, 2021, but personal care services were provided from May 2019.[71]

The Estate requested reconsideration, which was denied. The Estate then appealed to the Ingham County Circuit Court. That Court found that the services rendered by Harold, Lynette and Loreen were necessary and the only evidence that the payments were not for fair market value was the mere fact that the service contract did not meet the written requirements of the BEM. The circuit court found that the DHHS divestment penalty was in error and overturned the determination. DHHS moved for reconsideration, which was denied and this appeal ensued.

Analysis:

The Michigan Court of Appeals found that because federal Medicaid law required DHHS to consider evidence of transfers made for purposes other than qualification for Medicaid, BEM 405's personal-care policy was not authorized by (and did not comport) with federal law and, as a result, the divestment penalty needed to be administratively re-evaluated.

It found that "[a]n agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious."[72]

It recognized that a Medicaid applicant otherwise eligible for long-term care benefits is still subject to a divestment penalty if resources are transferred during a five-year look-back period for less than fair market value and those resources are not otherwise excluded from being a divestment. It then looked to federal statutes for a definition of "fair market value". It found that

> [f]or the SSI program, 20 CFR 416.1246 addresses whether a transfer is a divestment by defining "fair market value" and explaining that a transfer "of a resource for less than fair market value is presumed to have been made for the purpose of establishing SSI or Medicaid eligibility *unless the individual (or eligible spouse) furnishes convincing evidence that the resource was transferred exclusively for some other reason*." 20 CFR 416.1246(b) and (e) (emphasis added). That SSI provision is devoid of personal-care contract requirements.
>
> Although MCL 400.6 authorizes the DHHS to develop binding policies and exempts such developments from the rule-promulgation requirements of the Administrative Procedures Act, such policies must nonetheless be consistent with federal Medicaid statutes.
>
> * * *
>
> 42 USC 1396a(A)(17) authorizes the DHHS to include, *in its State plan*, "reasonable standards . . . for determining eligibility," but 42 USC 1396a(a)(18) requires compliance with 42 USC 1396p, which requires participating states to impose divestment penalties for disposition "of assets for less than fair market value," 42 USC 1396p(c)(1)(A), but also states that
>
> [a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that ... a satisfactory showing is made to the State ... that ... (*ii*) the assets were transferred exclusively for a purpose other than to qualify for medical assistance .... [42 USC 1396p(c)(2)(C)(*ii*).]
>
> The phrase "shall not" designates a prohibition. *1031 Lapeer LLC v Rice*, 290 Mich App 225, 231;

> 810 NW2d 293 (2010). Therefore this federal provision, 42 USC 1396p(c)(2)(C)(*ii*), prohibits state Medicaid programs from imposing a divestment penalty without considering the claimant's evidence that "the assets were transferred exclusively for a purpose other than to qualify for medical assistance …."
>
> As written, *BEM 405*'s personal-care contract policy does precisely what 42 USC 1396p(c)(2)(C)(*ii*) prohibits: instituting an irrebuttable presumption of divestment in the absence of a policy-compliant written and notarized contract. *BEM 405*'s personal-care and homecare contract requirements are therefore inconsistent with federal law.[73]

As a consequence, the appellate court held that, as written (and applied), BEM 405 was inconsistent with federal law and should not be applied in a manner that creates an irrebuttable presumption resulting in a divestment penalty. It then vacated the circuit court's reversal of the divestment penalty assessment and remanded the matter for further administrative proceedings in order for there to be a reevaluation of whether there had been a "divestment under the proper legal framework."

Comment:

On March 2, 2026, CareScout released its 2025 Cost of Care Survey Results (obtained from Genworth Financial, Inc.).[74] It reported the following national median results for 2025:

Many individuals prefer to age in place, but sometimes the level of care required and an individual's resources impact whether that remains a viable option.

Families often do not seek out legal counsel regarding Medicaid qualification until they are admitted to a long-term care facility or otherwise around the time when an application for aid is made or anticipated. Some do not realize that assets held in a trust established by a deceased spouse may be considered an available resource unless they are held in a special needs *testamentary* trust.

Historically, families who were not aware of the personal service contract requirements under Michigan's BEM 405 were caught off guard (and may have found themselves in a financial quandary) when personal-care and homecare services were performed at home during the five years before a nursing home admission. It would still be advisable to follow BEM 405 requirements with regard to such services, since *Brown* merely opens the door to the presentation of evidence to rebut a *presumption* that in the absence of meeting those requirements payments made will represent a divestment subject to the imposition of a penalty that will delay Medicaid availability.

Service Description	National Median
Non-medical caregiver (in home care)	$35/hour
Private Duty Nurse (in home care)	$90/hour with average visit cost of $160 per visit
Adult Day Care	$95/day or $24,700 annually based upon 5 days per week
Assisted Living Communities	$74,400 annually
Nursing Home – semi private room	$114,975 annually
Nursing Home – private room	$129,575

Estate of Karwoski v Hamlin-Rogers;[75] Establishing a Breach of Duty Without Damages Is Insufficient[76]

When a cause of action is brought against a fiduciary for breach of duties, the plaintiff must demonstrate that damages were suffered as a result of the breach. It is generally insufficient to merely allege a breach without providing evidence of harm. In *Estate of Karwoski v. Hamlin-Rogers,* the conservator acknowledged that she should have listed the protected individual's coin collection on the inventory before she sold a significant portion of the collection in anticipation of needing the proceeds to address his care needs. However, the failure of the Plaintiff (Estate) to demonstrate damages essentially results in a "no harm no foul" scenario.

Facts:

Vicky-Hamlin-Rogers ("Rogers") was appointed Frank Anthony Karwoski's ("Frank's") conservator in 2020. She acted in that capacity until Frank's death on September 4, 2022. Frank had been diagnosed with dementia and was living with his son. Prior to Rogers' appointment, Frank's daughter, Kathy Alston ("Alston") had served in that capacity. Alston was appointed personal representative of Frank's estate.

Following Roger's appointment, she searched Frank's home for assets and information relating to his assets. In doing so, she came across a list that reflected that Frank had coins and precious metals that he valued at $197,257. When Rogers filed her initial inventory she apparently did not include a reference to the coins and metals. Rogers indicated that she omitted them because she didn't know that they were indeed valuable. Alston purportedly informed Rogers that the coins had "potential" value approximately one year after Rogers was appointed conservator. By that time, Frank's doctor had indicated that he would require a higher level of care and his liquid assets only totaled approximately $35,000 and he had a monthly income of approximately $4,000. Rogers believed that greater liquidity would be required to facilitate an anticipated enhanced level of care.

Rogers took the coins and metals to Treasure Trove, a shop that Frank had frequented for over 30 years. Rogers did not have the coins appraised. She sought input from Treasure Trove regarding the value of the coins and metals and was informed that they were worth $105,720, but after costs of consignment might only net $90,000 to the conservatorship estate. Treasure Trove offered to buy them (as opposed to sell them on consignment) for $80,000. Rogers sold most of the coins and metals (reserving some items that lacked intrinsic value) and deposited the proceedings into the conservatorship account.

Alston felt that the price obtained was too low. She based her opinion on an internet search she conducted which resulted in her valuing the collection at $426,000. She did not have the collection appraised and admitted that she was not an expert on their valuation. She also did not proffer that Frank was an expert on the collection's valuation. Alston also alleged that Rogers converted some of the collection to personal use, but was unable to develop or establish any proof supporting that claim.

A retired pastor was appointed by the probate court to investigate Alston's claims. While he was concerned that the collection had not been appraised, he indicated that there were other coins that remained in Rogers' possession. He recommended removal of Rogers as Frank's conservator, but did not identify concerns supporting the removal in his report.

The court found that the list prepared by Frank was inadmissible and, even if admitted into evidence, was only indicative of what Frank believed the coins and metals to be worth, which was insufficient to establish their true value. The court ultimately found that Alston did not establish that Rogers kept any items for her own personal use.

While Rogers admitted that the failure to list the coins on the inventory was a technical breach of her fiduciary duty to report, the court found that without evidence of damages suffered by the estate the action against Rogers should be summarily dismissed. This appeal ensued.

Analysis:

The appellate court held that:

> If the nonmoving party bears the burden of proof at trial, it may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists …. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[77]

Alston argued that Rogers breached her fiduciary duties in various ways. There was no question that Rogers, as Frank's conservator, was a fiduciary. As conservator she was required to

> discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan prudent investor rule.[78]

However, the court held that "[t]o establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) breach of that duty, and (3) damages caused by the breach of duty."[79] Alston failed to offer evidence of the damage suffered by the estate as a result of Rogers failure to list the coins and metals on the inventory or that she sold them for significantly less than their fair market value. Had she produced some form of reliable evidence that the coins were sold for significantly less than their fair market value such that a question of fact was established as to the potential amount of damages suffered, summary disposition would not have been appropriate.

It was not disputed that Rogers failed to list all of the assets on an inventory within 56 days of her appointment as required by MCL 700.5417(1) and MCR 5.409(B)(2) and that a failure to keep suitable records of administration and to provide an annual accounting would constitute a breach of fiduciary duty. However, even assuming that Rogers breached each of those duties by failure to include the coins and metals on an inventory before they were sold, Alston's failure to demonstrate the damage that resulted from such breaches was fatal to her claim. That is because

> [a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.[80]

The appellate court also held that the pastor's report was admissible as it was not a "business record" prepared and kept in the ordinary course of business and even if it were, it contained hearsay statements which were offered for the truth of the matter asserted and for which no exception to the hearsay rules had been established.

For the same reasons that Alston's claim of breach of fiduciary duty failed, her claim that Rogers negligently administered the conservatorship estate must also fail. Even though Alston failed to raise such a claim at the trial court level, the appellate court found it would have nonetheless failed because Alston had "not presented any evidence that the value of the collection was higher than the purchase price obtained at Treasure Trove."[81]

Comment:

While it might have been prudent for Rogers to at least reflect the existence of the coins and precious metals on the initial inventory (to the extent she knew they existed at the time she filed the same) with a value of unknown, the evidence that the items were sold for less than fair market value was not presented to the court in a competent fashion sufficient to avoid the grant of a motion for summary disposition.

Rogers was at least put on notice that the coins and metals might have sufficient value to merit an appraisal. Had Frank had a federal estate taxable estate, any tangible asset (or collection) worth more than $3,000 would have required an appraisal.[82] Having the coins and metals appraised (as opposed to obtaining an estimate of value from the purchaser of the items) might not only have been prudent but could have assisted Rogers in evaluating the propriety of the offer to purchase tendered by Treasure Trove or whether a different course of conduct might be appropriate. While the lack of an appraisal did not affect the outcome in this case, had sufficient evidence of damages been presented it might have assisted in formulating a defense.

It may also be noteworthy that Alston (as Frank's prior conservator and ultimately his personal representative) had actual knowledge that the coins existed. It would have been prudent for her to file an objection to the inventory noting their omission and asserting their potential value. In all likelihood, Alston had not reflected the coins and metals on the conservatorship inventory she provided or in her final account in that capacity or had the coins and metals appraised during her tenure as conservator.

In addition, when there are items that family members wish to have preserved, they might consider asking the court to restrict the conservator's power to sell or dispose of such items without prior court approval or the consent of the protected individual's heirs at law and beneficiaries. A fiduciary (whether a guardian, conservator or trustee) might obtain a level of protection by notifying interested parties of their intention to sell a collection before they do so and request consent. If they receive push back, they can then decide whether they wish to proceed to sell the items under the authority granted them or to seek instructions from a court of competent jurisdiction.

Miller v. Williams;[83] Attorney Fees Incurred by Guardian May Be Recovered from Decedent Estate Even Though Not Allowed During Guardianship Proceedings Under the Right Circumstances[84]

Various issues were raised and addressed in the case of *Miller v. Williams.* This article will only be addressing two.

The first is whether attorney fees held in abeyance during the administration of a guardianship proceeding, and not addressed in the final order entered relative to those proceedings, could be claimed in the ward's decedent estate proceedings.

The second is whether the probate court has jurisdiction to address a claim for these fees under a quantum meruit theory. In Miller *v Williams,* the answer to both those questions was "yes."

Facts:

Brenda Miller ("Brenda") was appointed plenary guardian for Mardelle R. Williams ("Mardelle"), who was a developmentally disabled adult. During the administration of Mardelle's guardianship proceedings Brenda had to retain counsel when members of Mardelle's family sought to terminate the guardianship and establish a special needs trust for Mardelle's benefit. Rather than ruling on Brenda's request for reimbursement with regard to attorney fees and expenses incurred, the court in its December 21, 2021 order established the special needs trust, but held the request for fees and expenses in abeyance by indicating that the issue could be considered if Mardelle received an inheritance.

Mardelle died on May 16, 2022. On July 27, 2022, the probate court entered a final order allowing the guardian's accountings, discharged Brenda as Mardelle's fiduciary and ordered that any remaining assets be released to Mardelle's decedent estate (the "Estate").

On July 28, 2022, Brenda wrote to the interested parties of the Estate informing them that she had received a $7000.00 check made payable to herself as plenary guardian for Mardelle which represented Mardelle's inheritance. The letter also indicated that Brenda intended to deposit the check into the guardianship account and "make a claim against the estate for reimbursement of attorney fees."[85]

On September 2, 2022, Williams Estate (Williams) through its personal representative filed a motion in the guardianship proceedings requesting that Brenda show cause why the Special Needs Trust Funds should not be released to the Estate. In essence, it is alleged that because Brenda had been discharged, the guardianship account should have been closed, all funds transferred to the Estate and her claim for reimbursement of attorney fees barred.

The probate court ordered Brenda and Honor Bank to release and transfer the funds associated with the Special Needs Trust to the Estate. However, before the order was issued, Brenda filed a statement and proof of claim relative to the legal fees and expenses incurred during the guardianship proceedings.

Williams then filed a disallowance of the claim. In response Brenda then initiated proceedings in the Estate proceedings seeking reimbursement of $6,705.84 in fees and expenses claiming unjust enrichment.

Other actions between the parties were pending, but are not discussed in this article, other than to indicate that Williams had filed circuit court proceedings seeking damages from Brenda relating to alleged breaches of her fiduciary duties to Mardelle and for negligence.

Williams claimed that Brenda's claim against the Estate was barred for a number of reasons, one of which was under the doctrine of res judicata and another was that the probate court lacked jurisdiction to adjudicate an equitable claim of unjust enrichment. Williams did not contest the reasonableness of the fees sought, merely that the recovery of the same should be procedurally barred. The probate court found it had jurisdiction, the fees were reasonable, the doctrines of laches and res judicata did not apply and that Brenda was entitled to reimbursement.

This appeal followed.

Analysis:

According to Williams since Brenda did not request allowance and payment of the fees when she petitioned to have her final accounting allowed, her claim for reimbursement should be barred either under the doctrine of laches or as a result of res judicata. The court of appeals disagreed.

The appellate court found that Brenda was not dilatory in bringing her claim and the Estate did not demonstrate prejudice as a result of any delay that occurred.

> The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right. But it has long been held that the mere lapse of time will not, in itself, constitute laches. The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created. The defendant bears the burden of proving this resultant prejudice.[86]

Here, Brenda had sought reimbursement during the proceedings, the court had held a determination as to whether they should be paid in abeyance to see if Mardelle actually inherited something, and shortly after Mardelle died (and before the guardianship account was closed), a check representing Mardelle's inheritance was delivered payable to Brenda as plenary guardian for Mardelle. Brenda put the interested parties on notice that she intended to seek reimbursement and filed a proof of claim in the Estate seeking the same.

Williams then had the burden of proving that it would be inequitable to allow Brenda to seek reimbursement of the fees from the Estate.

Williams argued that the claim was

> …barred by res judicata, collateral estoppel, and waiver because, in the underlying guardianship

> proceeding, the court issued a final distribution of funds before [Brenda] made her request for fees. According to [Williams], [Brenda] had multiple opportunities to request the fees while the [guardianship] case was open but did not, and therefore the claim is barred."[87]

For res judicata to apply, Williams needed to demonstrate that

> …the prior action was decided on the merits, the judgment in the prior action was a final decision, the matter contested in the second action was or could have been resolved in the first case, and both actions involved the same parties or their privies. "The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." "To be accorded the conclusive effect of res judicata, the judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court …" The burden of establishing the elements of res judicata is upon the party asserting the doctrine.[88]

Because the attorney fees were not addressed in the probate court's order allowing Brenda's final account, that issue was not decided on the merits and a final order relating to entitlement to reimbursement was not entered. Accordingly, the appellate court held that Brenda became a general unsecured creditor of the Estate and was entitled to bring a claim for reimbursement within the four-month claims period. Further, Brenda did not intentionally relinquish her entitlement to reimbursement or so neglect or fail to act on her claim such that she had induced a belief that she had intentionally and purposefully waived her request for reimbursement. Therefore, the doctrine of waiver did not apply.

Brenda had sought reimbursement, the court held that request in abeyance, and four months later Mardelle died. When Mardelle died, Brenda's powers to act as guardian ceased. Brenda notified the Estate of her intention to file a claim and once the court ordered Brenda to turn the assets over to the Estate, she did so.

When the Estate disallowed Brenda's claim, she filed a one count complaint in the Estate proceedings alleging entitlement to reimbursement on the basis of unjust enrichment. "The essential elements of [an unjust enrichment] claim are (1) receipt of a benefit by the defendant from the plaintiff, and (2) which benefit it is inequitable that the defendant retain."[89]

In her complaint, Brenda alleged

> …she "was appointed by the Court as a professional plenary guardian of [Mardelle]." [Brenda] stated that she was "forced to expend a sum of $6,705.84 in attorney's fees and costs in the Guardianship Proceeding." According to the complaint, [Brenda] asserted that "[a]ll fees and costs paid by [Brenda] were on behalf of the estate and person of [Mardelle] and, specifically, furtherance of [Brenda]'s duties imposed upon her by the Court in appointing her as plenary guardian of [Mardelle]." [Brenda] asserted that because she was unable to submit a request for reimbursement before Mardelle's death, "[Brenda] has not been reimbursed by [Mardelle] (or her estate) for those attorney's fees and costs paid during [Brenda]'s appointment as plenary guardian …." [Brenda] alleged that the 'benefit retained by the Estate results in an inequity to [Brenda], wherein she, as professional guardian, is forced to bear the burden of legal fees and costs paid as a benefit to the estate … ."[90]

Williams contended that the probate court lacked jurisdiction to adjudicate an equitable claim of unjust enrichment because probate courts are courts of limited jurisdiction. The appellate court held that while unjust enrichment is indeed equitable in nature, "the probate court is not precluded from hearing equitable claims, so long as such claims are set forth in the statutes conferring jurisdiction."[91]

The appellate court found that there were multiple statutory sections pursuant to which the probate court could exercise jurisdiction over Brenda's claim.

> "For example, the probate court had exclusive jurisdiction over a 'matter that relates to the

settlement of a deceased individual's estate,' including the internal affairs of the estate, estate administration, settlement, and distribution, and the declaration of rights that involve an estate, devisee, heir, or fiduciary. The probate court also had exclusive jurisdiction over a 'proceeding that concerns the validity, internal affairs, or settlement of a trust; [or] the administration, distribution, modification, reformation, or termination of a trust …' '[Brenda]'s complaint for unjust enrichment is easily categorized as an action involving estate settlement and distribution, as well as a declaration of rights related to [Brenda] as fiduciary, …. Thus, the trial court did not err when it concluded that it had jurisdiction to hear [Brenda] claim.'"[92]

Comment:

While it might have been prudent for Brenda to alert the court in her final accounting that the issue of fee reimbursement had been reserved, the court may not have wanted to keep the guardianship open or otherwise address the matter previously held under abeyance if the potential of an inheritance remained unknown when the hearing on the final account occurred. Nonetheless, the failure to raise the issue did not preclude the guardian from asserting a timely filed claim against the Estate under the facts and circumstances presented. The key here is that the claim must be timely made.

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

(1) A claim against a decedent's estate that arose *before the decedent's death*, including a claim of this state or a subdivision of this state, whether due or to become due, absolute or contingent, liquidated or unliquidated, or based on contract, tort, or another legal basis, if not barred earlier by another statute of limitations or non-claim statute, is barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent unless presented within 1 of the following time limits:

(a) If notice is given in compliance with section 3801 or 7608, within 4 months after the date of the publication of notice to creditors, except that a claim barred by a statute at the decedent's domicile before the publication for claims in this state is also barred in this state.

(b) For a creditor known to the personal representative at the time of publication or during the 4 months following publication, within 1 month after the subsequent sending of notice or 4 months after the date of the publication of notice to creditors, whichever is later.

(c) If the notice requirements of section 3801 or 7608 have not been met, within 3 years after the decedent's death.[93]

MCL 700.3804 contemplates that a claim that is not yet due or that is contingent or unliquidated must nonetheless be filed within the above referenced time period, and describe when it will become due and the nature of uncertainty. Therefore, given the reservation of the issue in the guardianship proceedings, Brenda could still have filed a contingent claim within the claims period to preserve her potential right to reimbursement if the inheritance was not yet known before expiration of the claims period. MCL 700.3804 also addresses that the claimant may bring a proceeding to obtain payment of a claim against an estate in a court in which the personal representative may be subjected to jurisdiction.

MCL 700.3810 provides that when a claim is for an amount not yet due or uncertain, if the claimant consents, he may be paid the claim's present or agreed value, taking any uncertainty into account or arrangement for future or possible payment on the happening of a contingency may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distribute, or otherwise.

Different jurisdictions have different claims statutes, but the goal is generally to provide a shortened statute of limitations for bringing claims so that estates might be timely administered if the processes provided for shortening the statute of limitations are followed. Therefore, it is important that claimants understand and become knowledgeable about the time period and processes for filing a claim in the jurisdiction where the estate is being administered.

In re Estate of Nielsen;[94] General Versus Specific Devises[95]

Often estate planners draft what they believe to be "specific devises," but in reality, they may constitute a "general devise." The distinction between the two categories of non-residuary devises may impact whether (and to what extent) a spouse or child can assert a claim against property referenced in the devise to satisfy a Homestead Allowance or Exempt Property Claim. In the recent published opinion of *In re Estate of Nielsen*, the Michigan Court of Appeals addressed whether the devise of the decedent's household furniture, furnishings, automobiles, books, pictures, jewelry, art, hobby equipment and collections, clothing and articles of household or personal use and ornament (together with any assignable insurance policies relating to the same) represented a general or specific devise, such that the decedent's children might thwart the devise by electing to take some of the same in satisfaction of their Exempt Property Claim.

Facts:

Neal Nielsen ("Neal") and Paula Nielsen ("Paula") were originally married but divorced in July 2000. After their divorce, they continued to reside together until Neal's death some 20 years later. Neal's children were not aware that their father had divorced Paula until after his death.

One year after the divorce, Neal executed a Will that essentially left his tangible personal property to his "wife, Paula."[96] If she did not survive him, then those items were to be divided and distributed equally between his three children, Christie, Christopher, and Scott.

The parties' divorce settlement awarded Paula any insurance on her life, but it also awarded Neal his business interests together with the assets that belonged to such entities. At the time of the divorce, one of Neal's businesses owned a life insurance policy on Paula's life. During the twenty years following entry of their judgment of divorce, Paula took no action to secure or otherwise receive the policy of insurance on her life.

Another of Neal's businesses owned a Ford F-150 pickup truck. Neal did not devise that company to Paula; instead, the company (together with all assets other than the specifically devised tangible personal property) was to pour over and be distributed under the terms of Neal's revocable trust. Neal also reserved the right to otherwise dispose of his tangible personal property via a separate memorandum, as permitted under MCL 700.2513.

Neal's personal representative filed a petition in order to determine whether:

1. The bequest to Paula constituted a specific or general devise; and,
2. Whether, Paula was entitled to:
   a. insurance proceeds relative to a Chevy Silverado that had suffered a total loss shortly before Neal's death;
   b. the life insurance on her life owned by one of Neal's companies based upon the parties' judgment of divorce; and,
   c. the F-150 truck titled to another of Neal's companies based upon the devise contained in Neal's Will.

The children claimed the bequest to Paula was a general devise and that they could satisfy their Exempt Property Claim by selecting $16,000 of property from the estate that had been left to Paula under the Will.

Paula contended that she was unaware of the life insurance before Neal died but should receive it because all insurance on her life had been awarded to her in the divorce. However, the application for the policy reflected that Paula had signed the same.

The petition asserted that the F-150 was not included in the devise of automobiles to Paula because it was titled to Ajax Leasing LLC and that entity had not been devised to her, but the insurance proceeds paid after Neal's death relative to the Chevy Silverado that had been titled to Neal individually should be paid to Paula pursuant to the non-ademption statute.[97]

Christopher contended that the bequest to Paula was a general devise because it did not give specific items to Paula and, instead, it designated categories of tangible personal property to be distributed to her subject to the use of a list disposition that could have resulted in others receiving items that otherwise would have been distributable to Paula, as well as excluding cash and coins from the bequest and as such reflected the intent to create a general (as opposed to a specific) devise. Christopher also contended that because Neal had basically left all of his tangible personal property to Paula, that there were insufficient assets available to satisfy the children's Exempt Property Claim. Scott agreed.

In particular, Christopher wanted his childhood bedroom set. Paula contended that the children could satisfy their Exempt Property Claim out of other assets, such as Neal's coin collection, over $600,000 in cash, and assets belonging to Neal's two law practices. However, she contended that the children could not select any of Neal's University of Michigan memorabilia, furniture, or firearms in satisfaction of their Exempt Property Claim, because those were specifically devised to her. Christy generally agreed with Paula.

Paula also asserted that the children's Exempt Property Claim should be time-barred because they failed to timely assert it.

The probate court found that the devise of tangible personal property to Paula was a general devise. As such, the gun collection, bedroom furniture, and U of M memorabilia were fair game for selection by the children in satisfaction of their Exempt Property Claim. It also held that the Chevy Silverado was an asset of the estate, but because it was part of a general devise, the insurance proceeds were not payable to Paula.

The probate court held that the life insurance belonged to Neal's law practice, was an asset of Neal's trust, and did not belong to Paula. The same was also true of the F-150 that was titled to one of Neal's LLCs.

Paula appealed.

Analysis:

While the appellate court agreed that Paula was not entitled to the F-150 (because it belonged to the LLC), it held that the bequest of tangible personal property to Paula was a specific (and not a general) devise.

> "Under MCL 700.2606(1), '[a] specific devisee has a right to the specifically devised property in the testator's estate at death …." The term "devise" "means, when used as a noun, a testamentary disposition of real or personal property and, when used as a verb, to dispose of real or personal property by will." A "devisee" is "a person designated in a will to receive a devise.'
>
> Under MCL 700.3101, '[a]n individual's power to leave property by will, and the rights of creditors, devisees, and heirs to his or her property, are subject to the restrictions and limitations contained in [EPIC] to facilitate the prompt settlement of estates.' That provision further states, '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 … subject to homestead allowance, family allowance, and exempt property, to rights of creditors, to the surviving spouse's elective share, and to administration.' Accordingly, although the probate court's role when interpreting a will is to ascertain and give effect to the testator's intent as expressed in the language of a will, 'an individual's power to leave property by will is subject to the exempt property provisions' of EPIC, among other provisions of the code."[98]

A testator may specifically exclude a child from receiving exempt property,[99] and "if the estate is otherwise sufficient, property specifically devised shall not be used to satisfy rights to homestead allowance or exempt property."[100]

Michigan's Estates and Protected Individuals Code ("EPIC") does not define what constitutes a "specific" vs. a "general" devise, but "when the

Legislature chooses to employ a common-law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common-law meaning."[101] When EPIC was enacted, the terms "general" and "specific" devise had common-law meanings. In the case of *In re Corby's Estate*,[102] the devise of the testator's household furniture was found to be a specific legacy, while the devise of the rest of his "property of every kind and nature" was found to be a general residuary clause.

In *Morrow v. Detroit Trust Co.*,[103] Michigan's Supreme Court found that:

> A general legacy is one which is payable out of the general assets of the testator. A legacy is specific when it is the testator's intention that the legatee shall have the very thing bequeathed and not a corresponding amount in value. A demonstrative legacy partakes of the nature of both a general and a specific legacy. It is a gift of money payable out of a particular fund in such a way as to evince the testator's intent not to relieve his general estate from payment of the legacy in case the particular fund fails. The distinction between demonstrative legacies and specific legacies is that in the former the primary intention is that the legacy be paid in any event, even though the designated source fails, while in the latter the main intention is that the legacy be paid by the delivery of the identical thing, and that thing only, and in the event that at the time of the testator's death such thing is no longer in existence, the legacy will not be paid out of his general assets.[104]

That court further held that:

> A specific legacy is a gift of a specific thing, or of some particular portion of the testator's estate, which is so described by the testator's will as to distinguish it from other articles of the same general nature. A specific legacy differs from a general legacy in that it is not intended by testator to be paid out of his estate generally, but is to be paid solely by delivering to the beneficiary the specific thing given by will, as distinguished from a designated value, quantity, and the like.[105]

Relying upon the analysis in *In re Corby's Estate*[106] and *Morrow,*[107] the appellate court in *Nielsen* found that the devise of tangible personal property to Paula was a bequest of specific items when he identified those items specifically using the word "my." Further, nothing indicated that he wanted Paula to receive something equal in value to the tangible personal property identified as being bequeathed to her in his Will. The fact that Neal reserved the right to otherwise dispose of items of tangible personal property through the use of a separate memorandum (commonly referred to as "list disposition") did not change the character of the bequest from a specific devise to a general one.

Christopher had relied on the unpublished *In re Guise Estate*[108] in asserting that the bequest to Paula was a general devise, but the appellate court found such reliance misplaced; in *Guise*, the bequest of the decedent's tangible personal property was subject to sorting and selection by two individuals who were to determine how those items were to be divided amongst members of two branches of the family. That postmortem sorting and identification process indicated that the decedent did not intend for any one beneficiary to receive a specific item. The appellate court distinguished *Guise* from *Nielsen*, finding that in *Nielsen* the Will specifically identified that categories of Neal's tangible personal property were to be specifically distributed to Paula.

Once the appellate court found the bequest of tangible personal property constituted a specific devise, it naturally followed that if there are other assets from which the children's Exempt Property Claim can be satisfied, they will not be able to select from assets bequeathed to Paula to satisfy their claim. Therefore, the appellate court held that while the probate court had erred in finding that the bequest of tangible personal property was a general devise, it had correctly found that Neal's guns constituted hobby equipment, such that they were exempt from the children's selection of Exempt Property if other assets exist that might be utilized to satisfy the children's claim.

Additionally, since Paula was devised Neal's cars, and the Chevy Silverado had been titled to Neal with insurance proceeds paid after his death, Paula was entitled to those proceeds under MCL 700.2606(1)(c), which provides that:

> "[a] specific devisee has a right to the specifically devised property" and "[a]ny proceeds unpaid at death on fire or casualty insurance on, or other recovery for, injury to the property."[109]

The appellate court disagreed with Paula's contention that the children's claim was time-barred because MCL 700.2405 does not contain a time period during which an Exempt Property Claim must be asserted. Instead, if a spouse or children fail to make a selection within a reasonable period, the personal representative is authorized to select property to satisfy the statutory exemption.

The issue of how to address the insurance on Paula's life was complicated by the fact that Neal and Paula's divorce settlement contained conflicting provisions. While Paula was awarded all insurance on her life, Neal was awarded all of the

> business assets and ownership interest in Neal D. Nielsen, P.C. (with exception of its pension and profit sharing plans described … below, and with further exception of the Ameritrade accounts listed below which Paula Nielsen will receive).[110]

The court found these conflicting awards to create an ambiguity. Because Paula failed to take any action to assert a claim to the life insurance before Neal died and for over 20 years following their divorce, the court found that because Paula signed the application for the insurance (such that she knew or should have known of its existence) and claims relating to a property settlement contained in a judgment of divorce are subject to a ten-year statute of limitations, she was time-barred from now claiming entitlement to the policy.

The appellate court remanded the matter to the probate court for a determination of whether there are sufficient assets in the estate from which the Exempt Property Claim might be satisfied.

Comment:

One might query whether an effort to satisfy statutory allowances and exemptions with specifically devised property or assets might constitute a challenge to an estate plan sufficient to trigger a no contest clause if other assets exist from which such claims could be satisfied. Because of the potential risk of triggering a no contest clause, it might be prudent to carefully analyze whether a bequest constitutes a general or specific devise. When in doubt, a surviving spouse or child entitled to exercise such statutory elections might wish to file a petition seeking an interpretation or determination as to whether a bequest is general or specific in nature before electing to receive a covered item in satisfaction of a statutory allowance or exemption.

In re Conservatorship of GT;[111] the Court Cannot Rely on a GAL Report Not Made Available for Review by Petitioner[112]

Due process rights may be violated when a Court relies on information that was not admitted into evidence and not made available to interested parties to the litigation. Individuals cannot address allegations or other information to which they have not been made privy. The Michigan Court of Appeals recently held in the published opinion of *In re Conservatorship of GT* that the probate court erred when it did not permit the father the opportunity to review a negative GAL report which influenced its decision to deny the father of three minor children the ability to act as their conservator after the children inherited funds from their great-grandfather.

Facts:

Nicholas Temples' ("Nick") three minor children each inherited $100,000 from their great-grandfather necessitating the establishment of a conservatorship for each of their benefit. Nick petitioned to be appointed each child's conservator. At the time of the hearing on Nick's petitions, his children were 13, 11 and 9. The court appointed a GAL for the minor children. The GAL filed her report with the court but, despite Nick's verbal request, she indicated she would not supply a copy to Nick (or any other interested person) unless the court approved of the same. Her written report recommended that an independent be appointed conservator and indicated that recommendation was based, in part, on information contained in a "'confidential exhibit' submitted to the court."[113] The report and the "confidential exhibit" were never supplied to Nick.

At the hearing, Nick testified he intended to invest the inheritance conservatively for his children's benefit but expressed concern about them receiving such sums outright at 18 as they might lack the maturity to manage it. He indicated a preference to establish a trust for each child so that the funds could be used for "education and other productive purposes."[114] When the court inquired regarding the age at which each child should receive their money, Nick replied that "it would 'depend on the child.'"

The court indicated that Nick's desire to control distributions of the inheritance beyond a child's 18th birthday conflicted with Michigan law and it was concerned that Nick might be trying to "'hold the purse-strings' as a means of controlling the children."[115] The court appointed an independent conservator. This appeal ensued.

Analysis:

On appeal, Nick argued that the court erroneously relied on a confidential report submitted by the GAL without providing him with an opportunity of review and that such conduct violated MCR 5.121(D)(2)(a). The appellate court agreed.

MCR 5.121(D) provides as follows

> Evidence.
>
> (1) Reports, Admission Into Evidence. Oral and written reports of a guardian ad litem or visitor may be received by the court and may be relied on to the extent of their probative value, even though such evidence may not be admissible under the Michigan Rules of Evidence.
>
> (2) Reports, Review and Cross-Examination.
>
> (a) Any interested person shall be afforded an opportunity to examine and controvert reports received into evidence.
>
> (b) The person who is the subject of a report received under subrule (D)(1) shall be permitted to cross-examine the individual making the report if the person requests such an opportunity.
>
> (c) Other interested persons may cross-examine the individual making a report on the contents of the report, if the individual is reasonably available. The court may limit cross-examination for good cause.[116]

The appellate court found that the failure to provide Nick with an opportunity to review the report was procedurally unfair, since it was apparent that the court essentially received it into evidence when it relied on it in rendering its decision. By failing to permit Nick to review the report, Nick was denied an opportunity to examine or respond to the material contained in the report or submitted with it. The appellate court held that

> A proceeding in which the court relies on undisclosed evidence to resolve a contested issue affecting statutory priority and fiduciary appointment undermines the fundamental fairness of the adjudicative process. In our view, if we declined to review this alleged violation of a court rule designed to safeguard the rights of interested parties in probate proceedings, it would result in a manifest injustice.[117]

Importantly, MCR 5.121(D)(2)(a) directs that "any interested person shall be afforded an opportunity to examine and controvert reports received into evidence."[118] The fact that the court relied on the information contained in the report reflects that for all intents and purposes the report (and its attachment) had a similar effect to that of admitted evidence in the proceedings. There is no contest that Nick was an interested person. While the court's receipt and review of the GAL's report did not constitute "structural error … it was procedurally unfair for the court to consider and rely on information that was not made available to all interested persons."[119] Nick did not have to request to see the report as the court rule contains mandatory language regarding the need to provide interested persons with the ability to review a report that is received into evidence, "however it happens."[120] The rule also does not distinguish between confidential and nonconfidential reports nor does it provide any exception to the mandatory obligation to provide access to an interested person when the court relies on the contents of any such submission.

Therefore, the appellate court remanded the matter to the probate court for further proceedings, during which Nick must be afforded an opportunity to examine any GAL report relied upon by the court in the rendition of its decision.

Comment:

The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act ("UGCOPAA" or the "Uniform Act") also requires that "confidential" reports be made available to, *inter alia*, the individual who is the subject of the report or evaluation without limitation as to use, and the petitioner and the petitioner and respondent's attorneys.[121] While the class of "interested persons" appears to be smaller under the Uniform Act than that provided under MCR 5.125, under the Uniform Act the court may expand the persons to whom disclosure may be made if it finds that it is in the public interest or for a purpose the court orders for good cause.[122]

The rationale for why some information should generally remain confidential is reflected in the comments to Uniform Act Section 308, which provides, in pertinent part, that

> Guardianship involves highly personal and other data. It is important that the respondent's privacy be protected before and after the appointment. Furthermore, data found in guardianship records, such as Social Security numbers and information concerning financial accounts, can be used to facilitate fraud. Concern about access by the general public has increased as electronic filing of court records has made these records more accessible.
>
> On the other hand, public access is important. One criticism of guardianship in some states is that too much happens behind closed doors. The public, and "watch-dog" groups in particular, want to know how the guardianship system is functioning. In addition, this act encourages family and others interested in the welfare of the respondent to participate in the proceeding, both before and after the appointment. Sections 302 and 303 taken together require that notice of the proceeding be given to family and others whose participation might enhance the proceeding. Section 310(e) encourages the court to establish a list of family and other persons to receive notice of various actions following the appointment. In order for these persons to effectively monitor the guardianship, they need access to records. However, with the move to electronic filing and increasing concerns about protecting sensitive information, more courts are limiting access to guardianship records to the immediate parties and their counsel.
>
> This section attempts to balance these conflicting policy concerns. Subsection (a) provides that the existence of the guardianship case itself is a matter of public record. But even then, similar to the expungement of criminal records, the court has the authority to seal even the existence of the guardianship if the subject of the proceeding so requests and either the petition for guardianship was dismissed or, if a guardian was appointed, the guardianship is terminated.
>
> Subsection (b) addresses access to the underlying records of the guardianship. In addition to the adult and the adult's attorney, access is granted to persons entitled to notice under Section 310(e), including the guardian's plan under Section 316 and report under Section 317. Other persons must petition for access. The court shall grant the petitioner access if access is in the best interest of the adult or is in furtherance of the public interest and does not endanger the

welfare or financial interests of the adult.

The documents most likely to contain highly sensitive information is the visitor report under Section 304 and professional evaluation under Section 306. Consequently, access to these documents is more restricted than other documents filed, which are covered by subsection (b). *Pursuant to subsection (c), access to the visitor or evaluation report is available only to the court, the individual who is the subject of the proceeding and that individual's attorney, the petitioner and petitioner's attorney, and the visitor. Access is also available to agents under powers of attorney for health care or finances unless the court orders otherwise, and to other persons if the court determines it is in the public interest or for other good cause. A partial or complete redaction of sensitive personal or financial information may be a practical solution for courts in balancing the need for disclosure to the public and the interests of family and friends, with the need to protect the individual's privacy and avoid misuse of sensitive data*.[123]

The Uniform Act, MCR 5.125(D)(2) and the *Conservatorship of GT,* recognize the need for procedural due process protections in order for interest persons to be able to rebut or present supporting evidence that may otherwise be contained in reports relied on by the court. Once the bell had been rung via the presentation of allegations and recommendations contained within a report submitted to the court, it may be hard for the court to unhear (or unsee) what it has already reviewed that might influence the court's perspective in the case, especially if a party litigant is unaware of the report's contents.

If a litigant is not afforded an opportunity to know what has been presented for the court's consideration in a matter, how can it be expected to argue against acceptance or present contrary evidence? While MCR 5.125(D)(2) and the Uniform Act differ in some respects as to who will mandatorily be entitled to receive reports submitted for court consideration, perhaps Michigan's Court Rule might be refined to more clearly denote that such reports must be provided to interested persons unless the court determines that certain aspects should be redacted for the respondent's protection. Blending an adoption of the Uniform Act provisions in this regard, while expanding the class of persons automatically entitled to copies of the report, might better align with protecting due process rights.

In re Estate of Daniel K. Wallace;[124] Personal Representatives Owe Fiduciary Duties to Creditors of Estate[125]

Even though the decedent's estate was insolvent, the personal representative owed fiduciary duties to its creditors such that the imposition of statutory interest from the date the complaint was filed, on a money judgment entered against a removed personal representative, was determined to be appropriate. In addition, while an element of damages computed by an expert relative to presumed interest and penalties on unfiled income tax returns was vacated as speculative during the first appeal, the probate court was within its authority to reopen proofs to address the interest and penalties imposed by the IRS and State of Michigan after the tax returns were filed.

Facts:

Decedent, Daniel Wallace ("Daniel"), owned a number of LLCs at the time of his death. During his lifetime, he operated those LLCs with his wife, Tracy. On Daniel's death the LLCs became assets of his estate (the "Estate"). The LLCs owned over 2000 properties which Tracy continued to manage and operate as personal representative of his Estate. Claims totaling in excess of $4 million were filed against the Estate. Despite the existence of such claims, for over seven years following Daniel's death, Tracy continued to operate the LLCs and used proceeds from the LLCs to pay her personal expenses, while failing to file tax returns or pay creditors of the Estate. Ultimately, Tracy was removed as personal representative, and Gallagher was appointed successor personal representative.

Gallagher filed a complaint on behalf of the Estate and LLCs against Tracy (and an entity she created) alleging that she had breached duties owed to the Estate. Gallagher brought a motion for summary disposition and presented evidence that Tracy paid nonbusiness expenses from LLC accounts, failed to account for rents received by the LLCs, failed to settle creditor claims, and failed to file income tax returns. Tracy did not refute any of the evidence presented. Instead, she claimed she did not owe fiduciary duties to creditors of the Estate or the LLCs and that none of the beneficiaries of the Estate (which would ultimately have been Tracy and her children had the estate been solvent) wanted Gallagher to pursue litigation against Tracy for breach of any duties alleged to have been owed. The probate court granted summary disposition but conducted an evidentiary hearing on the issue of damages.

Tracy admitted that she comingled LLC funds and that the obligations of the Estate exceeded its assets. She also admitted to having failed to disclose assets on the Estate's inventory. She claimed that the attorneys advised her to continue to operate the LLCs as Daniel had during his lifetime and that she was merely trying to preserve Daniel's legacy for his children.

Considerable effort was expended by Gallagher in his attempt to determine the assets of the Estate and the proceeds attributable thereto. Of the approximately 2000 properties listed on the Estate's inventory, all but three were lost due to nonpayment of taxes or foreclosures while Tracy managed the Estate. A forensic accountant was retained to reconstruct pertinent transactions. His conservative opinion was that Tracy's personal misuse of Estate funds resulted in a loss of $525,860 to the Estate, plus what he computed would be attributable to interest and penalties relative to unfiled returns.

The probate court found that the Estate was insolvent from day one and Tracy breached her duties to the Estate and damaged the Estate significantly through her actions. Tracy appealed (the "First Appeal"). In that First Appeal, the court found that Tracy breached duties owed to the Estate's creditors and was responsible for all damages assessed by the probate court, other than those relating to potential interest and penalties on unfiled returns. Those were vacated during the First Appeal as being speculative in nature.

On remand, Gallagher requested that proofs be reopened on the issue of interest and penalties relative to tax returns for years 2011 through 2021, as those returns had by then been filed and the IRS had now assessed interest and penalties totaling $178,596.86 and the State of Michigan had assessed interest and penalties totaling $14,361.22. He also requested that the probate court enter final judgment against Tracy and impose pre-judgment interest under MCL 600.6013 in the sum of $104,016.83. The probate court granted the relief requested and Tracy again appealed (the "Second Appeal").

Analysis:

In the Second Appeal, Tracy argued that Gallagher was only entitled to a final judgment in the sum of $398,810, because those were the only damages affirmed by the appellate court in the First Appeal. She also contended that Gallagher was not entitled to statutory interest on the judgment because "[a]n ordered repayment of amounts taken from an estate in a breach of fiduciary duty surcharge … falls outside of judgments for which prejudgment interest is warranted."[126]

The probate court found Tracy's argument, that it should not award statutory interest, unpersuasive. MCL 600.6013 permits the imposition of interest on money judgments recovered in civil actions as permitted under the statute.

The probate court found that

> [t]he argument that we should ignore the statutory interest component because the person who the judgment is being entered against is the sole beneficiary of the estate fails for the rea-

> son that there were major creditors to this estate that really were being bypassed by the actor, the defendant and the corporation, and so the judgment replenishes the estate to allow for creditors to be paid. Those creditors really are the party in interest here for which Mr. Gallagher is representing as the personal representative of the estate. And they're entitled to the interest associated with those actions that has caused them to wait for their claims to be paid that's why the statutory interest should accrue.[127]

The appellate court also found Tracy's argument unpersuasive. In doing so it noted that Gallagher had filed a "complaint" against Tracy to recover damages to the Estate (and LLCs) caused by her breach of fiduciary duties. It held that interest on a money judgment is mandatory in all cases to which MCL 600.6013 applies and "[t]he purpose of MCL 600.6013 is to compensate the prevailing party for the expenses incurred in bringing an action and for the delay in receiving money damages."[128]

The appellate court noted that

> [f]or the purposes of MCL 600.6013, the term "money judgment" is "[o]ne which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred." "There are several types of civil awards that are not a money judgment in a civil action, including money awards in drug forfeitures, divorce judgments, awards of back pay for wrongful discharge, and awards reflecting payment of a forced share in an estate." Thus, "interest may be denied in proceedings that are not typical civil actions preceding an award of a money judgment."[129]

The appellate court agreed that judgment interest was appropriate here where the action was initiated by a complaint and the final judgment ordered Tracy to pay a sum of money as opposed to directing that she do some other act or restore or transfer property to the Estate. The appellate court recognized that Gallagher's complaint was filed in his capacity as personal representative of the Estate in the performance of his obligation to exercise his powers for the benefit of creditors as well as beneficiaries and that by awarding pre-judgment interest the probate court was addressing damage suffered by the creditors.

The appellate court also analyzed whether the probate court was limited in its ability to revisit the issue of interest and penalties as an element of damage under the circumstances presented. Key to that analysis was the fact that the original award of interest and penalties relating to unfiled income tax returns was "vacated" as opposed to "reversed." The appellate court held that when an award is "vacated" the prior court order is merely cleared—it does not represent a finding that no damage occurred. Therefore, the probate court was within its authority to grant a motion to re-open proofs if the party seeking such relief had previously been diligent and doing so would not provide that party with an unfair advantage. Here, Gallagher had attempted to expedite the process by presenting a computation of interest and penalties before returns had been filed and penalties and interest assessed. During the appellate process (and a stay resulting from Tracy's bankruptcy proceedings) the income tax returns had now been filed and the IRS and state had assessed interest and penalties against the Estate (in an amount greater than the presumed amount computed by the expert during the initial hearing) such that the amounts owed could no longer be considered speculative in nature. The probate court was within its discretion to re-open proofs to admit evidence regarding the amounts actually assessed by the taxing authorities and include the same as an element of damages.

Comment:

When an estate is insolvent, the personal representative still owes duties to certain beneficiaries as well as creditors. MCL 700.3805 (which is patterned after UPC §3-805) sets forth the priority for payment of obligations and allowances when an estate is insufficient to pay all claims and allowances in full (such as the situation presented in *In re Wallace).*[130] MCL 700.3805 provides that:

> (1) If the applicable estate property is insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order of priority:
>
> (a) Costs and expenses of administration.
>
> (b) Reasonable funeral and burial expenses.
>
> (c) Homestead allowance.
>
> (d) Family allowance.
>
> (e) Exempt property.
>
> (f) Debts and taxes with priority under federal law, including, but not limited to, medical assistance payments that are subject to adjustment or recovery from an estate under section 1917 of the social security act, 42 USC 1396p.
>
> (g) Reasonable and necessary medical and hospital expenses of the decedent's last illness, including a compensation of persons attending the decedent.
>
> (h) Debts and taxes with priority under other laws of this state.
>
> (i) All other claims.
>
> (2) A preference shall not be given in the payment of a claim over another claim of the same class, and a claim due and payable is not entitled to a preference over a claim not due.
>
> (3) If there are insufficient assets to pay all claims in full or to satisfy homestead allowance, family allowance, and exempt property, the personal representative shall certify the amount and nature of the deficiency to the trustee of a trust described in section 7605(1) for payment by the trustee in accordance with section 7606. If the personal representative is aware of other nonprobate transfers that may be liable for claims and allowances, then, unless the will provides otherwise, the personal representative shall proceed to collect the deficiency in a manner reasonable under the circumstances so that each nonprobate transfer, including those made under a trust described in section 7605(1), bears a proportionate share or equitable share of the total burden.[131]

Therefore, while Tracy (and potentially the children) would have been entitled to receive allowances and exempt property, sums which she removed from the Estate in excess of those allowances (and exemptions) that were not used to satisfy costs and expenses of administration and reasonable funeral and burial expenses should have been available to address obligations in the order set forth in MCL 700.3805. To the extent that the remaining assets were insufficient to pay creditors of a particular priority class, those creditors would have received a pro-rata share of the remaining assets. As a result, Tracy mischaracterized herself (and the beneficiaries of Daniel's trust) as the only persons to whom duties were owed or injured by her breach of duties.

In Michigan, there are two forms of actions that may be brought in probate court: (1) a proceeding and (2) a civil action. Proceedings are initiated by the filing of an application or petition; while civil actions are commenced by the filing of a complaint. Different service and filing fees generally apply depending upon the type of proceeding initiated. MCR 5.101(C) indicates that any action filed by a fiduciary against another needs to be commenced by the filing of a compliant and is governed by the rules application to civil actions in circuit court. Had Gallagher filed a Petition for Return of Assets the Money Judgment rules may not have applied.

Successor fiduciaries and/or interested parties seeking to hold a removed fiduciary liable for damage to an estate may therefore wish to carefully analyze the type of relief sought and the remedies available before filing a petition as opposed to a complaint, if money judgment from the time of filing is something that is ultimately sought to be recovered.

In re Estate of Nathalie I. Socha;[132] Rebutting the Presumption that Personal Service by a Family Member Was Gratuitously Provided[133]

Following the recent decision in *Estate of Brown v. HHS,*[134] where the Michigan Court of Appeals essentially invalidated Michigan's Department of Health and Human Services requirement that personal service contracts be in writing or be deemed to have been provided for free by relatives or represent a divestment if services provided were paid for, the ability to rebut the presumption that personal care services were gratuitously provided may become more important.

In *In re Estate of Nathalie I. Socha*,[135] the probate court found some services to have been provided in anticipation of payment and others to have been gratuitously provided. While *In re Socha*[136] did not involve Medicaid qualification, a review of the court's analysis may provide assistance when evaluating the facts in other matters.

Facts:

Nathalie Socha ("Nathalie") had four children—Bruce, Dawn, Robyn and Pam.

In 2016, Nathalie fell, and Bruce began helping with her care following that fall. He moved into her home and was not required to pay rent or contribute toward utilities. Since 2017 Bruce had been Nathalie's agent under a durable power of attorney relating to Nathalie's finances and designated patient advocate. At some point Nathalie suffered a stroke and required more care. In 2020, Bruce quit his job in order to provide for Nathalie's care when she was unhappy with the care she was receiving from multiple care providers and she did not want to go into a nursing home. In 2020, Bruce began paying himself out of Nathalie's funds for services he rendered in 2020 at the rate of $16.20 (which was the rate he had been paid at his job at Prairie Farms). Dawn was witness to a discussion regarding Nathalie's desire that Bruce provide care for Nathalie so that she could have a single care provider and avoid going into a nursing facility, but the terms regarding payment were murky.

Following Nathalie's stroke and after she began to receive hospice care, Nathalie required more care and Bruce indicated he was not able to pay himself for all the services he provided because Nathalie lacked the liquidity for him to do so. He kept a ledger showing all of the hours he claimed to have worked each week of 2022 and 2023. The types of services he provided included helping her to transfer to and from her bed, use the bathroom, and assistance with ambulation, personal grooming, medication administration and meal preparation.

Following Nathalie's death, Bruce applied for informal probate of Nathalie's Will and was appointed personal representative of her estate (the "Estate"). Bruce also filed two claims against the Estate, one seeking compensation for care services provided prior to Nathalie's death in the sum of $120,302.40 and the other for labor related to the installation of two decks at Nathalie's home in the sum of $7,500.

The first claim for personal care services had a log appended to it that reflected the hours, dates and rates for services provided. It also reflected that he had been paid in full for personal care services through February 19, 2022 and that arrears accrued starting February 21, 2022 through Nathalie's death on December 24, 2023.

Pam and Robyn objected to the claims, asserting that they were unaware of any contract between Bruce and Nathalie, the decks were not finished, Bruce had lived rent free since October 2016 and he had already been compensated. Robyn also alleged that the claims were merely a ploy by Bruce for him to receive the home, as the amount claimed equaled the value of the home.

The probate court conducted an evidentiary hearing spanning two days regarding the claims. At the conclusion of the hearing the probate court found that the decks were built six years before Nathalie died and if she wanted to pay Bruce for his labor in installing the decks she would have done so before her death. The probate court also acknowledged that services provided by family members are presumptively gratuitously provided, but found that an hourly rate of $16.20 per hour for 40 hours per week was reasonable compensation for the services that Bruce had provided during the two years prior to Nathalie's death. The total at that rate would have been $67,392. The court then reduced that amount by $59,720 for compensation that Bruce had already received and allowed a claim of $7,672 for his personal care service claim against the Estate. Bruce appealed.

Analysis:

The appellate court affirmed the probate court's decision. In doing so it also acknowledged the presumption of gratuity finding it reasonable to only compensate Bruce for 40 hours per week, rather than the 112 hours per week he sought. It noted that, between 2016 and 2020, Bruce had lived rent free and without compensation for services he provided. It further noted that

> … despite the on-call nature of the care, from the responsibilities listed, it is highly unlikely Bruce was actually working, i.e., carrying out those responsibilities, for 112 hours each week, which equates to 16 hours per day. Nor would it be likely that Nathalie would have agreed to pay Bruce more than she financially could have. Accordingly, the probate court did not abuse its discretion by basing its compensation award on a 40-hour workweek.[137]

On appeal, Bruce asserted that as a live-in domestic caregiver he was entitled to compensation for 16 hours per day under the Fair Labor Standards Act (the "FLSA"). Since this argument was not raised at trial, it was waived. Nonetheless, the appellate court found that the FLSA did not apply because this was a claim against an estate relating to an oral compensation agreement and not a suit for wages under the FLSA.

The appellate court upheld the probate court's denial of Bruce's claim to be paid for installation of the decks. Bruce contended that he installed the decks under a contract implied in fact. The court found that the presumption of gratuity had not been rebutted with regard to installation of the decks. In doing so it found that

> [c]onsistent with the court's findings, the decks portrayed in the pictures offered by Bruce and admitted into evidence at the evidentiary hearing do not appear as if they should have taken 300 hours over three years to build, as Bruce asserts, and Bruce began construction on the decks in 2018. Thus, it was likely that if Nathalie had agreed to pay Bruce for the labor, she would have done so much earlier. Moreover, Terry Campeau, Robyn's husband, testified that the decks were unfinished in 2022 when he visited the home, and [Pam] testified that the decks were not handicap accessible and boards were loose. Accordingly, the probate court's decision to deny Bruce's claim for compensation related to installation of the decks was reasonable and, therefore, did not amount to an abuse of discretion.[138]

Comment:

The credibility of witnesses is often key when an oral contract for payment for personal care services rendered by family members is claimed to exist. The existence of a care log and history of actual payments during Nathalie's lifetime, coupled with testimony elicited from Bruce that was, at least in part, corroborated by his sister Dawn, likely lead to Bruce's claim being allowed in part and not denied in its entirety.

In light of the recent decisions in *Estate of Brown v. HHS*[139] and *In re Estate of Sizick*,[140] being able to establish the existence of a verbal personal service care contract (which thereby rebuts the presumption that services by family members were gratuitously provided) may become important. Understanding the indicia that courts may look to in rebutting the gratuity presumption can be helpful in representing clients. Nonetheless, it is best to have a written contract rather than hoping evidence will be deemed sufficient to rebut the gratuity presumption.

RP v. TV;[141] A Tailored PPO May Be Appropriate but Consider the Options and the Potential Benefit of an Elder Abuse Shelter[142]

A PPO may be appropriately granted by the court when an individual engages in conduct that qualifies as stalking as defined by state statute. In Michigan stalking may include "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel … and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[143] When such behavior is exhibited by a family member who is living with and/or otherwise assisting with care but such behavior impedes the ability of an agent appointed under a durable power of attorney from being able to perform their fiduciary duties, finding an expedient and appropriate remedy may be difficult.

> Under MCL 600.2950(1)(j), an individual may petition the trial court to enter a PPO to restrain or enjoin an individual from engaging in conduct that is prohibited under MCL 750.411h. That section prohibits 'stalking,' defined as 'a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel … and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.' MCL 750.411h(1)(e). A trial court may issue a PPO prohibiting a respondent from entering particular premises, contacting the petitioner, or approaching, following, or appearing within the sight of the petitioner. MCL 600.2950a(3). When a respondent moves to terminate a PPO, the petitioner bears the burden of establishing that continuation is warranted. *Hayford*, 279 Mich. App. at 326. The trial court must consider the testimony, documents, and other evidence proffered, as well as whether the respondent had previously engaged in the types of acts prohibited in PPOs. MCL 600.2950(4).[144]

While a PPO precluding the family member who has engaged in stalking behavior from being present at the home of the principal during the agent's visit may be appropriate, consideration of other remedies, and their potential impact on the principal, may be merited.

Facts:

In *RP v. TV*,[145] RP (the "Petitioner") was nominated and appointed agent for her mother (the "Principal") under a durable power of attorney. TV (Petitioner's niece, the "Respondent") lived with the Principal. Petitioner alleged that on at least three occasions when she went to visit the Principal (in order to perform her fiduciary duties), Respondent engaged in assaultive behavior. The Petitioner alleged that Respondent: (1) took off her shoes and threw them at Petitioner and tried to dent Petitioner's car; (2) on another occasion, Respondent ran up behind Petitioner and started hitting Petitioner in the back of her head; and, (3) on another occasion Respondent ran up and tried to jump on Petitioner while attempting to hit Petitioner but Petitioner's sister, VG, stopped Respondent. Following each of these incidents, Petitioner contacted the police but Respondent was not criminally charged or arrested.

Respondent denied the allegations and alleged that Petitioner wanted to "fraudulently deplete her mother's finances"[146] and that Petitioner neglected the Principal and suffered from mental health issues, Respondent sought to have the PPO issued by the court set aside. The trial court conducted an evidentiary hearing and after weighing the credibility of witnesses, the court declined to set aside the PPO that precluded the Respondent from being present in the home when Petitioner was also there because Respondent's behavior constituted harassing or assaultive behavior and Petitioner needed to be able to visit the Principal in order to perform her duties under the power of attorney. Respondent appealed.

Analysis:

Respondent claimed the trial court erred in relying on Petitioner's power of attorney as a reason to continue the PPO, despite conceding that a PPO could be issued by the court upon a showing of stalking, harassment or assaultive conduct. She argued that Petitioner's testimony was not credible, but credibility generally falls within the purview of the trial court. Respondent challenged Petitioner's credibility based on her inability to recall the dates when events occurred, her failure to produce the police reports, the lack of corroborating testimony and the fact that Respondent was never criminally charged. But,

> MCL 600.2950a(1) explicitly allows a trial court to grant a PPO "whether or not the individual to be restrained … has been charged or convicted" of stalking. Moreover, respondent cites no relevant authority to establish that a petitioner must corroborate his or her accusations to continue a PPO, especially in light of the trial court finding petitioner credible despite lack of corroboration.[147]

The appellate court found that the record supported the

> conclusion that a PPO was necessary due to [R]espondent's harassment of and assaultive conduct toward [P]etitioner. Petitioner testified about [R]espondent's pattern of physically attacking her whenever she visited her mother's house. Clearly, the trial court found this testimony credible. Understandably and relatedly, the trial court's rationale for continuing the PPO also included [P]etitioner's need to visit her mother's house to perform her duties under the power of attorney, which [P]etitioner could not do if she risked being assaulted by [R]espondent during each visit. Accordingly, [R]espondent has not established that the trial court's continuation of the PPO fell outside the range of principled outcomes.[148]

Respondent also challenged the issuance and continuation of the PPO based upon her claim that Petitioner had a history of filing PPOs that were unsubstantiated. However, Respondent produced no evidence that the same had occurred and it was up to the court (and not Respondent) to judge Petitioner's credibility. The appellate court noted that the trial court had separately granted Petitioner a PPO against her sister, VG.

Comment:

Family relationships can be fraught with conflict. Abusive or assaultive behavior by persons living with a vulnerable adult can create a myriad of legal and psychological issues. The vulnerable adult may be fearful that if an abusive family member is removed from the home they will be left without adequate care or be moved to a nursing home. The time involved in evicting a family member may result in heightened tensions and danger of further assaultive behavior during the legal process. While a tailored PPO geared at providing guard rails against assaultive behavior toward an agent may be appropriate, the prohibitive nature of PPOs does not actually stop flying fists or bullets.

Some jurisdictions provide temporary housing options for vulnerable adults, so that they can receive a needed level of care while they weigh legal options and/or during the pendency of proceedings that might heighten emotional responses and abusive behaviors. The first such temporary elder abuse shelter was established in Riverdale, NY. It is the Weinberg Center at the Hebrew Home at Riverdale. The center's website indicates that:

> "The Weinberg Center at the Hebrew Home at Riverdale—the nation's first temporary elder abuse shelter—provides safe, short-term shelter.
>
> Each year, one in ten people over the age of 60 are abused, neglected, or financially exploited. Ranging from physical, emotional, and sexual abuse to neglect and abandonment, elder abuse can happen to anyone, anywhere, and does not go away on its own.

The Weinberg Center Shelter offers those who have experienced abuse a safe, comfortable space to regain their dignity, re-assert control, and develop the resilience they need to return to the community."[149]

While many communities recognize the need for battered women's shelters, few have recognized the potentially specialized needs of elderly and disabled adults who may be in need of shelter on a temporary basis. The Weinberg Center for Elder Justice provides assistance to communities around the United States (and the world) in establishing such shelters. They participate in SPRING (Shelter Partners: Regional, National, Global) Alliance®, a professional network whose goal is to increase the size, capacity and reach of the shelter movement.

Why the need for a shelter? The Weinberg Center's website reflects:

"Communities around the country have made great strides in responding to the tidal wave of elder abuse in America. In many places, diverse professionals, each with a role to play in detecting and stopping abuse and supporting survivors, have coalesced into effective multi-disciplinary teams. But nearly everywhere, shelter is the missing link.

Why shelter? Because for some elders, home is not safe. Bias and our collective failure to support healthy aging compounds the dangers. Many victims suffer years of abuse behind closed doors before it's discovered. We're only just beginning to understand the accumulated trauma and process of healing.

Most older victims of abuse won't need shelter, but providing refuge for those who do is essential and within our reach. It doesn't require new construction or even a dedicated facility. As this publication makes clear, there are smart ways to use existing community-based resources, particularly assisted living and skilled nursing facilities. With my colleagues at the Hebrew Home, we forged this model, and it works. The discovery of abuse should compel us to invest more time, money and hope in an older person, not settle for less than we would if the victim were younger. Elders who have endured great harm deserve a chance to live out the rest of their lives with dignity, purpose and peace. This is precisely what the growing movement for elder justice champions—justice that for some begins with shelter."

Some of the benefits of an Elder Justice Shelter may be its ability to meet skilled nursing care needs, funding through Medicare and Medicaid, and elder justice services on top of clinical care needs through a multidisciplinary team approach. Unfortunately, not all jurisdictions have such shelters.[150]

When two elder abuse shelters opened in Oakland County, Michigan in 2025, a local CBS station reported that:

"Each year tens of thousands of Michigan senior citizens are abused — whether it be physical, sexual, emotional or financial.

That's why, said Associate Director Barbra Giles, Jewish Senior Life have opened the first elder abuse shelters in the state on their two community campuses, in Oak Park and West Bloomfield.

'Having a shelter model at Jewish Senior Life was in complete alignment with our mission of helping to take care of older adults in our community who are in need,' Giles told WWJ's Zahra Huber.

According to the National Center on Elder Abuse, which is part of the Administration on Aging, one in 24 older adults are victims of elder abuse, costing our nation $2 billion every year and putting thousands of older adults at risk. Locally, officials say, as many as 90,000 older adults in Michigan are victims of elder abuse and neglect every year, with many of these crimes going unreported."[151]

Since then, other communities in Michigan have followed, but the number of such shelters still remains limited.

When examining options, one might wish to consider the potential impact on the vulnerable adult, the time that adult may remain in an emotionally charged or physically abusive environment while legal remedies are pursued, and the availability of alternate residential alternative during the deliberative and/or legal process.

In re Conservatorship of IL;[152] The Bounds of Arbitration and Removal of Fiduciaries for Good Cause or Because They Are No Longer Suitable to Serve[153]

Since "good cause" for the removal of a guardian and conservator are not statutorily defined in Michigan, courts may give such terms their plain and ordinary meaning. That may result in the court looking to a dictionary for input. To remove a guardian, the court need only find that the guardian is no longer suitable or willing to serve.

Michigan courts have held that "suitable" referred to a guardian "who is qualified and able to provide for the ward's care, custody and control."[154]

Black's Law Dictionary (12th ed.) defines "good cause" as "[a] legally sufficient reason."[155] While the Merriam-Webster's Collegiate Dictionary (12th ed.) defines it as "a substantial reason put forth in good faith that is not unreasonable, arbitrary, or irrational and that is sufficient to create an excuse for an act under the law."[156] When coupled with a probable cause standard, those definitions appear to give courts broad discretion.

Arbitration is a contractual arrangement for the resolution of matters. The terms of the arbitration agreement and award will control whether disputes arising after the award will be resolved through arbitration or court proceedings.

After determining that the arbitration award (and agreement) did not control disputes relating to future acts of the fiduciary, the probate court determined it had jurisdiction to resolve such disputes.

In three separate appeals, Michigan's appellate court reviewed whether the probate court properly applied the good cause standard when it ordered the removal of the first conservator,[157] the successor conservator,[158] and the guardian for IL.[159]

Facts:

IL has four adult children, Paul, Michelle, Renee, and Terese. The family was essentially split into two aligned factions: Paul and Terese vs. Michelle and Renee.

Following petitions to have a guardian and conservator appointed for IL, the siblings agreed to submit the matter of who would assume those fiduciary roles to binding arbitration. During those proceedings, the siblings entered a settlement agreement that resulted in Paul being appointed IL's conservator and Terese being appointed IL's guardian. The settlement agreement required that "…'[a]ny controversy or challenge to the *enforcement* of this agreement' be brought before the arbitrator."[160] (Emphasis added.)

As time went by, tensions between the siblings continued to rise. Michelle and Renee objected to accountings provided by Paul and questioned expenditures that Paul approved, including significant fees paid to an attorney with whom Paul had a personal relationship after the attorney raised his rate from $250/hr. to $500/hr. That attorney (Cooper) was not an experienced probate litigator and Michelle and Renee alleged that the majority of the time "Cooper simply supported whatever actions [Paul] had taken or recommend."[161] They also challenged disproportionate monetary gifts made by Paul to the siblings and members of their respective families.

Prior to initiation of the 2021 conservatorship proceedings, in 2019, Paul received a loan from IL in the sum of $170,000, but the note relating to that loan did not impose an obligation to pay interest and only needed to be repaid within three days of IL's death.

After her appointment as guardian, Terese moved IL to a new care facility without first informing Michelle or Renee. She also limited their access to IL's medical records and prohibited Michelle and Renee from taking IL outside of the facility. Since Terese lived in Wisconsin, she had installed cameras initially in IL's home and thereafter at the facility for IL's welfare. She refused Michelle and Renee viewing access.

Michelle petitioned to have Paul removed as conservator alleging that he had violated his fiduciary duties by not producing records relating to the accountings in a timely manner and due to Paul's approval of Cooper's allegedly unreasonable attorney fees. She also petitioned for removal of Terese as IL's guardian.

Following a hearing, the probate court removed Paul, appointed an auditor to review Paul's accounts, froze the conservatorship account and appointed attorney, Fraser, as IL's successor conservator. The court also granted the petition to remove Terese as guardian and appointed Renee temporary successor guardian.

Rather than petitioning the court to remove the restrictions on the conservatorship account, Fraser contacted the bank in an attempt to have the freeze lifted. In the meantime, the court became concerned regarding whether IL's needs were being met and wanted to know why Fraser had not petitioned the court to have the freeze removed. As a result, without a petition having been filed, the court scheduled an emergency hearing to address the frozen account.

Despite receiving notice of the hearing, Fraser did not attend nor did he inform the court that he would not be doing so. Fraser told other attorneys involved in the matter that he would not be attending due to his pending motion to disqualify the judge.[162]

When Fraser failed to appear at the emergency hearing intended to determine what Fraser was doing to address IL's expenses, the court removed him as IL's successor conservator.

Paul appealed his removal, Fraser appealed his own removal and Teresa appealed her removal. On May 20, 2026, the Michigan appellate court issued three separate opinions relating to each of those appeals.

Analysis:

Paul's Appeal[163]

The appellate court concurred that the probate court had jurisdiction to address concerns raised relating to Paul's accountings. In doing so, the court noted that

> "Arbitration is a matter of contract." "Accordingly, when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation." "Our primary task is to ascertain the intent of the parties at the time they entered into the agreement, which we determine by examining the language of the agreement according to its plain and ordinary meaning." "In considering the scope of an arbitration agreement, . . . a party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration
>
> The plain language of the arbitration clause in the settlement agreement indicates that it applies to challenges to the agreement's enforcement. The agreement concerned the original appointment of [Paul] as conservator. Thus, if the parties wished to challenge the merits of his appointment, they had to do so in arbitration. But the settlement agreement did not address [Paul's] future actions once appointed. The probate court, therefore, did not err by denying [Paul's] request, because it could not require [Michelle] "to arbitrate an issue which [she had] not agreed to submit to arbitration."[164]

Once the probate court correctly determined that it had jurisdiction to address the issue, the review of the court's ultimate determination relating to removal was subject to an abuse of discretion standard.

The appellate court noted that conservators were bound by the same standard of care imposed upon trustees. Pursuant to MCL 700.1212(1)

> [a] fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom

> the person is a fiduciary. A fiduciary shall observe the standard of care described in section 7803 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan prudent investor rule.[165]

While the probate court noted its concern over the fact that Paul was both a creditor and fiduciary of the conservatorship, removal resulted from the court finding that a breach of fiduciary duty had occurred. Once a breach of fiduciary duty is found to have occurred the court then has various remedies available, one of which is removal.

While the State Bar of Michigan's 2020 Economics of Law Practice Survey may have reflected that $500 was a rate found to be charged in Oakland County by some of its top and well experienced probate practitioners, that did not make the rate Cooper charged *per se* reasonable. In reviewing the reasonableness of fees, the court is to also consider

> … additional factors in order to "consider the totality of special circumstances applicable" in this case, including (1) the difficulty and novelty of the issues involved and whether the issues required a certain level of skill or expertise, (2) the experience of the attorney performing the services, (3) the expenses incurred by the attorney in representation, and (4) whether representation of a particular client prevented the attorney from handling other matters.[166]

The court held that Paul had breached his duty to use reasonable care and caution when he failed to investigate Cooper's 100% increase in the rate he would charge for work performed in representing him as conservator. The 95th percentile for experienced probate litigators in Oakland County, in 2020, according to the survey, was only $450/hr. and Cooper was not an experienced probate litigator. Before Paul agreed to the raise in his rates, Cooper was charging $250/hr. The court further found that Cooper did not incur any unusually large expenses in the course of representation and the work did not prevent him from handling other matters in his practice. It also found that the work that was performed did not benefit IL, but rather aided Paul in his efforts to conceal information from his siblings. Consequently, the probate court did not abuse its discretion in removing Paul as conservator.

Fraser's Appeal[167]

Fraser contended that the court could not *sua sponte* petition for his removal as successor conservator because MCL 700.5415(1)(d) references that someone interested in the protected individual's welfare could do so and the court was not an interested person. However, nothing in MCL 700.5415 limits the court's authority to remove a fiduciary in that way.

Without access to the conservatorship account, Fraser could not properly expend or distribute money for IL's support, education, care or benefit. The court had the right to inquire whether or not IL was being properly financially supported.

Fraser argues that he was being scapegoated for the court's own error in freezing the account and in retribution for his motion to disqualify the judge. But the Court issued an order that Fraser simply chose to ignore. The court also found that Fraser was not properly performing his duties. The appellate court found that the probate court did not abuse its discretion in removing Fraser as IL's conservator.

Teresa's Appeal[168]

During an initial hearing on Michelle's petition to remove Teresa as IL's guardian, the court noted that Teresa's behavior sounded "very controlling."[169] The court warned her that she was in danger of being removed if she continued such behavior. At a subsequent hearing it became clear to the court that Teresa had not changed her behavior. While no sworn testimony was presented at the hearing, the petition and response were filed under oath and no contrary evidence or testimony was proffered at the second hearing on the matter.

The probate court removed Teresa after she continued to isolate IL from Michelle and Rene, interfered with visitation, and kept essential information from them. The court recognized that if Michelle or Rene had been abusive or harmful to IL, limitations might have been appropriate, but since it appeared that it was instead Teresa's hostility toward her sister was the basis for her controlling behavior. That hostility based controlling behavior demonstrated that she was no longer suitable to act as IL's guardian given her inability or unwillingness to prioritize IL's well-being and care over her hostility toward her sisters.

The appellate court held that the probate court did not abuse its discretion in removing Teresa and replacing her with Renee as Il's temporary guardian.

Comment:

It is generally not a good idea to simply ignore court orders. Bad things tend to happen when one ignores a court's order. A motion for reconsideration or an appeal may be better remedies to utilize when one believes a court is wrong. Judges are human and they are not infallible, but deciding to intentionally disregard the court's order can have serious repercussions—such as the potential for a finding of civil or criminal contempt.

Probate judges tend to take the provision of protections for vulnerable adults seriously. While it has been argued that some may be too protective which may result in granting fiduciaries powers that are too broad and impinge upon civil liberties of the protected individual instead of a less restrictive approach. Judges are granted broad discretion when it comes to determining whether an individual is, or remains, suitable to act in a fiduciary capacity. This could occur when an actual breach has occurred or a court finds that the fiduciary is unable to put the needs of the individual who is under the court's protection above the wants and needs of the appointed fiduciary.

While the ability of the court to remove a trustee may be limited by the terms of a trust and reserved for serious breaches, such limitations are not imposed upon the court when considering whether to remove a conservator or guardian.

MCL 700.5414 provides that removal of a conservator may occur for good cause, while a guardian may be removed because they are unwilling to continue to act or are not suitable to act in that capacity.

In determining suitability, the court will generally review whether the guardian was qualified and able to serve and had satisfactorily provided for the ward's care, custody and control.[170]

MCL 700.5219(1) provides that

> [a] person interested in a ward's welfare or, if 14 years of age or older, the ward may petition for the removal of a guardian on the ground that removal would serve the ward's welfare or for another order that would serve the ward's welfare.[171]

This provides individuals with broad authority to bring issues impacting the ward's well-being to the court's attention and provides the court with broad discretion to address the issues presented in the ward's best interests.

While certain individuals are statutorily given priority for appointment as guardian or conservator, the court still must determine if such an individual is qualified and suitable to serve.

The Reporter's Comment to MCL 700.5409, reflects that

> [t]he court applies the general and overriding requirement of suitability to the specific circumstances of each particular case. If there is potential for conflict of interest between the interests of the person to be protected and a possible appointee, that potentiality may make the candidate unsuitable.[172]

Providing interested persons with notice regarding attorney engagement and the fees to be charged can be helpful. If interested persons fail to timely object or raise concerns, a laches argument might be raised.

MCL 700.5430(4) provides that when a claim is brought against the estate based upon a contract entered into by a conservator in his or her fiduciary capacity

> [a] question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, indemnification, or other appropriate proceeding or action.[173]

In conservatorship proceedings, attorney fees payable from the estate remain subject to court allowance which may result in approval of all or a portion of the fees. Generally, the remedy imposed by the court, when it deems the rate of the attorney to be unreasonable, is disallowance of a portion of the fees charged. It appears that the rationale behind Paul's removal went beyond the rate charged. Instead, it appears the court focused on the relationship between Paul and the attorney, an unexplained 100% increase to a rate reserved for attorneys with recognized expertise and experience not possessed by the attorney hired, and concerns that the relationship between Paul and the attorney was one that was intended to permit facilitation of Paul's efforts to obfuscate questionable conduct Paul engaged in while acting in a fiduciary capacity. When fiduciary attorney fees are incurred due to the fiduciary's wrongful conduct, it is not unusual for a court to deny payment of some (or all) fees necessitated by such conduct from the conservatorship estate which may leave the fiduciary responsible for the fees of his attorney incurred as a result of the fiduciary's wrongful conduct.

Notes

1. *Packaging Corp of America Thrift Plan for Hourly Employees v Langdon*, 166 F4th 645 (7th Cir 2026) ("PCA").

2. Sandra acknowledges and thanks Nancy H. Welber for her review and input with regard to this article. Cite as: LISI Estate Planning Newsletter #3286 (April 8, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.

3. *Kennedy v Plan Adm'r for DuPont Sav & Inv Plan*, 555 US 285 (2009).

4. *Id*. at *288. Internal citations omitted.

5. *Id*. at *289. Internal citations omitted.

6. *Id*. at *294.

7. *Kennedy, supra* at 300-01.

8. *Egelhoff v Egelhoff*, 532 US 141 (2001).

9. *PCA, supra*.

10. *See* MCL 552.101(1) and (2).

11. *PCA, supra*.

12. *Id*. at *12. Emphasis added.

13. *Id.* at *4.

14. *Id*. at *7.

15. Scholz passed away during the litigation.

16. *Id*. at *10-11. Internal citations omitted.

17. One exception may be when the named beneficiary who wishes to disclaim ERISA Plan benefits is a minor at the time of the participant's death. But a discussion of this type of scenario is beyond the scope of this article.

18. *Gries v Department of Health & Human Servs (In re Estate of Sizick)*, No 166921, ___ Mich ___, ___ NW3d ___ (Mar 18, 2026).

19. Cite as: LISI Estate Planning Newsletter #3289 (April 15, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.

20. *In re Estate of Sizick, supra* at *3.

21. *Id*. at *1-3. Internal citations omitted.

22. *Id*.

23. *Id*. at *5-6. Emphasis added.

24. *Id*. at *6.

25. *See In re Vansach Estate*, 324 Mich App 371, 385; 922 NW2d 136 (2018) and (*Schroeder) In re Estate of Norbert*, 335 Mich App 107; 966 NW2d 209 (2020).

26. *In re Estate of Norbert*.

27. *See* BEM 402, BPB 2025-001 (January 1, 2025) cited at *In re Estate of Sizick, supra* at *5.

28. *In re Estate of Sizick, supra* at *21. Internal citations omitted.

29. *Id*. at *22-24.

30. *Nazem v Ashcraft (In re Robert W Ashcraft Tr),* No 372846, ___ Mich App ___, ___ NW3d ___ (Mar 10, 2026).

31. Cite as: LISI Estate Planning Newsletter #3290 (April 20, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohib-

ited—Without Express Permission.

32. *See Becht v Miller*, 279 Mich 629, 273 NW 294 (1937).

33. *In re Robert W Ashcraft Tr, supra*.

34. *Id*. at *2.

35. MCL 700.7904(1).

36. *See* MCL 700.7901(2)(c) or (j) and MCL 700.7902(a). *See also* UTC § 1001 and 1002(a).

37. *In re Temple Marital Tr*, 278 Mich App 122, 128, 748 NW2d 265 (2008).

38. *In re Robert W Ashcraft Tr, supra*.

39. *Becht v Miller, supra.*

40. *Id.* at 638.

41. *In re Temple Marital Tr, supra*.

42. *Abu-Aita v Klug Law Firm (In re Edward & Elaine Jaye Tr)*, No 363847 (Mich Ct App June 6, 2024) (unpublished).

43. *Id*. at *11.

44. *Id*.

45. *In re Robert W. Ashcraft Tr, supra*.

46. *Id.* at 4-5 (citations omitted)

47. Bogert, Trusts and Trustees, §871.

48. *Merkel v Long*, 372 Mich 144, 125 NW2d 284 (1963).

49. *Smith v Khouri,* 481 Mich 519, 751 NW2d 472 (2008)

50. *Estate of Gill v Commissioner,* TC Memo 2012-7 (Jan 9, 2012).

51. *Bullis v Bullis (In re Guardianship of GJB)*, Nos 375937, 375938 (Mich Ct App Mar 17, 2026) (unpublished).

52. Cite as: LISI Special Needs & Elder Care Planning Newsletter #27 (April 22, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.

53. *Id*. at *2.

54. *Id*. at *2.

55. *Id*. at *2.

56. *Id*. at *3. Emphasis added.

57. *Estate of Brown v Department of Health & Human Servs*, No 368825, ___ Mich App ___, ___ NW3d ___ (Mar 26, 2026).

58. Cite as: LISI Special Needs & Elder Care Planning Newsletter #28 (April 24, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.

59. *Gries v Department of Health & Human Servs (In re Estate of Sizick),* No 166921, ___ Mich ___, ___ NW3d ___ (Mar 18, 2026).

60. *Id*. at *1-3. Internal citations omitted.

61. *Brown, supra* at *6.

62. *Id*. at *14.

63. *Id*. at *14.

64. *Id*. at *14-15.

65. *Id*.

66. *Id*. at *4.

67. *Id*. at *4.

68. *Id*. at *14-15.

69. *Id*. at *5.

70. *Id*. at *5-6.

71. *Id*. at *6.

72. *Id*. at *11.

73. *Id*. at *15-17.

74.Genworth Fin., Inc., CareScout Releases 2025 Cost of Care Survey Results (Mar 2, 2026), https://investor.genworth.com/news-events/press-releases/detail/1054/carescout-releases-2025-cost-of-care-survey-results.

75. *Estate of Karwoski v Hamlin-Rogers*, No 371980 (Mich Ct App Jan. 12, 2026) (unpublished).

76. Cite as: LISI Estate Planning Newsletter #3291 (April 27, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.

77. *Estate of Karwoski*, at *9. (citations omitted).

78. *Id*. at *11. (citing MCL 700.1212(1)).

79. *Id*. at *10. (citations omitted).

80. *Id*. at *16.

81. *Id.* at *20.

82. Rev. Proc. 95-16, 26 CFR 601.201 provides that "Section 20.2031-6(b) provides that if there are included among the household and personal effects articles having marked artistic or intrinsic value of a total in excess of $3,000, the appraisal of an expert or experts, under oath, must be filed with the estate tax return."

83. *Miller v Williams*, No 369462 (Mich Ct App Apr 16, 2026) (unpublished).

84. Cite as: LISI Estate Planning Newsletter #3295 (May 11, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.

85. *Miller v Williams*, at *2.

86. *Id*. at *9, citing *Penrose v McCullough*, 308 Mich App 145, 154, 862 NW2d 674 (2014).

87. *Id*. at *11.

88. *Id*. at *12-13. Internal citations and quotation marks omitted.

89. *Id*. at *16. Citations and quotation marks omitted.
90. *Id.* at *17.
91. *Id*. at *24. Internal citation omitted.
92. *Id*. at *26. Internal citation omitted.
93. MCL 700.3803(1).
94. *Matthews v Nielsen (In re Estate of Nielsen),* No 368054, ___ Mich App ___, ___ NW3d ___ (Apr 27, 2026).
95.Cite as: LISI Estate Planning Newsletter #3296 (May 13, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.
96. *In re Estate of Nielsen, supra* at *3.
97. MCL 700.2606.
98. *In re Estate of Nielsen, supra* at *10-11. Internal citations omitted.
99. MCL 700.2404.
100. MCL 700.2405(1).
101. *In re Estate of Nielsen, supra* at *13, citing *In re Bradley Estate*, 494 Mich 367, 377, 835 NW2d 545 (2013).
102. *In re Corby's Estate*, 154 Mich 353, 354, 117 NW 906 (1908).
103. *Morrow v Detroit Tr Co*, 330 Mich 635, 638, 644, 48 NW2d 136 (1951).
104. *Id.* at 644-645. Quotation marks and citations omitted.
105. *Id*. at 645. Quotation marks and citations omitted.
106. *In re Corby's Estate, supra.*
107. *Morrow v Detroit Tr Co, supra*.
108. *Pavka v Null (In re Estate of Guise)*, No 344217 (Mich Ct App July 23, 2019) (unpublished).
109. *In re Estate of Nielsen, supra* at *19.
110. *Id*. at *21-22.
111. *Temples v Santamarina (In re Conservatorship of GT)*, Nos 371518, 371519, 371523, ___ Mich App ___, ___ NW3d ___ (Apr 14, 2026).
112. Cite as: LISI Estate Planning Newsletter #3298 (May 18, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.
113. *In re Conservatorship of GT*, at *2.
114. *Id*.
115. *Id*. at *3.
116. MCR 5.121(D) (emphasis omitted).
117. *In re Conservatorship of GT*, at *4.
118. MCR 5.121(D)(2)(a).
119. *In re Conservatorship of GT, supra* at fn. 3.
120. *Id*. at *5.
121. *See* UGCOPAA, Section 308.
122. *Id*.
123. *Id*. Section 308, Comment (emphasis added).
124. *Gallagher v Wallace (In re Estate of Wallace)*, No 370747 (Mich Ct App May 11, 2026) (unpublished).
125. Cite as: LISI Estate Planning Newsletter #3300 (May 27, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.
126. *Id*. at *11.
127. *Id*. at *11-12.
128. *Id*. at *21.
129. *Id*. at *21-22. Internal citations omitted.
130. *Id*.
131. MCL 700.3805. *See also* UPC §3-805.
132. *Socha v Campeau (In re Estate of Socha),* No 373895 (Mich Ct App May 12, 2026) (unpublished).
133. Cite as: LISI Estate Planning Newsletter #3302 (June 5, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.
134. *Estate of Brown v Department of Health & Human Servs*, No 368825, ___ Mich App ___, ___ NW3d ___ (Mar 26, 2026).
135. *In re Estate of Socha, supra.*
136. *Id*.
137. *Id*. at *8.
138. *Id*. at *9-10.
139. *Estate of Brown v Department of Health & Human Servs, supra*.
140. *Gries v Department of Health & Human Servs (In re Estate of Sizick)*, No 166921, ___ Mich ___, ___ NW3d ___ (Mar 18, 2026).
141. *RP v TV*, No 374216 (Mich Ct App Mar 6, 2026) (unpublished).
142. Cite as: LISI Estate Planning Newsletter #3304 (June 10, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.
143. *RP v TV, supra* at *4.
144. *Id*.
145. *Id*.
146. *Id*. at *1.
147. *Id*. at *5-6.
148. *Id*. at *6-7.
149. The Weinberg Center Shelter, Weinberg Ctr. For

Elder Justice, https://theweinbergcenter.org/the-weinberg-center-shelter/.

150. Other examples of participating models include, but may not be limited to the Shalom Sanctuary Center for Elder Abuse, Hooverwood Living, in Indianapolis, IN; the Magen Center, Syracuse Jewish Family Service, in Syracuse, NY, and the Pikes Peak Elder Justice Center in Colorado Springs, CO.

151. Zahra Huber, 2 Elder Abuse Shelters Open in Oakland County, First in Michigan, CBS News Detroit, https://www.cbsnews.com/detroit/news/2-elder-abuse-shelters-open-in-oakland-county-first-in-michigan/

152. *Letissier v IL (In re Conservatorship of IL)*, No 371470 (Mich Ct App May 20, 2026) (unpublished).

153. Cite as: LISI Estate Planning Newsletter #3307 (June 25, 2026) at http://www.leimbergservices.com. Copyright © 2026 Leimberg Information Services, Inc. (LISI). This article has been adapted from that article and has been Republished with Permission. Further Reproduction in Any Form or Forwarding to Any Person Prohibited—Without Express Permission.

154. *In re Il, supra* at *4.

155. *Id*. at *7.

156. *Id*.

157. *In re Il, supra*.

158. *Id*.

159. *Id*.

160. *Id*. at *6.

161. *Id*. at *2.

162. Apparently, Fraser's motion to disqualify the judge had already been denied, but he had attempted to revive it by supplementing his motion which he did not have a right to do under the court rules.

163. *In re Il, supra*.

164. *Id*. at *4-5. Internal quotations and citations omitted.

165. *Id*. at *6.

166. *Id*. at *9. Internal citation omitted.

167. *In re Il, supra*.

168. *Id*.

169. *Id*. at *2.

170. *See Seabrook v Office of Midland Pub Guardian (In re Guardianship of AMS)*, No 372183 (Mich Ct App Feb 10, 2025) (unpublished).

171. MCL 700.5219(1).

172. Reporter Comment to MCL 700.5409.

173. MCL 700.5430(4).

Sandra D. Glazier, Esq., is the founding member of Sandra D. Glazier P.C. located in Troy, Michigan. She is also the RPTE Liaison to the Commission on Law and Aging and a member of Michigan's Probate Council. She was recently inducted into the NAEPC Hall of Fame for estate planning and designated as AEP® Distinguished. She was the 2018 recipient of Bloomberg Tax's Estates, Gifts and Trusts Tax Contributor of the Year Award and Trusts & Estates Magazine's Authors Thought Leadership Award. Sandra concentrates her practice in the areas of estate planning and administration, probate litigation and family law.

Probate Litigation Report: Conservatorship/Protective Orders and Romance Scams

By David L. J. M. Skidmore

Romance scams are frequently in the news. Many innocent people are falling for romance scams, and vast sums of money are being lost as a result. In 2025, romance scams contributed to $2.4 billion in overall reported losses from fraud for older Americans.[1] In articles on this topic, some authorities have suggested that families of victims have few legal options. This article advocates that a romance scam may be the basis for appointment of a conservator or entry of a protective order under Michigan law.

Description of Romance Scam

In a romance scam, a criminal causes a victim to falsely believe that a meaningful romantic relationship exists between the two of them. The scam typically unfolds online or by phone with no actual in-person contact. Employing a false identity or assuming the identity of a celebrity, the criminal exploits the victim's romantic feelings and attachment to obtain money from the victim. As the fraudulent lover describes being caught in repeated financial crises, the victim transfers assets to the criminal in the belief that she is helping her unfortunate beloved. The need for cash is described as the sole impediment to the "couple" meeting in real life and being together. The urgent financial demands will continue so long as the victim's resources hold out, and these scams can last for months or years. When the victim's assets are depleted, the criminal will move on to the next mark.

Anyone can fall victim to a romance scam. Obviously, loneliness and social isolation make it more likely that a person will be susceptible to this type of fraud. Those with addictive and/or compulsive tendencies may be at greater risk. Older Americans are 39 percent more likely to fall victim to a romance scam than younger adults.[2] The fact is that senior citizens are more vulnerable than others to financial exploitation and undue influence. Older persons may be more trusting, possess less "digital literacy," and be less able to recognize the signs of a fake online profile.

The Mental Experience of Being a Victim of a Romance Scam

According to experts, the victim of a romance scam experiences temporary chemical changes in the brain that interfere with logical decision-making. The victim is manipulated into feeling attraction for, and attachment to, the scammer. Strong feelings of attraction are linked to production of high levels of dopamine, which lead to "irrational behavior and poor-decision making."[3] Strong feelings of attachment are linked to production of high levels of oxytocin, which leads to emotional rather than logical decision-making.[4] So the romance scam victim undergoes chemical changes in the brain that negatively affect how she processes information and makes decisions.

The romance scam victim may be influenced by a logical error known as the "sunk cost fallacy." This is a cognitive bias that causes an individual to continue a failing endeavor simply because he has already invested so much time, money, and effort into it. In this way, falling for a romance scam resembles compulsive gambling. Neuropsychologist Peter Lichtenberg describes the dynamic as "almost akin to what a gambler experiences."[5]

Falling victim to a romance scam is similar to a rare mental disorder known as de Clérambault's Syndrome. "Erotomania, also known as de Clérambault's syndrome, is a relatively rare, persistent delusional manifestation, characterized by an irrational belief that another person, usually of higher socioeconomic status, is romantically involved with the patient, despite minimal or no contact between them."[6] As with this syndrome, the romance scam involves minimal or no real-world contact between the fraudster and the victim, and the belief in the existence of the relationship appears completely irrational to observers.

The victim typically experiences great trauma when the attention from the fraudster ends. "[M]ost victims found the loss of the relationship more upsetting than financial loss."[7] The delusion of the perfect romantic partner is so strong that victims often struggle to relinquish the mental image of their lover, even after being presented with evidence of the actual appearance of the fraudster. "[M]any victims exhibit symptoms similar to those of post-traumatic stress disorder long after the event, with some even contemplating suicide."[8]

Standard for Appointment of Conservator or Entry of Protective Order

MCL 700.5401(3) identifies two determinations that must be made in order for the probate court to appoint a conservator or make another protective order in relation to an individual's estate and affairs. The first determination is that the individual must be found to be "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." MCL 700.5401(3)(a). The second determination is that the individual must be found to have "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." MCL 700.5401(3)(b).

There are two subparts to the first determination. The probate court must find not only (1) that the individual is "unable to manage property and business affairs effectively," but also (2) that the inability is the result of either a listed potential cause ("mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance") or another cause similar to the listed potential causes ("… for reasons such as …"). According to the express terms of MCL 700.5401(3)(a), the list of potential causes is illustrative rather than exhaustive. Therefore, if the probate court finds that an individual is unable to manage property and business affairs effectively for a reason which is not listed in MCL 700.5401(3)(a), but which is similar to the reasons listed therein, then it may deem the first determination to be satisfied.

In a published decision, the Michigan Court of Appeals agreed with this analysis of the statute. "[T]he phrase 'for reasons such as' precedes the listing of these eight conditions. … Applying the common usage and understanding of the phrase, … we hold that the phrase 'for reasons such as' is one of enlargement rather than limitation. In other words, the use of the phrase 'for reasons such as' in MCL 700.5401(3)(a) does not limit the appointment of conservators only for individuals who have disappeared, been detained by a foreign power or confined, or suffer from mental illness or deficiency, a physical illness or disability, or chronic use of drugs or alcohol. Consequently, in light of the statutory language, … the appointment of a conservator for an individual may be appropriate even if the individual does not suffer from one of the conditions listed in MCL 700.5401(3)(a)."[9] However, "not any condition suffered by an individual will justify the appointment of a conservator. It is a familiar principle of statutory construction that words grouped in a list should be given related meaning. On the basis of this well-established rule of statutory construction, we also hold that any circumstance not listed in MCL 700.5401(3)(a) that prohibits an individual from effectively managing his or her property and business affairs must be of a similar nature and quality as the eight conditions listed in the statute to justify the appointment of a conservator."[10]

In an unpublished decision, the Michigan Court of Appeals has ruled that the same condition may serve as the basis for both required determinations under MCL 700.5401(3) (i.e., "unable to manage property and business affairs effectively" and "property that will be wasted or dissipated"). There, the subject of the petition argued on appeal that the probate court had impermissibly considered his drug use to satisfy both determinations under the statute. "However, respondent cannot demonstrate to this Court where in the statute the probate court was restrained from finding that the same underlying condition cannot form the basis for the probate court's determination that a person cannot manage their affairs as well as the determination that assets would be wasted. Review of the cited statutes reveals that the underlying condition would, in many cases, impact both considerations."[11]

It should be noted that the causes included on the illustrative list are not necessarily permanent conditions. Mental illness, physical illness, physical disability, and intoxication from alcohol or drugs are conditions that may resolve or improve. Hence, the reason why an individual is unable to manage property and business affairs effectively need not be permanent in order for the probate court to grant relief under this statute.

The condition "mental deficiency" was construed by the Michigan Court of Appeals in an unpublished decision. "Based on these [dictionary] definitions, 'mental deficiency' as used in the statute could plausibly refer to someone who has simply made consistently bad decisions with respect to his or her property, without being afflicted by some form of officially recognized mental illness or incapacity…."[12]

Applying the Conservatorship/Protective Order Framework to Romance Scams

It is advocated here that a probate court may appoint a conservator or enter a protective order in order to safeguard the victim of a romance scam. As a result of the scam, the victim's decision-making ability has become impaired for a time. Under the influence of the romance delusion, the victim is unable to make logical and rational decisions. In effect, the victim is taking actions that represent not the true will of the victim, but rather the will of the scammer who has gained control over, and is unduly influencing, the victim.

This cognitive distortion renders the victim "unable to manage property and business affairs effectively" within the meaning of MCL 700.5401(3)(a). The cause of the disability (believing in an irrational delusion) is either similar to the statute's list of illustrative causes or qualifies for the listed cause "mental deficiency." Falling for the scam also leaves the victim's assets liable to being wasted or dissipated, at the direction of the scammer, within the meaning of MCL 700.5401(3)(b). All of the statutory requirements are satisfied.

Conclusion

Michigan's conservatorship/protective order framework is intended to protect those whose assets are at risk because of cognitive impairment. Falling victim to a romance scam can seriously impair the victim's cognitive abilities, at least temporarily, and jeopardize their assets. When the romance scam has been adequately proven, the probate court may appoint a conservator or enter a protective order to safeguard the victim of the scam, as long as it proves necessary—recognizing that it may not be quick or simple to reset the victim's thought processes.

Notes

1. Federal Trade Commission, *Protecting Older Consumers 2024-2025: A Report of the Federal Trade Commission* (Washington, DC: Federal Trade Commission, 2025).

2. *Id.*

3. Christopher Hadnagy, *I Love You, Now Pay Up: Understanding Romance Scams*, Psychology Today (December 28, 2021), https://www.psychologytoday.com/us/

blog/human-hacking/202112/i-love-you-now-pay-up-understanding-romance-scams. (accessed May 26, 2026).

4. *Id.*

5. Matt Alderton, *It Can Be Agony When a Loved One Is a Scam Victim – But Refuses to See It*, AARP (August 20, 2024), https://www.aarp.org/money/scams-fraud/victims-in-denial/ (accessed May 27, 2026).

6. Nasri Alotti et al., *Induced Erotomania by Online Romance Fraud—A Novel Form of de Clérambault's Syndrome*, 24 BMC Psychiatry 218 (2024).

7. Jie-Yu Chuang, *Romance Scams: Ro mantic Imagery and Transcranial Direct Current Stimulation*, 12 Front Psychiatry 738874 (2021).

8. *Id.*

9. *In re Conservatorship of Townsend*, 293 Mich App 182, 188–189, 809 NW2d 424 (2011) (citation omitted).

10. *Id.*

11. *In re Conservatorship of Jacob*, No 329390 at *2 (Mich Ct App Jan 17, 2017) (unpublished).

12. *Brickman v Brickman*, No 278403 at *2 (Mich Ct App Oct 16, 2008) (unpublished). *But see In re Guardianship of GM*, No 373743, ___ Mich App ___, ___ NW3d ___, at *4 (Oct 24, 2025) (holding evidence insufficient to support appointment of guardian and/or conservator, despite subject's "lifelong difficulty properly caring for herself, both physically and financially…").

David L.J.M. Skidmore is a partner in Warner Norcross + Judd LLP with a statewide probate litigation practice. He also mediates probate litigation disputes. He is a Fellow in the American College of Trust and Estate Counsel and a past Chair of the SBM Probate and Estate Planning Council, and he delivers the annual caselaw update at ICLE's annual Probate Institute.

State Bar of Michigan
Members of Section Council 2025–2026

Officers

CHAIRPERSON:
NATHAN R. PIWOWARSKI
120 W. Harris St.
Cadillac, MI 49601

CHAIRPERSON-ELECT:
RICHARD C. MILLS
213 S. Ashley St.
Ste. 400
Ann Arbor, MI 48104

VICE-CHAIRPERSON:
CHRISTINE M. SAVAGE
2375 Woodlake Dr.
Ste. 380
Okemos, MI 48864

SECRETARY:
MELISA M. W. MYSLIWIEC
171 Monroe Ave., NW
Ste. 1000
Grand Rapids, MI 49503

TREASURER:
ANGELA M. HENTKOWSKI
205 S. Main St
Ishpeming, MI 49849

Council Members

TERM EXPIRES 2026:
James F. Anderton
124 W. Allegan St.,
Ste. 700
Lansing, MI 48933
Ernscie Augustin
1675 Watertower Pl.
Ste. 800
East Lansing, MI 48823
Georgette E. David
905 W. Eisenhower Cir.
Ste. 110
Ann Arbor, MI 48103
Daniel S. Hilker
1019 Trowbridge Rd.
East Lansing, MI 48823
Warren H. Krueger III
313 S. Washington Sq.
Lansing, MI 48933
Alexander S. Mallory
120 W. Harris St.
Cadillac, MI 49601

TERM EXPIRES 2027:
Patricia E. Davis
128 W. Spring St.
Marquette, MI 49855
Sandra D. Glazier
3910 Telegraph Rd., Ste. 200
Bloomfield Hills, MI 48302
Kathleen A. Martone
480 Pierce St., Ste. 300
Birmingham, MI 48009
Nicholas A. Reister
85 E. 8th St., Ste. 310
Holland, MI 49423
David Sprague
2723 S. State St., Ste. 210
Ann Arbor, MI 48104
Rebecca K. Wrock
101 N. Main St., Ste. 525
Ann Arbor, MI 48104

TERM EXPIRES 2028:
Daniel W. Borst
150 Ottawa Ave. NW
Ste. 1500
Grand Rapids, MI 49503
Susan L. Chalgian
1019 Trowbridge Rd.
East Lansing, MI 48823
Elizabeth L. Luckenbach
2600 W. Big Beaver Rd.
Ste. 300
Troy, MI 48084
Hon. Sara A. Schimke
40 N. Main St., Fl. 5
Mount Clemens, MI 48043
Michael D. Shelton
538 N. Division St.
Ann Arbor, MI 48104
Joseph J. Viviano
444 W. Lake St., Ste 4000
Chicago, IL 60605

Ex Officio

Raymond T. Huetteman, Jr. (deceased)

Joe C. Foster Jr. (deceased)

Russell M. Paquette (deceased)

James A. Kendall (deceased)

James H. LoPrete
41000 Woodward Ave., Ste. 310
Bloomfield Hills, MI 48304

Everett R. Zack
261 Ruby Way
Williamston, MI 48895

Douglas J. Rasmussen
500 Woodward Ave., Ste. 3500
Detroit, MI 48226

Susan S. Westerman
345 S. Division St.
Ann Arbor, MI 48104

Fredric A. Sytsma
1255 Sand Castle Rd.
Sanibel, FL 33957-3618

Stephen W. Jones (deceased)

John E. Bos
271 Woodland Pass, Ste. 115
East Lansing, MI 48823

W. Michael Van Haren
150 Ottawa Ave. NW
Grand Rapids, MI 49503-2832

Robert B. Joslyn
454 Kendall Dr.
Marco Island, FL 34145-2479

Robert D. Brower, Jr.
45 Ottawa Ave. SW
Ste. 1100PO # 306
Grand Rapids, MI 49503-4009

John D. Mabley
26211 Central Park Blvd.
Ste. 200
Southfield, MI 48076-4157

Raymond H. Dresser, Jr. (deceased)

John H. Martin
3437 Rambling Brook Rd.
Muskegon, MI 49444

Patricia Gormely Prince
4300 Persimmon Woods Dr.
North Charleston, SC 29420

Brian V. Howe (deceased)

Richard C. Lowe
2375 Woodlake Dr., Ste. 380
Okemos, MI 48864

Kenneth E. Konop
366 Bird
Birmingham, MI 48009

John A. Scott
5085 Anna Dr., Ste. B
Traverse City, MI 49684-7475

Dirk C. Hoffius
333 Bridge St. NW,
P.O. Box 352
Grand Rapids, MI 49501

Henry M. Grix
2600 W Big Beaver Rd.
Ste. 300
Troy, MI 48084-3312

Phillip E. Harter
395 S. Shore Dr., Ste. 205
Battle Creek, MI 49015

Hon. Michael J. McClory
2 Woodward Ave., Rm. 1305
Detroit, MI 48226-3441

Douglas A. Mielock
313 S. Washington Sq.
Lansing, MI 48933-2144

Lauren M. Underwood
30100 Telegraph Rd., Ste. 360
Bingham Farms, MI 48025

Nancy L. Little
271 Woodland Pass, Ste. 115
East Lansing, MI 48823

Harold G. Schuitmaker (deceased)

Douglas G. Chalgian
1019 Trowbridge Rd.
East Lansing, MI 48823

George W. Gregory (deceased)

Mark K. Harder
99 E. 8th St.
Holland, MI 49423-3562

Thomas F. Sweeney
151 S. Old Woodward, Ste. 200
Birmingham, MI 48009

Amy N. Morrissey
345 S. Division St.
Ann Arbor, MI 48104

Shaheen I. Imami
633 Chestnut St., Ste. 1900
Chattanooga, TN 37450-1801

James B. Steward
205 S. Main St.
Ishpeming, MI 49849

Marlaine C. Teahan
124 W. Allegan St., Ste. 1000
Lansing, MI 48933

Marguerite Munson Lentz
201 W. Big Beaver Rd., Ste. 500
Troy, MI 48084-4160

Christopher A. Ballard
101 N. Main St.
Ste. 525
Ann Arbor, MI 48104

David P. Lucas
70 Michigan Ave. W, Ste. 450
Battle Creek, MI 49017

David L. J. M. Skidmore
150 Ottawa Ave. NW
Ste. 1500
Grand Rapids, MI 49503

Mark E. Kellogg
124 W. Allegan, Ste. 1000
Lansing, MI 48933

James P. Spica
26211 Central Park Blvd.
Ste. 200
Southfield, MI 48076

Katie Lynwood
271 Woodland Pass
Ste. 115
East Lansing, MI 48823

Probate and Estate Planning Section
2025-2026 Committee Assignments

Editor's note: The Probate and Estate Planning Council welcomes your participation on committees. If you are interested in serving on any of the committees listed below, please contact the chair of the committee on which you would like to serve.

Amicus Curiae

Andrew W. Mayoras, Chair
- Ryan P. Bourjaily
- Patricia E. Davis
- Angela M. Hentkowski
- Scott Kraemer
- Neil J. Marchand
- Laura E. Morris
- Kurt A. Olson
- David L. J. M. Skidmore
- Trevor J. Weston
- Timothy White

Annual Meeting

Nathan R. Piwowarski

Assisted Reproductive Technology Ad Hoc Committee

Nancy H. Welber, Chair
- Ernscie Augustin
- Susan L. Chalgian
- Nazneen Hasan
- Laura Jeltema
- Christina Lejowski
- Nathan R. Piwowarski

Awards Committee

Katie Lynwood, Chair
- Mark E. Kellogg
- James P. Spica

Budget Committee

Christine M. Savage, Chair
- Richard C. Mills
- Melisa M. W. Mysliwiec

Bylaws Committee

David P. Lucas, Chair
- Christopher A. Ballard
- John Roy Castillo
- Nancy H. Welber

Charitable and Exempt Organizations Committee

Rebecca K. Wrock, Chair
- Celeste E. Arduino
- Robin Ferriby
- Brien Heckman
- David P. Lucas
- Joe McCarthy
- Richard C. Mills
- Matthew Wiebe

Citizens Outreach Committee

Kathleen M. Goetsch, Chair
- Ernscie Augustin
- David P. Lucas
- Hon. Michael J. McClory
- Neal Nusholtz

Committee on Special Projects

Daniel S. Hilker, Chair

Court Rules, Forms, & Proceedings Committee

Patricia E. Davis, Chair
Georgette E. David, Vice Chair
- James F. Anderton
- Ryan Buck
- Susan L. Chalgian
- Daniel S. Hilker
- Hon. Michael L. Jaconette
- Andrew W. Mayoras
- Hon. Michael J. McClory
- Dawn Santamarina
- Marlaine Teahan

Electronic Communications Committee

Susan L. Chalgian, Chair
- Angela M. Hentkowski
- Michael G. Lichterman
- Christine M. Savage

Electronic Wills Ad Hoc Committee

Kathleen A. Martone, Chair
- Kimberly Browning
- Georgette E. David
- Sandra D. Glazier
- Douglas A. Mielock
- Neal Nusholtz
- Christine M. Savage
- James P. Spica

Ethics & Unauthorized Practice of Law Committee

Alexander Mallory, Chair
- William J. Ard
- Raymond A. Harris
- J. David Kerr
- Neil J. Marchand
- Robert M. Taylor
- Amy Rombyer Tripp

Fiduciary Exception to the Attorney-Client Privilege Ad Hoc Committee

Warren H. Krueger, III, Chair
- David Sprague

Guardianship, Conservatorship, and End of Life Committee

Sandra D. Glazier, Chair
- William J. Ard
- Michael W. Bartnik
- Kimberly Browning
- Susan L. Chalgian
- Ponce Clay
- Georgette E. David
- Kathleen M. Goetsch
- Elizabeth Sue Graziano
- Raymond A. Harris
- Phillip E. Harter
- Hon. Michael L. Jaconette
- Kathleen A. Martone
- Hon. Michael J. McClory
- Hon. David M. Murkowski
- Kurt A. Olson
- Nathan R. Piwowarski
- Katie Lynn Ringler
- Hon. Avery Rose
- Dawn Santamarina
- David L. J. M. Skidmore
- James B. Steward
- Paul S. Vaidya
- Karen S. Willard

Legislation Development and Drafting Committee

Richard C. Mills, Co-chair
Robert P. Tiplady, Co-chair
- Aaron A. Bartell
- Howard H. Collens
- Georgette David

Kathleen M. Goetsch
Daniel S. Hilker
Michael G. Lichterman
David P. Lucas
Katie Lynwood
Alexander Mallory
Nathan R. Piwowarski
Nicholas Reister
Christine M. Savage
James P. Spica
David Sprague

Legislation Monitoring & Analysis Committee

Michael D. Shelton, Chair
Elizabeth Graziano
Angela M. Hentkowski
Daniel S. Hilker
Katie Lynwood
Nicholas Reister
David Sprague

Legislative Testimony Committee

Daniel S. Hilker, Chair

Membership Committee

Ernscie Augustin, Chair
Susan L. Chalgian
Angela Hentkowski
Katie L. Ringler

Nominating Committee

Mark E. Kellogg, Chair
Katie Lynwood
James P. Spica

Nonbanking Entity Trust Powers Ad Hoc Committee

James P. Spica, Co-chair
Robert P. Tiplady, Co-chair
James F. Anderton
Laura L. Brownfield
Mark K. Harder
Kathleen A. Martone
Elise J. McGee
Richard C. Mills
Joe Viviano

Planning Committee

Nathan R. Piwowarski, Chair
Angela Hentkowski
Katie Lynwood
Richard C. Mills
Melisa M. W. Mysliwiec
Christine M. Savage

Premarital Agreements Ad Hoc Committee

Christine M. Savage, Chair
Daniel W. Borst
Georgette David
Sandra D. Glazier
Angela Hentkowski
David P. Lucas
David Sprague

Probate Institute

Christine Savage, Chair

Real Estate Committee

Angela M. Hentkowski, Chair
Carlos Alvorado-Jorquera
Jeffrey S. Ammon
James F. Anderton
William J. Ard
Leslie A. Butler
Patricia E. Davis
J. David Kerr
Mark E. Kellogg
Michael G. Lichterman
Melisa M. W. Mysliwiec
Hon. Michael J. McClory
Alaina M. Nelson
Michael D. Shelton
David Sprague
James B. Steward

State Bar & Section Journal

Rebecca K. Wrock, Chair and Managing Editor
Nancy L. Little, Editor Emerita
Jonathan Beer
Marguerite Munson Lentz
Alexander Mallory
Neil J. Marchand
Melisa M. W. Mysliwiec
Kurt Olson
Katie M. Szymanski

Tax Committee

James F. Anderton, Chair
Daniel Borst
Jonathan Beer
Mark J. DeLuca
Warren H. Krueger, III
Robert Labe
John McFarland
Neal Nusholtz
Nicholas Reister
Christine M. Savage

Uniform Community Property Disposition at Death Ad Hoc Committee

James P. Spica, Chair
Kathleen A. Martone
Richard C. Mills
Christine M. Savage
David Sprague
Rebecca K. Wrock

Undue Influence Ad Hoc Committee

Kenneth F. Silver, Chair
Sandra D. Glazier
Warren H. Krueger, III
John Mabley
Andrew W. Mayoras

Uniform Fiduciary Income & Principal Act Ad Hoc Committee

James P. Spica, Chair
Kathleen A. Martone
Richard C. Mills
Marguerite Munson Lentz
Robert P. Tiplady
Joe Viviano

Various Issues Involving Death and Divorce Ad Hoc Committee

Daniel Borst, Co-Chair
Sean Blume, Co-Chair
Georgette David
Hon. Shauna Dunnings
Sandra D. Glazier
Elizabeth Luckenbach
Katie Lynwood
Kayla McCormack
Elizabeth Siefker

Appropriate Use of AI & Emerging Technologies

Joe Viviano, Chair
Nathan R. Piwowarski

Uniform Guardianship, Conservatorship, and Other Arrangements Act Ad Hoc Committee

Nathan R. Piwowarski, Co-chair
Kathleen A. Martone, Co-chair
James P. Spica, ULC Liaison

SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

All Section Members Are Welcome

Date	Place
October 31, 2026	Spring Arbor University, Ralph Carey Forum
November 13, 2026	University Club, Lansing
December 11, 2026	University Club, Lansing
January 8, 2027	Online only
February 12, 2027	Online only
March 12, 2027	University Club, Lansing
April 9, 2027	University Club, Lansing
June 11, 2027	University Club, Lansing
September 10, 2027*	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