Editor's Note: We are instituting a new column, "From the Probate Litigation Desk." David Skidmore has generously agreed to author this column. David has an extensive practice in estate, trust, and fiduciary-related litigation, and he is also a frequent author and lecturer on these topics. We appreciate David taking time from his busy practice to offer us helpful pointers on probate litigation.

From the Probate Litigation Desk

By David L.J.M. Skidmore

Michigan Rule of Evidence 803(3) and Decedent's Statements of Then-Existing Intent

Let's say that Montague added his son Romeo's name to his bank account. Assume that before the creation of the joint account, Montague said, "I am adding Romeo's name to my bank account so that he can help me pay my bills." If Lady Montague heard Montague make this statement, then her testimony about his statement would be admissible at trial. Now assume that Montague said, "I added Romeo's name to my bank account so that he can help me pay my bills" after the creation of the joint account. Lady Montague would *not* be able to testify that she heard Montague make this statement. The explanation for the distinction between the two statements is found in Michigan Rule of Evidence 803(3).

Michigan Rule of Evidence 803(3)

MRE 803(3) is an exception to the hearsay rule. By way of reminder, hearsay is an out of court statement offered to prove the truth of the matter asserted.[1] Hearsay is not admissible at trial unless it falls within one of the exceptions set forth in MRE 803, 803A, or 804. MRE 803(3) sets forth a hearsay exception for a statement of the declarant's "then existing mental, emotional, or physical condition." Specifically, MRE 803(3) provides that the following type of statement is not excluded by the hearsay rule: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

The difference between Montague's two statements is an issue of timing. The statement made before creation of the joint account is forward-looking: "I intend to do X, and here's why I'm going to do it." At the time of the statement, the declarant possesses the intent to take the prospective action. The intent exists then, at the moment when the declarant is speaking. In contrast, the statement made after creation of the joint account is backward-looking: "I already did X, and here's why I did it." At the time of the statement, the declarant does not possess any present intent to do something new. Instead, the declarant is describing what he believes or remembers about why he did something in the past.

Under the rules of evidence, the declarant's statement of present intent is deemed to possess credibility that the declarant's explanation for a past action lacks. "I'm getting married tomorrow to the girl I love!" spontaneously blurted out by a young Elvis on the eve of his wedding to Priscilla, is a more believable statement than, "I never loved Priscilla," grumbled by Elvis after his divorce.

Pre-1978 Michigan Caselaw

The effective date of MRE 803(3) was March 1, 1978. The rule's distinction between the admissibility of statements made before and after an event is consistent with Michigan common law predating the adoption of the rule.

In *Mitts v Williams*, , the decedent added defendant's name to certain bank accounts during his lifetime. After decedent's death, his estate brought suit to recover the account proceeds from defendant. The trial court ruled for the de-

fendant, and the estate appealed. On appeal, the estate challenged several evidentiary rulings by the trial court. The Michigan Supreme Court distinguished between the admissibility of hearsay testimony as to decedent's statements prior to, and subsequent to, the opening of the joint accounts. Hearsay testimony of decedent's statements made before the opening of the joint accounts was admissible: "While occurring several months before the account was actually opened, it clearly indicates the nature of the understanding of the parties at the time they discussed the matter.... Had such conversation taken place contemporaneously with the deposit in the joint names of the parties there could be no serious question as to its admissibility."[2] In contrast, hearsay testimony of decedent's statements made after the opening of the joint accounts was inadmissible: "Said statements were made after the transaction in question here, did not directly refer to the intention or understanding of the parties at the time of making the deposit, and, if given the interpretation contended for on behalf of plaintiff, were clearly in the nature of self-serving statements."[3]

An identical fact pattern was present in *Pence v Wessels*. There, the trial court ruled for the estate. On appeal, the defendant claimed that the trial court had erred by admitting hearsay testimony as to decedent's statements about the accounts. The Michigan Supreme Court observed that the trial court had admitted hearsay testimony as to decedent's statements made both before and after the decedent added defendant's name to the accounts. The Michigan Supreme Court ruled that the trial court erred by admitting hearsay testimony as to decedent's statements made after creation of the joint accounts: "To the extent that this testimony purported to disclose statements allegedly made by the deceased not in the presence of the defendant, *after* the joint bank deposits were made, and decedent's statements made at that time referring to his will and his intentions in disposing of his property thereunder, the testimony of this witness was not admissible to show his intentions with reference to the deposits at the time they were made."[4] Nonetheless, the Michigan Supreme Court ruled that the admissible evidence was sufficient to sustain the judgment of the trial court.

Timing of Statements As Key Factor

Caselaw decided under MRE 803(3) continues to distinguish between the admissibility of hearsay testimony regarding declarant's statements made before and after an event.

Hearsay testimony of a decedent's statement of future intent, prior to the act in question, was ruled admissible in *Aetna Life Ins Co v Brooks*,. There, plaintiff life insurance company filed an interpleader action to determine who was entitled to receive the proceeds of a life insurance policy—the original beneficiary or the new beneficiaries. The trial court awarded the proceeds to the new beneficiaries, and the original beneficiary appealed. On appeal, the original beneficiary claimed that the trial court had erred by admitting hearsay testimony as to the decedent's request for forms to change the beneficiary on his insurance policy. The Michigan Court of Appeals ruled that the hearsay testimony was admissible under the MRE 803(3) exception: "[T]he judge properly admitted it for the limited purpose of showing [decedent's] state of mind, specifically, to show his intent and plan to change beneficiaries."[5]

Hearsay testimony of a decedent's statement of past intent, after the act in question, was ruled inadmissible in *In re Cullman Estate*. In *Cullman*, decedent funded two joint bank accounts with defendant; both accounts were titled in joint ownership with right of survivorship. During her final illness, decedent gave defendant her bank account books. Approximately one month before decedent's death, defendant withdrew all funds from the joint accounts. On decedent's estate's petition for a determination that the joint account proceeds were estate assets, the probate court entered judgment for the estate, and defendant appealed.[6]

The Michigan Court of Appeals reversed. The appellate court found that defendant had prematurely withdrawn the funds from the joint accounts during decedent's lifetime, but that defendant's error had not harmed decedent, who did not seek to withdraw any funds during the month between defendant's withdrawal and decedent's death, at which point defendant became entitled to the funds by virtue of her right of survivorship.[7]

The estate argued that its evidence showed that decedent intended the bank account funds to pass under her probate estate. "[Decedent's relative] testified that approximately three years prior to her death, [decedent] told him: 'All I've got is a ten thousand dollar money savings [sic] certificate in the bank in joint with [defendant], which is to be cashed upon my death to pay all debts, funeral, doctor and what-have-you, and the rest is to go into the estate[.]'"[8] While recognizing that such evidence did tend to rebut the survivorship presumption, the Michigan Court of Appeals ruled that the probate court had erred by admitting such hearsay testimony. The appellate court specifically ruled that the testimony did not fall within the MRE 803(3) hearsay exception because the declarant's statement was made after the creation of the bank accounts at issue. "Under MRE 803(3), hearsay may be admissible into evidence if it concerns the declarant's 'then existing state of mind.' [Decedent's relative's] testimony did not relate to [decedent's] state of mind or intent at the time she created the joint bank accounts. Rather, it related to her state of mind at a time long after the creation of the accounts. [S]tatements made by a decedent regarding the decedent's state of mind when depositing money into a joint bank account are not admissible into evidence if the statements were made after the joint bank account deposit was made."[9] Accordingly, there was no evidence to rebut the statutory presumption that decedent intended the joint owner to receive the accounts as the survivor.

MRE 803(3)'s Exception for Statements Related to Wills

The hearsay exception of MRE 803(3) contains its own exception. Hearsay testimony of a decedent's statements regarding state of mind with respect to something that occurred in the past is inadmissible, *unless* the statement relates to the decedent's will ("...not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will").

The appellate court noted the wills exception of MRE 803(3) in *In re Estate of Fridman*. "[T]hree witnesses testified on behalf of respondent that decedent repeatedly declared that he intended to cut petitioner Eric Brum out of his will and that he 'ripped up' his copy of the 1999 will with the intent of revoking it."[10] "Petitioners' argument, that decedent's statements regarding the revocation of the 1999 will are inadmissible hearsay, is without merit. MRE 803(3) contains explicit exceptions from the hearsay rule for statements of a declarant's intent, and for statements of memory or belief that relate to the revocation of a declarant's will."[11]

Recent Michigan Caselaw Applying MRE 803(3)

The application of the MRE 803(3) hearsay exception regularly arises in modern probate litigation.

In *Shaeffer v Burghardt*, the decedent was survived by her five children. The decedent left a valid will, naming the five children as equal beneficiaries under the residuary clause. At death, the decedent and her daughter Mary were the co-owners of certain credit union accounts. The decedent also owned two annuities, on which she had designated her daughter Mary as the sole beneficiary. The credit union accounts and annuities made up a substantial portion of decedent's net worth. The decedent's estate initiated probate litigation against daughter Mary

to recover the credit union accounts and annuities, so that they would pass under the residuary clause of the will and be divided into equal shares among the five children. Following trial, the jury ruled for the estate on its claim that decedent intended the credit union accounts and annuities to pass under her probate estate, and that daughter Mary had converted such assets by exerting sole ownership over them. Daughter Mary appealed.

As to the credit union accounts, the Michigan Court of Appeals affirmed the jury's verdict that daughter Mary had converted the accounts, finding that the estate had put forth sufficient evidence to rebut the statutory presumption that decedent intended to vest title to the deposits in the accounts in the surviving joint owner. "[P]laintiff [estate] provided testimony by the decedent's beneficiary, Patricia Marchese[,] that the decedent had verbally indicated to her in November 2002, that she intended the accounts to be distributed equally among all of her beneficiaries."[12]

The appellate court noted that such testimony had been admitted over daughter Mary's hearsay objection. However, the appellate court ruled that such testimony was admissible under MRE 803(3) as a statement of decedent's "then existing state of mind," provided that such statement was made before the joint bank account deposit was made. "The decedent signed the most current bank signature card providing for joint ownership and survivorship rights for [daughter Mary] on December 6, 2002. The alleged statement by the decedent to another beneficiary regarding her intention that these monies be distributed equally amongst all beneficiaries occurred in November 2002."[13] Because the statement of decedent's "then existing state of mind" preceded the joint bank account deposit, it was admissible "to show the decedent's intentions and arrangements prior to [her] making the joint bank accounts, to rebut the presumption of joint ownership between the deceased and the defendant."[14]

As to the annuities, the Michigan Court of Appeals reversed the jury's verdict that daughter Mary had converted the annuities. The plaintiff's testimony (i.e., "that the decedent had verbally indicated to her in November 2002, that she intended the accounts to be distributed equally among all of her beneficiaries") did not apparently extend to the annuities. Even if the statement did extend to the annuities, the beneficiary designations preceded the date of the decedent's statement of intent, and so the MRE 803(3)'s hearsay exception did not apply to the hearsay statement. "[The] testimony regarding the decedent's purported intent to distribute her assets equally amongst all beneficiaries [o]ccurred in November 2002, almost ten years after the beneficiary designations were effectuated."[15] "Based on both the lack and inadmissibility of evidence regarding the annuities, there exists no legal basis to disturb or negate the decedent's beneficiary designations on these accounts."[16]

In *In re Estate of Johnson*, No 304420, 2012 WL 2945965 (Mich Ct App July 19 2012), decedent was survived by his ex-wife, minor children, and sister. After decedent and ex-wife were divorced, decedent had changed the beneficiary of his employer provided death benefit from his ex-wife to his sister. "After [decedent's] death, all of his employment-provided death benefits, roughly $600,000, were distributed to [sister.]"[17] Ex-wife as personal representative of decedent's estate filed a complaint against sister, seeking to impose a constructive trust over the death benefits. The estate claimed that decedent had intended sister to hold the death benefits in trust for the benefit of his minor children. The probate court granted summary disposition to sister, and the estate appealed.[18]

On appeal, the estate argued that summary disposition was improper because the estate possessed testimony from decedent's former girlfriends that decedent intended sister to hold the death benefits for the minor children. "Plaintiff further relies on the affidavit and deposition testimony of Bethany Shippey and the affidavit of Rebecca McClaren, both former girlfriends of

Johnson. [I]n her affidavit, Shippey claimed that Johnson had told her that his children 'would be set for life if anything' happened to him and that his 'employer-provided benefit plan was set up to take care of his children.' Similarly, McClaren averred that Johnson had told her that his children 'would be financially stable if he died[,]' and that Johnson named defendant 'as the beneficiary of his life insurance proceeds because he trusted that she would hold and use that money for their benefit.'"[19]

The appellate court ruled that the proffered testimony did not establish a genuine issue of material fact because it was inadmissible hearsay. The proffered testimony did not fall within the MRE 803(3) hearsay exception because decedent's alleged statements to his former girlfriends were statements of past belief, rather than statements of future intent. "[Decedent's] statements made to Shippey and McClaren were statements of belief not included within the MRE 803(3) hearsay exception. The statements conveyed [decedent's] belief that his children would be 'set for life,' that they would be financially stable, and that defendant would use the life insurance proceeds for their benefit."[20] "[A] statement explaining a past sequence of events (from the standpoint of the declarant at the time of the statement) is not a then existing physical condition within the meaning of the rule but, rather, 'a statement of memory or belief' that is explicitly excluded from the exception."[21] "Thus, [decedent's] statement that his employer-provided benefit plan or life insurance policy had been set up to take care of his children was a statement of belief and, as such, it did not fall within the MRE 803(3) exception."[22]

In *In re Estate of Spack*, No 309967, 2013 WL 2662398 (Mich Ct App June 13 2013), decedent was survived by her son and daughter. During her lifetime, decedent had quitclaimed her real property to herself and her daughter as joint tenants with right of survivorship. After decedent's death, daughter sold the real property. The decedent's estate brought suit against daughter, seeking to impose a constructive trust over the proceeds from the sale of the real property. "After a bench trial, the probate court found that [decedent] had intended to divide her property equally between her children. Accordingly, it ordered [daughter] to turn over the proceeds from the [s]ale of the real property to the estate."[23]

On appeal, daughter argued that the probate court had erred by admitting hearsay testimony—specifically, the testimony of the notary who had prepared the quitclaim deed as to decedent's intent in executing the deed. The notary testified as follows: "The only reason that I was told it was prepared this way is because my cousin [i.e., decedent's son] had legal issues. [Decedent] was afraid that they [the IRS and State of Michigan] were going to come and take her house out from underneath her. She didn't want that to happen. So she put it in her daughter's name, Debbie[']s, with the understanding that it was to be split, 50/50[, between daughter and son]."[24]

The appellate court ruled that the notary's hearsay testimony was admissible under MRE 803(3). "There is no dispute that [decedent's] state of mind is a critical issue in this case. The crux of [personal representative's] claim is that [decedent] intended that her real property be divided equally between her two children notwithstanding the terms of the deed."[25] "Consistent with MRE 803(3), the notary's testimony was relevant to show [decedent's] state of mind at the time she executed the deed—that is, to show that she executed the deed with the intent to convey the property to [daughter] so that [daughter] could later split it with her brother. The testimony further explained why [decedent] chose not to include [son] on the deed."[26]

Daughter noted that MRE 803(3) does not permit admission of hearsay testimony as to "a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Daughter then argued that the notary's testimony as to decedent's *belief* that she would lose her house if she made her son a

joint owner of the property was inadmissible under MRE 803(3), because such belief did not relate to "the execution, revocation, identification, or terms of [decedent's] will."[27]

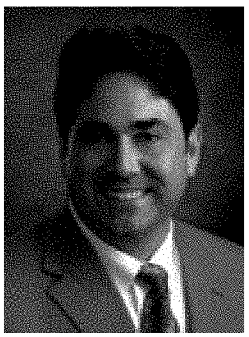
The appellate court rejected this argument. "Although the decedent's statement indicating her fear or belief that she would lose her house if she added her son to the deed could arguably be characterized as a 'statement of belief,' it was not offered to prove the facts believed—that is, it was not offered to prove that her son had legal issues that could cause her to lose her house if she named him in the deed. Instead, the statements were offered to show her intent in executing the deed; specifically, her intent to convey the property to [daughter] as part of an estate plan that would benefit both her children."[28]

Conclusion

A client may have compelling testimony as to decedent's statement of intent with regard to the execution of a deed, or the creation of a joint account, or the designation of a beneficiary. However, you cannot intelligently advise the client whether he or she possesses a meritorious legal claim until you establish the timing of the decedent's statement relative to the event in question. It is obviously in the best interests of both the client and the practitioner to avoid investing time and money in a claim that rests on inadmissible hearsay.

Notes

1. MRE 801(c).
2. 319 Mich 417, 424, 29 NW2d 841 (1947).
3. *Id.* at 426 (reversing judgment of trial court).
4. 320 Mich 195, 204, 30 NW2d 834 (1948).
5. 96 Mich App 310, 313, 292 NW2d 532 (1980).
6. 169 Mich App 778, 781-782, 426 NW2d 811 (1988).
7. *Id.* at 789.
8. *Id.* at 787.
9. *Id.* at 788.
10. No 260856, 2005 Mich App LEXIS 3278 *3 (Dec 27, 2005).
11. *Id.* at *4, fn 1 (affirming probate court's dismissal of will contest petition).
12. No 267717, 2007 Mich App LEXIS 1284 at *15 (May 15, 2007).
13. *Id.*
14. *Id.* at *16 (internal quotation omitted).
15. *Id* at *17-18.
16. *Id.* at *18.
17. No 304420, 2012 Mich App LEXIS 1378 at *1 (July 19, 2012).
18. *Id.*
19. *Id.* at *7.
20. *Id* at *8.
21. *Id.* (internal quotation omitted).
22. *Id.* (affirming probate court's entry of summary disposition in favor of defendant).
23. No 309967, 2013 Mich App LEXIS 1051 at *2 (June 13, 2013.
24. *Id* at *10.
25. *Id.* at *11.
26. *Id.*
27. *Id.*.
28. *Id.* at *12.



David L.J.M. Skidmore is a partner in Warner Norcross & Judd LLP. A member of the firm's Litigation Practice Group, his practice is centered on trust, estate, fiduciary and real property disputes and litigation. He is a member of the governing council for the Probate & Estate Planning Section of the State Bar of Michigan and is the chair of the council's amicus committee. He is a regular speaker at seminars on topics related to trust and estate law. He presents annual trust and estate case law updates to the Michigan Bankers Association, the West Michigan Estate Planning Council, and other groups. In 2012, he spoke on evidentiary issues to the Probate Judges at the Michigan Supreme Court Judicial Conference. He is a regular contributing author for the Michigan Probate and Estate Planning Journal, Michigan Real Property Review, and the American Bar Association's Probate and Property.