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Michigan Estate Planning Handbook

Chapter 26: Forms of Property Ownership

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I. In General

§26.1 In probate court practice, layperson clients commonly become confused regarding the relationship between the estate, the trust, and other nonprobate assets. This chapter will consider different forms of property ownership and the relationship of each to the decedent's probate estate. We will begin with the distinction between probate and nonprobate transfers, then turn to the relationship between probate and nonprobate transfers. From there, we will review the primary forms of real property ownership. The chapter concludes with a review of the identity and nature of the most common types of nonprobate transfers.

II. Distinction Between Probate and Nonprobate Transfers

A. In General

§26.2 Michigan law distinguishes between probate transfers and nonprobate transfers on death. A probate transfer on death is a transfer of an interest in property from the decedent to a successor through the probate process. Stated most broadly, a nonprobate transfer on death is a transfer of an interest in property from the decedent to a successor through any means other than the probate process.

Michigan law also distinguishes between probate assets and nonprobate assets. Probate assets (i.e., property owned by a decedent's estate, whether testate or intestate) pass by probate transfer. "'Estate' includes the property of the decedent … as the property is originally constituted and as it exists throughout administration. Estate also includes the rights described in [MCL 700.3805, .3922, and .7606] to collect from others amounts

necessary to pay claims, allowances, and taxes." MCL 700.1104(b). In contrast, nonprobate assets transfer by nonprobate transfer.

If an action by the personal representative of the decedent's estate, under the oversight of the probate court, is necessary to transfer legal title to the asset from the decedent's name into the name of the successor, it is a probate asset. For example, if the decedent was the fee simple owner of Blackacre at his death, title to Blackacre devolves to decedent's estate and the title will not pass to a successor unless and until the personal representative of the decedent's estate executes a deed conveying title to the successor.

If no action is needed by the personal representative to transfer title, the property is a nonprobate asset. Action by the personal representative is not necessary where

- ownership passes automatically by operation of law at the death of decedent (as with property held jointly with right of survivorship),
- a third party is contractually liable for transferring title to the asset to a successor (as with insurance proceeds or property subject to a beneficiary designation), or
- beneficial title to the property passes automatically under the terms of a governing instrument (other than a will) at the death of decedent (as with property titled in the name of a trust).

See MCL 700.6101 reporter's comment.

B. Nonprobate Transfers as Nontestamentary

§26.3 Pursuant to MCL 700.6101, nonprobate transfers are nontestamentary. *See* MCL 700.6101 reporter's comment.

III. Relationship Between Probate and Nonprobate Transfers

A. In General

§26.4 A nonprobate transfer is generally exempt from the probate process. *See* MCL 700.3805 reporter's comment. This exemption from the probate process is subject to two exceptions: (1) where the nonprobate transfer fails and (2) where the nonprobate asset is liable for a debt of the probate estate.

B. Failure of Nonprobate Transfer

§26.5 A nonprobate transfer may fail for any of the following reasons, in which case the underlying asset may devolve to the decedent's estate and be treated as a probate asset:

- The gift was revoked by the divorce of the decedent and the spouse, *see* MCL 700.2807.

- The gift was revoked by the beneficiary's killing of the decedent or by the beneficiary's conviction for abusing, neglecting, or exploiting the decedent, *see* MCL 700.2803.
- A beneficiary was not designated, or a designated beneficiary failed to survive the decedent. (If the beneficiary fails to survive the decedent and is a grandparent, a grandparent's descendant, or the decedent's stepchild, the antilapse provisions of EPIC may create a substitute gift. See MCL 700.2708, .2709, and .2710, which address the failure of gifts made under governing instruments other than wills and trusts.)

If a nonprobate transfer fails and no substitute gift is created under the antilapse statute, the nonprobate asset devolves to the decedent's probate estate and passes as a probate asset. *In re Seitz Estate*, 426 Mich 630, 397 NW2d 162 (1986); *Lyon v Rolfe*, 76 Mich 146, 42 NW 1094 (1889); *In re Estate of Monreal*, 126 Mich App 60, 337 NW2d 312 (1983).

C. Liability of Nonprobate Assets for Estate Liability

§26.6 A revocable trust created by the decedent may be liable for certain liabilities of the decedent's estate. MCL 700.3805(3) provides: "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 [MCL 700.7605(1)] for payment by the trustee in accordance with [MCL 700.7606]."

MCL 700.7605(1) describes a revocable trust as "a trust over which the settlor has the right without regard to the settlor's mental capacity, at his or her death, either alone or in conjunction with another person, to revoke the trust and revest principal in himself or herself." A trustee of a revocable trust must pay the personal representative of the settlor's estate the amount required to pay the administration expenses of the settlor's estate, an enforceable and timely presented claim of a creditor of the settlor (including a claim for funeral and burial expenses), and homestead, family, and exempt property allowances. MCL 700.7606(1). The amount required by the personal representative must be certified in writing. *Id.*

Other nonprobate transfers made by the decedent may be liable for certain liabilities of the decedent's estate. MCL 700.3805(3) provides: "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 [MCL 700.7605(1)], bears a proportionate share or equitable share of the total burden."

The nonprobate asset must be of the type of property that is liable for claims. *See* MCL 700.3805 reporter's comment.

D. Asset Subject to Both Probate and Nonprobate Dispositions

§26.7 A decedent may make inconsistent dispositions of the same asset, treating it as both a probate and nonprobate asset. Consider the following hypothetical. In her will, the testator specifically devised the funds on deposit in her savings account to her son. However, during her lifetime, the testator added her daughter's name as a joint owner of the savings account with express right of survivorship. At the testator's death, who should receive the savings account—the son or the daughter?

Recall that a will governs the disposition of "all property that the testator owns at death." MCL 700.2602(2). Did the testator here own the savings account at her death? No, because under testator's contractual agreement with the bank, the testator granted her joint-owner daughter the right to receive all funds in the account if her daughter survived the testator. Hence the nonprobate transfer is given effect, and the purported devise under the will is ineffective.

Consider an alternate hypothetical. During her lifetime, the testator added her daughter's name as a joint owner of the savings account, and the amended account agreement included the right of survivorship. In her will, the testator specifically devised the funds on deposit in her savings account to the son. Also in her will, the testator stated that she had added the daughter's name to her savings account solely for administrative convenience and that she did not intend to grant her daughter the right of survivorship. Now who should receive the savings account?

In this situation, the testator's statement explaining the intention behind adding her daughter's name to the account represents evidence that tends to undermine the presumption of survivorship. This evidence raises a fact question as to whether the presumption of survivorship should be given effect. A probate court proceeding to determine whether the survivorship presumption has been rebutted should resolve the question.

IV. Forms of Real Property Ownership

A. In General

§26.8 This section will identify the primary methods of ownership of real property and describe how each type of ownership relates to the probate estate.

B. Fee Simple

§26.9 *Fee simple* signifies an estate in, and individual ownership of, real property, without any limitation as to duration, disposition, or descendability. *Rathbun v State*, 284 Mich 521, 280 NW 35 (1938). "The term *fee simple absolute* generally refers to complete and total ownership of real property." John G. Cameron, Jr., *Michigan Real Property Law*

§7.2 (3d ed 2005). Fee simple "is the largest estate and most extensive interest that can be enjoyed in land." *Black's Law Dictionary* 554 (5th ed 1979).

Real property held in fee simple is a probate asset. *See Black's Law Dictionary* (10th ed 2014). The estate of fee simple is an estate of inheritance, meaning that at the death of its holder, the estate will be conveyed to the holder's heirs at intestacy, *Mandelbaum v McDonell*, 29 Mich 78 (1874), or to the beneficiaries of the holder's will at testacy. Peter Butt, *Land Law* 35 (2d ed 1988). "Every estate of inheritance shall continue to be termed a fee simple, or fee; and every such estate, when not defeasible or conditional, shall be a fee simple absolute, or an absolute fee." MCL 554.2.

Where real property is owned by multiple joint owners with right of survivorship, the last surviving joint owner will hold fee simple title to the property. *Klooster v City of Charlevoix*, 488 Mich 289, 795 NW2d 578 (2011).

C. Life Estate

§26.10 A life estate terminates at the death of the holder. *Black's Law Dictionary* (10th ed 2014). The estate of the holder of a life estate possesses no interest in the terminated life estate. *Darnell v Smith*, 238 Mich 33, 213 NW 59 (1927).

D. Lady Bird Deeds

§26.11 A Lady Bird deed (also known as an "enhanced life estate deed") is a conveyance from a fee simple owner of real property to the grantor as life tenant and another individual as the remainder beneficiary, with the grantor reserving to themself (as life tenant) the power of sale over the property. The life tenant's exercise of the power of sale during the person's lifetime divests the remainder beneficiary of the interest under the deed. If the life tenant does not exercise the power of sale, the conveyance to the remainder beneficiary becomes effective.

Michigan recognizes the validity of a Lady Bird deed. *Bill & Dena Brown Tr v Garcia*, 312 Mich App 684, 880 NW2d 269 (2015); *In re Tobias Estates*, No 304852, slip op at 5 (Mich Ct App May 10, 2012) (unpublished).

Michigan Land Title Standards 9.3 (Life Estate with Power to Convey Fee) confirms that the donee under a Lady Bird deed may transfer a fee interest in the subject property.

In order to dispose of the fee estate, the life tenant does not need to make specific reference to the power of appointment reserved under the Lady Bird deed unless the deed expressly requires the reference. *Tobias Estates,* slip op at 5–6 (citing section 4 of the Powers of Appointment Act, MCL 556.114).

The estate of the deceased life tenant will have no interest in real property conveyed by Lady Bird deed, either because the life tenant exercised the power of sale in favor of a

transferee or because the designated remainder beneficiary otherwise receives the property.

E. Tenancy in Common

§26.12 Tenancy in common is a type of joint ownership of real property. Tenants in common do not possess the right of survivorship. *De Vries v Brydges*, 57 Mich App 36, 225 NW2d 195 (1974). Instead, at the death of a tenant in common, the deceased tenant's interest will be conveyed to the tenant's heirs at intestacy, *Fenton v Miller*, 94 Mich 204, 53 NW 957 (1892), or to the beneficiaries of the holder's will at testacy, *Biddle v Biddle*, 117 Mich 28, 75 NW 91 (1898).

If the estate's decedent held title under a deed to two or more (unmarried) persons without specifying the estate being conveyed, there is a statutory presumption that the deed created a tenancy in common. MCL 554.44. This rule does not extend to "to mortgages, [or] to devises or grants made in trust, or made to executors, or to husband and wife." MCL 554.45.

If the estate's decedent was divorced and, at the decedent's death, the decedent and the former spouse appeared to hold title to real property as tenants by the entireties or as joint tenants, a tenancy in common may have been created by operation of law. Michigan statute provides that entry of a judgment of divorce is presumed to convert a tenancy by the entireties, or a joint tenancy, into a tenancy in common. MCL 552.102.

If the estate's decedent was legally separated from the spouse at death pursuant to a judgment of separate maintenance, and if the spouses held title to real property as tenants by the entireties or joint tenants, a tenancy in common may have been created by operation of law. *See In re Estate of Bentley*, No 321079 (Mich Ct App May 26, 2015) (unpublished) (holding that probate court's entry of judgment of separate maintenance, directing that real property held by spouses as tenants by entireties should be sold and sale proceeds equitably divided, implicitly converted form of ownership to tenancy in common).

F. Joint Tenancy and Joint Tenancy with Rights of Survivorship

§26.13 *Joint tenancy* is a type of joint ownership in real property in which each joint tenant possesses the right of survivorship. *Block v Schmidt*, 296 Mich 610, 296 NW 698 (1941). "This means that if one joint tenant dies, all others succeed to his or her share in equal proportions." John G. Cameron, Jr., *Michigan Real Property Law* §9.9 (3d ed 2005). Joint tenancy may be severed when one of the parties conveys interest to a third party. *Jones v Snyder*, 218 Mich 446, 188 NW 505 (1922). A joint tenant's interest in the property terminates at the tenant's death, and the tenant's estate possesses no interest in the property. *Jackson v Estate of Green*, 484 Mich 209, 771 NW2d 675 (2009).

Joint tenancy with rights of survivorship has the same characteristics as joint tenancy except that the right to survivorship may not be terminated by conveyance. Survivorship rights may only be severed by an act of all the parties. "A joint tenancy with full rights of survivorship may also be thought of as a 'joint life estate with dual contingent remainders.'" Cameron, §9.11. A trust may not hold real property as a tenant with rights of survivorship. *Schaaf v Forbes*, No 343630, ___ Mich App ___, ___ NW2d ___ (July 1, 2021), *leave granted,* No 163404, ___ Mich ___, 970 NW2d 887 (2022).

G. Tenancy by the Entireties

§26.14 Tenancy by the entireties is a form of joint ownership that is available only to two persons who are legally married. *Lilly v Schmock*, 297 Mich 513, 298 NW 116 (1941). A conveyance to two persons who are legally married creates a tenancy by the entireties, "except in respect to conveyances explicitly indicating that some other kind of tenancy is intended." *DeYoung v Mesler*, 373 Mich 499, 504, 130 NW2d 38 (1964). A tenant by the entireties' interest in the property terminates at the tenant's death, and the tenant's estate possesses no interest in the property. *In re Renz' Estate*, 338 Mich 347, 61 NW2d 148 (1953).

V. Types of Nonprobate Transfers

A. In General

§26.15 This section will identify the primary types of nonprobate transfers and describe how each relates to the probate estate. These nonprobate transfers are generally referred to as "will substitutes" because they are revocable and ambulatory during the owner's lifetime and generally do not take effect until the owner's death (although joint accounts are an exception). Unlike a will, each of these transfers—if effective—avoids the probate process.

B. Beneficiary Designations

§26.16 A beneficiary designation under a governing instrument other than a will is a nonprobate transfer unless the transfer fails for one of the reasons described above.

Under MCL 700.1103(e), "beneficiary designation" is defined as "the naming in a governing instrument of a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), of a pension, profit-sharing, retirement, or similar benefit plan, or of another nonprobate transfer at death."

MCL 700.1104(m) provides that "governing instrument" includes "a deed; will; trust; funeral representative designation; insurance or annuity policy; account with POD designation; security registered in beneficiary form (TOD); pension, profit-sharing, retirement, or similar benefit plan; instrument creating or exercising a power of

appointment or a power of attorney; or dispositive, appointive, or nominative instrument of any similar type."

A beneficiary may be designated as the primary or contingent beneficiary. The primary beneficiary is intended to receive the benefit under the governing instrument on the death of the person making the beneficiary designation. The contingent beneficiary is intended to receive the benefit only if, on the death of the person making the beneficiary designation, the primary beneficiary is deceased. One or more persons may be designated as the beneficiary or beneficiaries (primary or contingent).

C. Joint Bank Accounts

1. Joint Accounts Under MCL 487.703

§26.17 Joint bank accounts are governed by MCL 487.703. There is a statutory presumption that the joint owners hold the account with right of survivorship, and, if the presumption is given effect, the account is a nonprobate asset because it passes to the surviving joint owner by right of survivorship. However, the survivorship presumption can be rebutted, in which case the account may be deemed a probate asset.

Under MCL 487.703, a bank account titled "in the name of [the] depositor or any other person, and in form to be paid to either or the survivor of them" is a joint bank account. The two joint owners own the account as joint tenants. On the death of one joint owner, the funds in the account "may be paid ... to the survivor after the death of 1 of them."

Under this statute, a bank account titled "in the names of 2 or more persons, payable to either or the survivor or survivors" is also a joint bank account. Again, the two or more joint owners own the account as joint tenants. On the death of one joint owner, the funds in the account "may be paid ... to the survivor or survivors after the death of 1 of them."

2. Survivorship Presumption

§26.18 The creation of a joint bank account of a type described in MCL 487.703 (i.e., expressly providing for survivorship rights) gives rise to a presumption that each joint owner intended the surviving joint owner to succeed to complete ownership of the funds in the account. If the right of survivorship is given effect, the surviving owner receives the account balance free of the debts of the deceased owner. *Guilds v Monroe Cty Bank*, 41 Mich App 616, 200 NW2d 769 (1972).

The presumption that the deceased joint owner intended the surviving joint owner to possess the right of survivorship is rebuttable. "[R]easonably clear and persuasive proof" is required to rebut the presumption. *In re Wright Estate*, 430 Mich 463, 467–468, 424 NW2d 268 (1988) (quoting *Lau v Lau*, 304 Mich 218, 224, 7 NW2d 278 (1943)). If the presumption of survivorship is rebutted, some or all of the funds in the account would likely be deemed probate assets of the deceased joint owner.

In litigation over the intentions of the deceased joint owner, parties commonly offer evidence of statements by the deceased joint owner. A statement by the deceased joint owner constitutes hearsay. If the statement was made by the deceased joint owner before the account was created or amended, the statement is admissible under the "then existing mental, emotional, or physical condition" exception to the hearsay rule set forth in MRE 803(3). *In re Cullmann Estate*, 169 Mich App 778, 787–788, 426 NW2d 811 (1988). If the statement was made after the account was created or amended, the statement is typically held to be inadmissible hearsay.

Elderly or ill persons frequently add another person's name to their bank accounts because they need assistance with banking and bill paying—i.e., for "administrative convenience." Evidence showing that the original account owner added another person's name to the account solely for administrative convenience will typically rebut the presumption of survivorship. *See, e.g., Pence v Wessels*, 320 Mich 195, 207, 30 NW2d 834 (1948) (holding that presumption of survivorship was rebutted by testimony by disinterested witness that decedent, before creation of joint account, said that "[h]e wanted to go to Florida and wanted somebody to cash checks and deposit them and send money when he needed it after he got there if he got out of money and he wanted somebody to draw money and take care of his bills and expenses").

The presumption of survivorship may be rebutted by evidence that the deceased owner intended somebody other than, or in addition to, the surviving joint owner to receive the funds in the account at death. *See, e.g., In re Skulina Estate*, 187 Mich App 649, 656, 468 NW2d 322 (1991).

The presumption may be rebutted by evidence that the deceased owner intended the surviving joint owner to distribute the account funds to others, rather than retain the funds. *See, e.g., Thompson v Stehle*, 367 Mich 284, 116 NW2d 900 (1962) (presumption of survivorship was rebutted by evidence that deceased owner, who was worried that he might not survive surgery, added surviving owner's name to account in order to pay account funds remaining in account after payment of his final expenses to his church).

3. Joint Account Without Survivorship

§26.19 Note that MCL 487.703 describes an account that, by its terms, provides for survivorship rights. Alternately, an account may be titled in the name of two or more persons but not mention survivorship rights. Michigan caselaw recognizes that an account may be joint during the lifetimes of the joint owners, without the right of survivorship's being present. *Danielson v Lazoski*, 209 Mich App 623, 625–626, 531 NW2d 799 (1995) (citing *Leib v Genesee Merchants Bank & Tr Co*, 371 Mich 89, 95, 123 NW2d 140 (1963)).

If the joint account did not include the right of survivorship, then—at the death of the first joint owner—the funds in the account must be divided between the estate of the deceased joint owner and the surviving joint owner. It is presumed that joint owners own the account

funds in equal shares; however, this presumption can be overcome by showing that one owner contributed more or less than the presumed share. *Department of Treasury v Comerica Bank*, 201 Mich App 318, 506 NW2d 283 (1993); *American Nat'l Bank & Tr Co v Modderman*, 37 Mich App 639, 195 NW2d 342 (1972).

4. Statutory Joint Account

§26.20 Michigan statute also recognizes the existence of a statutory joint bank account, governed by MCL 487.711 et seq. A "statutory joint account" means "a joint account as to which a statutory joint account contract, as provided in this act, has been signed by a person having a right of withdrawal on the account." MCL 487.713(c). A statutory joint account is created by "one or more persons" on "signing a statutory joint account contract with a financial institution" that is in a form "substantially" similar to the example provided in the statute itself. MCL 487.715. The example contract provided in the statute is in question-and-answer format; the questions and answers constitute the terms of the account contract. *Id.* These questions ask who may withdraw funds during the co-owners' lifetimes, who can revoke the contract by written notice to the financial institution, who owns the funds during the lifetimes of both owners, and who is entitled to the funds when a co-owner dies. *Id.*

The estate of a deceased owner of a statutory joint account "may recover from the surviving owner so much of the deposits as were owned by the deceased person immediately before the deceased person's death to the extent required to satisfy claims against the estate." MCL 487.718. The estate of a deceased owner of a statutory joint account may also recover that amount of deposits owned by the decedent immediately before death to the extent that the estate's assets are insufficient to satisfy the "widow's allowance or allowance for dependent children ordered by a court of competent jurisdiction." MCL 487.719.

5. Tenants by the Entireties Joint Account

§26.21 There is a rebuttable presumption that a bank account jointly owned by two spouses is owned as tenants by the entireties. *Zavradinos v JTRB, Inc*, No 268570 (Mich Ct App Aug 23, 2007) (unpublished) (citing *DeYoung v Mesler*, 373 Mich 499, 504, 130 NW2d 38 (1964)).

D. Life Insurance

§26.22 The payment of a benefit under a life insurance policy is always a contractual, nonprobate transfer. A life insurance policy is a contract between insurer and insured. "While the policy must in form comply with the provisions of our statutes, it is nevertheless a contract entered into between the insurer and the insured." *Isaac Van Dyke Co v Moll*, 241 Mich 255, 257, 217 NW 29 (1928). Generally, the insurer must pay the proceeds to the beneficiary designated by the insured. *League Life Ins Co v White*, 136 Mich App 150, 153, 356 NW2d 12 (1984).

However, the benefit paid under a life insurance policy may be either a probate or a nonprobate asset. If the insured's estate is the designated beneficiary or if a beneficiary designation under a life insurance policy fails, the insurer will pay the proceeds to the personal representative of the estate and the proceeds will pass via the probate process. If a person other than the policy holder's estate is the beneficiary of the life insurance policy and the beneficiary designation can be given effect, the proceeds will be a nonprobate asset.

E. Pay-on-Death Accounts

§26.23 The owner of a bank account may designate that the account is payable on death to a certain beneficiary. Pay-on-death (POD) designations are popular because the account owner retains complete control over the account during the owner's lifetime, the beneficiary designation is revocable, the beneficiary has no right to the account until the owner's death, and the beneficiary is entitled only to the funds remaining in the account at the owner's death. After the death of the owner, the beneficiary of a POD account may claim the account funds directly from the bank, outside of the probate process. Hence a POD account represents a nonprobate transfer.

"*Totten* trust" is another name for a POD account. The name comes from a New York case recognizing the nature and validity of a POD account, particularly describing its trustlike nature. *In re Totten*, 71 NE 748 (NY 1904).

Michigan statute recognizes the validity of a POD account. MCL 487.702(1).

F. Retirement Accounts

§26.24 Employee benefits plans, retirement accounts, and pensions are nonprobate transfers; all such plans allow for the designation of beneficiaries. Employee benefits can take the form of fringe benefit packages, welfare benefit plans, and qualified and nonqualified retirement plans. Qualified plans include traditional pensions, profit-sharing plans, stock bonus plans, tax-sheltered annuity plans, contracts qualified under IRC 403, individual retirement accounts established pursuant to IRC 408, and certain state and local government plans. The Internal Revenue Code governs the provisions of all qualified plans, and ERISA governs all employer-sponsored plans.

The practitioner should be aware that significantly different rules govern the beneficiary's use of a qualified retirement asset, depending on the nature of the relationship between the beneficiary and the decedent. For example, if the beneficiary is the decedent's spouse, the spouse will be able to roll over the account proceeds into a retirement account and to defer distributions (other than the required minimum distributions starting at age 72). However, if the beneficiary is someone other than the decedent's spouse, the beneficiary will be able to roll over the account proceeds but will not be able to defer distributions, and those distributions are taxable. See chapter 22 for further information.

G. Transfer-on-Death Registration of Securities

§26.25 The Securities Transfer-on-Death Act (set forth at Article VI, Part 3, of EPIC) governs registration of a security in beneficiary form. "'Beneficiary form' means a registration of a security that indicates the present owner of the security and the owner's intention regarding the person who will become the security's owner upon the owner's death." MCL 700.6301(a). Securities held by joint owners as tenants in common may not be registered in beneficiary form. MCL 700.6302.

"[A] security is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners." MCL 700.6304. "Registration in beneficiary form may be shown by the words 'transfer on death' or the abbreviation 'TOD', or by the words 'pay on death' or the abbreviation 'POD', after the name of the registered owner and before the name of a beneficiary." MCL 700.6305.

"The designation of a TOD beneficiary on a registration in beneficiary form does not affect ownership until the owner's death." MCL 700.6306. "On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survived all owners." MCL 700.6307. "On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners." *Id.* "A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and [the Act], and is not testamentary." MCL 700.6309(1).

H. Trusts

§26.26 A settlor may create a revocable or irrevocable trust during the settlor's lifetime. MCL 700.7401 and .7402 govern the creation of a trust. In practice, a trust is most commonly created by executing a written trust agreement. Michigan law does recognize an oral trust in personal property. *Harmon v Harmon*, 303 Mich 513, 519, 6 NW2d 762 (1942), but a trust in realty cannot be established by parol evidence. The Michigan statute of frauds prohibits an oral trust in real property. *Howe v Webert*, 332 Mich 84, 93–94, 50 NW2d 725 (1952). Once the trust is created, the settlor may convey ownership of all, some, or none of the assets to the trustee of the trust—i.e., fund the trust. To the extent that the trust is funded during the settlor's lifetime, the trust represents a nonprobate transfer and the trust assets are nonprobate assets.

Example: Assume that the settlor creates a revocable trust and names herself as the initial trustee. The settlor individually holds title to Greenacre in fee simple. After creating her trust, the settlor executes a deed conveying title to Greenacre to herself as trustee of the trust. The settlor has thereby funded her trust with Greenacre. Further assume that, under

the terms of the trust, the settlor directed the successor trustee to make outright distribution of Greenacre to the beneficiary on the settlor's death. After the settlor's death, the successor trustee can, and should, execute a trustee's deed conveying title to Greenacre to the beneficiary on the conclusion of trust administration. Under this scenario, the successor trustee's conveyance of Greenacre to the beneficiary is a nonprobate transfer, and Greenacre is a nonprobate asset.

It is not uncommon for the settlor to fail to fully fund the trust. Consequently, at settlor's death, certain assets remain titled in settlor's name (as an individual, not as trustee). Such assets are probate assets, ownership of which must pass via the probate process—even if the settlor left a will devising (*pouring over*) the residue of the estate to the successor trustee of the trust. The assets must be probated in order to become trust assets.

While assets may flow from the estate to the trust under a pourover will, assets may also flow from the trust to the estate to satisfy certain liabilities. *See* MCL 700.3805(3).

Practitioners should note that a primary reason why individuals create a trust is privacy. A will is a public document that must by law be filed with the probate court, MCL 700.2516, but a trust agreement is a private document unless the jurisdiction of the probate court is invoked by an interested person. Where a settlor's estate and trust are being simultaneously administered, the distinct natures of the proceedings should be recognized.