

## Michigan Probate Litigation

# Chapter 3: Practice and Procedure in Probate Litigation

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## I. Introduction

**§3.1** Probate litigation may involve disputes over the validity of a legal instrument or transaction; the construction, reformation, or modification of a legal instrument; the administration of an estate or trust by a fiduciary; the appointment or removal of a fiduciary; a fiduciary's exercise of legal powers; a fiduciary's performance of legal duties; entry of a protective order; and ownership of property. To excel at probate litigation, you must possess substantive knowledge of trust, estate, and fiduciary law; of general civil litigation procedure and skills; and of probate court procedure and practice.

Probate court procedure and practice are governed by the Estates and Protected Individuals Code (EPIC), the Michigan Trust Code (MTC), the Michigan Court Rules, Michigan caselaw, and other sources.

## II. Jurisdiction

### A. Claims Within the Probate Court's Exclusive Jurisdiction

#### 1. In General

**§3.2** The probate court is a constitutional court, organized at the county level. Mich Const 1963 art 6, §15. The probate court is a court of limited jurisdiction. *Van Etten v Manufacturers Nat'l Bank*, 119 Mich App 277, 326 NW2d 479 (1982). MCL 700.1302 sets forth the exclusive legal and equitable jurisdiction of the probate court.

#### 2. Decedents' Estates

**§3.3** MCL 700.1302(a) grants the probate court exclusive jurisdiction over all claims and matters related to the settlement of a deceased individual's estate, including

- the internal affairs of the estate;
- estate administration, settlement, and distribution;
- declaration of rights that involve an estate, devisee, heir, or fiduciary;
- construction of a will;
- determination of heirs; and
- determination of death of an accident or disaster victim under MCL 700.1208.

### **3. Trusts**

**§3.4** MCL 700.1302(b) grants the probate court exclusive jurisdiction over any proceedings concerning the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary. Hence, the probate court's exclusive jurisdiction includes proceedings seeking to

- appoint or remove a trustee;
- review the fees of a trustee;
- require, hear, and settle interim or final accounts;
- ascertain beneficiaries;
- determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust;
- instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right;
- release registration of a trust; and
- determine an action or proceeding that involves settlement of an irrevocable trust.

See MCL 700.7203(1). MCL 700.7201(3) provides further details regarding the probate court's exclusive jurisdiction over trust-related proceedings.

### **4. Guardianship, Conservatorship, and Protective Proceedings**

**§3.5** MCL 700.1302(c) grants the probate court exclusive jurisdiction over guardianship, conservatorship, or protective proceedings, subject to the ancillary jurisdiction of the family division of circuit court over guardians and conservators.

### **5. Fiduciary Accountings**

**§3.6** MCL 700.1302(d) grants the probate court exclusive jurisdiction over issues regarding accounts of a fiduciary or directions to a fiduciary concerning an estate within the court's jurisdiction.

### **6. Estate's Right to Property**

**§3.7** Nonprobate assets typically pass outside of probate by right of survivorship (e.g., jointly owned real property) or beneficiary designation (e.g., an IRA account). The probate court does not possess exclusive subject matter jurisdiction over all disputes involving nonprobate assets (unless the nonprobate assets are trust assets). However, a proceeding to establish the estate's right to property that would otherwise pass outside of probate does fall within the probate court's exclusive jurisdiction to make a declaration of rights that involve an estate. MCL 700.1302(a)(iii); see *Provizer v Jackson*, No 298797 (Mich Ct App Mar 29, 2012) (unpublished) (probate court had exclusive jurisdiction over action by beneficiaries under decedent's will against surviving joint owner of brokerage account, seeking return of account proceeds to estate).

## **B. Claims Within Probate Court's Concurrent Jurisdiction**

**§3.8** MCL 700.1303 governs the concurrent jurisdiction of the probate court. The probate court possesses concurrent jurisdiction to take certain actions when done in relation to an estate of a decedent, protected individual, ward, or trust. MCL 700.1303(1). Note that probate court action is available under concurrent jurisdiction only when it relates to a decedent's estate, a protected individual, a ward, or a trust. Those actions are as follows:

- determining a property right or interest (including ownership of decedent's joint account)
- authorizing partition of property
- authorizing or compelling specific performance of a contract in a joint or mutual will or of a contract to leave property by will
- ascertaining if individuals have survived as provided in EPIC
- determining cy pres or a gift, grant, bequest, or devise in trust or otherwise as provided in MCL 554.351–.353
- hearing and deciding an action or proceeding against a distributee of a fiduciary of the estate to enforce liability that arises because the estate was liable on some claim or demand before distribution of the estate
- imposing a constructive trust
- hearing and deciding a claim by or against a fiduciary or trustee for the return of property
- hearing and deciding a contract proceeding or action by or against an estate, trust, or ward
- requiring, hearing, or settling an accounting of an agent under a power of attorney

*Id.*; see MCL 700.7203(2).

The court where a trust is registered has concurrent jurisdiction with other courts of this state of an action or proceeding to determine the existence or nonexistence of the trust if created other than by will, of an action or

proceeding against a creditor or debtor of the trust, and of another action or proceeding that involves a trustee and a third party.

MCL 700.7206.

In a case concerning a trust's authority to convey real property, *Schaaf v Forbes*, No 343630, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (July 1, 2021), *leave granted*, No 163404, \_\_\_ Mich \_\_\_, 970 NW2d 887 (2022), the court held that the legislature's grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts does not extend to plaintiffs' real property claims.

A party to an action or proceeding in another court (e.g., the circuit court) may file a motion to remove the action or proceeding to probate court based on the probate court's concurrent jurisdiction. MCL 700.1303(2). The purpose and policy of the probate court's concurrent jurisdiction is to consolidate and simplify all actions involving a decedent, a protected individual, a ward, or a trust estate. MCL 700.1303(3). "In light of the policy stated in [MCL 700.1303(3)], [MCL 700.1303(2)] should be read as stating a preference for having the matter considered by the probate court." Reporter's Comment to MCL 700.1303 in *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE updated annually). MCL 700.1303 imposes no time limit for requesting removal.

### III. Venue

#### A. In General

**§3.9** Many practitioners in probate court confuse the concepts of *venue* and *jurisdiction*. They are not the same or synonymous. Jurisdiction relates to the right of the probate court to exercise power over a class of cases. *Altman v Nelson*, 197 Mich App 467, 472, 495 NW2d 826 (1992). Venue conversely relates only to the geographical place where a proceeding or civil action may be filed. *Gross v GMC*, 448 Mich 147, 528 NW2d 707 (1995). An effective probate litigator must be familiar with this distinction. Venue may be proper in more than one location.

#### B. Decedent's Estates

**§3.10** Venue for litigation concerning a decedent's estate is either the county where the decedent resided at the time of death or, if the decedent did not reside in Michigan, the county where the decedent owned property. MCL 700.3201(1). Other rules concerning venue for decedent's estate proceedings, including change of venue, are set forth in MCL 700.3201(2)–(4).

#### C. Trusts

**§3.11** Venue for litigation of a registered trust is in the place of registration. MCL 700.7204(1)(a). For example, if a trust has been registered with the Kent County Probate

Court, then that county and court are the proper venue for judicial proceedings concerning the trust.

Venue for litigation concerning an unregistered trust is any county where the trust could be registered. MCL 700.7204(1)(b). A trust may be registered in the court designated in the terms of the trust or at the principal place of administration. MCL 700.7209(1). “[T]he principal place of the trust’s administration is the trustee’s usual place of business where the records pertaining to the trust are kept or the trustee’s residence if the trustee does not have such a place of business. For a corporate trustee, the usual place of business is the business location of the primary trust officer for the trust.” *Id.* MCL 700.7209(2) provides rules for determining the principal place of administration where the trust is administered by cotrustees.

If the unregistered trust is a testamentary trust and the estate is not yet closed, then “the county in which the decedent’s estate is being administered” is also proper venue for judicial proceedings concerning the trust. MCL 700.7204(1)(b). MCL 700.7204(1)(c) provides that venue for a judicial proceeding involving a trust is also proper “[a]s otherwise specified by court rule.”

Venue for litigation concerning an unregistered trust without a trustee is proper

- in a county in which a trust beneficiary resides;
- in a county in which trust property is located;
- in the county in which the decedent’s estate was or is being administered, if the trust is created by will; or
- as otherwise provided by court rule.

MCL 700.7204(2).

MCR 5.127 provides additional venue rules for specific types of proceedings. The venue provisions of the Revised Judicature Act (RJA) may govern venue determinations where the venue rules of EPIC, the MTC, and the supreme court rules are not dispositive.

## **D. Change of Venue**

**§3.12** MCR 5.128 governs change of venue for a probate court proceeding. Venue may be changed to another county by court order for the convenience of the parties and witnesses, for the convenience of the attorneys, or for an impartial trial. A request for a change of venue can be brought by an interested party or by the court. *Id.* MCR 2.222 and 2.223 govern the procedure for change of venue. *Id.* (eff. Jan 1, 2020).

## **IV. Probate Court Practice**

### **A. In General**

**§3.13** The general rules in Chapter 1 (General Provisions), the rules that apply to other civil proceedings set forth in Chapter 2 (Civil Procedure), and the rules in Chapter 5 (Probate Court) of the Michigan Court Rules govern practice in probate court. MCR 5.001(A) provides that the general civil procedure rules and the rules that apply to other civil proceedings in Chapter 2 apply in probate court unless they are modified by Chapter 5. Any references to the “clerk” in the Michigan Court Rules also apply to the register in probate court proceedings. MCR 5.001(B)(1). Any references to “pleadings” in the Michigan Court Rules also apply to “petitions, objections, and claims in probate court proceedings.” MCR 5.001(B)(2).

Chapter 2 (Civil Procedure) of the Michigan Court Rules—governing pleadings, summary disposition, motion practice, parties, joinder of claims and parties, venue, transfer of actions, discovery, pretrial procedure, alternative dispute resolution, settlements, trials, subpoenas, juries, judgments, orders, and postjudgment proceedings—applies to probate litigation except to the extent the rules are modified by Chapter 5. The court rules governing pretrial procedures, conferences, scheduling orders, and pretrial motions in civil proceedings expressly apply in contested probate proceedings. MCR 5.141, .142.

Chapter 3 (Special Proceedings and Actions) of the Michigan Court Rules—addressing subjects including debt collection, extraordinary writs, proceedings involving real property, and personal protection proceedings—also applies to probate litigation except as modified by Chapter 5. The scope of this chapter does not include the rules of procedure in civil proceedings generally.

## **B. Forms of Action**

**§3.14** In probate court, the two types of cases are *proceeding* and *civil action*. MCR 5.101(A). A proceeding is initiated by filing an application or a petition with the court. MCR 5.101(B). An application is a written request to the probate register “for an order of informal probate or informal appointment under part 3 of article III [of EPIC].” MCL 700.1103(b). A petition is a written request to the court for an order. MCL 700.1106(p) (MCL 700.1106(q) eff. Mar 28, 2019).

Note that the term *proceeding*, as used in EPIC, is defined to include both proceeding and civil action. A proceeding under EPIC includes both an application and a petition and may be an action at law or a suit in equity. MCL 700.1106(s) (MCL 700.1106(t) eff. Mar 28, 2019). Probate litigation always requires a proceeding commenced by a petition (rather than an application to the probate register), because the litigation seeks entry of an order by the probate court.

A civil action is commenced by filing a complaint with the court. MCR 5.101(C). Certain types of actions must be commenced by filing a complaint: “[a]ny action against another filed by a fiduciary or trustee” and “[a]ny action by a claimant after notice that the claim has been disallowed.” MCR 5.101(C)(1), (2).

The meaning of the phrase “[a]ny action against another filed by a fiduciary or trustee” is not entirely clear. The phrase has apparently not been construed by any caselaw. In practice, it is common for a fiduciary (including a trustee) to file a petition taking an adversarial position toward an interested person without using a complaint (e.g., a fiduciary’s petition to compel a beneficiary to return trust property distributed in error). A strict reading of MCR 5.101(C)(1) seems to suggest that, if a fiduciary (including a trustee) seeks entry of a legal or equitable judgment against another person, then the action should be brought by a complaint rather than a petition.

In a civil action, a summons must be issued to each defendant named in the complaint. MCR 2.102(A). In a proceeding, a summons need not be issued.

### C. Case-Type Codes

**§3.15** Each pleading filed in probate court must bear the proper case-type code as required by MCR 8.117. Case-type codes for probate court are found in a document issued by the SCAO, Case Type Codes and include these codes:

- DA: decedent estates, supervised administration
- DE: decedent estates, unsupervised administration
- TT: testamentary trusts
- TV: inter vivos trusts
- PO: petitions for a protective order
- CZ: civil actions

In addition, there are various codes for different types of guardianship and conservatorship matters, which may involve litigation.

It is not uncommon for complex probate litigation to necessitate more than one type of pleading and more than one type of case-type code. Suppose that an interested person desires to contest the validity of both the decedent’s will codicil and trust amendment as well as to challenge the personal representative’s denial of the person’s creditor’s claim against the estate. This litigation would require three pleadings and three case-type codes: a petition to invalidate the will codicil, filed in the estate proceeding (DA or DE); a petition to invalidate the trust amendment, filed in the trust proceeding (TT or TV); and a complaint for allowance of the disallowed claim (CZ). The multiple pleadings may be consolidated by order of the probate court for administrative convenience. MCR 2.505(A).

### V. Distinction Between Estate and Trust Proceedings

**§3.16** There is a fundamental difference between estate and trust proceedings, which may not be apparent to practitioners new to this area.

The administration of a decedent's estate always occurs in an active proceeding before the probate court. This estate proceeding may be informal (before the register) or formal (before the court). Filing an application initiates an informal proceeding for a decedent's estate. Filing a petition initiates a formal testacy proceeding for a decedent's estate. A request for supervised administration can be requested in a petition for a formal testacy proceeding. MCR 5.302(A).

Formal proceedings are proceedings conducted before a judge, with notice to interested persons. MCL 700.1104(h). Informal proceedings are proceedings for the probate of a will or appointment of a personal representative conducted by the probate register without notice to interested persons. MCL 700.1105(b). To obtain an order from the court, a formal proceeding must be commenced, which may require converting informal probate to formal probate. A court order is available only through a formal proceeding. Reporter's Comment to MCL 700.1104(h) in *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE updated annually).

In contrast, the administration of a trust generally occurs separate and apart from any probate court involvement or oversight. "Unless an interested person invokes court jurisdiction, the administration of a trust shall proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without court order, approval, or other court action. Neither registration nor a proceeding concerning a trust results in continued supervisory proceedings." MCR 5.501(B). An interested person may petition the probate court for relief relative to a trust, but unless and until that happens, the trust administration occurs entirely outside of the probate court.

When estate-related litigation is commenced, it often arises in an estate proceeding already pending before the probate court. When trust-related litigation is commenced, it often requires a new trust proceeding to be opened before the probate court.

## **VI. Parties and Interested Persons**

**§3.17** In a civil action, the parties are the plaintiff and the defendant. If there is a counterclaim, the parties to the counterclaim are the counter-plaintiff and the counter-defendant. If there is a third-party complaint, the parties to the third-party complaint are the third-party plaintiff and the third-party defendant. MCR 2.201(A), .203, .204.

In a proceeding, the petitioner (the party filing the petition) must serve the petition and notice of hearing for it on all interested persons. MCR 5.102, .107(A). An interested person who files a response or objection to a petition is called a respondent. If the petitioner anticipates that an interested person will likely file a response or objection to the petition, the petitioner may choose to identify the person as the respondent in the petition.

The petitioner must first identify the interested persons in order to serve them. MCR 5.125(C) identifies the interested persons with respect to certain specific types of

proceedings. See MCR 5.125(A)–(B) for further rules regarding service on interested persons.

MCL 700.1105(c) identifies the interested persons with respect to estate and trust proceedings generally. The Reporter’s Comment to MCL 700.1105(c) in *Estates and Protected Individuals Code with Reporters’ Commentary* (ICLE updated annually), provides helpful information regarding the concept of *interested person*. MCL 700.3403(1) identifies the interested persons with respect to a formal testacy proceeding.

If the interested persons are not defined by statute or court rule, the court may make a specific determination of who the interested persons are. MCR 5.125(D). The court may require additional persons to be served, if it is deemed necessary. MCR 5.125(E).

A person may file a demand to receive “notice of any order or filing pertaining to a decedent’s estate in which the person has a financial or property interest” with the probate court. A person who files the demand is an interested person with respect to the estate proceeding. MCL 700.3205. In a guardianship proceeding, an interested person may file a request for notice before an order is made by the probate court. MCL 700.5104(1). See MCR 5.126 for further rules governing such demands or requests for notice.

The interested persons regarding a certain proceeding may include beneficiaries, trust beneficiaries, or qualified trust beneficiaries. Under EPIC and the MTC, *beneficiary*, *trust beneficiary*, and *qualified trust beneficiary* are all defined terms, each having a different definition. See MCL 700.1103(d) (definition of *beneficiary*), .7103(l) (definition of *trust beneficiary*), .7103(g) (definition of *qualified trust beneficiary*).

## VII. Service of Process and Notice of Hearing

**§3.18** The plaintiff or petitioner is required to serve the complaint or petition on all interested persons. Service of process is governed by MCR 5.103–.108. See §3.17. Effective July 26, 2021, MCR 2.107(G) provides “all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible.” The new rule also provides that email transmission does not require agreement by the other party but should comply as much as possible with MCR 2.107(C)(4).

When service is required by statute or court rule, proof of service must be filed promptly and before a hearing to which the document relates. MCR 5.104(A)(1). The proof of service must include the date of service, the manner and method of service, a description of the papers served, and the identification of the person served. *Id.*

Personal and electronic service of a petition or motion must be made at least 7 days before the hearing date or an adjourned date, unless a different period is permitted by court rule. MCR 5.108(A). A primary exception to this rule is summary disposition motions, governed

by MCR 2.116. Service by mail must be made at least 14 days before the hearing date or an adjourned date. MCR 5.108(B)(1).

Under MCL 600.854, provision of notice in probate court proceedings is primarily governed by court rule. The notice of hearing must state the location, the date and time, and the nature of the hearing. *Id.* The hearing must be noticed for a date previously approved by the court. *Id.*

MCL 700.1401 also addresses provision of notice in probate court proceedings. However, under MCL 600.854, MCL 700.1401 governs only in the absence of supreme court rule. Reporter's Comment to MCL 700.1401 in *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE updated annually). In the absence of a Michigan Court Rule, MCL 700.7109, .7202(1), and .7208 govern notice in trust-related proceedings.

## VIII. Waiver and Consent

**§3.19** The petitioner may file waiver and consent forms, executed by interested persons, with the probate court to advise the court that some or all interested persons do not object to the relief sought by the petition.

In general, a person may waive notice and consent to the granting of a petition by a signed writing filed in the proceeding. A guardian ad litem, conservator, or other fiduciary may execute a waiver and consent. MCL 700.1402(1). A waiver and a consent may be made (1) by a legally competent interested person; (2) by a person designated as eligible to be served on behalf of an interested person who is a legally disabled person; or (3) on behalf of an interested person, whether competent or legally disabled, by an attorney who has previously filed a written appearance. MCR 5.104(B)(3).

There are exceptions to this rule. A person who is the subject of a petition for guardianship or for protective order, a ward, or a protected person cannot waive notice. MCL 700.1402(2). "A fiduciary shall not waive or consent on a petition, account, or report made as the fiduciary or in a different fiduciary capacity." *Id.* MCR 5.104(B)(3) states it differently: "[A] guardian, conservator, or trustee cannot waive or consent with regard to petitions, motions, accounts, or reports made by that person as guardian, conservator or trustee."

The waiver and consent may be stated on the record at the hearing or put in writing. MCR 5.104(B)(1), (2). SCAO Form PC 561 may be used to express the waiver and/or consent.

If every interested person in the proceeding waives notice and consents in writing to the granting of the petition, the court may enter an order without a hearing. MCL 700.1402(1). If all interested parties consent to the granting of the petition, the court may enter the order immediately. MCR 5.104(B)(4).

## IX. Representation

**§3.20** The parties to probate litigation may confront difficulties in providing notice to and effecting service of process on certain interested persons. Some interested persons may be under a legal disability, such as incapacity or minority; other interested persons may be unborn or otherwise unascertained. Moreover, the parties to probate litigation have an interest in ensuring that any order entered in the litigation will be binding on all interested persons—including those who are under a legal disability, unborn, or unascertained. The concept of representation permits one person to represent and bind another person in a contested or uncontested probate court proceeding.

The concept of *interested person under legal disability* is straightforward. The concept of *unborn or unascertained beneficiary* is somewhat unique. A person who is not yet born could become an interested person in the future. For example, if the grandchildren of the settlor of a trust are interested persons, and if the settlor has one or more living children when the petition is filed, then it is possible that a grandchild could be born in the future—at which point an additional interested person would come into being. Hence, identification of an interested person may be complicated by the fact that an interested person is not yet born.

Identification of an interested person may also be complicated by the fact that the identity of an interested person is not yet ascertained. For example, if the trust agreement names the unidentified spouse of the settlor's child as an interested person and the settlor's child is not married when the petition is filed, it is possible that the child could marry in the future—at which point an additional interested person would become identifiable.

In probate litigation, questions may arise regarding how to effect service of process on, and who may or must represent the interests of, an interested person who is under a legal disability, unborn, or unascertained. The concept of *representation* is governed by MCL 700.1403 and .7301–.7304 and MCR 5.105(D)–(E). Practitioners should study these rules carefully.

MCL 700.1403 governs representation “[i]n a formal proceeding that involves an estate of a decedent, minor, protected individual, or incapacitated individual or in a judicially supervised settlement relating to such matters[.]” Initially, the parties, in their pleadings, must describe each affected interest in the proceeding. MCL 700.1403(a). Each interest must be described so as to provide “reasonable information to owners [of each such interest] by name or class, by reference to the instrument that creates the interests, or in another appropriate matter.” *Id.*

MCL 700.1403(b) identifies situations where one person is bound by entry of an order that binds another person. MCL 700.1403(b). “An order that binds the holder of a power of revocation or amendment or a presently exercisable or testamentary general or special power of appointment binds another person to the extent the person's interest, as a permissible appointee, taker in default, or otherwise, is subject to the power.” MCL 700.1403(b)(i).

MCL 700.1403(b) permits one person to represent another person in various designated situations, provided that there is no conflict of interest. MCL 700.1403(b)(ii). If there is no conflict of interest between the persons represented, MCL 700.1403(b)(ii)(A)–(E) provides the following:

- (A) An order that binds a conservator, plenary guardian, or partial guardian binds the estate that the conservator, plenary guardian, or partial guardian controls.
- (B) An order that binds an agent under a durable power of attorney having authority to act binds the principal if a conservator, plenary guardian, or partial guardian has not been appointed.
- (C) An order that binds a guardian having authority to act with respect to the matter binds the ward if a conservator of the ward's estate has not been appointed and no agent under a durable power of attorney has authority to act.
- (D) An order that binds a trustee binds beneficiaries of the trust.
- (E) An order that binds a personal representative binds a person interested in the undistributed assets of a decedent's estate in an action or proceeding by or against the estate.

A parent may represent the parent's minor or unborn child to the extent there is no conflict of interest. MCL 700.1403(b)(ii)(F). To avoid any actual or potential conflict of interest when the parent and child are both beneficiaries of the same estate, it may be necessary to have the child represented by a disinterested parent who is not a beneficiary.

A person may be represented by another person who has a substantially identical interest in the proceeding, provided that there is no conflict of interest. MCL 700.1403(b)(iii).

A party may provide notice to an interested person through a permissible representative. "Notice as prescribed by [MCL 700.1401] shall be given to every interested person or to one who can bind an interested person as described in [MCL 700.1403(b)(i) or (ii)]. Notice may be given both to a person and to another who may bind the person." MCL 700.1403(c)(i). "Notice is given to an unborn or unascertained person, who is not represented under [MCL 700.1403(b)(i) or (ii)], by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained person." MCL 700.1403(c)(ii).

Representation in trust proceedings is governed by MCL 700.7301–.7304. Notice to a person who may represent and bind another person has the same effect as if notice were given directly to the other person. MCL 700.7301(1).

MCL 700.7302 governs representation of a person whose interest is subject to a power of appointment. MCL 700.7303 permits a fiduciary to represent a person for whom the fiduciary is acting or a parent to represent a child, when there is no conflict of interest. MCL 700.7304 permits representation of an interested person by another person having a substantially identical interest, provided that there is no conflict of interest.

MCR 5.105(D) describes circumstances under which certain types of representatives (guardian, conservator, guardian ad litem, trustee of a trust, parent of a minor, attorney, or agent under a power of attorney) must be served on behalf of an interested person who is under a legal disability or otherwise legally represented. MCR 5.105(E) governs how to serve notice on an interested person who is (1) unborn or unascertained and (2) not represented by a fiduciary or guardian ad litem.

## **X. Pleadings**

### **A. Initial Pleading—Petition or Complaint**

**§3.21** In a civil action, the plaintiff files a complaint, and the defendant files an answer and affirmative defenses.

In a proceeding, the petitioner files a petition. MCR 5.113(B) governs the required contents of a petition: “A petition must include allegations and representations sufficient to justify the relief sought[.]” A petition must also

- identify the petitioner, the petitioner’s interest in the proceedings, and qualification to petition;
- include allegations regarding residence, domicile, or property situs essential to establishing court jurisdiction;
- identify and incorporate, directly or by reference, any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- except when ex parte relief is sought, include a current list of interested persons, indicate the existence and type of incapacity, if applicable, the mailing addresses of the persons or their representatives, the nature of the representation, and the need, if any, for special representation.

MCR 5.113(B)(1). A petition must be verified by the petitioner. The petition or application must either be authenticated by verification of the person making it under oath or contain a statement immediately above the date and signature, stating, “I declare under the penalties of perjury that this \_\_\_ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.” MCR 1.109(D)(3)(b).

A false petition is subject to sanctions for contempt of court. MCR 1.109(D)(3)(b).

An interested person who objects to the petition is not technically required to file a written objection or response to the petition. Instead, a respondent is permitted to raise an objection for the first time at the hearing on the petition. MCR 5.119(B).

If the respondent elects to file a written response or objection to the petition before the hearing, the respondent may file and serve the written response or objection at any time before the hearing. MCR 5.108(F) (relettered from (E) eff. May 1, 2019).

The probate court is granted discretion to require that a respondent (objecting orally at the hearing on the petition) file a written objection. MCR 5.119(B).

It is best practice for a respondent to prepare, file, and serve a written response and objection to a petition, even though not required to do so by the court rules. Just as a complaint is met with an answer, a written petition should be met with a written response that answers each allegation of the petition. *See* MCR 2.111(C). A written objection should set forth the detailed factual and legal reasoning why the respondent is objecting to the relief sought by the petition (which may not be entirely apparent from the respondent's answers to each allegation of the petition). Practitioners may consider bifurcating a written response and objection into the response portion (which answers each allegation of the petition, paragraph by paragraph) and the objection portion (which sets forth the detailed factual and legal basis for the objection to the relief sought by the petition).

## **B. Affirmative Defenses**

### **1. In General**

**§3.22** Under MCR 2.111(F)(2), the respondent is not technically obligated to file affirmative defenses to the petition. However, it may be desirable to do so in certain cases, particularly when a respondent fiduciary is accused of breach of duty or the respondent is otherwise accused of misconduct. Certain of the standard affirmative defenses from MCR 2.111(F)(3) are likely to have recurring relevance in probate litigation matters: contributory negligence; payment; release; satisfaction; duress; estoppel; statute of frauds; statute of limitations; and “that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery.”

There are several affirmative defenses unique to probate litigation, not all of which will be reviewed here. For example, the doctrine of election may be an affirmative defense. Under this doctrine, a party who accepts a benefit under a will or trust renounces the right to contest the validity of the will or trust (unless the party tenders back the benefit received). *Heyd v Beglinger (In re Beglinger Tr)*, 221 Mich App 273, 277, 561 NW2d 130 (1997). Contracts concerning succession, MCL 700.2514, may also be an affirmative defense. Under this statute, claims for payment based on a promise to pay at death must be evidenced by a certain type of writing.

## 2. Limitations Period

**§3.23** Informal probate of a will does not trigger any limitations period for challenging the validity of the will. Formal probate should be employed if it is desired to permanently resolve any questions regarding the validity of the will. In general, “a formal testacy order under [MCL 700.3409–.3411], including an order that the decedent did not leave a valid will and that determines heirs, is final as to all persons with respect to all issues concerning the decedent’s estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will and to the determination of heirs[.]” MCL 700.3412(1).

An interested person may only seek to modify or vacate a final order in a formal testacy proceeding under limited circumstances. One exception to the rule of MCL 700.3412(1) is that “[t]he court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of that will’s existence at the time of the earlier proceeding, or were unaware of the earlier proceeding and were given no notice of it, except by publication.” MCL 700.3412(1)(a). A second exception is that,

[i]f intestacy of all or part of the estate has been ordered, the determination of the decedent’s heirs may be reconsidered if it is shown that an individual was omitted from the determination and that the omitted individual was unaware of his or her relationship to the decedent, was unaware of the decedent’s death, or was not given notice of any proceeding concerning the decedent’s estate, except by publication.

MCL 700.3412(1)(b). “The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.” MCL 700.3412(3).

A petition for vacation of a formal testacy order, filed under MCL 700.3412(1), must be filed before the earlier of

- the time of entry of an order approving final distribution of the estate, if a personal representative is appointed for the estate, or, if the estate is closed by statement, six months after the filing of the closing statement; or
- one year after the entry of the order sought to be vacated.

MCL 700.3412(2). However, based on good cause, a petition may be filed within the time allowed for appeal. MCL 700.3413.

MCL 700.7604(1) governs the statute of limitations for commencing a proceeding to contest the validity of a trust revocable at the settlor’s death. A trust contest petition is timely if filed within the earlier of

- two years after the settlor's death or
- six months after the trustee sent the person a notice informing the petitioner of the required information.

MCL 700.7604(1). To trigger the six-month statute of limitations, the trustee's notice must include

- (i) The trust's existence.
- (ii) The date of the trust instrument.
- (iii) The date of any amendments known to the trustee.
- (iv) A copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust, if any.
- (v) The settlor's name.
- (vi) The trustee's name and address.
- (vii) The time allowed for commencing a proceeding.

*Id.*

The statute of limitations for alleging a breach of fiduciary duty varies based on the type of fiduciary in question. A claim against a personal representative, "[u]nless previously barred by adjudication and except as provided in the closing statement, is barred unless a proceeding to assert the right is commenced within 6 months after the filing of the closing statement." MCL 700.3956.

There is a shortened one-year statute of limitations for a claim of breach of fiduciary duty against a trustee when a statutory notice requirement is satisfied. MCL 700.7905(1)(a). If the statutory notice requirement is not satisfied, then

a judicial proceeding by a trust beneficiary against a trustee for breach of trust shall be commenced within 5 years after the first of the following to occur:

- (a) The removal, resignation, or death of the trustee.
- (b) The termination of the trust beneficiary's interest in the trust.
- (c) The termination of the trust.

MCL 700.7905(3).

For any other breach of fiduciary duty claim, the statute of limitations is three years. *Miller v Magline, Inc*, 76 Mich App 284, 313, 256 NW2d 761 (1977).

## XI. Contested and Uncontested Proceedings

**§3.24** A proceeding may be uncontested, meaning that the petition is not contested by any interested person. In the alternative, a proceeding may be contested, meaning that the petition is contested by one or more interested persons. *Probate litigation* generally signifies civil actions or contested proceedings.

Again, an interested person may raise an objection to the petition orally at the initial hearing. Consequently, a unique aspect of probate court practice is that, in a proceeding, the petitioner (and counsel) may not know whether the petition is opposed by any interested person until the hearing is held.

When the petitioner requests a hearing date and time from the probate court, the court will typically ask the petitioner whether the petition is contested or uncontested. If the petitioner is unaware of any objections, then the court will usually treat the petition as uncontested and schedule it for an uncontested hearing.

The probate court may schedule multiple uncontested petitions for the same hearing time, to be heard sequentially. Under these circumstances, the probate court will not ordinarily conduct a hearing on a petition when an objection to the petition is raised for the first time at the hearing, causing the court to realize that the matter is contested rather than uncontested. In that case, the probate court will typically schedule a contested hearing time slot for a new date and time.

When an objecting interested person is represented by legal counsel, it is best practice for counsel (at least when practicable) to prepare, file, and serve a written objection before the hearing. Filing and serving the written objection before the hearing gives notice that the matter is contested, and the probate court will have the opportunity to adjourn the uncontested hearing time slot and reschedule the matter for a contested hearing time slot.

## XII. Initial Contested Hearing

**§3.25** There may be uncertainty about the scope or purpose of the initial hearing in a contested matter. Some contested matters can be resolved at the end of a single contested hearing while others cannot be resolved at that time (e.g., because discovery is necessary).

Probate courts with high volumes of probate litigation typically use the initial contested hearing as a scheduling conference at which a scheduling order will be prepared under MCR 2.401(A)–(B). Probate courts with low volumes of probate litigation may not automatically hold scheduling conferences or enter scheduling orders. Communicate with the probate court's clerk before the hearing to ascertain the court's policy for the initial hearing. You may need to formally request that the probate court hold a scheduling conference and enter a scheduling order before the initial contested hearing. *See* MCR 2.401(A).

Even when the litigation will be conducted under a scheduling order, the probate court has discretion to require oral argument or take proofs at the initial contested hearing regarding matters deemed to require urgent attention. Assume that an interested person has filed a conversion complaint against a fiduciary who is currently administering the property and finances of an incapacitated individual. The conversion complaint may be scheduled for discovery, alternative dispute resolution (ADR), and trial over a period of months, yet the probate court may nonetheless immediately consider at the initial contested hearing whether prompt action by the court is necessary for the well-being and protection of the incapacitated individual.

### **XIII. Guardian ad Litem/Visitor**

**§3.26** The probate court may choose to appoint a guardian ad litem to appear for and represent the interests of an interested person in a contested matter. Alternatively, the probate court may choose to appoint a visitor to conduct an investigation and report back to the court. Such appointments are governed by MCR 5.121.

MCL 700.1403(d) also governs appointment of a guardian ad litem. The court may appoint a guardian ad litem to represent the interests of a minor, an incapacitated individual, or an unborn or unascertained person at any point in the proceeding if it determines that representation of the person's interests would be inadequate. MCL 700.1403(d). A guardian ad litem may be appointed to represent multiple individuals or interests, provided there is no conflict of interest. *Id.* If the individual accepts the appointment as guardian ad litem, the guardian ad litem then conducts an investigation and prepares and files a report and recommendation. *Id.*

MCL 700.7305 governs appointment of a guardian ad litem in trust proceedings. The court may appoint a guardian ad litem to represent the interests of a minor or an incapacitated or unborn individual if the court determines that an interest is not represented or the representation is inadequate. The court's appointment allows a guardian ad litem to receive notice, give consent, represent, and act on behalf of the ward. A guardian ad litem may also be appointed to represent multiple beneficiaries. MCL 700.7305(1).

### **XIV. Attorney Appearance for Fiduciary**

**§3.27** It is common for a fiduciary (personal representative, trustee, attorney-in-fact under durable power of attorney) to be a party to probate litigation. MCR 5.117(A) provides that an attorney who appears on behalf of a fiduciary represents the interests of the fiduciary, not the beneficiaries or principal for whom the fiduciary acts.

It is poor practice and legally erroneous for an attorney to purport to represent an "estate" or a "trust." Instead, an attorney actually represents the fiduciary who retained the attorney, such as the personal representative of an estate or the trustee of a trust.

### **XV. Duties of Fiduciary to Interested**

## Persons

**§3.28** Fiduciaries are often parties to probate litigation. For example, a claimant whose claim was denied by the personal representative may bring a civil action against the personal representative seeking allowance of the claim by the probate court. The outcome of the probate litigation will affect the interests of the beneficiaries of the estate being administered by the personal representative.

The beneficiaries of the estate are entitled to be informed of

- the occurrence of the litigation and how it unfolds;
- their right to intervene in the litigation, if they wish to participate directly; and
- the actions that the personal representative intends to take in the litigation (e.g., entering into a settlement agreement).

The outcome of the litigation should bind those beneficiaries who choose not to actively participate in the litigation.

Under MCR 5.120, a fiduciary is considered to represent the interested persons in a contested matter. The fiduciary must give notice of the contested matter to the interested persons and must keep the interested persons informed of the fiduciary's actions regarding the matter. The notice must inform the interested persons of their right to intervene. The notice must also mention that an interested person's failure to intervene will result in that person's being bound by the fiduciary's actions.

One commentator has questioned the application of this court rule in practice:

Left open is the question of the frequency of and specificity of the information relayed by the fiduciary or trustee to interested parties. The timing of and service of such notices may also become an issue. At the very least, inherent within the confines of the rule is the requirement that, if requested to do so, the court must pass upon whether or not the fiduciary's or trustee's actions in a given case were 'reasonable' and met the rule requirements. If they did not, the rule is also silent as to what remedy an aggrieved party has.

Ronald S. Longhofer, *Michigan Court Rules Practice*, Author's Commentary on Rule 5.120, at 790–791 (6th ed 2017).

## XVI. Formal Testacy Proceedings

**§3.29** Article III, Part 4, of EPIC governs formal testacy proceedings, providing specific and detailed procedural rules for this type of probate litigation. "A formal testacy proceeding is litigation to determine whether a decedent left a valid will." MCL 700.3401(1).

“An interested person or a person that has a right or cause of action that cannot be enforced without administration” may commence a formal testacy proceeding. MCL 700.3401(1). A formal testacy proceeding is begun by filing one of the following:

- (a) A petition described in [MCL 700.3402(1)] in which the petitioner requests that after notice and hearing, the court enter an order probating a will.
- (b) A petition to set aside a will’s informal probate or to prevent a will’s informal probate that is the subject of a pending application.
- (c) A petition in accordance with [MCL 700.3402(2)] for an order that the decedent died intestate.

*Id.*

MCL 700.3402 governs the required contents of a petition in a formal testacy proceeding. MCL 700.3403 sets forth the notice requirement and identifies interested persons regarding a formal testacy proceeding. A party who opposes the probate of a will for any reason in a formal proceeding must state the objections in the party’s pleadings. MCL 700.3404.

MCL 700.3405 addresses proof of execution of a will in uncontested cases, while MCL 700.3406 addresses proof of execution of a will in contested cases. If it is necessary to provide evidence concerning execution of an attested will that is not self-proved in a contested case, the testimony of at least one of the attesting witnesses is required. MCL 700.3406(1). If the will is self-proved, it is conclusively presumed that there has been compliance with the signature requirements for execution. The other requirements “are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and sworn statements annexed or attached to the will, unless there is proof of fraud or forgery affecting the acknowledgment or a sworn statement.” MCL 700.3406(2). If a witness is found to have been competent when the witness signed the will, a subsequent incompetency of that witness does not prevent admission of the will to probate. MCL 700.3406(3).

The burden of proof of establishing death, venue, and heirship lies with the petitioner who is seeking to establish intestacy. MCL 700.3407(1)(a). A proponent of a will has the burden of proof to establish due execution in all cases. If that proponent is also the petitioner, the proponent must also establish proof of death and venue. MCL 700.3407(1)(b). A contestant of a will has the burden of establishing the lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. MCL 700.3407(1)(c). A party has the ultimate burden of persuasion about any matter for which that party has the initial burden of proof. If a will is opposed by a petition for probate of a later will revoking the former, the court first determines whether or not the later will is entitled to probate. If a will is opposed

by a petition for a declaration of intestacy, the court first determines whether or not the will is entitled to probate. MCL 700.3407(2).

“A will found to be valid and unrevoked shall be formally probated.” MCL 700.3409(2). “If 2 or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than 1 instrument may be probated if neither expressly revokes the other and neither contains provisions that work a total revocation by implication. If more than 1 instrument is probated, the order shall indicate which provisions control in respect to the nomination of the personal representative, if any.” MCL 700.3410. In the course of the formal testacy proceeding, if it becomes evident that the decedent’s estate is or may be partially intestate, the court will enter an order to that effect. MCL 700.3411. An order in a formal testacy proceeding may be modified or vacated within the time allowed for an appeal if it is determined that there is good cause. MCL 700.3413.

MCL 700.3415 permits any interested person at any time to petition the probate court for guidance on an issue arising during estate administration:

Unless supervised administration is sought and ordered, each person interested in an estate, including a personal representative, whether appointed informally or after notice, may make 1 or more independent requests to the court so that a question or assumption relating to the estate, including the status of an estate as testate or intestate, a matter relating to 1 or more claims, a disputed title, an account of a personal representative, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of a judicial order in regard to other or further questions or assumptions.

## **XVII. Discovery**

### **A. Prelitigation**

**§3.30** In general, prelitigation discovery is not available in probate court disputes. There is one notable exception: the Michigan Medical Records Access Act, MCL 333.26261 et seq., permits the heirs at law of a deceased patient to obtain the medical records of the decedent. MCL 333.26263(a)(ii)(B). The procedure for submitting a record request is specified in the statute. Thus, it is feasible for a person considering a will or trust contest to review the decedent’s medical records for evidence of mental incapacity before filing the contest.

### **B. Formal Discovery**

**§3.31** Discovery in probate litigation is governed by the same court rules that apply to general civil litigation, unless there is a specific probate court rule that differs. MCR 5.131(A). Interrogatories, document production requests to parties, document production

subpoenas to nonparties, and depositions of parties and witnesses are all commonplace in contested probate court matters.

In a contested proceeding, the scope of discovery is limited to matters raised in the petitions or objections pending before the court. In a civil action, the scope of discovery is governed by MCR 2.302(B), which applies to all civil litigation. Thus, the scope of discovery in a proceeding is intended to be more narrow than in a civil action.

Mandatory initial disclosures, MCR 2.302(A), which apply to discovery in civil actions effective January 1, 2020, generally do not apply to discovery in probate proceedings. MCR 5.131(B)(1), *amended* (eff. Jan 1, 2020). However, these disclosures are required in probate proceedings if, by the time of the first hearing on the petition initiating the proceeding,

- i. an interested person other than the petitioner files a demand for mandatory initial disclosure and properly serves the demand on all interested persons or
- ii. an interested person objects to or otherwise contests the petition, in writing or orally, properly serves any written objection or response on all interested persons, and the judge determines mandatory initial disclosure is appropriate.

MCR 5.131(B)(2)(a), *amended* (eff. Jan 1, 2020). These disclosures are made by the petitioner and any demandant or objecting interested person. *Id.* The court can also order mandatory disclosures on its own motion or on a motion filed by an interested person. MCR 5.131(B)(2)(b), *amended* (eff. Jan 1, 2020). See MCR 5.131(2)(c) as amended effective January 1, 2020, for the timing of these disclosures.

Depositions of a witness to the will or other witnesses taken in relation to a petition to admit a will to probate may be taken and filed without notice if no written objection has been filed. MCR 5.132(A). However, the deposition is not admissible in evidence if at the hearing on the petition for probate of the will an interested person who was not given notice of the deposition as provided by MCR 2.306(B) objects to its use. MCR 5.132(A)

A copy of a will reproduced in accordance with the Records Reproduction Act, MCL 24.401 et seq., may be used at a deposition taken in relation to a proceeding requiring proof of a will. MCR 5.132(B).

Where fraud or concealment in relation to an estate, trust, or protected person is alleged, MCL 700.1205 provides a unique discovery device—examination before the probate court. First, a complaint must be filed “under oath” with the probate court by a fiduciary, beneficiary, creditor, or another interested person of a decedent’s or ward’s trust or estate. MCL 700.1205(1).

Second, the complaint must include one or more of the following allegations against the person identified in the complaint (who would presumably be named as the defendant):

(a) The person is suspected of having, or has knowledge that another may have, concealed, embezzled, conveyed away, or disposed of the trustee's, decedent's, or ward's property.

(b) The person has possession or knowledge of a deed, conveyance, bond, contract, or other writing that contains evidence of, or tends to disclose, the right, title, interest, or claim of the trustee, decedent, or ward to any of the trust or estate.

(c) The person has possession or knowledge of a decedent's last will.

*Id.* If these three preconditions are satisfied, the court may order a person to appear and be examined on the matter. *Id.* If the person refuses to appear and be examined or refuses to answer the interrogatories that relate to the complaint, the judge may commit the person to the county jail to remain in custody until the person submits to the court's order. MCL 700.1205(2).

Effective September 9, 2022, a subpoena may require a party or witness to appear by telephone or videoconferencing. MCR 2.305(F) (eff. Sept 9, 2022; *see* ADM File No 2020-08). Telephonic proceedings are governed by MCR 2.402 and videoconferencing is subject to MCR 2.407. MCR 2.305(F).

## **XVIII. Decedent's Attorney-Client Privilege**

### **A. Waiver**

**§3.32** Under Michigan law, the attorney-client privilege generally survives the death of the client. *Lorimer v Lorimer*, 124 Mich 631, 637, 83 NW 609 (1900). However, the personal representative of the deceased client's estate has the authority to waive the privilege. *Grand Rapids Tr Co v Bellows*, 224 Mich 504, 511, 195 NW 66 (1923). The personal representative should waive the privilege only when the waiver would benefit or protect the estate; if the waiver would harm the estate, the personal representative should not waive the privilege. *McKinney v Kalamazoo-City Sav Bank*, 244 Mich 246, 253, 221 NW 156 (1928).

In *Eicholtz v Grunewald*, 313 Mich 666, 21 NW2d 914 (1946), the personal representative's waiver of attorney-client privilege was disallowed because it did not benefit the estate. There, the plaintiffs brought suit to enforce an alleged oral agreement to make reciprocal wills, binding on the survivor, between their late mother and father, and to set aside conveyances made by the father to the plaintiffs' sibling Rose after the mother's death. The plaintiffs' lawsuit was opposed by Rose, who was appointed as executrix of both parents' respective estates. At trial, Rose called her late parents' attorney as a witness. The attorney testified that the parents had not intended to make reciprocal wills that were binding on the

survivor. The trial court overruled the plaintiffs' objection that such testimony was barred by the attorney-client privilege. The trial court rendered judgment against plaintiffs, who appealed.

The appellants claimed that the trial court erred by admitting the attorney's testimony regarding his privileged communications with his late clients. The Michigan Supreme Court recited the rule that "[t]he privilege could only be waived by the administrator for the protection of the estate, and not for the dissipation or the diminution thereof." *Id* at 671 (quoting *McKinney*, 244 Mich at 253). Applying that rule, the court concluded that the waiver was for the protection of Rose, not the estate, and that it was therefore unenforceable. *Id*. However, the Michigan Supreme Court found other reasons why the attorney-client privilege did not bar admission of the attorney's testimony: first, the parents themselves had waived the privilege by allowing Rose to be present at the attorney meetings; and second, as discussed in §3.33, the attorney-client privilege does not apply in a will or trust contest. *Id*. at 672.

## **B. Inapplicability in Will and Trust Contests**

**§3.33** The attorney-client privilege does not apply to communications regarding the deceased client's testamentary intentions in a will or trust contest. *In re Loree's Estate*, 158 Mich 372, 377, 122 NW2d 623 (1909) (holding that trial court erred by applying attorney-client privilege to exclude testimony of testator's attorney regarding testator's prior will). While this rule from caselaw technically addresses attorney-client communications related to preparation of a will, the same rule should apply to communications related to preparation of a trust employed as a will substitute.

Accordingly, such communications are freely discoverable, and it is not necessary for the personal representative to waive the attorney-client privilege in a will or trust contest. Similarly, court approval is not necessary, although it is not uncommon for an attorney to refuse to disclose such communications until the party seeking discovery obtains a court order.

## **C. Fiduciary Exception**

**§3.34** In litigation between a fiduciary and a beneficiary of the trust or estate under administration by the fiduciary, the fiduciary may assert attorney-client privilege to shield the fiduciary's communications with its legal counsel from disclosure.

Jurisdictions other than Michigan have recognized a fiduciary exception to the attorney-client privilege under which fiduciary-attorney communications may be discovered where the communications related to administration of the trust or estate, were paid for by the trust or estate, and predated any dispute between the fiduciary and beneficiary. *See Riggs Nat'l Bank v Zimmer*, 355 A2d 709, 713–714 (Del Ch 1976). However, there is no Michigan authority recognizing the fiduciary exception to the attorney-client privilege.

## **XIX. Decedent's Statements as Hearsay**

**§3.35** At trial, decedent's statements may be deemed inadmissible under the hearsay rule, MRE 802. However, MRE 803(3) provides an exception to the hearsay rule that may render decedent's statements admissible: "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" is not excluded by the hearsay rule.

The first portion of the exception provides that a decedent's forward-looking statement reflecting state of mind relative to an action the decedent has not yet undertaken is admissible under the hearsay rule. Hence, the decedent's statement of future intent, plan, motive, or design regarding any matter is admissible. The forward-looking statement could relate to the execution, revocation, identification, or terms of the decedent's will.

Alternatively, the forward-looking statement could relate to nonprobate property dispositions, such as an intention to add another person's name to the decedent's bank account for some reason. The second portion of the exception provides that a decedent's backward-looking statement reflecting state of mind relative to an action the decedent has already undertaken is generally not admissible under the hearsay rule. The third portion of the exception provides that a decedent's backward-looking statement reflecting state of mind relative to the execution, revocation, identification, or terms of the decedent's will is admissible under the hearsay rule.

MRE 803(3) therefore precludes admission of a decedent's backward-looking statement regarding decedent's state of mind related to matters other than the execution, revocation, identification, or terms of the decedent's will. In particular, statements explaining the decedent's intent, plan, motive, or design in relation to nonprobate property dispositions—such as an explanation for why the decedent previously added another person's name to the decedent's bank account—are inadmissible. A substantial body of Michigan caselaw applies and construes MRE 803(3) in probate litigation.

## **XX. Preliminary Injunctive/Other Relief**

**§3.36** A litigant in probate litigation may seek preliminary injunctive relief from the probate court. In particular, it is common for the plaintiff/petitioner to seek to enjoin disposition of the property in dispute, pending a final ruling on the merits by the probate court.

For example, imposition of a constructive trust over assets in the possession of the respondent/defendant is frequently sought as relief in probate litigation. If the assets no longer exist at the conclusion of the lawsuit, however, the probate court would lack the ability to impose a constructive trust, which requires the existence of a res. Entry of a

preliminary injunction can preserve the assets and maintain the status quo until the probate court has the opportunity to make a final ruling on the merits.

MCL 700.1309 gives the probate court broad authority to render certain types of preliminary relief. To address a situation that involves immediate and substantial risk of loss, the probate court may either appoint a special fiduciary for specified duties or enjoin a person from conduct that presents an immediate risk of waste, unnecessary dissipation of an estate's or trust's property, or jeopardy to an interested person's interest. MCL 700.1309(a), (b). The probate court must base its action on reliable information from an interested person, government official, or other informed source or from the court's files. MCL 700.1309. MCL 700.1309 applies to all proceedings within the court's jurisdiction. Reporter's Comment to MCL 700.1309 in *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE updated annually).

However, the court may not enjoin a respondent in a proceeding to appoint a guardian or conservator or enjoin a ward or protected individual. MCL 700.1309(b). An enjoined person will be provided with a prompt hearing on request to show cause as to why the order should be terminated. *Id.* The court is granted broad authority by this section to address unique circumstances. See the Reporter's Comment to MCL 700.1309.

"A special fiduciary is an ad hoc agent of the court who is assigned tasks appropriate to the circumstances." Reporter's Comment to MCL 700.1309. The court may appoint a special fiduciary on its own initiative, on the notice it directs, or without notice in its discretion. MCR 5.204(A). The special fiduciary has the duties and powers specified in the court order appointing the special fiduciary. "Appointment of a special fiduciary suspends the powers of the general fiduciary unless the order of appointment provides otherwise. The appointment may be for a specified time and the special fiduciary is an interested person for all purposes in the proceeding until the appointment terminates." MCR 5.204(B).

Both MCR 3.310(A) (concerning preliminary injunctions) and Michigan caselaw on preliminary injunctions apply to probate litigation and may be invoked by a litigant. However, the standard for issuing a preliminary injunction under MCL 700.1309 is lower than the standard for issuing a preliminary injunction under MCR 3.310(A) and corresponding caselaw.

MCL 700.3607 provides a mechanism for an interested person to obtain preliminary relief against a personal representative. The court may, by temporary order, restrain a personal representative from performing a specified act of administration, disbursement, or distribution if it is determined that the personal representative may take action that would unreasonably jeopardize the interest of the petitioner or of some other interested person. A person who transacts any business with the personal representative may be made a party. MCL 700.3607(1).

For an order restraining the personal representative, the court will set a hearing date not more than 14 days after the issuance of the temporary order, unless the parties agree otherwise. Notice must be given to the personal representative, to the personal representative's attorney of record, if any, and to any named defendants in the petition. MCL 700.3607(2).

## **XXI. Fees**

### **A. Fiduciary's Attorney Fees**

**§3.37** In general, a fiduciary is entitled to pay attorney fees incurred in relation to probate litigation from the assets of the estate being administered by the fiduciary.

A personal representative is entitled to have necessary expenses, including reasonable attorney fees, paid from the estate if the personal representative defends or prosecutes a proceeding in good faith, regardless of whether it is successful. MCL 700.3720. "This provision is not intended to address whether a personal representative is entitled to expenses and fees for an unsuccessful defense of an action for breach of the representative's fiduciary duty." Reporter's Comment to MCL 700.3720 in *Estates and Protected Individuals Code with Reporters' Commentary* (ICLE updated annually).

A trustee who participates in a civil action or proceeding in good faith is entitled to have all expenses incurred, including reasonable attorney fees, paid from the trust property, regardless of whether the trustee is successful. MCL 700.7904(2). The probate court has the discretion to reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust. MCL 700.7904(3).

Separate from EPIC and the MTC, Michigan caselaw provides that a fiduciary is not entitled to use assets of the estate under administration to pay for the fiduciary's legal defense in a breach of fiduciary duty action. *In re Baldwin's Estate*, 311 Mich 288, 18 NW2d 827 (1945); *In re Hammond Estate*, 215 Mich App 379, 547 NW2d 36 (1996); *In re Gerber Tr*, 117 Mich App 1, 323 NW2d 567 (1982). It is increasingly common for the probate court to enjoin the payment of attorney fees from estate or trust assets by the fiduciary for the defense of an action for breach of fiduciary duty. If the fiduciary is exonerated at the conclusion of the proceeding, the fiduciary may seek reimbursement of attorney fees.

### **B. Beneficiary's Attorney Fees**

**§3.38** The petitioner or plaintiff in probate litigation is generally not able to shift attorney fees to another party. However, a beneficiary who takes action in a trust proceeding that causes the value of the trust to be enhanced may be able to recover attorney fees from the trust, at the discretion of the probate court. MCL 700.7904(1).

## **XXII. Alternative Dispute Resolution**

## (ADR)

**§3.39** ADR, including case evaluation, mediation, and other ADR processes, is generally available in probate litigation, either on the stipulation of the parties or the order of the probate court. MCR 5.143(A).

Facilitative mediation is increasingly common in probate litigation. MCR 2.411 (governing mediation), 2.412 (governing mediation communications), and 2.420 (governing settlements and judgments for minors and legally incapacitated individuals) all apply to probate litigation matters, to the extent possible. You should ensure that all interested persons whose consent is necessary to resolve the matter with finality participate in the mediation.

Case evaluation is available in probate litigation but is less common than facilitative mediation. MCR 5.143(A) provides that MCR 2.410 (governing alternative dispute resolution) applies to ADR in probate litigation to the extent possible. MCR 5.143(B) provides that MCR 2.403 and 2.404 (both governing case evaluation) apply to case evaluation in probate litigation “to the extent feasible.”

Probate disputes, including claims of mental incapacity and undue influence, may be resolved by binding arbitration on the agreement of the parties, and the probate court may enter an order giving effect to the arbitrator’s decision. *Petorowski v Nestorowski (In re Estate of Nestorowski)*, 283 Mich App 177, 769 NW2d 720 (2009). However, for the arbitrator’s decision to be enforceable, all interested parties should receive notice of the arbitration, agree that the arbitration will supply a binding resolution, and actively participate in the arbitration process. *Id.* at 196.

## XXIII. Settlement Agreements

**§3.40** Like other types of civil litigation, most probate litigation matters will be settled before trial. Settlement agreements should be drafted with the goal of binding interested persons other than the active litigants, which may be accomplished by having the other interested persons execute the agreement or by seeking probate court approval of the settlement agreement after notice to all interested persons.

MCL 700.3914(1) authorizes interested persons to agree to alter the shares to which they are entitled in an estate in an agreement “executed by all who are affected by its provisions.” MCL 700.3914(1). The phrase “executed by all who are affected” indicates that an agreement to alter shares may be made by some, but not necessarily all, of the beneficiaries. Those who do not join in the agreement will receive the shares given to them under the terms of the will or by the laws of intestate succession. Reporter’s Comment to MCL 700.3914 in *Estates and Protected Individuals Code with Reporters’ Commentary* (ICLE updated annually). MCL 700.3914(1) states:

If there is, or may be, an interested person to the agreement who is a minor or incapacitated individual or if there is an inalienable estate or future contingent interest, after notice to the representative of the individual or interest as provided by supreme court rule, the court having jurisdiction of the matter may, if the agreement is made in good faith and appears just and reasonable for the individual or interest, direct the representative of the individual or interest to sign and enter into the agreement. The personal representative shall abide by the agreement's terms subject to the personal representative's obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the fiduciary office's responsibilities for the benefit of a successor of the decedent who is not a party.

The parties to trust-related litigation before the probate court may seek judicial approval of a settlement agreement. MCL 700.7201 confers broad subject matter jurisdiction on the probate courts on matters related to the administration of trusts, including approval of settlement agreements. Reporter's Comment to MCL 700.7112.

The parties to a trust-related dispute which has not yet resulted in litigation may enter into a nonjudicial settlement agreement. MCL 700.7111(1). A nonjudicial settlement agreement is valid as long as it does not violate a material purpose of the trust and includes terms and conditions that could be court-approved. MCL 700.7111(2). For purposes of MCL 700.7111, *interested persons* means "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court." MCL 700.7111(5).

MCL 700.7111 allows beneficiaries to resolve administrative issues without court involvement and relieves interested parties and the courts from the burdens and costs associated with continued court supervision and control. *Draves v Draves (In re Draves)*, 298 Mich App 745, 763, 828 NW2d 83 (2012).

MCL 700.7111(3) lists various matters that may be resolved by a nonjudicial settlement agreement:

- (a) The interpretation or construction of the terms of the trust.
- (b) The approval of a trustee's report or accounting.
- (c) Direction to a trustee to perform or to refrain from performing a particular act or to grant to or to withhold from a trustee any power.
- (d) The resignation or appointment of a trustee and the determination of a trustee's compensation.
- (e) Transfer of a trust's principal place of administration.

(f) Liability of a trustee for an action relating to the trust.

A nonjudicial settlement cannot be used to terminate or modify a trust. MCL 700.7111(2).

Probate court approval of a nonjudicial settlement agreement may be sought. MCL 700.7111(4). On a determination that the representation was adequate, that the agreement does not violate a material purpose of the trust, and that the agreement contains terms that may be approved, the court will enter an order approving the agreement. *Id.*

## XXIV. Trial by Jury

### A. Right to Trial by Jury

**§3.41** Jury trials in probate proceedings are governed by MCR 2.508–.516, except as modified by Chapter 5 of the Michigan Court Rules or MCR 5.740, for mental health proceedings. MCR 5.151. Effective September 9, 2022, under MCR 2.407, trial courts may determine the manner and extent of the use of videoconferencing and may require participants to attend proceedings by videoconferencing technology, including the use of a remote video platform through an audio-only option. *See* ADM File No 2020-08.

In *Old Kent Bank v Remainder Beneficiaries (In re Messer Tr)*, 457 Mich 371, 579 NW2d 73 (1998), the Michigan Supreme Court clarified the availability of the right to trial by jury in Michigan probate court litigation, holding “that the issue of a trustee’s prudence is a question for the trial court” and that “[a]ll other factual issues are properly submitted as jury questions.” *Id.* at 388.

The question of whether the decedent possessed or lacked mental capacity to execute a legal instrument or engage in a property transaction is a question of fact for the fact-finder. *Barrett v Swisher*, 324 Mich 638, 641, 37 NW2d 655 (1949). The question of whether the decedent was unduly influenced to execute a legal instrument or engage in a property transaction is a question of fact for the fact-finder. *In re Peterson Estate*, 193 Mich App 257, 261, 483 NW2d 624 (1991).

The existence of a legal duty is a question of law for the court; the question of whether a breach of duty occurred is a question of fact for the fact-finder. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86–89, 679 NW2d 689, (2004). The existence of an ambiguity in a legal instrument is a question of law for the court; the resolution of the ambiguity, based on a determination of the intentions of the maker of the instrument, is a question of fact for the fact-finder. *Mahnick v Bell Co*, 256 Mich App 154, 159, 662 NW2d 830 (2003).

### B. Jury Demand

**§3.42** A party may demand a trial by jury when proper by filing a written demand within 28 days after an issue is contested. If trial is conducted within 28 days of the issue being joined, a written jury demand must be filed at least 4 days before trial. MCR 5.158(A). A

party who was not served with notice of the hearing at least 7 days before the hearing or trial may demand a jury trial at any time before the hearing. *Id.* The court may adjourn the hearing to impanel the jury. *Id.* A party's jury demand may be included in the pleading if notice of the demand is included in the caption of the pleading. *Id.* "The jury fee provided by law must be paid at the time the demand is filed." *Id.*

Note that a demand for a jury trial must be filed as a separate document. MCR 2.508(B)(1). See SCAO form MC 22, Jury Demand.

A party who fails to file a demand or pay the jury fee waives the right to trial by jury. A jury is also waived if trial or hearing is commenced without a demand being filed. MCR 5.158(B). If trial by jury is waived, then the trial will be a bench trial.

### C. Jury Instructions

**§3.43** Standard jury instructions for certain types of probate litigation matters (including will contests, bank accounts, claims for services rendered, and trust contests) are available in Chapters 170 through 180 of the *Michigan Model Civil Jury Instructions* (ICLE).

## XXV. Appeals

**§3.44** Appellate review, including pertinent provisions to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments, and power of the appellate court, is governed by the RJA and by supreme court rule. MCL 700.1305.

The RJA, in turn, says, "The court of appeals has jurisdiction on appeals from all final judgments and final orders from the ... probate court, as those terms are defined by law and supreme court rule, except final judgments and final orders described in subsections (2) and (3). A final judgment or final order described in this subsection is appealable as a matter of right." MCL 600.308(1). Further, "[t]he court of appeals has jurisdiction on appeal from the following orders and judgments that are reviewable only on application for leave to appeal granted by the court of appeals ... Any other judgment or interlocutory order from the ... probate court as determined by supreme court rule." MCL 600.308(2)(c).

MCR 5.801 governs appeals from probate court rulings.



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