

MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

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Multiple Damage Recovery in Probate Court

By Alan A. May and Ronald S. Nixon

Introduction

The probate practitioner often comes across situations where someone has taken the property of an estate or trust. The question arises in addition to claims for damages per se whether the law authorizing multiple damages can be used and in what situations. Keep in mind that, in most cases where the wrongdoer is not a distributee or beneficiary, that the chances of recovering sanctions or attorney fees through such vehicles as *In Re Hammond Estate*, 215 Mich App 379, 547 NW2d 36 (1996) are small.

At common law, the remedy for the wrongful taking of property, either embezzlement or conversion, is the fair market value of the property taken at the time of the conversion. If the property is not money, its fair market value may be so diminished that it would be difficult to find a replacement in the same condition in the open market. Statutes providing for multiple damages help make up for this depreciation. It may also help defray the fees and costs for pursuing the wrongdoer, that is, if the statute does not itself provide for recovery of costs and attorney fees, as is the case with the double damage provision included in the Estate and Protected Individuals Code (EPIC) and the Michigan Trust Code (MTC) that this article examines.

Statutory Authority

The probate practitioner has potentially three sources of statutory authority to obtain multiple damages for wrongfully taken property under Michigan law, as follows:

Estates

MCL 700.1205(4): If a person embezzles or wrongfully converts a decedent's property before letters of authority are granted, or refuses, without colorable claim of right, to transfer posses-

sion of the decedent's property to the personal representative upon demand, that person is liable in an action brought by the personal representative for the benefit of the estate for double the value of the property embezzled, converted, or withheld.

Trusts

MCL700.7813(4): If a person embezzles or wrongfully converts trust property, or refuses, without colorable claim of right, to transfer possession of trust property to the current trustee upon demand, the person is liable in an action brought by the current trustee, or the beneficiary of the trust for the benefit of the trust, for double the value of any property embezzled, converted, or wrongfully withheld from the current trustee.

General Law

MCL 600.2919a:

- (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees;
 - a) Another person's stealing or embezzling property or converting property to the other person's own use.
 - b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
- (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

Analysis

Comparison of EPIC on Estates Versus the MTC

The estate provision of EPIC and MTC provision initially appear parallel. In similar language, both provisions allow recovery of double damages for pursuing a wrongdoer who embezzles, converts, or refuses to turn over property to an estate or trust. However, the provisions have two significant differences, the first involving who has standing to bring an action under the statute and the second involving when an action may be brought.

Standing

Only the fiduciary may bring an action under MCL 700.1205(4), which states that the wrongdoer “is liable in action brought by the personal representative....” Either the fiduciary or a beneficiary may bring an action under MCL 700.7813(4), which provides that the wrongdoer “is liable in an action brought by the current trustee, or the beneficiary of the trust for the benefit of the trust....”

Under the Doctrine “*Exclusio Unius Est Expressio Alterius*” one sees the specific intent of the legislature to have a broad number of potential plaintiffs when money is embezzled or wrongfully converted from a trust but a narrow scope of potential plaintiffs relative to estates. A primary reason for this omission may be that in an estate the heirs and next of kin’s rights “are neither greater nor less than those of a mere stranger”; only the personal representative has sufficient right to bring an action for conversion of a decedent’s personal property before the estate’s debts are paid and the property distributed. See *Cullen v O’Hara*, 4 Mich 132, 138 (1856). Moreover, there could be a vast number of unidentified potential plaintiffs impeding the expeditious settlement, distribution, and closing of an estate. In the case of a trust, the administration of which may continue indefinitely, the settlor should have

already limited and identified the potential plaintiffs by identifying them as beneficiaries.

Despite the apparent intent of the legislature to be more restrictive in the area of estates, commentator May notes that case law exists under which one might argue the number of potential plaintiffs is greater if not equal to those delineated in the trust section. If the fiduciary is the one committing the wrong, it would be absurd to limit the possible party’s plaintiff to the fiduciary himself. Yes, a Probate Court could remove the wrongdoer but you remove that wrongdoer on a determination of wrong doing not *ab initio*. One would have to prove the tort to remove then replace then sue. Could the law of Michigan tolerate this situation despite the standing limitation included in the EPIC provision?

Language in the following cases would support a lawyer being paid out of corpus when litigating on behalf of someone other than the fiduciary. *Amerisure Ins Co v Folts*, 181 Mich App 288, 448 NW2d 829 (1989); *Becht v Miller*, 279 Mich 629, 273 NW 294 (1937); *Merkel v Long*, 372 Mich 144, 125 NW2d 284 (1963); and hence, since an attorney of the non-fiduciary can be paid from the estate, *ipso facto* that person must have had standing to bring the action. Admittedly the *Becht* decision antedated EPIC, but it continues to be cited. *Becht* involves an estate not a trust. The *Becht* fiduciary was sued by a beneficiary as an individual for withholding and claiming bonds as her own. She lost the case brought against her and the non-fiduciary’s attorney recovered fees from the estate as he improved and benefited. Hence, commentator May concludes that despite the limitation of the fiduciary as party plaintiff in MCL 700.1205(4), an action for double damages can be brought by a beneficiary if the wrongdoer fiduciary otherwise fits the torts described in MCL 700.1205(4). Also, such an action is clearly contemplated under the MTC counterpart. See *In re Estate of Poston*, No. 331772, 2017 Mich App LEXIS 1205, at *10 (July 25, 2017)(“If a trustee ‘embezzles or wrongfully converts trust property,’ the trustee is

liable ‘for double the value of any property embezzled, converted, or wrongfully withheld....’ MCL 700.7813(4)’). Query, suppose by converting the fiduciary renders the corpus insufficient to pay creditors, may they use either of the statutes? Commentator May does not believe the law is broad enough to cover this situation, and you would need a two-step proceeding; petition to remove, obtain a new fiduciary and then sue.

Commentator Nixon believes the proper cause of action against a fiduciary who commits conversion or embezzlement is for breach of duty under MCL 700.1308, which provides the court with a panoply of legal and equitable remedies to make the estate whole, including removing and replacing the personal representative in accordance with MCL 700.3611. A claim under MCL 700.1308 could be brought at any time by any interested person, which includes beneficiaries and creditors. As discussed below, it could also be joined with a common law and statutory conversion claim, assuming the plaintiff has been personally damaged by the fiduciary’s defalcation and has a greater claim to the property than the trustee.

Although it seems illogical, by its express terms MCL 700.1205(4) does not apply to conversion or embezzlement by an existing personal representative because, as discussed in the next section, such conversion or embezzlement must occur before the personal representative’s letters of authority are granted. Further, it is absurd to think that the personal representative would make and refuse his or her own demand to return estate property. Once appointed, a successor personal representative could demand that the predecessor return estate property and bring an action under MCL 700.1205(4) to benefit the estate. *Res judicata* would not bar a new petition even if the prior action concluded because the claim could not be brought in the original petition unless the successor fiduciary were appointed during the proceedings; on the other hand, collateral estoppel arguably should apply to bar the wrongdoer from relitigating his

or her liability.

Time of Taking

As touched on above, the estate provision, MCL 700.1205(4), aims to satisfy the return of property to an estate which has been converted *before* the granting of letters of authority. However, after they are issued, the section goes on to say “or refuses, without colorable claim of right to transfer possession of the decedent’s property to the personal representative upon demand.”

The use of the word “or” is disjunctive rather than conjunctive, seeming to create a separate situation after the letters of authority are issued, but it should make no difference whether property is converted or embezzled before or after the appointment of the personal representative. Since the personal representative appears to be the only individual who can bring an action, obviously that action must be brought after appointment. Moreover, as this section reads, once appointed, the personal representative must make a demand for return of the property before bringing an action under MCL 700.1205(4), imposing an additional requirement on a personal representative seeking to recover property converted or embezzled after appointment that has long been abandoned by the common law. *Trail Clinic, PC v Bloch*, 114 Mich App 700, 706, 319 NW2d 638 (1982) (“A demand is unnecessary where the act of the defendant amounts to a conversion regardless of whether a demand is made”).

The legislature should amend MCL 700.1205(4) to read more like its trust counterpart, MCL 700.7813(4), which has no reference to the time property is taken.

Number of Torts

By reading the above we can see that there are three torts: embezzlement, wrongful conversion or refusal to turn over the property without colorable right. This wrongful taking provision is very broad because there is no limitation to the act being a technical embezzlement or conversion. As we will see later in this article, these

torts have elements and nuances which might not be provable.

General Law

The general conversion statute, MCL 600.2919(a), has both a broader and narrower context than the EPIC estate and MTC provisions.

Standing

Who can bring the action? “A person damaged” is a limitless class of plaintiffs. It also suggests that that class should include those plaintiffs who may have been damaged by a conversion but lack standing under the probate and trust statutes, perhaps, for example, the creditor of an estate damaged by a the wrongful taking questioned previously or a beneficiary wronged by a personal representative. No reason exists that an action under MCL 600.2919a with a breach of duty action under MCL 700.1308.

Number of Torts

The general statute identifies at least four separate torts as grounds for recovery. Although embezzlement and conversion are used in both sets of statutes, the general conversion statute adds the torts of “stealing” and being a fence (i.e., knowingly “buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property”). Interestingly, this statute originally only permitted recovery of treble damages against the fence but not the thief, but the absurdity of the situation was recognized by the courts and later corrected by the legislature. As will be discussed below, the three main torts, stealing, conversion, and embezzlement, are very similar but contain some technical differences.

Treble Damages

MCL 600.2919a gives the successful plaintiff treble damages while the probate statutes only permit double damages; however, there is a major caveat recognizable in the language of

the statutes. The probate and trust statutes use mandatory language; a “person is liable” if an applicable tort is proven under MCL 700.1205(4) and MCL 700.7813(4). The general statute uses precatory language; a “person damaged...may recover” treble damages, costs and attorney fees if an applicable tort is proven. Courts have held that to recover treble damages under MCL 600.2919a, the plaintiff must prove “that the defendants acted willfully or wantonly by a preponderance of evidence.” *Hunt v Hadden*, 127 F Supp 3d 780, 786 (ED Mich 2015), citing *Michigan Land & Iron Co v Deer Lake Co*, 60 Mich 143, 146, 27 NW 10 (1886); *New Props v Newpower*, 282 Mich App 120,137, 762 NW2d 178 (2009).

A probate practitioner seeking to enforce the EPIC and MTC provisions would do well to alert a court reluctant to award double damages to the mandatory versus precatory difference between the statutes and avoid having to prove a higher level of scienter.

Term Definitions

Conversion

This tort is not defined in any of the statutes discussed. The common law definition of conversion is “any distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein.” *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 351-52, 871 NW2d 136 (2015). The term is broad, and the Michigan Supreme Court adopted a passage of the Restatement of Torts to illustrate the myriad different ways that property may be converted:

A conversion may be committed by

- (a) intentionally dispossessing another of a chattel,
- (b) intentionally destroying or altering a chattel in the actor’s possession,
- (c) using a chattel in the actor’s possession without authority so to use it,
- (d) receiving a chattel pursuant to a sale, lease,

pledge, gift or other transaction intending to acquire for himself or for another a proprietary interest in it,

(e) disposing of a chattel by a sale, lease, pledge, gift or other transaction intending to transfer a proprietary interest in it,

(f) misdelivering a chattel, or

(g) refusing to surrender a chattel on demand.

Thoma v Tracy Motor Sales, Inc, 360 Mich 434, 438, 104 NW2d 360, 362 (1960) (quoting 1 Restatement, Torts § 223. As this list indicates, conversion can be interference with a superior right to possession that is not necessarily ownership.

“Own Use” Required Under MCL 600.2919a

Although all the statutes discussed rely on the common law definition of conversion, when seeking treble damages under the general civil statute, an attorney must be aware that an additional element must be plead and proved that is not required for all forms of common law conversion. *Aroma Wines*, 497 Mich at 356-57. The express words of the statute are that treble damages may be awarded – not simply for “conversion” – but for “converting property to the other person’s own use.” MCL 600.2919a(1)(a). The Supreme Court stated that this additional element requires a showing “that the defendant employed the converted property for some purpose personal to the defendant’s interests, even if that purpose is not the object’s ordinarily intended purpose.” *Aroma Wines*, 497 Mich at 359.

The statute also makes “stealing or embezzling property” actionable, but the grammatical structure of the entire subsection suggests that the “own use” requirement does not apply to those two wrongs. MCL 600.2919a(1)(a) reads in full: “Another person’s stealing or embezzling *property* or converting *property* to the other person’s own use.” One reason for this, as will be noted in discussing the definitions of “embezzling” and “stealing” below is that those two wrongs inherently have an “own use” requirement, while there are many forms of conversion

identified in the list above that do not. The legislature only intended the punitive treble damages remedy to apply to a conversion that was akin to stealing or embezzling.

Action for Conversion of Money Is Limited

When seeking multiple damages under any of three statutes discussed based on a conversion, if the property converted is money, the courts generally hold it must be specific money entrusted to the converter’s care. *Thrift v Haner*, 286 Mich 495, 497, 282 NW 219 (1938). The *Thrift* court cited an earlier estate case in which the administrator pursued the wrongful taker of a gold coin. *Cullen v O’Hara*, 4 Mich 132 (1856).

This “specific money” requirement has been ameliorated somewhat by courts interpreting it to include improperly cashing checks and taking funds held in trust. *Rennie v Pentagon Refinery Co*, 280 Mich 1, 273 NW 325 (1937) (brokerage account); *Trial Clinic PC v Bloch*, 114 Mich App 700, 319 NW2d 638 (1982) (check). A check may be converted even if the recipient is entitled to some but not all of the money. *Citizens Ins Co of America v Delcamp Truck Ctr, Inc*, 178 Mich App 570, 444 NW2d 210 (1989). Recently, the court of appeals held that money withdrawn from a child’s UTMA account was a conversion even if the parent would have used the funds directly to pay medical bills for the child because it was the parent’s obligation to care for the child. *Hoffenblum v Hoffenblum*, 308 Mich App 102, 113, 863 NW2d 352 (2014). Although good faith is not a defense to the intentional tort, the court affirmed the lower court’s denial of treble damages because the funds were withdrawn on the advice of the parent’s financial planner and did not arise from dishonest motives, agreeing that the ruling was within the range of principled outcomes.

Embezzlement

Relying on the dictionaries of its time, the Michigan Supreme Court has stated that embezzle means “to appropriate by breach of trust”

and “to appropriate fraudulently to one’s own use what is entrusted to one’s care and management.” *Taylor v Kneeland*, 1 Doug 67, 72 (Mich 1843). Unlike stealing, which implies “a wrongful taking of another’s goods,...embezzlement denotes the wrongful appropriation and use of what came into possession rightfully.” *Id.* Embezzlement, rather than conversion, seems to be the proper cause of action against a fiduciary, although it would also apply to any bailee, employee, agent, and to anyone else who rightfully possesses but wrongfully uses another’s property. Embezzlement applies to all personal property, including money.

Stealing

Under the civil conversion statute, stealing is another cause of action for which a plaintiff may recover treble damages, and, like embezzlement and conversion, it is not defined. However, even in case interpreting criminal statutes, courts rely on the common law meaning of terms such as “steal” and “larceny.” See *People v March*, 499 Mich 389, 398-414, 886 NW2d 396 (2016) (extensive discussion of the definition of larceny, which involves stealing but may have many more elements). In that regard, to “steal” has been held to mean simply “to take (the property of another or others) without permission or right, esp. secretly or by force,” and “to appropriate ... without right or acknowledgment.” *People v Pratt*, 254 Mich App 425, 428, 656 NW2d 866 (2002)(quoting *Random House Webster’s Collegiate Dictionary* (2000)). Stealing is a possessory wrong, meaning that the plaintiff only needs to prove a superior right to possession over defendant at the time of the taking and does not need to prove ownership. See *March*, 499 Mich at 414 (for the purposes of larceny, the “‘property of another’ is any property in which ‘another’ individual holds the right to possess as against the defendant at the time of the taking”).

Property

These statutes all apply to any personal property, including money with the limitations discussed above. Personal property “includes substantially every valuable thing of a personal nature.” *Clark v Chapman*, 215 Mich 518, 526, 184 NW 497 (1921). EPIC similarly defines “Property” broadly as “anything that may be the subject of ownership, and includes both real and personal property or an interest in real or personal property.” MCL 700.1106(u). Notwithstanding that definition, conversion and stealing are wrongs that do not require a showing of ownership but only a superior right to possession, as discussed above. Michigan West Law lists 5,935 cases where the term is applied to money. See also *Clark v Chapman*, “Every valuable thing of a personal nature.” “Goods” is a phrase also defined broadly as that in contradiction to real estate.” *Curtis v Phillips*, 5 Mich 112, 113 (1858). EPIC MCL 700.1106(U) is even broader, “‘Property’ means anything that may be the subject of ownership, and included both real and personal property or an interest in real or personal property.”

Conclusion

To summarize some of the main points addressed in this article:

- A beneficiary of a trust can use either EPIC or the general law to sue a fiduciary for conversion inter alia.
- A beneficiary of an estate may be able to use EPIC MCL 700.1205(4) to pursue a fiduciary who fits the torts described despite the statutory restriction but certainly can use the general law to sue a fiduciary.
- A fiduciary can use EPIC and the general law to pursue a third person who fits the wrongdoing described in each statute.
- The ability to state a cause of action for stealing, embezzlement, and wrong-

ful withholding is less problematic than conversion if the property is money unless a specific fund is involved, but there is law which implies any money missing may be the object of conversion.

- If conversion is shown, the EPIC and MTC provision mandate double damages but, the civil conversion statute leaves treble damages to the court's discretion.

As a suggestion to the Michigan Supreme Court or legislature regarding the issue of standing, if commentator Nixon is correct about the inability of a non-fiduciary in a decedent estate to bring an action there is a hole in law, a wrong without a right to remedy. Though the non-fiduciary may bring an action, he or she lacks the remedy of enhanced damages. Making EPIC consistent with MTC would remedy this as well as the phantom before and after appointment issue discussed.



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Get Your Claims In: An Overview of Pre-Death Claims by a Fiduciary

By Thomas E.F. Fabbri and Nicholas E. Papasifakis

Introduction

If you have ever represented a fiduciary (i.e. personal representative or trustee) during the administration of an estate or trust, the following circumstances will sound familiar: (i) your client has been nominated to serve as a personal representative and/or the trustee of a decedent's estate or trust; (ii) prior to the decedent's death, your client provided services to the decedent and paid several expenses on behalf of the decedent; (iii) your client has a valid claim against the decedent's estate or trust for services rendered and for reimbursement of expenses paid at the direction or on behalf of the decedent; and (iv) because your client is a fiduciary (and therefore owes a duty of loyalty to the estate or trust and its heirs or beneficiaries) and creditor (owes a duty to one's self and therefore adverse to the interests of the heirs or beneficiaries), a "conflict" exists. You, as the attorney representing the fiduciary and creditor, must now counsel your client on how to continue to act as a fiduciary, while at the same time preserving your client's claim against the estate and/or trust and position as a creditor.

During the pendency of an estate or trust administration, the fiduciary must be prepared to properly respond to and account for claims against the estate or trust. In deceased estates, creditor claims will be addressed by the personal representative of the estate. If no such probate estate is necessary, or if the probate estate is otherwise insolvent, the trustee of the decedent's previously revocable trust will be tasked with addressing claims against the settlor of the trust.

Generally, the creditor claims process includes publishing notice to creditors, sending notice to known creditors, allowing and disallowing claims, prioritizing and paying claims, and if not resolved, litigating claims pursued by ag-

grieved creditor.¹ The Claims Process is codified at Article III, Part 8 and Article VII, Part 6 of the Estates and Protected Individual Code ("EPIC"). While EPIC provides the fiduciary and his or her legal counsel with a detailed playbook on how to address and deal with the claims of creditors at the estate and trust level, EPIC provides little guidance on how a fiduciary with a claim against the estate or trust that arose before the death of the decedent should proceed with presenting, preserving, and, hopefully, satisfying his or her claim. This article seeks to provide clarity and guidance on pre-death claims by a personal representative or trustee (hereinafter collectively referred to as the "fiduciary"), so as to provide the fiduciary (and his or her legal counsel) with a statutory mechanism to not only preserve the claim, but also to cure the "conflict" issues and avoid a breach of fiduciary claim by a litigious heir, beneficiary or other creditor of the estate or trust.

Pre-Death Claims by a Personal Representative

Statutory Law and Court Rule

EPIC and the Michigan Court Rules govern the manner and form in which the personal representative of an estate presents his or her pre-death claims. More specifically, a personal representative's claim against the estate that arose before the decedent's death is governed by MCL 700.3803(1), MCL 700.3804(3) and MCR 5.307(D).

With respect to the time limitations for presentation of claims by creditors, MCL 700.3803 provides in pertinent part:

(1) *A claim against a decedent's estate that arose before the decedent's death, including a claim of this state or a subdivision of this state, whether due or to become due, absolute or con-*

tingent, liquidated or unliquidated, or based on contract, tort, or another legal basis, if not barred earlier by another statute of limitations or non-claim statute, *is barred against the estate*, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent *unless presented within 1 of the following time limits*:

- (a) If notice is given in compliance with section 3801 or 7608, *within 4 months after the date of the publication of notice to creditors*, except that a claim barred by a statute at the decedent's domicile before the publication for claims in this state is also barred in this state.
- (b) For a creditor known to the personal representative at the time of publication or during the 4 months following publication, within 1 month after the subsequent sending of notice or 4 months after the date of the publication of notice to creditors, whichever is later.²

MCL 700.3804(3) governs the process of presentment of a claim by the personal representative. Specifically, MCL 700.3804(4) provides, in pertinent part, that “[t]he personal representative must give a copy of the claim to all interested persons not later than 7 days after the time for the claim’s original presentment expires.” MCL 700.3804(3) further provides that a claim by the personal representative against the estate shall be in a form prescribed by Supreme Court rule. MCR 5.307(D) offers that “[a] claim by a personal representative against the estate for an obligation that arose before the death of the decedent shall only be allowed in a formal proceeding by order of the court.”

Despite addressing the process for presentment of a claim by a personal representative, the applicable statutes and court rule fail to address when the applicable time period for presentment of such a claim commences. The Michigan Court of Appeals recently addressed this ambiguity in *In re Schwein*.³

Caselaw

In *Schwein*, the decedent died on September 10, 2013, survived by his four children and three grandchildren from a deceased child.⁴ The probate court appointed the decedent's daughter to serve as personal representative of the estate. As part of her duties, she published notice to creditors on October 15, 2013.⁵ Earlier in the decedent's life, he was involved in a serious motor vehicle accident, where he suffered a traumatic brain injury and required 24/7 attendant care services.⁶ Before the decedent passed away, in April of 2013, the decedent initiated a lawsuit against the defendant insurance company, seeking payment of personal protection insurance benefits.⁷ After the decedent passed away, the estate substituted as the plaintiff in the underlying no-fault case, which settled on June 24, 2014.⁸

On July 31, 2014, the personal representative filed a petition requesting that the probate court allow her pre-death claim against the estate for \$1,043,355.56.⁹ In this petition, the personal representative alleged that she provided all of the decedent's attendant care services between August 1, 1998 and September 10, 2013, and as a result, she was owed over \$1.5 million for attendant care services rendered.¹⁰ On September 4, 2014, the other heirs of the decedent (the “respondents”) filed objections to the petition, arguing that her claim was barred under MCL 700.3803(1)(a), MCL 700.3804(3), and MCR 5.307(D).¹¹ More specifically, the respondents argued that the personal representative failed to timely present her claim to the other interested parties within seven days after the expiration of the four-month publication period, and consequently, her claim was barred.¹² The probate court ruled in favor of the personal representative, holding that the personal representative's claim was not barred by the court rules or the statutory time limits.¹³

On appeal, the Michigan Court of Appeals recognized that MCL 700.3801 does not specifically address when the time period begins to run for

presentation of a claim by a personal representative against the estate. Despite the ambiguity in MCL 700.3801, the Court stated, “EPIC clearly contemplates that there is *some* applicable time period because MCL 700.3804(3) states that a personal representative ‘must give a copy of the claim to all interested persons not later than 7 days *after the time for the claim’s original presentation expires*.’”¹⁴ The Court further explained that “in EPIC, the Legislature imposed specific obligations on personal representatives to faithfully execute their duties for the benefit of the estate’s successor, and imposed liability and damages when a personal representative fails to perform her duties on behalf of the estate.”¹⁵

The Court declined to adopt the probate court’s interpretation of MCL 700.3801(1), which “would include a personal representative within the definition of ‘known creditor’ because the statutory definition does not plainly apply, and because such an interpretation would either require a personal representative to perform the nonsensical task of mailing or personally serving herself with a copy of the notice that she had already published, or allow a personal representative to benefit from her nonfeasance in not serving notice upon herself.”¹⁶ Instead, the Court concluded that the personal representative’s pre-death claim should be treated the same as the claims of every other general creditor of the estate, for which EPIC requires the personal representative to present the claim within 4 months after the date of the notice’s publication or forever be barred.¹⁷ The Court further noted that the personal representative is required to give a copy of her claim to all interested persons not later than seven days after the expiration of the four-month, general-creditor time limit.¹⁸

Application of EPIC, the Michigan Court Rules and *Schwein*

The *Schwein* decision not only resolves the ambiguity and question as to “when” a personal representative must present his or her pre-death claim against the estate, but also affirmatively

found that a personal representative is not, as a matter of law, precluded from being a creditor of the estate.

If the personal representative has a pre-death claim against the estate, he or she must serve a copy of the claim to all interested persons no later than seven days following the expiration of the four-month general creditor period.¹⁹ The personal representative’s pre-death claim must contain a warning that the personal representative’s claim will be allowed unless notice of objection is delivered or mailed to the personal representative within 63 days after the time for the claim’s original presentation expires.²⁰ The failure to do so will result in the claim being barred.

Pre-Death Claims by a Trustee

Statutory Law

Similar to the Claims Process codified at Article III, Part 8 and Article VII, Part 6 of EPIC, MCL 700.7606 through 700.7610 of the Michigan Trust Code (“MTC”), govern the Claims Process for pre-death claims attributable to the settlor of a trust.

MCL 700.7606(1) provides that if a personal representative is not appointed for the settlor’s estate, the Trustee shall pay directly to the creditor an enforceable and timely served claim of a creditor of settlor. MCL 700.7608 provides that, to the extent a personal representative has not been appointed for a decedent’s estate (and therefore the publication of notice requirement set forth under MCL 700.3801 has not been discharged), each trustee of the previously revocable trust of the settlor/decedent shall publish and serve a notice to creditors in the same manner, with the same duties, as described in MCL 700.3801 for a personal representative.

MCL 700.7609 governs the presentment of claims by creditors. Similar to the presentment process set forth under MCL 700.3804, a “claimant may mail or deliver to the trustee a written statement of the claim indicating its basis, the name and address of the claimant, and the

amount claimed. The claim is considered presented on the trustee's receipt of the claim."

MCL 700.7610 governs the time periods applicable to presentment of claims as follows:

(1) Subject to section 7611, if not barred earlier by another statute of limitations, a claim against the settlor of a trust described in section 7606(1) that arose at or before the settlor's death that a person seeks to recover from the trust is barred against the trust, each trustee of the trust, and a trust beneficiary, unless presented within 1 of the following times:

(a) If notice is given in compliance either with section 3801 or section 7608, within 4 months after the date of publication of notice to creditors.

(b) For a creditor known to the personal representative at the time of publication or during the 4 months following publication, or known to the trustee at or during such a time if publication occurred under section 7608, within 28 days after the subsequent sending of notice or 4 months after the date of publication of notice to creditors, whichever is later.

(c) If the notice requirements of either section 3801 or section 7608 are not met, within 3 years after the settlor's death.

Application of the MTC

Unlike MCL 700.3804(3), the MTC does not specifically address the process for presentment of a pre-death claim attributable to a trustee acquired by the trustee before he or she became or contemplated becoming trustee of the settlor's trust. Further, unlike pre-death claims by a personal representative, the Michigan appellate courts have yet to resolve any perceived ambiguity in the presentment of a pre-death claim by a trustee.

Although it is unclear whether a similar time limitation exists for the presentation of a trustee's pre-death claim against the trust, there is parity between the requirements applicable to the Claims Process set forth under the MTC and EPIC. In instances where the MTC is silent,

the MTC sections direct the reader to reference to the applicable EPIC sections. Unfortunately, there is a gray area involving a claim acquired by the trustee before he or she became or contemplated becoming trustee. Given the lack of clarity, it would be prudent for the trustee to abide by the same formalities and the same time restrictions set forth under MCL 700.3804(3) and the *Schwein* case.

Unlike the controls and formalities present during the administration of an estate,²¹ and, specifically, the Claims Process (again proctored by the probate court), trusts are ordinarily administered free of regular, ongoing judicial supervision, unless ordered by the court or unless supervision is invoked by an interested person.²² The Reporter's Comments to MCL 700.7201 provide in pertinent part, "The power to subject trusts to continuing supervision is intended to be used infrequently, which is reinforced by the final sentence of subsection (2)."

Despite the perceived informalities applicable to the administration of a trust, a trustee seeking to present, enforce, or negotiate a pre-death claim acquired by the trustee before he or she became or contemplated becoming trustee, must be considerate of the fiduciary obligations owed to the qualified trust beneficiaries of the trust. Specifically, MCL 700.7802(1) provides that "[a] trustee shall administer the trust solely in the interests of the trust beneficiaries." Further, MCL 700.7802(2) provides in pertinent part that "a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a substantial conflict between the trustee's fiduciary and personal interests is voidable by a trust beneficiary affected by the transaction unless...the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee."

Notwithstanding this specific exception to the "voidable nature" of a transaction affected by

the “conflict,” the trustee should be cautious and recognize that an attempt to satisfy the claim or negotiate a resolution could result in a “conflict” scenario. If a “conflict” scenario arises as a result of the presentment or satisfaction of a claim acquired by the trustee before he or she became or contemplated becoming trustee, the trustee should rely on MCL 700.7802(2)(d) and seek the trust beneficiaries’ consent prior to paying the claim or if the beneficiaries are unwilling to consent, the trustee should invoke the jurisdiction of the probate and seek instructions from the court through an order. At a minimum, the trustee should present the claim to the qualified trust beneficiaries in the same manner as required by a personal representative under EPIC, so as to allow the qualified trust beneficiaries the opportunity to send a notice of objection to the statement and proof of claim prior to payment.

Conclusion

As legal counsel for a fiduciary with a pre-death claim against the estate or trust, you must ensure your client acts prudently as a fiduciary, while at the same time ensuring your client’s rights as a creditor of the estate or trust are protected. In doing so, it is your responsibility to advise your client on (i) the applicable procedure and time limitations for presenting his or her pre-death claim, and (ii) further to enforce on your client (as held by Judge Benjamin Cardozo) that as fiduciary he or she “is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior...the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd.”²³

The decision in *Schwein* clarified that if the personal representative has a pre-death claim against the estate, he or she must serve a copy of the claim to all interested persons no later than seven (7) days following the expiration of the four (4) month general creditor period. Further, the claim shall only be allowed in a formal proceeding by order of the court. Following these

guidelines will avoid any potential dispute related to the claim.

While the decision in *Schwein* clarified the procedure and time limitations for the presentment of pre-death claims by a personal representative under EPIC, pre-death claims by a trustee against the trust remain an issue of uncertainty under the MTC. Until the Legislature or Michigan appellate courts address the issue, caution should be taken when advising a trustee on a pre-death claim. Similar to the personal representative, the trustee is likely not precluded from being treated as an individual creditor of the trust. Therefore, the trustee should present his or her claim within the statutory time frame so as to avoid any time bar. Furthermore, it is advisable to present the claim in the same manner as required in EPIC, which affords the qualified trust beneficiaries an opportunity to send a notice of objection, and, if necessary, allows the fiduciary to take the necessary steps to avoid any “conflict” or breach of fiduciary duty scenario.

Notes

1. For ease of reading, the authors will refer to the above listed duties collectively as the “Claims Process.”
2. Footnote omitted; emphasis added.
3. *Mead v Barton (In re Schwein)*, 314 Mich App 51, 885 NW2d 316 (2016).
4. *Id.* at 54.
5. *Id.*
6. *Id.* at 54-55.
7. *Id.* at 55.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 56.
12. *Id.* at 56-57.
13. *Id.* at 58.
14. *Id.* at 63 (emphasis added).
15. *Id.*, citing MCL 700.1212(1) and MCL 700.3712.
16. *Id.* at 64-65.
17. *Id.* at 65.
18. *Id.* at 66.
19. MCL 700.3804(4).
20. *Id.*
21. MCL 700.3804(3) provides that a claim by the per-

sonal representative against the estate shall be in a form prescribed by Supreme Court rule. Under MCR 5.307(D), “[a] claim by a personal representative against the estate for an obligation that arose before the death of the decedent shall only be allowed in a formal proceeding by order of the court.”

22. See MCL 700.7201 (“Subject to court jurisdiction as invoked by an interested person or as otherwise exercised as provided by law, the management and distribution of a trust estate, submission of an account or report to beneficiaries, payment of a trustee’s fees and other trust obligations, acceptance and change of trusteeship, and any other aspect of trust administration shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention, and without court order or approval or other court action.”)

23. *Meinhard v Salmon*, 249 NY 458, 164 NE 545 (1928).



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Tax Nuggets

By Lorraine F. New

How to Keep Your Clients (and You) Safe from IRS Liens and Levies

You get a call from your client, the Personal Representative. He is ready to distribute the assets of the estate. But wait! Did the decedent owe income tax, estate tax, or gift tax? If your client knew the debt existed or had knowledge of facts that would provide “a reasonably prudent person of the existence of the liability” and distributes the estate without paying the taxes, your client is personally liable pursuant to IRC 6901(a) and 31 USC 3713(b) for the amount of unpaid tax debt if he has distributed assets in excess of the tax debt. He will be liable to the extent of the improper distribution. Your client can pay funeral and administrative expenses, exempt property allowances and family allowances, and typically, debts of secured creditors, before paying Treasury. Caselaw throughout the United States may vary, and the IRS may argue that their lien has priority, but your authority is MCL 700.3805 providing the priority of claim payments in Michigan:

- Costs & Expenses of Administration
- Reasonable Funeral & Burial Expenses
- Homestead Allowance
- Family Allowance
- Exempt Property
- Debts & Taxes with Priority Under Federal Law Debts (including, but not limited to, medical assistance payments that are subject to adjustment or recovery from an estate under section 1917 of the social security act, 42 USC 1396p)
- Reasonable & Necessary Medical & Hospital Expenses of the Decedent's Last Illness
- Debts & Taxes with Priority Under Other Laws of this State
- All Other Claims

Your Personal Representative/Trustee client should protect himself from personal liability (and you can help) by:

1. Identifying himself or herself as the fiduciary by filing a Notice of Creation of Fiduciary Relationship, IRS Form 56.
2. Unless he or she is sure that the decedent has filed and paid all federal taxes, your client can request a tax transcript, and if necessary, request copies of prior tax returns using Form 4506. The IRS has various types of transcripts, including a tax return transcript for the current tax year and three prior years. The tax account transcript can provide up to ten-years-worth of information. Go to “Get Transcript Online” or use form 4506-T using Transcript Types and Ways to Order at irs.gov.
3. If filing income or gift tax returns, your client can request a prompt assessment of income and gift taxes owed by the decedent. This shortens the statute of limitations on future assessments from three years to eighteen months, assuming the gifts or gross income reported was substantially reported and not false or fraudulent. Once returns are filed, your client can apply for release from personal liability for income, gift, and estate tax by completing Form 5495, and the IRS will have nine months from receipt of the form to let the client know if any tax is due. Your client can also file Form 56 again to notify the IRS that the fiduciary relationship has ended.

Even if your client is not the fiduciary, he or she can have a problem. If your client is the recipient of assets of the estate or gifts of the decedent, he or she may also be liable for the unpaid taxes through transferee liability. The IRS has an additional year beyond the three-year statute on filed returns to assess transferee liability against the donees of a gift or estate asset recipients. There is no statute on unfiled returns. The IRS

can make assessments up to the amount of the gift or estate asset received and can collect from any recipient up to the assessment amount. I repeat, the IRS does not divide up the liability and pursue each recipient pro-rata, even though that might seem fair to a particular recipient.

Liens and Levies

Clients who have failed to pay federal tax, income, gift, estate, or had unreported or unpaid tax based on a forgiven debt, might find themselves with a tax lien. Taxpayers who fail to file may have the IRS file a return for them, and the IRS does not include all the deductions that may be appropriate, and gives the least favored filer category, so the taxpayer may also have to file a more correct amended return. After three years following non-filing, your client will lose any refund for the return they may be entitled to, so it pays to get those filings up-to-date!

When tax goes unpaid, your client has entered paperwork purgatory! The IRS will send a Notice and Demand for Payment. If tax is still unpaid, a lien, which was created with the unpaid assessment, can be filed by IRS as further indication of the liability. Assessment can be applied to all current and future property such as bank accounts, car, home, social security, paychecks, or rights to future income. The lien gives notice to the public and remains until paid or released or becomes unenforceable over time (ten years). Liens can have a negative effect on credit ratings, employers, landlords, and potential purchasers. To avoid a lien, clients might enter into collection alternatives such as installment agreements, Offer in Compromise, claim of innocent spouse, or inability to pay at the moment (IRS 53's the case because they are convinced a taxpayer cannot currently pay without hardship). Your client may definitely need your help with these alternatives to insulate their contact with the IRS and explain what might happen next.

Payment Alternatives

The IRS would like full payment and will suggest that your client borrows from relatives, sells assets, or pays tax with retirement funds. The IRS can pursue retirement funds with appropriate permission, and no early withdrawal penalty would occur. If you, however, withdraw from an IRA to pay taxes, you will receive the ten percent penalty, if it applies. Installment agreements may be accepted based on income and amount owed. If tax, interest, and penalties are \$50,000 or less (\$25,000 for a business) an on-line payment application is available. One can call 1-800-829-1040 or complete Form 9465, Installment Agreement Request. There is a fee for installment agreements that can be reduced for low income taxpayers. A Collection Information Statement and proof of financial status may be required--see Forms 433 F, 433-A, 433 B, and Publication 1854, How to Complete a Collection Information Statement. The taxpayer must file all returns and make estimated tax payments and must follow through on the agreement. Interest and penalties can still add up until the balance is paid. If the application is rejected, you can appeal, see Publication 1660, Collection Appeal Rights.

Similarly, an Offer in Compromise may be submitted to reduce the total amount due. Income, assets and expenses are compared to national and local figures (Collection Financial Standards) that the IRS publishes. You should use the online pre-qualifier tool, irs.treasury.gov/oic-pre-qualifier/. There is a fee to apply, and initial or periodic payments. Use Form 656-L for Offer in Compromise Doubt as to Liability if the amount of tax assessed is in question or Form 656, Offer in Compromise. You may be able to convince the IRS that the debt is not accurate, or that there are insufficient assets or income to pay the amount due, or that because of exceptional circumstances, the amount due would lead to economic hardship or would be unjust.

If there is a lien, subordination, discharge, or

withdrawal can be sought. Subordination makes the IRS lien secondary to a non-IRS lien, perhaps to re-finance a mortgage at a lower rate and apply the saving to the IRS debt. You can ask for a lien discharge from a particular property, such as a house that will be sold to pay the tax lien. If a lien was filed prematurely or procedures were not followed, you can request lien withdrawal.

If the other spouse is solely responsible for the tax debt, and your client does not owe the taxes, has paid, or is not responsible for the penalty assessed, file Form 8857, Request for Innocent Spouse Relief. Be prepared to show that the spouse did not know of the tax situation, did not benefit from it, and what the spouse did to make sure that this situation does not recur.

The IRS has ten years from the date of assessment to collect the tax. That time is extended for consideration of installment agreements, Offer in Compromise, time appeals is considering an appeals request, a period of six months or more living outside the U.S., bankruptcy, collection due process hearings, and innocent spouse consideration. Make sure that you or your client computes the statutory time and extensions correctly before deciding that tax is no longer due.

If your client has entered into a direct debit installment agreement and has a liability of \$25,000 or less, and the agreement will be paid off in 60 months or less or before the collection statute expires, and is in tax compliance, the lien can be released. If your client is selling the lien property to pay off the IRS, you can apply for discharge, see Publication 783, How to Apply for a Certificate of Discharge from a Federal Tax Lien. If the request is denied, you can appeal, using Publication 1660, Collection Appeal Request, and Form 9423, Collection Appeal Request.

Your client may be able to subordinate the tax lien to other creditors, if refinancing would allow larger payments to the IRS or if the IRS gets the equity other than closing costs. You will need at least 60-days lead time, a valuation or appraisal of the property, closing documents, etc. See

Publications 784 and Form 1153 for instructions.

If the IRS is not satisfied with a lien after they have assessed the tax and made a demand for payment and were not paid, they will send a Final Notice of Intent to Levy and Notice of Your Right to Hearing. This can be given in person, left at a home or business, or sent to the last known address by certified or registered mail, return receipt requested. Thirty days later, property your client owns or is held by her or someone else, can be levied on. A bank levy provides a 21-day waiting period for compliance. Wages, dividends, licenses, rental income, account receivables, cash loan value of life insurance, commissions, car, boat, house, other real estate, salary, even social security, can be levied on. A levy on wages may be released if it is causing an immediate economic hardship, which is defined as prevention of meeting basic reasonable living expenses. A levy cannot be issued while an installment agreement is pending or for 30 days after one is rejected, or while one is in effect. A levy usually will not be issued while an Offer in Compromise is pending, within 30 days after an offer is rejected, or while a rejected offer is being appealed, generally. The collections appeals program is available before or after IRS levies or seizes property, see Publication 1660. If the levy was wrongful, Publication 4528, Making an Administrative Wrongful Levy Claim under IRC 6343(b), may be helpful. If a collection due process hearing is requested within 30 days of the Notice of Intent to Levy, a levy generally will not be enforced. A request to return levy proceeds must be made within nine months of the date of the levy, per IRC 6343(d).

If the IRS believes that your client has assets that can be seized to satisfy the liability, it may proceed against a home or business. Seized property may be returned if the seizure was premature, in violation of the law, or procedures were not followed. It may be returned if doing so will help collection or is in the government's best interest, or if an installment agreement is entered into that does not prohibit return of pre-

viously levied property. Sold real estate may be recovered within 180 days of the sale by paying the purchaser what they paid plus interest at 20 percent annually. Seizures cannot be made earlier than 8 a.m. or after 9 p.m., if court approval was not obtained for the sale of the principal residence, or if the liability is \$5000 or less on property used as a personal residence. They also cannot be made when the taxpayer is in bankruptcy with a stay. They usually are not made when an innocent spouse claim is pending, an offer in compromise is pending, an installment agreement is pending, or if the seizure would leave the taxpayer without the exempt amount, which is the standard deduction and the amount deductible for exemptions.

A tax lien attaches to a taxpayer's interest in jointly owned property, even when only one owes taxes. The entire property can be sold, and the innocent party will get a percentage, see *United States v Rodgers*, 461 US 677 (1983).

Tenants by the entireties property is also subject to being seized and sold by the IRS, and an innocent spouse receives half of the proceeds. See *United States v Craft*, 535 US 274 (2002) and Internal Revenue Bulletin 2003-39.

Estate Tax Special Liens

Special tax liens apply to estates and arise automatically as of the date of death, with no notice or written lien necessary. They can be enforced with a levy, and in most situations the IRS must give a 30-day notice of intent to levy. The lien will expire ten years after the date of death, or when the tax liability is satisfied. An estate tax statute cannot be extended.

Recent changes were made to the policy of releasing estate tax liens on real estate in an estate. Authority for such lien releases was centralized in the IRS collection office ("Collection") at 55 South Market St., Mail Code 5350, San Jose, California, 95113 (Attn: Group Manager). Form 4422, Application for Certificate Discharging Property Subject to an Estate Tax Lien, was revised in March 2017, which indicates that when

a release is requested, one should submit 45 to 60 days in advance of closing in addition to the completed form:

- A legal description and appraisal of the property
- A copy of the form 706 or an inventory and appraisal of estate assets
- A will and/or trust
- Documents of proposed sale such as title commitment and draft of closing statement
- Form 8821, Tax Information authorization – Permission for the IRS to speak to individuals about the situation

At least initially, Collection's interpretation was that the net proceeds of property of any estate that was sold should be sent to the IRS as payment toward estate tax or held in escrow, using the IRS approved escrow agreement. The hold or escrow would be continued until the government received full payment, the return was accepted as filed, or an audit or litigation determined the amount of the estate tax. Once Collection approved the submission, it would send out a Conditional Commitment to Discharge Certain Property from Federal Estate Tax Lien so that the closing could occur. Collection staff was not responsive to the plea that no estate tax would be owed and funds were collected or escrowed other than that to satisfy mortgages and for reasonable selling expenses.

I found a number of articles discussing the unannounced new procedure, including one on Law.com by Donald A. Hamburg and Daniel B. Axman, which indicated that IRC 6325(c) was relied on for the change, as it provides that "subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge of any or all of the property subject to any lien imposed by section 6324 if the Secretary finds that the liability secured by such lien has been fully satisfied or provided for." Those authors concluded that in numerous cases, the IRS has been unable to collect estate tax from estates that were issued discharges. *Probate &*

Property's March/April 2017 "New IRS Release of Estate Tax Lien Requirements by Shaina S. Kamen and Michael S. Schwartz, discussed some pre-death and post death strategies on how to deal with the lien, and finally, Laird Lile's "Major Developments with Estate Tax Lien Releases," published in the Fall 2016 ActionLine, provided a source for the form of escrow agreement provided by and approved by the IRS, see www.Lile-Hayes.com. Lien releases appeared to be logjammed by the transfer of the function to Collection or perhaps by the change in IRS policy to not issue closing letters. To get a closing letter for a filed estate tax return, one can wait four to six months after filing, call the Service Center at 866-699-4083, or write them to request a closing letter, or order a transcript. If the transcript has a Code 421 on it, then the estate tax return has been accepted or closed after audit, and a lien release can be issued.

On April 5, 2017, the IRS provided Interim Guidance for Responsibility to Process all Request for Discharge of the Estate Tax Lien in SBSE-05-0417-0011. This guidance is not for practitioners, but for Collection personnel. This memo discusses various scenarios and possible approaches. For example, if it appears that no estate tax filing is necessary or appropriate estate tax has been paid with an extension or return, if the property appears to have no value to IRS or if the remaining property of the estate subject to the estate tax lien has a fair market value that is at least double the amount of the unsatisfied liability secured by the estate tax lien and the amount of all of the other liens on the property which have priority of the estate tax lien, Collection should consider lien release. Collection personnel are charged with balancing the need for speedy lien discharges and protection of the government's interest in collecting estate tax liability. Clearly if you or your client seek an estate tax lien release and can characterize your situation as one of the above, it may speed up your lien release.

Avoiding the IRS and the tools it has to collect

liabilities may not always be possible, but the advice and techniques suggested here may help you and your client fend off potential liens, levies, interest and penalties; always a good thing.



Lorraine F. New practices in the area of estate and gift tax returns, preparation and audits, estate planning, and tax controversies. Ms. New, formerly of the IRS Estate and Gift Tax Division, Detroit, has worked in estate tax since

1988 and was the division manager from 2002 to January 2007. She serves as an expert witness and uses her expertise to assist taxpayers and their representatives through the intricacies of the IRS with estate planning, return preparation or review, appeals, drafting of legal opinions or private letter ruling requests, and representation for controversies at every level at any place in the country. Ms. New is also of counsel for George W. Gregory PLLC.

Recent Decisions in Michigan Probate, Trust, and Estate Planning Law

By Hon. Phillip E. Harter

Trusts—Jurisdiction—Probate Court—Business Court—Standing—Breach of Fiduciary Duty—Remedies—Reformation—Rescission—Option Agreement

***Brody Living Trust v Deutchman*, No 330871, 2017 Mich App LEXIS 1430 (Sept 12, 2017)**

This is a complicated trust case involving the Rhea Brody Living Trust. Robert Brody was the spouse of Rhea Brody. Robert appealed the probate court's order granting summary disposition to Rhea and Robert's daughter, Cathy B. Deutchman. The order removed Robert as the successor trustee of the trust, declared Rhea to be disabled pursuant to the terms of the trust, and resolved claims relating to two family businesses, Brody Realty and Macomb Corporation. Jay Brody, Rhea and Robert's son and Cathy's brother, cross-appealed.

Robert and Jay asked the court of appeals to vacate the probate court's order for lack of subject-matter jurisdiction. They argued the trust action included a "business or commercial dispute" as defined in MCL 600.8031(1)(c) and was therefore within the mandatory jurisdiction of the business court under MCL 600.8035. In rejecting this argument the court of appeals noted that matters brought under EPIC are specifically excluded from the definition of business or commercial dispute under the business court statute.

Jay and Robert next argued that, regardless of the nature of Cathy's petition, her claims fell within the mandatory jurisdiction of the business court under MCL 600.8035(3), which states that "an action that involves a business or commercial dispute that is filed in a court with a business docket shall be maintained in a business court although it also involves claims that are

not business or commercial disputes, including excluded claims under section 8031(3)." In rejecting this argument the court of appeals held that the legislative intent was only to hold cases originally filed in the business court for the extent of proceedings, regardless of whether the business dispute also involved, or comes to involve, excluded subject matter. To read this section as requiring every action affecting a business to be originally filed in the business court or transferred to the business court upon the inclusion of matters affecting a business would be to read language into the statute that simply does not exist as well as to brush aside the legislative goal of accuracy and efficiency by imposing on the business courts mandatory jurisdiction over a seemingly endless variety of nonbusiness-related matters. It also noted that a recent amendment to the business court statute will have "business or commercial dispute" include only actions in which at least one party is a business enterprise.

The court of appeals observed that Robert's and Jay's proposed construction of the business court statute would create a direct conflict between the mandatory jurisdiction of the business court over all matters affecting or involving a business with the exclusive jurisdiction of the probate court to consider probate and trust matters. It opined that Robert and Jay would render the probate court without jurisdiction to consider any trust matter that also involved or affected, however tangentially, a business transaction. It held that such an interpretation cannot be reconciled with the legislative grant of exclusive jurisdiction on the probate court, which was to "simplify the disposition of an action or proceeding involving a decedent's, protected individual's, a ward's, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court." Finally, the court of appeals held to the extent the probate court's grant of exclusive jurisdiction over trust matters in MCL 700.1302 and MCL 700.1303 conflicts with the broad inclusion of trust-related matters within the

exclusive jurisdiction of the business court under MCL 600.8035(3), the more specific grant of jurisdiction in MCL 700.1302 and MCL 700.1303 controls. For all of the above reasons it held that Robert and Jay's jurisdictional challenge failed.

Robert and Jay both argued that Cathy did not have standing to request adjudication of the issues in her petition, including Robert's removal as trustee of the trust and reversal of actions taken by Robert as trustee. They argued that a contingent beneficiary does not have standing to bring an action regarding the administration of a revocable trust. The probate court had found that Cathy had standing pursuant to MCL 700.7201, which provided, in pertinent part, that "a court of this state may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." In affirming the probate court, the court of appeals cited the definition of "interested person" in MCL 700.1105(c), which states the following:

"Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, and by the supreme court rules.

It also cited the definition of trust "beneficiary" under MCL 700.1103(d), which includes a contingent interest. It quickly concluded that since Cathy was a child under MCL 700.1105(c) and Cathy had a future contingent interest in trust property under MCL 700.1103(d), she was an interested person and had standing to file her petition. I believe the reasoning used to reach this result is seriously flawed. The definition of "interested person" is dependent on circumstance

and just being a child or a contingent beneficiary does not give standing under these circumstances. The court of appeals misses the distinction in the Michigan Trust Code between a trust beneficiary and qualified trust beneficiary. It also ignores MCR 5.125(C)(33), which defines the interested persons in a proceeding affecting a trust, and MCL 700.7706, which specifically governs removal of a trustee. I believe both the court rule and statute to be controlling. They both require an individual to be a qualified trust beneficiary. In any event, enough facts are given to show that Cathy was a qualified trust beneficiary, so I believe the court of appeals was correct in its conclusions but for the wrong reasons.

The next issue raised by Jay and Robert was that the probate court erred when it found no genuine issue of fact regarding Robert's breach of fiduciary duty to the trust and granted partial summary disposition in favor of Cathy. The court of appeals rejected this argument by detailing how Robert violated the terms of the trust by failing to appoint a cotrustee as required by the trust to ensure that the beneficiaries' best interests were served while he served in a potentially conflicting role when selling interests in both businesses owned by the trust to Jay and Jay's family members. It also found that in entering into an option agreement with Jay to purchase the two businesses, he shifted interests under the trust to favor Jay. It concluded that the probate court did not err in determining that there was no genuine issue of material fact regarding Robert's breach of fiduciary duty.

Robert and Jay also took issue with the remedies imposed by the probate court with respect to both the Brittany Park sale and the option agreement, arguing that the probate court lacked the power to reform or rescind a contract. The court of appeals agreed that reformation was not appropriate in this case. It observed that reformation is an equitable remedy available for contracts if the writing fails to express the intentions of the parties as a result of accident, inadvertence, mistake, fraud, or inequitable con-

duct. It held that the probate court erred when it reformed the purchase agreement for the Brittany Park sale because the parties to the Brittany Park sale intended the purchase price and interest rate to be the amounts delineated in the plain language of the purchase agreement. There is no evidence they intended anything different. The court of appeals further pointed out that the language of MCL 700.7901 Cathy relied on makes no express reference to reformation. Rather, through MCL 700.7901, the legislature empowered the probate court only with authority to void a sale, impose a lien or constructive trust on property, or recover property and its proceeds. It observed a court's equity powers are not unlimited.

Robert and Jay also argued that the probate court improperly set aside an option agreement entered into between Robert and Jay granting Jay an option to purchase substantial amounts of the Rhea Trust interest upon Rhea's death. In exchange for approximately \$130,322 and \$33,325, Robert sold Jay an option to purchase "everything," including the Rhea trust's interest in Brody Realty and the Macomb Corporation, as well as the interest in Brody Realty and the Macomb Corporation held by Robert's trust. The option agreement did not contain any provisions pertaining to Cathy's interest in the Rhea Trust or the family businesses. Cathy was not given the option to purchase the assets of the trust. The court of appeals held that rescission of a contract is an equitable remedy to be exercised in the sound discretion of the trial court. Here, the probate court concluded that the option agreement was part of a pattern of favoring Jay over Cathy. The probate court reasoned that the option's delay of distribution to Cathy and the fact that the option was offered only to Jay, along with a present proxy and a \$2,000,000 penalty, supported its conclusion. The court of appeals concluded that Robert and Jay failed to establish any error requiring reversal of the portion of the order setting aside the option agreement.

In summary, the court of appeals affirmed in

part, reversed in part, and remanded for further proceedings consistent with its opinion.

What can we take from this case?

1. A trust matter filed in the probate court does not need to be removed to the business court if it has matters affecting and involving a business.
2. A person who is an interested person under MCL 700.1105 can invoke the court's jurisdiction to remove a trustee under MCL 700.7201(3)(a).
3. Reformation is not an appropriate remedy to change an unfair agreement when the parties to the agreement intended the language found in the agreement.
4. Rescission of a contract is an equitable remedy to be exercised in the sound discretion of the trial court.

Guardian—Standard for Removal— Suitability—Burden of Proof—Evidentiary Standard

Redd v Carney (In re Guardianship of Redd), No 335152, 2017 Mich App LEXIS 1475 (Sept 19, 2017)

Dorothy Redd was an elderly woman. One of her sons, Gary Redd, was appointed Dorothy's guardian in 2014. Two years later, Gary's daughter, Nichole Legardy, sought to remove Gary as guardian, alleging that he was no longer "suitable to serve as guardian." The probate court agreed, removed Gary as guardian, and appointed Nichole in his place. Gary appealed the decision of the probate court, claiming that the court applied the wrong standard for removal as well as the wrong burden of proof.

The court of appeals observed that from the initial appointment in 2014, the appointment of Gary was opposed by family members claiming that Gary was preventing Dorothy from visiting with the family. Also, over the next couple of years, the complaints about Gary persisted. They included prohibiting visitation between

Dorothy and family, unduly influencing Dorothy against family members, and trying to evict family members from Dorothy's old home. The probate court entered numerous orders aimed at facilitating Dorothy's visitation with family members, improving the accounting of Dorothy's finances, and preventing the eviction of Dorothy's family members from her old home. Nevertheless, the probate court refused to remove Gary as Dorothy's guardian, despite several motions seeking his removal.

In August 2016, after a physical altercation between Gary and Nichole regarding Dorothy's lack of visitation with family members, the probate court held a hearing concerning the removal of Gary as guardian. At the hearing, 17 persons testified. At least 10 witnesses testified that Gary was unduly influencing Dorothy's opinion of her family and was preventing her from carrying on relationships with various family members. Importantly, several persons who previously supported Gary's role as guardian now believed that Gary was an unsuitable guardian. Among these individuals were Gary's daughter, Nichole, and Dorothy's coguardian, attorney Jennifer Carney. The probate court found particularly insightful a police officer's testimony that, while Gary had brought Dorothy to the police station as part of a court-ordered visit with several family members, he blocked her from interacting substantially with her family members and seemed to be undermining the entire visit.

Dorothy testified at the hearing that she wished for Gary to continue as her guardian. The probate court concluded, however, that it was only required to honor her preference when that person was suitable to serve as guardian. The probate court found that Gary's unwillingness to facilitate relationships between Dorothy and various family members rendered Gary unsuitable to continue as her guardian. The probate court removed Gary as guardian and appointed Nichole as coguardian with Jennifer. Gary appealed this decision.

The court of appeals began by addressing the

issue of the standard for removal of a guardian. It observed that there was no dispute that Dorothy is incapacitated and that the appointment of a guardian was appropriate. Because Dorothy wished for Gary to serve as her guardian, and because Gary was willing to serve, Gary was entitled to remain as her guardian under MCL 700.5313(2)(b) unless there was sufficient grounds for his removal under MCL 700.5310. The court of appeals then stated that EPIC does not set forth a specific standard for removal of a guardian. MCL 700.5310 provides the right to petition for an order removing a guardian, but it is otherwise silent as to how a probate court is to determine whether the guardian should be removed. While MCL 700.5313 explicitly states that a person who is "suitable and willing" can be appointed a guardian in certain circumstances, the section does not similarly state that the same standard applies to remove a person as guardian. The court of appeals then opined that MCL 700.5313 provides in several places that the court may appoint someone else when a previously identified or designated person is not "suitable or willing to serve." While the language certainly applies to persons who were identified but disqualified before any appointment, it would also appear to apply to a person who was previously designated (and appointed) as a guardian but who no longer is "suitable or willing to serve." Therefore it held that to remove a guardian under MCL 700.5310, the probate court must find that the guardian is no longer suitable and willing to serve.

The court of appeals also addressed the issue of the meaning of *suitable* since EPIC does not define the term. It noted that the overarching purpose of a guardian under EPIC is to provide "for the ward's care, custody, and control," as stated in MCL 700.5314. Therefore EPIC makes it clear that the guardian's focus of concern must be on the ward, that decisions made on behalf of the ward must be in the interests of the ward and not the guardian, and that the guardian must be qualified to achieve the purposes set forth in

EPIC. It concluded that the statutory context and guidance from authoritative dictionaries confirm that a “suitable” guardian is one qualified and able to provide for the ward’s care, custody, and control. With respect to whether an existing guardian remains suitable, it logically follows that particularly relevant evidence would include (1) evidence on whether the guardian was still qualified and able, and (2) evidence on whether the guardian did, in fact, satisfactorily provide for the ward’s care, custody, and control in the past.

The court of appeals next addressed the standard of proof needed to show a guardian is not suitable. It observed that the evidentiary standard to use on whether a current, ward-preferred guardian should be removed is not explicitly addressed by EPIC. Unlike the initial determination stage, the legislature chose not to set forth a particular evidentiary standard. When a statute fails to state the standard that probate courts are to use to establish a particular fact, the default standard in civil cases—preponderance of the evidence—applies. Therefore it concluded that the probate court must use the preponderance of the evidence standard when determining whether a person is suitable to serve as a ward’s guardian under MCL 700.5313(2). In applying its analysis to this case, it found that the probate court could remove Gary as Dorothy’s guardian if the probate court found by a preponderance of evidence that Gary was not qualified or able to provide for his mother’s care, custody, and control. Particularly relevant evidence on this question would include whether Gary did, in fact, satisfactorily provide for his mother’s care, custody, and control in the past.

In applying the facts in this case, the court of appeals accepted the finding of the probate court as supported by the record. They observed that part of a guardian’s responsibility is to provide for the ward’s social well-being. Nearly all the witnesses agreed that Dorothy was very family oriented and wished to have a relationship with family members. The record amply supported that Gary was not willing to facilitate these re-

lationships and was, in fact, actively impeding them. Therefore it affirmed the probate court.

What can we take from this case?

1. To remove a guardian under MCL 700.5310, the probate court must find that the guardian is no longer suitable and willing to serve.
2. A “suitable” guardian is one who is qualified and able to provide for the ward’s care, custody, and control.
3. When determining whether a guardian remains suitable, particularly relevant evidence would include (1) evidence on whether the guardian was still qualified and able, and (2) evidence on whether the guardian did, in fact, satisfactorily provide for the ward’s care, custody, and control in the past.
4. A probate court must use the preponderance of the evidence standard when determining whether a person is suitable to serve as a ward’s guardian under MCL 700.5313(2).
5. The issue of suitability is a question of fact, and the burden to prove it is on the moving party.
6. Suitability includes the ward’s social well-being. To arbitrarily restrict a ward’s relationships with family members when these relationships are desired by the ward may serve as a valid reason for removing a guardian.

Appointment of Conservator—Waste and Dissipation—Priority of Appointment

***In re Brody*, No 332994, 2017 Mich App LEXIS 1478 (Sept 19, 2017)**

Rhea Brody is an elderly lady. All parties agreed that she was unable to manage her property or business affairs effectively. Rhea’s daughter, Cathy B. Deutchman, filed a petition for conservatorship which was opposed by Rhea’s husband, Robert D. Brody, and Rhea’s son, Jay Brody. Robert was Rhea’s attorney-in-fact under

a durable power of attorney. There appeared to be no evidence that Rhea's property had been wasted or dissipated at the time the petition was filed. The probate court appointed Mary Lyneis as Rhea's conservator. Mary had been appointed by this probate court as the trustee of Rhea's trust. Robert and Jay appealed the order of the probate court for many reasons, most of which were not properly preserved and were summarily dismissed by the court of appeals. The most substantial reasons were that the probate court erred in its conclusion that Rhea "has property that will be wasted or dissipated unless proper management is provided" and that the probate court failed to properly follow the priorities of EPIC. This summary will be mostly concerned with these two issues.

The court of appeals began by discussing the issue of whether Rhea had "property that will be wasted or dissipated unless proper management is provided." It observed that Rhea held property outside of her trust consisting of a Fifth Third Bank account for tax refunds, an individually held IRA, a jointly held Chase Bank account, and jointly owned homes in Michigan and Florida. It discussed each item of such property and agreed with the probate court that each item would need proper management to prevent waste or dissipation. Robert argued that the probate court should not have considered jointly owned property when finding possible waste and dissipation since the conservator would be unable to change the nature of the jointly owned property. The court of appeals cited MCL 700.5419, which states in part, "appointment of a conservator vests in the conservator title as trustee to all of the protected individual's property ... held at the time of or acquired after the order." Therefore it rejected Robert's argument and held the jointly held assets would be subject to waste or dissipation in satisfaction of MCL 700.5401(3)(b).

Robert also argued that the probate court erred in appointing a conservator to act on Rhea's behalf because there was no evidence that any asset of the estate had already been wasted or

dissipated. The court of appeals pointed out that the word "will" used to modify "be wasted or dissipated unless proper management is provided" supports the probate court's decision to focus on the likelihood that assets will be prospectively wasted or dissipated if a conservator is not appointed. It held that the probate court had properly concluded that it was unnecessary to find any waste or dissipation had already occurred. It also pointed out that Robert, who was 91, had abdicated his duties as attorney-in-fact to Jay, who was suspect in his commitment to protecting Rhea's estate.

The court also discussed the issue of priority for the appointment of a conservator. Robert argued that he should have been given priority over Mary as a potential conservator. The court of appeals stated that the existence of a durable power of attorney does not prohibit the appointment of a conservator, and the selection of an individual to be appointed as an incapacitated person's conservator is a matter committed largely to the discretion of the court, citing a pre-EPIC case. It observed that the statute governing appointment of a conservator, MCL 700.5409(1), allows a court to determine whether the individuals who fall within the statutory priority guidelines are "suitable." Additionally, MCL 700.5409(2), grants the probate court authority to pass over "a person having priority and appoint a person having less priority or no priority" for the role of conservator if good cause exists. It then reached the rather startling conclusion that the statute's priority classifications are merely a guide for the probate court's exercise of discretion.

Next, the court of appeals cited MCL 700.5409(1), which allows the probate court to determine whether the individuals who fall within the statutory priority guidelines are "suitable." It then observed that, pursuant to MCL 700.5409, a protected individual's spouse is entitled to consideration for appointment as conservator and is granted priority over all other individuals except a "conservator, guardian of property, or similar fiduciary appointed or recognized by the appropri-

ate court of another jurisdiction in which the protected individual resides,” MCL 700.5409(1)(a), and an “individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney,” MCL 700.5409(1)(b).

The court of appeals reached another startling conclusion—that Robert was not entitled to consideration unless the probate court considered an independent fiduciary and found him or her unsuitable. Therefore, it reasoned that Mary, as trustee and independent fiduciary, had statutory priority over Robert, despite Robert’s marriage to Rhea.

I have several problems with the reasoning of this case. First, in finding that it was proper for the probate court to focus on the likelihood that assets will be prospectively wasted or dissipated and that it is unnecessary to find any waste or dissipation had already occurred, it seems to run counter to the recent case of *Bittner-Korbus v Bittner* (*In re Bittner*), 312 Mich App 227, 879 NW2d 269 (2015), which we discussed last year. *Bittner* emphasized that a conservator should not be appointed when the protected individual has put into place a mechanism such as a power of attorney to manage property that had worked and was working. While this panel distinguished its decision from *Bittner* by saying Robert had abdicated his responsibilities under the power of attorney, it still appears to be placing a lot of weight on speculation of what may happen instead of evidence of what has happened.

Second, the court of appeals conclusions that who may be appointed conservator is committed largely to the discretion of the probate court and that the priority classifications are merely a guide for the probate court’s exercise of discretion gives an incorrect impression. The language used gives the impression that the priorities are unimportant, which I believe to be incorrect. The priorities must be followed by a probate court unless good cause is shown to pass over the prior-

ity. That standard was probably met in this case, and the appeal should have been clearly decided on that basis without the confusing language about discretion and priorities.

Third, the court of appeals held that under MCL 700.5409(1)(a), a fiduciary appointed for the protected individual by the same Michigan probate court was appointed by an “appropriate court of another jurisdiction” and therefore has priority over a spouse. This makes little sense, and I believe the language clearly only applies to action taken in a jurisdiction other than Michigan. Again, the same result could have been reached by passing over the spouse on the basis of suitability without interpreting the language “another jurisdiction” of the statute in such a way.

What I have said above is my opinion and not the law. So what may we take from this case? First, in finding whether a protected individual’s assets will be wasted or dissipated, it is not necessary to find that any waste or dissipation has already occurred. The court may rely solely on what it feels may happen in the future. Second, the appointment of a conservator is largely committed to the discretion of the probate court, and the statutory priorities are merely a guide for the exercise of discretion. Third, the appointment of an independent fiduciary for the protected individual in the same court gives a priority to that fiduciary superior to all others under MCL 700.5409(1).



Hon. Phillip E. Harter, formerly a judge with the Calhoun County Probate Court, Battle Creek, joined Chalgian & Tripp Law Offices, Battle Creek as “of counsel” in January 2011. He was chairperson of the Michigan Supreme Court Task Force on Guardianships and Conservatorships and a member of the Michigan Supreme Court bar examination staff (1976-1991). He is currently a member of the Calhoun County Bar Association, a fellow of the Michigan Bar Foundation, and a member of the Bar of the U.S. Supreme Court. Judge Harter is a past chairperson of the State Bar of Michigan Probate and Estate Planning Section, a former chairperson of the Probate Law Committee, and a former chairperson of the Probate Rules Committee of the Michigan Probate Judges Association. He reviews cases for the Michigan Probate and Estate Planning Journal and has lectured at ICLE’s Annual Probate and Estate Planning Institute for many years.

The Landscape in Lansing and Recent Legislation

By Harold G. Schuitmaker

Form Changes/Elimination of Dower— Eff. April 6, 2017

2016 PA 490 (MCL 700.2202)

Due to the elimination of dower, the form for election of surviving spouse has been modified. As of June 2017, SCAO Probate Court Form PC 581 has been modified. The change in the notice requirement for the spouse's election is as follows:

NOTICE

Paragraph 2. Your *spouse* died leaving no will. *You may take your intestate share.* (Emphasis added).

ELECTION

The previous Paragraph 3 has been deleted and the old Paragraph 4 is the new amended Paragraph 3 as follows:

I, as widow, take my intestate share (no will) as prescribed by law. (Emphasis added)

The repeal of dower only applies to decedents who died after April 6, 2017.

Michigan Principal Residence Exemption (PRE)—Eff. October 5, 2017

2017 PA 121 & 2017 PA 122

A pair of new laws would disallow a retroactive application and penalize a person who claims a PRE in Michigan and a PRE or similar election in another state. The Michigan Tax Tribunal recently ruled that if a person has been denied a Michigan PRE because that person had a similar exemption in another state, a person could revoke the other state's PRE and would be entitled to reinstate the Michigan PRE for the current year as well as up to three prior years.

Public Act 121 of 2017, PA 122 of 2017, MCL 211.7cc—both Acts took effect on October 5, 2017. These laws would restrict the three-year retroactive part of the Tax Tribunal's ruling. Violation would be a misdemeanor punishable by up to one year in jail, up to \$5,000 fine, or 1,500 hours of public service.

Probate Guardians and Conservators— Eff. October 26, 2017

2017 PA 136 (MCL 700.5106)

MCL 700.5106 is modified to add some additional requirements in the appointment of a professional guardian or conservator only if it is in the ward's best interest and there is no other competent, suitable, and willing person to serve in such a fiduciary capacity. There are other minor changes to MCL 700.5106 as well.

Legislation Introduced But Not Yet Law

House Bill 4410 of 2017

This would be a fix to *Estate of Jajuga*. This bill, if passed, would modify *Part 4 Exempt Property and Allowances*, EPIC Part 4, MCL 700.2402, MCL 700.2403, and MCL 700.2404:

The decision in *Chelenyak v Veith (In re Estate of Jajuga)*, 312 Mich App 706, 881 NW2d 487 (2015), addressed whether decedent's children could be prevented by Will from claiming an exempt property allowance. This question was noted but left open by the reporter's comments in the Estate and Protected Individual's Code With Reporter's Comments (ICLE March 2017 update). The court concluded the probate court was correct in determining that a testator may not exclude a child from exempt property by inserting a disinheriting provision in his or her will.

This proposed Act states:

A decedent by Will or other signed writing may expressly exclude or limit the right of a child who

is not a minor or dependent child to make a claim that the child is otherwise entitled to under this section. The exclusion or limitation described in this subsection must be expressly stated by the decedent, and must specifically reference the allowance described in this section in a manner sufficient to express the decedent's intent. An exclusion or limitation stated by a decedent by Will under Section 2101, without additional language specifically stating an intent to exclude or limit a right provided under this section, is not considered sufficient language to exclude or limit a right provided in this section.

Senate Bill 0488 of 2017 Dealing with Minor's Power of Attorney, MCL 772.111-.128

If passed, this bill would allow a parent or guardian to make up to two (2) consecutive 180 day powers of attorney for the care, custody and control of a minor child subject to a criminal history check, home safety inspection and requires training for the entity or individual appointed under the Power of Attorney. The Power of Attorney would not allow consent to a marriage, abortion or termination of parental rights. Either an individual or a church or child placement agency could be appointed. If a parent or guardian is in the Armed Services and deployed in a foreign nation, the Power of Attorney would be effective until 31 days after the end of the deployment.

Senate Bill 0540 of 2017 Introduced September 7, 2017

Real estate exemptions to transfers that uncap taxable value are expanded to include more exemptions for conveyances dealing with family, spouses, and transfers pursuant to trusts or by Will as well as sole proprietorships, partnerships, LLCs and corporations. The most dramatic changes are as follows:

(ii) Beginning on December 31, 2016, a conveyance during the transferor's lifetime, or by inheritance, or by distribution from a trust, or otherwise of an owner-ship interest, of any

percentage, in a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity is not a transfer of ownership if the transferee is the transferor's spouse or is a trust and the sole present beneficiary or beneficiaries are the transferor, the transferor's spouse, or both.

(iii) Beginning on December 31, 2016, a conveyance during the transferor's lifetime, or by inheritance, or by distribution from a trust, or otherwise of an ownership interest, of any percentage, in a limited liability company is not a transfer of ownership of residential real property owned by the limited liability company if the transferee is the transferor's or the transferor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, granddaughter, aunt, uncle, niece, or nephew, or is a lineal descendant of 1 or more of these individuals.

.....

Beginning December 31, 2016, the expiration or termination of the life estate or life lease is also not a transfer of ownership if either of the following is true:

(i) The transferee is the transferor's spouse, or is a trust and the sole present beneficiary is the transferor's spouse.

(ii) The property is residential real property and the transferee is the transferor's or transferor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter, or is 1 or more of these individuals, or is a trust and the sole present beneficiary or beneficiaries are 1 or more of these individuals, for so long as the residential real property classification under Section 34c does not change following the conveyance.



Harold G. Schuitmaker, of Schuitmaker, Cooper, & Cypher, P.C., Paw Paw, is admitted to the Michigan and Florida bars, practices in the areas of estate planning and probate, municipal law, corporations, and real estate. Mr. Schuitmaker is a Fellow of

the Michigan State Bar Foundation, and has a Martindale-Hubbell AV Peer Rating and an ICLE Certificate of Completion in the Probate and Estate Planning Program. He is a past-president of the Probate and Estate Planning Section of the State Bar of Michigan. He is a "Michigan Super Lawyer," named "Best Lawyers in America" by U.S. News and World Report and "Best Lawyers in Michigan." He was also named a "Leader in the Law" by *Lawyers Weekly*. Mr. Schuitmaker is a member of the Kalamazoo County Bar Association and the Van Buren County Bar Association. He is a past-president of the Rotary District Foundation. Mr. Schuitmaker is a regular contributor to the *Michigan Probate and Estate Planning Journal*.

Ethics and Unauthorized Practice of Law

By Raymond A. Harris*

Michigan Attorney Duties to Disclose Potential Elder Abuse

It is no secret that the population of the United States is getting older. Every other day brings another news article about the graying of America, and how a large segment of the population will soon be over the age of 65.¹ As the elderly population grows, so do the reported instances of elder abuse. Exploitation of the elderly is an issue regularly confronted by the public, as state and federal governments criminalize the physical, emotional, sexual, and financial exploitation of a vulnerable population.

In an effort to uncover potential abuses, many legislatures, bar associations, and attorneys are questioning what an attorney's role is in reporting suspected elder abuse to public officials. Some states have implemented mandatory reporting statutes that include attorneys,² some states give an attorney discretion as to whether such a report would violate attorney client privilege,³ and some states have provided no direction to attorneys.

Michigan has responded to the surge in elder abuse by enacting statutes that criminalize the exploitation of an elderly individual.⁴ Michigan has also enacted mandatory reporting laws of elder abuse.⁵ How these laws interact with the Michigan Rules of Professional Conduct, and what an attorney who suspects elder abuse can do are the subjects of this article.

Criminalization of Elder Abuse and Mandatory Reporting

In 2016, the Michigan Legislature passed the Vulnerable Adult Act, which was signed into law by Governor Rick Snyder. The law became effective on April 6, 2017. This law criminalized the exploitation of vulnerable adults:

(1) A caregiver is guilty of vulnerable adult abuse

in the first degree if the caregiver intentionally causes serious physical harm or serious mental harm to a vulnerable adult. Vulnerable adult abuse in the first degree is a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$10,000.00, or both.

(2) A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the second degree if the reckless act or reckless failure to act of the caregiver or other person with authority over the vulnerable adult causes serious physical harm or serious mental harm to a vulnerable adult. Vulnerable adult abuse in the second degree is a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$5,000.00, or both.

(3) A caregiver is guilty of vulnerable adult abuse in the third degree if the caregiver intentionally causes physical harm to a vulnerable adult. Vulnerable adult abuse in the third degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$2,500.00, or both.

(4) A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the fourth degree if the reckless act or reckless failure to act of the caregiver or other person with authority over a vulnerable adult causes physical harm to the vulnerable adult or the caregiver or other person with authority over the vulnerable adult knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a vulnerable adult, regardless of whether physical harm results. Vulnerable adult abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both.

(5) This section does not prohibit a caregiver or other person with authority over a vulnerable adult from taking reasonable action to prevent a vulnerable adult from being harmed or from harming others.

(6) This section does not apply to an act or failure

**The author would like to give a special thank you to our law clerk, Rose M. Scheid, who helped with this column.*

to act that is carried out as directed by a patient advocate under a patient advocate designation executed in accordance with sections 5506 to 5515 of the estates and protected individuals code, 1998 PA 386, MCL 700.5506 to 700.5515.⁶

In addition, Michigan updated its mandatory reporting act to include reports of elder abuse. Under MCL 400.11a, healthcare professionals, teachers, social workers, law enforcement officers, and county medical examiners are required to report instances of suspected abuse.⁷ However, the legislature specifically excluded attorney-client privilege from abrogation under the mandatory reporting statute.⁸

Michigan Rules of Professional Conduct

Rule 1.6 of the MRPC prohibits attorneys from disclosing information that they receive in confidence from their clients, except in limited circumstances.⁹ Those circumstances are when the client gives permission, when required by the professional rules or by court order, to rectify a client's illegal or fraudulent actions (when those actions have been furthered by the lawyer's services), to prevent a client from committing a crime, and in a dispute between the client and the attorney regarding fees. Unfortunately, for those attorneys concerned about the potential abuse of their client, these limited circumstances do not give an easy method to disclose suspected abuse.

At first glance, MRPC 1.14 appears to provide another avenue in which an attorney may report suspected abuse. This rule allows an attorney to take protective actions towards a client who, because of impairment, is unable to protect himself or herself.¹⁰ These actions can include filing for guardianship or conservatorship. However, this rule does not provide a broad exception as explained in *In re Makarewicz*, 204 Mich App 369, 373-374, 516 NW2d 90 (1994):

Under MRPC 1.14(b), a lawyer may take protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interests. The comment accompanying MRPC 1.14 sug-

gests that where a legal representative has already been appointed for the client, the lawyer ordinarily should look to the representative for decisions on behalf of the client. However, if the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

What Can You Do?

An attorney who is concerned about potential abuses is not in an enviable position. The attorney may have noticed suspicious behavior involving a client, or the client may have directly told the attorney about financial exploitation or abuse. As an attorney, it is important to inform your clients of the actions he or she should take such as reporting the abuse to law enforcement or removing themselves from the abusive situation. However, elderly clients may be reluctant to report abuse for a variety of reasons. Often the abuser is a family member, and the client does not want to get that individual into trouble. The client may be embarrassed about being tricked or scammed. In addition, the client may not want to provide ammunition to family members looking to reduce the client's independence. Finally, the client may be intimidated by the abuser and reluctant to report the abuse out of fear.

Under MRPC 1.6, an attorney may only report abuse to the appropriate authorities if the client gives permission. An attorney in this situation should always attempt to obtain permission from the client. However, if the client refuses to grant permission, the attorney cannot break attorney-client privilege under MRPC 1.6. Although a very limited exception to this rule is found in MRPC 1.14, an attorney is not obligated to do so.

Michigan's ethics rules and the various statutes regarding elder abuse and mandatory reporting do not provide easy answers to attorneys placed in this situation. In some cases, the best an attorney may be able to do is provide their client with emotional support and resources about elder abuse.

Notes

1. Aging in America: Land of the Free, Home of the Gray, Andrew Soergel, U.S. News, October 11, 2017.

2. Texas, Arizona, Ohio, Mississippi.

3. Washington, Montana.

4. MCL 750.145n.

5. MCL 400.11c.

6. MCL 750.145n.

7. MCL 400.11a(1) provides that “[a] person who is employed, licensed, registered, or certified to provide health care, educational, social welfare, mental health, or other human services; an employee of an agency licensed to provide health care, educational, social welfare, mental health, or other human services; a law enforcement officer; or an employee of the office of the county medical examiner who suspects or has reasonable cause to believe that an adult has been abused, neglected, or exploited shall make immediately, by telephone or otherwise, an oral report to the county department of social services of the county in which the abuse, neglect, or exploitation is suspected of having or believed to have occurred. After making the oral report, the reporting person may file a written report with the county department. A person described in this subsection who is also required to make a report pursuant to section 21771 of the public health code, Act No. 368 of the Public Acts of 1978, as amended, being section 333.21771 of the Michigan Compiled Laws and who makes that report is not required to make a duplicate report to the county department of social services under this section.”

8. MCL 400.11c(2) provides that “[a]ny legally recognized privileged communication, except that between attorney and client and except as specified in section 11a(2), is abrogated and does not constitute grounds for excusing a report otherwise required to be made under this act.”

9. MRPC 1.6:

(a) “Confidence” refers to information protected by the client-lawyer privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

(2) use a confidence or secret of a client to the disadvantage of the client; or

(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(c) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

(2) confidences or secrets when permitted or required

by these rules, or when required by law or by court order;

(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client’s illegal or fraudulent act in the furtherance of which the lawyer’s services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer’s employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

10. MRPC 1.14:

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority or mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.



Raymond A. Harris is a shareholder in the firm Buhl, Little, Lynwood & Harris, PLC, in East Lansing. He practices in the areas of elder law, Medicaid and disability planning, estate planning, trust and estate administration, and probate litigation. He is licensed

in Michigan and Florida. Ray sits on the board of directors for the Michigan Chapter of the National Academy of Elder Law Attorneys and is a council member of the State Bar of Michigan’s Elder Law and Disability Rights Section. He is the current president of the Greater Lansing Estate Planning Council. In 2014, he was named by Michigan Lawyers Weekly as one of the “Up and Coming Lawyers” and has been named by SuperLawyers as a “Rising Star” in the area of Elder Law in since 2015.

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Date	Place
January 20, 2018	University Club, Lansing
February 17, 2018	University Club, Lansing
March 24, 2018	University Club, Lansing
April 21, 2018	University Club, Lansing
June 15, 2018	University Club, Lansing
September 8, 2018*	University Club, Lansing

Meeting of the Committee on Special Projects (CSP) begins at 9:00 a.m. with the Council meeting to follow.

All members of the Section are welcome to attend meetings of the CSP and the Council.

*Annual Meeting