# How an Analysis of Litigated Cases Can Improve Your Drafting and Administration of Estates and Trusts

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Chapter 18

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## How an Analysis of Litigated Cases Can Improve Your Drafting and Administration of Estates and Trusts

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With permission from Leimberg Information Services, Inc. (LISI), this material represents a compendium of various articles authored by Sandra Glazier and published by LISI over approximately the past year that support the proposition that a review and analysis of court opinions issued in tax court as well as in probate and estate proceedings can help inform drafting options and actions that might be considered and/or taken during the administrative process.

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### Grantor Intent and Material Purpose

#### In Re Herbert Irrevocable Family Trust; The Importance of Considering Material Purpose when Seeking to Modify a Trust

Many articles have been written about potential ways to modify irrevocable trusts. When considering such modifications it may be important to analyze whether the proposed modification will violate a material purpose of the trust. In *In Re Herbert Irrevocable Family Trust*[1], the agreement entered into by the beneficiaries was found to violate a material purpose of the trust and was therefore unenforceable.

Facts:

In 2018, Gloria Herbert (Gloria) executed a trust (the "Trust") for the purpose of potentially qualifying for Medicaid coverage for her health care and nursing home needs. She named her son, Michael, as the sole trustee of the Trust. As part of that plan, she also executed what is commonly referred to as a "Ladybird Deed" or "Enhanced Life Estate Deed" that would effectively pass title of certain real property to the Trust upon her demise. In Michigan, the use of such deeds permits the grantor to retain the use, occupancy and ability to change the disposition of the property while potentially still qualifying the home as an exempt asset for purposes of Medicaid and avoidance of the recapture of benefits paid following the grantor's death.

Gloria had three children, Michael, Dennis and Mary Lou. In 2019, Gloria entered a nursing home where she remained until she died in July 2021. During that period, her assets were diminished as a result of the care she required.

The Trust provided, in pertinent part, that

> "[a]ny real estate in Michigan that this trust owns at the time of my death shall be distributed to my son, [Michael]. If [Michael] shall predecease me, then the interest of said deceased child shall

[1] Herbert v Herbert (In re Herbert Irrevocable Family Trust), ___NW2d___; 2025 Mich. App. LEXIS 3404 (Ct App, Apr. 30, 2025).

> be distributed to his descendants, per capita at each generation." …And … "[t]he sum of thirty thousand dollars ($30,000) shall be distributed in equal shares to [Dennis] and [Mary Lou]."[2]

Initially, following Gloria's death, her children believed that the Trust's assets were insufficient to pay the specific devise of $30,000 to Dennis and Mary Lou. Based upon that belief, Dennis, Mary Lou and Michael entered into an agreement (the "Disclaimer Agreement") which provided that

> 2. The language contained in the Trust calls for distribution [of] particular assets to each of the beneficiaries of Gloria Faith Herbert. However, due to needs for her care and strategies required for Medicaid planning, most of her assets were dissipated with the unintentional result of largely disinheriting Dennis L. Herbert and Mary Lou Steele. The only remaining Trust assets in the property located on Old Allegan Road (the "Property") [sic].
>
> 3. The beneficiaries unanimously agree to a different distribution of the remaining parcel of property in order to bring about an even distribution of trust assets which remain after the expenses of trust administration.
>
> 4. It is our unanimous agreement and intention as beneficiaries of the [trust] that [Michael] be granted an easement for lake access but then the entirety of the Property be sold at the highest and best price and the proceeds split evenly.
>
> * * *
>
> 6. This instrument is intended to be a partial qualified disclaimer within the meaning of Section 2518(b) of the Internal Revenue Code of 1986, as amended, and pursuant to the provisions of the Uniform Disclaimer of Property Interests Act (MCLA 700.2901 et seq.).[3]

A few months after entering into the Disclaimer Agreement, a safe containing $15,000 in cash was located among Gloria's belongings at the home, which brought the Trust's assets to a value sufficient to satisfy the $30,000 specific bequest to Dennis and Mary Lou. Michael sought to then enforce the Trust as written, but Dennis and Gloria sought to enforce the Disclaimer Agreement, pursuant to which they would each receive over $410,000. Failing to reach agreement with their sibling, Dennis and Mary Lou filed a petition in probate court to enforce the Disclaimer Agreement. Michael responded that the Disclaimer Agreement should not be enforced because it was (1) the result of mutual mistake; and, (2) was not a qualified disclaimer and therefore was a non-judicial settlement that violated a material purpose of the Trust that was contrary to Gloria's intent. Michael also proffered that had he disclaimed the property he could not control its disposition and his interest would have passed to his children (as opposed to his siblings).

The probate court agreed with Michael and denied Dennis and Mary Lou's Petition. It held

> the agreement was invalid under MCL 700.7111 and MCL 700.7412 because the agreement was contrary to the settlor's intent, violated the material purpose of the trust, and was based on a mutual mistake of fact. The court additionally determined that Michael did not disclaim the

[2] Id. at *1-2.
[3] Id. at *2-3.

> property through the agreement because, under the agreement's terms, he would have retained a one-third interest in, and an easement upon, the property. Accordingly, the agreement was not a disclaimer, but an invalid attempt to modify the trust.[4]

Dennis and Mary Lou appealed.

Analysis:

On appeal, Dennis and Mary Lou abandoned their argument that the Disclaimer Agreement was permitted as a nonjudicial settlement agreement (NJSA) under MCL 700.7111[5] or a permissible modification under MCL 700.7412. Instead, they argued that the Disclaimer Agreement was enforceable pursuant to MCL 700.7201. That statute provides in relevant part that:

> (1) 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.
>
> * * *
>
> (3) A proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and a determination regarding the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do any of the following:
>
> * * *
>
> (h) Determine an action or proceeding that involves settlement of an irrevocable trust.[6]

The appellate court essentially held that MCL 700.7201 was not dispositive. The issue on appeal was not whether or not the Court had jurisdiction to determine whether the Disclaimer Agreement should or should not be enforced, rather whether the Disclaimer Agreement itself was or was not enforceable under either MCL 700.7111 (relative to NJSAs) or MCL 700.7412 (which permits the probate court to modify the terms of a trust because of circumstances not anticipated by the grantor or when doing so would further the grantor's stated purpose, and if none, the grantor's probable intent).

The appellate court then held that the probate court did not err in its determination that the Disclaimer Agreement was unenforceable because it violated a material purpose of the Trust and did not meet the precatory requirements of MCL 700.7412 that would permit the court to modify the Trust's terms.

MCL 700.7111, pertaining to NJSAs provides, in pertinent part that such agreements

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[4] Id. at *5.

[5] See also UTC §111(c), which provides in pertinent part that "A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law. "

[6] Id. at * 6-7, citing MCL 700.7201.

> "shall not be used to accomplish the termination or modification of the trust" and is only valid "to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this article or other applicable law."[7]

The appellate court held that the probate court had correctly found that the stated purpose of the Trust was to eventually qualify Gloria for Medicaid benefits. As such, Gloria contemplated that her estate would be depleted when she established the Trust and specifically provided that Michael would receive the real property. Nothing in the Trust reflected an intent by Gloria to treat her children equally. All her children agreed that the real property specifically devised to Michael at all times pertinent to the matter exceeded the value of the $30,000 bequest to Dennis and Mary Lou. The bequest to Michael was unconditional. It was not dependent upon whether, or to what extent, other assets remained subject to division amongst Gloria's children at her death. Therefore, the Disclaimer Agreement did not meet the requirements of MCL 700.7412[8], in order for the court to modify the terms of the Trust.

The appellate court also found that the Disclaimer Agreement was not a "disclaimer" under Michigan law. While an interest may be disclaimed in whole or in part[9],

> "[a] disclaimer acts as a nonacceptance of the disclaimed interest, rather than a transfer of the disclaimed interest[,]" and "[t]he disclaimant is treated as never having received the disclaimed interest." The arrangement set forth in the agreement does not align with the nature of a disclaimer. Under the agreement, Michael did not reject his interest in the property. Rather, he accepted his interest in the property and agreed to sell the property and share the proceeds, while still retaining an easement. Though Michael agreed not to retain the property under the terms of the agreement, we fail to see how this arrangement can be properly characterized as Michael "never having received the disclaimed interest."[10]

The appellate court also found that the Disclaimer Agreement was inconsistent with MCL 700.2910, which provides

> (1) The right to disclaim property is barred by any of the following events that occur after the event giving rise to the right to disclaim and before the disclaimer is perfected:
>
> > (a) An assignment, conveyance, encumbrance, pledge, or transfer of the property, or a contract for such a transaction.
> >
> > * * *

---

[7] Id. at *8-9.

[8] Some state's that have adopted the UTC may have provisions that permit a court to modify a trust even if the modification is inconsistent with a material purpose of the trust. See optional language contained in UTC §411(a). As such, a change of situs for a trust may provide options not otherwise available in the current situs of administration.

[9] MCL 700.2902(1).

[10] (In re Herbert Irrevocable Family Trust), supra at *11-12.

> (c) An acceptance of the disclaimable interest or a benefit under the disclaimable interest after actual knowledge that a property right has been conferred.[11]

The appellate court then found that

> [t]he event giving rise to Michael's right to disclaim the property was Gloria's death. It was not until after that event that, under the terms of the agreement, Michael would be "granted an easement" for the property—and "then," sometime after that grant, "the entirety of the Property [would] be sold at the highest and best price and the proceeds split evenly." We fail to see, and petitioners have not explained, how their characterization of this arrangement as a disclaimer would comport with MCL 700.2910(1).[12]

As a result, the appellate court upheld the probate court's determination that the Disclaimer Agreement was nothing more than a failed attempt to modify the terms of the Trust.

Comment:

As more and more parties attempt to modify irrevocable trusts through decanting, NJSAs and/or court processes, it can be important to draft for such contingencies and when exercising the same to analyze whether a proposed modification violates a material purpose of the trust. The use of statements of intent, can help identify a grantor's purposes and intent, but often parties must review a trust as a whole in an effort to analyze and determine a grantor's intent and material purposes of a trust. Beneficiaries often wish to receive their interests outright, but creditor protection through the use of a spendthrift provision may be determined to be a material purpose of a trust. If creditor protection and avoidance of outright distributions is important to the grantor, stating so may be helpful in fulfilling the grantor's intention, because in some jurisdictions use of spendthrift provisions may be presumed not to constitute a material term.[13]

Here, conveyance of the real property to only one of Gloria's three children (while not set forth in a statement of intent) was determined to be a material purpose which precluded enforcement of a NJSA under Michigan law when the agreement provided terms to the contrary. Therefore, it may remain important to conduct a thorough analysis of whether a proposed modification (whether via a NJSA or court action) will thwart grantor intent or a material purpose of the trust, as well as whether other options may be available if the situs of the trust's administration were changed to a different jurisdiction. Because probate courts are generally statutorily created courts of limited jurisdiction, the probate court may not be empowered to fashion a remedy that goes beyond the confines of its statutorily provided authority.

It may also be noteworthy that, while some jurisdictions utilize a material purpose analysis in determining if decanting may be utilized to modify provisions of a trust, Michigan's decanting statute may be more restrictive in that it would not have been an available process for changing Michael, Dennis and Mary Lou's

[11] Id. at *12, citing MCL 700.2910.
[12] Id. at *12.
[13] See optional language in UTC §411(c).

beneficial interests in the Trust because under Michigan's statute the receiving trust cannot "materially change the beneficial interest of the beneficiaries of the first trust".[14]

CITE AS: LISI Estate Planning Newsletter #3209 (May 27, 2025) at http://www.leimbergservices.com.

### In re Charles C. Kalbach and Betty J. Kalbach Trust[15]; Joint Trusts, Grantor Intent and Drafting Issues

Joint trusts are commonly used by spouses in community property jurisdictions. They may not be as common in other jurisdictions and when used in those jurisdictions may lead to confusion and issues of interpretation. When drafting and administering a joint trust it can be important to address the extent to which all (or any portion) of the trust will become irrevocable upon the death of the first spouse and the extent to which distributions from the trust may be made during the surviving spouse's life.

Facts:

In 2006, Charles and Betty created a Joint Trust (the "Trust") to which they transferred their property. While they were both alive they acted as co-trustees of the Trust. The Trust was to provide for their financial needs during their respective lifetimes. Charles and Betty had five children: Barbara, Brett, Charles Jr ("Jr"), Thomas and Peter. Barbara and Brett were named successor trustees and primary beneficiaries after the later of Charles and Betty's death. The Trust specifically excluded Jr, Thomas and Peter as beneficiaries.

Upon the first spouse's death the Trust was to be divided into a complex structure of multiple smaller trusts apparently intended to minimize certain tax liability. Despite this division, each of the smaller trusts were still intended to provide for the surviving spouse's financial needs and support. The court (and the successor trustees) found the complexity of the language and division into smaller trusts confusing. However, it was clear that following the surviving spouse's death, the residue was to be divided into two equal shares subject to outright distribution – one share to Barbara and the other to Brett. The Trust also provided for a variety of scenarios should Barbara or Brett not survive to receive their entire share. It provided in pertinent part that

> [i]f a primary beneficiary died prior to "receiving their entire share," the remaining share was to be distributed to the other beneficiary. After the beneficiaries' shares were divided into equal halves, if a primary beneficiary or their heirs "predecease[d] complete distribution of his or her share, and there [was] no other direction for allocation and distribution," the remaining share was to be distributed to the primary beneficiary's descendants. The Trust also created a power of appointment, and, if a beneficiary died before being entitled to distribution from the Trust, the beneficiary's share was to be distributed according to any will of the deceased beneficiary so long as that will referenced the power of appointment. Finally, if all descendants of the [grantors] were deceased and there were no other directions from the Trust, the Trust's property was to be

[14] MCL 700.7820(a).
[15] *Kalbach v. Kalbach (In re Kalbach),* 2025 Mich. App. LEXIS 3727 (May 14, 2025).

> distributed to the [grantors'] heirs according to the laws of intestate succession except that no property was to be distributed to the [grantors'] parents, siblings, aunts, or uncles.[16]

The primary asset of the Trust was real property located in Benzie County, Michigan (the "Property"). Charles died in 2011. In October 2014, Betty amended the Trust to provide a specific devise of 3 acres of the Property to Barbara and 8 ½ acres of the Property to Brett. The amendment did not change any other provisions of the Trust. In December 2015, Betty executed a quitclaim deed that purported to retain a life estate for her own benefit and a conveyance of the property upon her death to Barbara and Brett as joint tenants with rights of survivorship. Betty died in November 2016 and Brett died one month later without a will or any descendants.

In April 2021, Barbara executed an enhanced life estate warranty deed (commonly referred to as a "ladybird deed") that purported to convey the Property to herself with a defeasible remainder to her brother Thomas and his wife. Five days later, Barbara died without any descendants but she did have a Will. Barbara's Will devised the entirety of her estate to her brother, Thomas. Even though the distribution of the Property to Barbara (and Brett) under the Trust was to result in an outright distribution upon Betty's death in November 2016, when Barbara dies in 2021 the Property was still titled in the name of the Trust. In fact, the parties agree that the Trust was never properly administered after Betty died and no property was ever distributed to Barbara or Brett despite the terms of the Trust providing for the same to occur. It appears that the only asset of the Trust may have been the Property.

In June 2022, Thomas petitioned the Court to be appointed successor trustee of the Trust, but due to objections a neutral successor trustee was appointed. Thomas then filed a petition for instructions. He argued that the Property should have been distributed to Barbara and that her Will should now control the disposition of the Property. He also argued that doing so would be consistent with the grantors' intent. The successor trustee proffered that the Trust was "'confusing, contradictory and incomplete and therefore, in need of court guidance and/or reformation regarding its administration'".[17] The successor trustee also indicated her belief that the Property had never been conveyed out of the Trust and that would mean that the Trust should control the disposition of the Property, but that given the "…hodgepodge of confusing, inconsistent or inapplicable provisions regarding trust asset distribution after the deaths of the named beneficiaries"[18] it did not contain terms that contemplated or provided for disposition of the Property under the circumstances presented.

Peter argued that once his father died, the Trust became irrevocable and Betty lacked any authority to amend it or convey the Property to herself or others and that as a result Barbara could not control the disposition of the Property except through the exercise of the power of appointment granted to her in the Trust, which she did not do. Peter contended that the Trust failed and that a "resulting trust" should be created which should mean that the Property is to be equally divided among Peter, Jr and Thomas as the then surviving children of the grantors.

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[16] *Kalbach v. Kalbach (In re Kalbach)*, 2025 Mich. App. LEXIS 3727 (May 14, 2025) at *2-3.
[17] Id. at *5.
[18] Id. at *5.

Thomas argued that Betty's actions (in amending the Trust and conveying the Property) provided clear evidence of her intent that Barbara (and by extension Barbara's estate) was to receive and dispose of the Property. While Thomas conceded that the 2015 deed was not valid (a point that perhaps he should not have readily conceded)[19], it nonetheless represented "the best and most recent evidence of Betty's intent regarding the Property",[20] and her desire that it go only to Barbara and Brett and if one them died to the survivor. He argued given the confusing and ambiguous provisions of the Trust the court should look to "grantor intent" to resolve the dispute.

The probate court agreed that the Trust did not contemplate the present situation and that the Trust contained ambiguities. It also found that the 2015 deed did not control the disposition of the Property but was evidence of the grantors' intent. Since Barbara outlived Brett, it found that the grantors' intended that Barbara should control the disposition of the Property and by extension that Barbara's Will should control its disposition. The probate court ordered that the Property be distributed from the Trust to Barbara's estate for administration. Peter appealed.

Analysis:

The appellate court cited to *Bill & Dena Brown Trust v. Garcia*[21] in holding that

> [w]hen parties dispute the meaning of a trust, the court must identify and give effect to the settlors' intent, which is accomplished by looking at the trust's terms. If unambiguous, the court must enforce the terms as written. The court must look at the entire trust, "harmonizing its terms with the intent expressed, if possible." However, if the trust's terms are ambiguous, the court is required to "look outside the document to determine the settlor's intent, and it may consider the circumstances surrounding the creation of the trust and the general rules of construction." Disagreement among parties regarding a trust's meaning does not mean there is an ambiguity.[22]

The appellate court found that the Trust did not become irrevocable at Charles' death and as a result, Betty had the ability to amend or revoke the Trust following his death. It held that

> "'[r]evocable', as applied to a trust, means revocable by the [grantor] without the consent of the trustee or a person holding an adverse interest." A [grantor] can amend a revocable trust "[b]y substantially complying with a method provided in the terms of the trust."[23]

Pertinent to that finding was the following language contained within the Trust:

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[19] See Bill & Dena Brown Trust v. Garcia, 312 Mich. App. 684 (2015).
[20] In re Kalbach, supra at *7.
[21] Bill & Dena Brown Trust, supra.
[22] In re Kalbach, supra at*8-9. Internal citations omitted.
[23] Id, at *10. Internal citations omitted.

> We reserve the right to amend or revoke this Agreement, wholly or partly, by a writing signed by us or on our behalf and delivered to Trustee during our life. However, we cannot change materially the duties or compensation of Trustee without its written approval.[24]

Also of import was the fact that the division of the Trust into separate sub-trusts following Charles' death would only be triggered if there was property over a certain threshold for federal and estate tax purposes, which was not the case when Charles died. By its terms, the appellate court found that only Trust B (which was never funded or needed due to the size of Charles' estate) was irrevocable by its terms.

The appellate court also found Peter's reliance upon the spendthrift provisions of the Trust as posing an impediment to Betty's ability to convey the Property to herself as beneficiary of the Trust to be misplaced. The appellate court held that

> [a] spendthrift clause prevents certain creditors from reaching a beneficiary's interest by limiting the beneficiary's interest in trust property. Such clauses restrict the beneficiary's ability to transfer her interest as a beneficiary to others. However, a spendthrift clause is invalidated "to the extent it is intended to apply to any interest of a beneficiary who is also the [grantor] of the trust." Here, Betty was a [grantor], so the clause could not be applied against her, contrary to [Peter]'s argument.[25] [26]

Peter's argument that Barbara's Will could not control disposition of the Property because she did not properly exercise the power of appointment was also found to be unpersuasive. In rejecting that argument the court found that the Trust provided

> "if the beneficiary dies **before** being entitled to distribution of the remaining trust property, Trustee shall distribute the remaining trust property to . . . person or persons among our descendants . . . as the deceased beneficiary appoints by will which specifically refers to this power of appointment." (Emphasis added.) Accordingly, application of this power of appointment was expressly limited to a beneficiary dying before being entitled to distribution. Although there is no dispute that Barbara's will did not expressly make reference to the power of appointment in the Trust, it did not need to do so because she died after becoming entitled to distribution.[27]

Peter then argued that the Trust ran out of identifiable beneficiaries such that a resulting trust arose. While the appellate court agreed there were no presently identifiable beneficiaries living it disagreed that a resulting trust arose. The appellate court found that a resulting trust

> arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein and where the inference is not rebutted and the

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[24] Id. at *11.
[25] Id. at *12-13. Internal citations omitted.
[26] Note however, that this analysis may only apply to trusts that don't qualify under Michigan law as a Qualified Disposition or a DAPT (Domestic Asset Protection Trust). See MCL 700.1041, et seq.
[27] In re Kalbach, id. at *13-14.

> beneficial interest is not otherwise effectively disposed of. Since the person who holds the property is not entitled to the beneficial interest, and since the beneficial interest is not otherwise disposed of, it springs back or results to the person who made the disposition or to his estate, and the person holding the property holds it upon a resulting trust for him or his estate.[28]

Here, the only reason that the Trust ran out of identifiable beneficiaries was because it was not properly administered. Had it been properly administered Barbara would have received the Property to which she was entitled.

Other arguments having failed to persuade the appellate court that the probate court's decision was in error, Peter claimed that the Trust was not ambiguous and therefore the court could not look outside its four corners to determine grantor intent. The independent successor trustee, probate court and appellate court all found the trust to be ambiguous on how to approach the situation resulting from the failure to timely and properly administer the Trust. The appellate court found that

> [h]aving reviewed the Trust, we agree that it was confusing, incomplete, and sometimes contradictory. Moreover, for the reasons already discussed, we agree that it did not address the present situation in which the primary beneficiaries died without any issue and without receiving any distributions from the Trust. The [grantors] made clear their intention to distribute Trust property to Barbara, Brett, and Brett's and Barbara's descendants to the exclusion of the other children. Yet, under the Trust's terms, this could not occur.
>
> We discern no error in the probate court's consideration and reliance on the 2015 deed along with the Trust's terms. In this deed, Betty attempted to convey the Property to Barbara and Brett with full rights of survivorship with a life estate reserved to Betty. This deed provided evidence of Betty's intent to follow the Trust's purpose of providing Trust property to Barbara and Brett to the exclusion of [Peter] and the other children. Moreover, by attempting to provide Barbara and Brett with rights of survivorship, Barbara as the surviving grantee would have received Brett's interest upon his death. …Once Barbara died, her interest in the Property would have passed via her own estate, which is what the probate court ordered should happen. Nothing about the 2015 deed contradicted the Trust's terms; in fact, it was in keeping with the [grantors'] overall desire to provide property to Barbara and Brett to the exclusion of the other children.[29]

Lastly, Peter argued that the probate court lacked the authority to reform the Trust. Again, the appellate court disagreed. In doing so the it found that the court had the authority to terminate or modify a trust under MCL 700.7412, when "because of circumstances not anticipated by the [grantors], modification or termination will further the [grantors'] stated purpose or, if there is no stated purpose, the [grantors'] probable intention".[30]

The appellate court went on to find that

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[28] Id at *16-17. Internal citations omitted.
[29] Id. at *17-19. Internal citations omitted.
[30] MCL 700.7412. See also UTC §412.

> [t]he clear purpose was to provide Barbara and Brett with Trust property, and the 2015 deed provided further evidence of this purpose. However, because the Trust was never properly administered, neither Barbara nor Brett ever received distributions from the Trust, and they died without any descendants. This was a situation not addressed by the Trust or anticipated by the [grantors]. By modifying the Trust to allow for distribution of the Property to Barbara's estate, the probate court was furthering the Trust's purpose of providing property to the primary beneficiaries in the manner that most closely followed the original Trust's terms. By outliving Brett, Barbara received his share, thereby entitling her to the entirety of the Trust's property. Accordingly, she would have received the Property via the Trust's terms, and her decision to devise this to [Thomas] was her prerogative. Nothing in the Trust prevented beneficiaries from disposing of Trust property after receiving it. [31]

Comment:

When drafting a joint trust for spouses, it might be helpful to use language that clearly conveys the grantors' intention regarding the ability of a surviving spouse to amend, revoke or terminate the trust following the first spouse's death. Perhaps the following language would have provided a clearer indication of grantor intent if the right to amend or revoke was to be reserved in whole or in part to a surviving grantor:

> While both of us are alive, we reserve the right to amend or revoke this Agreement, wholly or partly, by a writing signed by both of us or on our behalf and delivered to Trustee during our joint lives. Following the death of one of us, the survivor reserves the right to amend or revoke: Alternative 1: the Trust, in whole or in part – Alternative 2: the provisions of Articles ****, but not the provisions of Article ****. However, following the death of one of us, under no circumstances can the survivor materially change the duties or compensation of Trustee without its written approval.

If the right to amend or revoke a joint trust was intended to terminate following the death of the first spouse to die, something along the following lines might have provided greater clarity:

> We reserve the right to amend or revoke this Agreement, wholly or partly, by a writing signed by us or on our behalf and delivered to Trustee while we are both alive. Following the death of the first of us to die, the survivor shall not have any right to amend or revoke this Agreement and the survivor cannot change materially the duties or compensation of Trustee without its written approval.

When drafting also consider the potential effect of rights of withdrawals, gifts or distributions. The ability to distribute property, whether pursuant to a broad discretionary standard (or even one limited to health, education, maintenance and support), can result in dispositions not fully contemplated by the grantors. Careful drafting of lapse or anti-lapse provisions that contemplate a broad range of circumstances can help to avoid the need for reformation, modification and perhaps litigation in order to implement grantor

[31] In re Kalbach, supra at *19-22.

intent. While it's hard to predict every potential change of circumstances, careful drafting and the use of statements of intent can help.

CITE AS: LISI Estate Planning Newsletter #3212 (June 11, 2025) at http://www.leimbergservices.com.

### In re Philpot Estate;[32] Testator Intent

When it comes to interpreting and implementing the provisions of a Will, the testator's intent is often the key to the outcome.

Facts:

William Philpot ("William") died on March 28, 2007. He was survived by his spouse, Michaelene, and his three children from a prior marriage. Shortly before his death he conveyed some real estate parcels to himself and Michaelene as tenants by the entireties. In consideration for that conveyance, Michaelene agreed, in writing, to pay William's three children the sum of $200,000 within three years of William's death. Five days after Michalene signed the agreement to pay William's children $200,000 following William's death, William executed his Will. In his Will, William devised all of his real property to Michaelene, including his home at 1033 Lake Street, in Tawas City, Michigan, where he and Michaelene resided (the "Marital Home"). When William died, the Marital Home was still titled in William's name alone.

William's Will indicated that most of his real estate was held as tenants by the entireties with Michaelene and that:

> [t]he nature of this ownership is to facilitate the liquidation of my estate upon my demise with the explicit agreement and understanding on the part of my wife, Michaelene, that she shall distribute the sum of Two Hundred Thousand ($200,000.00) dollars of the value of said real property to my three children, equally, within three years of the date of my demise.[33]

Nothing was apparently said about the personal representative's obligation to pay any amounts to the children in this regard.

Michaelene continued to live at the Marital Home following William's death. When she became ill, her son ("Lull") moved in with her and both lived there until Michaelene died in August 2020. In the intervening 13 years following William's death there was a fire at the Marital Home, and it was alleged that the home was likely worth more when William died in 2007 than when Michaelene died in 2020.

Following Michaelene's death, Lull opened a probate estate for his mother and for William. He requested that the Marital Home be conveyed by William's estate to Michaelene's estate. One of William's children ("Clark") objected, because Michaelene had only paid each of the three children $10,000 and had failed to pay the remaining $170,000 due the children. Lull argued that enforcement of the agreement to pay William's children $200,000 was barred by the statute of limitations. He also argued that the bequest to

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[32] *Lull v Clark (In re Philpot Est)*, ___NW2d___; 2024 Mich. App. LEXIS 8171 (Ct App, Oct. 11, 2024).
[33] Id. at *2.

his mother of all of the real estate that comprised William's decedent estate wasn't conditioned on such payment. Lull also argued that the failure of William's children to probate his Will, or otherwise pursue payment, should act as a bar to the relief they requested under the doctrine of laches. The probate court disagreed.

The probate court concluded that William made it clear in his Will that he wanted his children compensated out of his estate for the real estate that Michaelene received or would otherwise receive as a result of his death. Therefore, if Michaelene failed to compensate them it was contemplated that property of his estate would need to be utilized to do so. The probate court ordered the Marital Home sold and $170,000 of the proceeds disbursed to William's issue per stirpes in accordance with the intent expressed by the Will.

Lull, acting as co-personal representative of William's estate appealed.

Analysis:

It is well established that a court is to interpret a Will to give effect to the testator's intent and absent a patent or latent ambiguity, that intent is to be determined from the plain language of the will.[34] A court is not permitted to interpret a clear and unambiguous will in such a manner as to rewrite it.[35] Lull argued that the probate court violated this precept because the Will didn't contain any language that specifically conditioned the bequest of the Marital Home to Michaelene on the payment of $200,000 to William's children nor did it specify that the property be liquidated.

The appellate court held that the probate court reached its decision based upon its interpretation of the testator's intent as expressed in the Will and not through enforcement of the agreement. The appellate court found it was foreseeable that if Michaelene failed to pay the children $200,000, that sum would come from his estate, which would mean property would need to be sold in order to accomplish such a distribution. Michaelene could have elected to take against the Will, but she did not do so.

The appellate court also found that the doctrine of laches didn't bar the result reached by the probate court since Lull could not establish that any delay on the part of William's children prejudiced Michaelene and she could have probated the Will (just as easily as the children) following William's death.

> The doctrine of laches is an equitable doctrine used to remedy the inconvenience resulting from a party's delay in asserting a legal right. Application of the doctrine "is not triggered by the passage of time alone." Rather, application of the doctrine "requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim . . . ." Thus, "[l]aches does not apply unless the delay of one party has resulted in prejudice to the other party." [36]

Comments:

[34] Id. at *4.
[35] Id. at *4.
[36] Id. at *6.

Clear drafting and statements of intent can help clarify a grantor or testator's intention. They can provide a road map to parties and the court that may help in effectuating such intent. William could have included clearer language, but he didn't. It appears William trusted that his spouse would do as she had promised and William relied on her promises when crafting his estate plan.

Laches is an equitable defense applied after consideration of the totality of circumstances. Here, it is likely that that court felt equity weighed more strongly in favor of the children under the facts and circumstances presented.

The use of laches as an affirmative defense was previously discussed in *No Good Deed Goes Unpunished Especially When Acceptance Means a Target on One's Back: Defending Breach of Fiduciary Claims in the Context of Trust and Estate Administration*[37] which reflected that the:

> [u]se of laches as a defense in a probate proceeding was addressed in *In re Estate of Crawford, Deceased*[38]. *Crawford* involved the implications of jointly titled assets and a joint will. In that particular case petitioner knew five years before decedent's death that property had been jointly titled and would, therefore, pass upon decedent's death in contravention of the terms of a joint will. In *Crawford*, the appellate court barred the claim indicating that:
>
> > Laches is an affirmative defense which depends not merely upon the lapse of time but principally on the requisite of intervening circumstances which would render inequitable any grant of relief to the dilatory plaintiff. For one to successfully assert the defense of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches. Laches is concerned mainly with the question of the inequity of permitting a claim to be enforced and depends on whether the plaintiff has been wanting in due diligence.[39]
>
> (Internal citations omitted).
>
> The *Crawford* court indicated that "the failure of anyone to make a legal claim to the property, well after the deed making defendant joint owner with rights of survivorship was publicly recorded, induced respondent to change her position in reliance on this lack of action by petitioner."[40] Further, the appellate court found that:
>
> > …the probate court had ample and reliable facts before it when it determined that the doctrine of laches foreclosed any claim by the petitioner to the Crawford property. Moreover, contrary to the petitioner's claim, the probate court set forth the necessary elements of laches in its opinion and stated that petitioner could have sued during the

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[37] Glazier, *No Good Deed Goes Unpunished Especially When Acceptance means a Target on One's Back: defending Breach of Fiduciary Duty Claims in the Context of Trust and Estate Administration,* BNA Tax Management Estates, Gifts, and Trusts Journal, Vol. 42, No. 4, p. 212 (07/13/2017).
[38] *In re Estate of Crawford, Deceased*, 115 Mich. App. 19, 320 N.W.2d 276 (Mich. App. 1982).
[39] *Id.* at p. 26.
[40] *Id.* at p. 28.

> five years prior to Mr. Crawford's death but did not and: "Mrs. Hammonds would have not relied upon her interest in the property, and circumstances would not have changed in such a way as to make this action now inequitable." We, therefore, find that the probate court did properly determine that all of the elements of the doctrine of laches were satisfied by the facts of this case, and the mere passage of time was not the only basis of the probate court's decision.[41]

So, while the UTC doesn't specifically set forth laches as being an equitable remedy to breach of fiduciary duty claims or accounting proceedings, it can provide a viable defense under the right factual circumstances.

The Restatement (Second) of Trusts § 219 in addressing the issue of laches reflected that: "(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable."[42]

Comments to §219 of the Restatement (Second) of Trusts identified certain factors that the court could consider, when determining whether laches should act as a bar to a claim, including

> (1) the length of time that has elapsed between the breach of trust and the bringing of suit, (2) whether the beneficiary knew or had reason to know of the breach, (3) whether the beneficiary was under an incapacity, (4) whether the beneficiary's interest was presently enjoyable or enjoyable in the future, (5) whether and when the beneficiary had complained of the breach, (6) the reasons for the delay in the beneficiary suing, (7) any change of position by the trustee, including loss of rights against third parties, (8) the death of a witness or parties, (9) hardship to the beneficiary if relief is not given, and (10) hardship to the trustee if relief is given.[43]

The Comments go on to reflect that even a beneficiary with a future interest may be barred, under the doctrine of laches, if he has knowledge of a breach and doesn't sue even if his interest isn't presently enjoyable. Because laches is essentially an equitable bar, courts will generally look to the totality of the circumstances in determining whether it will be applied to block a claim against the trustee.[44]

In *Philpot,* looking at the totality of circumstances, the court found that Michaelene was able to live at the property rent-free. While she paid the real estate taxes, it didn't find such payments to be of sufficient prejudice to overcome implementation of William's intent that his children receive $200,000 given his conveyance of other properties to Michaelene as tenants by the entirety as part of his overall estate plan. Since it appears that the bulk of William's assets passed outside of his probate estate, the estate was left

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[41] *Id*. at p. 28-29.
[42] Restatement (Second) of Trusts, *supra,* at §219.
[43] Comment to Restatement (Second) of Trusts, *supra* at §219.
[44] Glazier, *No Good Deed Goes Unpunished Especially When Acceptance means a Target on One's Back: defending Breach of Fiduciary Duty Claims in the Context of Trust and Estate Administration, supra*.

with the Marital Home constituting the only significant asset from which a distribution to the children could be made. Michaelene could have avoided the sale or loss of the Marital Home had she paid the children the funds William intended them to have within 3 years of William's death. In addition, she could have probated his Will and elected to take against the Will in the 13 years following his death, but she (and the children) failed to do so.

CITE AS:

**LISI** Estate Planning Newsletter #3157 (November 7, 2024) at http://www.leimbergservices.com

### In re James A. Reed Trust;[45] Grantor Intent and Mistakes of Law

When it comes to interpreting and implementing the provisions of a trust, the grantor's intent is often key to the outcome. In Michigan, even when the provisions of a trust aren't ambiguous, reformation to comport with the grantor's intent may be possible. The Trust provided that upon his death

Facts:

James Reed died in March 2020 survived by his four children, Roger, Gerald, David and Patricia. At the time of his death, his revocable trust (the "Trust") owned real property in Michigan and Indiana, a membership interest in James A. Reed Farm Properties, LLC (the "LLC") and stock in Reed Farms, Inc. On his death, the Trust provided that the LLC was to be distributed to his daughter, Patricia. The interest in Reed Farms, Inc was to be distributed to a grandson (also named David Reed). Roger and Gerald were residuary beneficiaries and no provision was made for his son, David.

On the same day that James executed his Trust, he also executed an Operating Agreement for the LLC, but for some reason failed to file an Article of Organization for the LLC before he died. The Operating Agreement reflected that the Trust owned 99% of the LLC and Patricia owned the remaining 1%. It also reflected that the initial contribution to the LLC consisted of six Michigan properties. Three days after creating the Trust, James quit claimed the Michigan properties to the Trust.

Following James' death, Patricia in her capacity as the Trust's successor trustee, sought to file the LLC's Article of Organization so that the Michigan properties indicated as the initial contribution to the LLC could be transferred from the Trust to the LLC. Roger and Gerald filed a petition with the probate court seeking a determination that since the properties had not been titled in the LLC at James' death, they were to be distributed to them as part of the residue. Patricia filed a counter-petition seeking reformation of the Trust pursuant to MCL 700.7415 (Reformation to Correct Mistakes)[46], claiming that James' intended for Patricia to inherit the Michigan properties.

The court conducted a bench trial and found, based upon the evidence presented, that James intended that Patricia inherit the Michigan properties and made a mistake of law in believing that the Operating Agreement alone was sufficient to effectuate the transfer of the Michigan properties to the LLC.

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[45] *Birk v Reed (In re Trust),* ___NW2d___; 2024 Mich. App. LEXIS 9134 (Ct App, Nov. 14, 2024).
[46] See also UTC §415.

At trial, the handwritten notes of one of James' estate planners was introduced into evidence. Importantly, that note reflected that:

> For the trust distributions, the Michigan [properties] would still be left to his daughter [appellee]. The Indiana land that he controls, 200 acres in Reed Farm, Inc., would be left to [his grandson] David J. Reed, also known as DJ Reed. He would like any residue after that split three ways between his daughter [appellee], his son Roger Reed [appellant], and his son Gerald Reed [appellant]. His son David E. Reed is to take nothing from his estate.
>
> We did talk about [appellee] getting an outright distribution. Between her getting all of the Michigan [properties] as well then one-third of the residue, we noted that the unequal distribution could cause Roger and Gerald to react poorly. The discussion followed with us asking [decedent] why he would want [appellee] to receive an unequal distribution from her two brothers. He advised that [appellee] gets the unequal distribution because of all the assistance she has provided to him along the way. According to [decedent], Roger and Gerald do not assist him with anything. David would not be receiving anything at this point because of the prior assistance that has been provided to David during his lifetime. I do think we will need an in terrorem clause in this trust just in case. We did talk with [decedent] about meeting with him alone and he insisted that there was no reason for [appellee] to leave. At first, he indicated that he just wanted [appellee] to get more and it did not matter why. When we pressed a bit, he led with a bit of an outburst, in a non-confrontational way that it was because [appellee] helped with everything and Roger and Gerald do not help at all.[47]

The evidence introduced during the trial also reflected that James executed the Operating Agreement on the same date as the Trust and the court found the testimony of James' estate planners and Patricia was credible, each of whom testified that James consistently stated his intent to leave the Michigan properties to Patricia and to no one else.

Although Roger and Gerald attempted to challenge the credibility of the witnesses, they didn't present any testimony to rebut the testimony given by the estate planners or Patricia with regard to James' intent. Instead, they argued that the failure to file the Article of Organization was part of

> an elaborate ruse to trick [Patricia] - and apparently his own estate planner as well- into believing she would inherit the Michigan properties so that she would continue to provide him with assistance.[48]

The court found Roger and Gerald's position wasn't supported by the evidence and reformed the Trust, directed the successor trustee to form the LLC, transfer the Michigan properties from the Trust to the LLC and distribute the Trust's interests in the LLC to Patricia.

Roger and Gerald appealed.

Analysis:

[47] Birk v Reed, supra at *5-7.
[48] Id. at *7-8.

The Michigan appellate court affirmed the probate court's determination. It found there was ample evidence to support a finding that James intended that Patricia inherit the Michigan properties.

> "In resolving a dispute concerning the meaning of a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor," which is "to be carried out as nearly as possible." The settlor's intent "is gauged from the trust document itself, unless there is ambiguity." But, a probate court:
>
> > [M]ay reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. [MCL 700.7415.][49]

Once Patricia met her initial burden of proof regarding James' intent, the burden shifted to Roger and Gerald. Roger and Gerald failed to introduce any evidence to rebut the evidence presented by Patricia and the estate planning attorneys with regard to James' intent.

Additionally, the appellate court concurred that there was sufficient evidence to indicate that a mistake of law occurred.

> A mistake of law is a "mistake . . . regarding the legal effect of an agreement[.]" The probate court found defendant believed that signing the Operating Agreement, without fully organizing the LLC, was sufficient to give the Michigan properties to appellee. Testimony from both of decedent's estate planners indicated that they believed the Michigan properties could and would be transferred to the LLC after decedent's death. Given the testimonies of the estate planners the probate court did not clearly err in finding that decedent, working off of the advice of his estate planners, made a mistake of law.[50]

Comments:

No argument was apparently made that the provisions of the Trust were the product of undue influence, despite Patricia's presence during the meeting with the estate planner and James' apparent reliance upon and need of assistance from Patricia (as reflected by the estate planner's handwritten notes and the assertion by Roger and Gerald that the failure to file the Article of Organization as a ruse to entice Patricia into continuing to provide care for their father).

The importance of an estate planner's contemporaneous notes regarding a grantor's intention and the rationale for the same (particularly when children aren't being equally treated) can't be overstated. Years can pass between the drafting of an instrument and when provisions might be implemented or challenged. During that period, memories fade and/or the estate planner may no longer be available.

If a presumption of undue influence can be established, the testimony of an independent advisor or independent estate planning attorney with regard to statements made before or contemporaneous with execution regarding intent and the client's rationale may be key to rebutting the presumption and

[49] Id. at *5. Internal citations omitted.
[50] Id. at *8-9. Internal citations omitted.

enforcement of the client's stated estate planning intent. The effect of rebutting the presumption may vary from state to state, however,

> [t]he potential importance of the scrivener attorney's testimony (and contemporaneous notes) cannot be overstated, nor should it be underestimated. In some states, the "dead man statute" may preclude other witnesses from offering competent testimony because they might benefit under the instrument. An analysis of the implications of "dead man" statutes also is beyond the scope of this book. It is, however, important to understand that because of such statutes, as well as because of circumstances attendant to matters like competency and undue influence, the ability to "waive" the privilege may be of the utmost importance in preserving the testator's true intent and in the determination of the validity of an instrument.
>
> In cases where the validity of an instrument is challenged for a purported lack of capacity or because it is alleged to be the product of undue influence, the testimony of the scrivener attorney can be of significant importance. The steps the attorney took, communications had with the testator, and the attorney's observations and impressions generally will be important aspects of the proponent's case. Things the attorney may have failed to do may become important aspects of the challenger's case. Under certain circumstances, the testimony of the scrivener attorney may prove to be as important (if not more important) than the testimony of treating professionals or other medical experts.[51]

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at http://www.leimbergservices.com.

### In re Tippett Family Trust; The Importance of Attorney Involvement in the Amendment of Trusts

The potential import of testimony from the drafting attorney, regarding revisions to estate planning documents, especially when that attorney is involved in the execution process, cannot be overstated. In *In re Tippett Family Trust*[52] a Third Amendment that changed the alternate beneficiary and trustee provisions was proffered under suspicious circumstances. Despite the testimony of witnesses to execution, the probate court found that the amendment had not been signed by the grantor and was, therefore, unenforceable under the facts and circumstances presented.

Facts:

In 2002, Jerry Tippett ("Jerry") and his wife (collectively the "Grantors") created the Tippett Family Trust (the "Trust"), with the aid of an attorney from the UAW Ford Legal Services Plan. Initially, the Trust deliberately omitted their only son, Jerry D. The Grantors amended the Trust in 2009 to provide for their son, naming him as the beneficiary and first successor trustee. Jerry's friend and business partner, Lawson, was named as an alternate beneficiary and successor trustee, should their son not survive the Grantors. The First Amendment was also prepared with the assistance of an attorney supplied through the UAW Ford Legal Services Plan. After Jerry's wife died in 2016, Jerry amended the Trust for a second time. In the

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[51] Glazier, Dixon and Sweeney, *Undue Influence and Vulnerable Adults,* ABA ©2020 at pp. 145-146. Footnotes omitted.

[52] *Lawson v Goines (In re Tippett Family Trust), ___NW2d___; 2025 Mich. App. LEXIS 3134 (Ct App, Apr. 21, 2025).*

Second Amendment Jerry reaffirmed his son as beneficiary of the Trust's assets and as first successor trustee, and Lawson as the alternate beneficiary and successor trustee. The Second Amendment was also prepared by an attorney.

Jerry's son and Rebecca Goines ("Rebecca") became engaged and lived at Jerry's home, but Jerry's son died in February 2022 before he and Rebecca were married. On May 26, 2022, Jerry was admitted to hospice care and died three days later.

Lawson accepted the appointment to act as successor trustee of the Trust and served Rebecca with notice to quit Jerry's home. In response, Rebecca presented a document dated March 13, 2020 that purported to be a Third Amendment to the Trust. While that document named Jerry's son as the beneficiary, it replaced Lawson with Rebecca as the alternate beneficiary and successor trustee. The document was witnessed by Darrell Mosser("Mosser") and Tammy Hall ("Hall") and notarized by Jennifer Modi ("Modi"), but the notary block referenced the document as the Second Amendment (as opposed to Third Amendment) to the Trust. No attorney was listed on the document. Lawson contested the validity of the purported Third Amendment and filed a petition for supervised trust administration.

The court appointed a guardian ad litem ("GAL") for the Trust. The GAL reported that the Third Amendment was suspicious because: (a) it was only presented after eviction proceedings were initiated; (b) Jerry's prior trust attorneys were unaware of the document, even though the document appeared to be a verbatim reiteration of the Second Amendment other than the changes to the alternate beneficiary and successor trustee provisions; and, (c) the notary block referenced it as a Second Amendment to the Trust. Rebecca later presented declarations under oath from witnesses to the Third Amendment pursuant to which each of the witnesses attested that they witnessed Jerry sign the same and that they each signed the Third Amendment as witnesses thereto.

When called as a witness, Mosser indicated that he had been a lifelong good friend of Jerry. Rebecca testified that she had essentially grown up with Jerry from the time that she was a very little girl and was a very good friend of Jerry's son when they were growing up. Both Mosser and Rebecca testified that Lawson had a business relationship with Jerry and that Jerry and Lawson had a falling out before the Third Amendment was signed.

Rebecca also testified that Jerry had been in and out of the hospital over the last two years of his life, and during that time she provided care for him, drove him to appointments, cleaned his house and cooked his meals. She acknowledged that Jerry had a girlfriend during that period, who would from time to time provide services, but Jerry was dependent upon her to drive him because his girlfriend didn't have a driver's license.

In November 2020, Rebecca became Jerry's patient advocate and in May 2022, she became his agent under a durable power of attorney.

Mosser testified that Jerry asked him to witness a document about one week before the Third Amendment was signed and asked if he could have Mosser's ex-wife (Modi) act as notary (which Mosser then arranged). Mosser testified that the witnesses, Jerry and Jerry's son were all present when the Third Amendment was signed and that Rebecca was not present at that time. He also testified that it was Jerry's son who drafted

the Third Amendment and while Hall was present at the time of execution, he did not see her sign the document but he did see Jerry sign it.

Modi, who acted as the notary, said she had Jerry verify his identity through presentation of his driver's license. While she saw Jerry sign the document she didn't see him read the document before signing it. Modi said she also saw both witnesses sign the document and only notarized it after that occurred. Modi and Mosser indicated that Jerry appeared to be competent when he signed the Third Amendment. While Modi had kept a log of documents she had notarized, she testified the log had been lost in a flood and that she had not read the notary block which referred to the document as a Second Amendment. Modi acknowledged that she was no longer a notary and had not been a notary when she signed the declaration in support of Rebecca's petition, pursuant to which Modi swore under penalty of perjury that she was a notary public in good standing in the State of Michigan.

Rebecca said she only found the Third Amendment when she was cleaning the property following Jerry's death and that she was not aware that Jerry had named her as alternate beneficiary until after Jerry died and she located the document.

Lawson testified that he had known Jerry since 1975 and that they had started a corporation together that operated rental properties and bought and sold houses. He said their relationship was great, there was no falling out, and they shared a cell phone, a boat dock, bank account, and their interest in the company up until Jerry's death. Lawson said Jerry made him aware of the Second Amendment and that he was familiar with Jerry's signature and that the signature on the purported Third Amendment did not look like Jerry's signature. Lawson indicated that he believed that Jerry wanted his assets to go to Jerry's nieces and nephews and that was what Lawson was to do with the assets as opposed to actually retain them. Lawson also testified that he had opened a bank account with the intention to distribute all of the Trust assets to Jerry's nieces and nephews.

Holmes, a forensic handwriting and document examiner and expert on handwriting, opined that the signature on the Third Amendment did not belong to Jerry. She identified eight differences between his signature on the Third Amendment and other exemplars of documents known to contain Jerry's signature. Holmes opined "with the highest degree of probability" that the Third Amendment was not signed by Jerry.

The probate court was very troubled by the error in the notary block and found the testimony of the expert compelling. The probate court found that the Third Amendment was invalid, and this appeal ensued.

Analysis:

The appellate court found that the probate court applied the proper preponderance of the evidence standard when weighing the competing evidence regarding the validity of the Third Amendment and the appeal represented an inappropriate attack on the probate court's findings regarding the credibility of witnesses.

> The probate court expressly weighed the evidence and testimony, found that Lawton and Holmes's testimony had more convincing force, and concluded that the third amendment was invalid. The

> probate court's conclusion was based on Holmes's opinion that "with the highest degree of probability," the signature on the third amendment was not written by decedent. The court also questioned Modi's credibility based on her failure to notice (1) a glaring error in the notary block on the third amendment and (2) the untruthful statement in her declaration that she was still a notary. The court further questioned the credibility of Mosser, Modi, and [Rebecca], who each testified that the business relationship between decedent and Lawson had ended. The court found that "[t]he testimony . . . was clear that there's [sic] still exist some business relationships."[53]

Comment:

Weighing the credibility of witnesses is generally left to the purview of the trier of fact. Had Jerry again utilized counsel through the UAW Legal Services (even if he had been assigned different counsel), a different outcome may have resulted. The fact that his son drafted the amendment to benefit his fiancé in the event he didn't survive his father (during a period when Jerry appears to have been vulnerable), presents yet more suspicious circumstances and potential red flags that might have been considered had the Third Amendment been challenged as being the result of undue influence as opposed to a forgery. In the presence of suspicious circumstances, the involvement and testimony of competent independent counsel can make all the difference in preserving the validity of estate planning instruments and establishing grantor intent.

As people embrace the use of computer and/or online generated estate planning documents prepared without the active involvement of competent independent counsel, the public may be unaware that those documents may be more susceptible to attack. Attorney involvement is important not only in the drafting of instruments, but perhaps even more so in regards to the independent advice that counsel may render, as well as their participation in processes employed in an effort to decern grantor intent as well as the execution and witnessing of instruments. The absence of such involvement can result in weaknesses that may serve to undercut the potential enforcement of estate planning instruments, even when those instruments initially appear to have been validly executed, witnessed and even notarized, and thereby undercut potential enforcement of grantor desires particularly when the changes made in the document deviate from long standing historical estate planning dispositions.

CITE AS: **LISI** Estate Planning Newsletter #3213 (June 16, 2025) at http://www.leimbergservices.com.

### In Re Geraldine M. Hardy Revocable Trust[54]: Interpreting Grantor Intent

When administering a trust, issues may arise that require interpretation. When that occurs, the settlor's intent may be of tantamount importance. Much like contracts and wills, intent is generally "gauged from the trust document itself, unless there is ambiguity."[55]

> There are two types of ambiguity, latent and patent. "A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning."

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[53] Id. at *12-13.

[54] Kystad v Melton (In re Geraldine M Hardy Revocable Trust), ___NW2d___; 2025 Mich. App. LEXIS 787 (Ct App, Jan. 29, 2025).

[55] *In re Kostin*, 278 Mich App 47, 53 (2008).

> On the other hand, "[a] patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language." The presence of an ambiguity "requires a court to look outside the four corners of a will in order to carry out the testator's intent." "Accordingly, if a will evinces a patent or latent ambiguity, a court may establish intent by considering two outside sources: (1) surrounding circumstances, and (2) rule of construction." "Where there is no patent or latent ambiguity in the provisions of a will [or trust], the intention to be ascribed to the testator is that intention demonstrated in the will's plain language." [56]

In *In re Geraldine M. Hardy Revocable Trust*[57], the issue of intent may be complicated by the fact that the Trust was established through judicial proceedings at a time when it was alleged that the settlor lacked sufficient capacity to do so on her own.

Facts:

Geraldine Hardy, a psychiatrist, had no children. In 1977 she created a trust that named the Medical University of South Carolina (MUSC) as its sole beneficiary for the stated purpose of establishing a chair in her name to address the study of psychiatry of women. Geraldine funded her trust with $10. It appears she intended to ultimately fund the trust through the use of a pour-over will, but no such will was ever located.

Geraldine stopped practicing medicine in 2006 and later surrendered her medical license. In 2010, her niece, Pamela, discovered that her aunt was suffering from dementia and was living in hoarder conditions. Sometime thereafter Laura Kystad (Kystad) was appointed Geraldine's conservator and guardian. Kystad petitioned the probate court for authority to restate Geraldine's trust (Trust) in order to fulfill Geraldine's intention and desire to fund a substantial gift to the medical school. Kystad informed the court that she believed Geraldine lacked testamentary capacity, but that Geraldine nonetheless continued to express her desire to fund the educational pursuits of women in medicine. In the petition, Kystad requested that the terms of the Trust be restated to (1) provide for Geraldine's support during her lifetime, (2) provide for her heirs at law, (3) reduce or eliminate federal estate tax, and (4) grant the MUSC monies for the advancement of women in medicine. Whether the above stated goals matched Geraldine's intentions remains to be seen.

In regards to the petition, the court appointed a guardian ad litem (GAL). The GAL reported that every time she visited Geraldine, without prompting, Geraldine indicated that"

> I worked hard all my life, I've earned all of this money and I want all of it to go to this university to pay for women to get through medical school. I don't think I owe a penny to any of my relatives, I don't want them to get anything.[58]

The proposed restatement provided that when Geraldine died the Trust would be divided into two fractional share trusts, (1) one for Geraldine's heirs at law and (2) the other for MUSC. The formula utilized to determine the fractional share each trust was to receive would essentially only provide MUSC with that amount which was required to reduce the amount of estate tax owed at the time of Geraldine's death to zero or the least amount possible under the facts and circumstances then presented.

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[56] *In re Geraldine M Hardy Revocable Trust*, supra at *6-7. Internal citations omitted.
[57] *Id.*
[58] *Id.* at *3.

At the time of the hearing on the petition in 2012, Geraldine's estate approximated $10 Million. Counsel for MUSC requested that any amendment provide MUSC with a minimum of $5 Million upon Geraldine's death. Pamela's counsel responded that Geraldine was otherwise healthy and the support she required over perhaps the next 10 to 15 years might reduce the value of the Trust over that period. The court noted that administrative expenses could also reduce the value of the Trust. In addition, changes in the tax code might also significantly reduce the amount available to fund MUSC's trust share. MUSC's counsel argued that in approving the proposed restatement, "the probate court was transferring its discretion 'to Washington, D.C. to figure out what the university [was] going to get.'"[59] Nonetheless, MUSC agreed on the record to accept the proposed restated terms for the Trust and the probate court authorized execution of the restatement on Geraldine's behalf utilizing the reduce to zero fractional share provision. MUSC did not appeal.

When Geraldine died in 2018, the estate tax exemption then in effect would have resulted in MUSC receiving nothing under the formula contained in the restated trust. MUSC filed a petition requesting that the probate court reform or otherwise void the restatement under MCL 700.7415 and MCL 700.7412. Pamela requested that the trust shares be funded based upon the reduce to zero formula. The court found that the Trust was ambiguous, and that as a result the calculation of each trust share should take into consideration the 2012 (as opposed to the 2018) federal tax exemption amount. It did not address MUSC's petition to reform or otherwise void the restatement. Geraldine's heirs at law (Pamela and Jerome) appealed.

Analysis:

While other issues were addressed in the appellate decision, such as the impact of a stay granted by the appellate court upon the probate court's ability to approve the sale of real estate, this article's focus is upon whether the Trust was ambiguous and the extent to which modification might now be sought.

On appeal, the court found that the Trust wasn't ambiguous. It held that the terms at issue unambiguously provided that

> [t]he Family Trust shall consist of a fractional share of the Trust Assets. The numerator of the fraction shall equal the largest value of the Trust Assets that can pass free of federal estate tax by reason of the unified credit and the credit for state death taxes . . . allowable to [Settlor's] estate, after [enumerated reductions] . . . . The denominator of the fraction shall equal the value of the Trust Assets as finally determined for federal estate tax purposes.
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> ***
>
> …the phrase "the largest value of the Trust Assets that can pass free of federal estate tax" more clearly contemplates a future determination, because assets could not pass into the Family Trust until the settlor died.
>
> For the language to be ambiguous, it would have [to] support two different meanings: (1) that the numerator of the fraction for determining the value of the Family Trust is the amount that will be able to pass free of estate tax when the settlor dies; or (2) that the numerator is the amount that would pass free of estate tax if the settlor died at the time the trust was executed. Even if the future-tense meaning of "shall" were disregarded in favor of the mandatory/must meaning, Article III would still derive the numerator from "the largest value . . . that can pass free of the federal estate tax." There is no language in the 2012 restated trust that fixes the numerator as the

[59] *Id.* at *4.

> value that would pass free of the federal estate tax if Dr. Hardy died in 2012. Thus, the language supports only the first meaning. The court erred in finding ambiguity and in resolving the issue in MUSC's favor.[60]

However, because the probate court failed to address MUSC's petition for reformation, the matter was remanded to the probate court for further proceedings and a determination of whether reformation is appropriate.

Comment:

MCL 700.7415 provides that

> [t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[61]

The Reporter's Comments to MCL 700.7415 indicate that while this section authorizes reformation of a trust, it doesn't address resolving ambiguities through interpretation. Instead, interpretation of ambiguities is to occur pursuant to MCL 700.302(b)(v) and (vi). The Reporter's Comments to UTC §415 provides that:

> [r]eformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent.[62]

The appellate court determined that the funding formula wasn't ambiguous. Reformation due to mistakes in expression or inducement is different.

> A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.[63]

Typically, reformation is sought when the settlor executed an instrument that for one reason or another didn't comport with the settlor's intent. Here, however, the language which MUSC seeks to reform is language imposed by the court (an error of which is typically addressed via appellate processes).

The other basis upon which MUSC sought relief was pursuant to MCL 700.7412. That statute provides, in pertinent party, that:

> (1) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

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[60] *Id. at* * 7-9. Internal citations omitted.
[61] MCL 700.7415. See also UTC §415.
[62] Reporter's Comments, UTC §415.
[63] *Id*.

(2) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the settlor's stated purpose or, if there is no stated purpose, the settlor's probable intention.

(3) If a trust is terminated under this section, the trustee shall distribute the trust property as ordered by the court.[64]

This statute is based on UTC §412. The options provided for in the statute aren't mutually exclusive. However, given the record made at the time of the restatement, it would be hard to argue that a change in the exemption amount wasn't anticipated in 2012, when the court authorized the restatement. The stronger argument, given the anticipated testimony by the GAL, might be that Geraldine never intended to benefit her niece and nephew and only intended to benefit MUSC. But might the court find that MUSC's petition, in actually, represents a collateral attack on the 2012 court order (from which no appeal was taken) or that MUSC is estopped from now challenging the terms having agreed to the court's restatement in 2012?

Whether MUSC is found to be estopped from now challenging the terms is likely another issue that the court will have to grapple with on remand (and perhaps subsequent appeal). However, even if MUSC is estopped from now challenging the funding provisions, given the charitable provisions of the Trust, could the Michigan attorney general raise the issue and urge the court to modify the trust, in order to distribute the trust property, in whole or in part, in a manner consistent with the settlor's general charitable intent?

This case may help to highlight the potential benefit of depositing wills for safekeeping with the appropriate probate register or the need to otherwise take steps to properly safeguard one's will. It's unlikely that a client would go through the effort and expense of drafting a charitable trust without having the contemplated pour-over will in place. It was only because the will could not be located that the court authorized amendment of the Trust in 2012, with the same apparently being intended as the mechanism for funding of the charitable bequest, since a conservator can't create a will for a ward, but procedurally can request that the court establish or modify a trust.

CITE AS: LISI Estate Planning Newsletter #3183 (Feb. 20, 2025) at http://www.leimbergservices.com.

## Amendment and Revocation

### In re Heidi S. Siklich Revocable Trust Dated 4/28/21[65]: Revocation Occurred through Amendment of a Different Trust

When creating a revocable trust, the grantor can limit the means by which it may be amended. When no limitations appear within the confines of the trust, revocation may occur through a variety of mechanisms. In In re Heidi S. Siklich Revocable Trust Dated 4/28/21 the court found that the amendment of a different revocable by Heidi, as grantor, provided sufficient evidence of the revocation of the 2021 trust to support its termination.

Facts:

[64] MCL 700.7412.

[65] *Siklich v Siklich (In re Heide S Siklich Revocable Trust Dated 4/28/21),* ___NW2d___; 2024 Mich. App. LEXIS 9058 (Ct App, Nov. 13, 2024).

Heide Siklich's estate planning attorney was Diane Huff ("Huff"). With Huff's assistance, in 2009, Heide established a revocable trust (the "2009 Trust"). The 2009 Trust was restated in 2015 and amended again in 2022. Heide had four children. During all times pertinent to this case, her son, Martin, was acting as the trustee of the 2009 Trust.

In 2020 Heide's sister, Eva, died without a will. Heide was her sister's sole heir and beneficiary. Heide's son, Gerald, became the personal representative of Eva's decedent estate. In 2021, Heide purportedly created another trust to be the receptacle of the $750,000 inheritance she was to receive from her sister (the "2021 Trust"). The 2021 Trust named Gerald as the trustee and sole residuary beneficiary upon Heide's death.

In 2022, Heide petitioned the probate court for appointment of Martin as her conservator indicating that the need for a conservator was due to her age and physical infirmity that had rendered it difficult for her to manage her own financial affairs. In 2022, an amendment to her 2009 Trust indicated that Gerald wasn't to receive any share of her estate unless he returned funds from Eva's estate to the 2009 Trust within one year of Heide's death.

In February 2023, Martin (acting as Heidi's conservator) petitioned the probate court to determine the validity of the 2021 Trust, to supervise its administration and to enjoin Gerald's distribution of trust assets. The petition alleged that Heide had no knowledge of creating the 2021 Trust, it had not been drafted by her estate planning attorney, and it conflicted with her 2009 Trust, as amended and restated. The petition further alleged that the 2021 Trust did not comport with Heidi's estate planning desires, she never intended to benefit Gerald during her lifetime and that the 2021 Trust was a fraudulent edifice established by Gerald for his own personal benefit.

The probate court ordered Gerald to provide trust accountings for the 2021 Trust, but he failed to do so. The court appointed Huff as Heide's guardian ad litem ("GAL") and ordered the matter into mediation. Gerald failed to appear for mediation, failed to comply with discovery requests and failed to comply with an order to compel discovery. Ultimately, Gerald was held in contempt of court.

In January 2024, Heide's conservator filed a motion to terminate the 2021 Trust and distribute its assets to the trustee of the 2009 Trust. Gerald appeared in pro persona at a settlement conference at which time he was served with the motion to terminate the 2021 Trust. He contended his failures to appear for mediation, appear for hearings and to comply with discovery requests and provide accountings were because of a series of injuries and illnesses he had suffered and that the medications he was on made it difficult for him to think. He indicated that all the financial information relating to the 2021 Trust was contained in two tubs relating to other lawsuits he was involved in and he simply didn't (over the last year) have time to review the materials in the tubs (or was otherwise overwhelmed) such that he was unable to prepare the accountings or respond to discovery requests. He nonetheless contended that he was able to continue to serve as trustee of the 2021 Trust.

When asked by the court what had happened to the assets of the 2021 Trust, Gerald indicated that he spent about $15,000 for Heide's benefit, with the remaining assets being utilized to purchase a house in his sole name and fix it up. He claimed that Heide had told him she wanted nothing to do with the

inheritance and wanted him to have it. None of the assets from Eva's estate remained at the time of the status conference. The petition to terminate the 2021 Trust was set for hearing on January 30, 2024, and Gerald agreed to that date.

Par for the course, Gerald arrived late for the January 30th hearing. Huff testified at the hearing that she had met with Heide after Eva died and Heide indicated she had no recollection of ever saying she wanted her inheritance to go solely to Gerald. Instead, Heide had indicated she wanted it equally divided among her children after her death. Martin testified that as Heide's conservator he never received any funds from the 2021 Trust for Heide's benefit and that he believed Gerald had misled their mother into thinking she was signing documents to distribute the inheritance to her 2009 Trust as opposed to a new trust. He also testified that due to expenses of assisted living, Heide's resources were starting to run out.

Gerald introduced a one-page document that indicated he had purchased a home for $610,000 and that $320,000 had been lost in the stock market and in addressing legal fees and expenses (of which $35,760 was an administrative commission he paid himself). Gerald also produced a letter purportedly signed and notarized by Heide in May 2020 that indicated that she intended that Gerald inherit what she was to receive as beneficiary of Eva's estate in the event she were to die or become incapacitated and appointing him administrator of Eva's estate. Gerald indicated that the pressure he was under from other matters resulted in his lack of attention to "stuff" and that while he had proof of his mother's wishes, he acknowledged he had not produced any of it during discovery. The probate court removed Gerald as trustee.

The court then noted there was nothing in the 2021 Trust (purportedly signed by Heide) that revoked the 2009 Trust. The court found that Gerald had engaged in "suspicious actions" and because the terms of the 2021 Trust hadn't been complied with and there was an absence of documentation indicating that Eva's estate had even been distributed to the 2021 Trust, the court terminated the 2021 Trust. The court also stated, that while Heide didn't specifically revoke the 2021 Trust,

it was "highly likely" that the trust was drafted by [Gerald]; further, the trust instrument made no mention of Heide's prior trust, despite directly contravening the terms of that trust. The court noted Huff's testimony that Heide had never expressed any intention to leave all of her assets to [Gerald]. In fact, Heide had signed an amendment to her prior trust in 2022, indicating that [Gerald] would only receive his share of her estate if he returned the funds from [Eva]'s estate to the trust within one year of Heide's death. The court found that Heide had "disavowed any intention that she may have ever had that [respondent] would have free reign with the funds that Eva Norris left to her as sole beneficiary . . . and/or that he would retain 100% of any residual amount upon the death of Heide Siklich." The court concluded that the 2022 amendment manifested a clear intent to revoke the trust, and it accordingly terminated the trust under MCL 700.7602(3).[66]

Gerald filed a motion for reconsideration (with the assistance of counsel), which was denied, and an appeal ensued.

[66] Id. at *10.

Analysis:

Because all of the issues raised by Gerald in his motion for reconsideration could have been raised during the initial hearing, the Michigan appellate court sustained the probate court's denial of Gerald's motion.

The probate court had found that factors set forth in MCL 700.7706 justifying removal of a trustee had been met. Gerald didn't challenge any of those findings. He merely contended that issues he raised in his motion for reconsideration (alleging that Martin had financially and verbally abuse Heide and that the house had been purchased with the intent that Heide would live there with him) justified him remaining on as trustee. Additionally, Gerald failed to address the probate court's finding that Heide had revoked the 2021 under MCL 700.7602(3).

MCL 700.7602 provides in pertinent part that:

> (1) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to any of the following:
>
> (a) A trust created under a trust instrument executed before April 1, 2010.
>
> (b) A trust created by the exercise of a power described in section 7820a.
>
> (c) A trust created by the exercise of a power of appointment held by a trustee in a fiduciary capacity.
>
> ***
>
> (3) The settlor may revoke or amend a revocable trust in any of the following ways:
>
> (a) By substantially complying with a method provided in the terms of the trust.
>
> (b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, in either of the following ways:
>
> (i) If the trust is created pursuant to a writing, by another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust.
>
> (ii) If the trust is an oral trust, by any method manifesting clear and convincing evidence of the settlor's intent.[67]

While Heide's trust was originally created prior to April 1, 2010, it was amended and restated in 2015. Essentially, the probate court found that in the absence of a method of revocation exclusively provided for by the 2021 Trust, the 2022 amendment to the 2009 Trust provided sufficient evidence of Heide's intent to revoke or otherwise amend the 2021 Trust even though it didn't specifically refer to the 2021 Trust, its revocation or amendment.

Comment:

[67]MCL 700.7602. Also see UTC §602.

While it might have been possible to demonstrate that the 2021 Trust was the product of undue influence, the language of the 2022 amendment to the 2009 Trust appears to have provided a cleaner path for the court to find that revocation of the 2021 Trust had occurred. The appellate decision did not address the issue of potential damages owed for Gerald's breach of fiduciary duties, either as Personal Representative of Eva's Estate or as Trustee of the 2021 Trust.

Because MCL 700.7602 (and the UTC) do not limit what type of writing can provide clear and convincing evidence of a settlor's intent to revoke or amend a revocable trust, practitioners may wish to consider and discuss whether a client wants to provide for specific and exclusive ways that revocation or amendment may occur. It may not be sufficient to merely indicate that the settlor reserves the right to amend or revoke the instrument if the settlor wants to preclude different options (or as here, looking to unrelated estate planning documents) to manifest intent. The trust may need to indicate that the methods set forth in the trust are the exclusive means for revocation or amendment to occur.

The Reporter's Comments to MCL 700.7602, paragraph (3)(b) indicates that statute

> [p]rovides default rules when the terms of the trust do not provide a method for amending or revoking the trust, or the method provided in the terms of the trust is not expressly made exclusive. This provision is important for several reasons. First, if the settlor intends the terms of the trust to be exclusive, the trust must expressly state that the method of amendment or revocation is exclusive. Second, if the terms of the trust describe a means to revoke or amend a trust, but the means is not exclusive, then the default rules found in §7602(3)(b) will apply in addition to the rules contained in the trust. Finally, where a trust is silent about the means by which amendment or revocation occurs, §7602(3)(b) describes how these actions are to occur.[68]

Interestingly, the Reporter's Comments go on to indicate that MCL 700.7602(3)(b)

> [d]oes not include a provision found in UTC §602(c)(2)(A), which stated that a trust could be amended by executing a later will or codicil expressly referring to the trust or specifically devising property that would otherwise have passed according to the terms of the trust. [69]

Nonetheless, the court held that the 2022 amendment of the 2009 Trust (which didn't expressly refer to the 2021 Trust) was sufficient under the facts and circumstances presented to revoke and/or amend the 2021 Trust.

While there were probably many factors that led the probate (and appellate) court to conclude that the 2021 Trust should either not be honored or terminated, the Siklich case shines a light on the importance of considering how a revocable trust might be amended or revoked and whether, and to what extent, the mechanisms set forth will be identified as the only operative means of doing so.

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[68] MCL 700.7602 Reporter's Comments.
[69] Id.

## Due Execution

### In re Estate of Pope[70]: The Potential Importance of the Presumption of Due Execution

Shifting burdens of proof can be confusing. Generally, a will that has been signed and witnessed by two individuals will be presumed to have been duly executed. Nonetheless, the burden of proving due execution generally falls on the proponent of the will. Understanding and meeting the initial elements for a valid will can help to establish a presumption of due execution, that may be rebutted if the challenger establishes an irregularity that then requires the proponent to prove due execution.

Facts:

Dolores Maxine Pope ("Dolores") died on July 24, 2023. She was survived by her two children, Troy and Lisa. On August 18, 2023, Lisa requested informal probate of Dolores' will and to be appointed her Personal Representative. The will appended to the application for informal probate was signed by Dolores and reflected the signature of two witnesses (each of whom were employees of the attorney that drafted the will). That will disinherited Troy as well as Dolores' step-children and each of their lineal descendants.

The will reflected that:

> I, DOLORES M. POPE, the Testatrix sign my name to this instrument on April 17, 2009. I certify or declare under penalty of perjury under the law of the state of Michigan that the statements in this document are true. I declare that this document is my will; that I sign it willingly or willingly direct another to sign for me; that I execute it as my voluntary act for the purpose expressed in this will; and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.
>
> * * *
>
> We, Mary Ann Garfi and Dawn R. Kelly, the witnesses, sign our names to this document and certify or declare under penalty of perjury under the law of the state of Michigan that all of the following statements are true; the individual signing the document as the Testatrix executes the document as her will, signs it willingly or willingly directs another to sign for her, and executes it as her voluntary act for the purposes expressed in this will; each of us, in the presence and hearing of DOLORES M. POPE signs this will as witness to the Testatrix's signing; and, to the best of our knowledge, the Testatrix is eighteen years of age or older, of sound mind, and under no constraint or undue influence.[71]

Troy alleged that the will was not executed in accordance with the legal formalities required by MCL 700.2502(1), was not Dolores' will, questions existed as to the chain of custody for the will, and it was not

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[70] *Mills v Fink (In re Est of Pope)*, ___NW2d___; 2024 Mich. App. LEXIS 9133 (Ct App, Nov. 14, 2024).

[71] Id. at *3-4.

self-proving under MCL 700.2504. The probate court permitted discovery with regard to issues surrounding the drafting, execution and signing of the will. The witnesses to the execution of the will and attorney who drafted the will were each deposed.

The attorney testified that he drafted Dolores' will after he interviewed her on the phone. He also met with her at the time the will was signed. He did not have any independent recollection of the meeting that had occurred 13 or 14 years earlier, but in preparation for his deposition he reviewed his notes which helped him to recall events surrounding the drafting of the will. He could not remember if he was present during the actual signing of the will, but he did recall that Dolores had two children, a boy and a girl and that Dolores wanted to disinherit her son and leave everything to her daughter. His notes also reflected his impression that Dolores was mentally competent. The attorney testified that he used a document assembly program when drafting wills and that he then customized the will to address Dolores' desire to disinherit one of her children. The program did not insert page numbers when generating documents. He recognized the names of the witnesses as individuals who had worked with him, but again had no independent recollection of the actual execution of the will by Dolores. He testified that the execution procedure he utilized didn't include a requirement that the testatrix or witnesses initial each page. Upon review of the will he found nothing unusual and that the distribution scheme matched his notes and reflected what Dolores had indicated she intended with regard to disposition of her estate.

Neither of the witnesses recalled Dolores executing the will, but each recognized their own signatures on the will as a witness. One of the witnesses testified that the form of the will comported with those that were prepared by the office and that the signature pages went with the other pages. The other witness testified that there was no procedure in their office for initialing pages and she could not recall if the attorneys numbered the pages of wills they prepared.

Following the close of discovery, Lisa moved for summary disposition contending that Troy had failed to state a claim upon which relief could be granted; there were no genuine issues of material fact; and, that Dolores' will met the legal formalities of a valid will in Michigan. Troy countered that the will should not be admitted because it was not self-proving.

The probate court found that although the will was not self-proving, it was nonetheless a properly executed will and formally admitted it to probate. Troy appealed.

Analysis:

The court held it knew of "… 'no rule of law which makes the probate of a will depend upon the recollection or even the veracity of a subscribing witness.'"[72] MCL 700.2502 merely requires that for a will to be considered valid it be (a) in writing, (b) signed by the testatrix (or in her name by someone in her presence and at her direction), and (c) signed by at least 2 witnesses, each of whom signed within a reasonable time after he or she witnessed either the signing of the will or following the testatrix's acknowledgment that she signed the will.

[72] Id. at *13.

MCL 700.3407(1)(b) states: "A proponent of a will has the burden of establishing prima facie proof of due execution in all cases and, if the proponent is also a petitioner, prima facie proof of death and venue." MCL 700.3407(1)(d) states: "A party has the ultimate burden of persuasion as to a matter with respect to which the party has the initial burden of proof."[73]

A prima facie case of validity (and due execution) is established when each of the elements of MCL 700.2502 have been satisfied. Once all of those elements have been met, the burden of production essentially shifts to the opponent to come forward with some evidence of an irregularity (e.g. fraud, undue influence, lack of capacity, forgery).

Here, the probate court found that

> …there was a valid will under MCL 700.2502(1) "based on the testimony of witnesses." The trial court noted the "terms of the [w]ill follow in a chronological order. [The decedent] did sign it. It is dated April 17, 2009. . . ." The trial court continued:
>
> > There is really no argument that she wasn't competent. There's no argument of undue influence. The document is labeled as her Last Will and Testament. The document is witnessed . . . by two witnesses who signed it, and their statement, in her presence.[74]

It also relied upon the testimony of the drafting attorney that reflected he interviewed Dolores to determine her estate planning desires and recalled that she wanted to disinherit her son and that there was nothing unusual about the form or content of the will from how he drafted UAW wills. He was able to delineate, through his testimony, his normal procedures when drafting a will and his practice of always meeting with the client to go over the terms of the document right before they signed it, the process by which they would "back" and staple the will and that everything about Dolores' will appeared to comport with those procedures.

Despite the witnesses' inability to recall meeting with Dolores or actually witnessing her will, the probate court found that was not unusual. One of the witnesses testified when Dolores' will was executed some 15 years ago, the law office had 3 or 4 signings a day.

While complying with the requirements of a self-proved will statute (such as MCL 700.2505[75]) may eliminate the need for the testimony of a witness, even a self-proved will can still be contested for all the other reasons (other than the signature requirements) that any other will may be.[76] The effect of a self-proved will is merely to avoid the necessity of witness testimony in order to have a will admitted to

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[73] In re Pope, supra at *9.

[74] Id. at *11.

[75] See also UTC §2-504.

[76] See MCL 700.2505 Reporter's Comment.

probate.[77] However, even when a will isn't considered self-proving it can generally be admitted for informal probate without the need for witness testimony.[78]

While Troy argued that the will was fraudulent, he failed to properly plead fraud in his petition. In this regard the court found that

> MCR 2.112(B)(1) states, "[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." "General allegations will not suffice to state a fraud claim." In support of this claim, [Troy] offers his affidavit. [Troy] stated he lived with the decedent "for almost a year prior to her death," took care of the decedent, and maintained her property. After the decedent's death, [Lisa] "stormed into the house . . . and dragged the safe across the floor and out of the house." [Troy] stated the decedent told him "prior to her death," that [Troy] and [Lisa] "were the beneficiaries of [the decedent's] property." [Lisa] told [Troy] "the purported will was found in the safe which she took from the house." The only statement that gives us pause is that [Troy] believed "based on what my mother told me" that "any wills [the decedent] prepared left things to [Lisa] and I equally." But this fails to rise to the level of particularity required under the court rules. What did mother say prior to her death to lead [Troy] to believe that? Further, the decedent's will was made in 2009, and the decedent passed away in 2023. Even if she allegedly made statements as asserted by [Troy], there is no evidence that the will was rescinded or that another (more recent) will was made.
>
> Because [Troy] failed to sufficiently plead any allegation of fraud, his affidavit is insufficient to create a genuine issue of material fact as to the validity of the will.[79]

Because the will was not self-executing (and as a result of Troy's objections needed to be formally admitted), the trial court relied on the testimony presented as to the attorney's common procedures, the notes contained in his file and the attorney's determination that Dolores was of sound mind and under no constraint or undue influence, in finding that testimony sufficient for admission of the will to probate under the facts and circumstances presented. The appellate court held that

> MCL 700.3406(1) does not explicitly require an evidentiary hearing, as [Troy] asserts. MCL 700.3406(1) also states: "Due execution of an attested or unattested will may be proved by other evidence." The trial court did not err by accepting the testimony on a motion for summary disposition, which allows the trial court to consider evidence beyond the pleadings, such as depositions. See MCR 2.116(G)(2). In this case, due execution was proven by the testimony of Kelly and Garfi.[80]

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[77] Id.

[78] Id.

[79] Id. at *15-17. Internal citations omitted.

[80] Id. at * 15.

Comment:

Even though a will need not be self-proving, complying with statutory requirements for creation of a self-proving will has some advantages, but is not generally a necessity. Some states have even adopted a "harmless error rule" or "dispensing power" that can result in the admission of a non-conforming will to probate on a finding of clear and convincing evidence that the writing comports with the decedent's testamentary intent and was intended as a testamentary instrument.

An important take-away may be the importance of an established process that is consistently utilized and noted when it is not. Whether the attorney only notes exceptions to the process or uses signing memos, checklists or other processes as part of the execution process, having a consistent process can prove helpful in establishing due execution. Having the client indicate the intent to omit an heir at law and the rationale for doing so in front of the witnesses at the time of execution can also be helpful. One might also consider having the client indicate who their heirs at law are and a general statement of their net worth in front of the witnesses as it can prove helpful in addressing any questions that might arise as to whether the client had sufficient capacity at the time the will was executed.

Contemporaneous notes made during or immediately following the estate planning meeting with the client, notation of who made the initial contact if done by a beneficiary, as well as inclusion of any important comments that the client might have made at the time of execution (particularly when heirs at law are not being treated equally), may prove helpful when questions are later raised as to whether the client had sufficient capacity to engage in the plan and was voluntary in nature. Remember, it may be many years before a challenge is levied against a will or trust. During the intervening period memories fade, the attorney may die or be incapacitated and the witnesses may no longer be alive, competent or found. Planning ahead for such eventualities can provide value to a client and the enforcement of their intent.

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### In re Heide S. Siklich Revocable Trust Dated 4/28/21;[81] The Potential Importance of the Presumption of Due Execution

When creating a revocable trust, the grantor can limit the means by which it may be amended. When no limitations appear within the confines of the trust, revocation may occur through a variety of mechanisms. In *In re Heide S. Siklich Revocable Trust Dated 4/28/21* the court found that the amendment of a different revocable by Heidi, as grantor, provided sufficient evidence of the revocation of the 2021 trust to support its termination.

Facts:

Heide Siklich's estate planning attorney was Diane Huff ("Huff"). With Huff's assistance, in 2009, Heide established a revocable trust (the "2009 Trust"). The 2009 Trust was restated in 2015 and amended again

[81] Siklich v. Siklich (In re Heide S. Siklich Revocable Trust Dated 4/28/21), ___NW2d _____; 2024 Mich. App. LEXIS 9058 (Ct App, Nov. 13, 2024).

in 2022. Heide had four children. During all times pertinent to this case, her son, Martin, was acting as the trustee of the 2009 Trust.

In 2020,Heide's sister, Eva, died without a will. Heide was her sister's sole heir and beneficiary. Heide's son, Gerald, became the personal representative of Eva's decedent estate. In 2021, Heide purportedly created another trust to be the receptacle of the $750,000 inheritance she was to receive from her sister (the "2021 Trust"). The 2021 Trust named Gerald as the trustee and sole residuary beneficiary upon Heide's death.

In 2022, Heide petitioned the probate court for appointment of Martin as her conservator indicating that the need for a conservator was due to her age and physical infirmity that had rendered it difficult for her to manage her own financial affairs. In 2022, an amendment to her 2009 Trust indicated that Gerald wasn't to receive any share of her estate unless he returned funds from Eva's estate to the 2009 Trust within one year of Heide's death.

In February 2023, Martin (acting as Heidi's conservator) petitioned the probate court to determine the validity of the 2021 Trust, to supervise its administration and to enjoin Gerald's distribution of trust assets. The petition alleged that Heide had no knowledge of creating the 2021 Trust, it had not been drafted by her estate planning attorney, and it conflicted with her 2009 Trust, as amended and restated. The petition further alleged that the 2021 Trust did not comport with Heidi's estate planning desires, she never intended to benefit Gerald during her lifetime and that the 2021 Trust was a fraudulent edifice established by Gerald for his own personal benefit.

The probate court ordered Gerald to provide trust accountings for the 2021 Trust, but he failed to do so. The court appointed Huff as Heide's guardian ad litem ("GAL") and ordered the matter into mediation. Gerald failed to appear for mediation, failed to comply with discovery requests and failed to comply with an order to compel discovery. Ultimately, Gerald was held in contempt of court.

In January 2024, Heide's conservator filed a motion to terminate the 2021 Trust and distribute its assets to the trustee of the 2009 Trust. Gerald appeared in pro persona at a settlement conference at which time he was served with the motion to terminate the 2021 Trust. He contended his failures to appear for mediation, appear for hearings and to comply with discovery requests and provide accountings were because of a series of injuries and illnesses he had suffered and that the medications he was on made it difficult for him to think. He indicated that all the financial information relating to the 2021 Trust was contained in two tubs relating to other lawsuits he was involved in and he simply didn't (over the last year) have time to review the materials in the tubs (or was otherwise overwhelmed) such that he was unable to prepare the accountings or respond to discovery requests. He nonetheless contended that he was able to continue to serve as trustee of the 2021 Trust.

When asked by the court what had happened to the assets of the 2021 Trust, Gerald indicated that he spent about $15,000 for Heide's benefit, with the remaining assets being utilized to purchase a house in his sole name and fix it up. He claimed that Heide had told him she wanted nothing to do with the inheritance and wanted him to have it. None of the assets from Eva's estate remained at the time of the status conference. The petition to terminate the 2021 Trust was set for hearing on January 30, 2024, and Gerald agreed to that date.

Par for the course, Gerald arrived late for the January 30th hearing. Huff testified at the hearing that she had met with Heide after Eva died and Heide indicated she had no recollection of ever saying she wanted her inheritance to go solely to Gerald. Instead, Heide had indicated she wanted it equally divided among

her children after her death. Martin testified that as Heide's conservator he never received any funds from the 2021 Trust for Heide's benefit and that he believed Gerald had misled their mother into thinking she was signing documents to distribute the inheritance to her 2009 Trust as opposed to a new trust. He also testified that due to expenses of assisted living, Heide's resources were starting to run out.

Gerald introduced a one-page document that indicated he had purchased a home for $610,000 and that $320,000 had been lost in the stock market and in addressing legal fees and expenses (of which $35,760 was an administrative commission he paid himself). Gerald also produced a letter purportedly signed and notarized by Heide in May 2020 that indicated that she intended that Gerald inherit what she was to receive as beneficiary of Eva's estate in the event she were to die or become incapacitated and appointing him administrator of Eva's estate. Gerald indicated that the pressure he was under from other matters resulted in his lack of attention to "stuff" and that while he had proof of his mother's wishes, he acknowledged he had not produced any of it during discovery. The probate court removed Gerald as trustee.

The court then noted there was nothing in the 2021 Trust (purportedly signed by Heide) that revoked the 2009 Trust. The court found that Gerald had engaged in "suspicious actions" and because the terms of the 2021 Trust hadn't been complied with and there was an absence of documentation indicating that Eva's estate had even been distributed to the 2021 Trust, the court terminated the 2021 Trust. The court also stated, that while Heide didn't specifically revoke the 2021 Trust,

> it was "highly likely" that the trust was drafted by [Gerald]; further, the trust instrument made no mention of Heide's prior trust, despite directly contravening the terms of that trust. The court noted Huff's testimony that Heide had never expressed any intention to leave all of her assets to [Gerald]. In fact, Heide had signed an amendment to her prior trust in 2022, indicating that [Gerald] would only receive his share of her estate if he returned the funds from [Eva]'s estate to the trust within one year of Heide's death. The court found that Heide had "disavowed any intention that she may have ever had that [respondent] would have free reign with the funds that Eva Norris left to her as sole beneficiary . . . and/or that he would retain 100% of any residual amount upon the death of Heide Siklich." The court concluded that the 2022 amendment manifested a clear intent to revoke the trust, and it accordingly terminated the trust under MCL 700.7602(3).[82]

Gerald filed a motion for reconsideration (with the assistance of counsel), which was denied, and an appeal ensued.

Analysis:

Because all of the issues raised by Gerald in his motion for reconsideration could have been raised during the initial hearing, the Michigan appellate court sustained the probate court's denial of Gerald's motion.

The probate court had found that factors set forth in MCL 700.7706 justifying removal of a trustee had been met. Gerald didn't challenge any of those findings. He merely contended that issues he raised in his motion for reconsideration (alleging that Martin had financially and verbally abuse Heide and that the house had been purchased with the intent that Heide would live there with him) justified him remaining on as trustee. Additionally, Gerald failed to address the probate court's finding that Heide had revoked the 2021 under MCL 700.7602(3).

[82] Id. at *10.

MCL 700.7602 provides in pertinent part that:

> (1) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to any of the following:
>
> (a) A trust created under a trust instrument executed before April 1, 2010.
>
> (b) A trust created by the exercise of a power described in section 7820a.
>
> (c) A trust created by the exercise of a power of appointment held by a trustee in a fiduciary capacity.
>
> ***
>
> (3) The settlor may revoke or amend a revocable trust in any of the following ways:
>
> (a) By substantially complying with a method provided in the terms of the trust.
>
> (b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, in either of the following ways:
>
> (i) If the trust is created pursuant to a writing, by another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust.
>
> (ii) If the trust is an oral trust, by any method manifesting clear and convincing evidence of the settlor's intent.[83]

While Heide's trust was originally created prior to April 1, 2010, it was amended and restated in 2015. Essentially, the probate court found that in the absence of a method of revocation exclusively provided for by the 2021 Trust, the 2022 amendment to the 2009 Trust provided sufficient evidence of Heide's intent to revoke or otherwise amend the 2021 Trust even though it didn't specifically refer to the 2021 Trust, its revocation or amendment.

Comment:

While it might have been possible to demonstrate that the 2021 Trust was the product of undue influence, the language of the 2022 amendment to the 2009 Trust appears to have provided a cleaner path for the court to find that revocation of the 2021 Trust had occurred. The appellate decision did not address the issue of potential damages owed for Gerald's breach of fiduciary duties, either as Personal Representative of Eva's Estate or as Trustee of the 2021 Trust.

Because MCL 700.7602 (and the UTC) do not limit what type of writing can provide clear and convincing evidence of a settlor's intent to revoke or amend a revocable trust, practitioners may wish to consider and discuss whether a client wants to provide for specific and exclusive ways that revocation or amendment may occur. It may not be sufficient to merely indicate that the settlor reserves the right to amend or revoke the instrument if the settlor wants to preclude different options (or as here, looking to unrelated estate planning documents) to manifest intent. The trust may need to indicate that the methods set forth in the trust are the exclusive means for revocation or amendment to occur.

The Reporter's Comments to MCL 700.7602, paragraph (3)(b) indicates that statute

[83]MCL 700.7602. Also see UTC §602.

> [p]rovides default rules when the terms of the trust do not provide a method for amending or revoking the trust, or the method provided in the terms of the trust is not expressly made exclusive. This provision is important for several reasons. First, if the settlor intends the terms of the trust to be exclusive, the trust must expressly state that the method of amendment or revocation is exclusive. Second, if the terms of the trust describe a means to revoke or amend a trust, but the means is not exclusive, then the default rules found in §7602(3)(b) will apply in addition to the rules contained in the trust. Finally, where a trust is silent about the means by which amendment or revocation occurs, §7602(3)(b) describes how these actions are to occur.[84]

Interestingly, the Reporter's Comments go on to indicate that MCL 700.7602(3)(b)

> [d]oes not include a provision found in UTC §602(c)(2)(A), which stated that a trust could be amended by executing a later will or codicil expressly referring to the trust or specifically devising property that would otherwise have passed according to the terms of the trust. [85]

Nonetheless, the court held that the 2022 amendment of the 2009 Trust (which didn't expressly refer to the 2021 Trust) was sufficient under the facts and circumstances presented to revoke and/or amend the 2021 Trust.

While there were probably many factors that led the probate (and appellate) court to conclude that the 2021 Trust should either not be honored or terminated, the Siklich case shines a light on the importance of considering how a revocable trust might be amended or revoked and whether, and to what extent, the mechanisms set forth will be identified as the only operative means of doing so.

**CITE AS: LISI** Estate Planning Newsletter #3162 (December 2, 2024)
at http://www.leimbergservices.com.

## Harmless Error

### In re Estate of Frankford[86]; Notes Found with an Unsigned Will Held to be a Will Under the Harmless Error Rule

Under MCL 700.2503[87] a document or writing that isn't executed, dated or witnessed or doesn't otherwise qualify as a holographic Will, can nonetheless be found to be a decedent's Will if the proponent can establish by clear and convincing evidence that the decedent intended it to be (1) his Will, (2) a partial or complete revocation of his Will, (3) an addition or alteration to his Will, or (4) a partial or complete revival of a formerly revoked Will or portion thereof.

In *In re Estate of Frankford,*[88] a handwritten note that was located adjacent to an unexecuted Will, was held to be a Will based upon testimony presented during a bench trial that established the decedent's intent.

Facts:

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[84] MCL 700.7602 Reporter's Comments.
[85] Id.
[86] *Frankford v Fultz (In re Est of Frankford)*, ___NW2d___; 2025 Mich. App. LEXIS 1271 (Ct App, Feb. 18, 2025).
[87] See also UPC §2-503.
[88] Id.

David Frankford ("David") was married to his wife, Debora, for 33 years prior to her death in 2015. Debora came to their marriage with children from a prior relationship. Debora's children were April and Chad. April had five children and Chad had two. Between April and Chad they cumulatively had nine grandchildren. David also had a brother, Michael.

After Debora died, in 2015 David met with an attorney and had her prepare a Will, Revocable Living Trust, Durable Power of Attorney, Medical Power of Attorney, HIPAA Authorization and an enhanced life estate deed. The deed reflected that April was to receive his home in Holly, Michigan upon his death. The unsigned Will nominated April's daughter, Courtnie, as his personal representative, and April as her successor. The unsigned Trust nominated Courtnie as the successor trustee following David's death and if she was unable to act, then April was to succeed her. The designated beneficiaries under the Trust were Debora and Chad's grandchildren and great-grandchildren. Michael was not a beneficiary under any of the instruments prepared by the attorney.

For unknown reasons, after receiving the draft estate planning documents, David never arranged to return to the attorney's office to have them finalized and executed. David died seven years later never having signed any of the estate planning documents that the attorney had prepared.

Following David's death, Michael petitioned the probate court for administration of David's intestate estate and was appointed personal representative. Courtnie filed a competing petition to be appointed personal representative and to have an unsigned Will admitted to probate.

Courtnie had found a packet of handwritten documents inside a box in what had been Debora's computer room. None of those documents were dated or signed. Under those documents were the unsigned draft estate planning documents that the attorney had prepared in 2015 for David's review. It is unclear when the notes were prepared. At trial Courtnie testified that David had told her where to find his Will and these documents were located where he had told her to look.

The first two pages of the documents Courtnie found consisted of a list of David's guns. The third page was a note about a PNC Bank beneficiary form that reflected an account number and David's written indication that "this is for grandkids college". Page four included a listing of the names of David's step-children, step-grandchildren and step great-grandchildren. Pages five and six represented a numbered list titled "how to set up will or trust". Next to property deeds, David had written "house- April" with the words written of "ladybird" and "cabin-kids" with the word "trust". Pages seven and eight had a list of 15 items, with 15 being the unsigned will. That list reflected, in relevant part:

> (1) Courtnie's name correct spelling (last name) [her name had been misspelled in the draft documents as Courtney]
>
> (2) Deed ID. # for McKinley (to grandkids)
>
> (3) Bank Acc # I need to put Courtnie's name on
>
> (4) PNC Bank Acc. # for school trust. Use by 21 or divide between grandkids when Autumn turns 25

* * *

(9) I need to sell Lakewood Shores property

(10) My IRA divide between grandkids[.] Need benf. form for Courtnie[.] 70% to grandkids + 30% to great grandkids[.] Must be 25 yrs old to get money.

* * *

(13) I am to be cremated, half of my ashes on top of Deb + half dump in the river[.] Next float trip down the river, take $2,000.00 from savings acc to pay for (up north party) and the luncheon at my memorial service.

(14) I will set up with Dryer Funeral Home a prepaid cremation, NO viewing[.] Have a memorial service within [one] month and a luncheon for my family +friends, you can have a memorial service + luncheon at the house if you want to, put up a good spread of food + booze, keep at least $500 for up north service[.] When you throw ashes in river have a party. I am not religious so do not have a preacher, kids can say something like they did at gram[’s] funeral.

(15) April to get the house, split up contest [sic]. Among kids except for personal thing [sic]. Like furniture to designated people[.] I will make a list.

Pages 9 through 12 were the May 2015 notes decedent wrote during or after his meeting with [the attorney].[89]

Michael, who would have been David’s sole heir at law had David died intestate, argued that in the seven years following David’s receipt of the draft Will he never signed it and in the intervening period following his receipt of the draft estate planning documents David’s relationship with Debora’s children, grandchildren and great grandchildren had soured because they weren’t inclusive of David’s new girlfriend, Michele. Michael testified that he and David were very close and that he visited with his brother once a week and talked to him on the phone weekly.

Michael argued the documents presented by Courtnie were “mere drafts” and weren’t intended by David to be his Will and that the handwritten notes hadn’t been verified by a handwriting expert as belonging to David. However, Courtnie presented witnesses to establish David’s intent.

The attorney who drafted the estate planning documents testified that her notes reflected that David knew he had a brother and that he was intentionally excluding him from his estate plan. David’s friend, Linda, testified that she had been David’s friend for over 45 years and he considered his step family to be his family. Linda also testified that she believed there had been conflict between Michael and David and that David would become tense anytime his brother’s name was mentioned. David did express concern that his step-family might not take well to his dating someone shortly after Debora’s death, but he also told her

[89] Id. at *4-5

that he had gone to an attorney and that his estate was "all in order and it was just going to April and the kids".[9091]

David's friend, Greg, testified that he had been friends with David for over 20 years and that David had an excellent relationship with his step family and was always talking about them and things that they had done together. Greg said David told him he didn't intend to leave anything to Michael, other than perhaps an old rifle that their father had given David which Michael wanted. Greg also testified that, in approximately 2019, David told him he had gone to a female attorney in town and had a Will made leaving his house to April and everything else "to his 'grandchildren and his daughter'"[92]. Greg was left with the impression that Courtnie was to administer the estate.[93]

Courtnie testified that after Debora died, David spoke to her and some of the grandchildren together about his estate plan. He told them that his bank account was for all the (step) grandchildren's education and that Courtnie needed to prepare to administer matters. He also indicated that April was to get the house but not any money and that the balance of his money was being split 70% to the (step) grandchildren and 30% to the (step) great grandchildren. He also told them to behave when they were up north because they would ultimately receive that property. Courtnie said he didn't show her the actual Will but David did show her the folder in which it was located in the box that was in Debora's computer room, where he had told her to look for his Will.

In 2019, David was diagnosed with cancer. After that diagnosis, David told Courtnie he wanted his girlfriend, Michele, to get a chair in his living room. Courtnie testified that she joked with him that he better have a Will and that David responded that she knew he had one. The last conversation Courtnie testified she had with David in which he referenced his estate plan occurred around July 2022. During that conversation she indicated she wanted to install a toilet at the property and David told her she could do that with the money she would get when he died.

Contrary to Michael's testimony, Courtnie testified that she and her family had a great relationship with David, that they were very close, they viewed him as their father and grandfather and not a step relative. They spent holidays and family celebrations together and that David took Courtnie's daughter for ice cream every week since Debora died. Various grandchildren testified to David being very involved in their lives and that they had discussions with David about his estate plan that were consistent with the testimony presented by Courtnie. Each testified that they were led to believe that David had his estate plan in place and in order, including his funeral arrangements.

One of the great-grandchildren had cancer. When that child was under-going cancer treatments at the same time as David was, David called him every day during the year before David's death, to tell him that he loved him. All the grandchildren testified that they had a close relationship with David. Chad's kids

[90] Id at *7.
[91] It may be noteworthy that at this time, Debora's son, Chad was apparently deceased.
[92] Frankford, supra at *8.
[93] Id. at *8.

testified that following Chad's death, David was their father figure. One of Chad's daughters met David for lunch at least once every month.

April testified that while David never told her he had a Will, he did indicate that his estate plan was in order and that she was to receive his house and the other property would go to the (step) grandchildren.

Pictures of Debora's children, grandchildren and great grandchildren that included David and his girlfriend, Michele, throughout the years after Debora's death were also introduced into evidence.

Michele testified that she lived with David during the last two years of his life. While she had a strained relationship with April, she testified that the relationship with the step-grandchildren and great grandchildren was "mostly good", and that she attended holiday gatherings with the step grandchildren and great grandchildren, and Michael (but not April). When those gatherings were not at April's, David would go and see April for an hour or two before hand and then meet up with Michele and the rest of the family. She said David's relationship with his brother was good. She also testified that David told her he had put Courtnie on his checking and safety deposit box and had met with an attorney back in 2015, but about 3 weeks before he died, he told her he hadn't complete his Will. When David died, Michele contacted Courtnie (not Michael). Michele couldn't explain why she hadn't called Michael.

At the conclusion of a 2-day bench trial, the court found the testimony of David's friends and step family to be very credible and that the list of 15 items on pages 7 and 8 were intended to be David's Will. The court indicated that the notes, draft documents and their testimony were all consistent. The court then acknowledged that the handwritten list didn't address all of David's assets and as such found David's statement to Michele (that he hadn't finished his Will) wasn't inconsistent with admission of the list as David's Will under MCL 700.2503 (otherwise known as the harmless error rule) as a result of the clear and convincing evidence presented. This appeal followed.

Analysis:

In a Will contest, the proponent bears the burden of establishing a prima face case that the Will was duly executed. There was no dispute that neither the list or the draft Will were duly executed in accordance with MCL 700.2502 and that the list didn't meet the requirements of a holographic Will because it wasn't dated or signed by David (even though it was in his handwriting). Therefore, the analysis undertaken by the court related to whether it could be established by clear and convincing evidence that the list was intended to constitute David's Will. Quoting *In re Estate of Horton*[94] (a Will on a Cellphone case) the court found that

> "[u]nder MCL 700.2503, any document or writing can constitute a valid will provided that the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will." In other words, the document or writing must "evince testamentary intent, meaning that it must operate to transfer property only upon and by reason of the death of the maker[.]" "Moreover, the document must

[94] In re Estate of Horton, 325 Mich App 325 (2018).

be final in nature; that is, [m]ere drafts or a mere unexecuted intention to leave by will is of no effect." [95]

What the appellate court found of importance was that

> …the list divided up decedent's bank accounts and disposed of the house, the property, and various items of personal property. Decedent gave explicit instructions for his cremation, funeral, spreading of his ashes, and celebration of life. Decedent explained he would prepay for his cremation and identified from which bank account to remove the funds. Decedent specifically documented how he wanted his remains handled and property divided posthumously. It is a reasonable inference that decedent wrote the list in contemplation of his death and intended the items in the list to govern after his passing. ("Ultimately, in deciding whether a person intends a document to constitute a will, the question is whether the person intended the document to govern the posthumous distribution of his or her property.").
>
> The statutory provisions in the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et seq., "must be liberally construed and applied to promote its underlying
>
> purposes and policies . . . including to discover and make effective a decedent's intent in distribution of the decedent's property[.]" "In considering the decedent's intent, 'EPIC permits the admission of extrinsic evidence in order to determine whether the decedent intended a document to constitute his or her will.' " Here, the trial court considered the testimony of numerous witnesses along with the unsigned estate planning documents. Decedent's friends and step-family members testified decedent repeatedly told them that he had met with a lawyer and his affairs were in order. Testimony was consistent that decedent intended for the house to go to April, Courtnie to be in charge of distribution, and the property and money to be split among the step-grandchildren and step-great-grandchildren. While Courtnie was the only one with whom decedent specifically used the word "will," he also physically showed her where it was located in a box in Debora's "computer room." Upon decedent's death, the list was located along with a packet of documents reinforcing decedent's purported testamentary wishes inside the identified box.[96]

It appears that Michael's testimony was based more on conjecture and opinion about what his brother wanted or the basis upon which he may have failed to sign any of the documents. As a result,

> [t]he trial court found the testimony of decedent's friends and step-family to be credible and consistent with decedent's testamentary intentions in accordance with the packet of documents submitted. The trial court found decedent "told everybody what he wanted, he wrote down what he wanted. The lawyer put into writing what he wanted. It's all consistent." Although parts of the list could be construed as a "to-do list" or as edits to the estate planning documents, testimony consistently indicates decedent thought his affairs were in order. The trial court found the list was

[95] In re Frankford, supra at *. Internal citations omitted.
[96] Id at *17-18. Internal citations omitted.

> in decedent's handwriting and was "the document that [decedent] intended, as he told Courtnie, to control the disposition of his assets after his death." Considering all of the evidence, we hold that the trial court did not err in finding by clear and convincing evidence that decedent intended the list to constitute his will. Any conflicting evidence is not sufficiently strong to leave us with a definite and firm conviction that a mistake has been made.[97]

Therefore, the appellate court found that the trial court didn't err when it admitted the "list" to probate as David's Will.

Comment:

In a different case, the Michigan courts found that the failure of a decedent to sign estate planning documents wasn't necessarily fatal to a potential determination that the document was intended to represent the decedent's Will. *See, In re Attia Estate*[98]. *In re Frankford* differs from *In re Attia Estate,* in that here the court admitted David's handwritten notes as opposed to the draft Will prepared by the attorney, even though it could have found (based upon the testimony presented) that the notes were evidence of David's intention that the draft documents operate as his Will (and there is no requirement that a Trust actually be "duly" executed"). *In re Attia Estate*[99] may nonetheless be instructive.

In *In re Estate of Attia*[100]*,* the Michigan appellate court held that the probate court erred when it concluded that an unsigned Will could not be admitted to probate as a matter of law. In *Attia* the court held that since MCL 700.2503 (the harmless error rule) permits the admission of a Will that doesn't meet the signature and witnessing requirements of MCL 700.2502(1)(b), as long as the proponent established by clear and convincing evidence that the decedent intended the document to be the decedent's Will it could be admitted to probate. In *Attia* the unsigned Will had been prepared by the decedent's attorney and was scheduled to be executed on the day that the decedent died. The court in *Attia* looked to New Jersey case law for guidance. In *In re Probate of Will & Codicil of Macool*[101] the New Jersey appellate court held that a Will didn't need to be signed by the testator to be admitted to probate. The reason that court gave in reaching that conclusion was it reasoned that to hold otherwise would render the harmless error rule meaningless with regard to the formalities of execution. This led the court in *In re Estate of Attia* to conclude that discovery needed to be permitted and the proponent given the opportunity to prove, by clear and convincing evidence, that the unsigned document was intended by the decedent to constitute his Will.

In an article on electronic Wills[102], I previously noted that

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[97] Id. at *20-21.
[98] In re Attia Estate, 317 Mich App 705 (2016)
[99] Id.
[100] Id.
[101] In re Probate of Will & Codicil of Macool, 416 NJ Super 298 (NJ App, 2010).
[102] Sandra D. Glazier, Electronic Wills: Revolution, Evolution, or Devolution, Bloomberg Tax Management Estates, Gifts and Trusts Journal, Vol. 44, No. 1, 1/10/2019, ©BNA 2019.

> [a]t its core, the harmless error doctrine attempts to facilitate implementation of a decedent's testamentary desires when those desires have been expressed in documented form, despite irregularities or deficiencies in formal executory requirements espoused in statutes, but only when the high burden of proof needed to meet a "clear and convincing" standard has been satisfied. Even in those cases where the harmless error doctrine (or a similar doctrine) was not applied, significant evidence of reliability was present.

Commentaries on the harmless error doctrine are mixed. Some view it as a "slippery slope problem of habitual noncompliance with Wills Act requirements.[103] Others view the use of the harmless error doctrine as a compromise that "favors fact-sensitive adjudication …against determinate formality rules."[104] However, it remains important to remember that the formalities of will acts were intended to perform intent-effectuating functions. These statutes were also intended to:

> provide a ritual, cautioning testators that their acts should be taken seriously to produce reliable evidence of testator's wishes, to protect testators (in the case of nonholographic wills) from fraud, undue influence or other forms of pressure, and to channel testators into forms of expressions easily recognized by courts as wills. (Internal citations omitted).[105]

In essence, the harmless error doctrine is merely an extension of a rebuttable presumption approach to wills that would otherwise be deemed invalid because of a defect in due execution.

> When a will is proper in form, it is presumed to reflect serious, genuine, authentic testamentary intent. But the presumption is rebuttable. Contestants may challenge the presumption raised by due execution by showing *inter alia* that the testator lacked capacity or did not in the circumstances truly intend the executed instrument to serve as his will. The "central insight" underlying the harmless error rule is just the mirror image: "[T]he law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one" Thus under the will execution reform, lack of due execution gives rise to the presumption that the document was not intended as the testator's will, but proponents may challenge that presumption by showing that, despite the execution defect, the testator *did* seriously intend the document to serve as his will. Like other important factual presumptions created by the UPC, the rebuttal must be clear and convincing. (Internal citations omitted).[106]

Of import to the harmless error approach is, in fact, the quantum of evidence required to rebut what would otherwise be presumed to be an invalid instrument. Clear and convincing evidence has been found to be evidence that is:

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[103] *See* Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law,* 73 Wash. & Lee L. Rev. 3,5, fn. 5 (2016) citing Wayne M. Gazur, *Coming to Terms with the Uniform Probate Code's Reformation of Wills,* 64 S.C. L. Rev. 403, 420 (2012).

[104] *Id.,* at 6, fn 8, citing Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice,* 34 Conn. L. Rev. 453, 474 (2002).

[105] Id., at 9.

[106] Id., at 24-25.

> "so clear, direct and weighty and convincing as to enable the [factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issues." "Clear and convincing evidence is more than a mere preponderance; it is highly probable evidence free from serious or substantial doubt." "Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven" (Internal citations omitted).[107][108]

In LISI Estate Planning Newsletter #2657, it was previously noted that

> [w]hile effectuating a testator's intent is a lynchpin concept in the administration of Wills and trusts, opening the door to the admission of electronic instruments (slips of paper and other documents which so significantly fall outside the gambit of an enabling statute), will likely increase the responsibilities and costs of administration as well as the potential for litigation.[109]

*In re Frankford* may buttress the potential need to search for (and perhaps present to the court) slips of paper, unexecuted documents and other forms of documentation that might ultimately be found to be intended by a decedent as the decedent's Will.

CITE AS: LISI Estate Planning Newsletter #3187 (March 5, 2025) at http://www.leimbergservices.com.

## Situs

### Olszewski v. Erdman[110]; Importance of Properly Establishing or Changing Situs

In Michigan, when a trust hasn't been registered, an action relating to the trust may be brought where the trust could have been registered. [111] The "power to establish the venue for causes of action" rests with the Legislature, and venue is thus "controlled by statute in Michigan."[112] "Probate courts are courts of limited jurisdiction," and the "jurisdiction of the probate court is defined entirely by statute."[113] In order to commence a proceeding in a Michigan probate court the trustee must, therefore, be subject to the court's jurisdiction according to the provisions of a statute establishing such jurisdiction and proper venue should also be established.

If the trust doesn't designate a place to register the trust, the court may need to conduct a factual analysis regarding where the principal place of the trust's administration is located and whether the situs of administration (if changed) was properly accomplished.

Facts:

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[107] Id., at 44-45.
[108] Sandra D. Glazier, Electronic Wills: Revolution, Evolution, or Devolution, supra.
[109] Sandra D. Glazier, In re Estate of Duane Frances Horton – the Will on a Phone. **LISI** Estate Planning Newsletter #2657 (August 6, 2018). Internal citations omitted.
[110] *Olszewski v Erdman*, ___NW2d___ at *5-6; 2025 Mich. App. LEXIS 3620 (Ct App, May 8, 2025).
[111] See MCL 700.7209.
[112] *Olszewski v Erdman*, ___NW2d___ at *5-6; 2025 Mich. App. LEXIS 3620 (Ct App, May 8, 2025). Internal citations omitted.
[113] Id. at *7.

During the grantor's lifetime, Kathy Erdman ("Kathy") was the sole trustee of her revocable trust (the "Trust"). At the time of her death she resided in Wexford County Michigan and that was the venue in which the principal administration of the Trust occurred. Following her death, Kathy's daughters became the Successor Co-Trustees of the Trust, both of whom resided in Cook County, Illinois. When Gary Olszewski ("Gary") brought a cause of action in the Wexford County Probate Court against the Trust concerning property located in that county (that had been previously owned by Kathy), the Successor Co-Trustees objected to the court's exercise of jurisdiction on the basis that since Gary was a Florida resident and the trustees were residents of Cook County Illinois, and the principal place of administration was where the trustees were located, the Wexford County Probate Court lacked jurisdiction and the action should, therefore, be dismisses.

The complaint that Gary filed

> sought to "determine an interest in land located in Wexford County, Michigan," and indicated that the "facts and circumstances giving rise to this Complaint occurred in Kent County, Michigan." It was noted that [Gary] and the [Kathy] had entered into a contract prior to the [Kathy's] death, stipulating that [Gary] would receive a percentage of the Cadillac property in exchange for the Lowell property as identified in [Kathy's] trust, along with investments made in the Cadillac property. The defendants were accused of breaching this contract or converting the proceeds of the Cadillac property by not paying the outstanding contract balance to Gary[114].

The probate court agreed that the principal place of administration for the Trust was Chicago and dismissed the complaint. Gary filed a motion for reconsideration that was denied and this appeal ensued.

Analysis:

The appellate court found that at the time of Kathy's death, the principal place of administration was in Wexford County Michigan. To change jurisdiction to Chicago, the appellate court held that the Successor Co-Trustees needed to provide the qualified trust beneficiaries with notice of the intention to change the Trust's principal place of administration in accordance with MCL 700.7108(4) and (5) which the trustees did not do. Therefore, a valid transfer of administration had not been effectuated and the Wexford County Probate Court had jurisdiction to adjudicate Gary's claim.

MCL 700.7108 provides as follows:

> Principal place of administration.
>
> (1) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if any of the following apply:
>
> (a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction.

[114] Id. at *3-4.

(b) A trust director's principal place of business is located in, or a trust director is a resident of, the designated jurisdiction.

(c) All or part of the administration occurs in the designated jurisdiction.

(2) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the qualified trust beneficiaries.

(3) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (2), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.[115]

(4) The trustee shall notify the qualified trust beneficiaries in writing of a proposed transfer of a trust's principal place of administration not less than 63 days before initiating the transfer. The notice of proposed transfer must include all of the following:

(a) The name of the jurisdiction to which the principal place of administration is to be transferred.

(b) The address and telephone number at the new location at which the trustee can be contacted.

(c) An explanation of the reasons for the proposed transfer.

(d) The date on which the proposed transfer is anticipated to occur.

(e) In a conspicuous manner, the date, not less than 63 days after the giving of the notice, by which a qualified trust beneficiary must notify the trustee in writing of an objection to the proposed transfer.

(5) The authority of a trustee under this section to transfer a trust's principal place of administration without the approval of the court terminates if a qualified trust beneficiary notifies the trustee in writing of an objection to the proposed transfer on or before the date specified in the notice.

(6) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed under section 7704.

(7) The view of an adult beneficiary must be given weight in determining the suitability of the trustee and the place of administration.

As a consequence, the appellate court overturned the probate court's dismissal of the action and Gary will be permitted to litigate his claim in the Wexford Probate Court.

Comment:

[115] MCL 700.7108. See also UTC §108.

It may be important to note that MCL 700.7108 (and UTC §108) may be overwritten by the express terms of a trust. While this did not occur here, one might consider whether (or not) to include a provision that permits a change of situs by the trustees without advance notice. The current Reporter's Comments to MCL 700.7108 state that

> [f]rom the perspective of settlors and their estate planners, §7105 is the most important provision found in the MTC. Section 7105(1)–(2) provides the general rule that the MTC is a series of default rules. This means that the remaining provisions of the MTC generally can be varied or overridden by the settlor.

Prior to 2024, the Reporter's Comments to MCL 700.7108 had indicated that

> MCL 700l.7209, defines the location from time to time of the principal place of administration. The section recognizes it may be the place designated in the trust instrument. Subsection 7108(1) is consistent with MCL 700.7209 by stating that the terms of a trust instrument are free to designate the principal place of administration, if there is some connection to the place designated – either the trustee's principal place of business, the trustee's residence, or the place in which all or part of the administration occurs. …
>
> ***
>
> Subsections (3) through (5) recognize the ability of the trustee to change the principal place of administration free of judicial oversight and establish a procedure for doing so. Before the enactment of §7108 trustees frequently moved the principal place of administration without court approval. This occurred even though there was no express authority permitting the trustee to do so and even though former EPIC §7305 recognized the authority of the court to approve a change in the place of administration, which some interpreted as *requiring* court approval to change the principal place of administration.
>
> The procedures in subsections (3) through (5) for changing the place of administration are default rules that apply when the trust instrument is silent about changes in the place of administration; the settlor is free to establish different requirements"….[116]

Given the potential income tax savings that might be afforded administration in a different jurisdiction (particularly, in some instances, for revocable trusts that become irrevocable upon the settlor's death), and other reasons that might be afforded by a change in situs, providing a static place of administration or flexibility in changing situs, might be preferrable. Even when the trust is silent and must rely upon statutes to fill the gap, an analysis of whether a change in situs and the steps required to effectuate the same may still be appropriate.

CITE AS: LISI Estate Planning Newsletter #3234 (Aug. 6, 2025) at http://www.leimbergservices.com.

[116] ICLE Estates and Protected Individuals Code with Reporters' Commentary to MCL 700.7108, February 2023 Update.

## Moore v. Moore; In Michigan There May Be Statutory Exceptions to Enforcing a Valid Prenuptial Agreement

In Michigan, once a court finds that a prenuptial agreement is valid and enforceable, the court may nonetheless invade separate property and/or award spousal support in contravention of the provisions of the prenuptial agreement when it is established that certain statutory exceptions are met that allow the trial court to invade a parties' separate property and/or allow it to award spousal support in order to balance the equities in rendering a divorce judgment[117] [118].

In *Allard v. Allard* (on Remand), 318 Mich App 583 (2017), Michigan's appellate court essentially held that despite the existence of a valid enforceable prenuptial agreement, parties cannot strip the trial court of equitable powers provided to it under MCL 552.23 and MCL 552.401 to fashion an equitable result when the prerequisites of those statutes have been factually met. Currently pending legislation in Michigan[119] would essentially legislatively codify the *Allard* decision. Michigan's Family Law Section supports the proposed legislation, while Michigan's Probate Section opposes such codification and advocates for adoption of the Uniform Marital and Premarital Agreement Act without codification of *Allard*.

The recent case of *Moore v. Moore*[120] may well buttress the concerns expressed by the Michigan Probate Section that an agreement might be found enforceable but nonetheless result in the invasion of separate property and award of spousal support in contravention of the agreement and various rights that might have been awarded in lieu thereof. The Probate Section, in an effort to compromise, proffered that perhaps the bill should (rather than codifying Allard) include a provision that requires in order for such agreements to be enforceable they need to be fair and equitable when entered into as well as when sought to be enforced – thereby attempting to address the scenario where as opposed to the hog getting fat, it

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[117] See MCL 552.23 which provides:

Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

[118] See MCL 552.401which provides:

The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

[119] Michigan SB 0160 of 2025.

[120] Moore v Moore, ___NW2d___; 2025 Mich. App. LEXIS 2876 (Ct App, Apr. 15, 2025).

should be slaughtered. Only time will tell whether the legislation passes in its present or some other form. Generally, parties enter into such agreements so that they can be captains of their own ships and destiny, but protections may be required to avoid abuses that may result from patently unfair or unenforceable provisions. How to arrive at such results is subject to debate.

Presently, an agreement that would be enforced in another jurisdiction, as written, might not be if the parties divorce in Michigan. Therefore, understanding the potential consequences of the Allard decision remains important for practitioners in Michigan as well as in other jurisdictions given the mobility of American society.

Facts:

Prior to their marriage in 2000, the Moores entered into a prenuptial agreement (PNA). At the time the parties married the wife earned more than the husband and owned what would become the parties' marital home. The PNA outlined the parties' debts and assets, and defined what would be considered marital property subject to equal division between the parties in the event of divorce, and what would be considered separate property that would not be subject to division on divorce. It also barred the award of spousal support. Earnings of a party resulting from active employment during the marriage would be considered separate as would that party's retirement benefits, and any property acquired through use of such funds would also be separate property, unless the earnings had been deposited into a joint account.

Once the parties married and had children, the wife became a stay at home parent and no longer had a source of income and no longer contributed to retirement funds. Husband continued to work, keep the bulk of his assets in separate accounts and accumulated significant retirement benefits. As a result, outside of the marital home, the marital estate was sparse. The wife claimed the PNA should not be enforced because she had not read or understood its terms when she signed it. The husband testified that the parties spent a significant amount of time drafting the PNA to protect the wife's assets.

The trial court found that the PNA was enforceable, but its enforcement would create an inequitable result given the length of the marriage, the amount of time the wife had not worked and her contributions to the marital estate. Despite finding the PNA enforceable, the court proceeded to divide husband's retirement accounts, award wife her 401(k) (the vast majority of which appears to have been acquired prior to the parties' marriage) and award her spousal support for a period of 10 years. Husband appealed.

Analysis:

The appellate court found that while marital agreements are contracts the enforcement of which should be guided by general contract principles, invasion of separate property may nonetheless be permitted when certain statutory requirements have been met. It acknowledged that prenuptial agreements are enforceable in Michigan and do not, per se, represent a violation of public policy. As such

> "[P]renuptial agreements are contracts subject to the rules governing construction of contracts generally." In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the

> contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law.
>
> However, "such agreements may be voided if certain standards of fairness are not satisfied." Prenuptial agreements "may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." [121]

Nonetheless, the appellate court held that the trial court's decision needed to be overturned essentially because it skipped a step before equitably dividing husband's retirement accounts and awarding wife spousal support. Once the trial court found that the PNA was enforceable, it was required to treat and characterize the parties' respective property as defined by the PNA before resorting to equitable considerations.

> …[I]in reaching an equitable division, the trial court must first determine what property is considered marital property and what property is considered separate property. Here, the PNA the trial court found to be valid did just that. Once the trial court decided what was marital and what was separate property according to the PNA, only then could the trial court consider matters of equity.
>
> The Legislature has provided statutory exceptions that allow the trial court to invade the parties' separate property to balance the equities in rendering a divorce judgment.[122]

Those exceptions are contained in MCL 552.23 and MCL 552.401. As a consequence,

> [P]arties to a divorce cannot, through [pre]nuptial agreement, compel a court of equity to order a property settlement that is inequitable. Although parties have a fundamental right to contract as they see fit, they have no right to do so in direct contravention of this state's laws and public policy.
>
> This procedure balances "the fundamental right to contract" freely while allowing a trial court discretion "to afford whatever relief is necessary" to ensure neither party is impoverished by the divorce judgment, which would be contrary to the public policy of this state. The trial court's failure to enforce the PNA as written impacted the trial court's overall decision concerning equitable division of the parties' property. We vacate and remand the property award for the trial court to adhere to the procedure outlined in our caselaw where prenuptial agreements are at issue.[123]

The appellate court further found that

> [o]ur caselaw is clear that the trial court's equitable authority to ensure neither party is impoverished by a property settlement overrides the parties' ability to contract around spousal

[121] Id. at *9. Internal citations omitted.
[122] Id. at *12.-13. Internal citations omitted.
[123] Id. at *14-15. Internal citations omitted.

> support. In Allard (On Remand), this Court held the trial court erred when it declined to award spousal support simply because the parties signed a prenuptial agreement waiving spousal support, even though equity demanded one spouse was entitled to such support to maintain the parties' minor child. Parties to a divorce action cannot, through a PNA, waive the trial court's discretion under MCL 552.23(1) to fully consider "the ability of either party to pay [spousal support] and the character and situation of the parties, and all other circumstances of the case," if the court is called upon to make a spousal-support determination. Stated differently, although the parties may enter into an agreement waiving spousal support; once a decision regarding spousal support is actually before the trial court, any agreements to restrict the equitable authority granted to the trial court under MCL 552.23(1) is necessarily void as against both statute and public policy. [124]

Comment:

While it is likely on remand, the end result may be the same, the trial court must engage in the analysis required under MCL 552.23(1) and 554.401, and make findings of fact that support the invasion of husband's separate property and award of spousal support under the facts and circumstances presented, treating property as separate or marital as defined by the parties' valid PNA. The significant increase in separate property and lack of marital property would have been a foreseeable outcome following the birth of the parties' child and the decision to permit wife to become a stay-at-home parent.

While both of the parties had children from prior relationships, when children of the marriage are anticipated, treating income earned from active employment during the course of the parties' marriage as separate property can result in very disparate results and may be a provision that parties might wish to avoid when negotiating marital agreements, as it may lead to the "hog being slaughtered", unless there is some other offsetting award in the agreement that attempts to compensate for that type of provision. It might also be helpful to define what will constitute wages as opposed to dividends or earnings resulting from appreciation of a holding or the collective efforts of those at a closely held company (inclusive of the employed spouse).

The Allard decision (and its progeny), makes it difficult for attorneys to predict and advise their clients regarding the extent to which the client can rely upon the terms of their marital agreement even when that agreement is found to be enforceable. Some question whether there is any merit in entering into such agreements (in light of *Allard)*, because of concerns that the client might be whipsawed by a determination that the agreement is enforceable, but additional relief may essentially be granted to the non-monied spouse, resulting in the spouse who put various benefits on the table during the negotiation process then being obligated to provide those benefits plus others not contemplated, despite having relied upon the agreement's enforceability when making economic decisions throughout the parties' marriage. Others argue it is still better to have an agreement that defines the parties' rights as it can set forth rules and expectations and argue the parties may contract that in the event a court decides to invade certain interests or award spousal support, other provisions in the agreement will then be deemed unenforceable.

[124] Id. at *15-16. Internal citations omitted.

One thing is for sure, parties should not enter into such agreements lightly and assume that despite the terms of the agreement they will ultimately be able to obtain different relief.

When counsel from other jurisdictions have requested a review of a parties' prenuptial agreement in contemplation of a party becoming a Michigan resident, some have been so shocked by the potential ramifications of Allard to the parties' marital agreement that they have advised the client against taking a job or changing their residence to Michigan. As a result, the consequences of Allard (and its codification) could potentially have broader economic ramifications to Michigan.

In Michigan, what does remain evident is that without a legislative fix, predictability in the enforceability of prenuptial agreements (and whether a court will nonetheless invade assets which the parties agreed would not be subject to invasion) remains aloof.

Cite as: LISI Estate Planning Newsletter #3237 (August 13, 2025)

### 2. *Haan v. Hann;*[125] *Court Enhancement of Spouse's Rights on Divorce Despite Provisions of Enforceable Prenuptial Agreement*

As the Michigan legislature considers adoption of a modified version of the Uniform Premarital and Marital Agreements Act that could result in the codification of the *Allard* decision[126], the Michigan Court of Appeals found in the unpublished *per curiam* decision of *Haan v Haan*[127] that pursuant to the *Allard* case, the divorce court has the authority to deviate from the terms of a parties' otherwise enforceable prenuptial agreement and invade separate property, as defined by that instrument, in order to award the spouse an additional $1.5 million plus attorney fees.

Facts:

Anne and Gerald Haar married in Mary 2008 and Anne filed for divorce in August 2021. The parties entered into a prenuptial agreement ("the Prenup") before they wed. When they wed Gerald's net worth was represented to be $3.8 Million, while Anne's was reported to be approximately $220,000. The Prenup specified that certain assets would remain a party's separate property, and provided that should the parties divorce after being married for 5 years, Anne would receipt spousal support of $45,000 per year for 4 years. When the parties divorced, Gerald's net worth had increased to $10 Million, and Anne's had increased to $537,000.

Prior to marriage, the parties also entered into a joint operating agreement ("JOA") with regard to the acquisition and ownership of what would be their marital home. The JOA provided that in the event of death, or the sale of the home prior to the death of either of the parties, each would get back what he or she contributed to the home and the remaining net equity would be equally split. The agreement did not specifically address what would happen in the event of divorce. Title to the property was held in the

[125] *Haan v Haan*, ___NW2d___; 2024 Mich. App. LEXIS 7986 (Ct App, Oct. 7, 2024)
[126] *Allard v. Allard (On Remand),* 318 Mich App 583, 899 NW2d 420 (2017).
[127] *Haan, supra*

parties' joint names as tenants in common and not as joint tenants, with each otherwise having an undivided one-half interest in the property.

During their marriage, Anne helped to raise Gerald's children from his prior marriage, her children from her prior marriage and provided assistance in running the marital home. She attended most of his children's sporting games, took them to practices and other functions including medical appointments and various extra-curricular classes and activities. She also helped him to start Haan Development, but ultimately the parties agreed that she would stay home instead of working at the company. Everyone agreed that Anne had been a good step-mother to Gerald's three children, but the parties also had a nanny for the first 3 to 4 years following their marriage (while Gerald's children were still residing in the marital home and before they went to boarding school or off to college). Anne also assisted in attending to the needs of Gerald's elderly mother, who lived nearby. Anne saw Gerald's mother several times a week and took her to doctor appointments and on shopping trips. Gerald ran the closely held business where he worked 65 to 70 hours a week and traveled frequently out of town for business. He received close to $1 Million a year in income as a result and by the time the parties' divorced the company was worth approximately $7.6 Million. Some of increase in Gerald's net worth was the result of inheritances he had received.

Because the JOA didn't address what would happen in the event of divorce, the trial court awarded each of the parties one-half the net equity in the marital home without consideration or return of Gerald's separate property contributions to the acquisition of the property. While the trial court didn't find the Prenup to be invalid, it nonetheless held that it could and would award Anne $1.5 Million (which was significantly more than what was provided by the Prenup) because parties, in Michigan, cannot waive or otherwise abrogate the Court's authority to equitably divide assets under MCL 552.23(1) and MCL 552.401.

MCL 552.23(1) provides that:

> …if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.[128]

MCL 552.401 provides that the trial court can:

> …award[ ] to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and

[128] MCL 552.23(1).

> effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.[129]

Gerald argued that what is "equitable" must be determined by referring to the Prenup, but the trial court found that his position was in direct conflict with *Allard,* and therefore unpersuasive. An appeal ensued and the trial court awarded Anne an additional $25,000 pursuant to MCR 3.206(D)(2) (which permits a court to award attorney fees in a divorce proceeding if a party is able to she he or she is unable to bear the expense of the action and the other party is able to pay) in order to address legal fees associated with the appeal.

Analysis:

Gerald argued that Anne had not sufficiently contributed to the acquisition, improvement or accumulation of his separate property to merit an invasion of his separate property under MCL 552.23(1) and even if she did, then the court needed to determine how much of her efforts helped the company to grow. The trial court (and appellate court) disagreed. Each court concluded that pursuant to *Hanaway*[130] a spouse's contributions to the administration of the household and caring for children that permits the other spouse to devote him or herself to cultivate and nurture a business may be a sufficient contribution to justify invasion of the separate property when, as here, the marriage operated as a partnership. The court in *Hanaway*[131] found it would be inequitable to deprive the stay at home spouse any share of the value of the husband's business simply because she enjoyed the benefits of her spouse's salary over the years. *Hanaway*[132] did not, however, involve a prenuptial agreement. The trial court in *Haan,* found that Anne's contributions (similar to those in *Hanaway)* were sufficient to justify the court's exercise of its equitable powers under MCL 552.23(1) and award Anne $1.5 Million and that the existence of a valid prenuptial agreement containing contrary terms did not deprive the court of those equitable powers.

In *Allard*[133]*,* while the trial court concluded that allowing the court to exercise discretion in the division of assets pursuant to MCL 552.23(1) and 552.401 to countermand provisions of a prenuptial agreement would "jeopardize []""the right to freely contract",[134] the appellate court disagreed. The appellate court in *Allard* held that

> it is well settled that divorce cases are equitable in nature and that the Legislature codified the principle that a property division must be equitable in light of the circumstances of the case. The Court stated that "the Legislature intend[ed] circuit courts, when ordering a property division in a divorce matter, to have equitable discretion to invade separate assets if doing so is necessary to achieve equity. [It] continued:

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[129] MCL 552.401.
[130] *Hanaway v.Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995).
[131] Id.
[132] Id.
[133] *Allard, supra.*
[134] Id. at 592.

> Moreover, to the extent that parties attempt, by contract, to bind the equitable authority granted to a circuit court under MCL 552.23(1) and MCL 552.401, any such agreement is necessarily void as against both statute and the public policy codified by our Legislature. Put differently, the parties to a divorce cannot, through antenuptial agreement, compel a court of equity to order a property settlement that is in equitable [sic]. Although parties have a fundamental right to contract as they see fit, they have no right to do so in direct contravention of this state's laws and public policy.
>
> Thus, we concluded that the "parties could not, and therefore did not, waive the trial court's equitable discretion under MCL 552.23(1) and MCL 552.401."[135]

Here the appellate court found the trial court didn't error in awarding Anne significantly more than what was provide for her benefit under the Prenup. It also found that because the JOA wasn't ambiguous, it had to be interpreted based upon the terms contained within its four corners and parole evidence regarding the parties' intentions was not permissible.

Comments:

Some might argue that the results in *Allard* and *Haan,* are demonstrative of the analogy that "pigs get fat and hogs get slaughtered". Generally, one might expect that agreements that are fair and equitable when entered (as well as when sought to be enforced) tend to be upheld and enforced by the courts in the absence of fraud or a change in circumstances not reasonably contemplated by the parties. But what is fair and equitable is often a judgment call and clearly one that under *Allard* and *Haan* may be second guessed by the court (and a party when it comes to divorce). These cases reflect dangers for attorney in being able to predict and otherwise advise clients on the potential enforceability of limitations contained in a negotiated prenuptial or marital agreement, even when both parties are represented by counsel, the terms have been heavily negotiated and there has been adequate disclosure.

Parties to a marital agreement may act and rely upon negotiated terms both in the manner in which they conduct themselves and in handling finances. While family law practitioners have advocated for codification of *Allard* in any statutory approach to premarital and marital agreements, estate planning practitioners (and others) believe that parties who enter into such agreements do so because they want to be captains of their own ship and want predictability. It is for this very reason that Michigan's Probate Council has advocated for adoption of the Uniform Premarital and Marital Agreement Act providing that when such an agreement comports with the Act and contains waiver of rights language similar to that provided by the Act, the agreement will be enforced unless if, in the context of the agreement taken as a whole, the term sought to be enforced was unconscionable at the time of signing; or, the time of enforcement or enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.

Whether the Uniform Act is adopted or not, it remains important to note it is always easier to negotiate terms in love than in hate. Include terms that are fair to each party with adequate disclosures, Providing

[135] *Haan, supra* at *4-5, citing Allard. Internal citations omitted.

sufficient time to address concerns, negotiate terms and provide for adequate representation by each of the parties remain important when drafting such agreements and to their enforcement. Because we live in a mobile society, and the enforceability of premarital and marital agreements may occur in a different jurisdiction than the one specified in the instrument, it may be important for attorneys (and parties) to be cognizant of statutory rights (and/or public policy positions) that might adversely impact the enforceability of provisions contained in an otherwise enforceable agreement, and might result in a party who believes they bargained for one thing (by giving a spouse certain rights in order to avoid perhaps a greater invasion of separate property) may nonetheless be required to provide even more in the event of divorce should the court find there are insufficient marital assets to provide for the other spouse's support (and that of children entrusted to the spouse's care) or the spouse is found to have contributed to the acquisition or maintenance of separate assets.

Attorneys may wish to consider, and discuss with their clients, whether a premarital agreement or marital agreement (or certain terms contained therein) should be deemed unenforceable in the event a trial court finds the agreement to be valid but nonetheless decides to exercise equitable powers to deviate from the terms contained within the agreement in order to award a spouse more or less than what is provided for under the agreement.

While many jurisdictions (including Michigan) permit spouses to waive or relinquish various statutory rights, in the absence of a statutory fix, Michigan courts have held that the court's equitable power to invade separate property in a divorce or separate maintenance proceeding can't be waived to the extent that (1) a spouse has contributed to the acquisition or maintenance of such separate property, or (2) when there are otherwise insufficient marital assets to provide for that spouse's support and maintenance (and that of children entrusted to him or her).

CITE AS: LISI Estate Planning Newsletter #3153 (October 22, 2024) at http://www.leimbergservices.com.

## Undue Influence

### In Re Sherrod Estate; The Danger of Relying Solely on the Presumption of Undue Influence When Challenging a Transaction

Because undue influence generally occurs in secret, the facts relating to the process that led to the execution of a challenged transaction often rest with the proponent of its validity. A challenger must often rely upon circumstantial evidence to establish that undue influence occurred. Typically, the proverbial "smoking gun" does not exist.

Importantly, not all influence is "undue".

> I]nfluences to induce testamentary disposition may be specific and direct without becoming undue as it is not improper to advise, persuade, solicit, importune, entreat, implore, move hopes, fears, or prejudices or to make appeals to vanity, pride, sense of justice, obligations of duty, ties of friendship, affection, or kindred, sentiment of gratitude or to pity for distress and destitution,

> although such will would not have been made but for such influence, so long as the testator's choice is his own . . . . [136]

For influence to become undue, it must generally be established that an individual's free agency was taken from them or destroyed, and substituted with the will of another.[137] This is typically (but not always) a psychological process that occurs over time as opposed to via a single act. Due to the insidious nature of that process, and in an attempt to level the playing field in these cases, public policies against such activity have resulted in the creation of what is commonly referred to as the "presumption of undue influence" (the "Presumption"). If all of the elements of the Presumption are established, a prima facie case of undue influence may be established. Once all of the elements of the Presumption have been met, it generally results in a shift in the burden of production and/or the burden of persuasion (depending on the jurisdiction where the challenge is brought). In the absence of establishing all the elements of the Presumption, duly executed instruments are generally presumed to be valid.[138]

Most, but not all Presumptions contain a reference to a confidential or fiduciary relationship as one of the prerequisite elements. Undue influence can occur in the absence of a confidential or fiduciary relationship, but in those instances the contestant generally will not be able to rely upon the Presumption to establish that it occurred. However, the Presumption is not the only way to prove that undue influence occurred and even when all the elements of the Presumption have been established, a proponent may present sufficient evidence to rebut the Presumption, so it is generally prudent for a challenger to also present evidence on as many "red flags" or "indicia of undue influence" and suspicious circumstances as may be applicable.

Unlike fiduciary relationships that may be established as a matter of law, establishing the existence of a "confidential" relationship is often a fact sensitive endeavor. As discussed in *Undue Influence and Vulnerable Adults*[139], this may be because:

> [a] confidential relationship can be found to exist when a person enfeebled by poor health relies on another to conduct banking or other financial transactions.[140] Courts have held that "a confidential relationship is not confined to any specific association of persons but arises any time there appears on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed."[141] Further, courts have recognized that:
>
> > [w]henever there is a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of the mind or body, or through trust, the law does not hesitate to characterize such a relationship as

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[136] *In re Spillette Estate*, 352 Mich. 12, 17-18, 88 N.W.2d 300, 303 (1958).
[137] *Kar v. Hogan*, 399 Mich. 529, 554, 251 N.W.2d 77, 79 (1976) (Levin, J., dissenting)
[138] For a more thorough discussion of undue influence and the presumption of undue influence *see* Glazier, Dixon & Sweeney, *Undue Influence and Vulnerable Adults,* ABA © 2020.
[139] *Undue Influence and Vulnerable Adults*, *id* at 83.-84.
[140] *In re Swantek Estate*, 172 Mich. App. 509, 514, 432 N.W.2d 307, 310 (1988).
[141] *In re Matter of Estate of Johnson,* 237 So. 3d 698 (2017) (citing *Norris v. Norris*, 498 So. 2d 809, 812 (Miss. 1986)).

> fiduciary in character. *Foster v. Ross*, 804 So.2d 1018, 1022–23 (Miss. 2002) (citing *Madden v. Rhodes*, 626 So.2d at 617 (Miss. 1993)). A moral, personal, or domestic relationship, which would impose the duties of a fiduciary also will be considered confidential under the appropriate circumstances. *Mullins v. Ratcliff*, 515 So.2d 1183, 1191 (Miss. 1987).[142]

A fiduciary is a person who stands in a position of confidence and trust vis-à-vis another person.[143] A fiduciary relationship also has been defined as a "relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship."[144] A fiduciary relationship also has been recognized to arise "from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another."[145] Such a relationship may be found to exist "when confidence is reposed on one side and there is a resulting superiority and influence on the other, and the relation and duties involved need not be legal, but may be moral, social, domestic, or merely personal."[146,147]

Michigan courts have held that there are four typical ways in which a fiduciary relationship can arise:

a. One person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first.

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[142] *Id*.

[143] *In re Estate of Wood,* unpublished opinion of the Michigan Court of Appeals issued January 3, 2008 (Docket No. 268024), 2008 WL 53149 4, 2008 Mich. App. LEXIS 12 (2008).

[144] *In re Estate of Karmey*, 468 Mich. 68, 75, 658 N.W.2d 796, 799 (2003) (citing BLACK'S LAW DICTIONARY (7th ed. 1999)).

[145] *In re* Monier *Khalil Living Trust,* 328 Mich. App.151, 936 N.W.2d 694 (2019) (citing *Vicencio v. Ramirez,* 211 Mich. App. 501, 508, 536 N.W.2d 280 (1995)).

[146] *State v. Campbell,* 756 N.W.2d 263, 270 (Minn. App. 2008) (citing *Toombs v. Daniels,* 361 N.W.2d 801, 809 (Minn. 1985)).

[147] It is even possible that the establishment of a joint or multi-party account may create fiduciary obligations. In *Campbell*, *id*., the court held that:

> …fiduciary obligations may be, but are not necessarily a part of, joint account arrangements. We recognize that the joint account is a starting point for analysis; it establishes a financial relationship. When each party is able to make unlimited withdrawals, there are clearly opportunities for abuse. To enter into the relationship, some level of trust exists between or among the parties to the account. The relationship and the trust may be nominal or far reaching. The important point is that in addition to the joint account, other factors must be weighed in determining whether a fiduciary relationship exists. These factors include the following: (1) the legal, familial, or personal relationship between the parties; (2) the capacity or sophistication of the parties; (3) who contributed the funds to joint accounts and in what ratio; and (4) the parties' understanding of their respective roles and responsibilities within the relationship. We do not suggest that this is an exhaustive list.

*Id*. at 272. It is noteworthy that on appeal, evidence of the joint nature of banking accounts, that the contributions were solely made by the decedent, and that the co-owner utilized funds for his own personal benefit was found to provide sufficient evidence of a breach of a fiduciary relationship, which supported a conviction for financial exploitation of a vulnerable adult under MINN. STATE § 609.2335 (1). *State v. Campbell,* 2012 WL 6554410 (Minn. 2012).

b. One person assumes control over and responsibility for another.
c. One person has a duty to act for or give advice to another person on matters falling within the scope of the relationship.
d. There is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.[148]

Facts:

In *In re Sherrod Estate*[149] it appears that the contestant may have merely relied upon the Presumption in her efforts to challenge the (re)titling of a credit union account of the decedent, Clyde Lamont Sherrod ("Clyde"). Originally, Clyde's daughter, Dedra, was designated to receive the proceeds of Clyde's credit union account on his death. In July 2022 Clyde withdrew all the funds in that account and placed them in a new account that named his previously estranged brother, Michael, as the beneficiary.

Following a bench trial, the court found that Dedra established the elements of Michigan's Presumption, to wit:

1) The existence of a confidential or fiduciary relationship between the grantor and a fiduciary;
2) The fiduciary or an interest which he represents benefited from the transaction, and,
3) The fiduciary had an opportunity to influence the grantor's decision in the transaction.[150]

There is no dispute that Michael benefited from the transaction and had the opportunity to influence Clyde. The issue appears to be whether Michael stood in a confidential relationship to Clyde. While the trial court found that Michael generally lacked credibility, it found that Michael's testimony supported a finding that he stood in a confidential relationship to Clyde at the time the challenged change to the credit union account occurred. The appellate court disagreed.

In March 2022, Clyde was admitted to the hospital due to heart failure. While he underwent quadruple-bypass surgery, his discharge from the hospital in April 2022 was followed by multiple re-admissions and additional medical issues. Clyde became depressed, lost significant weight and was ultimately discharged to a rehab facility in May 2022. In June 2022, shortly after being discharge from the rehab facility, Clyde was re-admitted to the hospital and diagnosed with episodic memory loss and dangerously low blood pressure. Following that hospitalization Clyde was discharged on July 7, 2022 to a nursing home.

It appears that prior to his July 7, 2022 discharge, Michael had not visited Clyde during any of the preceding hospitalizations nor did he visit Clyde during his rehabilitative stay, despite being aware of Clyde's precarious health situation. Michael justified his absence by indicating that he went to visit his brother after the July 7th discharge because Clyde called him. While Michael testified he and Clyde had a close relationship, other testimony indicated that the two generally disliked each other.

Once Clyde was released home, Michael occasionally took Clyde out for lunch and to the bank. On July 11th, Michael drove Clyde to the police station where Clyde filed a report alleging that Dedra was

[148] *In re Estate of Karmey*, 468 Mich. at 75.
[149] *In re Sherrod, supra*.
[150] *Id* at *8 citing, *Estate of Karmey*, 468 Mich 68 (2003).

mismanaging his money and had failed to take care of him. No evidence was presented to reflect that the accusation was true, but Clyde apparently believed it to be when he asked Michael to take him to the credit union on July 13th for the intended purpose of removing Dedra from having access to his credit union account.

When Clyde arrived at the credit union on July 13th, Michael accompanied him during the entire time that he met with the credit union's branch manager. During that meeting, Clyde was in a wheelchair and Michael remained "mostly silent". Clyde expressed his concerns about Dedra's handling of his finances and asked to have her removed as power of attorney over his account and to revoke her access. The manager suggested that Clyde simply close the account and open a new one which Clyde agreed to do. Clyde then named Michael as a pay upon death beneficiary to the new account. Michael had to drive Clyde back to the credit union to complete the establishment of the new account, because Clyde did not have a valid driver's license with him during the first meeting with the manager, as the one he had with him had expired. When Michael drove Clyde back to provide a valid id, Michael did not go into the bank with Clyde.

Michael did not tell the family or anyone else about the trips to the credit union or to the police department. He said he felt that he "need[ed] to keep the trips a secret because decedent told Michael that he was the only person that [he] could trust".[151] On July 17th, Clyde was readmitted to the hospital. Physician notes from that hospitalization reflect that Clyde's memory was impaired and his doctor opined that Clyde's cognitive issues were likely the result of lack of oxygen to his brain. At discharge, Clyde was given instructions on how he might improve his blood flow, but if he failed to follow those instructions it could adversely affect his cognitive abilities. In a subsequent doctor's visit, it was noted that Clyde continued to have cognitive difficulties. When he used supplemental oxygen during those visits, his confusion dissipated.

Clyde died on October 3, 2022. On October 4, 2022 Michael contacted the branch manager and started the process of closing the credit union account and retrieving the proceeds that had been contained therein. Dedra, as personal representative of Clyde's estate, then brought an action in the probate court seeking to settle title and ownership of the credit union account. The court indicated that it relied upon the following facts in finding that Dedra had established the existence of a confidential relationship:

- Michael drove Clyde to the bank after he became suspicious of Dedra;
- Clyde told Michael that he was the only person he could trust; and,
- Clyde had all of his mail redirected to Michael's house with regard to financial issues.

At the conclusion of a bench trial, the probate court found that Dedra had

> established a presumption of undue influence and that Michael's rebuttal evidence was "much weaker evidence than the evidence offered to support the presumption of undue influence," so

[151] *Id* at *5.

> the court found by a preponderance of the evidence that Michael unduly influenced decedent to name Michael the beneficiary of decedent's DMCU account.[152]

This appeal followed.

Analysis:

Michael claimed that the probate court erred when it found that he was in a confidential relationship with Clyde. The appellate court agreed with Michael. It found that the following facts supported Michael's contention that a confidential relationship between he and Clyde did not exist:

- Clyde did not make Michael a co-owner or signatory on the account;
- The manager, and not Michael, suggested opening a new account as a means of removing Dedra's access to the credit union account; and,
- There was no evidence presented that other than driving Michael to the bank, Clyde was reliant upon or otherwise trusted Michael with his banking.

The appellate court found that

> [c]learly, Michael and [Clyde] did not have a traditional fiduciary relationship like attorney-client or physician-patient, but that is not necessarily fatal. A confidential or fiduciary relationship is a "broad" term, encompassing any relationship "in which there is confidence reposed on one side, and the resulting superiority and influence on the other." *In re Wood's Estate*, 374 Mich 278, 282-283; 132 NW2d 35 (1965). In this way, the term "has a focused view toward relationships of inequality." In re *Estate of Karmey*, 468 Mich at 74 n 3.
>
> Trust alone is not sufficient to establish a confidential or fiduciary relationship. See *Knight v Behringer*, 329 Mich 24, 28; 44 NW2d 852 (1950). Rather, a confidential or fiduciary relationship requires "a reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another." In re *Jennings' Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952). See also *In re Wood's Estate*, 374 Mich at 282 (stating that a confidential relationship embraces "those informal relations which exist whenever one man trusts in and relies upon another"). So, for instance, a confidential or fiduciary relationship exists when one trusts another and relies on that person "in handling the bank accounts for her," with the other person acting "solely as her agent in these transactions." *Van't Hof v Jemison*, 291 Mich 385, 393; 289 NW 186 (1939). See also *In re Estate of Swantek*, 172 Mich App 509, 514; 432 NW2d 307 (1988) ("A confidential relationship exists when a person enfeebled by poor health relies on another to conduct banking or other financial transactions."). Conversely, while people generally trust those they live with, living with another does not necessarily create a confidential or fiduciary relationship. See *In re Carlson's Estate*, 218 Mich 262, 265; 187 NW 284 (1922) ("We have not overlooked the fact that at the time the will was made the testatrix was living in the home of the proponent, and had been there several weeks . . . . The relation so established was not a fiduciary one, militating against the bequest to proponent."). See also *Knight*, 329 Mich at 29. Likewise, while people generally only

[152] *Id* at *6.

> allow those they trust to assist in their business affairs, assisting someone with their business affairs does not necessarily create a confidential or fiduciary relationship. See *In re Cottrell's Estate*, 235 Mich 627, 630; 209 NW 842 (1926) ("Before the burden can be cast on proponent, it must be shown that the fiduciary relations exist, and the fact that she was living with testator when the will was made did not establish such relations, nor does the fact that she assisted him in his business affairs establish such relation."). See also *Knight*, 329 Mich at 29; *Blackman v Andrews*, 150 Mich 322, 323-325; 114 NW 218 (1907) (holding that the contestants failed to establish undue influence despite showing that the proponent's husband drove the testatrix to the bank to change her will and had previously given her advice "respecting her business affairs").[153]

Pertinent to the appellate court was the apparent lack of evidence that Clyde relied upon Michael's judgment or advice. Clyde's confusion around the time of the transaction alone was insufficient to establish a confidential relationship. Apparently, Dedra never argued that she had presented sufficient evidence absent the Presumption to establish that the changes to the account were the result of undue influence, which resulted in the appellate court summarily reversing the probate court's decision that undue influence occurred.

The appellate court noted, in reversing the probate court's decision, that

> [t]his court has often said that the mere fact that decedent so disposed of his property as to do an apparent injustice to one or more of his relatives would not nullify the transaction. Courts are not permitted to make equitable distribution of estates, but are concerned only in giving effect to the legal acts of decedents.[154]

Comment:

Establishing and understanding the elements of the Presumption (and what they entail) can be extremely important not only to the litigation of an undue influence case, but also to planners so that protective measures might be utilized in an effort to preserve the individual's true intentions. Establishing that the Presumption applies may also establish probable cause for a challenge in a jurisdiction that limits the application of a no contest clause when probable cause for the challenge is demonstrated to exist.

While it appears that a number of "red flags" or "indicia" of undue influence may have been present in Sherrod, mere reliance on the Presumption to prove one's case can be fraught with danger, especially when utilizing the existence of a confidential (as opposed to a legally recognized fiduciary relationship) to establish the existence of the Presumption. Moreover, a proponent may be able to present sufficient evidence to rebut the Presumption. The involvement and testimony of competent independent counsel may, in many circumstances, be sufficient to rebut the Presumption. In rebutting the Presumption and litigating undue influence cases it is not the quantity of the evidence, but often the quality of the evidence that makes the difference. In particular, when a confidential (as opposed to a recognized fiduciary relationship) is involved, the importance of developing a record of the "red flags", indicia and suspicious

[153] *Id* at *8.
[154] *Id* at *13-14, fn. 2.

circumstances that exist and propounding that even in the absence of the Presumption, sufficient circumstantial evidence exists to establish that undue influence was likely to have resulted in the challenged transaction, cannot be overstated.

CITE AS: LISI Estate Planning Newsletter #3207 (May 21, 2025) at http://www.leimbergservices.com.

1. **In Re Estate of Irene Sabaugh Trust[155]; Challenging a Trust on the Basis of Undue Influence or Lack of Capacity Can Be Difficult when the Grantor is Represented by Independent Competent Counsel and The Elements of the Presumption of Undue Influence Do Not Exist**

Generally, when challenging the validity of a testamentary instrument, in the absence of establishing that the presumption of undue Influence applies, three other presumptions may need to be rebutted:

1. the presumption of due execution;
2. the presumption of sufficient capacity; and,
3. the presumption of validity.

In Michigan, to establish the elements of the presumption of undue influence one must prove:

a. the existence of a confidential or fiduciary relationship between the grantor and a fiduciary;
b. the fiduciary or an interest which he represents benefited from the transaction, and,
c. the fiduciary had an opportunity to influence the grantor's decision in the transaction.[156]

If the presumption of undue influence has not been established, the challenger will have the burden of proving that: (i) the grantor lacked the requisite capacity to engage in the transaction, (ii) a challenged instrument was not duly executed (and perhaps that the harmless error rule should not apply), or (iii) that the transaction was the product of undue influence.

Even if all the elements of the presumption of undue influence are established, that presumption (like the presumptions of due execution, capacity and validity) is rebuttable.

Facts:

Irene and Samuel Sabaugh ("Irene") had three children: Chryresse, Shelly and Kimberly.

In 2006, Irene Sabaugh ("Irene") created a revocable trust. In 2009 she named her grandson, Adam as her attorney in fact. Irene's husband, Samuel had his own trust. Initially he named Chryresse and Shelly as successor trustees to his trust. In 2010, he amended his trust to name his grandson, Adam, as his successor Trustee. Samuel died in 2011. Because an attorney in fact is a legally recognized fiduciary, the first prong of the presumption of undue influence was met.

In 2014 Irene filed eviction proceedings pursuant to which Kimberly was evicted from Irene's home in Dearborn Michigan. Kimberly alleged that until 2015 she had a close relationship with her mother, but

[155] *Sabaugh v Hollerbach (In re Estate of Irene Sabaugh Trust)*, ___NW2d___; 2025 Mich. App. LEXIS 2121 (Ct App, Mar. 19, 2025).
[156] *Estate of Karmey*, 468 Mich 68 (2003).

after that Adam and other beneficiaries isolated Irene from her during the final years of Irene's life. Kimberly also indicated that in July 2015 she had a visit with Irene that "enraged" Irene.

In 2015, Irene expressed a desire to revise her estate plan. When she did so she allegedly also indicated that she wanted to engage a new attorney because her prior estate planning attorney was well into his 80's, was on the brink of retirement, and had difficulty locating documents and responding timely to her requests. Adam's brother-in-law recommended Randall Denha, a respected estate planning attorney.

In 2015, Irene executed a new trust. As trustee of her 2006 Trust she executed a deed conveying certain real estate from the 2006 Trust to her 2015 Trust. Irene was the initial and sole trustee of her 2015 Trust and Adam was named her successor. Adam was also named Irene's patient advocate and her attorney in fact in separate documents.

The 2015 Trust specifically devised certain real estate (the "Property") to Irene's four grandchildren, which included Adam. Irene's attorney, Randall Denha, notarized the deeds from the 2006 Trust to the 2015 Trust. Irene died in February 2020. In December 2020, Kimberly challenged the 2015 Trust claiming it was the product of undue influence, or in the alternative that Irene lacked the requisite capacity to create the 2015 Trust. Kimberly alleged that Irene had a history of mental illness and that her 2015 Trust significantly deviated from Irene and Samuel's historical estate plan.

While Irene's medical records reflected various physical and mental health diagnoses, and that she took medications, nothing appears to have supported an allegation that she lacked capacity to engage in the 2015 transactions. Adam brought a motion for summary disposition of Kimberly's challenge to the 2015 Trust. The first time he brought the motion the court denied it and permitted Kimberly to amend her complaint. When Adam brought a second motion for summary disposition (within the time parameters set by the court), Kimberly again sought to amend her complaint, but the court denied her request as being brought too late in the case as well as futile and prejudicial. The court granted Adam's second summary disposition motion.

Adam's motion was supported by affidavits. The court found that Kimberly's complaint (including her proffered 2nd Amended Complaint) and response to the motion did not include affidavits that created questions of fact, because none of the persons who provided affidavits had had any contact with Irene during any of the relevant time periods and generally included hearsay.

Denha provided an affidavit that reflected that while Adam drove Irene to some of her estate planning meetings, he never participated in any of the meetings where the proposed contents of the 2015 Trust were discussed. Adam did participate in discussions regarding the family organization, Irene's assets and Irene's payment of Denha's fee. Denha's affidavit averred all substantive conversations regarding Irene's estate planning desires took place between himself and Irene only and that she was adamant that she wanted the Property to go to her grandchildren. He also averred that she "was a pleasant client that did not suffer from any mental or physical issues that hindered her ability to communicate" and that he did not think her decisions had been influenced by anyone."

Irene's other children, Chyresse and Shelly, also supplied affidavits supporting Irene's intentions that the Property go to the grandchildren (as opposed to Irene's children), Irene was capable of making her own decisions and that the 2015 Trust was not the product of undue influence.

Adam denied that Irene suffered from any mental illness, disability or delusion when she signed the 2015 Trust.

While it appears that Kimberly established the elements of the presumption of undue influence, the court nonetheless granted Adam's motion for summary disposition. Typically, once that presumption is established, it precludes the grant of a motion for summary disposition, but not necessarily the grant of a directed verdict at the close of the challenger's proofs. Here the court apparently found that Kimberly had nothing more than the presumption of undue influence and that the proponents of the 2015 Trust presented the court with sufficient evidence to rebut that presumption such that in the absence of Kimberly being able to demonstrate that she would be able to present additional evidence that undue influence occurred there was no genuine issue as to any material fact and Adam was entitled to a judgment as a matter of law.

Kimberly appealed.

Analysis:

The appellate court noted that

> "[s]ummary disposition is appropriate when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. (cleaned up). When the moving party carries its initial burden of establishing undisputed factual issues, the party opposing the motion must demonstrate with *admissible* evidence that a genuine question of material fact exists.
>
> "A trust is void to the extent its creation was induced by fraud, duress, or undue influence." The burden of establishing undue influence is generally with the party asserting it existed. Undue influence exists when "the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." It is not sufficient to merely demonstrate that motive, opportunity or the ability to control existed in the absence of affirmative evidence that control was exercised. [157]

Unlike many other jurisdictions, in Michigan even when the elements of the presumption of undue influence have been satisfied, the burden of persuasion remains with the challenger, while the burden of production shifts to the proponent. Here, apparently the court felt that Adam met the burden of production sufficient to rebut the presumption, but Kimberly then could not meet the burden of persuasion.

[157] Estate of Irene Sabaugh Trust, supra at *7-8. Emphasis added. Internal citations omitted.

Comment:

The ability of parties (and the courts) to understand the operation of the presumption of undue influence in Michigan (given the shifting burdens and the distinction between the burden of production and the burden of persuasion), have led a committee of the Michigan Probate Council to engage in efforts to provide a statutory fix. Those efforts are still underway with a resolution not as yet reached.

In Sabaugh, it is difficult to ascertain if the challenger alleged that the existence of various "red flags" or often recognized "indicia" of undue influence coupled with the presumption (which although rebutted remained an inference). If she had it might have permitted the challenger to at least present her case.

Some of the "red flags" identified in the opinion appear to be claims of isolation, potential procurement, vulnerabilities suffered by Irene that could have made her more susceptible to influence such that the amount of pressure required to usurp her free will might have been lessened, and potential mind poisoning. Often, it can be helpful to elicit testimony from an expert witness when circumstantial evidence is to be relied upon relative to a grantor's vulnerability to, and indicia of, undue influence.

If the trier of fact determines that the attorney involved provided independent competent representation and advise, despite the existence of numerous indicia of undue influence, the proponent may nonetheless prevail. That is why the testimony of counsel can be extremely important to the preservation of the estate plan. A challenger will generally need to review the evidence from a longitudinal perspective given the potential psychological nature of undue influence, while a proponent will often focus on circumstances immediately surrounding the execution of the challenged transaction. Even when experts are utilized to address the psychology of undue influence (which can be impactful), the testimony of the scrivener attorney and witnesses to the pertinent instruments is also extremely important.[158] These cases tend to be extremely fact sensitive and reliance on the presumption of undue influence, without more, can be risky, particularly in a jurisdiction where the burden of persuasion remains at all times with the challenger.

CITE AS:

LISI Estate Planning Newsletter #3200 (April 30, 2025) at http://www.leimbergservices.com.

### SAM v. SEL: Are Acrimonious Acts between Siblings Caring for a Parent Sufficient for Issuance of a Stalking PPO or Would Probate Court Processes Perhaps Provide Better Solutions? [159]

When a parent has Alzheimer's Disease, the strain between and amongst family members can intensify. While having a diagnosis of Alzheimer's doesn't necessarily mean that the parent lacks the capacity to engage in estate planning or otherwise change an already existing plan, it may indicate the existence of a vulnerability that could make the parent more easily susceptible to undue influence – such that the amount of pressure that might be brought to bear might be lessened before such pressure becomes undue. While threats made by one of the sisters (if carried to fruition) might have constituted undue influence had they actually resulted in mom changing her estate plan, her physical assault of her sister

[158] See, Glazier, Dixon & Sweeney, *Undue Influence and Vulnerable Adults,* p. 126 and p. 145-147, America Bar Association ©2020

[159] Sam v. Sel, 2025 Mich. App. LEXIS 437 (January 16, 2025)

during a contentious interaction did not form the basis for the issuance of a non-domestic relationship PPO.

Facts:

*SAM v. SEL* involved two sisters, whose mother suffered from Alzheimer's and dementia. The sisters (SAM and SEL) had a long contentious relationship and rarely interacted. However, both siblings provided care for their mother. SAM installed a security camera ("Nanny Cam") in their mother's apartment to monitor her care and safety. One day in July 2023, when SAM checked the Nanny Cam she saw that it was turned off. As a result, she went to the mother's apartment and found SEL present. SEL indicated that she turned the camera off while she was with their mother, but would turn it back on just before she left.[160] The sisters argued about the presence of the Nanny Cam. Just before leaving, when SAM leaned over to kiss their mother goodbye, SEL grabbed her hair, pulled her head back and forth, and hit SAM in the head with her hand. SEL also threatened to have their mother change her estate plan to disinherited SAM. From the testimony presented it was unclear to the court if this threat was made during the argument and altercation that occurred in July 2023 at the mother's apartment or on another occasion.

Following the incident, SAM filed a police report and sought issuance of a PPO against her sister. Initially, the court declined her request for an ex-parte PPO finding that the petition didn't contain sufficient information to demonstrate a course of stalking or harassment that would terrorize a reasonable person. When SAM requested an evidentiary hearing, the court set the petition for hearing.

At the hearing SAM testified that the parties verbally argued before the physical altercation occurred. She admitted that she had used expletives and that the two sisters had not previously engaged in any physical altercations before the July 2023 incident at their mother's apartment. The parties had a long history of yelling and name calling. SAM testified that SEL made a statement about contacting an attorney to have SAM removed from their mother's trust but the record didn't indicate if this occurred on the same date as the physical altercation or on another date.

At the conclusion of the evidentiary hearing, the court granted SAM's request for a PPO, and this appeal ensued.

Analysis:

When a non-domestic stalking PPO is sought, the petitioner must establish that stalking or harassment have occurred. In this context stalking is defined as

> "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[161]

[160] It may be important to note that the use of a Nanny Cam, in certain circumstances, can constitute chaperoning, which can also be a red flag for the potential presence of undue influence.
[161] Sam v. Sel, supra at *5. Internal citations omitted.

For purposes of a non-domestic stalking PPO harassment is defined as

> conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.[162]

The emotional distress sufficient to qualify under the PPO statute is distress that causes significant mental suffering or distress but doesn't necessarily require treatment or counseling. "Unconsented contact" represents contact that is initiated or continued without the individual's consent or in disregard of the individual's expressed desired that the contact be avoided or discontinued. To obtain a non-domestic stalking PPO a pattern of prohibited contact (as defined by the statute) must also be established, which requires at least two separate and distinct acts not connected in time and space. Here, it appears that all of the alleged acts occurred during a single incident in July 2023 when both sisters were present at their mother's apartment.

The appellate court recognized that

> [s]everal acts "connected in time and space" may constitute "a single incident comprising a series of continuous acts, each immediately following the other," not a "course of conduct" or repeated unconsented contact with a petitioner.[163]

Because all of the acts occurred during a single episode of contact, the trial court was found to have erred when it granted SAM a PPO at the conclusion of the hearing.

Comments**:**

Because the conduct complained of had the potential of adversely impacting the parties' mother, who appears would have qualified as a vulnerable adult, other remedies, focused on protecting the mother might be available. MCL 7800.5401, which is patterned after UPC §5-401, permits the probate court, upon petition and after notice and hearing, to establish a protective order if the court finds that an individual is unable to manage their property and business affairs for a myriad of listed reasons. It is quite possible that due to the mother's dementia and Alzheimer's she would qualify for protective action. This procedure, given the existence of at least some indicia of undue influence (e.g. chaperoning by SAM, threats by SEL to have mother change her estate plan to eliminate SAM, mom's vulnerabilities, and perhaps others not delineated in the opinion), might (under some circumstances) be sufficient for the probate court to enter an order precluding modification of current estate planning documents without prior court approval – similar to a court-imposed Ulysses clause.

If the sisters were making care decisions under a designation of patient advocate or medical durable power of attorney, and they are now unable to effectively communicate and place mother's needs first, then appointment of a limited guardian might be appropriate and in doing so the court might implement

[162] Id. at *5-6.
[163] Id. at *7.

appropriate guardrails pertaining to unacceptable behavior. The question a court will likely have to grapple with in such a proceeding, especially if both have been named as agents by mother, is whether the sisters' interpersonal disputes and inability to get along adversely impact their ability to perform their fiduciary duties and act in their mother's best interests.

In any event, it appears that family mediation or counseling might be helpful. Whether a mediator or mental health professional can resolve what appear to be long prevalent animosities is unknown, but it might be worth a try. The probate court (as opposed to the circuit court PPO judge) will put the emphasis on the mother's needs and the impact her children's behavior may be having on her.

**CITE AS: LISI** Estate Planning Newsletter #3224 (July 9, 2025) at http://www.leimbergservices.com.

## Guardianships, Conservatorships and Powers of Attorney

### In Re Guardianship of JO; The Prism of Substantial Compliance Given the Material Purpose of a Limited Guardianship for a Minor

Limited guardianships for a minor child are initiated at the request of a parent. They typically include provisions for visitation and contact between the minor and the child's parent or parents intended to maintain a parent child relationship, the proposed duration of the guardianship, the financial support the parent is to provide for the child and the reason why the parent or parents are requesting the appointment of a limited guardian for the child. The placement plan may also include services that the parent, parents, child and/or guardian are to avail themselves of during the limited guardianship and any other provisions that the court may deem necessary for the welfare of the child. Any party to a limited guardianship for a minor may seek modification of the placement plan at any time. Annually, the limited guardian must file a report on the condition of the child with the court (and serve the interested parties with the same). Generally, a parent must demonstrate substantial compliance with the placement plan before the court having jurisdiction over the limited guardianship will terminate the guardianship for the minor.

Facts:

Following JO's birth, his mother (Oakley) experienced postpartum depression and found it difficult to care for JO and his older brother. While she was employed on a full-time basis, she still qualified for income-based housing in Cheboygan, Michigan. In September 2022, Oakley executed a power of attorney that authorized JO to live with Verona (who had been Oakley's mentor and was the director of Life Choices, a pregnancy resource center) and for Verona to provide for JO's care in Verona's home in mid-Michigan. The travel time between Oakley's home and Verona's was (according to Google) approximately 2.5 hours each way.

In March 2023, Verona petitioned the probate court to become JO's limited guardian. A guardian ad litem (GAL) was appointed. That GAL reported that Verona was financially secure, worked remotely, was able to care for JO and that all parties wanted what was best for JO. Under the resulting placement plan Oakley agreed to visit JO at least once per week, and attend arranged outings with him at least once per month. She was also to (i) provide for his health insurance coverage, (ii) remain gainfully employed, and (iii) provide for her own transportation when visiting JO. In May 2024, Verona filed an annual report on JO's

condition indicating that his living arrangements and health were excellent, he had bonded with his "guardian family" and the limited guardianship should continue. The report also indicated that Oakley had not complied with the placement plan and had only visited JO 7 times since April 2023 (substantially less than the more than 52 times specified in the placement plan).

In June 2024, the court appointed a licensed social worker (McMillan) to review the limited guardianship and report on JO's best interests. McMillan reported that Oakley had failed to substantially comply with the placement plan, JO shared a bond with Verona, Verona was meeting all of his needs, and she was providing him with a safe, stable and healthy environment. McMillan recommended continuation of the limited guardianship without modifications.

One month later, in July 2024, when JO was 27 months old, Oakley petitioned for the termination of the limited guardianship. A new GAL was appointed. That GAL reported that bonding with his mother at his age was crucial to JO's development, and that "the limited guardianship was not meant to be a permanent solution, and reunification was always the goal."[164] The GAL also reported that Oakley contended that Verona would not allow her to FaceTime or have video calls with JO or go anywhere alone with JO, nor did Verona take JO to Oakley's home. Contrary to the recommendation of the social worker one month earlier, the GAL recommended that the limited guardianship be terminated if Oakley could provide proof of suitable housing and sufficient income to support JO.

The court held a hearing on the motion to terminate in September 2024. The GAL indicated that Oakley had provided him with proof of her income, housing and car insurance. He also reported that he had received a letter from Oakley's sister-in-law in support of Oakley's petition that indicated Oakley had supportive family that lived near her and that Oakley had matured since the guardianship was initiated. The GAL recognized that Oakley had not complied with the provisions of the placement plan, but indicated that he felt she had made meaningful progress and reiterated his belief that it was "crucial" for JO to be able to bond with Oakley.

Verona objected to the termination. She testified that Oakley only visited JO 4 times in 2024 (as opposed to the over 32 times she should have visited him under the placement plan in 2024), and during those visits Oakley did not participate in typical parenting responsibilities such as feeding him or changing his diaper. Verona believed a change at this time would be traumatic for JO.

Verona's husband testified that Oakley only visited JO a dozen times during the nearly 2 years that JO lived with them, and that he believed that Oakley had failed to maintain stable employment and could not even afford the cost to travel to see JO. He also believed JO would be traumatized by a termination of the guardianship and that JO had bonded with he and Verona.

Oakley testified she previously worked a minimum wage job and found it difficult to afford to visit JO on a weekly basis, and that she recently lost her job and was now working as a Door Dash food delivery driver. While she was looking for a new job, she had not yet been able to attain one but had multiple interviews for jobs scheduled over the coming week. She had maintained her income based housing over the two

[164] Id. at *4.

years of the guardianship, had a driver's license and car insurance. She also received Medicaid benefits. She wanted JO to return to living with her so that they could create a "whole bond". She also testified that Verona did not give her the opportunity change JO's diapers when she would visit him or to take part in celebrations for his birthday or on holidays.

At the conclusion of the hearing the probate judge ordered that the limited guardianship be terminated, despite Oakley's apparent lack of substantial compliance with visits with JO. The court indicated

> So, if I had been at your first hearing, I would have talked about how difficult it is to terminate limited guardianships, because it is. . . . [JO] is bonded, and a limited guardianship is a way of helping with someone who is unable to take care of a child. But they need to end.
>
> And the -- the primacy of a parent's right is -- is very much there by way of statute. And it is an obligation of the Court to make sure that children are not forever taken by way of -- of what should be temporary types of situations.
>
> So, [Oakley] has appropriately petitioned at a time that -- maybe it should have been a year ago, but it wasn't, so the bond that the Verona[]s have is very, very real. And it needs to be respected by [Oakley]. But I am terminating this. It is time to move on and it is -- it is time to make sure that [JO] understands who his mother is.

The next day Verona wrote to the court and asked it to reconsider and stay its order. The court treated the letter as a motion for reconsideration but denied it nonetheless. In denying the request the court found that Oakley did substantially comply with the placement plan, because the distance between Oakley's and Verona's residences was an impediment to her compliance with visiting JO on a weekly basis and she had otherwise complied with the plan's provisions. It further opined that limited guardianships are not de facto adoptions and too much time had passed without proper facilitation of parenting time, so while the court had considered a stepped parenting time approach to reintegrate JO back with his biological family, the court was left with the impression that Verona would but up barriers to any such plan and it denied Verona's request for reconsideration.

Verona appealed.

Analysis:

Verona argued that Oakley's failure to substantially comply with the parenting plan she had agreed to (and the court had ordered) should preclude termination. In addition, she argued the court was required to serve JO's best interests, and termination did not further those interests. She also contended that the GAL did not fulfill his duties to adequately investigate Oakley's compliance with the parenting plan and JO's best interest. The appellate court disagreed and sustained the probate court's decision to terminate the limited guardianship.

In doing so it found that

> "[a]fter notice and hearing on a petition under [MCL 700.5208] to terminate a limited guardianship, the court shall terminate the limited guardianship if it determines that the minor's

> parent or parents have substantially complied with the limited guardianship placement plan." MCL 700.5209(1). If a minor's parent petitions a probate court to terminate a limited guardianship and MCL 700.5209(1) does not apply, the probate court may "[t]erminate the guardianship if the court determines that it is in the best interests of the minor . . . ." MCL 700.5209(2)(a).[165]

Since the statute did not define "substantial compliance", the appellate court looked to the Merriam-Webster's Collegiate Dictionary (11th ed) for a definition. That dictionary defined "substantial" as

> "consisting of or relating to substance" or "being largely but not wholly that which is specified[.]" Substantial compliance under MCL 700.5209(1) therefore refers to being largely but not wholly in compliance with a limited guardianship placement plan.[166]

It found that because Oakley's failure to comply was due, in large part, to the distance between locations, it was not error for the probate court to find that she substantially complied with the parenting place in as much as she otherwise complied with the other requirements set forth in the parenting plan and did make an effort to visit JO throughout the period that the limited guardianship was in place. Even when she lost her job, she found temporary work and was actively looking for employment.

The appellate court held that when a petition is filed to terminate a limited guardianship for a minor, the court only needs to consider the child's best interests if it finds that the parent did not substantially comply with the placement plan. Since the probate court found that Oakley did substantially comply with the plan, an analysis of JO's best interests was not statutorily required.

Additionally, since the GAL was not appointed to be an advocate for JO, but instead was appointed to "assist the court in determining a child's best interest", the appellate court found the GAL fulfilled his duties in that capacity. He prepared and filed a report based upon his communications with Oakley and Verona, he obtained proof of income, housing and car insurance, evaluated JO's developmental needs and made a recommendation to the court.

Comments:

It is unclear from the opinion why a limited guardianship was required if Oakley had supplied a power of attorney under MCL 700.5103, which permits a parent to delegate, for a period not exceeding 180 days, "any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to adoption of a minor ward or to release of a minor ward for adoption."[167] This type of appointment can be terminated by the parent at any time.

Parents are encouraged to provide alternate arrangements for the suitable care of a child when they, for any myriad of reasons, maybe unable to provide care for the child. Powers of attorney that permit temporary delegations of parental rights for purposes of the care and treatment of the child (whether because of illness, situations that impair the ability to address a child's needs, absence for work or a vacation without the child, permitting a child to vacation with others, or even deployment in the armed

[165] Id. at *10-11.
[166] Id. at *11.
[167] MCL 700.5103.

services) can provide for for a child's care and authority to obtain medical treatment, as well as greater control and flexibility to the parent.

When resorting to use of a limited guardianship for a minor, it can often be difficult to terminate such an arrangement in the absence of substantial compliance. In Michigan, a limited guardianship for a minor requires parental consent. Therefore, it can be important for a parent to consider the provisions of the placement plan and the likelihood they will ultimately be able to comply with the terms and conditions set forth in the plan before agreeing to its terms.

Verona appears to have acknowledged that she suffered from postpartum depression. It is considered a relatively common but serious medical condition, that according to Healthline affects 1 in 7 new parents.[168] It can be treated through medication and therapy. While the opinion indicates that it was Oakley's postpartum depression that initially led her to providing Verona with a power of attorney for JO's care, nothing in the opinion indicates that treatment compliance was a condition of the placement plan.

It appears that the court did not wish to penalize Oakley for a failure of compliance that resulted from limited financial resources, when in all other respects it found she had substantially complied with the placement plan's terms. Another court might have found a dozen visits over a two-year period (when the placement plan contemplated approximately 104 during that period) was not substantial compliance, but here the court looked to all of the terms and the reason for non-compliance in finding that Oakley had "substantially" complied with the plan, and the appellate court found that the probate court, in doing so, did not abuse its discretion.

CITE AS: LISI Estate Planning Newsletter #3205 (May 15, 2025) at http://www.leimbergservices.com.

### In Re Conservatorship of BJH[169]; The Importance of Keeping Records When Acting Under a Durable Power of Attorney

Just because a fiduciary under a durable power of attorney isn't generally performing duties under court supervision, doesn't mean it isn't important to keep accurate records.

Facts:

In October 2013, BJH executed a general durable power of attorney (the "DPOA") that appointed her daughter, Cynthia, as her attorney-in-fact. The DPOA authorized Cynthia to manage BJH's assets (including her money and real property) and to employ professional and business assistance (including attorneys, accountants and real estate agents). The acceptance signed by Cynthia outlined various fiduciary duties

[168] https://www.healthline.com/health/depression/postpartum-depression?utm_source=google&utm_medium=cpc&utm_cmpid=21555563674&utm_adgid=171370509571&utm_adid=708253831837&utm_network=g&utm_device=c&utm_keyword=&utm_adpos=&utm_gclid=EAIaIQobChMIgumCpdGgjQMVgVz_AR3DFx1XEAAYAiAAEgLviPD_BwE&gad_source=1&gad_campaignid=21555563674&gbraid=0AAAAAo8i9-a7GQgCjaXbu3mh6aVB8tWSQ&gclid=EAIaIQobChMIgumCpdGgjQMVgVz_AR3DFx1XEAAYAiAAEgLviPD_BwE

[169] Cynthia Mifsud v Fam Options Servs (In re BJH), ___NW2d___; 2025 Mich. App. LEXIS 2803 (Ct App, Apr. 10, 2025).

that Cynthia owed to her mother when acting as her agent under the DPOA, including the duty of loyalty and to act in the principal's best interests. The DPOA also contained an exoneration clause that indicated that BJH's agent

> shall not be liable for any loss that results from a judgment error that was made in good faith," but "[BJH's] Agent shall be liable for willful misconduct or the failure to act in good faith while acting under the authority of this Power of Attorney.[170]

In May 2021, Cynthia petitioned the probate court to become her mother's guardian. BJH objected, claiming she didn't need a guardian and that she had moved out of Cynthia's home "due to financial mismanagement and mistreatment"[171]. In light of BJH's response, the probate court suspended Cynthia's power to act as BJH's agent under the DPOA and appointed a guardian ad litem (GAL) to report to the court on BJH's best interests and to petition the court for appointment of a conservator. In June 2021, following a hearing on the petitions for appointment of a guardian and conservator, the court appointed Family Options Services Inc (FOS) as BJH's temporary guardian and special conservator. Cynthia stipulated to the entry of an order that required her to file accountings relative to her actions as BJH's agent covering the period from January 2019 through May 2021.

In September 2021, Cynthia filed accounts for 2019, 2020 and 2021, along with a petition to have those accounts allowed by the court. The petition was accompanied by various documents in support of the accountings, including cancelled checks, bank statements, receipts and an excel spreadsheet. FOS objected to the accounts contending that adequate supporting documentation for various claimed expenses was lacking. The court gave Cynthia an opportunity to amend her accounts and to supply the necessary supporting documentation. Despite repeated orders for Cynthia to file her amended accounts, Cynthia didn't do so until September 2022, at which time the GAL and FOS objected to the amended accounts. Cynthia was again ordered to amend her accounts and provide supporting documentation to substantiate claimed expenses. Cynthia hired counsel and, with the assistance of her new attorney, in November 2022 she filed second amended accountings and a petition to have those accounts allowed. She also asked that the court have the conservatorship estate pay her attorney fees and costs associated with the second amended accountings in the amount of $25,485.

The GAL again recommended that the court deny allowance of the accounts because they still didn't accurately represent BJH's expenses and Cynthia was attempting to obtain money from the conservatorship estate to which the GAL contended she wasn't entitled. The GAL represented that while she was able to verify some of the expenses, she was unable to verify over $100,000 in expenses because they were still unsupported by documentation. Following a hearing on the allowance of the accounts, the court found that the

> accountings "lack[ed] evidence supporting many of the expenses claimed," emphasizing that [Cynthia] had not presented any evidence "to substantiate the many questionable receipts and expenses." The court also found that [Cynthia] had breached her fiduciary duties to BJH by failing

[170] Id. at *2.
[171] Id. at *3.

> to maintain accurate records of her transactions as attorney-in-fact and by failing to keep BJH informed of her actions as attorney-in-fact. The court found that $47,922.70 in expenses of the second amended first accounting, $23,081.48 in expenses of the second amended second accounting, and $14,852.60 in expenses of the second amended third accounting "were unsubstantiated, improper or unaccounted for" and therefore could not be approved. The court thereafter issued an order granting the second amended accountings in part but denying them in the aforementioned amounts, denying [Cynthia]'s "attorney fees in the petition to allow accounts," and ordering that "the proceeds from the sale [of BJH's] house . . . be returned to" BJH.[172]

On appeal, Cynthia argued she (i) shouldn't be held liable for damages to the conservatorship estate through application of the exoneration clause, and (ii) should be entitled to payment of her attorney fees because the DPOA permitted her to hire an attorney to assist her in the performance of her duties as BJH's agent. The court disagreed. It held that (i) the exoneration clause did not operate to relieve her of liability under the circumstances presented, and (ii) she wasn't entitled to have her attorney fees paid under the DPOA because Cynthia had stipulated to prepare and file accountings after she was no longer acting as BJH's agent. Cynthia appealed.

Analysis:

Cynthia didn't deny that she breached certain duties or that the court didn't have the authority to compel a fiduciary to redress breaches through the payment of money, restoration of property or other means, including, but not limited to denial or reduction in fiduciary compensation. Rather, she argued that the exoneration clause contained in the DPOA eliminated her liability to redress her breaches because she acted in good faith. She further posited that the authority provided to agents acting under the DPOA to retain and compensate counsel barred the court from denying her request for attorney fees.

The appellate court opined that

> [i]t is well recognized that an attorney-in-fact is bound to act in the principal's best interests and owes the principal common-law and statutory fiduciary obligations, which include the duties of good faith and loyalty and the prohibition against self-dealing. These fiduciary duties and obligations are imposed on an attorney-in-fact upon his or her signing and acceptance of the power of attorney even if the document itself does not "include language expressly imposing a fiduciary duty."[173]

In addition, the appellate court reflected that

> [t]he exoneration provision contemplates, and relieves the attorney-in-fact from liability for, a situation where the principal has incurred a loss by virtue of a good-faith decision by the attorney-in-fact—an investment choice that did not pan out, for instance, or a decision to sell certain property for a price that proved lower than what could have been had. At issue here, however, are

[172] Id. at *6-7.
[173] Id. at *8-9. Internal citations omitted.

> expenses that [Cynthia] claims to have incurred in connection with BJH's care; [Cynthia] does not explain what the purported "loss" is to BJH (and indeed, [Cynthia] contends her decisions as to these expenses saved BJH money). What [Cynthia] appears to be seeking is not to avoid liability for a loss that BJH suffered as a result of [Cynthia]'s decisions as to these expenses, but to avoid any loss to herself—and to shift any such loss to BJH instead—for her failure to adequately document and otherwise manage these expenses.[174]

The court looked to Black's Law Dictionary to define "good faith", as a definition of what would constitute "good faith" was not contained within the DPOA. In doing so it found those words to mean "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation."[175]

The appellate court found that the probate court did not err in finding that the damage occasioned to the conservatorship estate wasn't the result of good faith actions by Cynthia because, among other things, Cynthia: (i) chose not to maintain proper records,(ii) did not keep track of caregiver or laborer billings or obtain 1099's, and chose to pay them in cash without obtaining receipts; (iii) compensated herself despite the DPOA's specific prohibition against payment for services rendered by Cynthia or gifts by an agent to the agent; (iv) spent BJH's funds on her own personal expenses (such as for property taxes, utilities, credit card bills, groceries, airline tickets, meals and entertainment); (v) disguised two disbursements as caregiver services despite those funds being used to purchase airline tickets for family members; (vi) couldn't account for cash disbursements of more than $62,000; and, (vii) took a cash distribution from the sale of BJH's home (such that not all of the proceeds derived from the sale of that property were deposited into BJH's accounts and remained unaccounted for at the time of the hearing).

With regard to Cynthia's request for attorney fees, the court found that the attorney wasn't hired pursuant to the DPOA, because at the time of retention and provision of legal services, Cynthia was no longer acting as agent under the DPOA and she was, therefore, not entitled to use assets of the conservatorship estate to pay for those fees, particularly where those fees were related to "his or her breach of fiduciary duties when there is evidence of wrongdoing".[176] Further, the court found that denial of requested attorney fees was an available remedy for redressing a breach of fiduciary duties. Accordingly, even if Cynthia had the authority to employ counsel under the DPOA (with regard to addressing actions she took while acting as agent under that instrument), the denial of such fees when incurred due to breaches of her fiduciary duties was a remedy that "was not outside the range of reasonable and principled outcomes."[177]

Comments:

Michigan recently adopted an iteration of the Uniform Power of Attorney Act (UPOAA).[178] While that UPOAA had not been in place during the period when Cynthia acted as BJH's agent under her DPOA, the

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[174] Id. at *11-12.
[175] Id. at *12.
[176] Id. at *17.
[177] Id. at * 17.
[178] Uniform Power of Attorney Act, National Conference of Commissioners on Uniform State Laws, ©2006. See also MCL 556.201, et seq.

duties imposed upon an agent under the operative POA did not significantly differ from those imposed by UPOAA. The Act defines "good faith" to mean "honesty in fact".[179] Among the duties imposed upon the Agent, notwithstanding provisions contained in the power of the attorney, are to:

> (A)(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
>
> (2) act in good faith; and
>
> (3) act only within the scope of authority granted in the power of attorney.
>
> (b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:
>
> (1) act loyally for the principal's benefit;
>
> (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
>
> (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
>
> (4) *keep a record of all receipts, disbursements, and transactions made on behalf of the principal*;
>
> (5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
>
> (6) attempt to preserve the principal's estate plan, to the extent actually known by 24 the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
>
> (A) the value and nature of the principal's property;
>
> (B) the principal's foreseeable obligations and need for maintenance;
>
> (C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
>
> (D) eligibility for a benefit, a program, or assistance under a statute or regulation.
>
> (c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

[179] UPOAA, §102 (4); MCL 556.202(h)

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal *unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate*. If so requested, *within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days*.[180]

While the "standard" of care owed may vary from jurisdiction to jurisdiction, the duties themselves are fairly consistent. Importantly, UPOAA specifically abrogates the exoneration of an agent, if operation of such a clause:

(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.[181]

Important to the court's analysis appears to be Cynthia's failure to keep records, inability to account for large expenditures, and the fact that she engaged in conduct that was either not authorized under the DPOA or specifically in violations of it terms.

While individuals might elect to take the risk of paying care providers under the table, it's advisable for fiduciaries to get receipts from providers when payments are made in that fashion. If cash is used to pay

[180] Id. §114 (a) –(h). Emphasis added. See also MCL 556.214.
[181] Id. §115. See also MCL 556.215.

for groceries and incidentals, it may be prudent to keep the receipts. When care providers are engaged directly (as opposed to through a company/service) it may be prudent to obtain both an I-9 and W-9, and issue appropriate 1099's, as well as to obtain workman compensation insurance in case the individual employed is injured on the job.

Gifts may only be made by an agent under a power of attorney, to the extent specifically authorized by the operative instrument. While one might argue that improvements made to Cynthia's personal home (to accommodate BJH's physical needs in order to reside there), to the extent they also benefited Cynthia, constituted a gift. In any event, it might be advisable to obtain the written consent of the principal (if the principal is competent), written approval of those who might be the principal's beneficiaries or a protective order that permits such conduct, when the avoidance of future contests over the expenditures is desired.

As may be the case when representing any fiduciary, it is helpful for agents to engage counsel to advise them on their duties when the responsibility to act is accepted and not wait until claims of a breach are levied. Doing so might also might help demonstrate that actions taken in reliance on such advise were undertaken in good faith. In *In re BJH,* the duties and responsibilities that Cynthia was found to have breached were specifically set forth in the very instrument pursuant to which she accepted responsibility to act. Under those circumstances it became difficult for the court to accept her argument that she acted in good faith such that the exoneration clause would apply to the losses suffered by BJH's estate as a result of BJH's inability to account for assets that comprised the estate and apparently no longer existed.

CITE AS:

LISI Estate Planning Newsletter #3235 (Aug. 7, 2025) at http://www.leimbergservices.com.

### In Re Guardianship of VA;[182] Protective Court Proceedings May Still Be Required Despite the Existence of a Durable Power of Attorney and Designation of Patient Advocate

Estate planners often advise their clients of the importance of not only having a will (and perhaps a trust), but also a durable power of attorney and designation of patient advocate. Having a durable power of attorney and designation of patient advocate can help to avoid the need for probate court proceedings. However, despite their existence protective proceedings may nonetheless be required. When a guardianship (or conservatorship) is required, the individual nominated to act as the fiduciary in such instruments may have priority of appointment.[183]

MCL 700.5313(2) provides that the following individuals will have priority of appointment in the event the court determines that appointment of a guardian is required:

(a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in this state or another state.
(b) A person the individual subject to the petition chooses to serve as guardian.

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[182] *Botsford v Rankin (In re Guardianship of VA)*, ___NW2d___; 2025 Mich. App. LEXIS 2704 (Ct App, Apr. 9, 2025).
[183] See MCL 700.5409(1)(b (based upon UPC §5-409) with regard to conservatorships and MCL 700.5313(2) (based upon UPC §5-305) with regard to guardianships.

(c) *A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition*.
(d) *A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney*.
(e) A person appointed by a parent or spouse of a legally incapacitated individual by will or other writing under section 5301.[184]

Emphasis added.

However, even when a party has priority, there may be circumstances when the court may find the agent or nominated individual to be unsuitable to act. In *In re Guardianship of Redd,* the Michigan appellate court defined a guardian who was "suitable" for purposes of MCL 700.5310 (relating to removal of a guardian) as

> …one who is 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.[185]

While inter-family disputes may, on their own, be insufficient to find that an individual is unsuitable to act, in *Redd,* in addition to the existence of such disputes the guardian was found, by a preponderance of the evidence, to no longer be suitable to serve as guardian because he was impeding family relationships and not willing to facilitate them as well as exerting undue influence over the incapacitated adult.

Facts:

VA had five children. She named her daughter, Kirsten, as her agent under a general durable power of attorney and as her patient advocate under a medical durable power of attorney.

During the summer of 2023, when VA was 92, had been diagnosed with dementia and was residing in an assisted living facility in Michigan, her daughter, Kari, and Kari's husband (hereafter collectively "Kari"), without notice to the facility or to Kirsten (who was then already acting as VA's patient advocate), removed VA from the facility where she resided and relocated VA to their home in South Carolina for three months. During that period, Kari restricted VA's ability to communicate with the rest of the family, transferred approximately $41,000 out VA's accounts and had her execute a new power of attorney naming Kari (and her husband) as VA's agents. Kirsten filed a petition for guardianship in Michigan and obtained an ex-parte order (the "Order") for the return of VA to Michigan. To enforce that order Kirsten then had to register the Order in South Carolina in order to obtain VA's physical return to Michigan.

Kari filed a competing petition for guardianship in South Carolina and responded to the petition filed by Kirsten in Michigan. By claiming that VA required a guardian, of necessity, Kari acknowledged that VA lacked capacity. The litigation necessitated by Kari's surreptitious removal of VA from the Michigan facility

[184] MCL 700.5313(2). See also UPC §5-305.
[185] Redd v Carney (In re Guardianship of Redd), 321 Mich App 398, 408; 909 NW2d 289 (2017).

depleted VA's assets to the extent that upon her return to Michigan Kirsten had to find a different facility for VA to reside at that would accept Medicaid.

In January 2024, the parties stipulated that VA was incapacitated and that Kirsten would be appointed her guardian, thereby resolving the competing guardianship petitions.

In June 2024, Kari proposed that VA reside with her in Kari's home in South Carolina rather than VA becoming a resident in a Medicaid qualified facility. The family could not come to a consensus and Kari filed a petition to modify the Michigan and guardianship to permit VA to be moved to South Carolina to have her social security payments assigned to Kari. Kari alleged that VA had a long-standing wish to be cared for by family, as opposed to by strangers in a care facility and, that Kirsten was only acting out of her own self-interest and anger in refusing to permit VA to reside with Kari in South Carolina. Kari also objected to the amount of attorney fees that had been incurred to secure VA's return to Michigan because it resulted in VA having to move out of her prior assisted living facility and into a Medicaid qualified facility that had had some complaints filed against it.

The court appointed guardian ad litem (GAL) recommended that Kirsten remain VA's guardian and indicated that given Kari's prior actions she (and her husband) were unsuitable to act as VA's guardian.

In October 2024 the probate court denied Kari's petition and found that she had not established by a preponderance of the evidence that Kirsten was unsuitable to (continue to) act as VA's guardian. The court found that Kirsten had "appropriately provided for VA's care, custody, and control, and was acting in VA's best interests". Kari appealed.

Analysis:

The Michigan appellate court found that:

> [f]ollowing contested petitions, the parties in this matter stipulated to VA's incapacity and to the appointment of [Kirsten] as guardian, thereby stipulating to [Kirsten]'s willingness and suitability to the satisfaction of MCL 700.5313(2). Furthermore, [Kirsten] was listed as VA's attorney-in-fact under a durable power of attorney and patient advocate under a durable power of attorney for health care, placing her ahead of [Kari] in priority for appointing a guardian under MCL 700.5313(2)(c) and (d).
>
> The process for attempting to remove a guardian is specifically provided for in EPIC and requires the filing of a petition by an interested party, pursuant to MCL 700.5310(2). But "to remove a guardian, under MCL 700.5310, the probate court must find that the guardian is no longer suitable or willing to serve." In order to remove a guardian that is otherwise willing to continue in his or her duties, it must be established by a preponderance of the evidence that the guardian is not qualified or able to provide for the person's care, custody, and control. The moving party has the burden of proving that the guardian is unsuitable. [186]

[186] In re Guardianship of VA, supra at *5-6. Internal citations omitted.

The appellate court distinguished the instant case from that of *Redd,* in that here it was Kari who had acted inappropriately by removing VA, removing funds from VA's accounts, isolating VA from her family and creating the need for fees to be incurred. There was no evidence that Kirsten attempted to limit family contact with VA. To the contrary, the evidence reflected that Kirsten permitted VA to communicate freely with her family and two of VA's other children (who also lived out of state) had recently visited VA in Michigan prior to the hearing on Kari's petition.

The evidence showed that Kirsten was providing for VA's care, had successfully enrolled her in Medicaid and had her admitted to an extended care facility about an hour from her home. The GAL testified that VA was getting the 24-hour care VA required and recommended that Kirsten remain VA's guardian.

Comment:

While inter-family disputes can certainly be disruptive and can result in depletion of the incapacitated individual's assets, generally the court will require something more before a guardian nominated by the individual in a power of attorney will be removed. Including statements of intent in powers of attorney can also help provide direction to a Court when contests later arise, especially if those statements reflect the material purpose of appointing one child over another when there is a history of contentious family interactions. Given the priority of appointment that may be afforded a person nominated in a durable power of attorney, including such documents as part of a client's estate plan remains an important planning option even when court processes become necessary.

When counseling clients on the creation of powers of attorney, a discussion of the appropriateness of nominated agents is also important. Merely naming all ones' children, or naming them in the order of birth, may not be the best solution. It can be helpful to ask the client who would make decisions closest to what the client would if they were capable of then acting. The child who can't manage their own affairs, or has been dependent upon the client, may not be the best option. A child who has difficulty analyzing options and making decisions might only be able to act under a general durable power of attorney if there is co-agent acting with him or her. A discussion of options and potential avenues for checks and balances, as well as the rationale for the appointment of one child over another, may also be helpful.

Because a principal retains the right to act on his or her own behalf, protective action (such as obtaining a protective order, limited guardianship or conservatorship) may nonetheless be required to protect the principal if the principal lacks insight into their level of disability and continues to engage in activities that result in assets being wasted or dissipated in the absence of proper management. Even when an individual recognizes their limitations, they may nonetheless become victim to elder abuse (financial or otherwise) such that protective action may be required to avoid further loss.

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### In re Guardianship of CY[187]; Guardian May Still Be Appointed Despite a Designation of Patient Advocate

MCL 700.5506 permits an individual to designate a patient advocate ("Agent") authorized to exercise powers concerning the principal's care, custody, and medical or mental health treatment decisions when the principal is unable to participate in making his or her own decisions. The designation of such an Agent may be revoked in a number of ways, including:

(a) the principal's death;

(b) an order of removing the Agent issued by the court;

(c) the Agent's resignation;

(d) the principal's revocation of the designation, even if the principal is unable to participate in medical treatment decision; or

(e) a subsequent designation of a patient advocate that revokes the prior designation either expressly or by inconsistency.

Before a petition for appointment of a guardian for an incapacitated adult is filed, the probate court (in Michigan) is required to provide the petitioner with written information identifying alternatives to the appointment of a full guardian. That includes providing information regarding limited guardians, conservators, a patient advocate designation, do not-resuscitate order, physician orders for scope of treatment form, and durable powers of attorney (with or without limitations on purpose, authority, or time period).[188]

If following a hearing on a petition for appointment of a guardian ("Petition"), the court determines that the individual is incapacitated and in need of a guardian, it generally cannot grant the guardian any of the same powers that were validly granted by the incapacitated individual to an Agent under a validly executed designation of patient advocate.[189] However, there are exceptions. When a Petition for guardianship (or its modification) alleges (and the court finds) that the Agent is not complying with the terms of the designation, the provisions of MCL 700.5506 to 700.5515, or the Agent is not acting in a manner consistent with the individual's best interests, the court may grant powers to the guardian that were previously granted to the Agent.[190] Moreover, if the Court finds that the Agent is denying persons access to the incapacitated adult (and that adult wants contact with the other person or contact with the other person is in the incapacitated adults best interest), the court may appoint a limited guardian to supervise access with the other person.[191]

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[187] *Cy v. Yulkowski (In re Of Cy.), 2025 Mich. App. LEXIS 4689*.
[188][188] MCL 700.5303(2).
[189] MCL 700.5306(2)
[190] MCL 700.5306(5).
[191] MCL 700.5306(6).

In *In re Of Cy*[192] the probate court found it had the authority to remove the Agent and appoint an independent guardian when the Agent had not acted in the principal's best interests and the principal (CY) had expressed a desire that none of her daughters be empowered to make medical decisions on her behalf.

Facts:

CY had three daughters and one son. CY's husband died in December 2022. Before her incapacity, CY had appointed her son, Leon, her Agent under a duly executed Designation of Patient Advocate. In January 2023, when CY was 93 years old, her daughters sought the appointment of a guardian for CY alleging that CY suffered from dementia and cognitive issues, and that Leon was not acting in Cy's best interests. The Petition asked that one of CY's daughters be appointed her guardian and cited multiple incidents of neglect, coercion and financial abuse spanning a period of years. CY objected to the appointment of a guardian. She claimed she was not incapacitated, but if she was, she wanted her son to be appointed her guardian and if the court would not appoint her son as her guardian, she wanted her son and an attorney from the law firm that had been handling her financial affairs to be appointed her guardian. In the alternative, she requested that her long time attorney (who was acting as her trustee) Amy Glenn, be appointed to act as a temporary guardian pending final adjudication of the Petition.

One of the daughters alleged that when she visited her mother in December (before her husband's death) their apartment was filthy and both Cy and her husband were in dire condition. The daughter feared that her brother's abuse would increase following Cy's husband's death. She testified that Leon told her he did not intend to make sure that CY was eating properly or wearing clean diapers. Cy's daughters contended that when they accompanied their mother to doctor appointments, it was clear that CY was not receiving proper care. Leon had arranged for a 70 year old man ("Samuel"), with no care-provider training to live with CY, and the daughters contended it was clear he was not capable of providing the level of care that CY required.

Leon claimed he had not shared information with his sisters about CY's condition out of respect for her privacy. Testimony elicited from the daughters indicated that CY's health declined after her husband died. She was extremely depleted, had trouble focusing, suddenly had problems walking and was sleeping all the time. When one of the daughters took CY to the doctor, she found out that Leon had fired the doctor after it was found that CY had "a vaginal vault impacted with feces".[193] In February, when visiting her mother, she found the door unlocked, Samuel asleep, her mother in a dirty diaper, feces and urine all over the bathroom and feces in the carpeting, and several bottles of voda. During the pendency of the Petition it was discovered that CY's legs were swelling because she was not wearing her recommended "leg wraps" and was not taking her prescribed blood thinner medication. During March and April 2023, the agency Leon had hired to provide care for CY failed to show up for their shifts on numerous occasions. While the court ordered Leon to provide his sisters with a list of their mother's physicians, when they contacted the doctors on that list they discovered only two of the five doctors listed were actively seeing CY. While there

[192] *Cy v. Yulkowski (In re Of Cy.), 2025 Mich. App. LEXIS 4689*
[193] Id. at *9.

was apparently a podiatrist on the list, CY's nails were so long that that had grown past the ends of her toes and were curling around them and CY had "an enormous callous on the bottom of her foot".

When the daughters saw CY following her husband's death, CY had lost a lot of weight, had numerous bruises and her skin was very dry and scaly, such that one of the daughters was concerned that CY was not eating properly or drinking enough water. In addition to suffering from poor hygiene, CY had "eloped" from her apartment while Leon was acting as her Agent and Leon's failure to involve and keep his sisters advised impeded the ability to address CY's social well-being.

The court conducted a two-day evidentiary hearing during which it considered CY's medical records, the report of the court appointed guardian ad litem ("GAL") and the testimony presented. Following the hearing, the court issued a 13-page opinion in which it found CY to clearly be an incapacitated individual due to her dementia/cognitive issues and need for 24/7 care and assistance in all aspects of daily living. The court acknowledged that Leon would have priority of appointment because he had been designated as CY's Agent in a duly executed designation of patient advocate, but found he had repeatedly failed to cooperate with his siblings and had acted contrary to CY's best interests.

The court also found that

> "[CY's] health and well-being has declined to the extent that she requires around-the-clock care," so further involvement from the daughters was pertinent. The trial court described [Leon's] "laissez faire" approach to CY's care as inappropriate, considering CY was "a 93-year-old woman experiencing memory issues and cognitive decline" with extensive needs. The testimony revealed that CY was left without proper supervision on several occasions, she was receiving inadequate nutrition, and she was found wearing a soiled diaper in an unclean residence. Finally, [Leon's] employment of [Samuel] as CY's caregiver was concerning, especially because there were numerous occasions when [Samuel] was asleep when the agency caregivers failed to attend their daytime shifts, and [Samuel] lacked formal training in elder care.
>
> Based on the evidence before it, the trial court opined that CY required greater supervision than [Leon] was willing or able to provide, and "[CY] needs a guardian and Leon … is unsuitable to be appointed in that capacity." But because the evidence reflected that CY "did not want her daughters to serve as decision-makers relative to her medical care[,]" it was contrary to CY's best interests "to appoint a guardian to which she objects." Hence, the trial court concluded: "There being no other person with higher priority willing or able to serve, the Court may appoint a professional guardian under MCL 700.5313(4)." Accordingly, the trial court appointed Thomas Brennan Fraser "to serve as guardian and determine a proper level of care for [CY] that will serve her best interests and foster cooperation and involvement by her children."[194]

This appeal ensued.

Analysis:

[194] Id. at *5-6.

The appellate court (in this published opinion) recognized that

> [p]ursuant to the Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq., "a probate court may appoint a guardian to be legally responsible for an incapacitated individual." Under MCL 700.1105(a), an "incapacitated individual" is defined as a person "lacking sufficient understanding or capacity to make or communicate informed decisions." A probate court has the power to appoint a guardian for an "incapacitated individual" if it finds, by clear and convincing evidence, "the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record." MCL 700.5306(1).
>
> By all accounts, CY qualified as an "incapacitated individual" under EPIC because of her dementia and chronic health issues, which were substantiated by medical records during the trial-court proceedings.[195]

The court understood that that guardianship should generally be a remedy of last resort because it can deprive a legally protected person of their "'legal autonomy, often completely and in extremely intimate ways.'"[196]

The probate court had also acknowledged that Leon had been appointed and acted as Cy's patient advocate in a duly executed instrument as well as the preferences CY had expressed during the course of the hearing on the Petition (including the other persons CY named in her response to the Petition). The court also found that

> [a]ccording to MCL 700.5306(2): "If the court is aware that an individual has executed a patient advocate designation under section 5506, the court shall not grant a guardian any of the same powers that are held by the patient advocate." However, MCL 700.5306(5) creates an exception to MCL 700.5306(2), allowing a court to grant powers to a guardian over "treatment decisions that the patient advocate is designated to make" if "the patient advocate is not acting consistent with the ward's best interests . . . ." Hence, the statutory scheme for court-appointed guardianships contemplates that a trial court may appoint a different person to serve as the guardian for an "incapacitated person" who has made a patient advocate designation. Moreover, while a legally protected person has the right to select who will serve as a fiduciary, the Legislature has decreed that the right is restricted to the selection procedure under MCL 700.5313, and whether the requested person is "suitable and willing to serve[.]" MCL 700.5306a(1)(aa).[197]

The court held that pursuant to MCL 700.5313 while Leon as designated patient advocate (as well as the attorney acting as CY's Agent under her Durable Power of Attorney, and the person's CY proffered to the Court in her response to the Petition) had priority, it could still appoint a professional guardian, if it found that the persons with priority were not suitable to act, even though they were willing to do so.[198] The court

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[195] Id. at *7-8. Internal citations omitted.
[196] Id. at *16, Internal citations omitted.
[197] Id. at *12.
[198] See MCL 700.5313(4).

found that while Leon was willing to act, he "demonstrated that he was utterly unwilling or unable to address CY's acute needs."[199]

Despite the existence of a validly executed designation of patient advocate (who is willing to act in that capacity), if the designated Agent is not acting in a manner that is consistent with the principal's best interests, the court may appoint a guardian and imbue then with the powers otherwise delegated to the Agent in a duly executed designation of patient advocate.

In a footnote, the appellate court also questioned whether CY even read the objection that nominated Leon and others to act on her behalf, when the objection misspelled Leon's name throughout the pleading, suggesting that she did not even know her son's name at the time the objection was filed on her behalf.[200]

Comment:

The existence of a designation of patient advocate (or medical durable power of attorney), is an important component of an estate plan. It can act as an impediment to the appointment of a guardian when a "suitable" individual is nominated and willing to act in such capacity and in the principal's best interests.

Cy certainly had the right of freedom of association, including the right to direct that her daughters not have decision making authority over her medical care. She could have even voiced her desire to limit visits from one or more of her children. When a client has strong feelings regarding the desire to omit family members from the decision-making process (or even to have contact with them), referencing the same in the instrument can prove helpful in conveying the principal's intent. However, even if such language was present in CY's designation of Leon as her patient advocate, under the circumstances presented, all of CY's children remained interested persons with regard to her welfare and entitled to bring concerns (such as those expressed in the Petition) to the attention of a court of competent jurisdiction. Here the court honored CY's desire that her daughters not become her surrogate decision makers, but their involvement was recognized by the court as providing a benefit where, as here, their involvement was the impetus to bringing abusive and neglectful behavior to the court's attention and providing a benefit to CY's overall well-being.

A client might recognize the benefit of having various individuals or family members advised of medical conditions and decisions that need to be made; they might also recognize that relationship dynamics might result in the potential inability of all being able to come to a consensus. The client might then wish to consider including language that indicates the client's desire that the appointed Agent consult with and/or share information with others under a variety of circumstances, but specify that medical provides rely solely on the instructions received from the then acting Agent. Delving into family dynamics with a client can help to inform the options that might be discussed with the client during the drafting process.

CITE AS: LISI Estate Planning Newsletter #3215 (June 18, 2025) at http://www.leimbergservices.com.

[199] In re Of Cy, supra at *17.
[200] Id., fn. 1.

### In re Guardianship of AMMB;[201] Standards for Removal are Different than those for Appointment of Guardian of Developmentally Disabled Adult

It's not uncommon for custody disputes over a minor child to pour-over and continue into adulthood when that child is developmentally disabled and in need of a guardian once they reach adulthood. In *In re Guardianship of AMMB*[202], initially the probate court appointed both parents as co-plenary guardians of their legally incapacitated developmentally disabled adult child. Continued disputes over parenting time and issues emanating from the parents' distrust of the other resulted in various proceedings and multiple appeals. The most recent appeal addressed whether the incapacitated adult child had to be present at a hearing on a petition to remove one of the co-plenary guardians and what the court may consider in arriving at a decision to remove one of those guardians.

Facts:

AMMB ("Anna-Marie") suffers from a number of developmental and physical ailments, including autism, spectrum disorder, obsessive compulsive disorder and epilepsy.[203] She reads at a first grade level, communicates at the level of a seven year old and is unable to provide for her own care. Historically, the bulk of her care was provided by her parents, Andrew and Christy. During her minority, her parents shared custody. Once she became an adult, her parents were appointed her co-plenary guardians. Following ongoing disagreements, accusations and breakdowns in communications each parent sought removal of the other parent and requested that the court appoint him or her to be Anna-Marie's sole plenary guardian. At the time of the probate hearing on each parent's petition Anna-Marie was 21.

A guardian ad-litem ("GAL") was appointed by the court to investigate and make recommendations relative to Anna-Marie's best interests. While Anna-Marie was present in court for the first day of the hearing on the petitions, the GAL waived her attendance at future hearing dates and provided the court with letters from Anna-Marie's primary care physician and psychiatrist. Each of those providers opined it would be detrimental to Anna-Marie's well-being to attend the court proceedings. Christy objected and wanted Anna-Marie to be compelled to attend. She contended that Anna-Marie had the right to be present at all hearings and her attendance could only be waived if *testimony* by a physician or licensed psychologist who had recently observed her established that her attendance would expose her to serious risk of physical harm. The court excused Anna-Marie's continued attendance.

On the first day of the hearing, Christy sought to call Anna-Marie as a witness to elicit testimony about where she would like to live. The GAL objected and asserted that Anna-Marie wasn't competent to testify. Christy's counsel argued that Anna-Marie had the "right to 'articulate her needs and preferences of who she wants as co-guardian'".[204] The judge ruled that it was required to

> … make a reasonable effort to question the individual concerning his or her preference regarding the person to be appointed guardian and any preference indicated shall be given due consideration. That provision does not require that the questioning take place on the record. I

[201] Bazakis v Bomba (In re Ammb), ___NW2d___; 2024 Mich. App. LEXIS 6563 (Ct App, Aug. 22, 2024).
[202] Id.
[203] Id at *1.
[204] Id. at *8.

> believe that [AMMB] would be more comfortable talking to me off the record in a more private setting such as my chambers.[205]

The court conducted an unrecorded *in camera* interview with Anna-Marie outside the presence of either of her parents or their attorneys, to ascertain Anna-Marie's preference. The judge indicated that he considered that preference among other factors, including her best interests, in arriving at his decision.

When ruling on the petitions, the court made extensive factual findings on the record, but did not include any of those factual findings in the resulting written (form) order entered by the court. Some of the findings addressed on the record related to points of contention, the credibility of the witnesses and "'[t]he hatred among the parties' as 'very obvious' and … 'not in the best interest of" AMMB.'"[206] The court also considered Christy's testimony that Anna-Marie wouldn't have to see her father, but could see him and stay with him over-night if, on Anna-Marie's own volition, she called her father, asked to see him and he agreed. Additionally the court cited to Christy's own testimony that she felt that the co-guardianship was bad for Anna-Marie and that Christy had suggested the appointment of a public guardian.

The probate court granted Andrew's petition to remove Christy as co-plenary guardian and ordered that Andrew continue as Anna-Marie's sole plenary guardian. This appeal ensued.

Analysis:

The appellate court found that the requirement of testimony relied upon by Christy for the proposition that the letter provided by Anna-Marie's doctors was insufficient was not applicable to the instant proceedings. Christy had relied on language in Michigan's Mental Health Code relating to involuntary civil commitments, as opposed to proceedings relating to guardianships for the developmentally disabled. MCL 330.1617(4), which relates to such guardianships, merely requires an affidavit provided by a physician or psychologist who recently examined the individual reflecting that attendance would subject them to serious risk of physical or emotional harm. Here, the doctors who supplied letters opining on their concerns regarding the potential adverse impact upon Anna-Marie that could result from her court attendance had examined her within the 6 months preceding the hearing and any error (if any) in not requiring that the letters be attested to or notarized was harmless.

With regard to Christy's contention that the interview of Anna-Marie should have been on the record, the appellate court noted this was an issue of first impression in the context of guardianships for developmentally disabled adults under Michigan's Mental Health Code. MCL 330.1628(2) provides:

> "[b]efore the appointment [of a guardian], the court shall make a reasonable effort to question the individual concerning his or her preference regarding the person to be appointed guardian, and any preference indicated shall be given due consideration."[207]

The appellate court found that the statute provided the court with "broad discretion to craft a method for ascertaining a ward's preference"[208] and "that the term 'to question' does not imply a need for sworn

[205] Id. at *8.
[206] Id. at * 15-16.
[207] Id. at *8-9.
[208] Id. at *9.

testimony."[209] In arriving at that conclusion, the appellate court analyzed the sections of the Mental Health Code that applied to developmentally disabled guardianships and noted that in other sections of the Code, the legislature used the word "testify", but here the word "question" (as opposed to "testify") was used. The appellate court noted that a developmentally disabled person might not have the capacity to testify and may be vulnerable to exploitation, so it makes sense that the probate court would be given discretion to "question an individual in a manner that prevents outside influence, including pressure from prospective guardians."[210]

Christy also argued that the court's *in camera* interview violated her fundamental due process rights as Anna-Marie's parent, relying on a case that involved the termination of parental rights. The appellate court found reliance of such cases was inappropriate because the liberty interests at issue in adult developmentally disabled guardianships were distinguishable from the parental liberty interests involved in the care and custody of their minor children. Here Anna-Marie's liberty interests (as opposed to her parents) were those subject to protection since she was no longer a minor and parents have no constitutionally protected liberty interests with regard to their children once they are adults.

Christy's argument that the judge's interview should have been recorded was also found to be without merit. The appellate court noted that courts routinely conduct unrecorded *in camera* interviews with minor children in custody proceedings and no authority has been provided that indicates the probate court can't use a similar process when questioning developmentally disabled adults under the circumstances presented in this matter.

While the Michigan Mental Health Code does require that the court enter a written order setting forth the factual basis for its findings when removing a guardian (or modifying the original guardianship order) and the failure to do so was "questionable", the appellate court found that Christy had not preserved this issue in the probate court proceedings. Nonetheless, the appellate court found there was

> simply no basis upon which to conclude that the outcome would have been different if the court had written its findings instead of only orally announcing them. Even if this issue were properly preserved, it would nevertheless fail to survive harmless error review. "[U]pon a finding of error an appellate court should remand the case for reevaluation, unless the error was harmless." An error is harmless "if it was not decisive to the outcome of the case." No reasonable person could argue in good faith that neglecting to write out the court's findings was decisive.[211]

Christy also contended that the probate court erred when it failed to make findings regarding the nature and extent of Anna-Marie's disabilities and ability to handle her own affairs. The appellate court found that because the hearing and determination at issue didn't involve a "hearing convened…for the appointment of a guardian", but rather related to the removal of a guardian for a person already determined to be in need of a guardian, such findings were not required.

Lastly, relying on MCL 330.1631(1), a statute that lists the duties of a guardian appointed for a developmentally disabled adult, Christy argued that the probate court failed to consider all the factors necessary to resolving the competing petitions filed by Anna-Marie's parents. The appellate court held

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[209] Id. at *9.
[210] Id. at *11.
[211] Id at *17. Internal citations omitted.

that Christy's reliance on that statute was misplaced, as it doesn't represent a list of factors that a court is to consider when removing a guardian. In fact, the appellate court held that the Mental Health Code doesn't list what factors a court must consider nor does it bar consideration of factors the probate court may find relevant to its decision making process. Here the probate court considered the evidence and arguments of the parties, as well as best interest factors generally considered in child custody disputes, as part of its deliberations. The appellate court held that

> there is no authority barring courts from considering how the best interest factors would apply in the context of a guardianship. In this case, it makes particular sense for those factors to be one of the court's reference points given that the parties are AMMB's parents.[212]

The probate court didn't err when it quashed a subpoena that Christy had issued to Andrew's current spouse that requested she produce communications between Andrew and his spouse about a trip Andrew's wife and her biological children took to Europe in 2023. The information sought was found by the probate court to be overbroad, unduly burdensome and

> "irrelevant and far afield from the central issue of suitability before this court." The request raised issues that would consume time without assisting the determination of a relevant issue. The court reasoned that the proceeding was about AMMB's best interests and whether the coguardians could put their love for AMMB before their distrust of each other.[213]

Comments:

Families who have loved ones that suffer from disabilities, mental health issues or substance abuse can develop maladaptive behaviors in their attempt to protect, cope and address those issues. When a court is confronted with behaviors, that while well intentioned end up nonetheless being harmful to an individual under (or in need of) guardianship, the focus of the court will be on the incapacitated individual's needs and best interests. There are times when a co-guardianship can work well in helping to spread what can be overwhelming responsibilities between parties who work well together and support the efforts necessary to address the incapacitated individual needs and achieve maximum independence. However, when parties don't function well together then a co-guardianship can increase litigation and, worse, adversely impact the very person they seek to help. A determination by the court that only one family member should act as guardian shouldn't be viewed as necessarily being a determination that the other family members are bad or don't love and care about the incapacitated adult, rather it is the result of the court recognizing that the focus must be on the incapacitated adult. Having frank discussions with clients about the potential adverse impact of disharmony and the resulting dysfunction that may have an adverse impact on the clients' loved one may help families find productive ways to support and enhance their loved one's life.

To avoid the acrimony that can accompany the appointment of co-guardians or co-patient advocates, consider appointing a primary, with the ability to delegate or permit a nominated next in line fiduciary who can be empowered to step up and act during any period when the primary is unavailable to act.

[212] Id. at * 21.
[213] Id. * 27-28.

Encourage open access to medical information to family who would be considered to have equal or higher priority of appointment (when and as appropriate) through the use of HIPAA release forms.

Children just want to be able to love and be loved by their parents and don't want to be placed in a position where they have to choose between them. While this concept is often stressed during minor custody proceedings, it remains equally important once those children become adults, particularly if those children suffer from disabilities that require guardianship proceedings. In *In re AMMB,* the Court reminds us that the needs and liberty of the adult child in need of protections are the constitutionally protected rights that must be focused on during guardianship proceedings, as opposed to those of parents or other family members.

CITE AS: LISI Estate Planning Newsletter #3143 (September 16, 2024) at http://www.leimbergservices.com.

## Special Needs Trust Created with Court Authority

### In re Hector M. Hernandez Supplemental Needs Trust[214]: Ultimate Disposition of Residue Voided when Terms Exceeded Authority

When court authority for creation of a first party special needs trust is obtained, it is important that provisions for disposition of the residue (remaining after Medicaid reimbursements are made) not exceed the authority granted to the fiduciary empowered to create the trust and that notice be provided to all heirs at law and parties of interest.

Facts:

Hector Hernandez suffered a stroke in 2014 resulting in him becoming a quadriplegic. He received a settlement of approximately $2 Million in a related medical malpractice case. The trial court ordered that the proceeds of the settlement be placed into a special needs trust for Hector's benefit since he was under the age of 65 at that time. Because the trust was to be funded with damages suffered by Hector, a first party special needs trust was required in order to protect his entitlement to need based governmental benefits. This type of trust requires that, to the extent assets remain at Hector's death, any governmental medical assistance Hector received would need to be reimbursed and only the residue (if any) would be available for distribution to beneficiaries.

Hector had three children. His sister, Luisa, was his guardian. The circuit court authorized Luisa, as Hector's guardian, to create a special needs trust, but the circuit court indicated that:

> Luisa, "the person serving as the fiduciary (guardian or conservator) is receiving no funds, individually, from the settlement/judgment." In other words, the circuit court granted Luisa, as Hector's guardian, the authority to create the special needs trust, but explicitly barred Luisa from receiving any funds from the settlement or judgment. Beyond this authority to create the trust, Luisa, as guardian, had no power to decide where Hector's property went upon his death. See MCL 700.5314, as amended by 2018 PA 594 (listing the powers of guardians, which do not include estate planning).[215]

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[214] Martinez v Findling (In re Hernandez Supplemental Needs Trust), ___NW2d___; 2024 Mich. App. LEXIS 8234 (Ct App, Oct. 14, 2024)

[215] Id. at *11.

While the probate court may grant powers outside of those enumerated in MCL 700. 5314[216], no such grant occurred here. Luisa hired an attorney ("Findling") to draft the trust and be its trustee.

In September 2020, following circuit court approval of Hector's settlement, and its order that a special needs trust be created, , Findling petitioned the probate court for funding the special needs trust for Hector's benefit under MCR 2.420(B)(5). That court rule provides that:

> [i]f a settlement or judgment provides for the creation of a trust for the minor or legally incapacitated individual, the circuit court shall determine the amount to be paid to the trust, but the trust shall not be funded without prior approval of the trust by the probate court pursuant to notice to all interested persons and a hearing. [217]

Hector's children were not notified regarding the probate proceedings to fund the trust. The trust Findling drafted (and was approved by the probate court) (the "Trust") provided, in pertinent part that:

> [t]he intent of this Trust [is] to supplement any benefits received (or for which Hector M. Hernandez may be eligible) from various governmental assistance programs and not to supplant any such benefits. All actions of the Trustee shall be directed toward carrying out this intent. Hector M. Hernandez shall not be considered to have access to income and/or principal of the Trust and he has no power to direct the Trustee to make distributions of income and/or principal to him.
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> ***
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> In the event that any Trust assets remain after payment for reimbursement to any state for medical assistance provided on the beneficiary's behalf as set forth above, the remainder, after reasonable expenses and costs for maintaining the Trust, shall be distributed to Luisa Martinez, unless Hector M. Hernandez leaves a valid Last Will and Testament or other estate plan which recites the power granted herein, directing the funds be distributed otherwise.[218]

After Hector's death in December 2021, Findling filed petitions to approve his final account as trustee and distribute the residue of the Trust to Louisa (after governmental reimbursements). The probate court granted those petitions. Later, another of Hector's siblings filed a petition to reform the Trust. It was during those proceedings that Hector's children finally received notice and filed a petition to vacate the probate court's allowance of the final account that authorized distribution of the Trust's residue to Luisa. Hector's children argued that the Trust was not properly formed because his presumptive heirs were not provided with notice and, further, the Trust didn't constitute his will.

The probate court granted the children's motion for summary disposition finding that:

> the court improperly authorized the trust because neither Findling nor Luisa notified Hector's adult children of the proceedings. According to the probate court, the residuary clause could not be deemed as Hector's will because (1) the trust lacked his signature, and (2) Luisa failed to produce clear and convincing evidence of Hector's intent to leave her the remaining balance and

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[216] See *In re Guadianship of Malloy,* ___ Mich ___; ___ NW3rd ____ (2024).

[217] In re Hernandez Supplemental Needs Trust), supra at *6, citing MCR 2.401(A).

[218] Id. at *2-3.

> therefore failed to create a material question of fact. To remedy this issue, the probate court altered the trust's residuary clause and replaced Luisa with Hector's estate as the remainder beneficiary. The probate court also modified its order allowing a final account and directed all remaining assets to "the personal representative of the estate of Hector M. Hernandez."[219]

Luisa appealed.

Analysis:

Louisa argued that Hector's children were not entitled to notice because Hector had not been declared (in an order of the court) to be a "protected individual" at the time the petition to establish and fund the Trust was filed and granted. However, it is undisputed that he was legally incapacitated at the time of the settlement and that Luisa was his duly appointed guardian at that time. While no conservatorship proceedings were initiated, Michigan Estates and Protected Individuals Code ("EPIC") provides for the issuance of a protective order that can include the establishment of a trust, if

> in a "proper proceeding" it is established that "a basis exists as described in [MCL 700.5401] for affecting an individual's property and business affairs" and the "court determines that the transaction is in the protected individual's best interests." MCL 700.5408(2). A person is "protected," then, even without a conservator, once a probate court authorizes a trust for their benefit pursuant to MCL 700.5401. See MCL 700.5408(2).[220]

The appellate court found that Luisa's argument missed the mark because the petition filed by Findling was part of a "protective proceeding" and EPIC mandates notice to Hector's presumptive heirs with regard to such proceedings regardless of whether Hector had been determined to be a protected individual at the time the petition for such proceedings were filed because

> "[o]n a petition for a . . . protective order, the requirements for notice described in [MCL 700.5311] apply . . . ." MCL 700.5405(1)-(2). MCL 700.5311(1)(a), as amended by 1998 PA 386,3 requires that notice of a hearing be provided to "[t]he ward or the individual alleged to be incapacitated and that individual's spouse, parents, and adult children." (Emphasis added). See also former MCR 5.125(C)(25)(b) ("The persons interested in an application . . . for a protective order are . . . the presumptive heirs of the individual to be protected[.]")[221]

Since it is undisputed that notice was not provided to Hector's children, the probate court did not err in finding that the proceeding to authorize the Trust was improper. Further, the probate court did not err in finding that the residuary clause went beyond the authority granted by the circuit court for the creation of the Trust and its limited intent; therefore, the residuary clause was void and unenforceable as written.

The appellate court also held the residuary clause might have been enforceable if established by clear and convincing evidence that it reflected Hector's testamentary intent through application of the dispensing power (otherwise known as the "harmless error" rule) pursuant to MCL 700.2503.[222] Under the harmless

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[219] Id. at **4-5

[220] Id. at **7.

[221] Id. at *8.

[222] See also UPC §2-503.

error rule, an instrument that is not executed in compliance with the formal requirements of a will, may nonetheless be treated as a valid will if "the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute"[223] the same. Luisa was unable to meet this burden.

The mere fact that a person is declared incapacitated, and a guardian appointed for their benefit, does not necessarily mean the individual lacks sufficient capacity to create a will. However, even if Hector had sufficient capacity to make a will, the special needs trust did not reflect Hector's signature and, therefore, could not qualify as a will except through application of the dispensing power.[224] While Hector understood that payments would be disbursed out of the Trust for his care, none of the employees or attorneys at Findling's firm recalled speaking to Hector about his testamentary intentions or regarding the terms of the Trust. Additionally, none of the billing records produced in discovery by the law firm reflected any communications by anyone at the firm with anyone other than Luisa. While Luisa testified that Hector told her on multiple occasions that he wanted her to receive the residue of the Trust, and Hector's siblings asserted that at some time *after* the Trust was created Hector affirmed that he wanted Luisa to be his sole beneficiary, the court did not err in finding that the evidence presented did not meet the clear and convincing standard required for the residuary provisions of the Trust to be treated as Hector's will.

The appellate court held the probate court did not err when it did not invalidate the entire Trust and merely held the residuary clause invalid thereby resulting in its termination at Hector's death. As a consequence, the residue needed to be distributed to and dispensed through intestate decedent probate proceedings (in the absence of a will) to Hector's heirs at law. In doing so, the court held that

> [u]nder MCL 700.7410, "a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become impossible to achieve or are found by a court to be unlawful or contrary to public policy." In this case, the trust's stated intent was "to supplement any benefits received (or for which Hector M. Hernandez may be eligible) from various governmental assistance programs and not to supplant any such benefits. All actions of the Trustee shall be directed toward carrying out this intent." When Hector died, the trust's purpose became impossible to achieve. Therefore, the trial court did not err by changing the void residuary clause to reflect the fact that Hector died without a will.[225]

The probate court also did not err when it modified its order allowing the trustee's final account, because MCL 600.848 permits the probate court, upon petition, where justice requires (as it did here) and after notice is given to the parties in interest, to modify and set aside orders.

Comment:

It is always important to make sure that all proper parties are served when seeking court authorization or approval because it is an integral due process requirement. When an interested party is not provided with notice, if that party timely addresses the lack of notice, they will generally have the opportunity to seek to have the relief granted set aside. Because court rules and statutes change from time to time, a review of

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[223] MCL 700.2503. See also UPC §2-503.

[224] See MCL 700.2502. See also UPC §2-502.

[225] In re Hernandez Supplemental Needs Trust), supra at *19-20.

those rules can help avoid mishaps. When an agent or fiduciary is acting as the grantor of a first party trust pursuant to a settlement reached, it remains important for the agent or fiduciary not to exceed the authority granted by the court when creating and funding the trust.

Historically, first party special needs trusts (otherwise known as" Medicaid Payback Trusts") could only be established by a parent, grandparent, guardian or a court. This changed in 2016. Now these trusts can also be established by the individual (for whom the trust is established) if that individual (i) has a disability that meets Social Security's standards, (ii) is under the age of 65, and (iii) they have sufficient capacity to do so.[226] However, the disabled individual should not be the trustee and the assets of the trust can only be used for that individual's benefit during his or her lifetime. Whether you draft Medicaid Payback Trusts or not, understanding these general requirements can help you better understand options that may be available for disabled individuals who meet the criteria for first party special needs trusts.

Here, had the residuary clause been drafted to provide for distribution of the residue to Hector's heirs at law, per stirpes (or by right of representation), in the absence of a valid will otherwise directing disposition of the remainder, the need for a decedent estate might have been avoided. If Hector had sufficient capacity, perhaps he could have been the grantor of the special needs trust, in which case he might have been able to specify how the remainder was to be distributed under the terms of the trust unless directed otherwise by his exercise of a testamentary power of appointment. The problem here was not that Hector retained the right to direct disposition of the remainder in his will, rather it was a combination of Luisa exceeding the authority granted to her for creation of the Trust and the lack of notice to Hector's presumptive heirs so that they could object to the form and substance of the Trust before it was approved and funded by the probate court.

CITE AS: LISI Estate Planning Newsletter #3233 (August 4, 2025) at http://www.leimbergservices.com

## Conflicts of Interest

### In re Kim Marie Edwards Trust[227]: Don't Forget to Consider Issues of Standing and Conflicts of Interest

In probate court, when it comes to who has standing to raise an issue, it may depend upon the type of proceeding involved. By way of example, an individual on his or her own behalf, or any person interested in the individual's welfare, may petition for a finding of incapacity and appointment or removal of a guardian.[228] When it relates to the appointment of a conservator, the individual to be protected, a person who is interest in the individual's estate, affairs or welfare, including a parent, guardian, or custodian, or a person who would be adversely affected by lack of effective management of the individual's property and business affairs may petition for a conservator's appointment or removal or for another appropriate

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226 https://mi.db101.org/mi/situations/workandbenefits/assets/program2d.htm#:~:text=To%20qualify%2C%20you%20must%20be,have%20this%20type%20of%20trust. See also, https://www.specialneedsalliance.org/the-voice/two-different-types-of-special-needs-trusts/

227 Id.

228 See MCL 700. 5303 and MCL 700.5310, UTC §5-5-303 and UTC §5-311.

protective order or the requirement of a bond or security.[229] Once a fiduciary has been appointed to act on an individual's behalf, including in probate court proceedings involving a trust or once a particular order has been entered by the court, the persons who might be considered interested persons or otherwise entitled to seek relief may be far more limited. It remains important to evaluate whether the individual seeking to intervene (or otherwise seek relief) has standing to do so. When it comes to an appeal, generally

> "[a]n aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power."[230]

If a guardian or conservator has been appointed by the court to represent the interests of an incapacitated or protected individual, standing might be further limited when determining who may represent the interests of an aggrieved party with regard to an appeal (or other proceeding). Because "[a] guardian's job is to exercise legal authority on behalf of the incapacitated individual",[231] only the guardian may have standing to bring a lawsuit on behalf of the incapacitated individual. While proposed changes to Michigan's Guardianship statutes may impact this analysis in some circumstances, those proposals did not become enacted during 2024 and will necessitate reintroduction during a later legislative session if they are to be considered.

In *In re Kim Marie Edwards Trust*[232] the incapacitated individual and her care provider (as opposed to her guardian) attempted to appeal the allowance of a trust accounting and appointment of a successor trustee to an irrevocable special needs trust (the "Trust") that had been established for Kim Marie Edward's ("Kim")benefit.

Facts:

Kim suffered a brain injury while giving birth to her daughter in 2004. In 2009, a medical malpractice action relating to her injury was settled for approximately $2.1 Million and the probate court ordered the creation of the Trust for Kim's benefit. Initially, Kim's mother was appointed the trustee of the Trust, but since she couldn't qualify for the bond ordered by the court, Mark Haywood ("Haywood") was appointed successor trustee. He served in that position for approximately 13 years. During that period Kim resided in a home purchased by the Trust with her sister, Melissa Edwards ("Melissa"). Melissa was Kim's primary caregiver and was compensated for those services by the Trust.

Over the years, various persons and/or entities served as Kim's court appointed guardian. When matters came up for hearing the court often appointed James C. McCann as a guardian ad litem ("GAL") to report to the court with regard to Kim's interests.

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[229] See MCL 700.5404 and MCL 700.5415, UTC §5-404 and UTC §5-415.
[230] In re Kim Marie Edwards Trust), supra *12.
[231] Id. at * 12-13.
[232] Id.

With regard to a petition to allow Harwood's 12th account, when no objections were timely raised, the court dispensed with the need for a hearing and in February 2023 allowed the account. In March, an attorney named Phillip Strehle ("Strehle") filed a motion for rehearing or reconsideration, purportedly on Kim's behalf, with regard to allowance of the 12th account.

Haywood had served his 12th annual account and notice of hearing with regard to allowance of that account on the employee representative for Kim's guardian, Michigan Guardian Services. The court appointed McCann as GAL with regard to the petition to allow that account. When the GAL filed his report with the court relative to that accounting, it noted his attempts to contact Melissa and stated that she never returned any of his calls. He also reported that he emailed Melissa a copy of the accounting and she never replied to his email nor did she filed any objections. Ultimately the GAL recommended allowance of the account.

Despite Kim's interests having been represented by her guardian (and service of the petition having been effectuated on the guardian), Strehle claimed that Kim wasn't properly served with the petition. He also alleged that when Melissa and Kim attempted to join the scheduled zoom hearing relating to that petition, they were informed by court personnel that the hearing had been cancelled by the court. Strehle alleged that Kim had the right to verbally challenge the petition and that the cancellation of the hearing and allowance of the account violated her due process rights. While the parties awaited the court's decision on the motion for reconsideration, Haywood filed a petition seeking permission to resign because "communications and relations with the family of the Ward have become unproductive such that the administration of the Trust is becoming increasingly challenging"[233] and recommended appointment of Lynn Marine-Adams as successor trustee. The court permitted Haywood to resign and took the appointment of his successor under advisement.

Strehle filed a brief with the court on behalf of Melissa *and* Kim and argued that Haywood had no authority to nominate his successor and that the court should appoint Melissa as successor trustee. Haywood responded that MCL 700.1302 provided the court with the authority to appoint someone other than the person nominated in the Trust. He also asserted that appointment of Melissa as successor would not be in Kim's best interest and pointed out a number of conflicts of interest that existed, both in terms of Strehle's representation of both Melissa and Kim and between their respective interests, should she be appointed as successor trustee.

> Haywood argued that the trustee should be an individual who was impartial and separate from the very person that was allegedly providing services. Regarding his suggestion that the court appoint Marine-Adams as the successor trustee, Haywood argued that by making the recommendation, he was fulfilling his duty to protect the best interests of the beneficiary. Haywood acknowledged that the court was not required to follow the recommendation but

[233] Id. at *4.

> asserted that he would be derelict in his duties if he did not inform the court as to why one person was acceptable and another was not.[234]

At the time of the hearing on the motion for reconsideration, the GAL argued that Melissa was not an interested party, but rather a caregiver and she lacked the authority to object to the accounting or to hire an attorney to act on Kim's behalf. The GAL reminded the court of numerous issues that had arisen during the period when Melissa resided in the home owned by the Trust and provided services to Kim. At the time of the hearing on the motion for reconsideration, Kim's then 18 year old daughter was her court appointed guardian. The GAL pointed out that

> Melissa had also been appointed and removed as appellant's guardian in the past. Two other guardians resigned because of non-cooperation. Specifically, the family refused to cooperate with Michigan Guardian Services when it served as appellant's guardian, including refusing the GAL entry into the home where [Kim] lived with her sister. The GAL also recalled that in 2014 and 2018 large sums of money were supplied by the Trust to repair extensive damage in the home, not caused by normal wear and tear. After recounting some of this family's history, the GAL recommended that the court appoint a professional trustee that had the experience necessary to deal with the issues in this case.[235]

The probate court held it had the authority, pursuant to MCL 700.1302, to appoint a successor trustee who was someone other than a person nominated to fill that position in the Trust if the court determined the nominated individual to be inappropriate and appointed Marine-Adams as successor trustee.

The probate court noted

> I have watched people come into this Court repeatedly with problems, trying to get [Melissa] to cooperate, whatever the reason was.
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> I saw a hearing, here pictures were shown of the destruction of that home. Holes in the wall, different explanations for a mattress that [Kim] was sleeping on that was on the floor, in the room. Even though she is the recipient of this Trust, the interior of that home did not look [like] she was being taken care of.
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> There was testimony of roaches and things in the home, there were pictures of holes in the wall and that, I saw, when they came in the Court, and it was the same arguments.
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> * * *

[234] Id. at *5-6.
[235] Id. at *8.

> So, they have not been allowed to go in that home . . . . And each time there was an excuse. It was, 'we can't go, then it was Covid.' But Covid came in this country in the year 2020 and I believe they were giving them difficulty before Covid, as far as getting into the home.
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> And as Mr. McCann said, they won't let him in the home, but they said he can meet them at the attorney's office. The idea, when I send someone out to look at a home and that I need to know that that person is safe, is that you allow in the home so they can inspect the home and see that the person is safe.[236]

After denying the motion for consideration and appointing Marine-Adams as successor trustee, to act under a $1 Million bond, the probate court then addressed whether it was appropriate for Strehle to portend to represent both Melissa and Kim. It found Kim lacked the capacity to engage an attorney and that Melissa lacked standing to challenge the accounting since she wasn't a beneficiary of the Trust. The court also found that Melissa's position as a care provider didn't grant her standing to challenge the accounting and that service upon Kim's guardian had been proper.

On August 4, 2023, Strehle filed a claim of appeal with regard to the probate court's orders allowing the 12th account and appointing Marine-Adams as successor trustee. Haywood and Marine-Adams jointly petitioned the probate court for an order permitting the use of Trust funds to pay a retainer to engage counsel with regard to the appeal.

Additional petitions were filed with regard to allowance of the 13th and 14th Trust accountings. Before Strehle responded in court at the hearing on allowance of the 14th account and for permission to utilize Trust assets to retain appellate counsel, the probate court stated

> that because of a conflict of interest, Strehle could not represent both Melissa and [Kim]. It therefore precluded Strehle from presenting any arguments on their behalf. Later, the court acknowledged that Strehle had filed objections to the petitions, but declined to consider them because the objections were untimely. The court ultimately granted the successor trustee's petition to allow the 14th and final annual account and authorized the successor trustee to pay from the Trust a $25,000 fee to the Kemp Klein Law Firm as a retainer for appellate work.[237]

This appeal ensued.

Analysis:

The appellate court found that Kim lacked standing to bring the appeal on her own behalf. It indicated

> to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power." Of concern to us, however, is that [Kim] is a legally protected individual. Were this not so, it would be clear that[Kim] would have standing

[236] Id. at *7-8.
[237] Id. at *10-11.

> to bring this appeal, given that she is the sole beneficiary of the Trust at the heart of these proceedings. Under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq., a "[l]egally incapacitated individual" is "an individual, other than a minor, for whom a guardian is appointed under this act or an individual, other than a minor, who has been adjudged by a court to be an incapacitated individual." Appellant's status as a legally protected individual indicates that she does not have standing to bring this appeal on her own behalf, and instead should have done so through her legal guardian.[238]

Because Kim had been determined to be a legally incapacitated person, and a guardian had been appointed to represent her interests, she could not individually file an appeal and her guardian had not done so on her behalf. The appellate court was also concerned that Melissa hired Strehle to represent Kim, despite Kim's daughter having been Kim's guardian since 2023 and the guardian had not authorized either Strehle's engagement or the filing of the appeal. While Strehle contended that one didn't have to have legal standing to hire an attorney for another individual, the appellate court disagreed. The appellate court also admonished Strehle for his lack of professional integrity - something no attorney relishes having reflected in a court opinion. The appellate court reflected upon what it perceived to be Strehle's "cavalier and dismissive comments" with regard to his representation of both Melissa and Kim. It also cited to the Michigan Rules of Professional Conduct, which "generally prohibit an attorney from representing multiple clients when the representation of one client is directly adverse to, or may materially limit, the attorney's representation of another client."[239] It found the conflicts of interest were readily apparent. When the court asked if Strehle had obtained an informed waiver of the conflict, Strehle responded that it was the court's responsibility to inform him of the nature of the conflict rather than his obligation to demonstrate that no conflict existed.

The appellate court held that

> [t]hese bald claims that no conflict existed do not inspire confidence, nor do they indicate that Strehle met his duty to comply with MRPC 1.7. There is no evidence that he consulted with Melissa and [Kim's]s legal guardian about the potential conflict, or that Melissa and [Kim's] guardian consented to dual representation. Accordingly, we are gravely concerned that Strehle may have violated MRPC 1.7. However, we acknowledge that "a breach of the MRPC merely constitutes grounds for invoking the attorney disciplinary process. The rules of professional conduct promulgated by this Court . . . neither overrule nor give rise to substantive law." [240]

The appellate court dismissed the appeal and indicated that it would defer to the Michigan Attorney Grievance Commission with regard to matters of attorney discipline.

Comment:

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[238] Id. At *12. Internal citations omitted.
[239] Id. at *16.
[240] Id. at *17.

Some jurisdictions permit an incapacitated person to engage counsel to represent them in guardianship proceedings, despite a finding of incapacity. It is important to note, however, that the representation at issue in *In re Kim Marie Edwards Trust* wasn't in regards to proceedings to determine whether Kim was incapacitated or who was to act as her guardian. Those issues had already been resolved in other proceedings. As such, her guardian was the person empowered to engage counsel and pursue a cause of action on her behalf. The issue of standing was essentially summarily handled by both the probate and appellate courts.

Perhaps of more significant import to practitioners, it the need to evaluate matters for conflicts of interest.

While a breach of the rules of professional conduct won't necessarily result in an award of monetary damages, it may be used as evidence of a breach of the standard of care. Therefore, while a conflict of interest alone may not result in a finding of malpractice, statistically conflicts of interests have represented a "major driver in legal malpractice claims".[241] This may be because such conflicts may give rise to a claim of a breach of fiduciary duty.

According to an Ames & Gough survey, "[c]onflicts remain the most common error resulting in legal malpractice claims. Nearly all participating insurers cited conflicts as either the first or second biggest cause of claims."[242]

> Every year the survey has been conducted, insurers have cited conflicts of interest, including perceived conflicts, as the most common alleged legal malpractice error. This year, seven of the nine insurers surveyed cited conflicts as the first or second biggest leading cause of legal malpractice claims. Indeed, a law firm's representation of a client in the face of an actual or alleged conflict of interest is taken seriously by clients and courts, mostly because such actions are viewed as a breach of the duty of loyalty.
>
> Overall claim frequency has stabilized as severity continued to rise, the survey found. Although seven of nine insurers in the survey reported claim frequency in 2017 was similar to or less than the prior year, claim severity remains on the rise. In 2017, all nine insurers surveyed had claims with reserves over $500,000. Five of the insurers reported having 21 or more such claims. The same number participated in paying a claim of $50 million or more, including one with a claim exceeding $100 million and one over $150 million.[243]

While some conflicts may be waived, others may not. Whenever a client is asked to waive a conflict, the waiver must be knowingly and voluntarily provided and the lawyer must reasonably believe that the client

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[241] https://www.peabodyarnold.com/the-increasing-danger-of-conflicts-of-interest/, citing a panel presentation at the Spring 2017 Legal Malpractice Conference.
[242] https://www.dentons.com/en/insights/newsletters/2017/august/17/practice-tips-for-lawyers/legal-malpractice-claims-level-off-as-conflicts-and-cyber-claims-rise
[243] https://www.insurancejournal.com/magazines/mag-features/2018/07/16/494789.htm

will not be adversely affected as a result of the representation. Some jurisdictions require a written waiver, while others do not.

Whether a written waiver is (or is not) required, the importance of reviewing the extent to which a conflict may currently exist or develop over the course of representation remains important.

For a more in depth analysis of issues relating to conflict of interests in the estate and trust arena, see Sandra D. Glazier & Martin M. Shenkman on *Overdeck v. Steyer and Seward & Kissel, LLP: The Importance of Addressing Potential Conflicts of Interest*, LISI Estate Planning Newsletter #3081 (Nov. 20, 2023).

Cite as LISI Estate Planning Newsletter #3168 (December 30, 2024) at http://www.leimbergservices.com

## Importance of Defining Scope of Engagement and Attorney Client Privilege

### Whitton v. Hopkins[244] Identifying the Client and Defining the Scope of Representation Is Important

Some states apply a fiduciary exception to the attorney-client privilege that essentially results in an attorney for the fiduciary also owing duties to the underlying estate. Michigan and some other jurisdictions do not. When one is seeking to bring a malpractice claim against the attorney for a fiduciary, it may be important to understand whether the fiduciary exception will apply in order to determine if a beneficiary or successor fiduciary will be considered a real party in interest.

The Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege ALR provides in pertinent part that:

> [t]he common law recognizes an exception to the attorney-client privilege called the "fiduciary exception": when a trustee obtains legal advice related to the exercise of fiduciary duties, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.

The fiduciary exception to the attorney-client privilege stems from a principle of English trust law that requires a trustee to comply with a beneficiary's request to produce all legal advice that the trustee has obtained on matters concerning administration of the trust.

Fiduciary exception to attorney-client privilege does not apply to attorney-client communications of fiduciary who seeks legal advice to protect his or her own individual interests, rather than to guide fiduciary in performance of his or her duties to beneficiary.

The fiduciary exception to the attorney-client privilege, with respect to communications between a trustee and the trust's attorney, is based on the theory that when a trustee seeks legal advice in executing his or her fiduciary duties, he or she is acting ultimately on behalf of the beneficiaries of the trust and, accordingly, cannot cloak his or her actions from them, the attorney's real clients.

The "fiduciary exception" to the attorney-client privilege provides that the privilege cannot be invoked by a trustee of a trust against the beneficiary of a trust where the legal advice was obtained to guide trust

[244] Whitton v Hopkins, ___NW2d___; 2024 Mich. App. LEXIS 7580 (Ct App, Sep. 30, 2024).

management, given that trustees are tasked with providing beneficiaries with information regarding the management of the trust. [245]

In the recent case of *Whitton v Hopkins*, the Michigan Court of Appeals reviewed the terms and scope of engagement to arrive at the conclusion that beneficiaries, the clients individually, and the estate and trust were not real parties in interest with regard to a claim of legal malpractice because the attorneys had been retained to represent the trustees in their fiduciary capacity. Clearly identifying the capacity in which a client is represented and the scope of the engagement can be important to determining who the real party in interest may be when claims of malpractice are asserted particularly in a jurisdiction that does not generally apply the fiduciary exception to the privilege.

Facts:

Robert Whitton died in July 2015. He was survived by his siblings, Richard, Eddie and Susan. Robert had founded TheraMatrix Services, Inc (TMX) a company that provided physical therapy referral services to unionized employees in the auto industry. Robert left behind a sizable estate. Before he died, he executed a Will that nominated Richard and Eddie as his co-personal representatives. His interest in TMX had been funded to his revocable inter-vivos trust (the "Trust"), of which Richard and Eddie had been nominated as his co-successor trustees. Richard, Eddie and Susan were equal beneficiaries under Robert's estate plan.

Following Robert's death, Richard and Eddie also became co-CEOs of TMX.

Richard and Eddie engaged Michael Witzke ("Witzke") of McDonald Hopkins ("MH") to represent them regarding the administration of Robert's estate and Trust. That engagement letter was addressed to Richard and Eddie as trustees of the Trust. The scope of the engagement was to help them with specific matters relating to administering the estate and Trust.

During the first 3 years of trust administration, Richard and Eddie each took more than $1 Million in compensation from TMX. They did not seek input from Witzke in doing so. Instead, they sought input from TMX's long time accountant at UHY. The accountant also advised them that they could take an annual fiduciary fee equal to 1% of the value of the Trust. Witzke warned them that any trustee fees had to be reasonable.

In 2016 Richard and Eddie entered a new contract for providing referral services to Chrysler employees. Because Richard and Eddie had developed the contacts at Chrysler after Robert died, the accountant advised them that they could set up a new business, which they would then personally own, to provide the referral services to the Chrysler employees. The accountant referred Richard and Eddie to different counsel (Rudzewicz), who was not associated with Witzke or MH to represent them and form the new entity (ERW). Witzke (and Latiff who also worked at MH), during their representation of Richard and Eddie on another matter, learned that the brothers had formed ERW, that it was in the same business as TMX,

[245] Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege, 47 A.L.R.6th 255, 4. Internal citations omitted.

and that they weren't sharing the proceeds of that business with their sister. Witzke advised Richard and Eddie that such actions could constitute a breach of their fiduciary duties and expose them to liability.

It was alleged that Richard and Eddie withdrew nearly $4 Million in profits from ERW.

In late 2016 or early 2017, Eddie contacted his sister and offered to buy-out her interest in the Trust for $2 Million. Susan rejected the offer. Her attorney then reached out to Witzke and requested information. When all the information requested was not provided (specifically information regarding distributions made to Eddie and Richard), Susan filed a petition to have her brothers removed as trustees of the Trust and requested that an independent trustee be appointed. That petition did not refer to ERW. The reasons stated in support of her request to remove her brothers as co-trustees were (1) the effort to buy her out of her interest in the Trust, (2) her brothers' compensation from TMX, and (3) UHY's failure to respond to requests for financial documents.

At a hearing on the Removal Petition held in August 2020, testimony was presented indicating that during the five years since Robert had died, Susan had only received a total of $90,000 in distributions from the Trust, of which $60,000 was to address phantom income attributable to the Trust.

After hearing how much Richard and Eddie had received in compensation for acting as CEOs of TMX and the additional amounts received in fiduciary fees, the court found they had breached their fiduciary duties and removed them and appointed an attorney, Nirenberg, as successor trustee of the Trust. Ultimately, Nirenberg's position was changed to that of a special fiduciary and he was granted control over management of the Trust's assets, including TMX. Apparently all three siblings were unhappy with what they felt were "substantial" fees charged by Nirenberg and all three siblings ultimately reached a settlement.

In November 2021, Richard and Eddie, individually and as co-personal representatives of the estate and as co-trustees of the Trust (collectively the "Plaintiffs"), sued Witzke, Latiff and MH (collectively the "Defendants") for malpractice. The Defendants filed notice of a nonparty at fault naming UHY.

Plaintiffs' expert (Carney) opined that once Defendants became aware of ERW, they had a duty to independently investigate whether it was an asset of the Trust and, if Richard and Eddie didn't cooperate, they should have withdrawn as counsel. Carney further opined that Latiff breached the standard of care when he failed to cite the court to MCL 700.7817(v) at the removal hearing. That statute provides a trustee with the power to employ professionals and "act without independent investigation upon such a person's recommendation"[246] Carney testified that Latiff should have argued that Richard and Eddie didn't breach their duties when setting their compensation and fiduciary fees because they relied on the advice of the UHY accountant and they were allowed to act on such advice. When cross examined, Carney didn't know if a different result would have occurred had Latiff made that argument. Carney testified that he believed the appointment of Nirenberg resulted in additional unnecessary fees that could have been avoided had the brothers not been removed from their fiduciary positions.

[246] MCL 700.7817(v).

Defendants moved for partial summary disposition. They argued, in part, that certain claims were time barred and that the Trust and estate did not have standing because they lacked an attorney-client relationship with Defendants. They also argued that in light of Carney's testimony, Plaintiffs could not established causation, which is a necessary element of a legal malpractice claim. The probate court granted Defendants' request for partial summary disposition and this appeal ensued.

Analysis:

Causation

In order to prevail on a legal malpractice claim, the Plaintiffs had to prove four elements:

> (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." "The first element correlates with the duty element of a traditional negligence claim because the existence of the attorney-client relationship gives rise to a duty as a matter of law."

Duty is any obligation the defendant has to the plaintiff to avoid negligent conduct. In negligence actions, the existence of duty is a question of law for the court.

In legal malpractice actions, a duty exists, as a matter of law, if there is an attorney-client relationship. Whenever an attorney or solicitor is retained in a cause, it becomes his implied duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management thereof.

The second element requires proof that the attorney breached a professional standard of care, in other words, didn't act as attorney of ordinary learning, judgment or skill would have under similar circumstances. One of my partners always asks me "what would a "C" attorney (as opposed to an "A" attorney) have done? To establish a breach of the standard of care, expert witness testimony is generally required to establish the applicable standard of care.

Next the plaintiff must essentially prove the "case within the case", meaning that the plaintiff "would have been successful in the underlying matter but for the attorney's malpractice".[247] Otherwise stated, that the attorney's malpractice was the proximate cause of the plaintiff's damages. In proving this element, the plaintiff cannot rely on speculation and conjecture. "Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred."[248] This is often the most difficult element to prove.

In the instant matter, the evidence indicated that Defendants warned Richard and Eddie that they might be deemed to have breached duties if it were determined that through their efforts and establishment of ERW they were usurping opportunities from TMX. While Richard and Eddie contend that the attorneys' warnings should have been more detailed and adamant, Plaintiffs failed to establish that they would have acted any differently had Defendants done so. Moreover, issues relating to the establishment of ERW or

[247] *Whitton, supra* *20.
[248] *Id.* at *20.

that through it the brothers engaged in the same business as TMX (thereby diverting business opportunity away from the Trust), didn't form the basis for the court's grant of Susan's petition to remove them as personal representatives and co-trustees of the Trust. The existence of ERW and the monies received by the brother as a result thereof weren't raised in the petition to remove them or the testimony presented. Rather, the basis for their removal was their compensation from TMX, the fiduciary fees taken and their failure to provide information to Susan, who was an interested party in the Trust's administration.

The failure to raise a particular defense, such as Richard and Eddie's right to rely upon the accountant's advice pursuant to MCL 700.7817(v), is generally viewed as a matter of trial strategy. In addition, Plaintiffs would need to show that the failure to raise the defense was a proximate cause of their damages. Here, the probate court removed them for a breach of trust with regard to duties owed Susan. In doing so, the court reviewed the statutory guidelines and the terms of the Trust in making its decision to remove them from their fiduciary roles. To establish that utilization of the defense that they reasonably relied upon the advice of the accountant and doing so should not have been held to have breached any duties owed Susan, would have required expert testimony. Carney's testimony failed to establish the level of causation required to prevail and, therefore, summary disposition was appropriate.

Real Party in Interest

Generally, an attorney can only be held liable for negligence that harms his or her client.

However, Michigan law recognizes some limited exceptions to this rule. For instance, named estate beneficiaries may, in some circumstances, bring a malpractice action against the attorney who drafted a testamentary document, even though those beneficiaries do not have an attorney-client relationship with that attorney. However, this exception is narrow and exists because of the low risk of conflicts of interest as well as a lack of any other available remedy. In general, "[t]here has been a reluctance to permit an attorney's actions affecting a nonclient to be a predicate to liability because of the potential for conflicts of interest that could seriously undermine counsel's duty of loyalty to the client." [249]

Since the facts in Whitten fall outside of the limited exception stated above,

> [a]n action must be prosecuted in the name of the real party in interest. . . . A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. The rule requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim that is asserted in the complaint. [250]

Prior to enactment of Michigan's Estates and Protected Individuals Code ("EPIC") and the Michigan Trust Code ("MTC") the Michigan Revised Probate Code ("RPC") indicated that "without obtaining a court order, a fiduciary of an estate may employ counsel to perform necessary legal services in behalf of the *estate*…".[251] That language was revoked and is not included in EPIC or the MTC. Following enactment of EPIC and the MTC, the Michigan Court Rules were amended to provide that "[a]n attorney filing an

[249] *Muvrin v Cooper*, ___NW2d___; 2022 Mich. App. LEXIS 4713, at *4-5 (Ct App, Aug. 11, 2022).

[250] *Whitton, supra* at *10-11. Internal citations omitted.

[251] MCL 700.543.

appearance on behalf of a fiduciary shall represent the *fiduciary*".[252] Once EPIC and the MTC were adopted, MCL 700.3715(1)(2) (relating to retention of an attorney by a personal representative), MCL 700.7817(w) (relating to retention of an attorney by a trustee), and MCL 700.5423(2)(z) (relating to retention of an attorney by a conservator) contained essentially identical language regarding engagement of an attorney by a fiduciary. As a result, the appellate court looked to *Estate of Maki v. Coen*[253] to help determine to whom the attorney's duties were owed when retained by a personal representative or a trustee in their fiduciary status. *Maki* involved a conservator's retention of counsel, but given the similarities in the applicable statutes, the *Whitton* court found *Maki* clarified that when a conservator, personal representative or trustee engages counsel to represent them, and provide services and assistance in their fiduciary capacity, the attorney only represents the fiduciary and not the ward, estate or trust.

While the Plaintiffs recognized the import of the *Maki* decision, they argued that the language contained in the engagement letter between Richard, Eddie and Defendants, contained language that reflected the work to be performed under that engagement was on behalf of the estate and Trust. In order to determine if that claim had merit, and thereby caused Defendants to owe a duty to the estate and Trust and not just the fiduciaries, the court was required to analyze the language of the agreement, because

> "the duty imposed on the attorney for purposes of a legal malpractice action is limited to the agreed-upon scope of representation." …
>
> "A fee [or retainer] agreement between an attorney and a client is a contract. Therefore, a fee or retainer agreement . . . is subject to the law of contracts." "[A]n attorney and a client are free to contract as they see fit, and courts must enforce contracts as written unless they are in violation of law or public policy."[254]

The July 17, 2015 engagement letter was directed to "Mr. Eddie Whitton, Trustee" and "Mr. Richard E. Whitton, Trustee". It stated it was *regarding* the estate and Trust. It indicated "[w]e appreciate the opportunity to act as your legal counsel regarding the estate and trust matters of Robert E. Whitton under the terms set forth in this letter."[255] Later, in a letter dated September 14, 2015, Witzke sent a letter to his clients, in their fiduciary capacities, to summarize the duties and services the Defendants would perform (essentially the scope of the engagement). That letter provided in pertinent part that

> [the law firm] will help you (a) identify all the assets in the estate for estate tax purposes, both probate and non-probate, (b) identify all debts, claims and administration expenses to be paid; (c) prepare a Federal Estate Tax return; (d) prepare all court filings and estate income tax returns; and (e) assist you with the transfer of assets.[256]

Neither Richard nor Eddie, in their individual capacities, engaged Witzke, Latiff or MH as their attorneys regarding the administration of the estate or the Trust, nor did the estate or the Trust itself engage any of

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[252] MCR 5.117(A).
[253] *Estate of Maki v Coen*, 318 Mich App 532; 899 NW2d 111 (2017).
[254] *Whitton, supra* at *16. Internal citations omitted.
[255] *Id*. at *17.
[256] *Id*. at *17-18.

the Defendants. The engagement letter, and scope of the engagement defined in a subsequent letter, established that the Defendants' duties were owed to Richard and Eddie in their fiduciary capacities and not to the estate or Trust (or them individually). The damages sought related to additional fees incurred by the estate and Trust due to Eddie and Richard's removal as fiduciaries, and as such were damages to the estate and/or Trust, not to them as fiduciaries. There was nothing in the opinion that indicated that Richard or Eddie were required to pay the estate or Trust any of Nirenberg's fees as an element of a surcharge.

Consequently, the court determined that because the Defendants represented Richard and Eddie only in their fiduciary capacities, they could not in their individual capacities assert a claim, nor could the Trust or estate assert a claim of malpractice against Defendants, because Plaintiffs were not the real parties in interest and the appellate court found that the probate court properly dismissed the legal malpractice claims.

Comment:

An analysis of the *Whitton* opinion reflects that despite Michigan's statutory regime (and applicable court rule) that essentially opt out of the fiduciary exception to the attorney client privilege, language contained in the engagement letter (and any modifications thereto) may result in duties being owed to an estate or trust, so care in drafting and the words utilized remain important.

Consider, perhaps including language along the following lines:

> We will be representing you in your capacity as Personal Representative of the decedent estate and as Successor Trustee of the revocable trust dated _____. We will not be representing you in your individual capacity nor will we be representing any other interested parties.

One might also wish to consider recommending that the client retain other counsel, should they seek advice regarding their rights as a beneficiary in either matter.

Defining the scope of the engagement can be as important when engaging in estate planning, litigation or estate and trust administration. Once a definition of the matter or matters for which representation has been engaged, and given the potential obligations for reporting under the Corporate Transparency Act, one might also wish to include language along the following lines:

> The Firm has been engaged to represent you in your fiduciary capacity with regard to the above referenced Matter. The Firm has not undertaken or accepted an engagement to represent you individually, nor has the Firm undertaken representation with regard to any reporting responsibilities under the Corporate Transparency Act or to file or prepare any tax returns on behalf of the Trust or any entities controlled thereby.
>
> The scope of this engagement may be enlarged, diminished and/or otherwise modified, from time to time. Any modification to the scope of engagement must, however, be defined in separate writings that are intended to supplement this engagement letter. Such writings may include, but not be limited to, emails that specifically acknowledge a modification to the scope of the engagement. However, a separate engagement is required on any matters relating to compliance

with the Corporate Transparency Act and this engagement may not be modified to simply include representation relative thereto.

Also consider "bookending" the representation. When representation concludes, consider sending a written communication that reflects that the representation has concluded. If the attorney is uncomfortable indicating that a matter is closed, consider perhaps indicating that all tasks undertaken by the Firm have been completed. Doing so may prove helpful in establishing the date upon which the statute of limitations for a claim began to run.

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### Consider the Benefit to the Trust or Estate when Addressing Compensation

#### In re Edward and Elaine Jaye Trust;[257] Beware the Jabberwock: The Court May Deny a Trust's Payment of Attorney Fees Despite a Stipulated Order When No Benefit to the Trust is Ultimately Found

The unpublished opinion of *In re Edward and Elaine Jaye Trust*[258] brought to mind the Jabberwocky poem by Lewis Carroll:

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe:
All mimsy were the borogoves,
And the mome raths outgrabe.

"Beware the Jabberwock, my son!
The jaws that bite, the claws that catch!
Beware the Jubjub bird, and shun
The frumious Bandersnatch!"

He took his vorpal sword in hand;
Long time the manxome foe he sought—
So rested he by the Tumtum tree
And stood awhile in thought.

And, as in uffish thought he stood,
The Jabberwock, with eyes of flame,
Came whiffling through the tulgey wood,
And burbled as it came!

One, two! One, two! And through and through
The vorpal blade went snicker-snack!

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[257] *Abu-Aita v Klug Law Firm (In re Edward & Elaine Jaye Trust)*, ___NW2d___; 2024 Mich. App. LEXIS 4395 (Ct App, June 6, 2024).
[258] *Id.*

He left it dead, and with its head
He went galumphing back.

"And hast thou slain the Jabberwock?
Come to my arms, my beamish boy!
O frabjous day! Callooh! Callay!"
He chortled in his joy.

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe:
All mimsy were the borogoves,
And the mome raths outgrabe.[259]

In *In re Edward and Elaine Jaye Trust*[260]*,* the Michigan Court of Appeals affirmed the probate court's ability to set aside a stipulated order providing for the payment of attorney fees by a trust when the probate court later found the services didn't provide a benefit to the trust. While the appellate court determined that the fees incurred by the attorney for the ward could be asserted against the conservatorship estate, the resources of the conservatorship were limited and may ultimately prove insufficient even if the court, on remand, determines them to be reasonable.

Facts:

In 2015 Elaine Jaye's children, Cindy Jaye and Chris Jaye ("Chris"), together with Allen Schlossberg ("Allen") were appointed Elaine's guardian in a Nevada probate court proceeding. At that time, Allen and Chris were the co-successor trustees of the Edward and Elaine Jaye Trust (the "Trust").

In 2016, Elaine's daughter, Karen, filed a petition in Eaton County Michigan's probate court seeking to be appointed her mother's conservator alleging that Chris was a frequent gambler and was refusing Elaine's access to funds governed by the Trust. Karen also requested removal of Chris as Elaine's co-guardian and as a co-trustee of the Trust. The probate court opened two proceedings: (1) a Trust proceeding and (2) a conservatorship. In response to the Petition, Chris alleged that (a) the Klug Law Firm had a conflict of interest due to its representation of both Elaine and Karen, and (b) the Petition was nothing more than a smear campaign designed to impugn his character and should be denied.

In February 2017, the parties entered a stipulated order that provided for Chris and Allen's resignation as co-trustees of the Trust in favor of the appointment of Byron Gallagher. That order also limited objections to any accountings or claims for surcharge against Chris and Allen to those for proven embezzlement or conversion. In pertinent part, the order also provided that:

> … the Trust will pay for the following costs and attorney's fees: the outstanding attorney fees for the Guardianship case pertaining to Klug Law Firm and Raymond G. Buffmyer PC; reimbursement

[259] Lewis Carroll, *Through the Looking Glass - Jabberwocky*, 1871.
[260] *In re Edward & Elaine Jaye Trust, supra.*

> of attorney fees paid by Karen Jaye to Raymond G. Buffmyer PC for the Michigan Guardianship case; outstanding attorney fees owed to Fraser Trebilcock Trebilcock Davis & Dunlap, P.C. ("Fraser") and reimbursement of attorney fees paid by Chris Jaye to Fraser for the Michigan Guardianship and Conservatorship/Trust Case; the attorney fees submitted pertaining to the Trust issues regarding this pending litigation submitted by Klug Law Firm, Raymond G. Buffmyer PC, and Bulh, Little, Lynwood & Harris, PLC; and the fees that have been incurred or will be incurred regarding the final accounting by Godfrey Wise Berg, CPAs & Advisors, LLC. Any and all such costs and fees will be submitted to the successor Trustee(s) for payment. The fees paid pursuant to this paragraph shall be paid first with priority over other attorney fees . . . .
>
> IT IS FURTHER ORDERED that any party reserves the right to petition the court for payment and/or reimbursement of attorney fees incurred for the current and past guardianship or trust matters.
>
> IT IS FURTHER ORDERED the Klug Law Firm shall no longer represent Elaine Jaye and the Eaton County Probate Court shall appoint a new independent attorney for Elaine Jaye . . . .[261]

In April 2019, the judge who initially presided over the Michigan probate proceedings disqualified himself and the case was re-assigned. Later that month, the Klug Law Firm filed a statement and proof of claim seeking $14,324.94 in attorney fees and expenses with regard to the conservatorship proceedings and $39,108.75 with regard to the Trust proceedings, for a total claim of $53,433.69. Other attorneys involved in the proceedings submitted similar statements. In December 2019 the Klug Law Firm was ordered to file a petition and prove how their services benefitted the Trust, Guardianship and/or Conservatorship and establish the reasonableness of the fees sought. In response to the claims filed by the Klug Law Firm (and other attorneys), Elaine's conservator asked that any attorney seeking to recover fees demonstrate that they provided a direct benefit to Elaine (as opposed to the contingent beneficiaries or the attorneys). He also asserted the fees should be denied because subjecting the assets of the Trust to the claims of attorneys represented a detriment (as opposed to a benefit).

During the evidentiary hearing on the multiple attorney fee petitions, the judge expressed his frustration over what he essentially characterized as prolonged litigation over not much at all that had resulted in years of litigation and tens of thousands in legal fees. On the court's own motion, the judge dissolved the Trust and appointed Amir Abu-Aita ("Abu-Aita") as Elaine's conservator and as successor trustee for purposes of winding up the affairs of the Trust and declared that " 'I don't know what Ms. Jaye has left, but it belongs to her,' and that all claims for payment should be submitted to Abu-Aita."[262]

The decision to terminate the Trust was appealed and over-turned on the basis that the probate court had failed to make sufficient statutory findings on the record to justify removal of the trustee (Gallagher), had failed to provide statutory notice and dissolution by the court *sua sponte* was inconsistent with the plain

[261] Id. at *3-5 (Ct App, June 6, 2024).
[262] Id. at *8.

language of the Trust.[263] Despite requests that the appellate court assign the case on remand to a different judge, the appellate court refused to do so noting that:

> Judge Dignan made several strong comments at the September 30, 2020 hearing when he terminated the trust. The comments were directed at all the parties and attorneys; no one was singled out. Reviewing the voluminous record in this lengthy and highly contentious matter, we can understand Judge Dignan's frustrations and concerns. The glut of lawyers making substantial claims in this dwindling estate undoubtedly perturbed the court and complicated the proceedings. A strong hand was needed to control the proceedings and put it back on track. Judge Dignan's language demonstrated that he was strengthening his hand.[264]

On remand, following a hearing, the probate court again removed Gallagher as trustee and appointed Abu-Aita as successor trustee. The probate court also ordered that Abu-Aita submit recommendations regarding whether, and to what extent, the attorney fee claims should be paid. The analysis sought was not whether the attorneys did the work for which they wished to be paid, but rather whether that work advanced the cause of the Trust. Ultimately, Abu-Aita recommended that the probate court deny the Klug Law Firm's claim against the Trust because it didn't benefit the Trust estate under MCL 700.7904.

In pertinent part, MCL 700.7904 permits a court to award costs and expenses, including reasonable attorney fees to any party who "enhances, preserves, or protects trust property" and have those costs and expenses paid from the trust that is the subject of the proceedings.

In October 2022, the probate court held a hearing regarding the claims filed for attorney fees. The court began the hearing with the following comments:

> They say Seinfeld was the show about nothing. I ultimately found this is pretty much the case about nothing. And, with little exception, the Court of Appeals agreed. When it seemed to be at the onset of my tenure going on slowly and pointlessly, I believe the record is peppered with cautions from myself not to count on getting paid by anybody but the ones who brought you here in terms of the lawyers. That the Court will follow the rules in terms of legal payments out of the Trust, but this is not a treadmill from which to run up a bill.[265]

The judge then set *sua sponte* aside the February 2017 stipulated order regarding the payment of attorney fees and expenses from the Trust. The court was perplexed as to why the Klug Law Firm waited six years before attempting to collect its fees and felt it inappropriate for the Klug Law Firm to attempt to charge interest on the fee when the firm delayed taking any action to collect the fee for so long. The judge denied payment of fees incurred by the Klug Law Firm from the Trust.

In the meantime, facing a statute of limitations concern, the Klug Law Firm also brought an action in circuit court attempting to collect its fee directly from Elaine. Elaine's conservator moved for summary

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[263] Id. at *9, citing *In re Edward & Elaine Jaye Trust*, unpublished *per curiam* opinion of the Court of Appeals, issued February 24, 2022 (Docket No. 355321), 2022 Mich. App. LEXIS 1008, *12.
[264] Id. at *9.
[265] Id. at *11-12. Emphasis added.

disposition in the circuit court action that was granted because another action involving the same parties and the same claim was already pending or already decided. One month later, the Klug Law Firm filed a petition in the conservatorship case claiming $14,324.94 for its representation of Elaine in the conservatorship case, $39,108.75 with regard to representation in the Trust case and an additional $18,172.12 in interest accrued at the rate of 7% per annum (based upon terms contained in the engagement letter). The Klug Law Firm asserted that its claim (that had been filed back in 2019 against the Trust) was presumptively allowed against the conservatorship pursuant to MCL 700.5499.

Abu-Aita acknowledged that service of a claim upon the conservator and/or filed with the probate court was the proper process for pursuing payment of fees incurred by an attorney representing a ward. However, since the conservatorship didn't have any money it was likely to be a pyrrhic victory, because the money was in the Trust. Abu-Aita also asserted that any fees incurred in attempting to collect its fees (and any interest charged) should be denied. The probate court denied the imposition of interest and deferred ruling on the underlying claim pending resolution of the appeal of the circuit court's grant of summary disposition out of concern that a reversal of that ruling could result in a double recovery.

The Klug Law Firm appealed the probate court's denial of its fees. The firm claimed: (a) it was entitled to be paid reasonable attorney fees and expenses from the Trust under MCL 700.7904(1), 700.7605(1)(b) and 700.7611(a); and (b) the probate court abused its discretion under MCR 2.612(C)(1)(f) when, on the court's own motion, it set aside the February 2017 stipulated order that provided for payment of fees from the Trust. The appellate court disagreed.

Analysis

MCL 700.7904(1) provides that:

> [i]n a proceeding involving the administration of a trust, the court, as justice and equity require, *may* award costs and expenses, including reasonable attorney fees, to any party who enhances, preserves, or protects trust property, to be paid from the trust that is the subject of the proceeding.[266]

Since an award pursuant to MCL 700.7904(1) is permissive and not mandatory, even had the Klug Law Firm's services enhanced, preserved or protected Trust assets, it was still within the probate court's discretion whether to award payment of those fees from the Trust. The Klug Law Firm could not demonstrate that the denial of payment from the Trust represented an abuse of that discretion.

The appellate court also found that the Klug Law Firm's argument that the Trust should be held responsible for the fees incurred pursuant to MCL 700.7605(1)(b) and 700.7611(a) missed the mark. Those provision of the Michigan Trust Code ("MTC") relate to a revocable trust's responsibility to pay creditor claims (and under certain circumstances other administrative expenses, allowances and exemptions) *after a settlor's death* when there is either no decedent probate estate or the decedent probate estate is insufficient to

[266] Id. at *20.

meet those obligations. Because Elaine was still alive during the probate proceedings, the cited sections of the MTC didn't apply.

Additionally, the appellate court found the Klug Law Firm's reliance on MCR 2.612(C)(1)(f) in objecting to the probate court's setting aside the February 2019 order (that permitted payment of attorney fees from the Trust) on the premise that the prerequisites of that court rule for granting relief were not met was also unfounded. Since the February 2019 order wasn't a "final judgment, order or proceeding" and was merely "one order in this ongoing saga"[267] the appellate court found that

> [t]he more applicable court rule to the stipulation at issue here is MCR 2.604(A), which provides that "an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties."[268]

The appellate court further found that

> [t]he provision of the order in question, as the probate court correctly observed, subjected all of the Jaye Trust assets to being raided for the continuous litigation between the parties, contingent beneficiaries, and others. Further, we agree with the probate court that it is difficult to discern any fundamental legal issue in this case. Much of the litigation in 2020, for example, concerned whether and to what extent Chris Jaye would be allowed to remotely communicate with Elaine Jaye through a telephone schedule. Yet, the February 1, 2017 stipulated order arguably allowed the parties and attorneys to recover any and all fees and expenses incurred for litigating such an insignificant matter. Moreover, with regard to [the Klug Law Firm] in particular, it is somewhat unclear why the Jaye Trust should be required to pay attorney fees and expenses for counsel to Elaine Jaye herself, in addition to such fees and expenses for counsel to her conservator, when her conservator should have been acting on her behalf in any event. Given these facts, the trial court was within its authority to partially set aside the February 1, 2017 stipulated order.[269]

The appellate court affirmed the circuit court's grant of summary disposition, not because there was a similar action pending in the probate court, but instead under the doctrine of *res judicata.*

> "*Res judicata* bars a subsequent action between the same parties when the evidence or essential facts are identical." "A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies."
>
> Here, the probate-court proceedings, which culminated in the November 8, 2022 order denying appellant's claim for attorney fees and expenses from the Jaye Trust, satisfy all three elements of res judicata. First, the order constituted a decision on the merits. Second, the contract issue

[267] Id. at *25.
[268] Id. at *25.
[269] Id. at **25-26.

> identified in the circuit-court complaint could have been maintained in the probate-court proceedings. Indeed, as explained in Part IV, infra, appellant is able to pursue its contract issue in the probate court under MCL 700.5429. Third, both actions involved the same parties, appellant and Elaine Jaye. Thus, all three elements of res judicata are satisfied, and the circuit court correctly ruled that appellant's complaint was barred by that doctrine.[270]

However, the appellate court found that the Klug Law Firm did have a claim that it could pursue against the conservatorship for fees incurred in representing Elaine in the guardianship, conservatorship and trust proceedings pursuant to the procedure set forth under MCL 700.5429. It remanded the claim against the conservatorship estate (including the Klug Law Firm's claim for interest as provided for in its engagement letter) for further hearing on the reasonableness of those fees.

Comments:

One issue that didn't appear to have been addressed in the case was whether, in 2016, under Michigan law Elaine would have been permitted to even engage counsel to separately represent her after having been determined to lack capacity and a conservator (and guardian) were appointed for her benefit. Pursuant to MCL 700.5407(1) it is only to the extent the individual is authorized to function autonomously that a person may deal with that individual as though he or she is mentally competent. Currently pending legislative proposals, if enacted, would permit an incapacitated person to retain counsel in guardianship and conservatorship proceedings. Therefore, if enacted, an increased likelihood of duplicate representation, fees and expenses will occur in many guardianship and conservatorship proceedings that could result in further diminishment of the individual's estate. Consequently, this case may provide important guidance for practitioners in understanding the available resources from which they *may* be paid. It may also be important to understand what constitutes a final order (such as an order allowing an account) or an interim order (such as the stipulated order at issue in this case).

Whether payment is sought from a conservatorship or trust estate, it is important to remember that any claim for payment will be subject to potential review by the probate court under a "reasonable compensation" standard. The probate court may review such "reasonableness" on petition or motion of an interested person or *on its own motion.* If it determines that the compensation for services rendered is excessive, the court may require the refund of any payments in excess of what is found to be reasonable.[271] The Michigan Rules of Professional Conduct ("MRPC") articulate at §1.5(a) factors to be considered by the court in determining the reasonableness of an attorney's fee and Michigan Court Rule ("MCR") 5.313(A) requires the probate court to consider those factors in assessing the reasonableness of fess for legal services rendered to a personal representative.

[270] Id. at *29-30. Internal citations omitted.
[271] See MCL 700.3721. See also, UPC §3-721.

MCL 700.5413 and 700.5423(z) both indicate that compensation for services rendered to an individual under disability (e.g. a legally incapacitated individual or protected person) must be reasonable.[272] Attorneys employed by a trustee are also subject to a reasonable compensation standard.[273]

MRPC 1.5 sets forth the following factors to be among those considered in determining the reasonableness of a fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.[274]

Even fiduciary fees are subject to court review and the terms of a trust may not override the power of the probate court under MCL 700.7708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.[275]

Therefore, while knowing how to perfect a claim for payment for services rendered to an incapacitated or protected individual is important, remembering that compensation for such services will be subject to potential review by the court (even without objection by an interested person) for reasonableness is also important.

CITE AS: LISI Estate Planning Newsletter #3152 (October 17, 2024) at http://www.leimbergservices.com.

[272] See also, UPC §5-413.
[273] See MCL 700.7817(w).
[274] MRPC §1.5(a). See also ABA Model Rules of Professional Conduct §1.5(a).
[275] See MCL 700.7105(g).

## Asset Protection Trust Drafting Considerations

### In the Matter of the CES 2007 Trust[276]; DAPT Protections may be Buttressed through Funding of LLC Interests

Currently there are at least 17 jurisdictions in the United States that have adopted legislation that authorizes the creation of a self-settled asset protection trust (DAPT).[277] Some of those jurisdictions refer to such legislation as providing for Qualified Dispositions in Trust. Michigan adopted its Qualified Dispositions in Trust Act[278] in 2016, with an effective date of March 8, 2017. Delaware's act predates the same.

While DAPT legislation may vary, some key similarities may exist. One of the major differences often relates to whether a jurisdiction provides protections to spouses or children who are commonly referred to as "Exception Creditors".

While the Delaware and Michigan DAPT statutes are not necessarily identical, they do have a number of key similarities. Those include:

- The DAPT must be irrevocable;
- The grantor/transferor cannot act as a trustee or trust protector;
- The trust must contain a spendthrift provision;
- At least one of the trustees must be a "qualified trustee" as defined by the jurisdiction's DAPT statute (both Michigan and Delaware require that to be a qualified trustee in that respective jurisdiction, the trustee must be a resident or an entity authorized to act as a trustee in that jurisdiction (and for an entity that entity must also be subject to supervision by at least one of the specifically enumerated permissible agencies) with the primary trust officer located in that jurisdiction;
- At least some of the trust's property must be located in that jurisdiction;
- For a creditor whose claim arose after a qualified disposition, the action must involve a qualified disposition that was made with actual intent to defraud the creditor;
- Michigan's statute specifically recognizes the ability of the grantor/transferor to serve as an "investment advisor" to the extent conferred or permitted under the terms of the trust instrument while Delaware appears to infer that this right also exists in its jurisdiction;
- The trust must be governed by the laws of the applicable DAPT jurisdiction pursuant to which it was established.

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[276] In the Matter of the CES 2007 Trust, Delaware Chancery Court C.A. No. 2023-0925-SEM, opinion dated May 2, 2025.

[277] Currently the following among those jurisdictions that have adopted some form of legislation recognizing the ability to establish a self-settled asset protection trust: Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

[278] MCL 700.1041, et seq.

Since Delaware was one of the earlier US jurisdictions to adopt a DAPT statute[279] (and given the limited number of cases that have tested the effectiveness of DAPT statutes in foiling the claims of a creditor), other US jurisdictions with similar provisions may look to Delaware case law for guidance. The recent Delaware Chancery Court decision in *In the Matter of the CES 2007 Trust*[280] may prove to be one such case.

Facts:

Craig Schubiner ("Schubiner"), as grantor, established the CES 2007 Trust (the "Trust") on April 30, 2007. He named U.S. Trust Company of Delaware as the "Initial Trustee". In the Trust, Schubiner retained the right to act as

> "Advisor" with "full power to manage the investments of the trusts" "in a fiduciary capacity[,] and […]gave to his brother as the "initial Trust Protector," [the power] to remove the trustee, appoint a successor trustee, appoint a successor advisor, and appoint co- trustees or co-advisors.[281]

The Trust also contained two restrictions:

(1) the trustee retained sole and absolute discretion at any time to distribute the net income and the principal of the Trust as the trustee determines for the benefit of the beneficiaries and (2) [Schubiner], as the grantor, barred himself from acting as, trustee.[282]

The beneficiaries of the Trust were Schubiner's wife (if any), his parents and "issue thereof, if alive". Schubiner was not a beneficiary. The Trust also contained a spendthrift provision that provided:

> No beneficiary's interest in any trust hereunder, whether in income or in principal, shall be subject to anticipation, assignment, pledge, hypothecation, sale or transfer in any manner, and no beneficiary of any such trust or other person interested therein shall have the power to anticipate, assign, pledge, hypothecate, sell, transfer, encumber or charge his or her interest therein, and no trust estate created hereunder shall be liable for or subject to the debts, contracts, obligations, liabilities or torts of any beneficiary of any such trust or other person interested therein; provided, however, that nothing contained herein shall be construed as preventing any beneficiary from making a qualified disclaimer within the meaning of [S]ection 2518 of the Code with respect to interests herein. This section constitutes a restriction on the transfer of the Grantor's beneficial interest in the trust estate that is enforceable under applicable non-bankruptcy laws within the meaning of Section 541(c)(2) of the Bankruptcy Code (11 U.S.C.A Section 541(c)(2)) or any other similar or successor statute.[283]

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[279] While the Delaware statute has since been modified, it first became effect as to qualified dispositions made on or after July 1,1997. 71 Del. Laws, c. 159, § 1; 71 Del. Laws, c. 343, § 10. Off shore Asset Protection Trusts ("APTs") were in existence long before that.

[280] In the Matter of the CES 2007 Trust, Delaware Chancery Court C.A. No. 2023-0925-SEM, opinion dated May 2, 2025.

[281] Id. at p. 5.

[282] Id. at p. 5.

[283] Id. at p. 6.

Schubiner transferred various real property interests to LCCs. He then transferred a 99% interest in three Delaware limited liability companies (304 Associates LLC (the "304 LLC"), 305 Associates LLC (the "305 LLC") and 306 Associates LLC (the "306 LLC"), (collectively the "LCCs") to the Trust.

Three real properties were at issue. Two of the real property interests were located in Michigan, the third was located in Colorado. One of the Michigan properties had been originally owned by Schubiner and transferred to 305 LLC on March 19, 2007. It had been used as Schubiner's primary residence from 2001 to 2018. Over time, ownership of that real property changed hands several times as a result of transactions initiated by Schubiner. It was transferred into and out of the 305 LLC on a number of occasion until it was finally quit claimed back to the 305 LLC by Schubiner in early 2020.

In 2009, Schubiner and the 305 LLC purchased other real property located in Michigan, taking title to that real estate as joint tenants with rights of survivorship. On January 20, 2020, Schubiner conveyed his interest in that property to the 305 LLC.

A third property, located in Colorado, was originally owned by 303 Associates LLC, an entity that was wholly by Schubiner. On April 5, 2007, 303 Associates LLC conveyed the Colorado property to 306 LLC for $10.00. On March 30, 2016 (when the property was being refinanced), the property was transferred to Schubiner, to facilitate financing, and then almost immediately transferred back to the 306 LLC.

In 2014, Can IV Packard Square, LLC ("Can IV") loaned a different company owned by Schubiner funds to finance the development of a luxury retail and residential project in Ann Arbor Michigan. Presumably Schubiner personally guarantee repayment of the loan.

In 2017, the Initial Trustee of the Trust petitioned the Delaware Chancery Court seeking to resign and have a successor trustee appointed, because it had not received compensation for acting as trustee of the Trust. Ultimately First State Trust Company (the "Current Trustee") replaced the Initial Trustee of the Trust, and the Petition to resign and for payment of fees was withdrawn.

The Ann Arbor development project didn't go as planned and, on May 4, 2018, Can IV sued Schubiner in the 6th Judicial Circuit Court for the State of Michigan. In late 2019, judgment was granted in Can IV's favor (and against Schubiner) for nearly $14 Million plus attorneys' fees, consultant fees, interest and costs (the "Judgment"). In early 2020, Schubiner was enjoined in the Judgment proceedings from transferring assets outside of the normal course of business pending satisfaction of the Judgment. Schubiner contends he lacks assets with which to satisfy the Judgment and the Judgment remains unpaid.

Challenges to the above referenced real property transfers into and out of the LLCs were then initiated by Can IV and remain pending in Michigan and Colorado as part of its effort to collect on the Judgment. Collection efforts in several proceedings and in various jurisdictions have been brought by Can IV in its effort to recover on the Judgment, not only from Schubiner but also from entities he owns or otherwise controls.

On September 11, 2023, Can IV filed a Petition (which was subsequently amended) in the Delaware Chancery Court seeking to void the spendthrift provisions of the Trust, or in the alternative, to invalidate the Trust in its entirety, with the intention of attaching Trust assets or otherwise satisfying the Judgment

with Trust assets (the "Petition"). At the time the Petition was filed, Schubiner was not married, had one minor child, one then living parent and two brothers.[284]

As reflected above, the 305 LLC and 306 LLC were assigned to the Trust long before Can IV loaned the funds to Schubiner. In its Petition, Can IV contended that the Trust was a "sham" intended to defraud creditors and "a shell to prevent [Schubiner] from satisfying the Judgment".[285] Can IV also contended that Schubiner (as opposed to the Current Trustee) was the *de facto* trustee of the Trust as a result of his role as manager of the LLCs and the transfers of LLC property identified above. The Current Trustee responded that it continues to act as trustee of the Trust, denied the Trust was a "sham" and contended that it should not be voided, in whole or in part, to satisfy the grantor's debts.

A motion to dismiss was filed. Among other things, the motion contended that because the Initial Trustee (and Current Trustee) were "qualified trustees", who received "qualified dispositions" of membership interests in the LLCs (as opposed to in the underlying real estate), Can IV could not pierce the Trust in an effort to collect on the Judgment. The motion was argued on December 5, 2024 and taken under advisement. An order dated May 2, 2025 was entered granting the motion to dismiss. Because those issues were "gatekeeping" issues, other arguments (alleged to support a claim that the Petition should be summarily dismissed) were not addressed by the Delaware Chancery Court.

Analysis:

The court held that Can IV had

> failed to plead a reasonably conceivable claim for avoidance of the protections afforded to the Trust, and its beneficiaries, as an "Asset Protection Trust." As more fully explained herein, the Trust meets the statutory requirements for such protections, and the Petitioner has failed to plead facts which would overcome that showing, or affirmatively demonstrate that the trustees were not qualified, [Schubiner] was somehow a de facto trustee, or the spendthrift provision should be invalidated.[286]

The court found that while the parties agreed the Trust was intended to provide asset protection (as a DAPT), they disagreed whether it met the statutory requirements in order to be treated as one. The court found that the Trust satisfied all of the statutory requirements for it to qualify as a Delaware Qualified Disposition in Trust (DAPT). It held

> [i]n 1997, Delaware codified the ability to create Delaware self-settled asset protection, or qualified disposition, trusts (Asset Protection Trusts). The Qualified Dispositions in Trust Act (the "Act") permits someone to create an Asset Protection Trust, and irrevocably transfer assets to the

[284] This may be of some import in addressing common law principals that might permit invalidation of a spendthrift provisions when a trust has no economic reality and only functions to enable the grantor to control and enjoy trust property without limitations or restraints as was done before the trust was created or under the doctrine of merger (where the interests of the beneficiaries and the interests of the grantor are identical).
[285] CES 2007 Trust Opinion, supra at p. 15.
[286] Id. at p. 2.

> trust, to protect those assets from claims against the grantor/former owner. For assets to be protected, however, the transfer must be a "qualified disposition" to a "qualified trustee." The trust agreement must also invoke Delaware law, include a spendthrift provision, and be irrevocable. The Trust contains each of these requirements. [287]

It found that the Trust was irrevocable, at least one of the trustees was a "qualified trustee" and the grantor could not act as trustee nor was his residency utilized to achieve qualified trustee status.

It further held that

> [a] qualified disposition, made to a qualified trustee, may only be attached or avoided in limited circumstances. For pre-transfer creditors, their avenue is through 6 Del. C. §§1304–05 (fraudulent transfers); for post-transfer creditors, they must prove "the qualified disposition was made with actual intent to defraud such creditor. Both avenues have time limits.[288]

The court declined to "conflate" the underlying real property interests that were (and had at various times been assets of the Trust's LLCs) with the LLCs interests themselves. The court disagreed that the degree of control that Schubiner was able to exercise over the real property undermined the role of the Trustee, thereby rendering the Trustee(s) as "not qualified and superfluous". Instructive may be the following findings of the court:

> The Trust's assets are the LLCs, for which the Trust has a ninety-percent interest. Under Delaware's LLC Act "A limited liability company interest is personal property. A member has no interest in specific limited liability company property." Thus, the Trust, through its membership interest in the LLCs, has no interest in the specific real estate owned (or no longer owned) thereby. It would be inappropriate for this Court, through this type of proceeding, to adjudge the real estate transactions at the LLC level under the guise of potential fraudulent transfer sufficient to void the Trust's spendthrift provision. There are, simply put, no transfers to/from the Trust which would give rise to such an inquiry, and [Can IV] has pled no basis on which this Court should engage in veil piercing.
>
> [Can IV] has also failed to plead a reasonably conceivable claim that the trustees of the Trust were not "qualified trustees." Both meet the statutory definition, and the Amended Petition does not provide any factual averments that would demonstrate that either of the trustees failed to "[m]aintain[] or arrange[] for custody in this State of some or all of the property that is the subject of the qualified disposition, maintain[] records for the [T]rust on an exclusive or nonexclusive basis, prepare[] or arrange[] for the preparation of fiduciary income tax returns for the [T]rust, or otherwise materially participate[] in the administration of the [T]rust.
>
> It is the last clause to which [Can IV] grips, arguing the trustees were never intended to materially participate in the administration of the Trust. This conclusion is not, however, supported by the well-pleaded facts in the Amended Petition. At most, the Amended Petition reflects that little

[287] Id. at p.16. Internal footnotes omitted.
[288] Id. at p. 17.

administration was necessary for the Trust; for a trust holding solely membership interests in the LLCs, it is not difficult to understand and appreciate such dormancy.

[Can IV] argues, however, that it was more than dormancy, and points to the Initial Trustee's earlier petition to this Court, wherein it complained about its inability to perform under the circumstances. To some extent, yes, the allegations in that earlier action are concerning but they were: (1) resolved, and (2) followed by the appointment of a successor trustee, the Current Trustee, who meets the definition of a Qualified Trustee, and continues to serve in such role. Absent any allegations regarding the stewardship of the Current Trustee, the resolved allegations in the 2017 action are insufficient to state a cognizable claim that the Current Trustee is not a qualified trustee, such that this action should move past the pleading stage.

[Can IV] further argues that [Schubiner]'s retention of control under the Trust's agreement undermines the trustee's authority. I disagree. As advisor, [Schubiner] has the power to manage investments and delegate authority in accordance with his fiduciary duties. Such is in line with what the Act, which permits the settlor/grantor to appoint advisors and protectors with rights, including but not limited to: (1) removing the trustee and appointing a new qualified trustee, and (2) directing, consenting to, or disapproving distributions.

[Can IV] argues that these statutorily permitted rights do not include the right of a settlor to continue to manage, control, and operate a business owned by the Trust. True, such is not explicitly spelled out in the Act. But it does not need to be, given the layers of protection inherit in such a setup. The Trust owns a ninety- percent interest in the LLCs. That membership interest does not, as already addressed, grant the Trust any right, claim, or title to the assets of the LLCs, but the LLC Act (and any LLC agreements) define the Trust's rights, claims, and interests as a member. The Trust, through the Current Trustee, can invoke those rights as the trustee sees fit, subject to a beneficiary check on the Current Trustee's exercise of its duties. To grant the relief [Can IV] seeks would be to ignore these layers of protection.

Finally, [Can IV] argues that [Schubiner], regardless of the propriety of the rights retained in the Trust's agreement, exercises near-complete dominion and control over the Trust, disregarding and failing (or refusing) to recognize its separate existence. This leap in logic is unsupported by the allegations in the Amended Petition, which is scant with any factual averments regarding how [Schubiner] acted regarding the Trust and management of the Trust's assets. The Trust does not own or have a direct interest in the real estate at issue. It owns the LLCs, and its membership interests therein remain unchanged. To entertain [Can IV]'s theory would require this Court to disregard the layers of business entities and ignore the LLC Act's and Act's clear legislative intent. I decline to do so.[289]

[289] Id. at p. 18-22. Internal footnotes omitted

The court held the Trust complied with Delaware's DAPT statute in other ways. It contained a spendthrift provision and incorporated Delaware law regarding the Trust's governance, validity, construction and administration.

Can IV also argued that the Trust could be invalidated under Delaware's common law. While the court found that there may be certain circumstances pursuant to which a spendthrift provision could be deemed to be of no effect, those circumstances did not exist here.

The court recognized that under Delaware's common law, it was a basic principle that

> our courts will not give effect to a spendthrift trust that has no economic reality and whose only function is to enable the settlor to control and enjoy the trust property without limitations or restraints, as was done before the trust was created.[290]

This is premised on two primary doctrines:

> The first: public policy. … [P]ublic policy will not permit someone to create a spendthrift trust solely for their own benefit because where "the trustee controls the assets and income of the trust for his own benefit, unconstrained by any fiduciary duties owed to others, the purpose of a spendthrift trust—to protect the beneficiary from his or her own improvidence—is lost. The second underlying doctrine is that of merger. "Under that doctrine, a trust becomes void where the interests of the beneficiaries and the interests of the settlors are identical."[291]

The court held neither doctrine applied under the facts and circumstances of this case where the Trust's assets were membership interests in LLCs (as opposed to direct interests in the assets of the LLCs) which the qualified trustee held for the benefit of the Trust's beneficiaries.

Comment:

Since the possibility of appeal exists, practitioners may wish to watch this space. Based upon the analysis espoused by the Court, it appears that holding LLC interests in a trust that qualifies as a DAPT (as opposed to holding underlying assets outright in trust), might afford an additional level of protection when the grantor retains the right to act in an investment advisory role, acts a manager of the LLC or otherwise is able to exercise significant control over the underlying assets. Based upon this Delaware Chancery Court opinion, practitioners may wish to consider suggesting that that a DAPT's grantor first establish an LLC in the DAPT jurisdiction, fund the LLC with the underlying interests that the grantor wishes to fund to the DAPT, and then transfer the funded LLC to the DAPT, especially when the grantor wishes to act as an investment advisor, retain other permitted rights under the jurisdiction's DAPT statute and/or act as a manager for the LLC.

In all other regards, it remains important when drafting the DAPT, to comply with the statutory requirements for the DAPT to qualify under the jurisdiction's Qualified Dispositions in Trust act, as well as for the transfers themselves to qualify as "qualified dispositions".

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[290] Id. at p. 25.
[291] Id. at p. 25.

### Other Potential Drafting and Administrative Considerations

#### Estate of Sally J. Anenberg, Donor, Deceased v. Commissioner;[292] No Gift by Surviving Spouse on Termination of QTIP Trust

While so[293]me grantors may wish to provide flexibility following their death, others wish to exercise "dead-hand control". One common estate planning option is to leave assets in trust for the benefit of intended beneficiaries as opposed to providing for outright distributions. When assets are left in trust for the benefit of a surviving spouse, certain requirements must be met in order for that trust to qualify for a marital deduction on the grantor's Form 706 or 709 (as may be applicable).

In simple terms, one of the options that the Internal Revenue Code ("IRC") permits a grantor to use in leaving assets in trust for the benefit of a surviving US citizen spouse and still receive the benefit of a marital deduction, is to establish what is commonly referred to as a qualified terminable interest in property trust ("QTIP"). In doing so the surviving spouse must be provided with a mandatory right to receive all the (qualified) income of that trust for the remaining duration of the surviving spouse's life (regardless of marital status), nobody can have the power to appoint the property away from the surviving spouse during the surviving spouse's lifetime, and a QTIP election must be made under I.R.C. §2056(b)(7) on a timely filed Form 706 or 709 (as may be applicable). When a QTIP election is made on a timely filed Form 706, the grantor's estate is able to essentially defer the payment of federal estate tax ("FET") on the entire value of a marital trust over which a QTIP election has been made ("QTIP Trust") until the surviving spouse's death.

When the surviving spouse's dies, the entire value of the QTIP Trust as of the surviving spouse's death will be included in the surviving spouse's taxable estate for FET purposes. To the extent the surviving spouse has FET exemption left, it may be utilized to reduce the ultimate tax due. In addition, to providing "dead-hand control", QTIP Trusts provide potentially valuable FET and generation skipping transfer tax ("GSTT") savings. Further discussion of those potential savings (and the use of reverse GSTT allocations to portions of a QTIP Trust is beyond the scope of this article).

Suffice it to say, the use of a QTIP Trust as an estate planning option provides benefits beyond the exercise of "dead-hand control". One rationale behind permitting beneficial FET treatment of QTIP Trusts is that "the purpose of the terminable interest rule is to deny the marital deduction for transfers between spouses if the transfer has been structured to avoid estate tax when the surviving spouse dies."[294] This may seem contrary to the statements reflected above, but really it is not. The FET tax regime will apply to the assets of the QTIP Trust at the surviving spouse's death, but a surviving spouse's remaining FET credit (commonly known as the exemption) will apply. In order to avoid the potential escape of QTIP Trust assets from being subjected to FET, if the surviving spouse makes an inter-vivos gift of any portion of that spouse's qualified

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[292] *Est. of Sally J. Anenberg, Donor, Deceased v. Commissioner*, 162 T. C. No. 9 (5/20/24).

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[294] *Id*. at *9.

income interest in a QTIP Trust, IRC §2519(a) will treat the surviving spouse as having transferred all of his or her interests in the QTIP Trust. Under IRC §2512(b), when such a transfer occurs for less than full and adequate consideration in money or money's worth, the value of the transferred property (less the value of the consideration received) will be deemed to be a gift. But what happens if the QTIP Trust is terminated and all assets of that trust are distributed free of trust to the surviving spouse?

Facts:

In the *Estate of Sally J. Anenberg*[295] Alvin Anenberg died in March 2008, survived by his spouse, Sally, and his children from a prior relationship. At his death, pursuant to his estate plan, significant assets were funded to a marital trust over which his executor made a timely QTIP election. The QTIP Marital Trust required that the trustee distribute, at least annually, all of the QTIP Martial Trust's income to Sally, and authorized the trustee to "distribute corpus to Sally as the trustee 'deem[ed] necessary' for Sally's support."[296] Alvin's children held remainder interests to the corpus of the QTIP Marital Trust.

In October 2011, the trustee of the QTIP Marital Trust petitioned the court, under California Probate Code §15403, with the consent of all of the beneficiaries (current and contingent), to distribute all of the QTIP Marital Trust's assets to Sally and to thereby terminate the QTIP Marital Trust. In March 2012, when the court entered an order approving the petition, the QTIP Marital Trust was valued at $25,450,000, and Sally's qualified income interest was valued at $2,599,463. Following entry of that order, the trustee distributed all of the assets of the QTIP Marital Trust to Sally, which included (among other assets) 199 voting shares and 19,701 nonvoting shares in the family's closely held business, Al-Sal Oil Company ("Al-Sal").

In August 2012, Sally gifted some of the Al-Sal shares she received on termination of the QTIP Marital Trust to trusts established for Alvin's two children. The fair market value of those gifts, for federal gift tax purposes, was $1,632,622. One month later (in September 2012), Sally sold virtually all of her remaining interest in Al-Sal to various trusts for the benefit of Alvin's children and grandchildren. In return, Sally received a 9-year promissory note equal to the value of the interests sold, bearing annual interest at the then applicable federal rate of .84%. The notes were payable in installments and were secured by the Al-Sal shares sold to the trusts for Alvin's descendants. The notes were also partially guaranteed and were due in full, including all outstanding principal and accrued and unpaid interest, on September 1, 2021.

Sally filed a timely Form 709 that not only disclosed the $1,632,622 gift, but also disclosed her sale of her remaining interests in Al-Sal reflecting her position that the sale was not subject to gift tax as it was made for full and adequate consideration.

Sally died in 2016 and the Commissioner (the "IRS") examined Sally's 2012 gift tax return. On December 1, 2020, the IRS issued a gift tax deficiency assessment of more than $9 million. It based that assessment on the termination of the QTIP Marital Trust and subsequent sale of Sally's interest in the shares of Al-Sal that had previously comprised corpus of that trust. The IRS also assessed an accuracy related penalty of

[295] *Id*.
[296] *Id*. at *6.

over $1.8 million. Sally's estate (the "Estate") filed a timely Petition for redetermination of both assessments. The Estate and the IRS each filed their own motions for partial summary disposition and the court granted the Estate's motion and denied the IRS's.

Analysis:

The Estate contended that the termination of the QTIP Marital Trust and distribution of its assets to Sally didn't constitute a *gift* under IRC §2519. While the distribution may have constituted a *transfer,* her Estate contended it didn't constitute a *gift.* The Estate further posited that because the QTIP Marital Trust had terminated the shares no longer belonged to the QTIP Marital Trust. Therefore, when Sally sold the Al-Sal shares she held the full bundle of rights to those shares and, as a result, IRC §2519 didn't apply because she no longer held a qualifying income interest in the QTIP Marital Trust at the time of sale.

The IRS contented that Sally should nonetheless be treated as having made a gift of the full value of her interest in the QTIP Marital Trust, less the value of her qualifying income interest. Essentially, looking at the termination and subsequent sale as a step-transaction and argued that IRC §2519 should therefore still apply.

The Tax Court didn't address whether the children's (and grandchildren's) consent to the termination of the QTIP Marital Trust and distribution of the entirety of that trust's assets to Sally constituted a gift. Instead, it only analyzed whether, and to what extent, Sally made a gift as a result of the QTIP Martial Trust's termination and subsequent sale of Al-Sal shares that had comprised corpus of that trust.

In analyzing the respective parties' positions, the Tax Court reflected that while often referenced in the applicable sections of the IRC, the term "gift" is not statutorily defined. However,

> the Supreme Court has described "gift in the statutory sense . . . [as] proceed[ing] from a 'detached and disinterested generosity' . . . 'out of affection, respect, admiration, charity or like impulses.'" *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960) (first quoting *Commissioner v. LoBue*, 351 U.S. 243, 246 (1956); and then quoting *Robertson v. United States*, 343 U.S. 711, 714 (1952)). And our Court and the governing regulations have explained transfers in exchange for full and adequate consideration are not gifts. See, e.g., *Estate of Redstone v. Commissioner*, 145 T.C. 259, 269 (2015); see also Treas. Reg. § 25.2511-1(g)(1) ("The gift tax is not applicable to a transfer for a full and adequate consideration in money or money's worth . . . .").[297]

In addition, it held that even though the termination may have constituted a "transfer" that alone isn't sufficient to create a gift tax liability.

> Rather, section 2501 tells us that gift tax applies "on the *transfer* of property by *gift* during [the] calendar year." I.R.C. § 2501(a)(1) (emphasis added); *Irvine,* 511 U.S. at 232; see also *Estate of Howard v. Commissioner*, 910 F.2d 633, 636 (9th Cir. 1990) (construing the provisions governing QTIPs and observing that "[i]n a statute so carefully crafted every difference counts"), rev'g 91 T.C. 329 (1988). And, as the Supreme Court observed in *Irvine,* "[w]e have repeatedly emphasized that

[297] *Id*. at *12.

> [the Code's] comprehensive language was chosen to embrace all *gratuitous* transfers." *Irvine*, 511 U.S. at 232–33 (emphasis added); id. at 235 ("[T]he capacious language of Internal Revenue Code §§ 2501(a)(1) and 2511(a) . . . encompasses all gratuitous transfers of property and property rights of significant value." (Emphasis added.)). In other words, a gratuitous transfer—not just a transfer—is required to impose gift tax.[298]

Therefore, the Tax Court held that to determine whether Sally made a gift, they had to compare what she had before and after the termination.

Prior to the QTIP Marital Trust's termination, Sally's interest was to some, but not all, of the bundle of interests that existed with regard to the Al-Sal shares held by that trust. Sally only agreed to termination of the QTIP Marital Trust on the assurance she would then hold the "full bundle of sticks" representing all rights in and to the assets previously subject to QTIP Martial Trust administration, including the right to receive both the underlying property and the right to receive the income generated by that property. While the termination and distribution to Sally may have constituted a *transfer,* it didn't represent a *gift* by Sally because at termination she received full ownership of the assets and, therefore, more than she surrendered as a result of the termination. As a result, she could not be deemed to have gratuitously transferred either the income or the remainder interest due to the QTIP Martial Trust's termination. Moreover, as a result of the termination Sally didn't part with dominion and control over the assets that had comprised the corpus of the QTIP Marital Trust and she had full control over the potential disposition of the assets previously held in that trust. The Tax Court, therefore, found that

> [a]ccordingly, under the regulations, any gift by Sally would appear to be viewed as wholly incomplete. See also *Estate of Sanford v. Commissioner*, 308 U.S. 39, 43 (1939) ("[A] retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death."); *Robinson v. Commissioner*, 675 F.2d 774, 777 (5th Cir. 1982) ("There can be no completed gift before the donor surrenders dominion and control of the subject matter of the gift." (quoting 4 Jacob Rabkin & Mark H. Johnson, *Federal Income, Gift and Estate Taxation* § 51.04B(1) (1982)), aff'g 75 T.C. 346 (1980).
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> Treasury Regulation § 25.2511-2(c) points the same way. It provides that "[a] gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in [herself]." Here, in agreeing that the Marital Trusts be terminated, Sally was assured that she would receive the assets held by the trusts. While not cast in the form of a reserved power, one might view the arrangement presented to the Superior Court as amounting to Sally's agreeing to part with her qualifying income interest for life (and to the deemed transfer of the remainder interests in the QTIP) on the condition that she was reserving the power to revest title in the property in herself, a power that was promptly exercised upon the termination of the Marital Trusts.[299]

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[298] *Id*. at *14.
[299] *Id*. at *16-17.

The Estate argued that the Tax Court should interpret the Superior Court's order to distribute the QTIP Marital Trust assets to Sally and terminate that trust as a court-ordered exercise of a power of appointment in favor of Sally. The Tax Court held that

> … here Sally's receipt of the QTIP (and later the promissory notes) preserves the value of the marital assets in her hands for future gift or estate taxation. *See Estate of Novotny*, 93 T.C. at 16, 17–18; *see also* I.R.C. § 2033 ("The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."). Thus, the authorities the Commissioner cites support a result contrary to the one he advances.
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> The termination of the Marital Trusts is similar to an appointment of the assets of the Marital Trusts to Sally—i.e., an assignment of ownership in the assets to her. *See, e.g.*, Cal. Prob. Code § 610(f) (West 2023) (defining a "power of appointment" as "a power that enables a powerholder . . . to designate a recipient of an ownership interest in . . . property"); *see also Power of Appointment*, *Black's Law Dictionary* (5th ed. 1979) (defining a "[p]ower of appointment" as "[a] power . . . to appoint, that is, to select and nominate, the person or persons who are to receive and enjoy an estate or an income therefrom"). Perhaps in recognition that it would make little sense to impose the gift tax when property owned (or deemed owned) by the surviving spouse is distributed to her for her own use, the governing regulations provide that appointment of the QTIP to the surviving spouse is not treated as a disposition under section 2519. *See* Treas. Reg. § 25.2519-1(e) ("The exercise by any person of a power to appoint [QTIP] to the donee spouse is not treated as a disposition under section 2519, even though the done spouse subsequently disposes of the appointed property."); *cf.* IRC §2056(b)(7)(B)(ii)(II) (providing that a surviving spouse can hold a qualifying income interest for life in a QTIP only when "no other person has a power to appoint any part of the property to any person *other than the surviving spouse"* (emphasis added)). As a result, no gift tax applies in the event of an appointment [to the spouse]. We see no reason to reach a contrary result here, where as a result of the Superior Court's order the Marital Trusts distributed the QTIP to Sally by analogous means.[300]

The IRS argued that the case was analogous to the *Estate of Kite*[301] where a QTIP Trust was terminated and the entire property of that trust was distributed to another trust for the benefit of the surviving spouse. Once the QTIP property was transferred to the second trust for the surviving spouse's benefit, she sold the property to her spouse's children in return for a private annuity agreement that was unsecured and under which payments were not due until 10 years after the date of sale. If Mrs. Kite died before the first payment on the annuity was due (which she did), then her annuity interest would terminate and the income from the annuities would no longer be part of her gross estate and would escape estate tax. In the *Estate of Kite* the court found that

> [o]n these facts and assuming the form of Mrs. Kite's transactions were respected, the value of the QTIP that was deemed to pass to Mrs. Kite (and for which a marital deduction had been taken)

[300] *Id*. at *22-23.
[301] *Estate of Kite*, T.C. Memo 2013-43.

> would have escaped estate and gift tax altogether. Observing that the form of the transaction would allow Mrs. Kite's estate to "circumvent the QTIP regime" and "avoid any transfer tax," this Court (at the Commissioner's urging) applied the substance over form doctrine to treat the transactions as one integrated transaction. And, in doing so, the Court concluded that the termination of the trust and subsequent sale of property was a disposition for purposes of section 2519(a). [302]

The Tax Court, in *Anenberg,* distinguished the *Estate of Kite* from the facts presented, finding that the facts in *Estate of Kite* "involved an apparent attempt to prevent estate or gift tax from ever being imposed on the residual value of the QTIP for which a marital deduction had been taken".[303] Here, the entirety of the QTIP property was distributed to Sally. When she made a gift of Al-Sal stock to Alvin's children it was subject to gift tax. Any payments made under the promissory notes during Sally's lifetime would be part of her estate for FET purposes when she died to the extent not otherwise dissipated. Any outstanding balance remaining due under the promissory notes at the time of Sally's death would also be part of her estate for FET purposes.

The Tax Court also distinguished the instant scenario from other cases where IRC §2519(a) was applied, because in those cases the surviving spouse only received the value of the income interest when the QTIP Martial Trust was terminated and the remaining value/corpus was distributed to the residuary beneficiaries (as opposed to the surviving spouse). The Tax Court found it inappropriate to consider only part of the transaction (termination of the QTIP Martial Trust) which by itself might have constituted a disposition triggering IRC §2519(a). If viewed alone, the act of termination could have been viewed as Sally giving up her remainder interest and resulted in a diminution (albeit temporary) in the value of her estate. However, the court order terminating the QTIP Marital Trust also required that the entirety of that trust be distributed to Sally, which not only replenished any "temporary" diminution in the value of her estate but also enhanced it.

Comment:

In order to provide flexibility, when appropriate, drafters might consider including a power of appointment that would permit an inter-vivos distribution of QTIP Marital Trust assets to the surviving spouse, thereby enabling her to engage in inter-vivos estate and gift tax planning with regard to assets distributed to her as a result of any such exercise. This would avoid the type of machinations the Tax Court went through in its efforts to distinguish other QTIP termination cases.

Another option might be to provide an independent trustee, trust director or trust protector with the power to distribute (or direct distribution of) QTIP Trust assets to the surviving spouse for any reason. Providing such powers may carry risks that a grantor might not feel comfortable providing when a blended family or spendthrift spouse is involved. However, including such provisions might have avoided the costs of litigation as well as the potential gift tax ramifications that might be attributed to Alvin's children and

[302] *Est. of Anenberg, supra* at *25, citing *Estate of Kite* at *41. Internal citations omitted.
[303] *Id*. at * 25.

grandchildren's relative to their consent to the termination of the QTIP Marital Trust whereby they essentially consented to the elimination of their remainder interests.

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### McDougall v. Commissioner304: Gift Tax Consequences on Termination of QTIP Trust

Estate Planning Newsletter #3146 discussed the Estate of Sally J. Anenberg[305]. That case analyzed the gift tax consequences (or lack thereof) to the surviving spouse resulting from the grant of a petition to terminate a QTIP trust and distribute all its assets to the surviving spouse. In *Anenberg* the court concluded that the termination of the QTIP trust (and distribution of all of its assets to the surviving spouse) did not result in a gift tax obligation to the surviving spouse; however, *Anenberg* did not address the potential gift tax consequences that might result to the remainder interest beneficiaries. On the heels of *Anenberg*, the tax court has now addressed that very issue in *McDougall v. Commissioner*, and came to the conclusion that that an agreement by the remainder beneficiaries to terminate the QTIP, and distribute all of the assets to the surviving spouse, indeed resulted in a gift.

Facts:

In the *McDougall v. Commissioner*[306] Clotilde McDougall died in December 2011. She was survived by her spouse, Bruce, and their two children, Linda and Peter. At her death, her gross estate was worth approximately $60 million. Her estate plan provided for the establishment of a residuary marital trust. Her personal representative made a QTIP election with regard to the marital trust and claimed a $54 million marital deduction on the Form 706. The marital trust provided for distribution of all of the income to Bruce and discretionary distributions of principal subject to a HEMS standard. Bruce also had a special testamentary power of appointment over the assets of the marital trust remaining at the time of his death. By 2016, the assets in the QTIP trust had more than doubled in value. In October 2016, Bruce, Linda and Peter entered into a non-judicial agreement (the "Agreement") to terminate the QTIP trust so that Bruce could control the assets outright. That agreement provided in pertinent part that:

By signing this Agreement and by virtue of the QTIP election for the [Residuary] Trust, the commutation of the Trust results in a deemed gift, for federal gift tax purposes, of the remainder interest in the Trust assets from Bruce to Linda and Peter under Section 2519 of the Code. By virtue of the distribution of all of the Trust assets to Bruce, the commutation of the Trust does not result in a deemed gift of Bruce's income interest in the Trust under Section 2511 of the Code. Additionally, by signing this Agreement and by virtue of the distribution of all of the Trust asset [sic] to Bruce, the commutation of the Trust results in a gift, for federal gift tax purposes, of the remainder interest in the Trust from Linda and Peter to Bruce. The deemed gift of the remainder interest from Bruce to Linda and Peter and the gift from Linda and Peter to Bruce results in a reciprocal gift transfer. [307]

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[304] *McDougall v. Commissioner,* 163 T. C. No. 5 (9/17/24).
[305] *Est. of Sally J. Anenberg, Donor, Deceased v. Commissioner*, 162 T. C. No. 9 (5/20/24).
[306] *McDougall v. Commissioner,* 163 T. C. No. 5 (9/17/24).
[307] Id. at *7-8.

On the same day that the last party signed the Agreement, Bruce transferred assets he received from the marital trust to a trust established for Linda, Peter and their descendants (the "Children's Trust") in exchange for promissory notes of equal value. Bruce, Linda and Peter each filed their own respective Form 709s reflecting the transaction. Each return included an explanation of the taxpayer's view of the transaction and the effect of the Agreement. Each taxpayer's Form 709 reflected the taxpayer's position that the termination and distribution of the assets of the marital trust to Bruce resulted in a disposition under IRC §2519(a)3 of Bruce's qualifying income interest in the marital trust, however each went further and asserted that no gift was made by Linda or Peter because their gifts were offset by the transfer of the same assets by Bruce thereby asserting a "reciprocal gift" theory that they contended negated the existence of a taxable gift or transfer.

Analysis:

While both the majority and concurring opinions in *McDougall* came to the same conclusion, their analysis of *Anenberg* differed in arriving at the conclusion. Both held that no taxable gift by Bruce resulted from: (1) the termination and distribution of the marital trust assets to Bruce, or (2) the transfer of those assets to the Children's Trust (assuming that the value of the assets and the promissory notes issued by the Children's Trust were of equivalent value). However, the majority opined that the analysis contained in the concurring opinion should be ignored except as to the outcome. Essentially, the majority believed that the concurrence got to the right result but the analysis utilized was faulty and should not be relied on.

The majority held that the approach applied in *Anenberg,* with regard to what happens when "... 'taxpayers subject to the QTIP regime take steps to conform their actual legal arrangements to the regime's legal fiction",[308] applied here with regard to Bruce's acquisition of the marital trust assets under the Agreement, but that "legal fiction" didn't apply to the termination of the remainder beneficiaries' interest.

The Commissioner asserted in *McDougall* that the termination of Bruce's QTIP interest represented a taxable gift by Bruce, Linda *and* Peter. The court disagreed as it related to whether Bruce made a taxable gift, and while it indicated it was not determining the value of gift made by Linda and Peter, it found that a gift was certainly made by Linda and Peter because they parted with valuable property interests under the Agreement. The Commissioner asserted that:

> [w]ith regard to Linda and Peter, there is no [QTIP] tax fiction at work." Rather, he says, "[t]hey received a remainder interest in the Residuary QTIP Trust assets at Clotilde's death." The Commissioner observes that "[t]his is a valuable property interest that became part of their estates at that time, and with respect to which they agreed to an immediate transfer to Bruce pursuant to the Nonjudicial Agreement." The Commissioner reminds us "that federal gift tax is an excise tax on the transfer of property," and he concludes that "the transfers of Linda['s] and Peter's rights to a pro rata share of the Residuary QTIP Trust assets are taxable gifts." He reasons that,

[308] Id. at *13. Internal citations omitted.

> "[b]ecause the assets are no longer part of either of their taxable estates and cannot be further transferred by Linda and Peter, they are no longer subject to further transfer taxation therein." [309]

The Court agreed with the Commissioner with regard to whether the Agreement resulted in a gift having been made by Linda and Peter and found that the "QTIP fiction" doesn't apply for all purposes and here:

> [u]nder the "gratuitous transfer" framework described in *Estate of Anenberg*, Linda and Peter plainly made gratuitous transfers. Before the implementation of the Nonjudicial Agreement, they held valuable rights, i.e., the remainder interests in the QTIP. After the implementation of that agreement, which required their consent, Linda and Peter had given up those valuable rights by agreeing that all of the Residuary Trust assets would be transferred to Bruce. And they received nothing in return. By giving up something for nothing, Linda and Peter engaged in quintessential gratuitous transfers and are therefore subject to gift tax under sections 2501 and 2511.[310]

The Court found unpersuasive the taxpayers' position that Bruce, Linda and Peter made "reciprocal gifts" that offset each other such that no gift tax was applicable. It noted that no such theory is recognized and the "reciprocal trust doctrine" did not apply under the facts and circumstances presented. It found Linda and Peter received nothing of value from Bruce under the terms of the Agreement and a deemed transfer under IRC §2519(a) added nothing to their "bundle of sticks". In other words, the children received nothing for relinquishing their remainder rights. The transfer by Bruce to the Children's Trust was for different consideration – promissory notes equal to the value of assets transferred by Bruce to the Children's Trust.

The Court held that:

> [t]he gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.
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> The Commissioner correctly points out that "[i]f Linda and Peter were to transfer their remainder interests to a third party, the transfers would clearly be a gift and Petitioners admit as much." That Bruce was the recipient of Linda's and Peter's largesse does not change this conclusion.[311]

Valuing Linda and Peter's gift may be an entirely different issue where, as here, Bruce had a special testamentary power of appointment, the exercise of which could significantly reduce or otherwise alter Linda and Peter's interests, making valuation of the gift difficult and perhaps speculative.

Comment:

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[309] Id. at *19-20. Internal citations omitted.
[310] Id. at *20.
[311] Id. at *25-26. Internal citations omitted.

Because a QTIP election had been made, the assets of the marital trust would already be subject to estate tax in Bruce's estate and (under the current estate tax regime) a step up in basis on his death. The purpose for terminating the trust and distributing the assets to Bruce appears to have been intended to exclude future appreciation of those assets and the ultimate estate tax consequence attendant to that growth from his estate for federal estate tax purposes. One might reasonably suspect that the Children's Trust was a grantor trust, and as a result Bruce's payment of income taxes attendant thereto might also help to further reduce the estate tax consequences to Bruce's estate on his death.

Building in greater flexibility might have helped to avoid the potential adverse gift tax consequences to Peter and Linda. If an independent trustee was given the power to distribute assets to Bruce for any reason, the need for Peter and Linda's consent could have been avoided. If a trust protector had the power to terminate the marital trust and on termination was mandated by the terms of the trust to distribute the assets contained within the marital trust to the surviving spouse, again the need for Peter and Linda's consent could have been avoided. However, when exercising discretion over such a large trust/distribution, a fiduciary might be inclined to seek court approval or request waivers and consents from trust beneficiaries. While doing so makes a lot of sense in terms of protecting the fiduciary from liability, might it also open the remainder beneficiaries to potential gift tax consequences under Chief Counsel Advice 2023-52-018 (the "CCA")? Perhaps only time will tell. In the interim, drafting for flexibility may help.

The tax court didn't address (and the parties don't appear to have raised) whether a nonjudicial settlement agreement could even have been utilized to terminate the marital trust and distribute its assets to Bruce. UTC §111 provides that such an agreement is only valid to the extent that it doesn't violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court. Comments to the UTC §111 indicate that a nonjudicial settlement cannot be used to terminate a trust in an impermissible manner. Michigan's version of the UTC specifically precludes the ability of parties to use a nonjudicial settlement to terminate or modify a trust.[312] Other jurisdictions may have similar limitations on the use of this process. Whether it might be possible to unwind the transaction if the Agreement exceeded what is permitted under a nonjudicial settlement in that jurisdiction and require return of the assets to the marital trust (together with all appreciation and benefits attendant thereto) and thereby avoid the gift tax consequences was also not addressed.

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### In Re Trueman Harrison and Modesta Harrison Trust[313]; When a Court Determines a Special Fiduciary Appointment is Required it Doesn't Have to Follow the Plan of Succession Provided by the Grantor

When drafting estate plans, practitioners encourage clients to carefully consider who will administer the plan and to thoughtfully select fiduciaries and those who will succeed them should they (for any reason) be unable to act in that position. But what if the court suspends the fiduciary's powers and determines that a special fiduciary is needed? In In Re Harrison, the Michigan Court of Appeals analyzed whether the

[312] MCL 700.7111(2).
[313] Kruse v. Harrison (In re Harrison), 2025 Mich. App. LEXIS 525 (Jan. 22, 2025).

probate court erred when it appointed the personal representative of a beneficiary's estate, as opposed to the Trust's nominated successor trustee, when it suspended the powers of a trustee and concluded the probate court was not bound to follow the order of succession established by the grantors.

Facts:

Trueman and Modesta (the "Grantors") established a joint trust (the "Trust") which was apparently subject to amendment by the surviving grantor spouse. Trueman and Modesta were the initial trustees. When Modesta amended the Trust following Trueman's death, she nominated Debra Kruse ("Kruse") to succeed her as trustee, and Barbara Chandler ("Chandler") as second successor trustee. The Trust provided that in the absence of a nominated trustee who was willing and able to act, the majority of beneficiaries could nominate and select the successor.

When Modesta died in 2017, Kruse accepted the appointment to act as successor trustee of the Trust. In 2021, Kenneth Harrison (who was one of the beneficiaries of the Trust) died and Elizabeth Harrison ("Elizabeth") was appointed the personal representative of his estate.

In 2022, Kruse filed a petition for partial supervision of the Trust for purposes of closing the Trust and approving a plan of distribution. The court approved the distribution of $25,000 to each current beneficiary, but held that no distribution was to be made to Kenneth's estate because a dispute existed as to whether it was entitled to a distribution. The approved distributions were to be made no later than February 18, 2022.

On March 7, 2022, Elizabeth filed a motion for summary disposition alleging that (1) Kenneth's estate was entitled to 1/6$^{th}$ of the residue of the Trust, and (2) the court ordered distributions that were to be made by February 18$^{th}$ hadn't not occurred. On September 6, 2022, the court determined that Kenneth's estate was in fact entitled to 1/6$^{th}$ of the Trust's residue and ordered Kruse to file an amended plan of distribution within 14 days.

When Kruse failed to timely amend the plan of distribution, Elizabeth filed a motion for an order for show cause and the court ordered Kruse to appear and show cause why she shouldn't be held in civil contempt for her failure to make the court ordered distributions and file an amended plan of distribution. On December 9, 2022 the court entered a stipulated order that required Kruse to make the previously ordered $25,000 distributions to 5 of the beneficiaries and to file a final accounting within 14 days. By the time the court held a status conference in February 2023, the interim distributions still hadn't been made, nor had an accounting been filed. Additional show causes ensued. Ultimately, Kruse filed an accounting, but Elizabeth objected to the same.

Elizabeth's efforts to obtain discovery with regard to the accounting were thwarted by Kruse's repeated failures to respond or answer. A motion to compel was then filed but, on Kruse's requests, adjourned multiple times to provide additional time for her to respond. By September 2023, the court apparently had had enough and refused further requests to adjourn. Elizabeth asked the court to appoint a special fiduciary pursuant to MCL 700.1309 and MCR 5.204, citing multiple reasons, including that following the sale of real estate in 2020, funds had been deposited into Kruse's attorney's ("Elowski") client trust account (IOLTA), no effort to complete administration had been made and only one beneficiary had received their

$25,000 distribution. Elizabeth's counsel also indicated that it was aware of other matters where Elowski was holding money that didn't belong to her and for which distributions were being sought.

In response to further inquiries, Elowski provided a redacted checking account statement, but due to the redactions it was impossible to determine to whom the account belonged. Moreover, the balance in the account didn't match the amount owed to the Trust. While it was slightly more than what was owed to the Trust, it was less than the amount owed to the Trust and another estate. The court granted Kruse's request for appointment of a special fiduciary but noted that no county public administrator was available for that purpose and there might not be funds available to pay a special fiduciary. For those reasons, the court decided to appoint Elizabeth, in her capacity as personal representative of Kenneth's estate, as special fiduciary of the Trust and ordered Elowski to turn over the Trust's remaining funds to the special fiduciary.

On October 6, 2023, the special fiduciary filed a motion for an order to show cause Elowski and a petition to surcharge Kruse. At the hearing on the motion and petition that occurred on November 3, 2023, Elowski appeared remotely (despite lacking permission or authority to do so) and when asked when she would be able to return to the practice of law, Elowski terminated the videoconference. The court rescheduled the contempt hearing to November 8th and the surcharge petition to December 1, 2023. On November 6th, the probate court entered an order finding Elowski in direct contempt of court for terminating her appearance at the prior hearing, via videoconference, without permission.

On December 28, 2028 the probate court entered an order holding Elowski in contempt and ordered her confined to jail, but held the order in abeyance pending a de novo circuit court review. When the circuit court denied Elowski's motion on review, a bench warrant was issued for Elowski's arrest.

On February 12, 2024, Elowski testified under oath that she didn't have any of the $270,908.36 owed the Trust. Because she had been held in civil contempt, and no longer held the keys to the jail that could have permitted her release upon compliance, the court vacated the prior order, but ultimately issued a new order finding her in direct contempt and sentenced her to 93 days in jail, with 48 days held in abeyance if she completed paperwork necessary for her to be substituted out as counsel in approximately 12 matters.

Analysis:

The Michigan appellate court recognized that

> "[u]nless an interested person invokes court jurisdiction, the administration of a trust shall procede (*sic*)expeditiously, consistent with the terms of the trust, free of judicial intervention and without court order, approval or other court action. Neither registration nor a proceeding concerning a trust results in continued supervisory proceedings." MCR 5.501(B). In the present case, the trustee invoked the probate court's jurisdiction when she filed the petition for partial supervision of the trust.[314]

[314] Id. at *12.

On appeal, Kruse argued that her due process rights were violated because she didn't have notice that she might be removed and replaced by a special fiduciary when the attorney she hired embezzled the Trust's assets. The appellate court held that Kruse's failure to distribute and account for the Trust's assets, despite multiple court orders to do so, merited the appointment of a special fiduciary. In doing so the appellate court found that the

> …court correctly relied upon MCL 700.1309, which allows the court to appoint a special fiduciary upon reliable information received from an interested person. Specifically, MCL 700.1309 states:
>
> > Upon reliable information received from an interested person, county or state official, or other informed source, including the court's files, the court may enter an order in a proceeding to do either or both of the following:
> >
> > (a) Appoint a special fiduciary to perform specified duties.
> >
> > (b) Enjoin a person subject to the court's jurisdiction from conduct that presents an immediate risk of waste, unnecessary dissipation of an estate's or trust's property, or jeopardy to an interested person's interest. Under this subdivision, the court shall not enjoin a respondent in a proceeding to appoint a guardian or conservator or enjoin a ward or protected individual. An enjoined person shall be given a prompt hearing, if requested, to show cause why the order should be terminated.
>
> The court also correctly relied upon MCR 5.204, which allows the court to appoint a special fiduciary on its own initiative and without notice, and which suspends the power of the general fiduciary unless the court orders otherwise. MCR 5.204 states:
>
> > (A) Appointment. The court may appoint a special fiduciary or enjoin a person subject to the court's jurisdiction under MCL 700.1309 on its own initiative, on the notice it directs, or without notice in its discretion.
> >
> > (B) Duties and Powers. The special fiduciary has all the duties and powers specified in the order of the court appointing the special fiduciary. Appointment of a special fiduciary suspends the powers of the general fiduciary unless the order of appointment provides otherwise. The appointment may be for a specified time and the special fiduciary is an interested person for all purposes in the proceeding until the appointment terminates.[315]

Even thought it was Kruse's attorney (and not Kruse) who embezzled the Trust's assets, Kruse may nonetheless be held liable to the Trust. It is clear from the appellate court opinion, that the trial court gave Kruse (and her counsel) multiple opportunities to correct their failures to comply with court orders and to distribute the Trust assets to its beneficiaries before appointing a special fiduciary.

[315] Id. at * 13-15.

Kruse then argues that the court erred when it appointed Elizabeth, as opposed to Chandler, to act and if Chandler couldn't act for the beneficiaries to then by majority vote select the trustee who would succeed Kruse. The appellate court held that

> MCL 700.1309 does not limit the court's discretion on the issue of who it may appoint as a special fiduciary. Despite the trustee's assertion that the court should have appointed one of the successor trustees named in the trust, *as special fiduciary*, she cites to no portion of the Estates and Protected Individuals Code (EPIC) indicating that the court was required to do so and fails to direct this Court to any case in support of her position. Likewise, MCR 5.204 contains no provision suggesting, in a case where a will or trust names a successor trustee (or personal representative), that the court must appoint one of those named persons as a *special fiduciary*. At the time of the hearing, the court did not address the issue of the successor trustees named in the trust; however, the record supports the conclusion that the court selected one of multiple reasonable and principled outcomes. Initially, the court considered appointing a public administrator or some other third party, but said the county had no public administrator available, and counsel for appellee advised that there was likely no money available in the trust to pay a subsequent fiduciary. Under these circumstances, we defer to the trial court's judgment and hold that it did not abuse its discretion by appointing appellee as special fiduciary, instead of a successor trustee named in the trust.[316]

Comments:

A special fiduciary is different than a successor trustee. According to the Reporter's Comments to MCL 700.1309, it "is an ad hoc agent of the court who is assigned tasks appropriate to the circumstances" as opposed to a successor trustee. As a result, in making such appointment the court isn't limited by the terms of the trust as to who may be appointed. Instead, the court may select and provide the special fiduciary with such powers as may be appropriate to address "unique circumstances" presented. Therefore, when selecting and appointing a special fiduciary the court can appoint a public administrator or another third party who it believes appropriate to address a particular situation and imbue that person with those powers the court deems appropriate to fulfilling the task(s) assigned to the special fiduciary.

Care in selecting trustees (and a trustee's selection of counsel) remains an important tenet of estate planning and trustees may need to understand that actions of their counsel may be attributable to them, so their selection of an attorney should be carefully weighed after engaging in due diligence not only during the selection process but over the course of representation.

**CITE AS LISI** Estate Planning Newsletter #3214 (June 17, 2025) at http://www.leimbergservices.com

### In re Estate of Earnest Ovell King, Sr.; Removal of Trustee and Potential Drafting Considerations

When a court finds that a trustee's behavior is "outrageous", unless there are limiting provisions contained within the trust, the court may (even on its own initiative) remove the trustee and appoint a special fiduciary. Including terms regarding what type of behavior may be sufficient to justify removal and the

[316] Id. at *18-19. Internal citations omitted. Emphasis added.

type of duties that must be violated for removal to occur, may prove important if a nominated trustee's appointment is a material term to the grantor.

Facts:

Earnest O. King ("Earnest") had eight children. When he died his estate poured over to his Revocable Trust (the "Trust"). His daughter, Eugenia, was named successor trustee of the Trust. Another of Earnest's daughters ("Emeline"), acted as his caregiver for the 4 years immediately prior to his death and resided with him in his home. Earnest died on June 29, 2023. On June 30, 2023, while Emeline was out running errands, Eugenia changed the locks on the home as well as to the mailbox associated with the home's mailing address. On October 4, 2023, Emeline changed the locks again and did not provide Eugenia with a key.

The home was the primary asset of the Trust.

In 2023, Emeline filed a petition requesting supervision of the Trust, removal of Eugenia as successor trustee, an accounting, surcharge against Eugenia and an injunction against dissipation of Trust assets. She alleged that Eugenia had committed breaches of trust, failed to respond to beneficiaries and failed to properly administer the Trust. She also requested the appointment of a special fiduciary. Eugenia denied any wrongful conduct or breach of fiduciary duties. The parties settled the petition at mediation. Among other terms, the settlement agreement reached at mediation on December 15, 2023 (the "Agreement") required that: (1) Emeline give Eugenia a key to the home; (2) Emeline vacate the home so it could be sold; (3) Eugenia prepare the home for sale and provide a timeline for listing the home; and, (4) Emeline receive $80,000 from the proceeds from the sale of the home.

Eugenia did not list the home for sale until May 28, 2024 (almost one year after Earnest's death and five months after the Agreement was entered). Emeline filed a motion to enforce the Agreement, remove Eugenia and appoint a special fiduciary. Eugenia responded that there was no evidence supporting her removal and that her removal would violate terms of the Trust.

Neither of the parties testified at the removal hearing; both Eugenia and Emeline relied upon their verified pleadings in support of their respective positions. The probate court found that the "parties' behavior was 'outrageous' and the home was sellable".[317] It did not expressly identify any of the statutory grounds for removal found within Michigan's Trust Code. The opinion is devoid of information regarding the condition of the home that might have justified a delay in listing the property for sale or whether timing of the market was a consideration.

The probate court removed Eugenia and appointed a special fiduciary. This appeal ensued.

Analysis:

The appellate court reviewed the probate court's ruling for an abuse of discretion. It noted that

[317] Id. at *6.

> "Except as otherwise provided in the terms of the trust," the duties and powers of a trustee are governed by the Michigan Trust Code. The terms of the trust do not prevail over the court's power "to take action." A qualified trust beneficiary may request the removal of a trustee, or a court may remove a trustee "on its own initiative." The specific requirements for the removal of a trustee by a court have been "comprehensively codified" by the Legislature. A court may remove a trustee if one or more of the following grounds are met:
>
> > (a) The trustee commits a serious breach of trust.
> >
> > (b) Lack of cooperation among cotrustees substantially impairs the administration of the trust.
> >
> > (c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the purposes of the trust.
> >
> > (d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of the trust beneficiaries and is not inconsistent with a material purpose of the trust, and suitable cotrustee or successor trustee is available.
>
> A breach of trust occurs when a trustee violates the duties they owe to a trust beneficiary. The duties imposed on a trustee are dependent on the terms of the trust, as well as the relevant statutes and caselaw. A trustee is required to administer a trust "in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article." By statute, a trustee is required to "administer the trust solely in the interests of the trust beneficiaries[,]"; and, in doing so, the trustee "shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule". Prudence means "acting with care, diligence, integrity, fidelity[,] and sound business judgment." Removal of a trustee is an appropriate remedy for a breach of trust. Whether a trustee breached a duty is dependent on the facts of the case.[318]

Because the Petition and Response were both verified, and were made under penalty of perjury, the court was entitled to base its ruling on the pleadings when no testimony was otherwise presented. Because the court found that the home was sellable such that the delay in placing the home on the market for over 5 months was found to be unreasonable following settlement at mediation (and the passage of almost one year since Earnest's death), the appellate court found the probate court's decision was within the range of reasonable and principled outcomes. Typically, the appellate court

> "will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court."[319]

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[318] *In re Estate of Earnest Ovell King, Sr., supra* at *5. Internal citations omitted.
[319] Id. at *3.

Comments:

Had the trustee presented testimony regarding any delays in readying the home because of Emeline's delay in vacating the property, the time needed to make the property marketable after Emeline vacated it, or that the trustee had reasonably considered a potential increase in value that might be attained by listing the property for sale in May (as opposed to earlier in the year), a different outcome may have resulted. Prudent fiduciaries might consider keeping memos regarding decisions and issues impacting timing of sales of trust assets.

Sometimes including language regarding the importance of who is appointed to act, duties owed and what the grantor wishes the court to consider as "cause" for removal, can be helpful. Perhaps removal of a corporate fiduciary without cause (if replaced by another corporate fiduciary) might be acceptable to a grantor, while specifically defined "cause" might assist in determining when removal of a specifically nominate individual might be appropriate.

Perhaps consider the following, if it is reflective of the grantor's intent:

> Whenever I provide authorization in this instrument to remove any individual who I have specifically nominated to act as a fiduciary under this trust, then except with respect to an individual who is nominated specifically to act as Independent Trustee or Independent Special Trustee, it is my intent that such authority only be exercised "for reasonable cause" unless otherwise specifically provided to the contrary in this Agreement. In this regard, "reasonable cause" for removal shall mean and include any one of the following: (a) the incapacity or disability of the Trustee; (b) the willful or negligent mismanagement by the Trustee of the trust assets; (c) the abuse or abandonment of, or inattention to, the trust or its assets by the Trustee; (d) the Trustee's conviction of, indictment for (or its procedural equivalent), or the entering of a guilty plea or plea of no contest with respect to, a felony, the equivalent thereof, or any other crime or offense involving moral turpitude or with respect to which imprisonment is a possible punishment; (e) an act of stealing, dishonesty, fraud, embezzlement, or significant moral degeneration by the Trustee; (f) the repeated use of narcotics without a valid prescription, or repeated abuse of a prescribed narcotic for which a prescription was issued and/or excessive use of alcohol by the Trustee; (g) the Trustee's poor physical, mental or emotional health which causes the Trustee to be unable to devote sufficient time and attention to administer the trust; (h) unreasonable conflicts between the Trustee and either the trust's beneficiaries or another co-Trustee, caused by the Trustee repeatedly taking or asserting an unreasonable position, which operates to the detriment of the Trust beneficiaries; or, (i) any other reason that a court of competent jurisdiction deems appropriate for the removal of the Trustee based upon factors similar to those reflected by my statement of intention as evidenced by the foregoing. Whenever a right to remove an independent Trustee or any Trustee who is not specifically nominated by me in this Trust with or without cause is authorized, such right may not be exercised without cause more frequently than once in a 3 year period.

One might also consider that

[t]he trust may modify or eliminate some of the duties [of a trustee] and/or define and regulate the conditions under which removal may occur. The UTC often only provides ''default'' provisions which apply when the trust is otherwise silent on the issue. Therefore, when a breach of trust is claimed and removal is sought pursuant to the UTC, it's often helpful to remind the court that the UTC generally contemplates removal only for:

- ''serious'' breaches; lack of cooperation between co-trustees which impairs administration;
- unfitness, unwillingness or persistent failure to administer the trust effectively which leads the court to the conclusion that (as a result) it would be in the beneficiaries' best interest for removal to occur;
- there's been a substantial change of circumstances; or
- all the qualified beneficiaries request the removal and the court finds that removal best serves the interests of all beneficiaries and is not inconsistent with a material purposes of the trust when a suitable co-trustee or successor trustee is available.

You may wish to also remind the court that it has the power to order appropriate relief under UTC §1001(b) to protect trust property or the interests of the beneficiary, which may be far less harsh than removal.[320]

CITE AS:

LISI Estate Planning Newsletter #3227 (July 16, 2025) at http://www.leimbergservices.com.

### In re Elsie N. Sage Revocable Trust[321]; Strict Compliance Required to Invoke Statutory Shortening of Time to Challenge Validity of a Revocable Trust

MCL 700.7604, which is patterned after UTC§604, provides a mechanism for shortening the period of time in which a party may contest the validity of a revocable trust following the death of the settlor. When properly invoked, notification provided under the statute will shorten the time period to challenge the validity of the trust from two years to six months.

The Reporter's Comment to MCL 700.7604 reflects that there may be instances when the trustee may wish to consider sending the notice to omitted heirs and persons who might inherit if the trust (and/or its amendments) were deemed invalid. In doing so the trustee will need to "carefully consider the benefit of providing the notice in order to avail the trust of the shorter period of limitation in contrast with the disadvantages of giving notice of a trust's existence to those who would not otherwise be entitled to it."[322]

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[320] Glazier, *No Good Deed Goes Unpunished Especially When Acceptance Means a Target on One's Back: Defending Breach of Fiduciary Duty Claims in the Context of Trust and Estate Administration,* Bloomberg BNA, Tax Management Estates, Gifts, and Trusts Journal, Vol, 42, No.4, 212 (07/14/2017). Internal citations omitted.
[321] Tyler v. Winters (In re Sage), 2025 Mich. App. LEXIS 5979 (July 28, 2025)
[322] Reporter's Comment, MCL 700.7604.

MCL 700.7604 provides, in pertinent part that:

> (1) … a person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following:
>
> (a) Two years after the settlor's death.
>
> (b) Six months after the trustee sent the person a notice informing the person of all of the following:
>
> (i) The trust's existence.
>
> (ii) The date of the trust instrument.
>
> (iii) The date of any amendments known to the trustee.
>
> (iv) A copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust, if any.
>
> (v) The settlor's name.
>
> (vi) The trustee's name and address.
>
> (vii) The time allowed for commencing a proceeding.[323]

Facts:

Elsie N. Sage ("Elsie") established a revocable trust in 2012 (the "Trust"). She restated her Trust in 2018, 2019 and 2021. The 2021 Restatement intentionally omitted one of Elsie's five children ("Lola"), and Lola's descendants, named the Hastings Fire Department ("Hastings") as a beneficiary of 20% of the Trust and provided that Elsie's other four daughters would each receive 25% of the remainder of the Trust.

Elsie amended the 2021 Restatement on September 18, 2022 (the "First Amendment") and again on September 23, 2022 (the "Second Amendment"). The First Amendment added seven other fire departments, a library, a school band program, a park and a museum as beneficiaries. Those additions essentially reduced the residue to be divided among Elsie's four children (other than Lola) and provided that her daughter Joyce's share would be administered under a special needs trust. The Second Amendment provided that Hastings would receive 25% of the Trust, five other fire departments and a school band program would each receive 5% of the Trust, Joyce would receive 25% of the Trust (in a special needs trust), her daughters Janice and Jacquelyn would each receive 10% of the Trust, Lola would receive 4% of the Trust and her daughter, Cynthia, would receive 1% of the Trust.

Elsie died on October 24, 2022. At her death the Trust became irrevocable.

On December 20, 2022, Cynthia (in her capacity as successor trustee of the Trust) provided each of the beneficiaries with a Trust Notice indicating that they had six months in which to contest the Trust (the

[323] MCL 700.7604(1).

"Notice") accompanied by a letter that was drafted by Cynthia's legal counsel. Unfortunately, the Notice did not indicate that the Trust had been amended on September 23, 2022 (a fact known to the trustee).

On July 26, 2023, after the expiration of the six-month period reflected in the Notice expired, Cynthia sent the beneficiaries of the Trust (as amended by the Second Amendment and restated in 2021), a proposed distribution plan that disclosed that the Trust had assets totaling over $3.2 Million.

On September 25, 2023, three of Elsie's children (Lola, Janice and Jacquelyn, collectively the "Contestants") filed a petition contesting the validity of certain Trust Restatements and amendments they alleged were the product of undue influence. Hastings filed a motion for partial summary disposition on the basis that the contest was time-barred under MCL 700.7604(1)(b) or, in the alternative, barred under the doctrine of laches. The Contestants responded that their claim wasn't barred because the Notice didn't comply with the requirements of the statute. They asserted that the Notice failed to: (1) include a reference to the date of the Second Amendment, (2) include material provisions from the 2018 Restatement, and (3) didn't list a provision in the 2021 Restatement that affected Lola's rights as a beneficiary. They also contended that Hastings was not prejudiced by the September 2023 challenge because it was brought within two years of Elie's death. In response, Hastings alleged the Contestants had "decided to 'slumber on their rights' causing prejudice to the beneficiaries by forcing the Trust to incur the costs of belated litigation."[324]

The probate court granted Hastings' motion for summary disposition and the Contestants appealed.

Analysis:

The appellate court reversed the probate court, essentially finding that strict compliance was needed to trigger the shorter six-month statute of limitations and the failure to include the date of the Second Amendment was fatal to the Trustee's effort to trigger the shorter six-month statute of limitations for challenging the validity of the Trust (since the trustee was aware of the date of the Second Amendment).

Hastings had argued that the Contestants could infer that the Second Amendment took place during a five-week window between the date of the First Amendment and Elsie's date of death. The appellate court held that substantial compliance wasn't sufficient to trigger the shortened statute of limitation and, therefore, the two-year statute of limitations applied.

The appellate court also held that the Contestant's challenge wasn't barred as a result of laches. In doing so the appellate court indicated that

> "[l]aches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert." However, "[f]or laches to apply, inexcusable delay in bringing suit must have resulted in prejudice." ("Application of the doctrine [of laches] requires the passage of time combined with a change in conditions that would

[324] Tyler v. Winters (In re Sage), 2025 Mich. App. LEXIS 5979 (July 28, 2025), at *6.

make it inequitable to enforce a claim against the defendant."). Laches may bar a claim even though the limitations period has not run.[325]

Hastings hadn't argued in the probate court proceedings that ***it*** had been prejudiced by the Contestants' delay in bringing the challenge; rather it argued that the Trust would incur costs that would deplete the value of the Trust. The appellant court held this was not sufficient as it didn't represent prejudice that resulted from inexcusable delay, because a timely filed challenge would also have incurred costs of litigation.

Comment:

To limit the period during which a will may be challenged, an action is typically brought to have the will formally admitted to probate. While an appeal may be brought, by having a will formally admitted that action serves to shorten the time period during which a challenge might be brought. Such formal proceedings provide notice to heirs at law and interested parties, provides them with a forum in which to review the terms of the will and bring a challenge within a limited period of time.

When it comes to the validity of revocable trusts, MCL 700.7604 specifies the period during which a challenge must be brought. That statute doesn't apply to trusts that were irrevocable from the outset.[326]

While MCL 700.7604 contemplates that less than a complete copy of a trust may be provided, when the trustee elects to provide less than the entire trust instrument, the trustee may wish to carefully consider what is and is not to be provided. If the trust contains a "no contest clause" it may be prudent to not only include the provisions of the trust that specify the beneficiary's interest but also the "no contest" provisions that could, if enforced, impact the beneficiary's interest.

Some attorneys choose to only supply provisions from an Amendment and Restatement relative to that beneficiary's interest under the last iteration of the trust as amended and restated. When a specific devise or beneficiary has been eliminated (especially one who wouldn't otherwise know that they might have been considered a beneficiary under a prior iteration), there may be a benefit in providing portions of the trust (that previously provided for that individual) in order to put the potential challenger on notice that their rights were adversely impacted by an amendment or restatement or simply decide to let the two-year statute run out before making distributions.

If distributions are made before the period to challenge the trust has expired, and it is later determined that the provision pursuant to which the distribution was made was invalid, the trustee will have a duty to seek return of the distribution. But what if the beneficiary no longer has the assets or funds with which to satisfy a demand for return of the distribution to the trust? A petition for surcharge of the trustee may follow.

Generally, it may be prudent to trigger the shortened six-months statute of limitations in which to bring a challenge, but it may not be necessary when dealing with a taxable estate where no interim distributions

[325] Id. at*12. Internal citations omitted.

[326] See ICLE Estates and Protected Individuals Code with Reporters' Commentary, Annotation to MCL 700.7604 citing *Sparling v. Sparling, No. 355843 (Mich Ct App June 16, 2022) (Unpublished)*

are contemplated, or a trust where the beneficiaries are essentially receiving the equivalent of their intestate share and modifications of those rights were never terms reflected in the trust. A trustee who elects to make distributions before the statute of limitations in which to contest the trust has expired, claims of creditors have been resolved or satisfied, and tax obligations satisfied or otherwise addressed, does so at his own potential peril and risk.

Care in preparing the Notice and what, if any of the provisions of the Trust will accompany the Notice, can help to shorten the period for contesting trust provisions and may help facilitate prompt administration.

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