# MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

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**Featured Articles:**




STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

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The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

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# From the Desk of the Chairperson

## By David P. Lucas

I don't need to remind my readers that these are challenging times for everyone, including our profession. Loved ones and friends are dying from a terrible disease brought on by an insidious virus. We all mourn the terrible toll that the SARS-CoV2 virus is taking on our world.

I also don't need to remind my readers that we have to adapt during challenging times. These trying times both require us to, and give us the opportunity to, apply technologies to our practice. I continue to be amazed as I see the many ways in which Michigan lawyers apply innovative, and time-tested, concepts and techniques to help clients achieve their goals. Physical proximity tends to spread the virus. We adapt with innovative ways to work remotely, and conduct meetings remotely.

During trying times, estate planning work and estate administration work are some of the most important types of work in which lawyers can engage for their clients. Providing clients with peace of mind regarding care for vulnerable individuals and the orderly transfer of assets is what probate and estate planning lawyers have done for centuries and are critical during these times.

The Probate and Estate Planning Section, through its Council, Committees, and Members, provides stability and fosters innovation. The Council develops legislation to address longstanding, and immediate, problems that our citizenry faces. For example, Members of the Probate and Estate Planning Section, working with other Sections, drafted, promoted, and obtained legislation to authorize the remote witnessing and notarization of documents.

Each year, the Section's Council develops a Plan of Work, which helps the Council focus on the critical needs of the Section. In addition to obtaining permanent authorization for remote witnessing and notarization, this year's Plan of Work includes projects as diverse as assisted reproductive technology legislation, vehicle transfer-on-death legislation, and substantial changes to the Estates and Protected Individuals Code. In addition to those projects, the Section, through its Committees and Council, provides amicus briefs in matters of litigation that are of great import to Section members, and the Section works closely with ICLE, with whom the Section has long partnered, in providing education opportunities to Section Members. The work is exhausting, but extremely rewarding.

I invite all Section Members to become involved in the Section's work. Start by attending Council meetings, which are held nine times per year. Become a member of the Section Committees that address your particular interests. I am sure that you will find that your efforts are well-rewarded.

It is a great honor for me to be the Chairperson of the Probate and Estate Planning Section. Many thanks to Section Members who have preceded me, and who have set the tone and steered the course for the important work of our Section. I give special thanks to Chris Ballard, the immediately previous Section Chairperson, and to Hon. Michael Jaconette, Michael G. Lichterman, and Raj A. Malviya, all of whom are retiring from the Council. For the continuing Council members, fasten your seat belts.

# Estate Planning for Clients with Heirs That Have Huge Federal Tax Liabilities They Will Never Pay

**By Neal Nusholtz**

When somebody doesn't pay their federal taxes, two things happen. Immediately, the United States has an unrecorded lien upon all property belonging to the delinquent taxpayer.[1] Then, ten days after notice and demand, the Internal Revenue Service ("IRS") "can levy upon all property or rights to property belonging to such person."[2]

Tax liens do not pay taxes. They give the government an interest in property that they can assert against third parties.[3] A tax levy pays taxes by obligating a person who owes money to a delinquent taxpayer to pay that money to the IRS—subject to personal liability for failure to do so plus a 50 percent penalty in the absence of reasonable cause.[4]

Estate planning to protect inheritances from IRS collection activity means preventing tax levies and tax liens from reaching property in an estate or a trust. Sometimes, the law will treat property in an estate or a trust as belonging to beneficiaries for purposes of federal revenue collection.

Practitioners should be mindful that courts are reluctant to approve protections against tax collection. Opening the floodgates to such practices could risk the fisc. That same concern applies to state laws that limit or could limit the collection of federal taxes.

## Two Important Limitations on Tax Levies

### Existing Property

For purposes of this discussion, tax levies have two important limitations. First, a levy does not cover after-acquired property: "a levy shall extend only to property possessed and obligations existing at the time thereof." (IRC 6331(b)). In contrast, tax liens cover any property acquired during the period of time that taxes are unpaid.

Sixty-five years ago, liens and levies both covered after-acquired property. In Rev. Rul. 55-210, the IRS had ruled that a levy applies to all property covered by a tax lien. The ruling addressed whether successive levies were required to be issued to an obligor who was making contractual periodic payments. It held that since levies could be made on any property subject to a tax lien a "notice of levy based on such lien is effective to reach, in addition to payments then due, any subsequent payments or distributions that will become due thereunder."

The 1966 Federal Tax Lien Act added a sentence to IRC 6331 that changed the rule that levies will cover after acquired property.

> [T]he bill adds a sentence specifying that this right to levy extends only to property of the taxpayer and in the possession of the person on whom the levy is made, or obligations to the taxpayer of the person on whom the levy is made which are existing at the time of the levy.[5]

Treasury regulations provide an example of the temporal effect of a levy. "[A] levy made on a bank with respect to the account of a delinquent taxpayer is satisfied if the bank surrenders the amount of the taxpayer's balance at the time the levy is made. The levy has no effect upon any subsequent deposit made in the bank by the taxpayer. Subsequent deposits may be reached only by a subsequent levy on the bank."[6]

### Debts Must be Fixed and Determinable

A second important limitation on levies is that for an obligation to a delinquent taxpayer to be levied, the obligation must be "fixed and determinable."[7] The phrase "fixed and determinable" is the definition of a bona fide debt. The language was transplanted from the bad debt regulations under IRC 166, which govern when a tax deduction can be taken for an uncollectible bad debt.

Treas. Reg. 1.166-1(c) provides:

> Only a bona fide debt qualifies for purposes of section 166. A bona fide debt is a debt which

arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money.

## Tax Liens

Two factors make tax liens troubling.

### Every Interest in Property

An IRS tax lien is "meant to reach every interest in property that a taxpayer might have." *United States v National Bank of Commerce*, 472 US 713, 719–720 (1985). The problem with court interpretations of language about interests in property is that property rights can be like imaginary creatures that exist only because you believe in them. In *Drye v United States*,[8] a delinquent taxpayer disclaimed his inheritance. The issue in *Drye* was whether there was a tax lien attached to the disclaimed property in Mr. Drye's deceased mother's estate of which he was the sole heir. The Supreme Court held that an inheritance is a sufficient interest in property to which a tax lien may attach. As a result, Mr. Drye's inheritance was subjected to his tax lien while it was in the hands of his mother's estate.

In its analysis of whether Mr. Drye had a property right in the estate of his mother, the Supreme Court drew a distinction between a disclaimed gift, which leaves the gift with the donor, and a disclaimed inheritance, which causes the bequest to vest in a third party. The court explained that Mr. Drye had an unqualified right to either receive his inheritance or to channel that value to his daughter by disclaiming. "The control rein he held under state law, we hold, rendered the inheritance 'property' or 'rights to property' belonging to him within the meaning of §6321, and hence subject to the federal tax liens." *Drye v United States*, 528 US 49, 61 (1999). In other words, if you hold the reins, you own the horses.

In *Estate of Deinlein v United States*,[9] a woman died on October 4, 2011. Her three sons fought over becoming executor of her estate. A third party was appointed as executor who drafted a settlement agreement. One of the sons, Chris, had a tax liability of $459,409.49 for which tax liens were filed in 2006 and 2007. The decedent's will in *Deinlein* provided for an "accountability for debts" and had a residuary clause that left the residue equally to her three sons.

Mrs. Deinlein had lent Chris $185,000 between 2000-2010. In the settlement agreement, Chris agreed to "renounce any further claims as a beneficiary of the estate." In response to a tax lien asserted against his share of the estate, Chris argued he was entitled to nothing because he had already gotten his advancement of $185,000.[10]

Chris's two brothers took over their mother's condo, made the mortgage payments, and put it up for sale. The IRS alleged that its lien extended to a one-third interest in the proceeds of the condo. The probate case was removed to federal court where the condo was sold for $303,000. The proceeds of $198,339.56 were placed with the court pending resolution of the lien issue in a motion for summary judgment. The *Deinlein* court did "not believe that Chris received an advancement of his share of the Estate so as to relieve him of the devised one-third interest in the condo." The IRS tax lien on Chris extended to one third of the condominium proceeds held by the estate.

In *Drye* and *Deinlein,* the tax liens of beneficiaries migrated upward into the assets of an estate. The same thing can happen with a partnership, i.e. the lien on the tax liability of a partner can migrate upward into the assets of the partnership. In *Craft*,[11] the Supreme Court addressed whether a federal tax lien could reach Michigan entireties property. In his dissent, Justice Scalia argued that entireties property should be treated like partnership property, and the tax liabilities of partners do not extend to partnership assets. Justice O'Connor's majority opinion said "no" to that. She said, "the federal tax lien does attach to an individual partner's interest in the partnership, that is, to the fair market value of his or her share in the partnership assets." *Id.* at 285–86.

### *In Rem* Proceedings

The second troubling factor about federal tax liens is that they allow the government to procure an *in rem* court order under IRC 7403 to sell property upon which they have a tax lien and to divvy up the proceeds between the government and other property owners.

In *United States v Rodgers*,[12] a married Texas gambler died owing substantial wagering taxes, interest, and penalties. Texas is a community property state and under Texas law Mrs. Rodgers had a right to live in the marital home for her lifetime. Instead of selling just the deceased husband's half of the marital home, the government sought to force the sale of the entire home. The argument advanced by Mrs. Rodgers was that if her deceased husband could not himself have forced the sale of the home, then the government, standing in his shoes, could not force a sale of the home. The court responded, "we believe that the better analogy in this case is not to the traditional rights of lienholders, but to the traditional powers of a taxing authority in an *in rem* enforcement proceeding." (*Id.* at 702). "[T]he use of the power granted by §7403 is not the act of an ordinary creditor, but the exercise of a sovereign prerogative, incident to the power to enforce the obligations of the delinquent taxpayer himself, and ultimately grounded in the constitutional mandate to "lay and collect taxes." *Id.* at 697.

When the tax lien of a beneficiary attaches to trust or estate assets, it can result in the sale of those assets in an *in rem* proceeding with a portion of the proceeds being be paid to the IRS. That can happen even if a delinquent taxpayer's rights in trust property is a matter of pure speculation. ("We think that such rights, although inchoate unvested, and unenforceable … are sufficient to support a proceeding *in rem* to test the question of whether or not taxpayer's interest in such res is subject to a lien for delinquent taxes due the Government." *United States v Dallas Nat'l Bank*, 152 F2d 582, 586 (5th Cir 1945)).

### Future Obligations

Lastly, another impact of a tax lien on trust or estate property is that it can cause a levy on *existing* obligations to extend to obligations owed to a delinquent taxpayer in the future. *See In re Orr* 180 F3d 656 (5th Cir 1999); *United States v Cohn*, 855 F Supp 572 (D Conn 1994); compare *Texas Commerce Bank Nat'l Ass'n v United States*, 908 F Supp 453 (SD Tex 1995) and *United States v Riggs Nat'l Bank*, 636 F Supp 172 (DDC 1986).

### Support, Spendthrift and Discretionary Trusts

Any estate plan that tentatively leaves assets to an heir in a way that does not expose those assets to tax liens or levies will come without a guarantee. One thing is for sure, neither a support trust nor a spendthrift provision will shelter assets from tax levies or tax liens. In Michigan, the state and federal government can reach into a support trust or a spendthrift trust to pay a beneficiary's bills. Under MCL 700.7504, assets in support trusts and in trusts with spendthrift provisions can be reached by the state of Michigan and the United States:

> Sec. 7504.
>
> (1) The interest of a trust beneficiary that is subject to a spendthrift provision, a support provision, or both may be reached in satisfaction of an enforceable claim against the trust beneficiary by any of the following:
>
> …
>
> (c) This state or the United States.

### Discretionary Trusts

One type of trust that potentially could shelter assets from tax levies or tax liens would be a discretionary trust as defined under MCL 700.7505:

> Sec. 7505.
>
> The transferee or creditor of the beneficiary of a discretionary trust provision does not have a right to any amount of trust income or principal that may be distributed only in the exercise of

> the trustee's discretion, and trust property is not subject to the enforcement of a judgment until income or principal, or both, is distributed directly to the trust beneficiary.[13]

Discretionary trusts should work to protect trust assets from tax collection because distributions are not fixed and determinable, and a beneficiary does not have enforceable rights in trust property that can serve as a basis for a tax lien on the trust property. In two cases, a forfeiture provision in a support trust converted support distributions into discretionary distributions if the trustee received a notice of levy. That did not work to avoid revenue collection. *United States v Riggs Nat'l Bank*, 636 F Supp 172 (DDC 1986); *Bank One Ohio Tr Co v United States*, 80 F3d 173 (6th Cir 1996).

Reliance on discretionary trusts to protect trust assets from collection of taxes owed by a beneficiary is not foolproof. Property rights in delinquent taxpayers have been found in discretionary trust assets if the delinquent taxpayer had enforceable rights against a fiduciary. ("New York law clearly establishes, moreover, that an aggrieved trust beneficiary can enforce his right to trust property or income against a trustee who refuses to exercise his discretion as directed in the trust instrument." *Magavern v United States*, 550 F2d 797, 802 (2d Cir 1977)). Discretionary distributions can be construed to be mandatory, at least in part, when there is a history of payments establishing a pattern that evinces an implied right to payment.

### Enforceable Rights in Discretionary Trusts

When the word "shall" is included in the distribution language of a discretionary trust, it can be interpreted to imply that at least some payments *must* be made by a trustee. Even a small amount of required payments is enough to create a property right upon which a lien may attach to trust property. *See Magavern v United States*, 550 F2d 797, 801 (2nd Cir 1977) (concluding that the language "Trustee shall pay over or use, apply and expend whatever part or all of the net income or principal" creates a property right, not a discretionary trust, because "it does not give [the trustee] the authority to deny a particular beneficiary anything at all"). *See also*, *United States v Delano*, 182 F Supp 2d 1020, 1023 (D Colo 2001) (trustee did not have "discretion to make no payments").

The issue of beneficiary rights in discretionary trusts has come up in the gift tax context. Rev. Rul. 77-378 addressed the issue of whether there is a completed gift when a grantor transfers property to a discretionary trust, and one of the potential beneficiaries of corpus is the grantor. If the grantor has enforceable rights, the gift is incomplete if as a consequence the remainder interests might not get anything. Enforceable rights discussed in the revenue ruling included "enjoyment of the entire trust income and corpus by borrowing money or by selling, assigning, or transferring the grantor's interest in the trust fund and relegating the grantor's creditors to the trust fund for payment." Enforceable rights that could support a tax lien can include rights that might accrue from reciprocal trusts. (*See Kanter v United States*, 262 F2d 761( 9th Cir 1959). Another right in trust property that might support a tax lien would be a right to use trust property, such as a right to live in a home. An eventual right in a beneficiary to ultimately receive the property that was not distributed to that beneficiary can support a tax lien. *See In re Darrell V Wright Tr Agreement*, No 319832 (Mich Ct App Mar 17, 2015) (unpublished); compare *Wilson* (at n. 13 below) wherein the absence of a right to the receipt of undistributed funds was given as a reason for no lien attachment.

### History of Payments

In some instances, a history of payments from a discretionary trust can support an inference of a right to property. In PLR 9024076, the IRS addressed a personal holding company where stock was held by a trustee who had discretion as to how much income should be distributed and to whom. Ownership in a personal holding com-

pany must be five or fewer individuals holding not more than 50 percent of the company. Under the regulations, ownership can be determined actuarially. Since distributions were entirely discretionary, an actuarial calculation could not be made. As a result, ownership was premised on the history of trust payments. A similar reliance on a history of payments was obtained in a New Jersey divorce case where a spouse was a beneficiary of a discretionary trust. The New Jersey court of appeals ruled that in determining the amount of alimony to be paid, "the judge must consider the historical record of payments made by the [discretionary trust]." *Tannen v Tannen*, 416 NJ Super 248, 277, 3 A3d 1229, 1246 (App Div 2010), *aff'd*, 208 NJ 409, 31 A3d 621 (2011). In *Magavern, supra,* the annual payments to a delinquent taxpayer were between $1,000 and $3,500. The government and the taxpayer stipulated that if a lien on trust property did exist, the value of the delinquent taxpayer's lienable interest in the discretionary trust was $2,300.

## Suggestions

In drafting an estate plan for the client who has heirs that are delinquent taxpayers, consider having discretionary distributions contingent upon the consent of a third party whose consent is optional. In PLR 200426027, the government could not levy on a pension plan when distributions required spousal consent. In addition to having third-party consent, consider making the consent completely optional. Enforceable rights in beneficiaries can exist because beneficiaries could theoretically sue for damages for breach of a fiduciary duty, including the failure to properly exercise discretion. That circumstance might be avoided by having distributions conditioned upon permission of a third party where the permission is entirely optional. If the exercise of a power is "optional, it is not a power in trust." *Estate Ware v Commissioner*, 55 TC 69 (Oct 19, 1970), *rev'd* on other grounds, 480 F2d 444 (7th Cir 1973).

In addition to using third-party optional consent as suggested above, consider providing that the trustee may make discretionary distributions in amounts that will completely settle a beneficiary's liability with a particular creditor. The IRS has an Offer in Compromise Program, which will settle a taxpayer's tax liability with payment of an amount equal to reasonable collection potential ("RCP"). RCP is calculated in IRS form 656 as net collectible value of the delinquent taxpayer's assets (80 percent of fair market value) plus 12 times net monthly income (income less living expenses). Once an RCP number is calculated, the discretionary trustee could pay off the delinquent tax liability (after optional consent is given) and the beneficiary would be free of the tax debt thereafter. Other assets can be included in an RCP calculation if they can be reached by the government. Assets that can be reached by the government include dissipated assets, which have been transferred away, or assets held by a nominee or an alter ego of the delinquent taxpayer. *See Campbell v Commissioner*, TC Memo 2019-4, 117 TCM 1018, (Feb 4, 2019). A discretionary trust can be designed where its assets are not reachable by the government and would not be included in an RCP calculation.

## Conclusion

Estate planning for unpaid federal tax liabilities of heirs probably won't tame the tax beast, but at least your client can die trying.

### Notes

1. IRC 6321.
2. IRC 6331.
3. IRC 6323(a)" The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary."
4. IRC 6332. In one case, after the IRS sent a levy to a trust company, the trust company sold off all of the taxpayer's investments and sent the funds to the IRS. The taxpayer sued the trust company claiming that the levy did not authorize the sale of property. Because IRC 6332 con-

tains immunizing provision for obligors who comply with a notice of levy, there was no liability for the trust company. *Kane v Capital Guardian Tr Co*, 145 F3d 1218 (10th Cir 1998).

5. S. Rep. No. 1708 89th Con. 2d Sess., reprinted in [1966] U.S. Code Gong. & Admin. News. P. 3738.

6. Treas. Reg. 301.6331-1(a)(1).

7. *Id.*

8. 528 US 49 (1999).

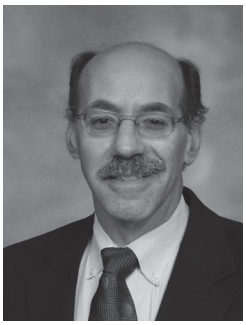
9. 114 AFTR 2d 2014-XXXX (DC KY 7/23/2014); 2014 WL 3653464 (ED Ky July 23, 2014).

10. After an inheritance has already vested in a delinquent taxpayer, a renunciation is too late because the lien has already attached. *United States v Comparato*, 22 F3d 455 (2d Cir 1994).

11. 535 US 274 (2002).

12. 461 US 677 (1983).

13. A levy and a tax lien did not attach to withheld distributions in a discretionary trust in *In re Wilson*, 140 BR 400 (Bankr ND Tex 1992).



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# *Estate of Mary P. Bolles v. Commissioner*: Loan, Gift and/or Advancement[1]

**By Sandra D. Glazier**

It is not uncommon for clients to seek advice on how best to provide funds to a child who needs them to support or establish a business endeavor. How the transaction is documented, treated, and the reasonable expectations with regard to repayment, may all have an impact on whether such transactions will be treated as a loan, gift and/or advancement, or some combination thereof.

While a loan may continue to accrue interest and result in an enhanced value to the estate, it is also possible that a loan may be discounted at the time of the payee's death if the maker is insolvent.[2] A factual analysis is often important in determining how such transactions may be treated and loans valued. The *Estate of Mary P. Bolles, Deceased, v Commissioner*[3] exemplifies some of the important factors that may have a significant impact on how such transactions are viewed for estate and gift tax purposes.

Believing in her son Peter's ability to become a successful architect (like his father), over a period of time Mary loaned him considerable sums. She also made loans to her other four children, annually forgiving a portion of the debt owed in amounts equal to her annual gift tax exclusion. This is not an uncommon situation, and the court held that her practice of doing so would not have been controversial but for the substantial sums she provided to Peter amounting to $1,063.333 between 1983 and 2007. No written loan instruments were prepared and executed. Instead, because it was ultimately her goal to equalize the amounts that each of her children received, Mary kept a running ledger of the amounts which she "loaned" to Peter (and her other children).

On October 27, 1989, Mary created a revocable trust, which in part wrote Peter out of her estate. In late 1994 or early 1995, working with an estate-planning attorney, Mary again amended her trust and wrote Peter back into the estate but, in an attempt to equalize what each child would ultimately receive, Peter's share would be reduced using a formula intended to account for the "loans" Mary had made to him. On August 27, 1996, Peter signed an acknowledgement reciting that as of May 3, 1995, he had received, directly or indirectly, $771,628 in loans from Mary but did not possess assets or the earning capacity to repay the loans. Peter also agreed that for purposes of computing his share of Mary's estate upon her death, that amount plus an amount equivalent to the AFR for short-term indebtedness would be utilized to compute his share of Mary's trust estate under Article Five of her trust. Article Five described the manner that advances (described as loans) would be considered in dividing her estate among her children.

When Mary died, the loans to Peter were valued at zero on Schedule C of her Form 706. On review, the IRS valued the principal amount due from Peter at $1,063,333 under IRC 2031. The IRS also added interest of $1,165,778 on the loans, bringing the total adjusted value to $2,229,111 (which was a significantly greater value than what was reported on the Form 706). In the alternative, the IRS posited that if the receivable from Peter was determined to be zero for estate tax purposes, then Mary's lifetime taxable gifts should be adjusted in the amount of $1,063,333, in which case that amount should then be included in computing her estate's tax liability under IRC 2001(b).

The estate ultimately conceded that it undervalued the receivable due from Peter but then attempted at trial to have the loan treated as an advance to Peter and, therefore, treated as gifts. Both the estate and IRS relied on *Miller v Commissioner,*[4] for their respective positions. *Miller* identified a variety of factors traditionally used to decide whether an advance is a loan or a gift, including whether:

(1) there was a promissory note or other evidence of indebtedness,
(2) interest was charged,
(3) there was security or collateral,
(4) there was a fixed maturity date,
(5) a demand for repayment was made,
(6) actual repayment was made,
(7) the transferee had the ability to repay,
(8) records maintained by the transferor and/or the transferee reflect the transaction as a loan, and
(9) the manner in which the transaction was reported for Federal tax purposes is consistent with a loan.[5]

However, the *Miller* factors aren't exhaustive, and in the case of a family loan, the actual expectation of repayment and an intention to enforce the debt are generally critical to substantiating the characterization of the transaction as a loan.[6]

Key to the tax court's analysis were the following facts:

(a) While Mary kept track of the loans and interest, there were no loan agreements or attempts to collect; and,
(b) While there was no way to objectively measure Mary's intention with regard to the reasonable possibility of repayment, at least as of October 27, 1989, her knowledge of Peter's deteriorating financial situation was known to her when she eliminated Peter from her estate plan, and she more likely than not realized that he would not repay the loans.

Therefore, the tax court found that as of 1990 the loans to Peter lost their characterization as loans for tax purposes and became advances on his inheritance, resulting in Mary making a gift to Peter as of 1990. Interestingly the court found that Mary didn't forgive the debt at that time, but rather, she "accepted they could not be repaid on the basis of Peter's financial distress."

While this case may represent a "*win*" for the taxpayer (in that a reduction of $1,063,333 was made to the exemption available at Mary's death as opposed to an increase of $2,229,111 in the value of the gross estate), it nonetheless illustrates the importance of analyzing facts at various times. Under the facts presented, it was important to analyze facts surrounding (1) the initial transfer of funds by Mary to Peter, (2) her subsequent knowledge of his financial circumstances, and (3) the actions she took thereafter in determining whether there was a transmutation of "loans" to "advances" treated as gifts for federal estate and gift tax purposes.

**Planning Pointer:**

As many high net worth clients consider taking advantage of current historically high lifetime exemption rates in an attempt to preserve the benefits of the current exemption before it disappears, this case suggests that it may be prudent to review outstanding family loan transactions in an attempt to determine the extent to which such loans may have been transmuted into gifts that could adversely impact a client's remaining lifetime exemption.

**Notes**

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2. *See*, TAM 9240003 and Treas. Reg. § 20.2031-4.
3. *Estate of Bolles v Commissioner,* TC Memo 2020-71 (June 1, 2020).
4. *Miller v Commissioner,* TC Memo 1996-3, *aff'd* 113 F31241 (9th Cir 1997).
5. *Id.* at *9-10.
6. *Id.* at *10 citing *Estate of Maxwell v Commissioner*, 98 TC 594 (1992) *aff'd* 3 F3d 591 (2d Cir 1993) and *Estate of Van Anda v Commissioner*, 12 TC 1158, 1162 (1949), *aff'd per curiam* 192 F2d 391 (2d Cir 1951).

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# Undue Influence: What Rules Apply to This Species of Fraud?

**By Robert S. Zawideh**

Undue influence is a species of fraud. As such, logic dictates that the rules of fraud apply to undue influence cases. Yet, despite its long-acknowledged membership in this species, the State of Michigan does not subject undue influence to the same rules as other species of fraud. In a related article,[1] this author advocates abolishing the presumption of undue influence because it undermines the "guiding polar star" of probate and trust law: the will of the testator controls the disposition of their property.[2] The problem with the presumption is threefold. First, undue influence will be presumed when three facts that are insufficient to prove undue influence are established. Second, even if rebutted by substantial evidence, an inference of undue influence remains for the trier of fact. Third, instead of clear and convincing evidence, this presumption, as well as the underlying fraud, may be proved with only a preponderance of the evidence. Currently, if a contestant can prove opportunity, benefit, and ability to control[3] then not only does the contestant go to trial, but undue influence can legally be found based on the lowest of evidentiary standards.

Michigan's failure to treat undue influence as though it is a species of fraud, despite its lip service to the contrary, is wrong for two critical reasons. First, accusations of fraud must be taken seriously. There are reasons why fraud must be pled with particularity, never presumed, and for requiring clear and convincing evidence to prove it. Second, imposing a lower burden of proof in will and trust contests conflicts with Michigan policy. Both the Estate and Protected Individuals Code (EPIC) and the Michigan Trust Code (MTC) require clear and convincing evidence to divine the intent of a testator or a settlor. The time has arrived for the bench and the bar to revisit not only the presumption, but the quantum of proof required to prove undue influence.

## A "Species of Fraud" and "the Rules of Fraud"

In eighteen different cases since 1886, Michigan courts described undue influence as a "species of fraud," mostly without significant analysis.[4] Of those, three decisions state with little analysis that the rules of fraud apply to this particular species of fraud. As recently as 2018, in a dissenting opinion, Justice McCormack repeated that "'[u]ndue influence is a species of fraud,' and the rules of fraud therefore apply to questions of undue influence."[5] But what is it about undue influence that merits its inclusion in that genus?

Black's Law Dictionary defines "species" as "[i]n the civil law, form; figure; fashion or shape."[6] Precisely defining "fraud" however, is more challenging. "Although 'fraud' connotes deception or trickery generally, the term is difficult to define more precisely."[7] Unlike its definition of "species," Black's defines "fraud" far more expansively, describing it as "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right."[8] Black's also defines it as "a generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated."[9]

Thus, a "species of fraud" is any conceivable form of deceit or trickery in which one person cheats another. "Misrepresentation is considered a species of fraud."[10] Using silence to mislead where the defendant knew the facts to be otherwise constitutes a species of fraud.[11] Concealment of information material to the transaction where such a fiduciary relationship exists constitutes a species of fraud.[12] The conduct of

depositing checks with unauthorized or forged endorsements has been found to be a species of fraud justifying application of the discovery rule to avoid the running of the statute of limitations.[13] "'Fraud upon the court' is a "species of fraud which constitutes an attempt to defile the court itself."[14] A prosecutor's threats to prosecute third persons absent probable cause to believe that the third person has committed a crime, while offering "concessions" as to him or her constitutes a species of fraud.[15] "Where a defendant makes a promise touching a substantive part of the consideration moving to the plaintiff, in bad faith and without intent to perform the promise, it constitutes a species of fraud."[16] "Duress is a species of fraud."[17] "[T]rademark infringement, false description, and deceptive trade practices constitute . . . species of fraud."[18] "[A]n insurance company's 'massive failure' to carry out its identified duties constitutes a 'suggestion of dishonesty' or 'a species of fraud,' within the meaning of 'bad faith.'"[19] "[I]nsider trading is a variation of the species of fraud known as embezzlement."[20]

In the case of *Scholten's Estate*,[21] the Michigan Supreme Court affirmed the trial court's instruction to the jury on undue influence. In so doing, the court shed light on why undue influence is a member of the "species of fraud":

> "'Undue influence is not exercised openly. It is a species of fraud, *and, being a species of fraud, works secretly in order to accomplish its improper purpose*. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition as shown by the evidence and the opportunity possessed by the beneficiary for the exercise of such control.
>
> 'If you find that *a scheme was made and carried out* by Catherine Scholten and Anthony Witte, or either of them, at the instance of Catherine, whereby the deceased was *induced to sign this instrument* at a time when she was weak in mind and body, stupefied by disease, and under conditions such that she was *unable to hear or appreciate or understand* what she was doing or what the instrument provided, and if such a scheme was carried out and this instrument was executed under those circumstances, then this instrument is not her last will and testament.'"[22]

That is the essence of undue influence and illuminates why undue influence is a species of fraud.[23] *Scholten's Estate*'s description of undue influence is the embodiment of fraudulent conduct. It involved a secret scheme designed to mislead another to take action. The result of the scheme was an act the victim never would have done were they fully informed and acting of their free will. Machinations were secretly put into play by the bad actor which were deceptive in nature. By definition, fraudulent conduct is intended to trick another into doing something that they would not ordinarily do, in order to benefit the bad actor. That is undue influence, and that is why it is a species of fraud.

### The First Rule of Fraud: Fraud Must Be Pled with Particularity

Claims based on fraud are subject to a "heightened pleading standard."[24] "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity."[25] "In alleging fraud, it is well settled, both in law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient; that, whether fraud be alleged in a declaration, complaint, or bill, or set up by way of defense in the plea, answer, or replication, it is essential that the facts and circumstances which constitute it should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer. The reason is that fraud is a conclusion of law from facts stated, and facts, and not legal conclusions, are required to be pleaded. Mere general averments of fraud or the fraudulent conduct of a party, without the facts, do not constitute a statement upon which the court can pronounce judgment."[26] "[U]ndue influence is a species of fraud and as such the facts should be alleged with particularity."[27]

Applying this rule to undue influence, a contestant must therefore plead with particularity

those facts and circumstances (1) which constitute threats, misrepresentation, undue flattery, fraud, or physical or moral coercion to which the decedent was subjected; (2) the specific actions which overpowered or destroyed the decedent's volition and free agency; (3) the facts showing the decedent's previous inclination; and (4) that the accused influencer caused the decedent to act against their inclination and free will.[28] Simply alleging the challenged documents were procured by fraud, duress or undue influence does not satisfy the pleading requirement of setting forth facts and circumstances with particularity. Additionally, a contestant asserting the presumption must likewise plead the underlying facts with particularity. Just asserting the existence of a confidential or fiduciary relationship is insufficient. Rather, the facts supporting that conclusion must be pled, as well as identifying with particularity the benefit the alleged influencer obtained, as well as the supporting facts of how the accused had the opportunity to influence the testator.

Given that undue influence usually happens in secret, and the decedent is unavailable to testify, pleading causation with particularity can be difficult. *But it is still required*.[29] Evidence of undue influence is almost always circumstantial.[30] "We do not lose sight of the fact that undue influence need not be proven by direct evidence, but can be established by indirect and circumstantial evidence … . But we are of opinion that the contestant must introduce evidence from which *inferences may fairly be drawn that such influence was exercised."*[31] Although "circumstantial evidence may be relied on by contestants to show undue influence … such circumstantial evidence must … do more than raise a mere suspicion."[32] "To be adequate, a plaintiff's circumstantial proof must facilitate *reasonable inferences of causation*, not mere speculation."[33] "We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation … . [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. 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."[34]

Circumstantial evidence of undue influence "must be of considerable probative force"[35] and have "probative force beyond mere suspicion."[36] "[F]act finders, be they jury or court, may not indulge in conjecture. They are constrained to draw reasonable inferences from established facts. Reasoning '*post hoc ergo propter hoc*'[37] does not meet this test."[38] Accordingly, those facts must be set forth in the initial pleading.[39]

### The Second and Third Rules of Fraud: Fraud Must Be Proved by Clear and Convincing Evidence and Fraud Is Never Presumed

This is where substantive Michigan law on undue influence conflicts with its status as a "species of fraud." On the one hand, caselaw makes it clear that undue influence is to be proved by a preponderance of the evidence.[40] "[T]o satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true."[41] Fraud, on the other hand, "must be established by clear and convincing evidence and must never be presumed."[42] This means that the party asserting fraud "must do more than merely persuade you that the proposition is probably true. To be clear and convincing, the evidence must be strong enough to cause you to have a clear and firm belief that the proposition *is* true."[43] Unlike undue influence, "[f]raud is not presumed but must be proven by clear, satisfactory, and convincing proof."[44]

Historically, "[w]here dishonesty, or fraud, is at issue, the courts have typically required a higher standard of proof. In view of the scienter requirement of an 'intent to deceive' imposed in the § 17a(2) exception, the reasoning behind the traditional requirement of a higher standard of proof for fraud or dishonesty is equally applicable here. This higher standard is based

> on the fact that fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith. The presumption is against the existence of fraud and in favor of innocence, the presumption against fraud approximating in strength the presumption of innocence of crime. 37 C.J.S. Fraud s 94, p. 398 et seq.[45]

Claims of fraud will not be presumed due to the serious nature of the allegation. "While the stern principles by which courts of equity are guided, will be applied in all their strictness to cases of fraudulent conveyances, where the fraud is clearly established, yet we cannot *presume* that fraud actually exists upon slight circumstances. The proof should be so clear and conclusive as to leave no rational doubt upon the mind as to its existence."[46]

### *Standards Imposed by Other States*

Requiring proof of undue influence by clear and convincing evidence is nothing new. As stated by the Kansas Supreme Court, "[t]here is another reason for the clear and convincing standard of proof. Undue influence is a species of fraud, and the terms in our decisions are used almost interchangeably … . It is hardly necessary to list the citations of authority on the longstanding rule in this state that one who asserts fraud must prove it by a preponderance of the evidence; that such evidence should be clear, convincing and satisfactory, and that it does not devolve upon the party charged with committing the fraud to prove the transaction was honest and bona fide. Fraud is never presumed; it must be proved. Mere suspicion is not sufficient."[47] Other states have imposed the higher burden of proof in such cases. See *Doolittle v Exchange Bank*, 241 Cal App 4th 529, 545, 193 Cal Rptr 3d 818, 830 (2015), as modified on denial of reh'g (Nov. 4, 2015) ("the party contesting a testamentary disposition bears the burden of proving undue influence" and "[u]ndue influence must be proven by clear and convincing evidence"); *In re Estate of Schumacher*, 2016 PA Super 17, 133 A3d 45, 52 (2016) ("A party claiming undue influence must establish, by clear and convincing evidence, that: (1) when the will was executed the testator was of weakened intellect and (2) that a person in a confidential relationship with the testator (3) receives a substantial benefit under the will … . Once this prima facie case has been established, the burden shifts to the proponent to refute the charge of undue influence"); *Parson v Miller*, 296 Va 509, 527, 822 SE2d 169, 179 (2018) ("[t]he contestant of a will always retains the burden of persuasion, and in order to prevail on a claim of undue influence, the contestant of a will must prove undue influence by clear and convincing evidence.")[48]

Iowa has taken a unique approach to applying the appropriate burden of proof in undue influence cases, focusing *on the sufficiency of evidence needed to prove causation*. While finding that the appropriate burden of proof for *most* of the elements was a preponderance of the evidence, the Court held that a contestant needed to prove *causation* by clear and convincing evidence:

> A heightened causation element in undue influence cases makes sense. In cases involving challenges to wills based upon undue influence, the central issue is whether the acts of the testator were a product of free will or coercion. The testator, however, is not available to testify and, as a result, a speculative element is necessarily introduced into the claim. As colorfully noted in the commentary, will contests necessarily apply a "worst evidence" rule … . Further, it is not always easy to distinguish ordinary permissible influences on a testator from improper coercion. *The injection of the word "clearly" into the fourth element of undue influence is designed to add a measure of protection to the free will of a testator, filter out claims that are unduly speculative, and to prevent the doctrine from expanding beyond its limited scope*. All of the other elements of undue influence might be present—susceptibility, opportunity, and disposition—and, still, the

will provisions might be the result of the testator's free will. *The heightened causation requirement of "clearly" ensures the other factors really mattered to the end result.*[49]

### *The Law of Fraud in Michigan*

In Michigan, the relevant model jury instructions concerning fraud are M Civ JI 128.01 (Fraud Based on False Representation), 128.02 (Silent Fraud), and 128.03 (Bad Faith Promise). Each of these categories of fraud generally require the plaintiff to prove by clear and convincing evidence each of the following:

- Defendant intentionally committed a bad act (misrepresentation, omission of material fact, or bad faith promise);
- Defendant intended that Plaintiff rely on the bad act;
- Plaintiff actually relied on the bad act, and
- Plaintiff was damaged by that reliance.

Unlike fraud, however, undue influence can be both presumed and satisfied with a lesser evidentiary burden, based on facts that by definition are insufficient to show that control over the decedent was ever exercised. No justifiable reason exists, either in policy or in law for the disparate treatment of these two members of the same species. Assume fraud is treated the same as undue influence, and that a plaintiff could prove fraud with the assistance of a legal presumption. Currently, in order to prove fraudulent misrepresentation, a plaintiff must establish (1) a representation by defendant that was false, (2) that defendant knew it was false or made the representation with reckless disregard of the truth of that statement, and (3) that the defendant made the representation with intent that it be relied on, (4) that it was relied on and (5) plaintiff was damaged. Instead, imagine that all plaintiff had to establish was 1, 4 and 5, and by doing so, the law would presume the existence of (2) and (3). Further, the existence of the presumption would then shift to the defendant the burden of producing substantial evidence to rebut the presumption of fraud. Add to that the lower evidentiary standard of preponderance of the evidence. The end result is that a trier of fact could enter a judgement for plaintiff based on a presumption that defendant more likely than not committed fraud. Such an arrangement would be incredibly unjust for many reasons. First, fraud is of such a serious nature that it would never be presumed. Second, it would foist on the defendant the obligation to prove a negative. Yet that is exactly what Michigan prescribes for undue influence.

Scienter is one reason for imposing a higher burden of proof. Compare Michigan's Model Jury Instructions for fraud with the instruction for innocent misrepresentation. Both involve a misrepresentation, but unlike fraud, innocent misrepresentation only requires proof by a preponderance of the evidence.[50] The disparity in levels of proof required to establish fraud and innocent misrepresentation underscores why undue influence is included as a "species of fraud." There is nothing innocent about undue influence. Like fraud, undue influence is an intentional act conducted in secret, using deceit, and made with knowledge that the challenged document does not reflect the will of the person who is the target of the wrongful conduct, but rather the will of the undue influencer.

Fraud is an affront to society and to our legal system. There is a reason why the bench and bar have universally agreed that due to the gravity of the allegation, fraud should not be presumed and should be proven by clear and convincing evidence. The reason likely lies in the permanent stain such a finding leaves on a party. "What a man does fraudulently, he does in vain; and as to him, once a fraud, always a fraud."[51] Undue influence is of the same species as fraud and the allegation is just as serious. Perhaps even more so as it generally involves victimizing the vulnerable and the elderly. Since undue influence is as deceitful as fraud, it should be treated as such, and should only be proven by clear and convincing evidence. Fortunately, it appears that the trend in Michigan law is moving in that direction.

### The Trend Toward Proving the Testator's Intent by Clear and Convincing Evidence

On October 16, 2014, Michigan's Committee on Model Civil Jury Instructions amended M Civ JI 170.44 (Wills) and its counterpart for trusts, M Civ JI 179.10.[52] At the time that it did, the relevant jury instructions expressly set forth that in both will and trust contests based on undue influence, the contestant's burden of proof was preponderance of the evidence. *That is no longer the case*. Effective January of 2020, both M Civ JI 170.44 and M Civ JI 179.10 were amended to say only that the contestant has the burden of proving undue influence, *with no reference to "preponderance of the evidence."*[53] The notes to both instructions state each instruction should be accompanied by M Civ JI 8.01, (Definition of Burden of Proof). That jury instruction, however, simply provides the definitions for both preponderance of the evidence and clear and convincing evidence.

The elimination of "preponderance of the evidence" from M Civ JI 170.44 and M Civ JI 179.10—and the silence over the correct burden of proof—is significant. First, after the amendments in 2014 were approved by the Committee, the dissent in *Mardigian* cited long-standing case-law that undue influence is a species of fraud, and that rules of fraud apply.[54] Second, the Committee retained the express language "preponderance of the evidence" in M Civ JI 170.41 and 179.04 (contest based on lack of capacity). This strongly suggests that the deletion of "preponderance of the evidence" from 170.44 and 179.10 was intentional.[55] Last, the model civil instructions may only be given in a case if "they accurately state the applicable law."[56] That begs the question: was the deletion of "preponderance of the evidence" required to accurately state the applicable law regarding a contestant's burden of proof? The answer to that question may be found within the trust code and the estate and protected individuals code.

### The Statutory Emphasis on the Clear and Convincing Evidence Standard

While scienter is one reason for an increased burden of proof for undue influence, it is not the only reason. There exists another reason, one which is separate and distinct from undue influence being included as a species of fraud. *The reason is this" both EPIC and the Michigan Trust Code require clear and convincing evidence whenever courts are required to determine a decedent's testamentary intent.*

Clear and convincing evidence is required when a proponent of a document claims that such a document is a decedent's will. "Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section *if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended* the document or writing to constitute any of the following: (a) The decedent's will; (b) A partial or complete revocation of the decedent's will; (c) An addition to or an alteration of the decedent's will; (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will."[57] Likewise, the existence of an oral trust may only be established by clear and convincing evidence.[58] Moreover, a "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."[59]

### Two Standards, One Document

Clear and convincing evidence is required even when a settlor seeks to revoke or amend his or her *own* revocable trust. According to MCL 700.7602(3), that can be accomplished 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." (Emphasis added).

In the case of *In re Bisbikis Trust*, the Court of Appeals rejected petitioner's argument that a letter from her late husband constituted an amendment to his trust.[60] The Court found that in the writing, the decedent made a two-columned list outlining the distribution of some assets, however, the list did not specify whether the assets were held in the trust or outside of the trust, nor did it refer to the trust agreement in conjunction with the list. The letter did make a reference to the trust agreement when Bisbikis was relating his history to petitioner. *However, there was no dispute that the letter in question was written by the decedent, was written of his own free will, that he was competent to write it, that it was written subsequent to the trust, or that it reflected what he wanted to do with his own assets and his trust assets.* Nonetheless, although there was an inconsistency in the distribution of assets, the Court concluded "the single inconsistency between the list in the letter and the distribution of assets mandated by the amended trust agreement does not amount to substantial compliance with the trust provision allowing amendment of the trust agreement."[61]

Fortunately, the *Bisbikis Trust* case is unpublished. Nonetheless, it demonstrates that courts may not be swayed to deviate from the language of a trust document *even in the face of a subsequent written directive from a competent and freely acting trust settlor that contradicts that trust*. It appears then, *absent a settlor's manifestation of clear and convincing evidence of their own intent specifically relating to his or her Trust or Will, a settlor would be unable to amend or revoke their own trust*.

On the other hand, Michigan law imposes a lower evidentiary standard on a trust or will contestant seeking to revoke, on the basis of undue influence, a written manifestation of the settlor's intent on the basis of undue influence. Put another way, under Michigan law, a settlor must work harder to amend or revoke his or her own trust than a third party seeking to revoke all or part of that document on the basis of undue influence. Two standards. One document. On its face this seems absurd, particularly since the contestant (1) was likely not present for the execution of the challenged documents, and (2) must frequently overcome the testimony of the scrivener, a notary, and other eyewitnesses to the signing. This begs the question: How does the imposition of a lower evidentiary standard on a stranger to the transaction promote expressed purpose and policy set forth in the Michigan Trust Code: namely, the fostering of certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out *as expressed in the terms of the trust*?[62]

## Conflicting Presumptions, Competing Burdens and a Hypothetical

Assume the following: John Doe privately meets with his lawyer to sign a new will and to revoke his old will. Under the new will, John disinherits his son, Junior, and leaves everything to his daughter, Jane, who has consistently cared for him, taken him to his doctor appointments, paid his bills, balanced his check books, and who has previously acted as his attorney-in-fact and patient advocate. John Doe decides to disinherit Junior, in part because Junior stopped visiting his father, and John wants to reward Jane for all her sacrifice, loyalty and hard work. In the first sentence of John's new will, it states "I, JOHN DOE, of Any County, Michigan, declare this as my Last Will and Testament. I hereby revoke all prior Wills and Codicils." John's revoked will left everything equally to his two children, Junior and Jane.

After John's death, Junior files a petition con-

testing the subsequent will, alleging undue influence. One significant problem for Junior's case is that everyone who knew John thought he was a "stubborn, strong-willed, SOB, who knew his own mind and couldn't be made to do anything he didn't want to do." But even though Junior has no evidence that his sister made John do anything to get her father to change his will, Junior will likely establish—by a preponderance of the evidence—the three prongs that make up the presumption of undue influence: (1) fiduciary relationship (by virtue of the power of attorney), (2) benefit, and (3) opportunity to influence the testator. The establishment of the presumption shifts the burden of producing substantial evidence to rebut the presumption on to Jane.

This common law presumption of undue influence, however, directly conflicts with a statutory presumption that it was John's intent to replace his prior will with the subsequent one. This is, in fact, the most powerful indication that clear and convincing evidence is the correct burden of proof in an undue influence contest, particularly involving a will. MCL 700.2507 provides, in pertinent part, as follows:

> (1) A will or a part of a will is revoked by either of the following acts:
>
> (a) Execution of a subsequent will that revokes the previous will or a part of the will expressly or by inconsistency.
>
> . . .
>
> (2) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.
>
> (3) *The testator is presumed to have intended* a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. *If this presumption arises and is not rebutted by clear and convincing evidence*, the previous will is revoked, and only the subsequent will is operative on the testator's death.
>
> (4) *The testator is presumed to have intended* a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. *If this presumption arises and is not rebutted by clear and convincing evidence*, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will, and each will is fully operative on the testator's death to the extent they are not inconsistent.

In the above hypothetical, the existence of undue influence is presumed, i.e., that the subsequent will reflects Jane's intent, and not John's. But under MCL 700.2507(3), the subsequent will is presumed to reflect intent of John and no one else. Further, under the common law, Jane must rebut the presumption that she unduly influenced with substantial evidence.[63] Junior, on the other hand, must rebut the statutory presumption that the subsequent will reflects his father's intent *by clear and convincing evidence.*

If both presumptions are allowed to stand, the existence of John's subsequent will presumes the simultaneous existence two diametrically opposed facts: *that the will both does and does not reflect the intent of John Doe.* It would be an absurd result to presume the existence of two facts which cancel each other out. "Statutory language should be construed reasonably, keeping in mind the purpose of the act, and to avoid absurd results."[64] The only reasonable construction in the face of this irreconcilable conflict is that "the unambiguous language of the statute must control."[65]

MCL 700.2507 controls in the case of a will contestant challenging a subsequent will replaces or supplements a previous will. There is no exception in the statute for theories of undue influence being the basis of such a claim. Since that is the case, not only is there NO presumption of undue influence in such a contest, but there is no question that a will contestant must prove undue influence—which would be the basis for the challenge under the statute—by clear and convincing evidence.

This leaves open the question of whether

MCL 700.2507 applies to a trust contest based on undue influence. Although the express language of MCL 700.2507 applies to wills, an argument can be made that its provisions will also apply to trusts. First, "under Michigan law, courts apply the same rules of interpretation to trusts and wills … ."[66] Second, EPIC provides that "[a] rule of construction or *presumption* provided *in this act*[67] applies to a *governing instrument* executed before that date[68] unless there is a clear indication of a contrary intent."[69] "Contrary intent" refers to the intent of the decedent.[70] EPIC also applies to a "*governing instrument* executed by a decedent dying after" the effective date of EPIC.[71] "Governing instrument" is a defined term that includes trusts.[72] MCL 700.2507 contains rules of presumptions provided under EPIC, and pursuant to MCL 700.8101(2) and MCL 700.1104(m), applies to trusts signed before EPIC was enacted and also applies to a trust executed by a decedent dying after the effective date of EPIC. Last, the Trust Code arguably already has its own corresponding provision in the form of MCL 700.7602, *supra*.

This conclusion makes sense. Assume all of the facts contained in the hypothetical above, but instead of a will leaving everything to Jane, assume John signed a pour-over will leaving everything to his revocable trust, which he amended by leaving his entire residue to Jane. There would be no meaningful reason to instruct a jury regarding the pour-over will based on MCL 700.2507, while instructing the same jury on the current state of the common law on undue influence regarding the trust. Such a hodgepodge of conflicting instructions would do little "to simplify and clarify the law concerning the affairs of decedents."[73]

## Conclusion

The Legislature demands that EPIC be liberally construed and applied to discover and make effective a decedent's intent in the distribution of their property.[74] Ten years later, it enacted the Michigan Trust Code "[t]o foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust."[75] Treating undue influence as a species of fraud will further these goals. Specifically, it cannot be presumed, it must be pled with particularity, and it must be proven by clear and convincing evidence.

The Michigan Legislature has made it clear where it stands on the quantum of proof needed to prove a testator's intent. EPIC and the Michigan Trust Code state that when proving a decedent's testamentary intent, the proofs must be clear and convincing. Documents proposed to be wills without the statutory formalities must be proven by clear and convincing evidence. Likewise, rebutting a presumption that a testator intended a subsequent will to replace or supplement a previous will or trust must be by clear and convincing evidence. Establishing an oral trust or reforming a written trust require clear and convincing evidence. A settlor may only revoke or amend his or her own revocable trust with clear and convincing evidence. Further, it is presumed that a testator's subsequent document revokes a prior will or codicil, and such a presumption will only be rebutted by clear and convincing evidence.

Absent the Michigan Supreme Court reversing over a hundred years of caselaw, change must come from the Michigan Legislature. Currently, MCL 700.3407(c) provides that "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." The statute could be amended by adding a sentence that reads "[U]ndue influence, fraud, duress, mistake, or revocation shall never be presumed and must be proven by clear and convincing evidence." Similarly, this sentence could be added to MCL 700.7406 which now states that "[a] trust is void to the extent its creation was induced by fraud, duress, or undue influence." To simplify the law regarding decedents' estates and foster certainty that a settlor's wishes will be carried out, the Legislature should enact within the Trust Code a statute that corresponds with MCL 700.2507, but which expressly references

trusts. These changes would also require corresponding revisions to the relevant jury instructions. Last, to avoid any confusion, the Michigan Supreme Court should amend MCR 2.112(B)(1) to read "[i]n allegations of fraud, *or any species thereof*, or mistake, the circumstances constituting fraud, *the specific species of fraud*, or mistake must be stated with particularity." Invalidating a will or a trust on the basis of undue influence is a difficult task. But nullifying a testator's last written directive should not be easy, and such litigation must not be undertaken absent clear and convincing evidence. That is because "the intention of the testator or settlor is paramount."[76] Pursuit of the guiding polar star of probate and trust law requires no less.

**Notes**

*1. Undue Influence: Rethinking the Presumption*, Robert S. Zawideh, Esq.

*2. In re Mardigian Estate*, 502 Mich at 179 (Markman, CJ).

3. In the context of a confidential or fiduciary relationship.

4. "What influence amounts to undue influence in the sense of the law cannot be defined with precision. It is a species of fraud, and, like fraud, must remain undefined by the courts." *Bradford v Vinton*, 59 Mich 139, 153, 26 NW 401, 408 (1886); *see also Coon v Dennis*, 111 Mich 450, 451–52, 69 NW 666 (1897); *In re Johnson's Estate*, 326 Mich 310, 319, 40 NW2d 163, 166 (1949); *In re Jennings' Estate*, 335 Mich 241, 247, 55 NW2d 812, 815 (1952); *In re Spillette's Estate*, 352 Mich 12, 17, 88 NW2d 300, 303 (1958); *In re Gotautas*, 373 Mich 513, 517, 129 NW2d 888, 890 (1964).

*5. In re Mardigian Estate*, 502 Mich 154, 187, 917 NW2d 325, 345, *reh'g denied*, 503 Mich 854, 915 NW2d 887 (2018).

*6. Black's Law Dictionary*, Fifth Edition, West Publishing Co., 1979.

*7. Husky Int'l Elecs, Inc v Ritz*, ___ US ___, 136 S Ct. 1581, 1586–87, 194 L Ed 2d 655 (2016), citing 1 J. Story, *Commentaries on Equity Jurisprudence* § 189, p. 221 (6th ed. 1853) (Story) ("Fraud ... being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which Courts of Equity will grant relief under this head")."

*8. Id*.

*9. Id*., citing *Johnson v McDonald*, 1934 OK 743, 170 Okla 117, 39 P2d 150.

*10. Alternative Sys Concepts, Inc v Synopsys, Inc*, 374 F3d 23, 29 (1st Cir 2004).

*11. Creson v Carmody*, 310 Ky 861, 863–64, 222 SW2d 935, 936 (1949).

*12. Degner v Moncel*, 6 Wis 2d 163, 166, 93 NW2d 857, 860 (1959).

*13. Pena v First State Bank & Tr Co*, 404 SW2d 56 (Tex Civ App 1966).

*14. State v Carvajal*, 147 Ariz 307, 309, 709 P2d 1366, 1369 (Ct App 1985).

*15. United States v Nuckols*, 606 F2d 566, 569 (5th Cir 1979); *Harman v Mohn*, 683 F2d 834, 837 (4th Cir 1982).

*16. Martin v Lawrence*, 156 Cal 191, 194, 103 P 913, 914 (1909).

*17. Hochman v Zigler's Inc*, 139 NJ Eq 139, 143, 50 A2d 97, 100 (Ch 1946).

*18. Tunlaw Corp v EF MacDonald Co*, No 68 C 2288, 1969 WL 9548, at *9 (ND Ill May 28, 1969).

*19. Roehl Transp, Inc v Liberty Mut Ins Co*, 2010 WI 49, 325 Wis 2d 56, 104, 784 NW2d 542, 566.

*20. United States v Pinto-Thomaz,* 352 F Supp 3d 287, 295–96 (SDNY 2018), *reconsideration denied*, No S2 18-CR-579 (JSR), 2019 WL 1460216 (SDNY Jan 10, 2019).

*21. In re Scholten's Estate*, 233 Mich 117, 125–26, 206 NW 559, 561–62 (1925).

*22. Id*., (emphasis added).

23. "Undue influence is the overpowering of the volition of the testator by another person whereby what purports to be the testator's will is in reality the will of the other person. While there need be no violence or threat of physical force, there must be unreasonable pressure upon the mind of the testator, amounting to psychological or moral coercion, compulsion, or constraint, so great that his free agency is destroyed and the volition of the person applying the pressure is substituted. To be actionable, the unreasonable and improper pressure must result in a will which the testator would not otherwise have made. Such a testament does not represent the testator's true will at all, but, in reality, represents the will of the person who influenced him." *In re Willey's Estate*, 9 Mich App 245, 254–55, 156 NW2d 631, 637 (1967).

*24. State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63, 852 NW2d 103, 112 (2014).

25. MCR 2.112(B)(1) and MCR 5.001(A).

*26. Scofield v Clarke*, 179 Mich 681, 706, 146 NW 377, 385–86 (1914).

*27. Taylor v Klahm*, 8 Mich App 516, 517–18, 154 NW2d 529, 530 (1967).

*28. See Guntzviller v Gitre*, 195 Mich 695, 698, 162 NW 290, 291 (1917) (emphasis added) ("[I]t will be sufficient to say that they allege that [decedent] had been feebleminded from childhood, was mentally incompetent to, and did not, transact any business; was not mentally

competent to execute the deeds in question, and that if she executed them, they were procured by fraud, duress, and undue influence.")

29. A party alleging undue influence bears the burdens of both proof and persuasion. *Kar v Hogan, supra*.

*30. E.g., In re Jackson's Estate*, 220 Mich 565, 579, 190 NW 762 (1922).

*31. In re McKeand*, 185 Mich 97, 117 (1915) (emphasis added). The Supreme Court went on to say "[t]he fact that Jones and his wife were made beneficiaries under the will is not alone sufficient nor is contestant aided by the fact that it is shown that testator and Jones and his wife were intimate friends for many years. The latter consideration serves rather to show why Jones and his wife became objects of the testator's bounty. Opportunity alone cannot give rise to a valid inference that undue influence has been exercised." *Id*. at 117-118 (citations omitted).

*32. Willey's Estate*, at 257.

*33. Skinner v Square D Co*, 445 Mich 153, 164-165 (1994).

*34. Id*., (emphasis added).

*35. In re Willey's Estate*, 9 Mich App at 245.

*36. In re Langlois' Estate*, 361 Mich 646, 652, 106 NW2d 132 (1960).

37. Definition of *post hoc*, *ergo propter hoc*: after this, therefore because of this : because an event occurred first, it must have caused this later event—used to describe a fallacious argument. *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/post%20hoc%2C%20ergo%20propter%20hoc.

*38. Genesee Merchants Bank & Trust Co v Payne*, 381 Mich 234, 248, 161 NW2d 17 (1968) (citation omitted).

39. "The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that: (a) he or she has read the document; (b) to the best of his or her knowledge, information, and belief formed *after reasonable inquiry*, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 1.109(E)(5) (emphasis added).

*40. Sullivan v Foley, supra*; *Bush v Delano*, 113 Mich 321, 71 NW 628 (1897); ("[u]ndue influence in the procurement of a will need be established by a preponderance of the evidence only"); *In re Kramer's Estate*, 324 Mich 626, 37 NW2d 564 (1949); *Taylor v Klahm*, 40 Mich App 255, 198 NW2d 715 (1972); *In re Estate of Haynes*, No 235232, 2003 WL 22715781, at *1 (Mich Ct App Nov 18, 2003) ("[t]he petitioner must still prove the existence of undue influence based on the preponderance of the evidence", citing *Kar* at 538.)

41. M Civ JI 8.01(a).

*42. Foodland Distribs v Al-Naimi*, 220 Mich App 453, 457, 559 NW2d 379, 381 (1996); *see also* M Civ JI 128.01, 128.02, and 128.03.

43. M Civ JI 8.01(b).

*44. Youngs v Tuttle Hill Corp*, 373 Mich 145, 147, 128 NW2d 472, 473 (1964); *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414, 751 NW2d 443, 451 (2008).

*45. In re Huff*, 1 BR 354, 357 (Bankr D Utah 1979). Further, if undue influence requires a lower burden of proof, it raises a question about the dischargeability of such a claim in bankruptcy. *See In re Mbunda*, 604 F App'x 552, 554 (9th Cir 2015) (even if undue influence proven, bankruptcy court did not err in dismissing claim with prejudice); *but see In re Scott*, 227 BR 918 (Bankr SD Fla 1998) (debtor's obligation on state court judgment would be excepted from discharge, as one for debtor's "willful and malicious injury" to property of another, given evidence that debtor deliberately used her position to procure the wealth of sick, old man, cleaned out his safe deposit box on date of his death, and promptly cashed in joint certificates of deposit.)

*46. Buck v Sherman*, 2 Doug 176, 182 (1845) (emphasis in original).

*47. Matter of Estate of Bennett*, 19 Kan App 2d 154, 164, 865 P2d 1062, 1069 (1993).

48. A number of other states, however, have treated undue influence in a significantly different manner. Many states hold that once a presumption of undue influence is established, the burden shifts to the party receiving the benefit to prove by clear and convincing evidence that the will or the trust was *not* the product of undue influence.

*49. Burkhalter v Burkhalter*, 841 NW2d 93, 105-106 (Iowa 2013) (internal citations omitted, emphasis added).

50. M Civ JI 128.04; compare with M Civ JI 128.01, 128.02 and 128.03 each of which expressly set forth the burden of proof as being "clear and convincing evidence."

*51. Botsford Lumber Co v State*, 188 Minn 247, 250, 246 NW 902, 903 (1933); *see also Merrill v Meachum*, 5 Day 341, 352 (Conn 1812).

*52. Michigan Bar Journal*, December 2014, pp. 70-72.

53. https://courts.michigan.gov/courts/michigansupremecourt/mcji/pages/home.aspx.

54. "Undue influence is a species of fraud," and the rules of fraud therefore apply to questions of undue influence. *In re Mardigian Estate*, 502 Mich 154, 187, 917 NW2d 325, 345, *reh'g denied*, 503 Mich 854, 915 NW2d 887 (2018) [citing *Adams v. Adams (On Reconsideration)*, 276 Mich App 704, 710 n. 1, 742 NW2d 399 (2007).]

55. While the model jury instructions do not carry the force of a court rule, the exclusion of that language in one section of the chapter while retaining it in another section of the same chapter, or similar chapter, calls to mind the statutory construction doctrine of "*expressio unis est exclusio alterius*," which provides that an express mention of

one thing generally implies the exclusion of other similar things that were not mentioned.

56. MCR 2.512(D)(2)(b).

57. MCL 700.2503 (emphasis added).

58. MCL 700.7407.

59. MCL 700.7415 (emphasis added).

*60. In re Bisbikis Tr*, No 317588, 2014 WL 6602701, at *3 (Mich Ct App Nov 20, 2014).

*61. Id*. With all respect to the Court of Appeals, this appears to be a victory of form over substance, with the loser being the intent of the decedent.

62. MCL 700.8201(2)(c).

63. "Substantial evidence" is more than a scintilla, and less than a preponderance of the evidence. *Jozwiak v N Michigan Hosps, Inc*, 231 Mich App 230, 238 (1998).

*64. Rogers v Wcisel*, 312 Mich App 79, 87, 877 NW2d 169, 173 (2015).

65. We presume that the Legislature is aware of the common law that *184 legislation will affect; therefore, if the express language of legislation conflicts with the common law, the unambiguous language of the statute must control." *Lewis v LeGrow*, 258 Mich App 175, 183–84, 670 NW2d 675, 683 (2003).

*66. In re Mardigian Estate*, 312 Mich App 553, 563, 879 NW2d 313, 319 (2015), (internal citations and quotation marks omitted), affirmed by an equally divided court, *In re Mardigian Estate*, 502 Mich 154, 917 NW2d 325, reh'g denied, 503 Mich 854, 915 NW2d 887 (2018); *but see In re Mary E. Griffin Revocable Grantor Tr*, 483 Mich 1031, 1031, 765 NW2d 613 (2009) (reversing the Court of Appeals' application to a trust of the probable cause statute governing wills).

67. "This act" refers to EPIC. MCL 700.1101.

68. This refers to EPIC's effective date of April 1, 2000. MCL 700.8101(1).

69. MCL 700.8101(2)(e)(emphasis added).

*70. See In re Estate of Mayfield*, No 228624, 2002 WL 31188765, at *2 (Mich Ct App Oct. 1, 2002) ("Petitioner's self-serving testimony on the issue does not establish a clear indication of a contrary intent under M.C.L. § 700.8101(2)(e) so as to make the EPIC inapplicable. Because the will is unambiguous, we will not look beyond its four corners to establish decedent's intent."); *see also In re Estate of Fink*, No 278266, 2008 WL 2861662, at *4 (Mich Ct App July 24, 2008) ("Nothing in MCL 700.8101 prevents a trial court from considering extrinsic evidence to determine whether a testator who executed his will before EPIC was implemented had an intent contrary to the presumption contained in EPIC.")

71. MCL 700.8101(2)(a).

72. MCL 700.1104(m).

73. MCL 700.1201(a).

74. See MCL 700.1201(b).

75. MCL 700.8201(2)(c).

*76. Matter of Estate of Sykes*, 131 Mich App 49, 53–54, 345 NW2d 642, 643 (1983).

Robert S. Zawideh is an attorney and shareholder in The Kemp Klein Law Firm, of which he has been a member since 2010. Currently the head of Kemp Klein's Litigation Practice Group, Mr. Zawideh primarily represents interested persons in high net worth trust and estate disputes. This body of work is part of a 29-year history of successfully resolving complex litigation and business matters on behalf of individuals, businesses and municipalities. In addition to trust and estate litigation, Mr. Zawideh's experience includes representing businesses and families involved in complex business and commercial litigation, employment claims, franchise matters, real estate claims and contract disputes. Robert Zawideh's litigation practice has taken him before Michigan's trial and appellate courts, including the Michigan Supreme Court, as well as before federal courts, state courts and arbitration panels across the United States. He has appeared in state and federal, trial or appellate courts in Michigan, Ohio, California, Illinois, Louisiana, Utah and Washington, D.C. Mr. Zawideh was featured in the 2020 Michigan Edition of *Leading Lawyers Magazine* in the article, "Trust and Estate Lawyer Strives to Make a Lasting Difference." Mr. Zawideh is "AV" rated as "Preeminent," the highest peer review rating for attorneys by Martindale-Hubbell, which recognizes lawyers for strong legal ability and high ethical standards.

# *United States v Sanmina Corporation*: A Primer on the Attorney Client Privilege and Work Product Doctrine[1]

**By Sandra D. Glazier**

The phrase "better safe than sorry" has been traced back to Rory O'More by the Irish novelist Samuel Lover (1797-1868). Understanding what is covered under the attorney-client privilege and work product doctrine and actions that can result in the waiver of protections that would otherwise be available can be extremely important in preserving privileged communications and work-product.

*United States v Sanmina Corporation*[2] ("Sanmina") is an excellent primer on the attorney-client privilege, the work-product doctrine, and important distinctions between the two. It also provides an analysis of various actions that might result in the waiver of protections offered under those doctrines and the potential implications attendant to such waiver.

In *Sanmina*, the corporation sought to take a $503 million deduction for worthless stock on its federal tax return. In-house counsel for Sanmina wrote a detailed memo (the "attorney-memo") that contained a combination of facts and counsel's analysis, impressions, and opinions regarding the value of the stock and appropriateness of the deduction. Given the significant deduction Sanmina anticipated taking, Sanmina assumed the IRS would likely disallow all or some portion of the deduction. As a consequence, it sought an outside opinion on the appropriateness of the proposed deduction and the value of the stock.

Sanmina hired the law firm, DLA Piper, to conduct its own analysis and provide a valuation of the stock thought to be worthless. During the course DLA Piper's provision of services, Sanmina shared the attorney-memo with DLA Piper and clearly identified it as being confidential and work product.

Unfortunately, DLA Piper referenced the attorney-memo in its valuation. Despite having knowledge that the attorney-memo was reflected in a footnote to DLA Piper valuation report, Sanmina submitted the report to the IRS during the audit process of the return that reflected the deduction for the worthless stock.

At the trial court level, the court ruled that Sanmina had waived both attorney-client privilege as well as work product protections and should produce the attorney-memo pursuant to a subpoena issued by the IRS. Sanmina appealed. The resulting appellate court opinion addressed the privileges that attached to the attorney-memo, the extent to which they had or had not been waived, and what must be produced under the challenged IRS subpoena relative to the attorney-memo in light of Sanmina's use of the DLA Piper valuation report, which disclosed the existence of the attorney-memo in a footnote to the valuation report submitted to the IRS in support of the deduction taken. While the appellate court ultimately ruled that Sanmina need not produce those portions of the attorney-memo that reflected the analysis and conclusions of its in-house counsel, in hindsight, a better approach might have been for Sanmina to provide DLA Piper with a memo containing only relevant facts upon which DLA Piper could then formulate its own independent analysis. Following receipt of DLA Piper's report, Sanmina's in-house counsel could then have internally reviewed DLA Piper's analysis and conclusions, compared them against those arrived at by in-house counsel, and engaged in a discussion regarding any differences of opinion. Understanding why this may be a prudent approach requires a basic understanding of the privileges.[3]

In a nutshell, the attorney-client privilege only applies to communications between attorneys and clients made for the purpose of giving legal advice.[4] The privilege may be extended to communications with third parties if they are engaged to assist the attorney in providing legal advice[5] as well as communications with third

parties "acting as agent" of the client.[6] But with regard to such third-party communications, care must be taken because retention not related to legal advice or if the advice itself is not legal in nature (e.g. accounting or other advice), the privilege won't apply.[7]

While DLA Piper was engaged to perform multiple functions, generally when a client retains an attorney, a rebuttable presumption exists that the engagement relates to the provision of legal advice.[8]

In the instant case, the appellate court found that the attorney-client privilege applied to the Sanmina and DLA Piper communications subpoenaed by the IRS because the advice sought concerning the propriety of the deduction was legal in nature and had an expectation of attorney-client confidentiality as between Sanmina and DLA Piper (despite the potential that such advice might be sought for a dual purpose). However, the court also found that the attorney-client privilege with regard to the attorney-memo had been waived.

An express waiver can occur through voluntary disclosures to third parties who are not bound by the privilege. In addition, an implied waiver is also possible. Discovery of materials under an implied waiver theory generally rests on fairness principles, which prevent a party from using the privilege as both a shield and a sword.[9] When waiver by implication occurs, only communications about the matter actually disclosed will lose protection under the attorney-client privilege.[10]

The appellate court then determined that the analysis should not end with the determination that the attorney-client privilege had been waived because the attorney-memo constituted attorney work product.

> The work-product doctrine is a "qualified" privilege that protects "from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case," and protects both "material prepared by agents for the attorney as well as those prepared by the attorney himself." The primary purpose of the work-product rule is to "prevent exploitation of a party's efforts in preparing for litigation."[11]

While the qualified privilege that attaches to work-product may also be waived, the analysis regarding the implications of the waiver differs from that of the attorney-client privilege because of the distinctly different purposes of the two privileges.[12]

Relying in part upon *United States v Deloitte LLP*,[13] the court drew a distinction between the two privileges citing that:

> "Voluntary disclosure waives the attorney-client privilege because it is inconsistent with the confidential attorney-client relationship. Voluntary disclosure does not necessarily waive work-product protection, however, because it does not necessarily undercut the adversary process." Accordingly, the overwhelming majority of our sister circuits have espoused or acknowledged the general principal that the voluntary disclosure of work product waives the protection only when such disclosure is made to an adversary or is otherwise inconsistent with the purpose of work-product doctrine—to protect the adversarial process.[14]

After going through a careful and thorough analysis of applicable caselaw pertaining to the work-product doctrine, the court came to the ultimate conclusion that because the waiver of the work-product doctrine employs fairness considerations, under the facts and circumstances of the instant case, the attorney-memo need not be disclosed where the underlying facts and data have been produced. The court found that Sanmina had a reasonable expectation that DLA Piper would keep the contents of the attorney-memo confidential, and the memo was prepared in anticipation of a dispute between Sanmina and the IRS for which Sanmina enlisted the assistance of DLA Piper in anticipation of that litiga-

tion. It, therefore, found that Sanmina and DLA Piper had a "common litigation interest."

The court then held, based upon the facts and circumstances of the case at the time the subpoena was issued, in order to waive the work-product privilege the contents of the attorney-memo would have had to have been disclosed to the IRS (who was the adversary). It reached this conclusion by applying a fairness doctrine that recognized that the overriding concern of the work-product privilege is not confidentiality but rather the protection of the adversarial process. While confidentiality expectations regarding the existence of the attorney-memo were not reasonable once Sanmina decided to submit the DLA Piper valuation report that cited the memo to the IRS during the course of the audit, the appellate court held that the scope of waiver needed to be limited to the extent necessary to eliminate any unfair advantage gained by Sanmina.

Since Sanmina bore the burden of substantiating the deduction, and at the audit stage the IRS wasn't bound to accept the conclusions espoused in the DLA Piper report, fairness didn't dictate disclosure of opinion work product contained in the attorney-memo at this stage of the proceedings because such disclosures are generally only discoverable when a compelling need for disclosure has been established.[15] A showing of substantial need and inability to obtain such information without undue hardship isn't sufficient[16] because mandating full disclosure of impressions and opinions would undermine the adversarial process and allow the IRS to litigate on "wits borrowed from the adversary."[17] Nonetheless, Sanmina did implicitly waive protection over any factual or non-opinion work product contained in the attorney-memo to the extent that is served as foundational material for DLA Piper's valuation. As a result the factual information had to be produced.

Because of the clear and concise analysis contained in this opinion, *Sanmina* is an important read for any advisor or valuation expert in gaining a better understanding of appropriate ways to communicate information in order to protect applicable privileges and not inadvertently provide a road map of potential weaknesses or arguments that could undercut a plan or valuation. Being cognizant of privileges, the manner in which they may be waived and the potential ramifications attendant to such waivers can help us to be "better safe than sorry."

**Notes**

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2. *United States v Sanmina Corp*, 968 F3d 1107 (9th Cir 2020).

3. A more thorough analysis of the attorney-client privilege may be found in Sandra D. Glazier, Testimony from Beyond the Grave—The Gravamen of the Attorney-Client Privilege in Will and Trust Contests, Tax Management Memorandum (BNA) (Nov 28, 2016).

4. *Upjohn Co v United States*, 449 US 383, 389 (1981).

5. *Richey*, 632 F3d, 559, 566 (9th Cir 2011).

6. *United States v Landoff*, 581 F2d, 36, 39 (9th Cir 1978).

7. *See Richey, supra*, at 566.

8. *United States v Chen*, 99 F3d 1495, 1501 (9th Cir 1996).

9. *Bittaker v Woodford*, 331 F3d 715, 719 (9th Cir 2003).

10. *Chevron Corp v Pennzoil Co*, 974 F2d 1156, 1162 (9th Cir 1992), internal citations omitted.

11. *Sanmina Corp, supra*, at *20.

12. *United States v Massachusetts Inst of Tech*, 129 F3d 681, 687 (1st Cir 1997).

13. *United States v Deloitte LLP*, 610 F3d 129, 140 (DC Cir 2010).

14. *Sanmina Corp, supra*, at *21-22, internal citations omitted.

15. *See, Holmgren v State Farm Mut Auto Ins Co*, 976 F2d 573, 577 (9th Cir 1992).

16. *Upjohn Co v United States*, 449 US 383, 401 (1981).

17. *Sanmina Corp, supra*, at *32, citing *Hickman v Taylor,* 329 US 495, 516 (1981) (Jackson, J. concurring).

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# Signing Estate Plans (and Other Documents) in the Time of Pandemic, Part Two!

**By Lauren M. Underwood and James L. Frisch III**

2020 presented a tsunami of changes to all of our lives. Some of them are harbingers of progress. Advances in remote witnessing and notarization of a variety of documents—from deeds to probate papers to estate plan documents—have proven to be a convenience and a benefit to our clients. There were a stream of executive orders and "saving" legislation once those orders were invalidated. By the end of the year, we saw some semi-permanent (through June 30, 2020) legislation that gives us a clear set of requirements to ensure that documents witnessed and notarized remotely are valid.

Four acts protect documents executed in compliance with the Governor's Executive Orders from April 30, 2020, and they extend the procedures established in those orders through June 30, 2021. They have been signed by the governor, but the laws were so new at the time this article was written that they had not been assigned MCL numbers.

### Enrolled SB 1186 (Assigned 2020 PA 335)

This act amends Michigan's uniform commercial code to accept electronic records and electronic signatures without a separate determination from or approval by the department of technology, management and budget.

### Enrolled SB 1187 (Assigned 2020 PA 336)

This act amends 2003 PA 238, the notary public act, to permit notarization of documents using two-way real time audiovisual technology (providing certain requirements, set forth below, are met):

1. Two-way, real-time audio and visual recording.
2. The person signing must:
   a. Present satisfactory evidence of identity (unless personally known to the notary) on the video;
   b. Affirmatively represent that he or she is physically in Michigan; or
   c. That there is a substantial connection between the act and the state of Michigan (a court filing, a document relating to an entity subject to the jurisdiction of this state such as a governmental entity or public official) and the record either involves property located in Michigan or a transaction substantially connected to Michigan.
3. The notary must not have actual knowledge that the transaction is prohibited by the laws of the jurisdiction in which the person is located.
4. The notary must be able to affix signatures in a manner that would make modification or tampering of the remote notarial act evident.
5. The document must be transmitted to the notary the same day it is signed. This can be by facsimile, mail, or electronic means.
6. Finally, the notary must complete notarization within 24 hours of receipt of the document, and it must then be transmitted back to the individual who signed the document.

If all of the requirements are met, then the notarization is valid and the date and time of notarization is treated as being the date and time the person signed it using the remote technology. Accordingly, documents signed and notarized using these procedures may be signed in counterparts.

If a person relies on the effectiveness of the execution using the remote notary procedures, in good faith, their rights or interests cannot be impaired or challenged based solely on a technical failure to adhere to the procedures.

Compliance with the procedures is presumed and can only be rebutted by clear and convincing evidence that a participant (the notary or the person signing) intentionally failed to comply with the act.

### Enrolled SB 1188 (Assigned 202 PA 337)

This act creates the Uniform Real Property Electronic Recording Act, an Electronic Recording Commission, and the powers and duties of that commission.

The act applies to transactions after April 29, 2020 and before July 1, 2021. It mandates that the register of deeds accept electronic documents for recording.[1] Only substantial compliance is required. Financial institutions shall accept a document recorded by the register of deeds under this section.[2]

### Enrolled SB 1189 (Assigned 2020 PA 338)

This act is the one near and dear to the hearts of attorneys who do estate planning, and estate and trust administration. The act[3] codifies, consolidates, and revises:

1. The law relating to:
   a. Wills and intestacy;
   b. Administration and distribution of:
      i. Decedent's estates,
      ii. Guardianships, and
      iii. Conservatorships.
   c. Relating to trusts.
2. It provides for:
   a. The powers and procedures of the probate court;
   b. The validity and effect of transfers, contracts, and deposits that relate to death;
   c. Procedures to facilitate enforcement of certain trusts.

If certain requirements for two-way, real-time audiovisual technology are met, then the following documents will be valid if signed and witnesses in that manner:

1. Wills;
2. Disclaimers;
3. Funeral representative designations;
4. Parental appointment of a guardian of a minor under MCL 500.5202;
5. Appointment of a guardian of a legally incapacitated individual under MCL 700.5301;
6. Durable power of attorney under MCL 700.5501;
7. Patient advocate designation.

What are the requirements? They are similar to, but not identical to, the requirements for valid notarization of documents:

1. Two-way, real-time audiovisual technology that allows direct, contemporaneous interaction by sight and sound between the signatory and the witness;
2. The interaction must be recorded and preserved by the signatory or the signatory's designee for at least three years;
3. The signatory must either:
   a. Affirmatively represent during the recording that the signatory is physically in Michigan, or
   b. If the signatory is not in Michigan, one of the following applies:
      i. The document is intended to be filed with a court, governmental entity, public official, or other entity affiliated with Michigan (or relates to one of those);
      ii. The document involves property in Michigan;
      iii. Is a transaction substantially connected to Michigan.
4. Affirmatively state what document they are executing during the recording;
5. Show the title page and signature page of each document to the witnesses during the recording;
6. Every page of the document must be numbered and must include the total number of pages (i.e., 1 of 6);
7. The physical act of signing must be observable by the witnesses;
8. The documents must be returned to the witnesses within 72 hours of being executed;
9. 72 hours after the witness receives the documents, they must be signed by the witnesses and returned to the signatory (by mail, fax or electronic delivery);
10. If a person relies in good faith and without actual notice that the requirements above are not met, the validity of the document cannot be challenged solely on the basis of improper execution;
11. Compliance is presumed but may be

overcome by clear and convincing evidence that the signatory or witness intentionally failed to comply with the requirements set forth above;

12. These provisions apply to documents executed from April 30, 2020 through June 30, 2021.

Many estate planning documents, papers to commence probate estates and the like are both witnessed and notarized. Accordingly, PAs 336, 337, and 338 must be complied with. Here is a comparison:

| SB 1187 | SB 1188 | SB 1189 |
|---|---|---|
| Notary Act | Deeds | Estate Plan, Probate and Trust Documents |
| Applies to documents signed 4/30/20 through 6/30/21. | Applies to documents signed 4/30/20 through 6/30/21. | Applies to documents signed 4/30/20 through 6/30/21. |
| | Register of deeds to accept documents electronically (or by facsimile). | |
| | Financial institutions shall accept electronically recorded documents. | |
| 2-way, real-time audio and visual recording. | | 2-way, real-time audio and visual recording. With direct, contemporaneous interaction by sight and sound between the signatory and the witness. |
| | | The interaction must be recorded and preserved by the signatory or the signatory's designee for at least three years. |
| Present satisfactory evidence of identity (unless personally known to the notary) on the video. | | |
| Be in Michigan OR transaction is a "Michigan" transaction. | | Be in Michigan OR transaction is a "Michigan" transaction. |
| | | State name of document. |
| | | Show title page and signature to the camera. |
| | | Must have page numbers and total number of pages (i.e., 1 of 6). |
| | | Physical act of signing observable. |
| No knowledge by notary that the transaction is prohibited in jurisdiction where signed. | | |
| Document must be formatted so that modification or tampering are obvious. | | |
| Transmit to notary SAME day as document signed (fax, mail, electronic). | | Transmit to witness within 72 hours (fax, mail, electronic). |
| Notarization completed within 24 hours of receipt by notary and transmitted back to signer (fax, mail, electronic). | | Witness signs and returns to signatory within 72 hours of receipt by witness (fax, mail or electronic). |
| Notarization deemed to be date document is signed. | | |
| Good faith reliance in compliance with procedures prevents challenge on technical compliance basis alone. | | Good faith reliance in compliance with procedures prevents challenge on technical compliance basis alone. |
| Compliance is presumed – rebutted by clear and convincing evidence of intentional failure to comply. | | Compliance is presumed—rebutted by clear and convincing evidence of intentional failure to comply. |

Electronic signing, witnessing, and notarizing is here to stay. After eight months of experience, clients love it. You will be surprised at how efficient your signings are, and how efficiently your office processes documents once you have the hang of the procedures. The greatest challenge is making sure that documents are perfect before they are sent to a client. I know that all of us have had the experience of modifying a document while a client is in our conference room. Well, those days are going, going and almost gone. I am confident that permanent legislation is coming.

While in-person signings will return, the convenience of signing remotely is undeniable and is a real boon to clients. For those who are skeptical about your ability to have a personal interaction over the camera, try it! You just might like it.

**Notes**

1. If a register of deeds does not have equipment to accept an electronic document, then it shall accept for recording a tangible copy of an electronic document that is properly notarized.
2. The register of deeds shall deem all financial institutions and title insurance companies (and their agents) as covered by an agreement establishing a verified transactional relationship; the register of deeds may ask either for verification of a notary's employment or contractual association.
3. The act amends MCL 700.1202 and 700.5108a, as added by 202 PA 246.

Lauren M. Underwood is a former Chair of the Probate and Estate Planning Council of the State Bar of Michigan, past editor of the Probate Journal, member of the Real Property, Trust Law and Taxation Sections of the American Bar Association; the Taxation Section of the State Bar of Michigan, the Oakland County Bar Association, and a Fellow of the State Bar of Michigan. She has written several articles and is a chapter author for the ICLE publication Michigan Estate Planning Handbook. Ms. Underwood received her B.A. degree with high distinction from Wayne State University in 1981 and her Juris Doctor summa cum laude from the Detroit College of Law in 1991. She lectures frequently for many groups and organizations, including the Institute for Continuing Legal Education. She is a Past President of the Wayne State University Alumni Association, Past President of the Woodbridge Citizen's Association, past member of the Board of Visitors of the Institute of Gerontology, and past board member for St. Luke's Health Ministries and Canterbury on the Lake.

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# Estate Planning and Charitable Planning Opportunities: Impact of a Low-Interest Rate Environment and COVID-19

**By Laura L. Brownfield**

Interest rates that are used to calculate the gift tax deduction in estate planning strategies are at historically low levels in response to the slowdown of the economy and the onset of the pandemic in 2020. As a result, there is a planning opportunity for practitioners who work with charitably inclined clients who wish to transfer significant wealth to their heirs at a reduced gift or estate tax cost. Through a charitable lead trust, clients can benefit charity now and minimize gift and estate taxes in shifting wealth to the next generation.

The drop in asset values—from the stock market, to real estate, to closely held businesses—as a result of the pandemic also presents a unique estate planning opportunity for wealthy families. A client can fund a charitable lead trust with those assets, supporting charity over a stated term and passing the remainder to the younger generations at a lower transfer tax cost. Any subsequent appreciation of the assets passes to the heirs free of gift and estate tax.

From an estate planning perspective, and given the potential for significant changes in tax policy following the election—including President-elect Biden's proposed 45 percent estate tax rate, $3.5 million per taxpayer exemption amount, and repeal of basis step-up on death—wealthy clients should consider taking advantage of existing low interest rates and current tax laws to benefit their favorite charitable causes and their heirs.

## Charitable Lead Trust

For a charitably minded client seeking to reduce his or her taxable estate who possesses income-producing assets sufficient to provide for his or her cash needs, the charitable lead trust ("CLT") is an effective estate planning strategy. The CLT is an irrevocable trust in which an income (the "lead interest") is paid to one or more charitable beneficiaries for a specific period, and at the end of the term, the remainder interest either reverts to the grantor or is paid to one or more designated noncharitable beneficiaries.

## Permissible Beneficiaries

Community foundations, private foundations, and other charitable vehicles such as donor advised funds qualify as a charitable beneficiary and can receive the distributions of the CLT lead interest. A client can identify a donor advised fund at a community foundation and designate that fund as the charitable beneficiary. The client's family may then act as donor advisors and recommend grants to the family's favorite charities. A donor advised fund also allows accumulation of distributions for several years in order to facilitate larger grants to multiple charitable causes. The CLT remainder beneficiaries may be the grantor or other noncharitable beneficiaries.

## Inter Vivos or Testamentary CLT

Clients can create a CLT either by inter vivos agreement during the lifetime of the grantor or through a testamentary agreement that becomes effective on the date of the grantor's death. A CLT results in a taxable gift upon creation equal to the fair market value of the assets gifted to the trust, reduced by the value of the lead interest. The estate planning objective is to generate a current gift or estate tax charitable deduction that will partially, or even completely, offset the taxable transfer to the non-charitable beneficiaries.

An inter vivos CLT may reduce estate and gift tax on an appreciating asset and provide some income tax savings to the grantor. When the CLT is funded, the grantor makes a charitable gift equal to the present value of the stream of the annuity or unitrust payments to be paid

to the charitable beneficiary. Additionally, at the time the grantor transfers property to the CLT, the grantor is treated as having made a noncharitable gift to the remainder beneficiaries, who will receive a carryover basis for assets received from the CLT.[1] The higher the present value of the lead interest to be paid to a charitable beneficiary, the lower the present value—and therefore the gift tax value—of the property transferred to the remainder beneficiaries. In effect, the grantor loses the income from the asset contributed to the lead trust, and on expiration of the charitable beneficiary's lead interest, the noncharitable remainder beneficiaries will receive the trust corpus.

The testamentary trust, established at death, may be funded with property passing to the trust on death of the grantor. As the property is included in the grantor's estate, the trust will receive a stepped-up basis (equal to the estate tax value) for the CLT assets, which will eventually pass to the noncharitable beneficiaries receiving the testamentary CLT assets.[2]

To be a qualified CLT,[3] the trust instrument must satisfy all of the requirements set forth in IRC 664 and the regulations thereunder. In 2007 and 2008, the IRS published sample inter vivos grantor and non-grantor CLTs and testamentary CLTs. See Rev. Procs. 2007-45 (inter vivos) and 2007-46 (testamentary) as a starting point for drafting a charitable lead annuity trust.[4] See Rev. Procs. 2008-45 (inter vivos) and 2008-46 (testamentary) as a starting point for drafting charitable lead unitrusts.[5]

## Term of the Trust

The CLT can provide that the trustee shall distribute the lead interest for a specified term (with no limit to the term) or for the life or lives of an individual(s) who are living and ascertainable on the transfer date. The CLT can specify the duration of the payments by a combination of a life span and a term of years. This can provide an opportunity to plan for young children or grandchildren using an appropriate term and by thoughtfully selecting assets that produce adequate growth to accomplish the preservation of the remainder beneficiaries' interest in the trust assets while satisfying payment of the lead interest during the trust term.

## Annuity or Unitrust Interest

The trustee of a CLT must make fixed "annuity" payments or variable "unitrust" payments to the charitable beneficiary, which must be paid by the trustee at least annually. Although similar, the annuity trusts and unitrusts function in different ways and can meet different planning objectives. Both trusts are structured to preserve the original principal and some growth of principal for the remainder beneficiaries.

### Annuity Trust

In an annuity trust, the amount payable to the current income beneficiaries is measured as a fixed dollar amount or a fraction or percentage of the initial fair market value of property at the time of funding and the creation of the trust. For those clients who want their charitable beneficiary to receive a fixed income stream, regardless of the income generated by the trust, the annuity trust may accomplish their intentions. In an annuity trust, generally no additional contributions can be made because the trustee must be able to ascertain the payout amount that is determined by the initial value of the trust. As the annuity interest remains constant over the term of the trust, the remainder beneficiaries will benefit from growth of the trust principal.

### Unitrust

The payout of a unitrust is tied to the value of the property each year. The charitable beneficiary has an irrevocable right to receive payment of a fixed percentage of the net fair market value of the assets determined annually. Although the percentage remains fixed throughout the trust term, the unitrust amount may vary from year to year as the trustee determines the payment based on the annual net fair market value of the

trust assets. As the value of the assets increases, so does the unitrust amount. The grantor can make additional contributions to a unitrust if the trust instrument permits the same. Unitrusts are appropriate for trust property that is easy to value annually, such as stock or securities.

### Grantor or Nongrantor Trust

Another planning issue to consider is whether to draft the CLT as a grantor or nongrantor trust. Depending on how the trust is structured, either the grantor or the trust will receive a charitable tax deduction. Under a "grantor charitable lead trust," the grantor receives an immediate income tax deduction for the total net present value of the future distributions to charity in the year the CLT is established. Under a "non-grantor charitable lead trust," none of the income produced by the trust is taxable to the grantor, instead the trust is an independent taxable entity that is responsible for its own taxes.

#### Grantor Trust

For income tax purposes, the grantor, and not the trust, is taxed on the trust income. A grantor charitable lead trust must be established as an inter vivos trust. A grantor CLT provides the grantor with an immediate charitable income tax deduction for the present value of the annuity or unitrust amounts to be paid to the charitable beneficiary. The price of the income tax deduction at inception is that the grantor must include the income of the trust in his or her income in all years that it is being paid to a charitable beneficiary. Furthermore, the deduction cannot exceed thirty percent (30%) of the grantor's adjusted gross income if the lead interest is payable to a public charity as described in IRC 170(b)(1)(A)) and only twenty percent (20%) of the grantor's adjusted gross income if the lead interest is payable to a private nonoperating foundation. Any excess deduction can be carried forward an additional five years.

While the grantor charitable lead trust may seem to be onerous from a tax perspective, a client may wish to use a grantor CLT to obtain a one-time income tax deduction for the charitable gift of the lead interest. For example, if a client experiences a large gain such as from the sale of a major asset, the proceeds can be used to fund a grantor CLT in order to create a lump-sum deduction for the client in the same year in which he or she has an unusually high level of income. The resulting charitable income tax deduction will offset income otherwise taxable at the client's maximum marginal rate. Although the client must recognize taxable income distributed to the charitable beneficiary from the CLT in the following years, that income will generate less tax.

#### Nongrantor Trust

Nongrantor CLTs are an effective estate and tax planning tool for clients who are maximizing their charitable deductions that remain subject to percentage limitations and the maximum five-year carryover period, which may mean that a portion of their charitable contributions may never be deductible for income tax purposes. A nongrantor charitable lead trust may allow them to effectively increase the amount they can deduct for their gifts to charity as charitable distributions from the nongrantor CLT are 100 percent deductible by the CLT and are not taken into account in the grantor's own contribution limits.

A grantor of a non-grantor CLT is entitled to a gift tax charitable deduction for the present value of the charitable lead interest. The greater the deductible charitable income interest, the lesser the estate or gift tax consequence on transfer of the remainder interest. The value of both the lead interest and the remainder interest is affected by the interest paid to charity each year, the term of the trust, and the IRC 7520[6] interest rate in effect when the CLT is funded, as discussed below. In addition, for closely held business interests, the nongrantor CLT offers additional discount for lack of control or lack of marketability that will reduce the deemed value of the remainder directed to heirs, with the result that the

grantor incurs a smaller gift tax liability, providing the grantor with the ability to transfer a significant amount of wealth to younger generations at a lower tax cost.

The trust receives a charitable tax deduction each year that it makes distributions to charity. A nongrantor CLT is allowed an unlimited fiduciary income tax charitable deduction for the amount it pays to charity each year.

### Funding the Trust

When a client establishes a CLT, he or she can fund it with cash or with other assets, e.g. real estate, securities, and qualifying closely held business interests, which can be either income-producing or non-income-producing property. The contribution of non-income-producing property presents a problem for the trustee if the trust principal will not generate income sufficient to meet the guaranteed annuity or unitrust payment requirements, forcing the trustee to sell a portion of the principal, borrow against it, or distribute a portion of the principal to meet the distribution requirements.

From the standpoint of the noncharitable remainder beneficiary, the ideal asset to transfer to a CLT is property appreciating at or above the general rate of inflation. Clients should consider assets that have declined in value but are expected to appreciate in the future increasing the value of the assets passing to the remainder beneficiaries free of gift or estate tax at the end of the lead interest term. This strategy is further enhanced where the asset is a minority or fractional interest that may be entitled to a valuation discount, including discounts for lack of marketability and lack of control.

### Gift Tax Consequences

When the grantor funds the CLT, he or she makes a taxable gift equal to the fair market value of the assets contributed to the trust, reduced by the present value of all charitable interests (e.g. annuity or unitrust interest). The value of the charitable interest is equal to the total payments the charitable beneficiary will receive over the trust term, discounted to present value using what is commonly referred to as the "Section 7520 rate." The Section 7520 rate is set forth in a monthly IRS revenue ruling, and it is equal to 120 percent of the mid-term applicable federal rate, compounded annually, for the month in which the valuation date falls.

The grantor may elect to use the Section 7520 rate for the month in which the trust is funded or either of the two months preceding the month of the transfer. This allows the practitioner to determine the approximate value of the gift at least two months before it occurs and to plan for establishing and funding the trust based on the rate. As of this writing, the Section 7520 rate has fluctuated between 2.0% in January 2020[7] to 0.4% in November 2020,[8] and as of December 2020 the Section 7520 rate is 0.6%.[9]

A CLT works better in a low interest rate environment because a lower Section 7520 rate will cause the present value of the annuity paid to the charitable beneficiary to be higher, which in turn produces a larger charitable contribution deduction and a smaller taxable gift to the remainder beneficiaries. If trust assets outperform the applicable Section 7520 rate, the trust will produce wealth transfer benefits as the noncharitable remainder beneficiaries will receive assets in excess of the grantor's taxable gift, free of transfer taxes.

### Illustration

Tom and Tallulah Taxpayer are a wealthy couple in their early 60s with two children in their early 30s. Tom is a tech guy who recently received a windfall when he sold a mobile application he developed. A year ago, Tallulah's grandmother passed, leaving a substantial inheritance to Tallulah. Tom's app success and Tallulah's' inheritance have allowed them to give generously to their donor advised fund (DAF) at the community foundation, from which they have been able to support a variety of charities to address needs in the community and their charitable in-

terests as they evolve over time. In an effort to involve their family in philanthropy, Tom and Tallulah have named their children as the successor advisors to the DAF, so that their children will be able to advise the community foundation regarding charitable uses of the funds Tom and Tallulah have gifted to the DAF.

Tom and Tallulah have three problems. They have been maximizing their contributions to charity, and as a result significant portions of their charitable gifts are not qualifying for deduction due to the percentage limitations. Also, they have done little planning for their two children. Finally, the charities they support are in need as they have been impacted by the pandemic.

Tom and Tallulah meet with their attorney to establish a grantor charitable lead annuity trust (CLAT), funded with $10 million, primarily in highly-appreciated stocks that pay an annual dividend, and designed to pay out $1 million annually to their DAF for a period of ten years. At the end of the ten-year period, the trust will terminate, and its assets will be distributed equally to their two children. They would like their children to benefit from the growth in the portfolio that they anticipate over the next ten years.

Using the November 2020 Section 7520 rate of 0.4%, Tom and Tallulah will receive a charitable gift tax deduction of $9,783,500. Tom and Tallulah have made a taxable gift of $216,500, which may be offset through the use of their gift tax exemption. Assuming that the CLAT assets earn a total return of 8% on average over its ten-year term, the distribution to the children will be over $7.1 million at the end of the CLAT term. Utilizing the CLAT has allowed the parents to transfer over $17 million in assets between charitable and non-charitable beneficiaries over the term of the trust, while reducing their taxable estate and incurring a nominal gift tax on the distribution to their children.

## Conclusion

In the current climate of low interest rates and at a time of need for charities during the pandemic, clients who wish to give to charity should explore the role that charitable lead annuity trusts can play in helping them accomplish their philanthropic objectives while minimizing gift and estate taxes in shifting wealth to the next generation. For a client who is charitably inclined, exploring a charitable lead trust as a strategy in his or her estate plan could preserve assets for the next generation, by significantly reducing the potential transfer tax on amounts passing to non-charitable beneficiaries, while providing support to charity.

### Notes

1. IRC 1015(b).
2. IRC 1014(a).
3. Another planning technique is the nonqualified CLT which is an irrevocable charitable trust providing an income interest to charity that does not meet IRC requirements for estate, gift, or income tax deductibility and is taxed as a complex trust. The nonqualified CLT is not the subject of this article.
4. See https://www.irs.gov/irb/2007-29_IRB#RP-2007-45.
5. See https://www.irs.gov/irb/2008-30_IRB.
6. All section references herein are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.
7. Rev. Rul. 2020-01.
8. Rev. Ruling 2020-22.
9. Rev. Ruling 2020-26.

Laura L. Brownfield is General Counsel for the Community Foundation for Southeast Michigan. The Community Foundation is experienced in accepting gifts of closely held business interests and works with attorneys and their clients to make the gifting process straightforward and efficient, consistent with the clients' business and estate planning goals. With a knowledge of southeast Michigan nonprofits, the Community Foundation for Southeast Michigan advises clients about grantmaking to organizations locally and across the country.

## The Landscape in Lansing and Recent Legislation

### By Harold G. Schuitmaker

There is not too much in the way of new 2020 Public Acts probably because of COVID and elections, but what has been introduced gives one insight of what is on the minds of the legislature.

### Trends (Legislation That I Think Could Affect Probate Practitioners in the Future)

This article is being prepared in early November and there is some chance that some of these bills summarized here could become law prior to December 31, 2020.

**House Bill 4676 (2019)** addresses sexual discrimination and orientation. As introduced, this bill makes it possible for a property owner to negate restrictions, covenants, or condition, including a right of entry or possibility of reverter, that directly or indirectly prohibits or limits the conveyance, encumbrance, rental, occupancy, or use of real property on the basis of race, sex, national origin, familial status, sexual orientation, or gender identity, or on the basis of an individual having sensory, mental, or physical disability or using a trained dog guide or service animal because of the individual being blind or deaf or having a physical disability.

This is not yet the law but if passed it would allow a property owner the opportunity to file a document with the Register of Deeds where the property is located which would remove such restrictions

**House Bill 6097 (2020)** would amend MCL 700.2114 & 700.2806 of EPIC. (1) The word "husband" would be replaced by "spouse", (2) a "man and a woman" as to marriage would be replaced by "two individuals" or "married couple," etc.

**Senate Bill 1201 (2020)** would create a new section under the Public Health Code reading as follows:

> Sec. 10251. (1) A person that performs organ transplants in this state shall not refuse to transplant an organ in a transplant recipient who is physically or mentally disabled based solely on the transplant recipient's physical or mental disability.

**House Bill 6294 (2020)** and **Senate Bill 1189 (2020)** are very similar to each other. They address signing documents and allowing visitations to take place electronically, which amends EPIC at MCL 700.2502, 3206, 6601 & 5506 and adds sections 1202 & 5108a.

It appears both of these are a work in progress and are quite detailed. This bill has a limited time of effectiveness which is between April 30, 2020 to January 1, 2021. It might not even be law before January 1, 2021. However, it is possible if COVID continues that this will be reintroduced in the next legislative session.

**House Bill 4292 (2019)** deals with remote notarization and witnessing. The Probate Council on Special Projects appears not to be in favor of the bill as House Bill 4292 requires lengthy notarization training, exam, and requires each notary to keep a journal. If the notary was an attorney and if the attorney changed law firms then a violation of client confidentiality could become an issue.

**House Bill 5769 (2020)** deals with Durable Powers of Attorney which would be an amendment to EPIC MCL 700.1104 and 700.5501. An attorney-in-fact under a durable power of attorney would be classified as a fiduciary. The bill would require that the durable power of attorney must be signed in the presence of two (2) witnesses and be notarized.

It also would add:

> (3) All of the following apply to a power of attorney executed after June 30, 2021:
>
> (a) An attorney-in-fact shall not do any of the following on behalf of the principal or with the principal's property unless the durable power of attorney expressly grants the attorney-in-fact the authority and is certified under subdivision (b);

(i) Make a gift of any of the principal's assets.

(ii) Create or change rights of survivorship.

(iii) Create or change a beneficiary designation.

(iv) Create an account or other asset in joint tenancy between the principal and the attorney-in-fact.

(v) Delegate authority granted under the durable power of attorney.

(vi) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

(vii) Renounce or disclaim property, including a power of appointment.

(viii) Receive reasonable compensation for the attorney-in-fact's services.

NOTE: This is a proposed certificate that an attorney must sign. Some of the requirements are as follows:

(b) If a power of attorney grants an attorney-in-fact a power described in subdivision (a), the attorney-in-fact shall not exercise the granted power unless the power of attorney contains the following certification signed under oath by an attorney who has an attorney-client relationship with the principal:

I, ____, under the penalties of perjury, certify that to my knowledge:

1. I am a licensed attorney for the principal.

2. The principal understand the significance of giving the attorney-in-fact the powers described in this document as listed in section 5501(3)(a) of the estates and protected individuals code, 1998 PA 386, MCL 700.5501, and is knowingly granting those powers to the attorney-in-fact.

(c) Notwithstanding an express grant of authority to do an act described in subdivision (a), an attorney-in-fact may exercise the authority only as the attorney-in-fact determines is consistent with the principal's objectives, and is consistent with the principal's best interest based on 1 or more of the following factors:

(i) The value and nature of the principal's property.

(ii) The principal's foreseeable obligations and need maintenance.

(iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes.

(iv) Eligibility for a benefit, a program, or assistance under a statute or regulation.

(v) The principal's personal history of making or joining in making gifts.

(vi) The principal's existing estate plan.

(d) Without limiting other criminal or civil remedies, if the attorney-in-fact takes an action that violates this subsection, the action can be used as evidence in a criminal or civil proceeding, and the attorney-in-fact is liable to the principal or the principal's successors in interest for the amount required to do both of the following:

(i) Restore the total value of the principal's property to what it would have been had the violation not occurred.

(ii) Reimburse the principal or the principal's successors in interest for the attorney fees and costs paid on the principal's and attorney-in-fact's behalf.

I believe this makes a Durable Power of Attorney costly, complicated and impractical.

**Senate Bill 1054 (2020)** provides for the formation of corporations for the purpose of owning, maintaining and improving lands and other property kept for the purposes of summer resorts or for ornament, recreation or amusement.

This would be in addition to existing law on summer resorts. The bill makes the Board of Directors all stockholders. A stockholder can delegate a family member to the Board of Directors. There is a proposed size limitation of 700 acres and value up to $6 million. It appears to be an effort to codify summer resort and park associations.

## New Public Acts

### 2020 PA 183, House Bill 5148 (Eff. October 8, 2020)

It would appear that attorneys had some influence on this legislation concerning adoption. It amends the Probate Code of 1939 by amending section 55 of chapter X (MCL 710.55). Present law allows a biological parent or guardian, the court, department, or child placing agency with authority to place a child may advertise for, solicit, or recruit potential adoptive parents. No other person or entity may advertise for, solicit, or recruit prospective parents.

The addition to MCL 710.551 states as follows:

> Advertise for, solicit, or recruit does not include disseminating information about the availability of an attorney's legal services, including an advertisement or website as allowed under the Michigan Rules of Professional Conduct.

### 2020 PA 184, House Bill 5149 (Eff. January 6, 2021)

Present law which prohibits transfer or attempted transfer of legal or physical custody of an individual to another person for money or other consideration. The addition to the statute *excludes an adoption attorney* in a court supervised adoption and other circumstances such as relatives, child planning agreements and HHS Services.

### 2019 PA 113, Senate Bill 100 (Eff. October 1, 2021)

The age of offenders for specific juvenile violations under the Probate Code of 1939 is changed from 17 years of age to 18 years of age.

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## Ethics and Unauthorized Practice of Law

### By Raymond A. Harris

### Preventing Data Breaches in the COVID Era

Every day brings new stories of companies or governments being hacked and private data being leaked. In the first three quarters of 2020 alone, there were 2,935 publicly disclosed breaches, amounting to the disclosure of 36 billion records.[1] When one thinks of such occurrences, large scale breaches suffered by Target or Experian spring to mind. However, law firms are not immune, and bad actors are increasingly targeting law firms for the wealth of sensitive information under their control. In 2017, DLA Piper, one of the largest law firms in the world, suffered a complete worldwide outage of its email system for an entire week due to a ransomware attack originating from its Ukraine office.[2] The 2016 "Panama Papers" leak also originated from a law firm, Mossack Fonseca, in which 11.5 million documents totaling 2.6 terabytes were released.[3]

A law firm that suffers a data breach risks more than the loss of clients or standing in the community. A law firm could be subject to damages should its clients be adversely affected, and attorneys may face potential violations of the Michigan Rules of Professional Conduct.[4]

Data security is especially important in the era of COVID and remote work. Because so many law firms have enacted remote work policies, the amount of digital information needed to sustain this practice has increased accordingly. Therefore, it is paramount that law firms have robust systems in place to prevent the devastating occurrence of a data breach.

1. *Home network security*. Even if your law firm has a secure office network, employees working on unencrypted home networks can compromise the firm's office network because data on an unsecured network is freely accessible to third parties. Firms should ensure that their remote employees do not have unsecured Wi-Fi networks while at home.
2. *Traveling network security*. For employees on the go, it may be tempting to use public Wi-Fi networks offered by restaurants and airports. However, just like an unsecured home network, public access points can compromise the firm's office network security. Traveling employees who use public access points should use either their smartphone hotspot function or utilize a Virtual Private Network (VPN) service so that data between the employee and the law firm is encrypted.
3. *Anti-phishing training for employees*. The best security solutions can be defeated by a simple phishing attack. Phishing is defined as "a scam by which an Internet user is duped (as by a deceptive e-mail message) into revealing personal or confidential information which the scammer can use illicitly."[5] For example, assume an employee receives an email purporting to be from Microsoft informing the employee that Outlook needs to be updated via the link in the email. The employee clicks the link, which then downloads malware directly onto the employee's computer that quickly spreads to the firm's network. This is an all-too-common occurrence and is how DLA Piper was compromised. Employees should be trained to recognize phishing emails.
4. *Adequate data backups*. If your firm's network is compromised, it is vital that your data is backed up so that it may be retrieved securely in the event of a ransomware attack.[6] This would include firewalls, so that backups are not compromised, and off-site storage to protect against physical damage by fire or

flood.

5. *Vendor data security*. Most law firms will not have a dedicated IT department and so will rely on third-party vendors to provide IT services. Ensure that the vendor has a good reputation in the community and is familiar with the unique challenges that law firms face compared to other industries.

Vendor security also arises in the cloud computing context. Your firm's sensitive data could be leaked if hackers target the cloud computing vendor without targeting your firm itself. Firms utilizing cloud services should consider using a hybrid system wherein the most sensitive data is stored locally and less sensitive data is stored on the cloud service. Data stored in the cloud should also be encrypted to prevent unauthorized access should the cloud provider be hacked.

6. *Passwords*. Along with phishing attacks, weak passwords are the low hanging fruit for bad actors. Passwords should never contain easily guessable information such as birthdays or the names of loved ones. Consider using password management tools so that unique, strong passwords can be used for each specific site or service without the need to write passwords down on paper. Multifactor authentication can also prevent attacks.

**Notes**

1. https://www.securitymagazine.com/articles/94076-the-top-10-data-breaches-of-2020.
2. https://www.biggerlawfirm.com/do-not-fall-down-the-rabbit-hole-of-a-law-firm-data-breach/.
3. https://en.wikipedia.org/wiki/Panama_Papers.
4. The comment to MRPC 1.1 states that "[t]o maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter." Ethics Opinion RI-381 further opines that technology competence includes cybersecurity and the ongoing confidentiality of clients' Electronically Stored Information (ESI) pursuant to MRCP 1.6. https://www.michbar.org/opinions/ethics/numbered_opinions?OpinionID=1251&Type=6&Index=C.
5. https://www.merriam-webster.com/dictionary/phishing.
6. "Ransomware" is defined as "malware that requires the victim to pay a ransom to access encrypted files." https://www.merriam-webster.com/dictionary/ransomware.

Raymond A. Harris is a shareholder in the firm Buhl, Little, Lynwood & Harris, PLC in East Lansing. He practices in the areas of estate planning, elder law, Medicaid and disability planning, trust and estate administration, and probate litigation. He is licensed to practice law in Michigan and Florida. Ray is the past president of the Michigan Chapter of the National Academy of Elder Law Attorneys and is a council member of the State Bar of Michigan's Elder Law and Disability Rights Section. He is the past president of the Greater Lansing Estate Planning Council. In 2014, he was named by Michigan Lawyers Weekly as one of the "Up and Coming Lawyers" and was named by SuperLawyers as a "Rising Star" in Elder Law from 2015 to 2020.

# Nominations for 2021-2022 Probate and Estate Planning Council

The Nominating Committee of the Probate and Estate Planning Council of the State Bar of Michigan is seeking nominations for Council member and Treasurer for the 2021-2022 year.

If you wish to nominate a candidate, submit your nomination to the Nominating Committee no later than February 28, 2021. The Nominating Committee consists of the three prior Section Chairs: Marlaine C. Teahan, Marguerite Munson Lentz, and Christopher A. Ballard.

The Nominating Committee considers the following factors in making its nomination decisions:

**For new Council members:**

1. Prior attendance at the Committee on Special Projects ("CSP")/Council meetings and participation on CSP/Council committees.
2. Prior contributions to the probate and estate planning bar, including but not limited to through speaking (e.g. ICLE and other continuing legal educations presentations) and writing (e.g., Section Journal, State Bar Journal, ABA, and other professional organizations).
3. Years of experience in the individual's practice that have been committed to trusts and estates work.
4. Contribution to the diversity of the Council, including in the following areas:
   a. geography (e.g. representation in areas of the state currently proportionately underrepresented on the Council);
   b. law firm size;
   c. representation of the areas of private law practice, government (probate court), and banking (professional trustee); and
   d. gender, race, and ethnicity.

**For officer positions (in addition to the above considerations):**

1. Overall contributions to the Council, the Section, and its mission, with emphasis on contributions made during the Council member's term(s) on the Council.
2. Exhibited leadership skills appropriate to the officer positions, including Chair of the Section.

Please feel free to join us for monthly Council meetings (a schedule is posted on the State Bar website at connect.michbar.org/probate). All Section members are welcome to attend. Additionally, if you are interested in a standing committee of the Council, contact the chair of that committee or ask to join (connect.michbar.org/probate/council/join). Attending meetings and serving on committees are both good ways to see the Council in action and determine whether you would have an interest in serving as a member of Council.

The slate of nominations for 2021-2022 will be presented at the June 25, 2021 Council meeting; after that meeting, nominations will be closed. The vote for Officer and Council Member positions will occur at the Section's Annual meeting on September 17, 2021.

Please email your nominations to the Committee members: mteahan@fraserlawfirm.com, mlentz@bodmanlaw.com, and caballard@varnumlaw.com. All nominations received by February 28, 2021 will be considered. Nominations received after that time are welcome and may also be considered but might be deferred to a future year.

Sincerely,

Marlaine C. Teahan, Chair
Nominating Committee
Probate and Estate Planning Section

# State Bar of Michigan
# Members of Section Council 2020–2021

## Officers

Chairperson:
David P. Lucas
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Treasurer:
Katie Lynwood
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# ICLE Products of Interest to Probate Practitioners

## *Books*

### *Michigan Probate Litigation, Third Edition*

*Edited by Douglas A. Mielock and David L.J.M. Skidmore*

Covers all aspects of probate litigation from procedural issues to substantive challenges to specific documents. Whether it is an incapacity allegation, a challenge to real or personal property, or a claim against the estate, this has the expert advice you need to win in court.

| *Prices: | | | 0-4 Attorneys | 5-29 Attorneys | 30+ Attorneys |
|---|---|---|---|---|---|
| **Print Book** | $149.00 | **Online Book** | $189.00 | $299.00 | $549.00 |

***Product #:*** *2017556521*

### *Estate Administration in Michigan, Second Edition*

*By Michele C. Marquardt and Michael D. Holmes*

Whether this is your first estate or hundredth, this book will eliminate unnecessary delays and missteps with the probate court. In addition to step-by-step instructions on filling out the right SCAO forms, this resource will you to determine the right form of administration so your client moves quickly through the process.

| *Prices: | | | Firm Size<br>0-4 Attorneys | 5-29 Attorneys | 30+ Attorneys |
|---|---|---|---|---|---|
| **Print Book** | $199.00 | **Online Book** | $189.00 | $299.00 | $549.00 |

***Product #:*** *2012556535*

## *Upcoming ICLE Seminars*

### *Remote Notarization and Witnessing Update*

*Presented by Howard H. Collens, Nathan R. Piwowarski, and Max H. Matthies*

Cosponsored by the Probate and Estate Planning Section of the State Bar of Michigan. HB 6294 and HB 6297, addressing remote notarization and witnessing and ratifying those acts done under the executive orders, have been passed by the Michigan Legislature. Our experts discuss what this legislation does, what has changed, and what you need to do now.

**On-Demand Seminar** **Now Available!**

**General fee: $**95 ***Seminar #: 2020CT6561***

**Section Members:** $85 **ICLE Partners:** Free **New Lawyers:** $45

### *Drafting an Estate Plan for an Estate Under $5 Million (March 2021)*

*Presented by Michele C. Marquardt*

Cosponsored by the Probate and Estate Planning Section of the State Bar of Michigan. Understand the best solutions to typical issues fround in drafting an estate under $5 million. Participation is limited to 27, and the focus is on interaction with your peers and the instructor.

**Online Seminar** **Livestream:** March 18, 2021

**General fee: $3**95 ***Seminar #: 2021CL6592***

**ICLE Partners:** $395 **New Lawyers:** $395

# SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

| **Date** | **Place** |
|---|---|
| Saturday, February 20, 2021 | University Club, Lansing |
| Friday, March 19, 2021 | University Club, Lansing |
| Saturday, April 24, 2021 | University Club, Lansing |
| Friday, June 25, 2021 | University Club, Lansing |

Each meeting starts with the Committee on Special Projects at 9:00 a.m., followed by the meeting of the Council of the Probate & Estate Planning Section, except for the Annual Meeting of the Section, which is held in September, the Committee on Special Projects will start at 9:00 a.m., followed by the Annual Meeting of the Section at approximately 10:00 a.m., which will then be followed by the September Council meeting.

**Due to COVID-19 restrictions, some meetings may be held by Zoom. Members will be sent a notification in advance of any remote meetings.**