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Featured Articles:

STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

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Editorial Policy

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.

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria. Manuscripts and letters should be sent to Nancy L. Little, Managing Editor, *Michigan Probate and Estate Planning Journal*, Bernick, Radner & Ouellette, PC, 2400 Lake Lansing Rd., Ste. F, Lansing, MI 48912, (517) 371-5361, fax (517) 371-1211, e-mail nlittle@borpc.com.

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From the Desk of the Chairperson

By Amy N. Morrissey

As incoming chair of the Probate & Estate Planning Section, I attended the State Bar of Michigan Leadership Forum this past June. The Leadership Forum is intended to educate leaders of State Bar Sections and affiliate bar associations about leadership tools and opportunities and to promote collaboration and the sharing of ideas. The keynote speaker was a dynamic consultant whose focus was on engaging and expanding organization membership. I felt very energized by her words.

The Probate & Estate Planning Section is one of the Bar's largest and most active Sections. How has this happened? Members of our Section are engaged in a very personal area of practice. Relationships are important, not only to our clients, but our practitioners as well. When we invest in relationships, they become stronger. I believe that personal relationships have served to build an energetic Section.

The June keynote speaker stressed the importance of connecting Section leadership with Section members and Section members with one another. She noted, as we can readily observe, that how people interact has changed dramatically over the past half century, and even more dramatically in the past decade. We don't even have to leave the comfort of our pajamas to "chat," attend a seminar or discuss a resolution to a problem with multiple parties.

While I was all but ready to reject this notion that it is not necessary to leave the house or one's pajamas to truly connect with people, perhaps a bit vexed by the fact that I have had some very challenging travels to Lansing for Section meetings, I realized that there are many ways in which Section members can and do interact with one another to build relationships and make an impact as it relates to their professional work and our Section work.

Some of our Section's tremendous committee work is performed via conference call and email. I was reminded of the impact of our committee members while working recently on a legislative issue of great importance to our membership and the general public - fiduciary access to digital assets. A Section committee member whom I have never personally met wrote and delivered eloquent testimony on this particular piece of legislation to which he has invested great time and energy. Many of you have assisted (or have been assisted by) your fellow practitioners via our Section's online communities and listserv. Perhaps you have mentored a new attorney. This kind of dedication and commitment builds personal relationships that make our Section strong.

This is not to say that "live" personal encounters are not important. There continues to be great benefit to them. I welcome the opportunity to see you at a monthly Section meeting in Lansing. I admit that initially, I was reluctant to give up several Saturday mornings each year to attend Section meetings. But, each time I attend, I receive an invaluable education from my colleagues, surpassed only by the friendly and enjoyable interactions that can only be achieved in person.

I look forward to serving you this year.

Sebastian V. Grassi, Jr. Receives the Michael W. Irish Award

By Nancy L. Little

The Michael W. Irish Award was created by the Council of the Probate and Estate Planning Section for the purpose of honoring a practitioner, based on the recommendations of his or her peers, whose contributions to the Probate and Estate Planning Section of the State Bar of Michigan, and whose service to his or her community, reflect the high standards of professionalism and selflessness exemplified by the late Michael W. Irish.

Since its creation in 1995, sixteen practitioners have been honored with the Michael W. Irish Award. This year, that award was presented to Sebastian V. Grassi, Jr., of Troy. Before a catastrophic back injury ended his career, Sebastian was a tireless volunteer for our Section. He is also a devoted family man to wife Elizabeth, and his children Laura, Stephen, and Carolyn, active in his faith community, and a good friend to all. We all miss Sebastian's presence, as well as his many contributions, at various Council and practice-related functions.

I have known Sebastian for many years, and I have worked closely with him on many projects. Sebastian is a modest person, and when I finally reviewed his full resume, I was amazed at the full depth and breadth of his accomplishments.

Sebastian graduated from Lehigh University in 1976, and obtained his J.D. in 1979 at the University of Detroit-Mercy School of Law, where he served as a member of the School's Law Review. After graduation, Sebastian began a long and distinguished career, practicing in the areas of estate planning, trust and estate administration, closely held businesses and related real estate matters, and complex tax issues.

Sebastian also embarked on a prodigious career as an author, speaker, and source of advice and support for other practitioners, all the while maintaining a busy legal practice. He once told me his goal was to "publish 50 by 50"—50 books or scholarly articles by the age of 50 years. Sebastian far exceeded that goal; at last count, the total was nearing 120 articles. Many of us wondered when (and if) Sebastian ever slept! Jeff Kirkey of ICLE describes Sebastian as "ICLE's best friend" for his many contributions to ICLE's continuing education programs, and he was always a reliable go-to author when we needed articles for the Probate & Estate Planning Journal.

Many of our law libraries include books Sebastian published for ALI/ABA, such as A Practical Guide to Drafting Irrevocable Life Insurance Trusts (with Sample Forms and Checklists), A Practical Guide to Drafting Marital Deduction Trusts (with Sample Forms and Checklists), and A Practical Guide for a Family with a Special Needs Child. On several occasions, Sebastian was awarded the American Bar Association's Probate & Trust Excellence in Writing Award. Sebastian also authored works for Matthew Bender/Lexis-Nexis, CCH Tax and Accounting, the American Bar Association's Probate & Property Journal, the State Bar of Michigan's Probate & Estate Planning Journal, Tax Management's Estates, Gift and Trusts Journal, The Practical Tax Lawyer, and many others. His works also have been cited numerous times in national publications.

In addition to writing, Sebastian frequently taught and lectured on estate planning, estate and trust administration, and tax matters. He was a guest lecturer at the University of Michigan Law School on numerous occasions. He also lectured at the Electronics Industry Management College of Beijing, China, and at over 40 continuing legal education programs with the ABA, the Heckerling Institute, ACTEC, ICLE, and several state and local bar associations.

In the midst of his family life, busy practice, and his teaching and writing, Sebastian also served on the Council of the Probate and Estate Planning Section of the State Bar of Michigan, as well as several of its committees: Uniformity of Practice, Education and Advocacy Services for Section Members, Journal, Transfer Tax, Specialization and Certification, Rule Against Perpetuities, Advising the Fiduciary, Insurance Interest, Real Property Tax Issues and the Michigan Trust Code. He also served on advisory boards for ALI-ABA Continuing Legal Education and ICLE.

Despite his many accomplishments, Sebastian has never been too busy to take a call—from any member of the Bar—to patiently answer questions, provide advice, or act as a sounding board.

With characteristic modesty, Sebastian responded to his selection for the Michael W. Irish Award by stating, “I am most honored and humbled to have received such a prestigious award. My most heartfelt thanks to the Michigan Probate Council for bestowing the award on me.” Sebastian, our most heartfelt thanks to *you* for your generous spirit, for all you have done for the Section, for your commitment to the estate planning practice in general, and most of all for your friendship. The Michael W. Irish Award is an honor that is truly well deserved by you.

Nancy Little, Sebastian Grassi, and George Gregory

Hey, What's the Big Idea?! Why Estate Planners Need to Understand the Basics of Intellectual Property

By Hope Shovein and Katie Lynwood

People who have big ideas are intriguing. How did they come up with it? Was it prompted by their need for something? For example, Sara Blakely created a woman's favorite invention—SPANX®—when she could not find the right garment to wear under her clothes to make her look slimmer. Mark Zuckerberg, co-founder of FACEBOOK®, created an international phenomenon in his Harvard dorm room that now allows people to communicate, market, and network. It had its first public offering in 2012.

How do these ideas affect estate planners? Does your client have intellectual property (IP)—such as copyright, trade secrets, patents, or trademarks—to protect? Understanding how to transfer IP rights can be just as important as understanding how to obtain the initial IP rights.

IP rights are intangible rights to an idea or the expression of an idea. They are a form of property and are important to consider in estate planning. The goal of this article is to briefly explain the most common forms of IP, and how each is transferred during the client's lifetime or at death.

Copyright

A copyright protects the *expression* of an original idea or thought, but not the idea itself. The right is created the moment the expression is fixed in a tangible medium (for example, when a painting is painted). The copyright owner also has the exclusive rights to copy the work, prepare derivative works, distribute copies of the works, and perform or display the work publicly or through digital audio transmission. Some examples of works that may be protected via copyright are books, software, music, plays, movies, paintings/art, architecture, choreography, and other composition art.

The creator/owner may register their ownership with the U.S. Copyright Office. Registration is not required, but it does provide certain additional rights and is a prerequisite to bring a copyright infringement claim in federal court.

The duration of copyright protection can depend on several factors. In short, for works created on or after January 1, 1978, the Copyright Act automatically protects a work from the moment that it is created and fixed in a tangible medium of expression, and it gives it a term lasting for the author's life plus an additional 70 years.

Patents

Patents protect new, useful, and nonobvious inventions. A patent is a property right granted by the U.S. government to an inventor "to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States" for a limited time in exchange for public disclosure of the invention when the patent is granted. In order to obtain a patent, the inventors must file an application with the U.S. Patent Office. The Patent Office then examines the application ,and, if it finds that the invention meets all of the requirements for patentability, it will grant a patent.

The two most common types of patents are utility patents and design patents. A utility patent protects an invention that performs a new and useful function, or an improvement to an existing process, and protection exists for 20 years from the application filing date. A design patent protects a new, original, and ornamental design of something (as opposed to the functional design), and it exists for 14 years from the issue date.

Patents are not renewable. Once they expire, the underlying invention falls into the public domain.

Trademarks

A trademark is a word, name, symbol, or design that identifies the source of a product or service, so that the source is readily identifiable for consumers. Trademark rights are established as soon as the trademark is used in connection with the sale of goods or services, and they exist so long as the trademark is in continuous use.

Federal registration of a trademark provides public notice of a claim of ownership in a mark (the ® symbol may only be used in connection with federally registered marks), opportunity to obtain enhanced damages in litigation, the legal presumption of ownership, nationwide rights on or in connection with the goods or services identified in the registration, and can often form a basis for registration in foreign countries. Federal registrations must be renewed every ten years and require a showing of continued use of the mark in commerce.

Estate Planning Considerations

These types of intellectual property—copyrights, patents and trademarks—can be owned by individuals, groups of individuals, or various types of entities. If your client owns IP, they will need to decide who will have the authority and ownership over their IP, and whether the transfer should occur during their lifetime (which could have tax consequences) or at death. If rights are transferred following your client's death, they may be transferred via a will or trust agreement, through intestate succession laws, or other written documents prepared before death.

Wills, Trusts, and Powers of Attorney

If the client dies without a will ("intestate"), the state intestate succession laws will decide how the client's property—including IP—is distributed and who has priority over its management. Intestate succession may produce undesirable results.

If owned by an individual, the client should determine who will *own* the IP rights on death and include distribution provisions in their will and/or trust. Although most wills contain bequests of "tangible personal property," that language may not transfer IP rights, leaving IP rights in the client's "residuary estate" to be divided among beneficiaries according to the general instructions for asset distribution in estate planning documents. Obviously, this can lead to unintended results.

Although all potential issues cannot be addressed here, several deserve special attention. In general, having a sole owner of IP is the preferred route. How multiple owners interact can create complications, often negative. This may be avoided during estate planning by creating an entity that will hold the rights to the benefit of multiple individuals/rights holders.

Further, special language must often be used to avoid invalidating or weakening IP rights. For example, a trademark cannot be distributed as a "naked" asset. It must always be transferred with the good will residing in the trademark. Also, the bequest may also include the right to sue for damages before the transfer.

Such language can be very specific, transferring some or all IP rights to one or more beneficiaries in a manner that the client prefers. Perhaps the most important thing is that the decision is made in advance, by the client, not the courts.

In addition to identifying who will *own* the IP in the client's estate or trust, the client's decision regarding *management* of the IP should be included in the general durable power of attorney, will, and trust. The client may want to name a separate fiduciary to handle the IP. For example, if the client owns a copyright to their book of research on behavioral psychology, the client may decide to name a certain individual in the client's trust to act as the trustee over the copyright. The individual the client selects will probably be someone they work with in their field of psychology because this person will understand the importance of the information along with the subject matter. The client would then name another individual or corporate fiduciary to act as the trustee over all other assets in their trust.

Lifetime Transfers

The client may have various reasons for choosing to transfer IP rights during his or her lifetime, as opposed to including it in an estate plan. Should the client choose to transfer rights during his or her lifetime, it is important that any name changes or assignments are recorded with the U.S. Patent and Trademark Office or the Copyright Office so that the chain-of-title is current should there be any issues on your client's death.

IP rights are typically transferred via formal assignments from one individual or entity to another. For example, consider how real estate is transferred. In order to transfer real estate, a deed must be signed and recorded with the county register of deeds.

Other Planning Issues

The value of the IP should also be considered when analyzing IP from an estate planning perspective. It could be that the IP is valuable enough to affect the client's federal estate tax exemption amount. If the client has a high-valued IP, they should have it appraised to ensure that it will not cause future estate tax. In addition, if the IP is transferred as a gift during the client's lifetime, consider whether it qualifies for the annual gift tax exclusion.

The U.S. Patent and Trademark Office has special procedures that must be followed if the inventor dies before filing a patent application or during the prosecution process. These procedures generally require a legal representative to execute documents that would normally be executed by the deceased inventor. It is advisable to consult a patent attorney about the proper procedures to follow should this situation arise.

Another issue to consider in estate planning: in some cases, the Copyright Act provides the author the power to terminate a transferred copyright at a future date. If the author is deceased, then the author's surviving spouse, children, grandchildren, or personal representative may have a nonassignable, nonwaivable right to terminate most transfers and licenses granted by the author during a certain time frame.

Conclusion

IP rights can be very valuable and may comprise a large portion of your client's total estate. Proper estate planning is necessary so that rights pass as the client intends. If you are creating an estate plan for a client, or assisting a client with administering an estate or trust that includes IP, you should consult an experienced IP attorney to determine the rights involved, ownership, value, and how rights may be transferred.

	Copyright	Patent	Trademark
What does it protect?	The expression of an idea.	A new, useful and nonobvious invention.	A word, phrase, symbol or design, or a combination thereof, that acts as a source designation for goods and/or services.
How are rights obtained?	The work must be fixed in a tangible medium of expression. Additional rights are granted by federal registration.	Filing an application with the U.S. Patent and Trademark Office.	Rights are created when the trademark is used in connection with the sale of goods and services. Additional rights can be conferred by federal and/or state registration.
Term	For works created after 1/1/1978, the copyright lasts for the life of the author plus 70 years. For "works made for hire," the copyright lasts for ninety-five years from their first publication, or 120 years from their creation, whichever term expires first.	For applications filed on or after 6/8/1995: Utility patent – protection for 20 years from application filing date, subject to payment of maintenance fees; Design patent – protection for 14 years from issue date.	Rights exist so long as the trademark is in continuous use. Federal registrations must be periodically maintained – A "Declaration of Use" must be filed between the fifth and sixth year following registration. A combined "Declaration of Use and Application for Renewal" must be filed between the ninth and tenth year after registration, and every 10 years thereafter.

Hope Shovein is a Senior Attorney at Southfield-based Brooks Kushman P.C., where her practice focuses on the procurement and enforcement of trademark rights. Hope serves on the State Bar of Michigan Board of Commissioners, is the Chair of the SBM Young Lawyers Section, and sits on the council for the SBM IP Section. She is also a member of the Enforcement Committee of the International Trademark Association. She was listed as a "Michigan Super Lawyer" for Intellectual Property in 2013 and 2014 and named a Michigan Super Lawyers Rising Star in 2011 and 2012. She was also named a Top Lawyer by DBusiness Magazine for 2011-2014 and an Up & Coming Lawyer by *Michigan Lawyers Weekly* in 2010. She speaks and publishes regularly on IP-related topics.

Katie Lynwood is an attorney with Bernick, Radner & Ouellette, PC in Lansing. She practices estate planning, probate and trust administration, probate litigation, Medicaid planning and elder law. She is licensed to practice in both Michigan and Florida. Katie is a frequent speaker and author on topics related to Medicaid planning, elder law, probate and estate planning. She is a past President of the Greater Lansing Estate Planning Council and serves on the Institute for Continuing Legal Education Young Lawyers Advisory Board. In 2013 she received the Ingham County Bar Association Young Lawyers Section Top 5 Under 35 Award; the *Michigan Lawyers Weekly* Up & Coming Award; and in 2013 and 2014 was named a Michigan Super Lawyers Rising Star in the areas of Estate Planning and Probate. In September 2014 Katie was chosen as one of the Lansing Chamber of Commerce's "10 Over the Next Ten" by the Lansing Chamber of Commerce, an award that recognizes the Lansing region's top young professionals who are anticipated to contribute significantly to the community in the next ten years.

A Newly Revised *Post* Perpetuities Reform RAP Applicability Flowchart for Property Subject to Michigan Law*

James P. Spica

Editor's synopsis: Having developed an earlier version of the perpetuities flowchart that composes Part V of this Article to acquaint readers with perpetuities reform in Michigan, the author has taken the occasion of updating the flowchart (to reflect recent changes in Michigan law concerning "trust decanting") to preface the flowchart with two primers that will be of general interest to practitioners dealing with either state-law perpetuities reform or federal tax aspects of perpetuities rules. The first primer, composing Part II of the Article, is on the common law and uniform statutory rules against perpetuities. The second primer, composing Part III of the Article, is on federal tax aspects of the common law rule, the uniform statutory rule, and the regulatory rule against perpetuities invented by the United States Treasury for purposes of the generation-skipping transfer tax effective date regulations.

Introduction

An earlier version of the perpetuities flowchart in Part V of this Article was published in 2010 as an appendix to an article about exercises of special powers of appointment over tax advantaged trusts in the atmosphere of perpetuities reform.[1] The flowchart was updated in 2011 (by the addition of question, or stimulus, 4)[2] to reflect the enactment of Michigan 2011 Public Acts Numbers 11 and 12,[3] the confluence of which made Michigan's Personal Property Trust Perpetuities Act of 2008[4] (PPTPA) more instructive for those wielding special powers of appointment over personal property held in trusts "grandfathered" from federal generation-skipping transfer (GST) tax under the United States Department of the Treasury's GST tax effective date regulations.[5]

The flowchart is newly updated in this Article (by the addition of stimuli 10 through 12) to reflect the enactment of Michigan Public Act 484 of 2012,[6] amending PPTPA to bolster that statute's anti-Delaware-tax-trap provision in light of the possibility that when a trust is created by the exercise of a nonfiduciary special power of appointment, a "decanting" power in the appointive trustee might be viewed as a "second power" for purposes of the so-called Delaware tax trap.[7] Occasion is taken here to preface the flowchart with two primers in light of which, it is hoped, distinctions drawn in the flowchart will be more intelligible to readers not already familiar with the rule against perpetuities (RAP) and its refractions through state-law statutory reform and federal transfer taxation. The first primer, composing Part II of the Article, is on the common law RAP and the uniform statutory rule against perpetuities (USRAP), both of which preceded the reign of PPTPA in Michigan, and the latter of which PPTPA overlies. The second primer, composing Part III of the Article, is on the federal tax aspects of the common law RAP, the USRAP, and the regulatory RAP invented by the United States Treasury for purposes of the GST tax effective date regulations.

A Primer on the Rule Against Perpetuities

The Common Law Rule

Scope

The standard, one-sentence formulation of the common law RAP, namely John Chipman Gray's,[8] slurs over two important points. Gray says, "No interest [legal or equitable, in realty or personalty] is good, unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[9] This formulation fails to indicate (1) that the RAP applies to powers of appointment[10] (which are not classically regarded as property)[11] and (2) that the rule's application to future interests is only to *transferred* future interests—the common law rule has no application to *retained* future interests, that is, to reversions, possibilities of reverter, and rights of entry.[12] (As to reversions and possibilities of reverter, the conceptual rationale for the RAP's inapplicability is simply that such interests are always vested.[13] As to rights of entry, the conceptual rationale is more fugitive, but the result is no less certain.[14])

It is important to note that though the RAP applies to beneficial *interests* in trusts, that is, to equitable as well as transferred legal interests in realty or personalty,[15] and to powers of appointment, the rule does not apply to *trusts themselves*: trusts are legal relations *in respect of* (or *with relation to*) property, but they are not themselves property (legal or equitable);[16] and trusts may involve fiduciary powers of appointment, but they are not themselves powers of appointment.[17] So, the control over the duration of trusts that the RAP exercises (when it applies) is indirect:[18] what the rule directly requires is only that there be, at some point during the perpetuities testing period, a finite set of determined and identified beneficiaries who collectively hold the totality of equitable interests in the *res*.[19] In England, *at that point*, the inclusive set of those beneficiaries can compel the trust's termination.[20] In the United States, the inclusive set of those beneficiaries may be made to wait if the settlor's "material purposes" entail the trust's "indestructibility," but the beneficiaries cannot be made to wait longer than the perpetuities testing period.[21] Thus, the medium of the RAP's control over the duration of whole trusts (as opposed to discrete equitable interests and powers of appointment over trust assets) is a rule allowing early termination (at some point) at the unanimous instance of the beneficiaries.

Paradigms of Compliance and Contravention

As a simple model of compliance with the RAP, suppose:

Example I

T transfers assets in trust "income to *A* for life, on *A*'s death to *A*'s children for their lives, then principal to *B*." At the time of the transfer, *A* has no children, and *B* is living.

At common law,[22] *A*'s "particular estate"[23] and *B*'s remainder are both vested upon creation[24] and so are unoffending.[25] (Those are the results *at common law*: it is important to note the potential effect of anti-lapse legislation on the analysis of *B*'s remainder as vested upon creation.)[26] The remainder to *A*'s children, though obviously not vested (since *A* has no children at the time of the transfer), is nevertheless valid under the RAP because the class of *A*'s children will be determined (according to the common law conception of what is possible in the way of posthumous birth), at the latest, on the expiration of a period of actual gestation beginning on the date of *A*'s death.[27]

As a simple model of contravention of the RAP, suppose:

Example II

T transfers assets in trust "income to *A* for life, on *A*'s death to *A*'s children for their lives, then principal to *A*'s living descendants." *A* has no children at the time of the transfer.

A's income interest and the remainder to *A*'s children (if *A* should have children) are both valid for the reasons given above (apropos of Example I).[28] But in light of the possibility that the survivor of *A*'s children will have been born after the date of transfer and will live beyond twenty-one years (plus gestation) from the death of *A*, the remainder to *A*'s remoter *descendants* is void *ab initio* at common law.[29]

Reversions (Reprise) and Resulting Trusts

We can deduce the RAP's inapplicability to reversions (discussed above[30]) by altering our "model of contravention of the RAP"[31] so that the interests created by *T* are legal interests rather than equitable ones. If we then ask what will happen, at common law, on the death of the survivor of *A*'s children (or on *A*'s death if *A* has no children), the undoubted answer, namely that *T* has an implied reversion,[32] implies a proof: by hypothesis, *T*'s reversion may become possessory sometime later than the end of the perpetuities testing period; therefore, to play its role as presumptive substitute for an interest that is invalid *ab initio*, the reversion must be vested *in interest* as of the time of *T*'s transfer. The same model as originally stated, that is, with hypothesized equitable interests rather than legal ones, yields an analogous proof of the RAP's inapplicability to so-called "resulting trusts," which are the equitable analogues of implied legal reversions.[33]

Creatures of Statute

The Uniform Statutory Rule

In many states, the common law RAP is supplanted by the USRAP. The USRAP sets out two alternative tests for validity, one to be satisfied, if at all, at the time a contingent future interest is transferred or a power of appointment is created, and one to be satisfied, if necessary, anytime within ninety years thereafter.[34] Adoption of the USRAP displaces the common law RAP in the adopting jurisdiction.[35] The common law perpetuities *testing period* is still relevant under the USRAP, for an interest that must vest, if at all, within that period is, *for that reason*, valid under the USRAP.[36] But an interest that may vest beyond the common law period is not *invalid* under the USRAP until the relevant "wait-and-see" period elapses, a result that flatly contradicts the common law RAP. Thus, one should not confuse the continued relevance of the common law *testing period* under the USRAP with continued *application* of the common law RAP itself: the USRAP makes use of the former while displacing the latter.

We can illustrate the USRAP's wait-and-see approach by returning to our "model of contravention of the RAP."[37] Again, suppose *T* transfers assets in trust "income to *A* for life, on *A*'s death to *A*'s children for their lives, then principal to *A*'s living descendants." Though the remainder to *A*'s descendants is not sure to vest, if at all, within the common law testing period,[38] it *could* vest within ninety years from the date of the transfer, and if it does, it will be valid under the USRAP. If that remainder does *not* vest within the wait-and-see period, the statute mandates that "[u]pon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates [*T*'s] manifested plan of distribution that is within the [wait-and-see period]."[39]

As to application only to *transferred* future interests, although the USRAP nominally applies to any "nonvested property interest," which would not exclude rights of entry, the USRAP specifically excludes any property "that was not subject to the common-law rule against perpetuities."[40] Again, the common law rule has no application to any *retained* future interest, including a right of entry.[41]

RAP-Like Rules Affecting Retained Future Interests

Several states regulate the duration of *retained* future interests by means of separate statutes.[42] Under Michigan's Possibilities of Reverter and Rights of Entry Act of 1968, for example, a retained future interest in, or power over, reality that, by its terms, becomes possessory or exercisable on a specified contingency is made unenforceable, by the statute, after thirty years unless the specified contingency must obtain, if at all, within "the period of the rule against perpetuities" (or the property subject to the retained interest or power is held for public, educational, religious, or charitable purposes).[43] It is not clear whether the statute's reference to "the period of the rule against perpetuities" is meant to peg the common law testing period (of a life in being plus twenty-one years) or, alternatively, to import whatever period, if any, would constrain the vesting of a *transferred* future interest in the same reality as of the time the regulated reversion, possibility of reverter, or right of entry is retained. In any case, the statute's effect on the regulated interest or power is more closely analogous to that of the USRAP (on *transferred* interests or powers) than to that of the common law RAP: if the contingency in question is not certain to occur, if at all, within the relevant perpetuities period, the retained interest or power is nevertheless enforceable within a thirty-year wait-and-see period.

Rules Against Suspension of Absolute Ownership or the Power of Alienation

The postponement of vesting is the conceptual province of all forms of RAP, whereas suspension of absolute ownership or the power of alienation is the province of a conceptually distinct group of rules.[44] Vesting is irrelevant to rules against suspension of absolute ownership or the power of alienation, under which a suspension occurs when there is no person or group of persons living who can convey absolute ownership of the property in question (as when trust principal is directed to someone yet unknown or unborn).[45] These rules are violated when such a suspension may last longer than the length of time allowable under statute, a period often similar to the common law RAP's testing period of a life in being plus twenty-one years.[46]

We can demonstrate the independence of the rule against suspension of the power of alienation from the common law RAP by adding to our "model of compliance with the RAP"[47] that the trustee is prohibited by the terms of the trust from selling the trust assets and that the trust in question is a "spendthrift" trust. In that case, in light of the possibility that the survivor of *A*'s children will have been born after the date of transfer and will live beyond twenty-one years (plus gestation) from the death of *A*, given that meanwhile, neither the trustee nor the inclusive set of beneficiaries can convey ownership of the trust assets, the remainder to *A*'s children may be void *ab initio* in a jurisdiction with a rule against suspension of the power of alienation. [48] And this is true notwithstanding that the remainder to *A*'s children is *valid* under the common law RAP.[49]

The common law RAP was partly superseded in Michigan from 1847 to 1949 by statutory provisions limiting suspension of the power of alienation.[50] Those provisions applied only to real property.[51] Later amendments repealed the provisions and restored the applicability of the common law RAP to real property, "thereby making uniform the rule as to perpetuities applicable to real and personal property."[52] There was no rule against suspension of absolute ownership or the power of alienation at common law[53]—though, of course, in saying this, we must be careful to distinguish the rule against suspension of the power of alienation from prohibitions against direct restraints on alienation that the law makes ineffective *per se*, without regard to their duration.[54]

Rule Against Accumulation of Income

Although its durational limit is that of the common law RAP testing period, the rule against accumulation of income is a common law rule independent of the RAP and is recognized as such in the United States.[55] We can demonstrate the rule against accumulation and its independence from the RAP by adding to our "model of compliance with the RAP"[56] that by the terms of the trust, income payments to *A*'s children are entirely discretionary for twenty-one years after *A*'s death, income thereafter to be accumulated until the death of the survivor of *A*'s children.[57] In light of the possibility that the survivor of *A*'s children will have been born after the date of transfer and will live beyond twenty-one years (plus gestation) from the death of *A* and that income may be accumulated over the duration, the directed accumulation beginning twenty-one years after *A*'s death may be void in a jurisdiction that recognizes the common law rule against accumulation of income.[58] This is true notwithstanding that the remainder to *A*'s children is *valid* under the common law RAP.[59]

Thus, in a jurisdiction that has enacted RAP reform, the reform's effect on the rule against accumulation of income may be an interesting question—if the reform legislation does not expressly refer to the rule against accumulation (and there is not authoritative case law in the jurisdiction that mistakenly identifies that rule with the RAP). The best reform statutes specifically refer to the rule against accumulation.[60]

Applications of the RAP to Powers of Appointment

As already noted, the common law RAP applies to powers of appointment as well as to transferred future interests,[61] and this is true too of the USRAP.[62] As applied to a power of appointment, the rule concerns both the validity of the power itself and the validity of interests (and powers of appointment) created by *exercise* of the power.[63]

Fiduciary and Nonfiduciary Powers of Appointment

A trustee's discretionary power to distribute trust assets, if it is discretion to decide whether to make certain trust distributions *or not*, is a special power of appointment within the meaning of most states' powers of appointment laws[64] and is so classified by the Restatement (Second) of Property: Donative Transfers (Restatement (Second)) and the Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement (Third)).[65] This is textbook knowledge on the classification of special powers of appointment.

> To be absolutely accurate, we should point out that a power of appointment may be created in a trustee, a beneficiary of a trust, a person with a legal interest not held in trust, or in a person who has no other interest in the property. . . . A trustee who has discretion to pay income or principal to a named beneficiary, or discretion to spray income among a group of beneficiaries, has a special power of appointment.[66]

Validity of the Power Itself is Patent When a Nonfiduciary Power of Appointment Is Created in a Living Person

Whenever a nonfiduciary power of appointment is created in a person living at the time of the power's creation, we know that that power must be exercised (and for so-called "nonimperative" powers, we must add, *if at all*) within twenty-one years of the death of a life in being at the time the power was created, namely the life of the power holder herself, for a power of appointment is not transmissible.[67] Therefore, the power of appointment must be exercised, if at all, by the "donee" of the power (or, in the case of so-called "imperative" powers or "powers in trust," by a court in default of the donee's exercise).[68]

Paradigmatic Invalidity of the Power Itself

We can illustrate invalidity of a power of appointment itself by adding to our "model of compliance with the RAP"[69] that *T* grants "the survivor of *A*'s children" a power to appoint the assets of the trust among *A*'s remoter descendants, and that *B*'s remainder is "in default" of exercise of the power. In that case, in light of the possibility that the penultimate survivor of *A*'s children will have been born after the date of transfer and will live beyond twenty-one years (plus gestation) from the death of *A*, the power of appointment is too remote under the common law rule: to be valid, the power must be sure to become exercisable, if at all, within the perpetuities testing period and, furthermore, because it is a special power, the power hypothesized here must be exercisable *only* within that period.[70] (Note that at common law, the existence of a valid power of appointment by which *B*'s remainder in default might be destroyed would *not* render *B*'s remainder contingent,[71] and, therefore, the invalidity of the power in our example here merely removes a threat of divestment from *B*'s vested interest.[72])

Validity of Interests Created by Exercise of a Power of Appointment

At common law, in the case of any power of appointment *other than* a presently exercisable general power,[73] the maximum period for which exercise of the power can postpone vesting of a future interest is measured from the time the power is created; in the case of a presently exercisable general power, the period is measured from the time the power is exercised.[74] This feature of the common law is unaffected by adoption of the USRAP. Thus, for example, if *H* has a power of appointment over reality subject to Michigan law, interests created by *H*'s exercise of the power will be subject to Michigan's USRAP,[75] but the relevant testing period, that is, the common law period or the ninety-year wait-and-see period,[76] will be measured either from the time *H* exercises the power or from the time the power was created, depending on whether the power is a presently exercisable general power or is otherwise.[77]

The State of Delaware is peculiar in applying the date-of-exercise convention, which the common law applies only to the exercise of a presently exercisable general power, to the exercise of *any* power of appointment: under Delaware statutory law, the period for which exercise of a testamentary general or special power of appointment can postpone vesting of a future interest is measured from the time the power is exercised, not from the time the power was created.[78]

Saving Clauses

A RAP "saving clause" is a provision in a trust (or other governing instrument) that forces interests either to vest or terminate within the relevant perpetuities testing period, thereby preventing affected interests from violating the RAP. If a saving clause stipulates what the drafter takes to be the relevant testing period, the clause may have application regardless of whether any RAP is actually implicated at the time of the saving clause's application. A trust provision, for instance, that simply vests, in the trust's then-current discretionary distributees, all nonvested interests "twenty-one years after the death of the survivor of [certain people] living at the time of the trust's creation" is liable to have that effect *regardless* of whether any form of RAP is (or need be) applicable at the time the provision operates.

Therefore, it is important to note, apropos of perpetuities reform in general, and for purposes of the flowchart in Part V of this Article in particular, that saving clauses vest or terminate interests; they do not *invalidate* them. To say that in a given jurisdiction (*post* perpetuities reform) the RAP is irrelevant to a given interest's *validity* says nothing about whether the interest is liable to be convulsed by the effect of a saving clause in the trust (or other governing) instrument.

It is also important to remember that the object of a saving clause that forces vesting—as opposed to terminating nonvested interests—is *vesting*; and vesting *in possession* is just one (and not necessarily the most advantageous) form of vesting.[79] If the longevity of tax advantages, like a GST tax exemption, is at stake, for instance, a saving distribution of trust principal to the then-current discretionary distributee may be suboptimal. A discretionary, fiduciary power to create a presently exercisable general power of appointment in that distributee's *descendants* may yield a far better result given the actuarially expected order of deaths. The point is that the granting of a presently exercisable general power of appointment is as good as a trust distribution for purposes of vesting: a presently exercisable general power of appointment vests all interests subject to the power in the power holder, for "a general power of appointment presently exercisable is, for perpetuities purposes, treated as absolute ownership in the donee [of the power]."[80]

The Alternative Contingencies Doctrine

Under the alternative contingencies doctrine, part of the common law RAP, a transfer under a later-of-two-events provision is made on two separate conditions for perpetuities purposes, and each of the conditions is evaluated separately.[81] This is of special importance for some GST tax planning purposes in jurisdictions that have adopted the USRAP, for the alternative contingencies doctrine is expressly incorporated in the uniform act[82] and, as discussed below, it can cause problems under the Treasury's GST tax effective date regulations.[83]

A Primer on Tax Aspects of the Rule Against Perpetuities

The Delaware Tax Trap

"Delaware tax trap" (Trap) is the colloquial name for Internal Revenue Code (Code) section 2041(a)(3) and its gift tax counterpart, Code section 2514(d), which provide that assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) transfer tax base (gift tax base or gross estate depending on whether the triggering exercise of the power is effectively testamentary) to the extent *H exercises* the power by creating another power (over the assets in question) that "under the applicable local law can be validly exercised so as to postpone the vesting of [interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[84]

Though the Code is not explicit on the point, legislative history indicates that the Trap was not intended to apply to purely fiduciary powers of appointment, a trustee's discretionary power to invade principal, for example.[85] And though the Trap refers to postponement of vesting and suspension of absolute ownership or the power of alienation in the *disjunctive*, it has been interpreted so that the Trap is sprung (that is, causes inclusion in the relevant transfer tax base) only if under the applicable local law *both* the period during which vesting may be postponed by exercise of the second power of appointment (the power created by *H*'s exercise of the first power) *and* the period during which absolute ownership or the power of alienation may be suspended by exercise of the second power can be ascertained without regard to the date of the first power's creation.[86]

So, in a jurisdiction without a RAP, a relation-back (-to-the-time-of-the-creation-of-the-"first-power") rule in conjunction with a rule against suspension of absolute ownership or the power of alienation may prevent the Trap from being sprung (if the instrument creating the second power—by exercising the first—does not itself avert the Trap—by effectively placing one of the relevant limitations on exercise of the second power).[87] And, contrariwise, in a jurisdiction without a rule against suspension of absolute ownership or the power of alienation, a relation-back rule in conjunction with an applicable RAP may disarm the Trap.[88]

In a jurisdiction that has a finite perpetuities testing period[89] and no rule against suspension of absolute ownership or the power of alienation, what prevents the Trap from springing (when the instrument of exercise does not itself do that) is, again, that at common law, in the case of any power other than a presently exercisable general power, the maximum period for which exercise of the power can postpone vesting of a future interest is measured from the time the power is created; in the case of a presently exercisable general power, the period is measured from the time the power is exercised.[90] So, in a jurisdiction in which *that* is true (that is, in any common law jurisdiction with a RAP, excepting Delaware),[91] inadvertent Trap springing (when it is not simply caused by ignorance of the Trap) is a matter of inadvertently creating a presently exercisable general power of appointment.

On the other hand, in such a jurisdiction, creating a presently exercisable general power of appointment can sometimes be beneficial for tax purposes, as when, for instance, a nonfiduciary special power holder's death would otherwise be a "taxable termination" within the meaning of the GST tax and the attributable GST tax would be more than the attributable estate tax under the Trap.[92] In that case, the Trap may be sprung on purpose—by the power holder's *knowingly* creating a presently exercisable general power.

The GST Tax Effective Date Regulations[93]

The Department of Treasury's Own, Regulatory RAP

The Treasury's GST tax effective date regulations generally exempt from GST tax any generation-skipping transfer under a trust that was irrevocable on September 25, 1985 provided that the trust is not tampered with in any of several prohibited ways.[94] One mode of tampering to which the effective date regulations devote elaborate attention involves post-GST-tax-effective-date exercises of fiduciary and nonfiduciary powers of appointment over grandfathered trusts. For purposes of determining the effect of such exercises on grandfathered status, the Treasury regulations impose a rule against perpetuities of their very own, one completely independent of state law perpetuities rules (Regulatory RAP). The Regulatory RAP period is twenty-one years from the death of any life in being at the time the grandfathered trust became irrevocable—or, for purposes of some of the regulations, the time the grandfathered trust was created—(plus gestation),[95] though in a nod to the USRAP, the regulations grant that

> the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date the original trust became irrevocable [or for purposes of some of the regulations, the time the grandfathered trust was created]) will not be considered an exercise that postpones or suspends vesting, absolute ownership, or power of alienation beyond the [regulatory] perpetuities period.[96]

The Treasury's Unwillingness to Wait and See

It is important to notice that the ninety-year period specified in the Treasury regulations as the Regulatory RAP alternative to the common law perpetuities testing period is *not* a "wait-and-see" period. Whereas the USRAP sets out two alternative tests for validity, one to be satisfied, if at all, at the time a contingent future interest is transferred or a power of appointment is created, and one to be satisfied (if necessary) anytime within ninety years thereafter,[97] the effective date regulations set out two alternative tests, one or the other of which must be satisfied *at the time of exercise* of a special power of appointment over assets of a grandfathered trust. Thus, an exercise of a special power may be unoffending under the regulations if either (i) it cannot cause postponement or suspension of vesting, absolute ownership, or the power of alienation beyond twenty-one years from the death of some life in being at the time the grandfathered trust became irrevocable—or, in some cases, at the time of the grandfathered trust's creation—(plus gestation) or (ii) it cannot cause postponement or suspension of vesting, absolute ownership, or the power of alienation beyond ninety years from that date.[98]

It follows that the exercise of a power so as to postpone or suspend vesting, absolute ownership or the power of alienation for whichever of the testing periods (the common law period or ninety years) turns out to be the *longer* will satisfy *neither* of the regulatory tests, for *as of the time of exercise*, it is possible (i) that vesting, absolute ownership or the power of alienation will be postponed or suspended for longer than twenty-one years from the death of some life in being at the time the grandfathered trust became irrevocable—or was created—(in case all of the measuring lives terminate prematurely) *and* (ii) that postponement or suspension will continue for longer than ninety years from that date (in case any of the measuring lives demonstrates pronounced longevity).[99]

As noted above, however, the alternative contingencies doctrine is expressly incorporated in the USRAP.[100] So, a longer-of-the-two-testing-periods disposition may be valid in a jurisdiction that has adopted the uniform statutory rule, notwithstanding that such a disposition is liable to violate the Regulatory RAP as to assets grandfathered from GST tax. Section 1(e) of the USRAP prevents certain longer-of-the-two-testing-periods dispositions from violating the Regulatory RAP by generally causing any stated term-certain alternative to a period specified by measuring lives in conjunction with a tack-on number of years (for example, twenty-one years from the death of some life in being at some time) to be ignored.[101] But in a state that has adopted the USRAP without enacting section 1(e), or in circumstances to which the enacted version of section 1(e) does not apply, a longer-of-two-periods disposition may be valid under the USRAP; and if such a disposition is of GST tax grandfathered assets, it may threaten grandfathered status by violating the Regulatory RAP.[102]

Beneficial Special Powers of Appointment over Grandfathered Assets

The effective date regulations provide that if a nonfiduciary special power of appointment is exercised in such a way that the vesting, absolute ownership or power of alienation of an interest in assets of a grandfathered trust may be postponed or suspended beyond the Regulatory RAP period, the assets subject to the exercise may lose exempt status, thence forward being fully subject to GST tax.[103] On the other hand, the regulations contemplate that the exempt status of assets subject to a trust that was irrevocable on September 25, 1985 may survive the assets' being appointed to a new trust, provided that the appointment may not postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in the assets beyond the Regulatory RAP period.[104]

Though the effective date regulations preclude a tax-advantaged perpetuity, the Regulatory RAP offers some scope for longevity planning, for it authorizes a testing period of ninety years or one measured by "*any* life in being at the date the original trust became irrevocable plus a period of 21 years."[105] And the regulations adopt the common law conception of the commensurability of lives affecting vesting by expressly permitting the use of *extraneous* measuring lives.[106] So, if a grandfathered trust is set, by its terms, to terminate on the death of the survivor of the settlor's prolific but now elderly children, each of whom was in her thirties when the grandfathered trust was created, and the trust instrument provides a beneficiary a special power of appointment, then we can imagine an appointment to a new receptacle trust set to terminate twenty-one years after the death of the survivor of a pool of measuring lives comprising people who bid fair to achieve longevity, all of whom were born on (or, perhaps, up to a few years before) the date on which the trust was created.

"Decanting" Grandfathered Assets

The Regulatory RAP's common law alternative authorizes the use of extraneous measuring lives for the exercise of *fiduciary* special powers of appointment as well as beneficial ones.[107] So, if a grandfathered trust is set, by its terms, to terminate on the death of the survivor of the settlor's prolific but now elderly children, each of whom was in her thirties when the grandfathered trust became irrevocable, and the trust instrument does *not* provide any beneficial special power of appointment, but also does not rule out use of the trustee's discretionary distribution power to "decant" (that is, to make discretionary distributions in further trust), then we can imagine a decanting to a new receptacle trust set to terminate twenty-one years after the death of the survivor of a pool of measuring lives comprising people who bid fair to achieve longevity, all of whom were born on (or, perhaps, up to a few years before) the date on which (in this case) the trust became irrevocable.

The regulations explicitly permit decanting without loss of grandfathered status provided (1) that the Regulatory RAP is not violated and (2) that the terms of the grandfathered trust or state law *"at the time the [grandfathered] trust became irrevocable* . . . authorized the distribution to a new trust . . . without the consent or approval of any beneficiary or court."[108] There is no scope for longevity planning at all in the regulations' alternative "safe harbor" for the exercise of a fiduciary special power of appointment, the safe harbor for decantings that do not shift beneficial interests to younger generations of beneficiaries, for that alternative requires that the exercise not "extend the time for vesting of any beneficial interest in the trust beyond the period provided for *in the original trust*."[109] So, although the regulations provide two safe-harbor rules for trust decanting, it is only the one that refers to the vintage of the trustee's decanting authority—under the terms of the grandfathered trust or state law *"at the time the [grandfathered] trust became irrevocable*"—that will avail for longevity planning.

Now, as already noted, a grandfathered trust (in most cases) is one that was irrevocable on September 25, 1985.[110] And the first decanting statute in the country, New York's original decanting statute, was enacted in 1992.[111] So, the scope for trust longevity planning by means of a fiduciary special power of appointment (used to subject grandfathered assets to more favorable trust-termination provisions) depends in *every* common-law jurisdiction, *regardless* of the enactment of a decanting statute, on the plausibility of the claim that given the terms of the grandfathered trust in question, the common law, at the time the trust became irrevocable, authorized the trustee to make distributions in trust for the benefit of permissible distributees.

Of course, the trust instrument itself can explicitly authorize the trustee to decant, in which case the trustee has all the facility she needs for this purpose.[112] On the other hand, the trust instrument can explicitly forbid decanting, in which case the longevity planning in question is simply not on.[113] The interesting case, for our purposes, is the one in which the grandfathered trust instrument (which, by hypothesis, does *not* provide any *beneficial* special power of appointment) neither expressly authorizes nor expressly rules out use of the trustee's discretionary distribution power to decant. This brings us back to the point that at a certain pitch of discretion, at least, a trustee's discretionary power of distribution is a special power of appointment.[114]

The Restatements (Second) and (Third) both support the proposition that as a special power of appointment, a trustee's power to make discretionary distributions entails the power to make distributions *in trust* for permissible distributees unless the trust instrument that created the discretionary distribution power manifests a contrary intent.[115] In Florida, the proposition thus supported by the Restatements (namely that at common law, a discretionary power to distribute trust property presumptively implies the power to decant) is strongly supported by *Phipps v. Palm Beach Trust Company*,[116] in which the Florida Supreme Court held that a trustee's "sole absolute discretion" to direct trust distributions for the benefit of one or more of the settlor's descendants permitted distributions in trust, because (the court said) a fiduciary power to transfer a fee simple interest in trust assets (that is, to make *outright* distributions) includes the power to create any lesser estate unless the trust instrument clearly expresses a contrary intent.[117] There are similar cases (discussing *Phipps*) in a couple of other states.[118] And in New Jersey, a common law basis for decanting was fairly *implied* when the appellate division of the superior court examined a decanting exercise of a trustee's "absolute and uncontrolled discretion" to distribute trust assets for the beneficiary's best interests as a question of abuse of discretion.[119]

There is (as far as this author knows) no decided case binding as precedent on Michigan judges that stands for the Restatements' proposition that a discretionary power to distribute trust property presumptively implies the power to decant. In *Paine v. Kaufman*,[120] the Michigan Court of Appeals adduced the relevant foundational provisions of the Restatement (Second), but the case before the court involved a nonfiduciary power, and the instrument creating the power expressly authorized appointment in trust.[121] Nevertheless, the mere absence of binding case authority in a jurisdiction cannot establish the absence of a common law basis for decanting there, since the method of common law adjudication obviously cannot be deduced from the doctrine of precedent alone.[122] The *Phipps* case, for example, was not wrongly decided by the Florida Supreme Court just because, at the time *Phipps* was decided, there was no *Phipps* case for the court to rely upon: reasoning by analogy and the use of nonbinding precedent are potent forces in the development of common law wherever it exists.[123]

Thus, for example, the fact that there is no decided case binding as precedent on Ohio judges that clearly stands for the proposition that a discretionary power to distribute trust assets presumptively implies the power to decant[124] did not prevent the Ohio legislature from asserting that its decanting statute is partly declarative of Ohio common law applicable prior to enactment.[125] And Michigan's recent trust decanting legislation expressly provides that the description of the decanting power contained in Michigan's Powers of Appointment Act of 1967 as amended by the decanting legislation is intended to be a codification of Michigan common law in effect prior to enactment.[126]

The Emperor's Nakedness (or The Irrelevance of the Regulatory RAP to Trusts Having a "Zero Inclusion Ratio" for GST Tax Purposes)

There is nothing in the effective date regulations that has anything to do with the "GST exemption" described in Code section 2631.[127] Thus, the Regulatory RAP has nothing to do with trusts having a "zero inclusion ratio" for GST tax purposes because of an allocation of the GST exemption.[128] It is true that the Internal Revenue Service (Service) regularly rules that there is no threat to GST-exemption-sheltered status in circumstances in which there would be no threat to GST-tax-"grandfathered" status.[129] But it is a patent example of the logical fallacy of "denying the antecedent"[130] to argue that because there is no threat to GST-exemption-sheltered status in circumstances in which there is no threat to GST-tax-grandfathered status (assuming this is true), there *would be* a threat to GST-exemption-sheltered status in circumstances in which there would be a threat to GST-tax-grandfathered status. The Service's penchant for adverting to the effective date regulations apropos of situations to which they do not apply lends no credence whatsoever to the idea that the Regulatory RAP applies to exercises of special powers of appointment (whether fiduciary or nonfiduciary) over assets to which GST exemption has been allocated.

The Treasury did once propose to apply the Regulatory RAP in just that way to exercises of nonfiduciary special powers of appointment. Prior to the adoption of the final GST tax regulations, the proposed regulations under section 2652 (on the definition of "transferor" for GST tax purposes) provided the following:

> The exercise of a power of appointment that is not a general power of appointment (as defined in section 2041(b)) is treated as a transfer subject to Federal estate or gift tax by the holder of the power if the power is exercised in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any specified life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (perpetuities period). For purposes of this paragraph (a)(4), the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust) is not an exercise that may extend beyond the perpetuities period.[131]

But a subsequent amendment to the proposed regulation deleted this provision,[132] leaving no trace of the Treasury's faint-hearted attempt to extend the application of the Regulatory RAP beyond the effective date provisions.

The upshot is that there is no GST tax prohibition against extending, by the exercise of a fiduciary or nonfiduciary special power of appointment, the period during which GST-exemption-sheltered assets will be held in trust.[133]

Michigan Perpetuities Reform

The common law RAP was supplanted by the USRAP in Michigan in 1988.[134] Except for certain personal property previously held in trusts that were irrevocable on September 25, 1985, Michigan's *post*-USRAP perpetuities reform, PPTPA, applies to interests in personal property held in any trust that was revocable on or created after May 28, 2008.[135] PPTPA generally makes the RAP and all similar rules affecting the duration of trusts (including the rule against accumulation of income) inapplicable to personal property held in trusts of the required vintage.[136] But PPTPA provides an exception for the case in which a nonfiduciary special power of appointment over personal property held in trust (first power) is exercised so as to subject property to, or to create, another nonfiduciary power of appointment other than a presently exercisable general power (second power): in that case, the period during which the vesting of a future interest in the property may be postponed by the exercise of the *second* power is determined under a modified (360-year wait-and-see) USRAP by reference to the date the first power was created.[137] This exception was Michigan's original *post*-RAP-reform anti-Delaware-tax-trap provision.[138]

In 2012, PPTPA was amended[139] to bolster that statute's anti-Delaware-tax-trap provision in light of the possibility that when a trust is created by the exercise of a nonfiduciary special power of appointment, a decanting power in the appointive trustee might be viewed as a "second power" for purposes of the Trap.[140] The effect of the amendment is that the exercise of a "first power," within the meaning of PPTPA (that is, a nonfiduciary special power of appointment over personal property held in trust),[141] so as to create a new trust will not allow a decanting of the new trust to suspend vesting for a period that can be determined without regard to the date of creation of the first power.[142] That will prevent the possibility of decanting under Michigan law from causing the trust assets to be included, under the Trap, in the transfer tax base of the holder of the first power when she exercises that power so as to create a trust that does not by its terms rule out decanting.[143]

PPTPA's anti-Delaware-tax-trap provision accounts for stimuli 6 through 12 in the flowchart below.

A Newly Revised *Post* Perpetuities Reform RAP Applicability Flowchart for Property and Powers of Appointment Subject to Michigan Law

Special Flowchart Nomenclature

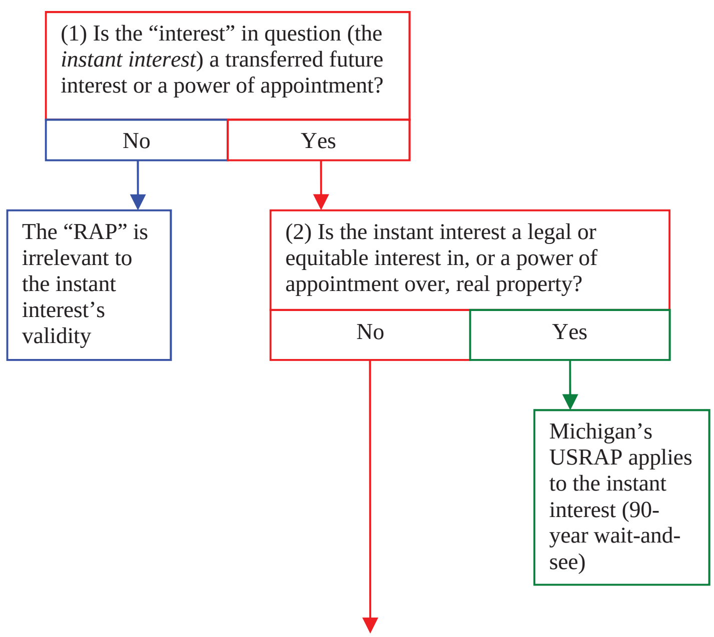
Having duly noted that powers of appointment are not classically regarded as property,[144] it will be convenient for us to affect to ignore this punctilio of knowledge for purposes of the flowchart below and to adopt the single tag "instant interest" to refer (in the flowchart) to either a transferred future interest or a power of appointment. It will also be convenient for us to stipulate to a special sense of the term "create" in connection with powers of appointment: for purposes of the flowchart, a preexisting power of appointment *p1* is "created" by another power *p2* to the extent that an exercise of *p2* newly subjects assets to *p1*. Thus, for example, if a power holder *H* exercises her power to appoint asset *A* by adding *A* to a preexisting trust over which a beneficiary *B* has a power of appointment, then (for purposes of the flowchart) *B*'s power over *A* is *created* by the exercise of *H*'s power.

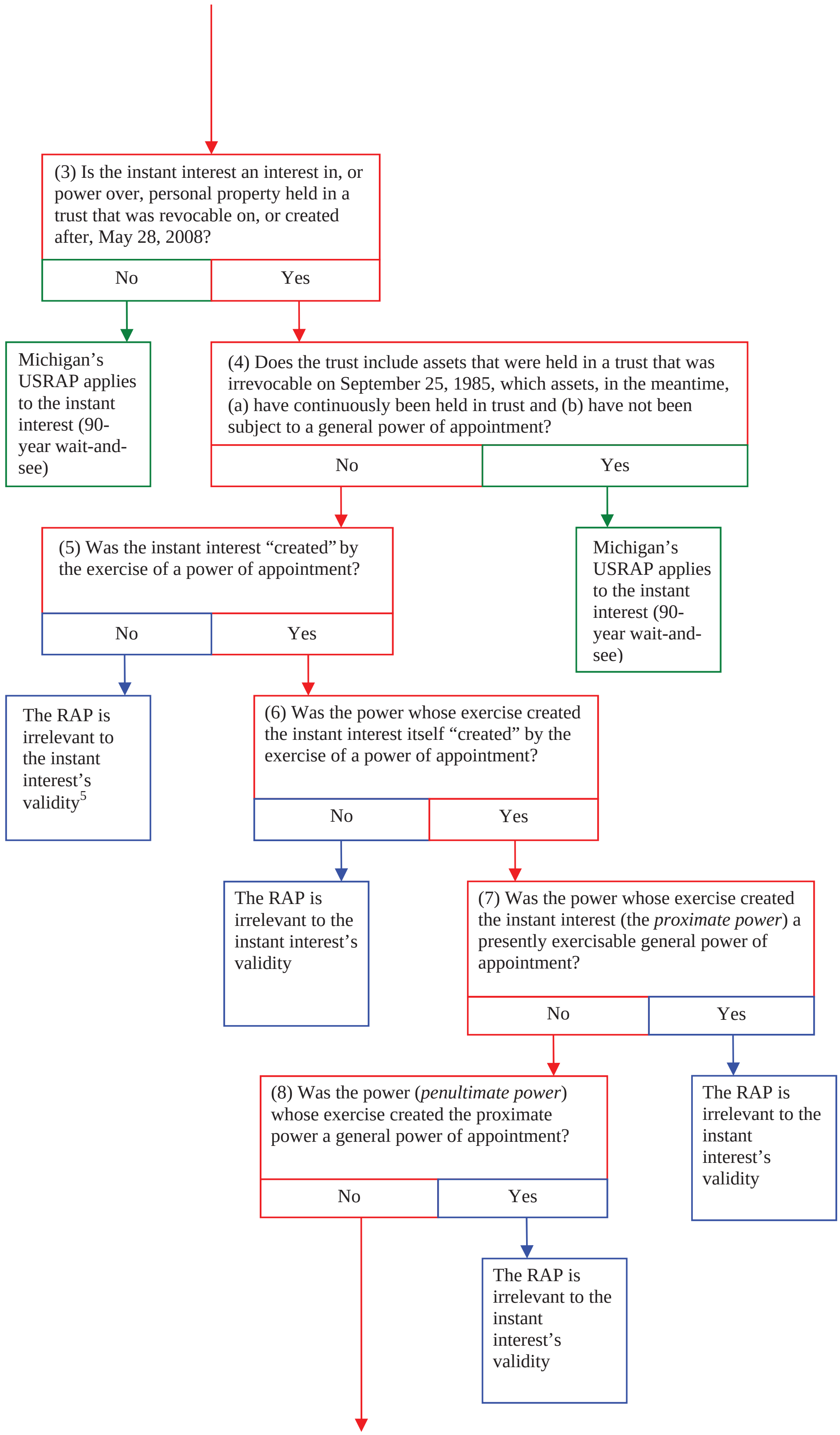
In order to keep responses to the flowchart's stimuli binary (that is, "Yes" or "No," but not both), we have to adopt a separate-share rule at stimulus 4: if a trust comprises both (a) assets described in question (4) and (b) other assets, the respective shares are treated as separate trusts for purposes of the flowchart. For the share that comprises assets described in question (4), the answer to question (4) is, "Yes"; for the share that comprises other assets, the answer to question (4) is, "No."

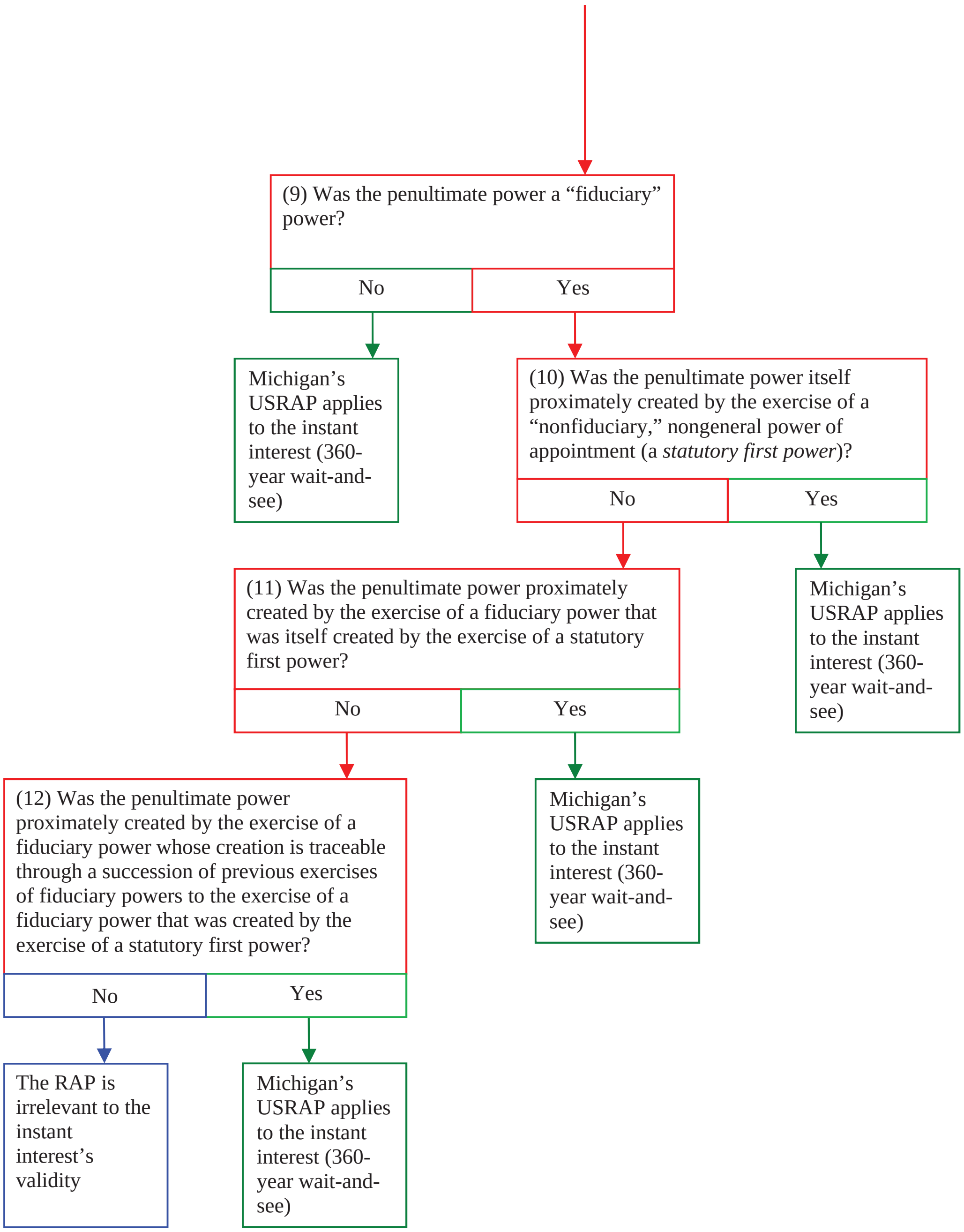
The terms "fiduciary power of appointment" and "nonfiduciary power of appointment" mean within in the flowchart what they mean within PPTPA, that is, they refer, respectively, to powers of appointment that are, and are not, held by a trustee in a fiduciary capacity.[145] And the flowchart's references to the "RAP" in the statement, "The RAP is irrelevant to the instant interest's validity," comprehend both the common law rule and the USRAP.

Terms coined in the flowchart itself are parenthetically introduced (there) in italics; the first instance in the flowchart of each term specially defined in this Section appears in quotation marks.

The Flowchart




(3) Is the instant interest an interest in, or power over, personal property held in a trust that was revocable on, or created after, May 28, 2008?
No
Yes
Michigan's USRAP applies to the instant interest (90-year wait-and-see)
(4) Does the trust include assets that were held in a trust that was irrevocable on September 25, 1985, which assets, in the meantime, (a) have continuously been held in trust and (b) have not been subject to a general power of appointment?
No
Yes
(5) Was the instant interest "created" by the exercise of a power of appointment?
Michigan's USRAP applies to the instant interest (90-year wait-and-see)
No
Yes
The RAP is irrelevant to the instant interest's validity[5]
(6) Was the power whose exercise created the instant interest itself "created" by the exercise of a power of appointment?
No
Yes
The RAP is irrelevant to the instant interest's validity
(7) Was the power whose exercise created the instant interest (the *proximate power*) a presently exercisable general power of appointment?
No
Yes
(8) Was the power (*penultimate power*) whose exercise created the proximate power a general power of appointment?
The RAP is irrelevant to the instant interest's validity
No
Yes
The RAP is irrelevant to the instant interest's validity


(9) Was the penultimate power a “fiduciary” power?
No
Yes
Michigan’s USRAP applies to the instant interest (360-year wait-and-see)
(10) Was the penultimate power itself proximately created by the exercise of a “nonfiduciary,” nongeneral power of appointment (a *statutory first power*)?
No
Yes
(11) Was the penultimate power proximately created by the exercise of a fiduciary power that was itself created by the exercise of a statutory first power?
No
Yes
Michigan’s USRAP applies to the instant interest (360-year wait-and-see)
(12) Was the penultimate power proximately created by the exercise of a fiduciary power whose creation is traceable through a succession of previous exercises of fiduciary powers to the exercise of a fiduciary power that was created by the exercise of a statutory first power?
No
Yes
Michigan’s USRAP applies to the instant interest (360-year wait-and-see)
The RAP is irrelevant to the instant interest’s validity
Michigan’s USRAP applies to the instant interest (360-year wait-and-see)

***Editor's Note:** This article originally appeared in the *Wayne Law Review*. Having previously presented excerpts from the article by permission of the *Wayne Law Review*, the *Michigan Probate and Estate Planning Journal* is now authorized to present the article in full. Thanks to Jim Spica for another excellent article, as well as to the *Wayne Law Review* for agreeing to share the publication of this article with our members.

Notes

1. James P. Spica, *Exercising Special Powers of Appointment over Tax Advantaged Trusts Post Perpetuities Reform Can Be More or Less Hazardous*, Mich Tax Law, Fall 2010, at 37, 41-42.

2. James P. Spica, *Revised Post Perpetuities Reform RAP Applicability Flowchart for Property Subject to Michigan Law*, Mich Tax Law, Summer 2011, at 45, 46-47.

3. 2011 PA 11, 12 (codified at MCL 554.75, .94 (West 2011)).

4. 2008 PA 148 (codified at MCL 554.91-.94 (West 2008)).

5. Treas. Reg. 26.2601-1 (2014).

6. 2012 PA 484.

7. *See generally* James P. Spica, *Spilt to Last: Longevity Planning for Tax Advantaged Trusts Under a New Statutory Decanting Regime in Michigan*, 48 Real Prop Tr & Est LJ 35, 79-81 (2013).

8. *See, e.g.*, Jesse Dukeminier et al., *Wills, Trusts, and Estates* 885 (8th ed 2009); Ronald H. Maudsley, *The Modern Law of Perpetuities* 34-35 (1979).

9. John C. Gray*, The Rule Against Perpetuities* 201-02, at 191-92 (4th ed 1942).

10. *See* Maudsley, *supra* note 8, at 35. The common law rule also applied to non-appointive administrative powers. *See id*. at 58. That application was modified to some extent by the advent of statutory administrative powers. *See id*. at 59, 183-84. But more importantly, it has been modified by statutory reform of the RAP itself. Thus, for example, the USRAP, which displaces the common law RAP in the adopting jurisdiction, refers only to "a nonvested property interest or a power of appointment." *See, e.g.*, MCL 554.72(1)-(4) (West 2006)*; see also infra* notes 34-36 and accompanying text. Statutory RAP reform in England has likewise exempted administrative powers. *See* Maudsley, *supra* note 8, at 183-85.

11. *See, e.g*., Laurence M. Jones, *The Rule Against Perpetuities as Applied to Powers of Appointment in Maryland*, 18 Md L Rev 93, 96 (1958). *Cf*. Gray, *supra* note 9, 474.2 (acknowledging the historical point, but suggesting that for the RAP's purposes, at least, there need be no objection to treating a power of appointment as a property interest); John A. Borron, Jr. et al., *The Law of Future Interests* 1272, at 270 (3d ed 2004) (to the same effect).

12. *See* Dukeminier et al., *supra* note 8, at 889.

13. *See* Maudsley, *supra* note 8, at 13-14, 70; Gray, *supra* note 9, 41, 113, 205.

14. *See* Gray, *supra* note 9, 299-310. *See also* Borron et al., *supra* note 11,1238, at 190-91.

15. *See, e.g*., Gray, *supra* note 9, 202, 205, 322, 411. *See also id*. 116 (vesting of equitable interests identical to that of legal interests).

16. *See, e.g.*, *Restatement (Third) of Trusts* 2 (2003); Simon Gardner, *An Introduction to the Law of Trusts* 17-18 (3d ed. 2011); J. E. Penner, *The Idea of Property in Law* 133-38, 142 (1997). As to the peculiar nature of the "equitable property" constituting a beneficial interest in a trust, see, for example, F. W. Maitland, *Equity and The Forms of Action at Common Law: Two Courses of Lectures* 17-18 (photo. reprint 1984) (1929); Robert Stevens, *When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?* 92 BU L Rev 919, 921-25 (2012).

17. *See, e.g.*, Gardner, *supra* note 16, at 149-57; J. E. Penner, The Law of Trusts 3.13-3.17, 50 (8th ed 2012).

18. *See* Dukeminier et al., *supra* note 8, at 892.

19. *Id.*

20. *See* Penner, *supra* note 17, 3.30-3.36, at 57.

21. *See Restatement (Third) of Trusts* 29 cmt. h(1) (2003). *See generally* John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 BU L Rev 375, 380-83 (2010) (contrasting the English and American rules on early termination).

22. Throughout this article, the term "common law" is used without regard to the former separation of the jurisdictions of the King's (or Queen's) Bench, on the one hand, and the Court of Chancery, on the other. As used here, the term refers to the confluence of judge-made rules and principles, legal and equitable, applicable in common-law jurisdictions since the statutory unification of law and equity in England at the end of the nineteenth century. *See generally* Penner, *supra* note 17, 1.10-1.15, at 5-7 (discussing the unification of the jurisdictions in England); *see also* Maitland, *supra* note 16, 15-20.

23. This is Gray's terminology. Gray uses the term "particular estate" to refer to the (legal) life estate preceding any given (legal) remainder. *See* Gray, *supra* note 9, § 8.

24. *See id*. 101-02 (vested and contingent remainders); *id.* at 116 (vesting of equitable interests determined by same principles applied to legal interests); Maudsley, *supra* note 8, at 7-8 (remainders); *id.* at 10 (same prin-

ciples as applied to legal interests).

25. *See id*. 99.

26. *See, e.g.*, MCL 700.2714(1) (West 2013) ("[A] future interest under the terms of a trust is contingent on the beneficiary surviving the distribution date."). *See also* MCL 700.2701 (effect of rules of construction in general).

27. *See, e.g.*, Gray, *supra* note 9, § 220.

28. *See supra* notes 23-27 and accompanying text.

29. *See* Dukeminier et al., *supra* note 8, at 892.

30. *See supra* notes 12-13 and accompanying text.

31. *See supra* Example II.

32. *See, e.g.*, Borron et al., *supra* note 11, § 442.

33. *See Restatement (Third) of Trusts* 7 (2003); Gray, *supra* note 8, 116, 327.1, 414; Borron et al., *supra* note 11, § 1240; Penner, *supra* note 17, 5.3, 5.58-5.59.

34. *See, e.g.*, MCL 554.72(1) (West 2014).

35. *See, e.g.*, MCL 554.53 (West 2014) ("Unless as otherwise provided by statute, this act [i.e., 1948 PA 38 (effective Sept 23, 1949) (codified at MCL 554.51) (making the common law RAP applicable to real and personal property)] shall not apply to nonvested property interests created on or after the effective date of the uniform statutory rule against perpetuities.").

36. *See, e.g.*, MCL 554.72(1).

37. *See supra* Example II.

38. *See supra* notes 28-29 and accompanying text.

39. *See, e.g.*, MCL 554.74.

40. *See, e.g.*, MCL 554.75(1)(e).

41. *See supra* note 12 and accompanying text.

42. *See, e.g.*, MCL 554.61-.65 (West 2013); Mass Gen Laws ch 184A, § 7 (2014); NY Real Prop Law 345 (McKinney 2014).

43. MCL 554.64, .64(b)-(c), .61(a).

44. *See, e.g.*, Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, 28 Est Plan 68, 70-71 (2001); Gray, *supra* note 9, § 119.

45. *See* Ira Mark Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation Skipping Taxation*, 45 Alb L Rev 260, 267-69 (1981).

46. *See id.* at 268.

47. *See supra* Example I.

48. *See id.*

49. *See supra* note 27 and accompanying text.

50. *See Lantis v Cook*, 342 Mich 347, 69 NW2d 849 (1955). *See also* Gray, *supra* note 9, § 751.1.

51. *Rodney v Stotz*, 280 Mich 90, 273 NW 404 (1937).

52. 1948 PA 38 (eff. Sept 23, 1949) (codified at MCL 554.51 (West 2013)).

53. *See* Gray, *supra* note 9, §§ 3, 278.1-.4, 736-73, 743-44, 747-752.1.

54. *See* Greer, *supra* note 44, at 70.

55. *See Gertman v Burdick*, 123 F2d 924 (DC Cir 1941). *See generally* Borron et al., *supra* note 11, § 1466; Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW U L Rev 501, 503-07 (2006). Prior to 1953, Michigan had a statutory rule against accumulation of income applicable to real property. *See* 1952 PA 6, 7 (repealing MCL 554.37-.40).

56. *See supra* Example I.

57. It is tempting to suppose that we could illustrate the independence of the rule against accumulation of income from the RAP simply by adding to our "model of compliance with the RAP" that income payments to *A*'s children (after *A*'s death) are entirely discretionary. Indeed, one commentator has succumbed to that temptation. *See* Sitkoff, *supra* note 55, at 507. It is true that a discretionary power to accumulate income (which is necessarily implied in the discretion to distribute income *or not*) is sufficient to offend the rule against accumulation. *See, e.g.*, Maudsley, *supra* note 8, at 198-99, 203. The trouble is that the discretionary power (on the distribution side) is a special power of appointment. *See infra* notes 64-66. As we have said, powers of appointment are subject to the common law RAP. *See supra* notes 10-11 and accompanying text. And, as we shall see, a special power violates the RAP if it may be exercised beyond the perpetuities testing period. *See infra* note 70 and accompanying text. Thus, "simply" adding to our model of compliance with the RAP that income payments to *A*'s children are entirely discretionary involves adding a *violation* of the RAP. Our aim, however, is partly to illustrate the *independence* of the rule against accumulation, and that requires a case in which there is a violation of the rule against accumulation *without* a violation of the RAP. Hence the more contrived hypothetical described in the text. Furthermore, to make the hypothesized violation of the rule against accumulation practically significant, we can add to our hypothetical that the trustee has discretion to distribute principal to *A*'s children for certain likely purposes for as long as any of those children is living. This will provide *A*'s children standing to oppose (and an economic incentive to veto) *B*'s attempt to have the trust terminated at the end of the perpetuities testing period. *See supra* note 21 and accompanying text.

58. *See Restatement (Second) of Prop.: Donative Transfers* 2.2 reporter's note 1 (1986) (stating that violation of the rule wholly voids accumulations in some common law jurisdictions; in others, violation voids accumulations only to the extent they may exceed the perpetuities testing period); Borron et al., *supra* note 11, § 1469.

59. *See supra* note 27 and accompanying text.

60. *See, e.g.*, Del Code Ann tit. 25, 506 (West 2014); MCL 554.93(1)(d) (West 2012).

61. *See supra* notes 10-11 and accompanying text.

62. *See, e.g.*, MCL 554.72 (West 2008).

63. *See, e.g.*, Gray, *supra* note 9, § 473.

64. *See, e.g.*, MCL 556.112(c), .112(i) (West 2012). *See also, e.g.*, MCL 556.118(2) (stating that a special power of appointment exercisable by a trustee is presumptively nonreleasable). A "special power" is a power whose permissible appointees do not include the donee, his or her estate, his or her creditors, or the creditors of his or her estate. *See, e.g.*, MCL 556.112(i).

65. *See Restatement (Second) of Prop.: Donative Transfers* 11.1 cmt. d (1986); *Restatement (Third) of Prop.: Wills & Other Donative Transfers* 17.1 cmt. g (2011).

66. Jesse Dukeminier et al., *Wills, Trusts, and Estates* 591 (7th ed 2005). *See also* Gardner, *supra* note 16, at 153-55; Penner, *supra* note 17, 3.16-3.17.

67. *See Restatement (Third) of Prop.: Wills & Other Donative Transfers* 17.1 cmt. b (2011). *See also* Gray, *supra* note 9, § 476; Borron et al., *supra* note 11, § 1272; Maudsley, *supra* note 8, at 59.

68. *See, e.g.*, Borron et al., *supra* note 11, § 877 (discussing the distinction between imperative and nonimperative powers of appointment); Penner, *supra* note 17, 5.13 (same).

69. *See supra* Example I.

70. *See, e.g.*, Maudsley, *supra* note 8, at 58-62; Dukeminier et al., *supra* note 8, at 921-22.

71. *See* Gray, *supra* note 9, § 112(3); Borron et al., *supra* note 11, § 113.

72. *See* Gray, *supra* note 9, § 258; Maudsley, *supra* note 8, at 13.

73. A "general power" is a power whose permissible appointees include the donee, his or her estate, his or her creditors, or the creditors of his or her estate. *See, e.g.,* MCL 556.112(h) (West 2013). A power is "presently exercisable" if its exercise is neither required to be by will nor otherwise constrained to be postponed. *See, e.g.*, MCL 556.112(*l*).

74. *See Restatement (Third) of Prop.: Wills & Other Donative Transfers* 17.4 cmt. f (2011). *See also* Gray, *supra* note 9, 514-15. For an example of codification of the common law rule on this point, see MCL 556.124(1) (West 2012).

75. *See* MCL 554.93 (West 2012) (stating that PPTPA, Michigan's *post*-USRAP perpetuities reform statute, is applicable only to *personal property* held in trust).

76. *See supra* notes 34-39 and accompanying text.

77. *See* MCL 556.124 (West 2012).

78. *See* Del Code Ann tit. 25, 501 (West 2014). As to the uniqueness (among common law jurisdictions with a RAP) of Delaware's eschewal of the common law rule on this point, see, for example, Gray, *supra* note 9, § 514 n.1.

79. *See, e.g.*, Maudsley, *supra* note 8, at 11-13.

80. Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 Colum. L. Rev. 1648, 1669 (1985). *See also, e.g.*, Gray, *supra* note 9, § 474.2, at 467.

81. *See, e.g.*, Gray, *supra* note 9, § 341; Borron et al., *supra* note 11, § 1257; Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 Real Prop Tr & Est L J 185, 190-91 (1995).

82. *See* Unif. Statutory Rule Against Perpetuities § 1 cmt. H, 8BU L A 352 (1990).

83. *See infra* notes 97-102 and accompanying text.

84. IRC 2041(a)(3) (West 2005) (estate tax version of Trap). *See also* IRC 2514(d) (gift tax version).

85. *See* S. Rep. No. 82-382 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1535.

86. *Estate of Murphy v Commissioner*, 71 TC 671 (1979), *acq*. 1979-2 C.B. 2.

87. As to special powers of appointment over assets held in trust, see, for example, NC Gen Stat Ann 41-32 (West 2007). (The constitutionality of the provision just cited, which substitutes a rule against suspension of the power of alienation for the RAP as to property held in trust, is not free from doubt, because of the North Carolina constitution's deprecation of "perpetuities" as "contrary to the genius of a free state." NC Const. art. 1, § 34. *See Brown Bros. Harriman Trust Co, NA v Benson*, 202 NC App 283, 688 SE2d 752 (2010); John V. Orth, *Allowing Perpetuities in North Carolina*, 31 Campbell L Rev 399 (2009)).

88. *See, e.g.*, MCL 554.93(3) (West 2012) (Michigan's *post*-USRAP perpetuities reform statute's anti-Trap provision).

89. In a jurisdiction that is *without* a finite perpetuities testing period and has no rule against suspension of absolute ownership or the power of alienation, a relation-back provision will not prevent the Trap from springing. *See* James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 Real Prop Tr & Est L J 673 *passim* (2009).

90. *See supra* note 74.

91. *See supra* notes 73-78 and accompanying text.

92. *See generally* James P. Spica, *A Practical Look at Springing the Delaware Tax Trap to Avert Generation Skipping Transfer Tax*, 41 Real Prop Prob & Tr J 165 (2006); Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes*, 68 J Tax'n 242 (1988).

93. Portions of the material under subheadings B and C of this Part of the Article appeared previously in Spica, *supra* note 7, at 62-65, 73-75.

94. *See* Treas. Reg. 26.2601-1(b)(1) (2014). A fuller description of the applicable rules would have to refer also to the regulations' transition rules for wills and revocable trusts executed before October 22, 1986 and for certain cases involving mental incompetency. *See* Treas. Reg. 26.2601-1(b)(2)-(3).

95. *See* Treas. Reg. 26.2601-1(b)(4)(i)(A)(2).

96. *Id.* (fiduciary special power of appointment). *See also* Treas. Reg. 26.2601-1(b)(1)(v)(B)(2) (nonfiduciary power). *See generally* Dukeminier, *supra* note 81, at 189-90.

97. *See supra* note 34.

98. *See supra* notes 95-96 and accompanying text.

99. *See* Treas. Reg. 26.2601-1(b)(1)(v)(D) (ex. 6).

100. *See supra* note 82.

101. *See, e.g.*, MCL 554.72(5) (West 2009) (Michigan's version of USRAP section 1(e)).

102. *See generally* Dukeminier, *supra* note 81 *passim*.

103. *See* Treas. Reg. 26.2601-1(b)(1)(v)(B). The precise effect of loss of "grandfathered" status is not spelled out in the effective date regulations, and the Internal Revenue Service has taken inconsistent positions in private letter rulings. *See* William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 Real Prop Tr & Est L J 1, 22 (2010).

104. *See* Treas. Reg. 26.2601-1(b)(1)(v)(D) (ex. 4) (especially the last sentence).

105. Treas. Reg. 26.2601-1(b)(1)(v)(B)(2) (emphasis added).

106. *See* Treas. Reg. 26.2601-1(b)(1)(v)(D) (ex. 4). As to the common law conception, see Dukeminier, *supra* note 80, at 1654 n.14, 1660-63.

107. *See* Treas. Reg. 26.2601-1(b)(4)(i)(A)(2).

108. *Treas. Reg.* 26.2601-1(b)(4)(i)(A) (emphasis added).

109. *Treas. Reg.* 26.2601-1(b)(4)(i)(D) (emphasis added).

110. *See supra* note 94.

111. *See* NY Est Powers & Trust Law 10-6.6 (McKinney 2002).

112. *See, e.g.*, *In re Estate of Resiman*, 266 Mich App 522, 529, 702 NW2d 658 (2005), discussed *infra* in the text accompanying notes 120-21.

113. *See, e.g.*, MCL 556.112(c) (West 2014) (defining "power of appointment" as "a power…that enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property [subject to the power]"); *id.* § 556.115(2) (requiring that an exercise comply "with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power"); *Hannan v Slush*, 5 F2d 718, 722 (ED Mich 1925) (requiring that power of appointment be exercised in the mode prescribed by donor).

114. See *supra* notes 64-66.

115. *See Restatement (Third) of Prop.: Wills & Other Donative Transfers* 19.14 (2011); *Restatement (Second) of Prop.: Donative Transfers* 19.3 cmt. a, illus. 2 (1986).

116. *Phipps v Palm Beach Trust Co*, 142 Fla 782, 196 So 299 (1940).

117. *See id*. at 300.

118. *See In re Estate of Spencer*, 232 NW2d 491, 494-95 (Iowa 1975); Morse v Kraft, 466 Mass 92, 922 NE2d 1021 (2013).

119. *Wiedenmayer v Johnson*, 106 NJ Super 161, 254 A2d 534 (1969).

120. *In re Estate of Resiman*, 266 Mich App 522, 702 NW2d 658 (2005).

121. *See id*. at 664.

122. *See, e.g.*, Ronald M. Dworkin, *The Model of Rules*, 35 U Chi L Rev 14 *passim* (1967).

123. *See, e.g.*, Neil MacCormick, *Legal Reasoning and Legal Theory* 120-21, 155-56 (1979).

124. *See* William J. McGraw III, *Report of the Estate Planning, Trust and Probate Law Section*, Ohio St B Ass'n 66-67, http://www.ohiobar.org/General%20Resources-/pubs/councilfiles/EstPlanComReport.pdf (last visited May 6, 2014) (explaining a proposal to enact section 5808.18 of the Ohio Trust Code authorizing decanting).

125. *See* Ohio Rev Code Ann 5808.18(O)(1) (West 2012).

126. *See* MCL 556.115a(8) (West 2012).

127. *See* Treas. Reg. 26.2601-1(b)(1), (b)(4) (as amended in 2004). *See also* IRC 2631 (West 2011).

128. *See, e.g.*, Culp & Mellen, *supra* note 103, at 23.

129. *See, e.g.*, IRS Priv Ltr Rul 07-43-028 (May 29, 2007); IRS Priv Ltr Rul 09-19-008 (May 8, 2009).

130. *See, e.g.*, Richard Jeffrey, *Formal Logic: Its Scope and Limits* 65-66 (2d ed. 1981); Wesley C. Salmon, *Logic* 29 (3d ed. 1984).

131. Prop. Treas. Reg. 26.2652-1(a)(4), 61 Fed. Reg. 29654 (proposed June 12, 1996) (subsequently amended by TD 8720, 1997-1 CB 187); *cf*. Treas. Reg. 26.2601-1(b)(1)(v)(B),Treas. Reg. 26.2601-1(b)(4)(i)(A).

132. Treas. Reg. 26.2652-1.

133. *See* Jonathan G. Blattmachr et al., *An Analysis of the Tax Effects of Decanting*, 47 Real Prop Tr & Est L J 141, 169-70 (2012); Culp & Mellen, *supra* note 103, at 25; Carol A. Harrington et al., *Generation-Skipping Transfer Tax: Analysis* with forms ¶ 2.02[1][d] (2d ed. 2001). The Treasury has lately proposed a limit for the useful life of an allocated GST exemption by means of legislation under which property could be GST-exemption sheltered only for ninety years from the date the GST exemption is allocated. *See* Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2013 Revenue Proposals 81-82 (2012). *See also* Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2012 Revenue Proposals 129-30 (2011) (same proposal).

134. 1988 PA 418 (codified at MCL 554.71-.78 (West 1988)).

135. *See* MCL 554.94 (West 2011). Like Delaware's, Michigan's general exemption from the RAP and simi-

lar rules does not pertain to real property, regardless of whether such property is held in trust. *See* Del Code Ann tit. 25, 503 (West 1995).

136. *See* MCL 554.93(1)-(2) (West 2012).

137. *See* MCL 554.93(3) (PPTPA provision); MCL 554.75(2) (ancillary USRAP provision). For this purpose, a power is "nonfiduciary" if it is not held by a trustee in a fiduciary capacity. *See* MCL 554.92(c) (PPTPA definition); MCL 554.75(3) (coordinating USRAP reference to PPTPA definition). *See also* MCL 554.75(2) (stating that standard 90-year "wait-and-see" period is extended to 360 years).

138. *See generally* Spica, *supra* note 89, at 678-79.

139. *See supra* note 6.

140. What motivated the amendment was that the assurance we have, in legislative history, that the Trap will not be sprung by the exercise of a fiduciary power of appointment (*see supra* note 85) is probably limited to fiduciary powers of appointment created by transfers in trust that are *not* themselves proximately attributable to the exercise of a nonfiduciary power of appointment; and the assurance seems to be only that, in that case, the Trap will not cause assets to be included in the *fiduciary's* transfer tax base. *See* Spica, *supra* note 7, at 79-80.

141. *See* MCL 554.92(b).

142. *See* MCL 554.93(3).

143. *See supra* note 84 and accompanying text.

144. *See supra* note 11.

145. *See* MCL 554.92(a).

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Exploitative Marriages in Michigan: "To Love and Honor Until Death Does Its Part"

By Stephen L. Elkins

For as long as men and women have been getting married, there have been "moral imbeciles"[1] willing to marry a person with diminished mental capacity for financial exploitation. As the large Baby Boomer generation ages and some become vulnerable due to senility, physical illness, loneliness, and increased dependency, our society will undoubtedly be confronted with more of these exploitative marriages. These questionable unions are often referred to as "deathbed marriages" or "predatory marriages," and they can be considered a form of elder abuse because they typically involve a vulnerable elderly person who is lured into marrying a younger caregiver.[2]

Many exploitative marriages share these characteristics:

1) The predator is the victim's caregiver;
2) The predator is motivated to gain control of, or eventually benefit from, the victim's assets;
3) The victim's normal mental capacity is compromised due to mental or physical illness;
4) The marriage is expected to be short due to the victim's illness or advanced age;
5) The marriage is arranged by the predator without the victim's input or knowledge;
6) The marriage may be kept a secret from the victim's family members; and
7) The victim may not have an opportunity to intelligently ratify the marriage.

For an unscrupulous opportunist who perpetrates the guise of a valid marriage for financial gain, it may be comforting to know that the law is seemingly, while not intentionally, on his or her side. Michigan marriage law, as in a majority of states, is not designed to prevent exploitative marriages. Rather, the law has historically developed to protect a person's right to marry, preserve the institution of marriage, and restrict challenges to a marriage after the death of a spouse. Consequently, as this article examines, the family members of a victim who want to challenge an alleged marriage following the victim's death are faced with a difficult task of invalidating the marriage.

Law and Marriage

Federal and state laws view marriage not merely as a private civil contract with mutual and reciprocal obligations but also as a unique relationship, which, as a matter of public and social policy, should be encouraged, supported, and protected in order to promote the stability and welfare of society and its children.[3] As a result, the law provides a spouse with significant legal and financial rights and benefits that inure solely by virtue of the marriage or the status of being the surviving spouse.[4] These federal[5] and state[6] entitlements are often what the predator "banks on" to secure financial gain.

One might reasonably believe that since marriage provides a spouse with substantial rights and benefits, there would be considerable legal requirements to enter into a marriage contract. However, the legal formalities to obtain a marriage license and a certificate of marriage in Michigan are minimal, and are arguably as liberal as in any other state. While an explanation of Michigan's Marriage License Act[7] is beyond the scope of this article, suffice it to say that the formalities of applying for a marriage license are not intended to detect and thwart an exploitative marriage.[8] The actual act of tying the knot is surprisingly simple in Michigan, and once a marriage is solemnized courts have held that there is a strong presumption in favor of the validity of a ceremonial marriage.[9]

Standing to Challenge an Exploitative Marriage

In order to annul a marriage, the marriage must be either *voidable* or *void*. This distinction between voidable and void marriages is important in determining marital property rights and who has standing to challenge a marriage. A marriage that is *voidable* is considered valid until either the husband or wife files an annulment action and has the marriage formally annulled. A voidable marriage cannot be attacked after the death of a spouse. If the marriage is not annulled, then both spouses retain all property rights that normally arise by reason of their marriage.

Whereas a marriage that is *void* means that a marriage never occurred, no marital contract was ever entered into, and no marital property rights were created. Sections 551.1 and 551.2 of the Marriage License Act provide that a marriage may be declared void only on the following grounds: (1) a party already has a living spouse; (2) a party marries a family member; (3) a party is not mentally competent to enter into a contract; (4) a party is under 18 years of age; or (5) the consent of a party is obtained by force or fraud.[10]

However, the law has traditionally viewed the right to annul a marriage as a personal right that can be brought only by a party to the marriage.[11] There is only one exception that allows a third-party to file an annulment action after the death of a spouse. This exception is found under MCL 552.35[12] and provides for a court-appointed person to seek an annulment on behalf of a party who, at the time of the marriage, had insufficient mental capacity to enter into a marriage contract. While this exception may provide family members with some hope, they need to realize that, short of demonstrating that the victim was in a coma during the marriage ceremony, it may be difficult to convince a court that the victim lacked the requisite level of mental capacity to enter into a marriage contract.

Mental Capacity to Marry

Michigan law recognizes that marriage is a contract "to which the consent of parties capable in law of contracting is essential."[13] When a marriage is solemnized pursuant to the requirements of the Marriage License Act, both parties are presumed to have had sufficient mental capacity at the time of the ceremony to enter into a marriage contract.[14] Thus, the burden of proving otherwise rests on the challenging party to provide "clear and positive proof" that the person in question did not possess the sufficient competency to enter into the marriage.[15]

The written language used to define the level of mental capacity needed to enter into a marriage contract is the same language used to define the level of capacity needed to enter into any other civil contract:

> The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract.[16]

The problem, however, is that courts have applied the above test to marriage contracts assumably using a lower level of competency than the level applied to a deed or business contract in an effort to satisfy the strong public policy to protect and support a person's right to marry and the institution of marriage itself.[17] Even the lower testamentary capacity needed to defeat a last will or trust[18] is insufficient to void a marriage contract. Therefore, this low marital standard as judicially applied to marriage contracts has, for all practical purposes, created three levels of transactional competency: the highest level being the mental capacity to enter into a contract; the next being the testamentary capacity to enter into a will or trust; and the lowest being the capacity to marry,[19] which is, as one author joked, just above that of a vegetable.[20] Unfortunately, this low threshold makes it nearly impossible for a third party to posthumously annul an alleged exploitative marriage based on Michigan's only statutory exception (i.e., insufficient mental capacity to enter into a marriage contract), and provides a stalking predator with plenty of potential victims.

The Need for a Solution

Michigan is not the only state that makes an exploitative marriage an attractive scam since the majority of states have standing rules that prevent a voidable marriage from being attacked after the death of either spouse.[21] So is there a solution?

Terry L. Turnipseed, associate professor of law at Syracuse University, has written a treatise titled "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America."[22] In his exploration of the topic, Professor Turnipseed suggested these possible fixes to the problem and noted that there are undoubtedly other remedies to be considered:

1) Require more safeguards in the marriage process to deter undue influence and ensure sufficient capacity, such as requiring more witnesses, videotaping of the ceremony, the attendance of medical professionals, the assignment of mandatory guardians ad litem;
2) Shift to a presumption of incapacity if one party dies within a certain amount of time after the wedding;
3) Give a surviving spouse minimal property rights if the marriage lasts less than a certain amount of time;
4) Prohibit weddings in hospitals and similar facilities; and
5) Increase the level of capacity needed to enter into a marriage contract, say to testamentary capacity, and allow family members to demonstrate that the alleged victim did not have the higher capacity at the time of marriage, thus invalidating all property consequences associated with the marriage. This last suggestion would sever the property rights associated with marriage, rather than actually nullifying the marriage itself, thereby upholding marriage while providing states with significant flexibility in deciding how marriage affects property rights based on a person's mental capacity.[23]

There are now five states that have passed laws granting heirs standing to challenge an alleged exploitative marriage after the death of the victim: New York,[24] Vermont,[25] Louisiana,[26] New Jersey,[27] and, most recently, Florida.[28] Generally, the first four states allow an heir to file an annulment action based on grounds of fraud or duress. However, the Florida statute does not annul the marriage but instead allows an heir to challenge the marriage based on fraud and duress, and, if successful, the predator is treated as if he or she predeceased the victim. This prevents the predator from acquiring any property rights through the fraudulent union.

Conclusion

A state law that prevents a morale imbecile from enjoying the fruits of his or her efforts should certainly satisfy family members who are concerned about receiving the victim's estate. But for some family members, a law that addresses only property rights will not provide a satisfactory resolution because for them it's really not about the money. They want the specious marriage annulled.

An exploitative marriage is a deliberate, greedy act that heaves emotional turmoil upon the victim's family members after they learn that their vulnerable loved one was taken advantage of by a trusted caregiver or friend who parlayed the relationship into marriage. They are left bewildered and questioning how the predator accomplished it without their knowledge. They are upset that their loved one will always be legally linked to the predator.

Any attorney who practices estate planning and elder law should educate potential victims and their families about this form of abuse. As another pro-active measure, an attorney might consider placing a provision in a client's estate planning documents that requires the consent of a third party (e.g., family member, attorney, or court order) before the documents may be amended or revoked.[29] If there is an immediate concern, the attorney or a family member should call adult protective services or commence a conservatorship proceeding.

As the general population grows top-heavy with Baby Boomers, and considering the present cultural debate and changes surrounding the definition of marriage, the acceptance of re-marriages, multiple marriages, and cohabitation, our society can certainly expect an increase in exploitative marriages, where moral imbeciles are more than willing to love and honor until death does its part.

Notes

1. Tredgold, A. F. (1921). *Moral Imbecility*, Proc R Soc Med, 1921; 14 (Sect Psych): 13–22.
2. See two New York cases of recent notoriety that involve marriage of younger caregivers to older persons; *Matter of Berk*, 71 AD3d 883, 897 NYS2d 475 (2010) and *Campbell v Thomas*, 73 AD3d 103, 897 NYS2d 460 (2010).
3. *Meyer v Nebraska*, 262 US 390, 399 (1923); *Hess v Pettigrew*, 261 Mich 618, 621, 247 NW 90 (1933); MCL 551.1.
4. See U.S. General Accounting Office; Defense of Marriage Act: Update to 1997 Report (Washington, DC: Jan 23, 2004), citing 1,138 federal statutory provisions in which benefits, rights, and privileges are contingent on marital status.
5. See *Lager v Lager (n re Estate of Lager),* 286 Mich App 158, 779 NW2d 310 (2009), demonstrating how the Employee Retirement Income Security Act of 1974 (ERISA) provides economic security to a surviving spouse and trumps any conflicting state law.
6. See Gilbreath, *Rights of a Surviving Spouse*, Michigan Prob & Est Plan J (Winter 2005).
7. Michigan Marriage License Act, 1887 PA 128, MCL 551.101 *et seq.*
8. See Michigan Office of Attorney General Opinion.,1977-1978, No 5409, p 730 (Dec 18, 1978).
9. *In re Estate of Adams*, 362 Mich 624, 627, 107 NW2d 764 (1961).
10. MCL 552.1 and 552.2.
11. *Estate of Mullin v Duenas*, 296 Mich App 268, 280, 818 NW2d 465 (2012).
12. MCL 552.35.
13. MCL 551.2
14. *May v Meade*, 236 Mich 109, 113, 210 NW 305 (1926).
15. Estate of Mullin, supra, p 272.
16. See *Estate of Mullin*, supra., p 27.3, citing *In re Erickson Estate*, 202 Mich App 329, 332, 508 NW2d 181 (1993).
17. See Terry L. Turnipseed, How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America, 96 Ky L J 288 (2008).
18. MCL 700.2501; MCL 700.7601.
19. See Turnipseed, supra, at 288.
20. Id.
21. Id., at 287.
22. Turnipseed, supra.
23. Id., at 299- 301.
24. NY Domestic Relations Law §140 (McKinney 2005).
25. Vt. Stat. Ann. Tit. 15, §516 (2005).
26. La. Civ. Code. art. 95 (2006).
27. NJ Stat. 2A:34-1 (2007).
28. FSA §732.805.
29. *Dunn v Patterson*, 395 Ill App 3d 914, 919 NE2d 404 (2009).

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Changes in Communications About, To, and From the Internal Revenue Service: What's New with Circular 230 and IRS Form 2848 (Power of Attorney)

By George W. Gregory

Two procedural tax alerts: First, if you use a tax disclaimer at the bottom of your e-mails and have not recently changed it, you should. Changes to Circular 230 in June 2014 and repeated pronouncements by Karen Hawkins, Director of the Office of Professional Responsibility, indicate that, at best, you do not know what you are doing if you state or imply that the federal government or any of its subdivisions or publications requires such a disclosure. Second, changes to IRS Form 2848 (Power of Attorney and Declaration of Representative) imply that one should have a Preparer Tax Identification Number (PTIN), unless one really never prepares any other tax form but a 2848.

Tax Disclaimers and Circular 230

In an effort to manage or diminish perceived abuses from reliance on tax advice, in 2005 the Office of Professional Responsibility (the treasury office responsible for regulating people who practice before the Internal Revenue Service) changed circular 230[1] concerning written communications with tax advice, particularly the requirements for the tax advisor so that he could communicate with a client, and the client could rely on an attorney's opinion to avoid penalties for both the advisor and the client.[2] Many people, including your author, concluded that one needed to either draft a "covered opinion letter" as described in the then revised Circular 230 or provide a disclaimer stating that one could not rely on the communicated information to avoid penalties.[3] Typical disclaimers started off with things like, "The Federal government requires that we tell you…" or "Government regulations require…" or "Pursuant to Circular 230."

After Karen L. Hawkins became the director in April 2009, she objected to that type of disclaimer and thought it was inaccurate. She had no problem with statements like, "my answer is based on the facts you have given me."[4] Ms. Hawkins was the moving force behind the recent change to eliminate any requirement for a disclaimer or for a "covered opinion letter."[5] The explanation of the revisions to Circular 230 stated:

> …the proposed regulations, final § 10.37 replaces the covered opinion rules with principles to which all practitioners must adhere when rendering written advice. Specifically, § 10.37 states affirmatively the standards which a practitioner must adhere to when providing written advice on a Federal tax matter. Section 10.37 requires, among other things, that the practitioner base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or reasonably should know. A practitioner must also use reasonable efforts to identify and ascertain the facts relevant to written advice on a Federal tax matter.[6]

Ms. Hawkins has summarized this as follows. The written communication must be "reasonable under the circumstances."[7] Circular 230 provides guidelines on what is unreasonable. Ms. Hawkins has always thought the disclaimers typically found at the bottom of e-mails were inaccurate. Now she has definitely made the use of them legally inaccurate; and she has made it plain that she does not like them. *If you do not want difficulty with the IRS Office of Professional Responsibility,* you should either revise your tax disclaimer language to remove any reference to it being legally required (perhaps among other things) or simply remove your tax disclaimer language altogether.

IRS Form 2848 Power of Attorney

The IRS revised Form 2848 (Power of Attorney and Declaration of Representative). On the face it, they changed the form to (1) allow someone to have four representatives instead of three, (2) reorganize questions 3 and 5 about what the agent is authorized and not authorized to do, and (3) remove much of the instructions on the form for unenrolled preparers, actuaries, and others (not attorneys, CPAs, and enrolled agents) who might use the form. Reviewing the instructions occasionally is a good idea anyway. The instructions have changed so this is a good time to review them. The 2848 is useful for the IRS mainly, but not for other uses. The rules on years, forms, and taxes are specific. The IRS also changed the instructions to require you to have a PTIN if you are a tax return preparer.[8]

Conclusions

It is time to remove your tax disclaimer or at least modify it so you do not run afowl of Circular 230 10.37 because you are slandering the Department of Treasury and any of its subdivisions. If you prepare any tax returns, get a PTIN.

Notes

1. Technically Circular 230 is a publication based on Title 31, CFR Subtitle A, Part 10. Its basic authority is not the Internal Revenue Code, but 31 USC 330. Title 31 deals with "Money and Finance." The history of the Office of Professional Responsibility predates not only the Internal Revenue Service, but also the Internal Revenue Code. A history of the Office of Professional Responsibility is available at http://www.irsvideos.gov/Circular230Overview_June_25_2014/player/frame-flv.htm

2. Circular 230, sections 10.33 through 10.37, as then published in TD 9165, 69 Fed. Reg. 75389 (December 31, 2004) and TD 9201, 70 Fed. Reg. 28824 (May 19, 2005).

3. Former Circular 230, sections 10.35(b) and 10.37.

4. One place you can listen to her say this is at http://www.irsvideos.gov/Circular230Overview_June_25_2014/player/frame-flv.htm a 2 hour and 15 minute webinar. She talks about this from 1hour and 33 minutes to 1 hour and 48 minutes, and again at 2 hours and 8 minutes. You can use the slide bar if that is all you want to hear.

5. As stated in TD 9668, where the changes were first published, this change was "to eliminate the complex rules governing covered opinions."

6. Treasury Decisions, T.D. 9668, Internal Revenue Service, (Jun. 9, 2014). All of Circular 230 available at http://www.irs.gov/pub/irs-utl/Revised_Circular_230_6_-_2014.pdf, including all of section 10.37 on "Requirements for Written Advice."

7. http://www.irsvideos.gov/Circular230Overview_June_25_2014/player/frame-flv.htm a 2 hour and 15 minute webinar from 1hour and 44 minutes to 1 hour and 47 minutes.

8. As I read the instructions this does not apply to attorneys who are not tax return preparers. Don't have a PTIN? Consider it, go to http://www.irs.gov/Tax-Professionals/PTIN-Requirements-for-Tax-Return-Preparers. It will cost you $64.25 to sign up and $63.00 every year to renew. Do not think you need a PTIN or at least continuing tax education? You might be right. You might not agree with Karen Hawkins' comments at http://www.irsvideos.gov/Circular230Overview_June_25_2014/player/frame-flv.htm at 1 hour and 51 minutes (you can use the slide bar to get those comments). The broadcast is an overview of Circular 230 in general, but at 1 hour and 51 minutes she starts with her analysis of what *Loving v United States*, 742 F3d 1013 (DC Cir, 2014) held and what is dicta (her word was "musings"). She may not be entirely correct, but I take her comments as a warning. It will be interesting to see how other similar regulatory matters dealing with tax preparers and advisors are ultimately dealt with these include *Steele, Monrois et al v United States*, (DDC, 1:cv 14-1523) class action filed about PTIN fees, and *Ridgely v Lew,* No 1:12-cv-00565, 2014 US Dist LEXIS 96447 (DDC, July 16, 2014) holding that the limitation of contingency fees on claims are overbroad in Circular 230.

George W. Gregory is a CPA, but practices law in Troy, specializing in tax law, estate planning, business law, and probate. He is active in the Taxation Section and the Probate and Estate Planning Section of the State Bar of Michigan where he has chaired many committees and projects. He is also the only lawyer to have held all of the officer positions in both sections. He has presented materials for various professional groups including ICLE, the Michigan Association of Certified Public Accountants, and many Estate Planning Councils and has written about tax related topics in a variety of publications including the "Michigan Bar Journal," "Michigan CPA," "Michigan Probate and Estate Planning Journal," and "Michigan Tax Lawyer." Mr. Gregory has been a fellow of the American College of Trust and Estate Counsel since 1998 and has an AV Martindale Hubble rating. He has been listed in every issue of "The Best Lawyers in America" since 2000 and every issue of "Michigan Super Lawyers" since 2006.

Don't Miss the 2014 Portability Opportunity!

By Lorraine F. New

Portability has been described as the most important change to estate planning since the qualified terminable interest trust (QTIP) in the 1980s. It allows a legally married couple to "share" their total exclusion amount and not lose it. We call the threshold dollar amount a decedent has to have before his or her heirs are required to file an estate tax return (Form 706) the "applicable exclusion amount," and in 2014 that amount is $5.34 million. That exclusion amount can be used for taxable gifts during lifetime or, whatever has not been used, to transfer assets at death without tax.

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, introduced the concept of portability, effective for decedents dying after 2010. The American Taxpayer Relief Act of 2012 made it permanent. While originally a $5 million exclusion, it has grown because of annual inflation increases, which means a legally married couple can share $10.68 million of exclusion if a complete and accurate return is filed within the nine-month deadline (and a possible six-month extension).

Prior to 2011, we had a "use it or lose it rule." If someone died and did not use their exclusion amount, it was lost. Beginning in 2011, a surviving spouse can elect to use their deceased spouse's remaining exclusion amount using portability. To use portability, the survivor must file an estate tax return (Form 706) for the deceased, indicating all the assets, with description and valuations. Even though a return would not be required this year for an estate adding up to $5.34 million, one must be filed in order to obtain the deceased spousal unused exclusion (DSUE) amount for the last surviving spouse. That amount, which is the result of deducting the decedent's taxable estate from the allowed exclusion amount, can be used by the surviving spouse to make gifts during life or shelter assets from estate tax at death.

Because the concept of portability was new, not every eligible estate filed on time, and many requests for extension of time to file were sent in, but denied. Additionally, in *Windsor v United States*, the Supreme Court held that section 3 of the Defense of Marriage Act, which defined marriage as between persons of different sexes, was unconstitutional. After this decision, the IRS issued Revenue Ruling 2013-17, 2013-38 I.R.B. 201, which treats a same sex spouse as a spouse for tax purposes if the marriage was valid in the state where the parties were married. Same-sex spouses can elect portability and can file claims if gifts to spouses resulted in gift tax, or assets passing to spouses resulted in estate tax. Furthermore, the IRS granted an extension of time until December 31, 2014, to estates of decedents dying in 2011, 2012, and 2013 to elect portability if they were not required by the size of their assets to file a federal estate tax return. Rev. Proc. 2014-18, 2014-7 I.R.B. 513. This means that those with eligible estates who did not file for portability within the original time frame, as well as same-sex couples who desire to do so, can elect portability by December 31, 2014 for deaths after December 31, 2010 but before December 31, 2013. This is true for citizens. Residents who are not citizens can elect portability and can employ a Qualified Domestic Trust for non-citizen spouses. The DSUE amount available for the resident non-citizen survivor is not determined until the second death, so gifts using the DSUE amount are not available.

There is no E-Z- form 706. An executor filing this form must list all assets at their date of death values and support the value used. While Internal Revenue Bulletin 2012-28 indicates that items passing to the surviving spouse or charity may be identified at the executor's best estimate, in good faith and with due diligence regarding all of the values includible in the estate, items passing to others still require professional valuations. Also important is the fact that statutes on the portability returns do not toll, and the values can be changed by the IRS for a period of years not ending until the portability amount is used by the surviving spouse and the statute on that return tolls. Records and support need to be kept in order to verify the calculation of the DSUE amount.

Care should always be exercised in valuations because penalties can be imposed, especially if bad faith can be inferred. In a recent tax court case, *Estate of Helen P Richmond*, TC Memo 2014-26, a 20 percent accuracy-related penalty was upheld for an estate. Decedent had owned an interest in a Personal Holding Company (PHC), and her executors employed a CPA to value the interest. An unsigned draft report value was used on the 706 filed. Although knowledgeable about the asset and with some appraisal experience, the CPA was not a certified appraiser. The court indicated that in order to avoid the penalty for the undervaluation, the estate needed to show reasonable cause for the valuation disparity of less than 65 percent of the value found at trial, and "needed to have the decedent's interest in PHC appraised by a certified appraiser." While this was not a portability case, one does expect that with millions of dollars of exclusion at stake, cases will arise involving the value of assets such as PHC.

In deciding whether or not to file a 706 return, consideration should be given to the usefulness of the DSUE amount. How long will the surviving spouse be expected to live? How large will their estate grow? Are they likely to make gifts to use the DSUE amount? Are they likely to remarry, and then survive the second spouse, losing the DSUE amount from the first spouse? Two and a half million Americans die each year, and 40 percent are married. Fewer than 2000 will have to file an estate tax return, but 975,424 could file for the sole purpose of portability. Now is a one-time opportunity for survivors of spouses who died from 2011-2013 to consider or rethink their choice not to file a return for portability by the end of this year. Survivors of spouses who died in 2014 may be nearing the end of their election period as well.

I say "may" because of the curious language of Private Letter Ruling 201421002, dated January 14, 2014. This PLR clearly was requested for the estate of a decedent who died before 2014, and so would have been able to use Revenue Procedure 2014-18 to elect portability if it had been available. Prior to Revenue Procedure 2014-18, the IRS had been denying relief for late filed portability elections because of the requirement of a timely filed estate tax return as stated in Regulations 20.2010-2T. The language used in the PLR 201421002 makes a distinction, however, between regulatory elections (due date based on regulation) for which 9100 relief can be granted and statutory elections (due date based on statute), and it puts an election for portability alone into that regulatory category. It would appear then, those that desire to file a portability return but who failed to meet the filing deadline may make a private letter ruling request. Instead of being outright rejected, it may be granted if a time for electing portability is inadvertently missed or as stated in the facts to this PLR, "Decedent's Form 706 was due on Date 2, but the estate did not file a timely Form 706 to make the portability election. The estate discovered its failure to elect portability after the due date for making the election." Of course, timely made elections, or those using Rev. Proc. 2014-18 are preferred over the cost, time, and risk of a private letter ruling. Yet all is not apparently lost if a portability election is missed but later requested.

One last caution, this late filing opportunity is only for returns that are below the required filing limit. Families and preparers should be diligent in determining whether or not gifts were previously made and gift tax returns filed, eating into the applicable exclusion amount. If the IRS discovers that the amount is over the filing threshold because of previous gifts, reported or not, no portability amount would be available, and penalties and interest can be assessed for late filing and late payment.

Lorraine F. New practices in the area of estate and gift tax returns, preparation and audits, estate planning, and tax controversies. Ms. New, formerly of the IRS Estate and Gift Tax Division, Detroit, has worked in estate tax since 1988 and was the division manager from 2002 to January 2007. She serves as an expert witness and uses her expertise to assist taxpayers and their representatives through the intricacies of the IRS with estate planning, return preparation or review, appeals, drafting of legal opinions or private letter ruling requests, and representation for controversies at every level at any place in the country. Ms. New is also of counsel for George W. Gregory PLLC.

Tax Nugget

By Lorraine F. New

In the past, organizations had to meet multiple requirements to qualify under 501(c)(3), complete a Form 1023 and pay a user fee[1] to apply for tax-exempt status. The Internal Revenue Service (IRS) has recently announced a 1023-EZ, http://www.irs.gov/pub/irs-pdf/f1023ez.pdf, which is completed online. This includes ten pages of instructions, http://www.irs.gov/pub/irs-pdf/i1023ez.pdf , that discuss the type of organization that can use this process, reporting requirements, and gives specific help with completing the online form. There is an additional seven-page worksheet that must be completed with all "No" answers to show that you are eligible to use Form 1023-EZ. For example, your annual gross receipts cannot exceed $50,000 in the next three years or in the past three years. You cannot have assets in excess of $250,000. You cannot have a mailing address in, or have been formed under, the laws of a foreign country. You cannot be organized as an LLC, be a school or church or hospital. However, if all of the answers are negative, you can move on to the online submission.

If you qualify, you will need to have an employee identification number. Your organization documents must include a purpose clause and a statement that your organization will substantially engage in activities that are in furtherance of acceptable exempt purposes. You must also make sure that your organizing documents include an acceptable dissolution clause—the same as in the old application. What is much easier in the online form is that you are merely certifying that your documents contain these clauses, and not sending in all the documents as with the written Form 1023. While you need a Form 2848 to show that someone is represented, you do not include the form but wait until the IRS requests it. Also, what used to take so much time—collecting all of the information, writing much of it out, such as the history of the organization and its specific plans for the future, making multiple copies, organizing them and sending a copy of all of the information to the IRS—can be done in a shorter time online. There is a $400 user fee.

By comparison, the longer Form 1023 is 29 pages with a two-page checklist, before you add your own documents and supplemental answers. In it, you must answer multiple questions about compensation of officers, benefits provided by the organization, a history of the organization, and pages of financial data. The filing fee is $850, or $400 if you meet reduced fee requirements. There is also an "Interactive Form 1023" (http://www.stayexempt.irs.gov/StartingOut/InteractiveForm1023Application.aspx), which has hints and can be downloaded and prepared.

Of course, submission of the EZ application does not guarantee that an exemption will be recognized. The IRS can reject incomplete or incorrectly completed forms; it can request additional information; and, in some cases, it does a statistically valid, random, sample, pre-determination review. There is no indication of how long the approval process will take. However, it does promise to be a time saver for the practitioner and the client on the front end.

Part V of the 1023-EZ will also be useful to charities that have previously obtained exempt status but lost it. Annual returns are generally required by IRC 6033(a) in report or postcard form. Failure to report for three years will result in revocation of the exempt status of the organization. Reinstatement requires re- application. Rev. Proc. 2014-11, 2014-3 IRB 411 provides reinstatement procedures for those that were eligible to file Form 990-EZ or Form 990-N but failed to do so. This includes a streamlined retroactive reinstatement process for applying within 15 months after the later of the revocation letter or the posting of the organization's name on the IRS Revocation List. You can now use Part V of the Instructions from Form 1023-EZ to apply for reinstatement following Rev. Proc. 2014-11.

Notes

1. Churches, their integrated auxiliaries and public charities with annual gross receipts normally less than $5000 do not need to apply for section 501(c)(3).

Lorraine F. New practices in the area of estate and gift tax returns, preparation and audits, estate planning, and tax controversies. Ms. New, formerly of the IRS Estate and Gift Tax Division, Detroit, has worked in estate tax since 1988 and was the division manager from 2002 to January 2007. She serves as an expert witness and uses her expertise to assist taxpayers and their representatives through the intricacies of the IRS with estate planning, return preparation or review, appeals, drafting of legal opinions or private letter ruling requests, and representation for controversies at every level at any place in the country. Ms. New is also of counsel for George W. Gregory PLLC.

From the Probate Litigation Desk

By David L.J.M. Skidmore

There Is No Such Thing As "The Attorney for the Trust"

Introduction

Those of us who routinely represent trustees may have casually said, "I'm the attorney for the trust," on occasion. Technically, of course, you are not the attorney for the trust. Instead, you are the attorney for the trustee who is administering the trust. The "attorney for the trust" phrase, while inaccurate and misleading, is nonetheless heard and tolerated in practice. Experienced practitioners presumably think of "I'm the attorney for the trust" as an abbreviated way of saying, "I'm the attorney for the trustee of the trust." However, the phrase "attorney for the trust" can cause significant problems when it is included in the terms of a trust agreement.

A Troubling Scenario

Imagine the following scenario: The settlor of an *inter vivos* trust died two years ago. He left a trust agreement providing that Attorney X (not the scrivener of the document) would be the "attorney for the trust." The successor co-trustees, when they commenced serving, retained Attorney X as their counsel. Subsequently, there was a breakdown in the relationship between Attorney X and the co-trustees. When the co-trustees told Attorney X that they wanted to terminate her services and retain substitute counsel, Attorney X told them that they could not terminate her because she was the "attorney for the trust," not the attorney for the trustees. Moreover, Attorney X told the co-trustees that she would seek to have them removed if they contravened the trust agreement's direction that Attorney X serve as "attorney for the trust."

The co-trustees petitioned the Probate Court to confirm their authority to discharge Attorney X, based in part on the trust agreement provision empowering the co-trustees to hire (and implicitly to fire) attorneys and other professionals. In the Probate Court proceeding, Attorney X informed the court that, as "attorney for the trust," she represented both the co-trustees and the trust beneficiaries—especially the beneficiary who was then involved in trust-related litigation with the co-trustees, even though that beneficiary was represented by separate counsel. Attorney X took this position despite the fact that her engagement letter was addressed solely to the co-trustees and despite the fact that she had previously filed an appearance in the litigation solely on behalf of the co-trustees.[1]

Trust as Relationship

Is there such a role as the "attorney for the trust"? Was Attorney X correct that she represented both the co-trustees and the trust beneficiaries? I suggest that the phrase "attorney for the trust" is inherently defective and should not be used, or tolerated, in practice.

By definition, a trust (here, meaning the type of trust used in estate, donative, or charitable planning) is a relationship among a trustee, a beneficiary, and property. "A trust…is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee."[2] "[A] trust involves three elements, namely, (1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) one or more beneficiaries, to whom… the trustee owes the duties with respect to the trust property; [and] (3) trust property, which is held by the trustee for the beneficiaries."[3]

Not a Legal Entity

Geometrically speaking, a trust is a triangle with three points: the trustee, the beneficiary, and the property. One element of the trust relationship, the property, is inanimate and therefore incapable of retaining legal counsel. Two elements of the trust relationship, the trustee and the beneficiary, are legal persons who are respectively capable of retaining legal counsel. However, unlike a corporation, a trust is not an artificial legal person. Hence, neither the trustee nor the beneficiary can retain legal counsel to represent "the trust" as an entity or organization. Instead, the trustee can retain counsel to represent the trustee with respect to the administration of the trust, and the beneficiary can retain counsel to represent the beneficiary's interests with respect to the trust.

When a trust is thought of as an incorporeal relationship among three elements, the inability of an attorney to represent "the trust" should be apparent. Saying that one is the attorney for "the trust" is akin to saying that one is legal counsel for "the Holy Trinity" or "the love triangle." While there is no Michigan caselaw on point, this fundamental truism has been expressly recognized elsewhere. According to the California Supreme Court, "[W]hen a fiduciary hires an attorney for guidance in administering the trust, the fiduciary alone…is the attorney's client. The trust is not the client, because a trust is not a person but rather a fiduciary relationship with respect to the property."[4]

Cannot Hire or Fire Counsel

The nonsensical 1980 pop song, "Fish Heads," described all the things that "roly poly fish heads" cannot do, "They don't play baseball; they don't wear sweaters; they're not good dancers; they don't play drums!" In a similar vein, there are many things that a trust cannot do. A trust cannot hire an attorney; it cannot communicate with an attorney; it cannot assert attorney-client privilege; and it cannot terminate the services of an attorney. All these actions would have to be taken by the trustee who is administering the trust.

If the phrase "attorney for the trust" really meant that the attorney represented the trust, rather than the trustee, then nobody could discharge such attorney, because a trust is not a legal person or an organized entity, and nobody has the right to act on behalf of the trust except for the trustee. What settlor would desire to have the trustee of his trust advised by an attorney who cannot be fired?

Joint Representation

Designating an "attorney for the trust" in the trust agreement creates a minefield of ethical issues. In the scenario presented above, Attorney X took the position that she represented both the co-trustees and the beneficiaries by virtue of her position as "attorney for the trust." Attorney X was describing a joint representation situation, which is governed by MRPC 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another clientunless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."

This situation raises the question whether it is reasonable for a lawyer to believe that she can simultaneously represent the interests of both the trustee and the beneficiary of the same trust with regard to trust-related matters, without the representation of either or both being adversely affected. In my opinion, it is not possible for a lawyer to reasonably reach such a conclusion.

Unified Legal Strategy Impractical

Joint representation of multiple clients is permissible only when it is possible for the lawyer to devise a legal strategy that serves the interests of, and is agreed to by, all of the clients. It is extremely unlikely that the trustee and the beneficiaries will agree on every decision that is made in the course of a trust administration. Even if the parties could reach a consensus on how to administer the trust, each party's interests would be affected to some extent, either positively or negatively, by many decisions made during administration, so that the attorney would have to seek conflict waivers from the affected clients each time such situation arose.

Competing Legal Interests

The trustee and the beneficiary of a trust will routinely have fundamentally different interests that a single attorney cannot simultaneously protect. An attorney is a fiduciary who owes a duty of loyalty to his/her clients.[5] An attorney cannot ethically serve as counsel for multiple clients who have disparate and competing interests.

Many examples of competing interests between the trustee and the beneficiary are readily apparent. An attorney cannot simultaneously represent the trustee with regard to minimizing the risk of liability, and the beneficiary with regard to identifying and seeking redress for any breaches of fiduciary duty. An attorney cannot simultaneously represent the trustee with regard to the preparation of the trust inventory and accountings, and the beneficiary with regard to analyzing whether such documents raise any concerns regarding the trust administration.

An attorney cannot simultaneously represent both the trustee and the beneficiary with regard to the beneficiary's request for a discretionary distribution from the trustee, and the trustee's consideration of such request. An attorney cannot simultaneously represent the trustee with regard to calculating the amount of the beneficiary's distributive share, and the beneficiary with regard to checking the accuracy of the trustee's calculation. An attorney cannot simultaneously represent the trustee with regard to requesting that the beneficiary execute a receipt and release form on final distribution, and the beneficiary with regard to evaluating whether to execute such an instrument.

Trust Administration by Committee

Moreover, joint representation of the trustee and the beneficiary would fundamentally alter the nature of the trust administration process. Typically, the trustee makes decisions regarding trust administration without consulting the beneficiaries at each step of the way. Where the joint-representation attorney is involved in advising on, or implementing, such decisions, the attorney would have to seek consent from the beneficiary-client to a proposed course of action by the trustee-client. Trust administration would essentially be governed by a committee comprised of the trustee and the beneficiaries.

No Attorney-Client Privilege

In a joint representation situation, information exchanged between the attorney and one client cannot be withheld from any of the other clients. Hence, the trustee would be entitled to all information exchanged between the joint-representation attorney and the beneficiaries, and the beneficiaries would be entitled to all information exchanged between the joint-representation attorney and the trustee. Neither the trustee nor the beneficiaries could assert attorney-client privilege with respect to the other.

Who Pays Legal Fees?

Another practical difficulty would be determining liability for the attorney's fees. The Michigan Trust Code provides that a trustee may pay for professional services, such as legal fees, from the assets of the trust.[6] However, trust beneficiaries have no comparable right under Michigan law, suggesting that (unless the trust agreement provided otherwise) the joint-representation attorney would have to invoice the trustee and the beneficiaries separately for legal services rendered to each of them.

Explanation of Implications

If an attorney did undertake such joint representation of the trustee and the beneficiaries, then all of the myriad complications and issues would have to be detailed in the initial engagement letter. "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implication of the common representation and the advantages and risks involved."[7] It is difficult to imagine any letter adequately anticipating and explaining the multiplicity of problems that would arise from such joint representation.

Each Co-Trustee Entitled To Counsel

In the scenario presented above, the trust agreement provided that the co-trustees possessed broad administrative powers, including the power to hire attorneys. In fact, Michigan caselaw has construed MCL 700.7817(w) (trustee's power to employ an attorney) to mean that each co-trustee of a trust may retain an attorney to advise the co-trustee regarding trust administration and/or litigation.[8] So the designation of a single "attorney for the trust," where the trust was under the administration of multiple co-trustees, was potentially inconsistent with the scope of MCL 700.7817(w). (Of course, co-trustees frequently choose to be represented by the same attorney, despite their right to retain separate counsel.)

Direction to Employ Attorney as Counsel for Trustee

If the settlor desires to have the successor trustee advised by a certain attorney, then the settlor may include a direction in the trust agreement (either mandatory or precatory) directing the trustee to employ such attorney as counsel for the trustee (not the trust). Such a direction raises difficult questions as to whether the settlor was motivated by a desire to confer a benefit on the attorney or a desire to promote sound trust administration; if the settlor desired to confer a benefit on the attorney, whether the attorney is a beneficiary of the trust; whether the attorney can compel the trustee to employ him; and whether the trustee owes any fiduciary duties to the designated attorney.

A mandatory direction that the trustee should employ a particular attorney is likely unenforceable due to the unique nature of the attorney-client relationship. "Even if a settlor intended to confer a right to the employment, the trustee is not necessarily obliged to employ the person. Thus, there is no such obligation to that person where the employment is of such a character that it might seriously interfere with the trustee's proper administration of the trust.[9]

The Probate Court likely would not compel a trustee to employ an attorney who the trustee does not want to work with. "A direction to employ a specified attorney…is not enforceable because the relationship is highly fiduciary and personal in character."[10]

There is apparently no ethical rule against an attorney drafting a trust agreement in which the settlor designates the scrivener as the attorney desired to represent the successor trustee. "It appears that no rule of professional conduct prohibits the lawyer from drafting the instrument to name the lawyer as the lawyer for ... the trust [i.e., the trustee] provided there have been no improper suggestions or solicitation[.]"[11] (MRPC 1.8(c), prohibiting an attorney from inserting a gift to the attorney in an instrument drafted for an unrelated client, apparently does not apply to a designation that an attorney is to be employed, presumably because compensation for services rendered does not constitute a gift).

In the view of the ethics panel, however, such a designation would be unenforceable by the attorney. "[T]he lawyer does have the responsibility of notifying the client at the time of drafting the instrument that notwithstanding the nomination[,] the fiduciaries may choose whomever they wish to act as counsel for…the trust [i.e., the trustee], in line with the requirements of MRPC 1.7(b)(2)."[12]

Conclusion

Sometimes the niceties of legal language are a matter of preference and style. In this instance, however, inaccurate terminology creates the possibility of significant negative consequences, not only for the scrivener and the designated "attorney for the trust," but also for the trustee and the beneficiaries. When we hear someone say, "I'm the attorney for the trust, we should respond, "There is no such thing; you mean that you represent the trustee of the trust, right?" If the other attorney does not agree with you, then you've got a problem.

Notes

1. See MCR 5.117(A) ("An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary").
2. Restatement (3rd) of Trusts § 2 (2003).
3. *Id* at cmt f.
4. *Borissoff v Taylor & Faust*, 93 P3d 337, 340 (Cal 2004) (internal quotation omitted).
5. See *People v Waterstone,* 486 Mich 942, 952; 783 NW2d 314, 322 (2010) (describing the attorney's duty of loyalty to the client as "the backbone of our legal system"); see also cmt to MRPC 1.7.
6. MCL 700.7817(w).
7. MRPC 1.7(b).
8. *In re Fox Revocable Living Trust*, No 292879, 2010 Mich App LEXIS 2160 (Nov 16, 2010) (unpublished).
9. Restatement (3rd) of Trusts § 48 cmt b.
10. *Id*.
11. Michigan Ethics Opinion RI-291 (Apr 23 1997).
12. *Id*.

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

By Hon. Phillip E. Harter

Heirs—Parent/Child—Presumption—Gift—Lack of Delivery

***Estate of Casey v Keene*, Nos 314209, 314728, 2014 Mich App LEXIS 1430 (July 31, 2014)**

The decedent, Everett Casey, and his wife Mary Alice, who predeceased him, had two marital children, Kathryn and Kirk Casey. In July 1997, the decedent executed a will and trust, naming in his trust Kathryn and Kirk as his only children. After the decedent's death on March 24, 2012, Kathryn filed a petition for probate and sought to admit the decedent's 1997 will to probate. Renee and Bruce Keene filed demands for notice and objections to the petitions for probate and claimed that the decedent was their biological father. Renee and Bruce alleged that the decedent and their mother, Corinne Keene, had an extramarital affair while she was married to Robert Keene, the man listed as Bruce's and Renee's father on their birth certificates. Robert Keene died in 1996, and Renee and Bruce did not seek to establish decedent's paternity until the present action. Bruce also challenges the probate court's determination that decedent did not gift the contents of his safe to him.

The probate court issued a thorough written opinion and order granting Kathryn's motions for summary disposition on the grounds that (1) Renee and Bruce were not interested persons, (2) the 1997 will was valid and unrevoked, and (3) no genuine issue of material fact existed that the decedent did not gift the contents of the safe to Bruce. The decedent's 1997 will was admitted to probate, and the court ordered an evidentiary hearing as to the amount of money in the decedent's safe at the time of his death.

With respect to the interested person determination, the probate court ruled that MCL 700.2114(1)(b)(v) was inapplicable because the plain language of the statute requires an initial finding that Renee and Bruce were either born out of wedlock or born or conceived during the marriage but were not the issue of the marriage before the court could make a natural parent determination under MCL 700.2114(1)(b)(v). The court reasoned that because Corinne and Robert Keene were married when Bruce and Renee were born, Robert Keene is the presumed father and "there has been no determination that the children were not an issue of the marriage," and thus Renee and Bruce were not interested persons. Renee and Bruce Keene appealed.

The court of appeals began by observing that at the time of the decedent's death in 2012, EPIC was in effect and governed the question. They stated that the statute defines *interested person* to include a child or heir, among others. Because Renee and Bruce claim to be interested persons as the biological children of the decedent, the parties focused their attention on MCL 700.2114, which sets forth the framework for establishing the parent/child relationship for the purposes of intestate succession. That section provides in relevant part:

> (1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:
>
> (a) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for the purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in

> apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession.
>
> (b) If a child is born out of wedlock or *if a child is born or conceived during a marriage but is not the issue of that marriage,* a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:
>
> ***
>
> (v) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.
>
> ***
>
> (5) Only the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent.

MCL 700.2114 (emphasis added).

The court of appeals recognized that the statue clearly provided that, for purposes of intestate succession, a child is to take from his or her natural parents, "regardless of their marital status." The court went on to state that the statutory language also could not more clearly establish that the parents of children born during a marriage are presumed to be the natural parents of those children. The statute then provides that the parent/child relation with the alleged natural parent can be established in a number of ways. Relevant to this case, the statute provides that (1) "If" a child is born or conceived during a marriage but is not the issue of that marriage, (2) the court can determine whether the alleged father is the child's natural one under the procedures of the paternity act. In other words, "if" a person can establish that he was born or conceived during a marriage but was not an issue of that marriage (and therefore has disclaimed that the presumed natural father is not the natural father), the court can then proceed to the next step of DNA testing under the paternity act to determine whether the alleged father (here the decedent) is the natural parent of Renee and Bruce.

The court of appeals next analyzed the definition of the word *if* by using a standard dictionary definition of the word. It concluded that the use of the word *if* in the first and second clauses of MCL 700.2114(1)(b) sets forth the alternative conditions on which the rest of the subsection is premised. Absent satisfaction of one of those conditions, the remainder of subsection 2114(1)(b) does not come into play. The fact in this case is that Bruce and Renee are the children of Corinne and Robert Keene, as they were married when Bruce and Renee were conceived. This fact is established by their birth certificates. Because of that undisputed fact, it is established the Renee and Bruce were born during a marriage. The court of appeals then asks what then becomes of the proof that they were not issues of the marriage? Bruce and Renee claim that the DNA evidence proving that they are the biological children of the decedent accomplished that task.

The court pointed out, however, the plain language of MCL 700.2114(5) provides the exclusive means by which a presumption of natural parenthood set forth in MCL 700.2114(1)(a) may be overcome as well as specifies that the only person holding the right to challenge the presumption is the presumptive natural parent; the right to attempt to overcome the presumption ends when the presumed parent is deceased. Here, that person was Robert Keene. Since Robert Keene has already died, the exclusive right to disprove the presumption the Renee and Bruce are his natural children has terminated. Accordingly, the court of appeals held, Renee and Bruce do not satisfy the express criteria of MCL 700.2114(1)(b). To hold otherwise would effectively allow an additional method to rebut the presumption of paternity provided in subsection 2114(5) and render the relevant portion of subsection 2114(1)(b) superfluous. This the court of appeals refused to do. Therefore, the court of appeals affirmed the trial court's order of summary disposition that (1) neither Renee nor Bruce were interested persons or heirs of the decedent, and (2) the decedent's 1997 will is valid and unrevoked since there is no interested party who is challenging that will.

The court of appeals next dealt with the issue concerning the probate court's grant of summary disposition that the decedent did not gift the contents of the safe located at his company's office to Bruce before his death. The court of appeals observed that for a gift to be valid, three elements must be satisfied: (1) the donor posses the intent to transfer title gratuitously to the donee; (2) there must be an actual constructive delivery of the subject matter to the donee, unless it is already in the donee's possession; and (3) the donee must accept the gift. A gift inter vivos is not only immediate, but also absolute and irrevocable. Delivery must be unconditional and must place the property within the dominion and control of the donee. Additionally, an inter vivos gift "must be fully consummated during the lifetime of the donor and must invest ownership in the donee beyond the power of recall by the donor." *Osius v Dingell*, 375 Mich 605, 611, 134 NW2d 657 (1965). In this case the probate court had found that Bruce's affidavit's had failed to establish delivery. The court of appeals observed that although Bruce claims the decedent provided the combination of the safe and indicated that the contents of the safe belonged to him, it was the decedent who retained domination and control over the safe and its contents. The safe was located in the decedent's office at a company exclusively owned by the decedent. Additionally, the decedent retained control of the combination that he could change at any time, thereby precluding Bruce's access to safe contents. The court therefore held that this means the decedent retained not only control but also the power to recall. Therefore there was no delivery. The court of appeals affirmed the probate court's grant of summary disposition that no genuine issue of material fact existed that the decedent did not gift the contents to Bruce.

Enforcement of Property Settlement—Judgment of Divorce—Incorporated—Merged—Statute of Limitations—Enforcement of Contractual Attorney Fees

***Peabody v DiMeglio (In re DiMeglio Estate)*, No 315319, 2014 Mich App LEXIS 1483 (Aug 12, 2014)**

Plaintiff and Paul DiMeglio (the decedent) were married in 1989 and divorced in 1995. As part of the divorce, plaintiff and decedent entered into a property settlement agreement, which was incorporated, but not merged, into a Virginia judgment of divorce by express language to that effect on December 15, 1995. The portion of the agreement relevant to this appeal deals with a piece of real property located in Colorado (Colorado property). Paragraph 16(B)(2) of the agreement states, "The Husband specifically agrees that he shall be responsible for and shall indemnify the Wife from any liability whatsoever rising out of … [the] Colorado Mortgage." Paragraph 19(B) of the agreement states,

> The parties agree that the Wife is the sole owner of a property located at 1222 Colorado Boulevard, Idaho Springs, Colorado, in which the Husband has an investment interest. The parties further agree that
>
> (1) Said Colorado residence shall remain as an investment property.
>
> (2) Wife shall not sell, deed over, or otherwise dispose of said property in any manner.
>
> (3) Neither party shall encumber said property by subsequent mortgages, equity loans, or other means without the written agreement of the other.
>
> (4) Husband shall be responsible for all mortgage payments on said property even though the mortgage loan on said property is in the name of the Wife.
>
> ***

(7) Husband has the sole and separate option to sell said property at any time of his choosing. Wife shall have the right of first refusal to purchase said property incident to any such sale.

(8) If said property is sold, all net proceeds of sale after customary costs of sale, such as the real estate commission, closing costs, mortgage payoff, and capital gains tax responsibilities, etc., shall be divided equally between the parties. The settlement attorney of other person conducting the settlement shall receive a copy of this Agreement as his or her instructions.

Sometime before 1997, decedent missed several mortgage payments on the Colorado property. On November 27, 1997, plaintiff executed a quitclaim deed in favor of decedent conveying her entire interest in the Colorado property. This was done to remove her from the mortgage to avoid financial responsibility for the property and to allow decedent to refinance. Sometime around 2000, decedent further encumbered the property with mortgage debt.

On November 12, 2003, decedent conveyed his entire interest in the Colorado property to his new wife, defendant Marta DiMeglio, by quitclaim deed. Decedent executed a second quitclaim deed in favor of Marta on August 30, 2004. On that same day, Marta conveyed the property to a third-party buyer by general warranty deed for consideration of $215,000. The proceeds from the sale were used in an IRC 1031 "like-kind" exchange in which Marta purchased real property in Eaton Rapids, Michigan.

Decedent died on November 12, 2011. Plaintiff filed a claim against decedent's estate that Marta, as personal representative, denied. Plaintiff then filed an eight-count complaint in the probate court against decedent's estate and Marta as personal representative of the estate and individually. The complaint alleged breach of contract, breach of covenant of good faith and fair dealing, conversion, statutory conversion, concert of action, fraud, enforcement of the divorce judgment, and unjust enrichment.

Marta moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The probate court granted summary disposition as to Marta in her individual capacity, under MCR 2.116(C)(8) and (10), because she was not a party to the property settlement agreement and had no personal liability for any of the claims. The probate court further granted summary disposition to Marta in both capacities under MCR 2.116(C)(7), finding that the six-year statutory period of limitation for contract claims had run. On appeal, plaintiff contested only the probate court's finding that the statute of limitations for contract claims barred all of plaintiff's claims, specifically the claims for enforcement of the divorce judgment and unjust enrichment, provided for in counts VII and VIII of her complaint, respectively. Defendant cross-appealed the probate court's order denying her motion for attorney fees.

Court first addressed the question as to whether Michigan or Virginia law should apply. They observed that Michigan has adopted the Uniform Enforcement of Foreign Judgments Act, MCL 691.1171 et seq. Because the divorce judgment was filed in accordance with the act, the judgment is treated as a Michigan judgment and Michigan law would apply to its enforcement.

The second issue addressed by the court is which statute of limitations provision applies. MCL 600.5807(8) provides a 6-year statute of limitations for ordinary breach-of-contract claims. MCL 600.5809(3) provides a 10-year statute of limitations for "noncontractual money obligations." The court cited *Gabler v Woditsch*, 143 Mich App 709, 372 NW2d 647 (1985). They stated the holding of the *Gabler* case to be that a property settlement that was expressly incorporated by reference into the divorce judgment is founded on a judgment within MCL 600.5809(3), and the 10-year statutory period of limitation would apply. The court of appeals adopted the principle of law in *Gabler* that incorporation by reference into a judgment of divorce makes a property settlement agreement enforceable as a judgment to which the 10-year statute of limitations, MCL

600.5809(3), applies. When the parties to a divorce agree, through their attorneys, to incorporate the terms of a property settlement agreement by reference and specifically agree not to merge the agreement into a judgment, it could be assumed that the attorneys and the judge who enter the judgment understand the definitions of *merger* and *incorporation.* The clear intent of the parties entering into such agreement would be to make the agreement enforceable as a court order and also as an ordinary contract. Applying that principle to the present case, the court of appeals concluded that the property settlement agreement is enforceable as a judgment because it was incorporated rather than merged into the divorce judgment. Therefore, the probate court erred in applying the 6-year statutory period of limitation for breach-of-contract claims to enforce the divorce judgment, and should have applied the 10-year statutory period of limitation for noncontractual money obligations pursuant to MCL 600.5809(3). Because the plaintiff sought enforcement of the provision requiring decedent to pay plaintiff half of the proceeds from the 2004 sale of the Colorado property, the cause of action for that claim occurred in 2004 when the property was sold and defendant failed to pay plaintiff half of the proceeds. Therefore plaintiff timely filed her complaint in 2012 pursuant to MCL 600.5809(3).

Regarding the third issue, the court of appeals examined defendant's argument that claimed unjust enrichment cannot be sustained when a contract exists on the same subject matter. The court agreed with defendant's assertion and stated that the law operates to imply a contract in order to prevent unjust enrichment, and that will not occur if there is already an express contract on the same subject matter. However, they stated that the claim was beyond the claim for contract breach. Plaintiff alleged not only that the estate owed her for decedent's breach, but that defendant was unjustly enriched when she retained the funds from the sale of the Colorado property. This is purely an equitable claim that is not covered by any express contract of the parties. Because the claim is not based on an analogous legal claim, the statue of limitations does not apply. If the claim for unjust enrichment is time-barred it would be under the equitable doctrine of laches. Accordingly, the court of appeals held that the trial court erred by granting summary disposition to defendant for plaintiff's complaint concerning unjust enrichment.

Regarding the fourth issue, concerning the defendant's cross-appeal denying the court's denial of her motion for attorney fees, the court of appeals found that the probate court's interpretation of the contractual language in the property settlement agreement providing for attorney fee was overly narrow. Contrary to the probate court's determination, the contract provision providing for attorney fees is a valid exception to the American rule regarding attorney fees. A common-sense reading of the relevant provisions of the property settlement agreement is that "reasonable costs incurred by a party in the successful defense to any action for enforcement of any of the agreements, covenants, or provisions of the th[e] [property settlement] agreement" would include attorney fees regardless of which party prevails. They did not, however, reverse the probate court's order because a "successful defense" per the contractual language had not been determined pursuant to the remand back to the probate court.

What can we take from this case? First, if the property settlement is incorporated but not merged into the judgment of divorce, the 10-year statute of limitations would apply. Likewise, a property settlement that was incorporated by reference into a judgment of divorce or merged in a judgment of divorce would likewise be covered by the 10-year statute of limitations. Second, statute of limitations does not apply to an equitable claim of unjust enrichment. Such a claim can be barred only by the equitable remedy of laches. Third, a contract provision providing for attorney fees is a valid exception to the American rule regarding attorney fees.

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

Legislative Report

By Harold G. Schuitmaker

2014 PA 310

MCL 211.27a(7)(t)(u)

A transfer of ownership of real property for the purpose of uncapping the value does not include the following:

(t) Beginning December 31, 2014, a transfer of residential real property if the transferee is the transferor's or the transferor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. Upon request by the department of treasury or the assessor, the transferee shall furnish proof within 30 days that the transferee meets the requirements of this subparagraph. If a transferee fails to comply with a request by the department of treasury or assessor under this subparagraph, that transferee is subject to a fine of $200.00.

(u) Beginning December 31, 2014, for residential real property, a conveyance from a trust if the person to whom the residential real property is conveyed is the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. Upon request by the department of treasury or the assessor, the sole present beneficiary or beneficiaries shall furnish proof within 30 days that the sole present beneficiary or beneficiaries meet the requirements of this subparagraph. If a present beneficiary fails to comply with a request by the department of treasury or assessor under this subparagraph, that present beneficiary is subject to a fine of $200.00.

2014 PA 159

Adoption of the Uniform Collaborative Law Act, which provides collaborative alternative dispute resolution as an alternate to litigation for marriage, divorce, annulment, property distribution, child support, adoption, and pre- and post-marital.

Future Legislation

The Probate and Estate Planning Council is working on legislation to release Irrevocable Life Insurance Trust (ILIT) Trustees from compliance with the prudent investor rule.

The purpose of this proposed legislation would relieve ILIT trustees of the fiduciary duties of a trustee in a trust that only owns life insurance policies.

Oftentimes, a nonprofessional person or family member has been named as the fiduciary of such a trust. This legislation would relieve the trustee of the duty to determine if the policy is a prudent and proper investment.

The Probate and Estate Planning Council of the State Bar of Michigan will be proposing legislation that would grant fiduciary access to digital assets as follows:

> Unless otherwise provided by a court, will or trust of a decedent, the fiduciary, personal representative or trustee would have the right to access all digital assets of the decedent. This act would also give such access to a conservator as well as access by an agent.

Along similar lines, the following House bills (which are all tie barred) have been introduced.

House Bill 5366

A conservator could execute control and be an authorized user of digital property of a protected individual.

House Bill 5367

> (2) Except as otherwise provided by a decedent's will, and subject to applicable law and a terms-of-service agreement, with respect to a

decedent's digital property, a personal representative has the lawful consent of the decedent and is an authorized user under all applicable state and federal statutes. A personal representative has the right to, and if necessary for purposes of administration shall, exercise control over the decedent's digital property. A personal representative's written request for access to, or control of, digital property is conclusive evidence in any action that the access to, exercise of, control of, or both, digital property by the personal representative is necessary for purposes of administration. The personal representative may maintain an action to gain access to, exercise control of, or both, digital property.

House Bill 5369

(F) Unless provided in the durable power of attorney or by judicial order and subject to the applicable terms-of-service agreement, the attorney-in-fact, while acting as attorney-in-fact, shall *not* do any of the following:

(i) Exercise control over digital property.

(ii) Exercise a right in digital property.

(iii) Change a governing instrument affecting the digital property.

House Bill 5370

(oo) Subject to the applicable terms-of-service agreement, [a Trustee may] exercise control over and rights in digital property according to terms of the trust.

(1) On receipt of a trustee's written request under this subsection for access to digital property, ownership of digital property, or a copy of a digital asset, a digital custodian shall provide the trustee with the requested access, ownership, or copy, as applicable. A trustee's written request under this subsection must be accompanied by a certificate of trust.

(2) A digital custodian shall comply not later than 56 days after receipt of a request made under subsection (1). If the digital custodian fails to comply, the Trustee may petition the court for an order directing compliance. If, not later than 56 days after receiving a request made under subsection (1), the digital custodian fails to comply with the request, the Trustee may petition the court for an order directing compliance.

Senate Bill 293

A Personal Representative may "take control of, conduct, continue, or terminate any accounts of the decedent on any social networking website, any micro-blogging or short message service website, or any electronic mail service website."

Harold G. Schuitmaker, of Schuitmaker, Cooper, Schuitmaker, Cypher, & Knotek, P.C., Paw Paw, is admitted to the Michigan and Florida bars, practices in the areas of estate planning and probate, municipal law, corporations, and real estate. Mr. Schuitmaker is a Fellow of the Michigan State Bar Foundation, and has a Martindale-Hubbell AV Peer Rating and an ICLE Certificate of Completion in the Probate and Estate Planning Program. He is a past-president of the Probate and Estate Planning Section of the State Bar of Michigan. He is a "Michigan Super Lawyer," named "Best Lawyers in America" by U.S. News and World Report and "Best Lawyers in Michigan." He was also named a "Leader in the Law" by *Lawyers Weekly*. Mr. Schuitmaker is a member of the Kalamazoo County Bar Association and the Van Buren County Bar Association. He is a past-president of the Rotary District Foundation. Mr. Schuitmaker is a regular contributor to the *Michigan Probate and Estate Planning Journal*.

Ethics and Unauthorized Practice of Law

By Fred Rolf, Josh Ard, and Victoria A. Vuletich,

The State Bar of Michigan recently issued a new ethics opinion that addresses probate issues. Three questions were asked:

1. If the law firm's personal injury client dies during the pendency of the lawsuit, leaving only minor heirs, may the law firm bill the client's probate estate at an hourly rate for probate work performed for the benefit of the estate, including fees for opening the estate, obtaining appointment of a personal representative, and representing the personal representative while the personal injury lawsuit is pending?
2. May the law firm rely on the client's signature on the contingent fee agreement as consent to proceed with the probate work PEC Meeting Materials, October 31, 2014, on an hourly basis if the appointed personal representative does not agree?
3. If the defendant dies during the pendency of a personal injury lawsuit, may the law firm bill its plaintiff-client on an hourly rate basis for probate work required to substitute a decedent's probate estate as the defendant, including fees for opening the probate estate, and communicating with the public administrator during the proceedings?

The Committee's answers were: *yes*, *no*, and *no*. The opinion references RI-6, RI-114, RI-291, MRPC 7.3, and MRPC 1.16.

In essence there are two different issues facing a plaintiff attorney:

1. The plaintiff dies. Will the plaintiff's successor (PR) retain the same attorney?
2. The defendant dies. If nothing is done to open a probate estate, the plaintiff must do so as a creditor.

The ethics opinion deals with both issues.

The opinion states a lawyer may do probate work on an hourly basis and personal injury work on a contingency basis. However, the personal representative has free rein in the choice of an attorney for the probate estate and cannot be bound by any prior action of the decedent. Moreover, the lawyer may not bill separately for services that are normally covered in the contingency fee. RI-114 previously stated that presentation of wrongful death proceeds to the court is part of the wrongful death representation, and those particular aspects of probate cannot be billed twice, once hourly and once folded into the contingency fee. This opinion elaborates, stating that a lawyer representing a plaintiff takes on various risks about what happens to a defendant, including the possibility that he will die. If he dies and no probate estate is opened within forty-two days, the plaintiff, like any other creditor, can file to open an estate. The opinion states this is a risk the plaintiff's lawyer bears by taking the case on a contingency arrangement. The plaintiff's lawyer cannot represent the personal representative because of the conflicting interests in litigation. Furthermore, the same priority for appointment exists so there is no reason to assume that a public administrator would be appointed. The opinion noted it does not address the question of whether the plaintiff could seek reimbursement from the estate for the filing fee and costs of opening the estate. These questions were not asked.

Veteran Benefits

Veteran benefits can be a wonderful benefit for some of our clients. In the future, veteran benefits will likely have a look-back period similar to Medicaid eligibility. HR 2189 proposed a three-year look-back period. Attorneys and investment advisors must practice veteran benefit planning in an ethical lawful manner. There is a perception that some advisors promote questionable veteran eligibility practices with the use of irrevocable trusts and annuity contracts. In 2012, the Government Accounting Office (GAO) conducted a covert investigation of nearly 200 attorneys/advisors.

Practice Note

Conduct your practice estate planning, Medicaid planning, and veteran benefit planning in an ethical manner. You do not want to be a target of a Government Strike Force Team.

Ramon F. (Fred) Rolf, Jr., of Chalgian & Tripp Law Offices PLLC in Midland, Michigan, practices in the area of probate, estate planning and elder law. Mr. Rolf also was a past president of the Northeastern Michigan Estate Planning Council and a Fellow of the American College of Trust and Estate Counsel.

W. Josh Ard of the Law Office of Josh Ard PLLC in Williamston, Michigan, practices in the areas of elder law, probate law, consumer law and administrative law. Mr. Ard specializes in special needs planning and planning and dealing with incapacity.

Victoria A. Vuletich has a private practice counseling lawyers on legal ethics and practice development matters, and is also a professor at Cooley Law School. Her co-columnists, Josh Ard and Fred Rolf, are esteemed Michigan estate planning attorneys and she is grateful for their legal knowledge and client centered approach to practice.

The George A. Cooney Society

The Institute of Continuing Legal Education, in conjunction with the Probate & Estate Planning Section of the State Bar of Michigan, periodically selects a Michigan estate planning attorney to be inducted to the George A. Cooney Society for outstanding contributions to continuing legal education in Michigan. Inductees to the Society are installed at the Annual Probate & Estate Planning Institute.

As of November 2014, there have been four inductees:

John E. Bos (2007)
Everett R. Zack (2009)
John H. Martin (2011)
John A. Scott (2013)

George A. Cooney was one of Michigan's premier estate planning and elder law attorneys and a mentor to many. The George A. Cooney Society was established to recognize lawyers who epitomize George's dedication to his fellow attorneys and to honor George's long-term, significant contributions to continuing legal education in Michigan.

ICLE nominates candidates based upon the specific criteria contained in the Guidelines for Selection and forwards its nomination to the Probate & Estate Planning Section for ratification. Section members may recommend candidates to ICLE for consideration.

Guidelines for Selection:

- Significant CLE contributions to probate and estate planning over a substantial period of time.
- Outstanding quality of contributions.
- A wide range of contributions, e.g. multiple contributions for the following: speaker, author, editor, advisory board member, curriculum advisor, creating case study scenarios, preparing Top Tips, How-To Kits, or other online resources, etc.
- Generous mentorship and assistance to colleagues with their probate and estate planning career development as well as activities and active involvement with the Probate & Estate Planning Section of the State Bar of Michigan.

If you wish to nominate a candidate for induction into the Society, please contact Jeff Kirkey at ICLE.

Michael W. Irish Award

Mission: To honor a practitioner (supported by recommendations from his or her peers) whose contributions to the Probate and Estate Planning Section of the State Bar of Michigan and whose service to his or her community reflect the high standards of professionalism and selflessness exemplified by Michael W. Irish.

Recipients

1995 Joe C. Foster, Jr.
1996 John H. Martin
1997 Harold A. Draper
1998 Douglas J. Rasmussen
1999 James A. Kendall
2000 NO AWARD PRESENTED
2001 John E. Bos
2002 Everett R. Zack
2003 NO AWARD PRESENTED
2004 Brian V. Howe
2005 NO AWARD PRESENTED
2006 Hon. Phillip E. Harter
2007 George Cooney (April 3, 2007)
2008 Susan A. Westerman
2009 Russell M. Paquette (posthumously)
2010 Fredric A. Sytsma
2011 John A. Scott
2012 NO AWARD PRESENTED
2013 Michael J. McClory
2014 Sebastian V. Grassi, Jr.

The Michael W. Irish Award was first presented in 1995 in honor of the late Michael W. Irish. The award reflects the professionalism and community leadership of its namesake.

If you wish to nominate a practitioner for this Award, please contact the Chair of the Awards Committee, Douglas A. Mielock, or any member of the Committee:

Douglas A. Mielock, Chair
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Ex Officio

Probate and Estate Planning Section
2014-2015 Committee Assignments

Editor's note: The Probate and Estate Planning Council welcomes your participation on committees. If you are interested in serving on any of the committees listed below, please contact the chair of the committee on which you would like to serve.

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ICLE Products of Interest to Probate Practitioners

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Michigan Estate Planning Handbook, Second Edition

Edited by Carol J. Karr

Get the book that should be the backbone of every Michigan estate planner's library. It covers all stages of the planning, including drafting wills and trusts, tax considerations, health care decisions, and trust administration.

			Firm Size 0-4 Attorneys	5-29 Attorneys	
***Prices:**					
Print Book	$145.00	**Online Book**	$135.00	$225.00	***Product #:*** *2006556555*

Michigan Guardianship and Conservatorship Handbook, Revised Edition

Edited by Phillip E. Harter and Thomas V. Trainer

Confidently counsel your clients on the "ins and outs" of guardianships and conservatorships. Know how to establish, modify, and terminate guardianships and conservatorships for minors and individuals who are legally incapacitated or developmentally disabled.

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Upcoming ICLE Seminars

Drafting Estate Planning Documents, 24th Annual

Co-Sponsored by the Probate and Estate Planning Section of the State Bar of Michigan

From portability elections to joint trusts to Circular 230 changes, estate planning is changing rapidly and in profound ways. Get the latest drafting strategies from the experts and get your forms in tip-top shape. This perenially popular and valuable program informs you of the changes in the law and gives you sample forms that you can put to use today.

Dates: January 22, 2015
February 12, 2015

Locations: GVSU Eberhard Center, Grand Rapids
The Inn at St. John's, Plymouth

Seminar #: *2015CR6535*

General fee: $195.00
Section Members: $175.00
ICLE Premium Partners: $0.00
New Lawyers: $95.00
ICLE Basic Partners: $175.00

Estate Planning for Retirement Assets

Co-Sponsored by the Probate and Estate Planning Section of the State Bar of Michigan

Learn to effectively handle retirement assets for your estate planning clients. This seminar uses a case study approach to explain the Required Minimum Distribution rules, making retirement benefits payable to trusts, and post-death administration. Your clients and their families will benefit for years to come.

Date: April 30, 2015
Location: Atheneum Suite Hotel, Detroit

Seminar #: *2015CR6544*

General Fee: $165.00
Section Members: $145.00
ICLE Premium Partners: $0.00
New Lawyers: $95.00
ICLE Basic Partners: $145.00

SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

Date	Place
January 17, 2015	University Club, Lansing
February 14, 2015	University Club, Lansing
March 14, 2015	University Club, Lansing
April 11, 2015	University Club, Lansing
June 13, 2015	University Club, Lansing
September 12, 2015*	University Club, Lansing

*Annual Meeting

Meeting of the Committee on Special Projects (CSP) begins at 8:30 a.m. with the Council meeting to follow.
All members of the Section are welcome to attend meetings of the CSP and the Council.