JAEPC Year in Review

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A. Changes to the Law

1. **A Win for Uniformity** ☻ ☻ ☻

The Uniform Durable Power of Attorney Act ("UPOAA") was signed into law. The effective date was July 1, 2024

The UPOAA relates only to financial power of attorneys (FPOAs) and represents no change to the law of Patient Advocate Designations (aka, Medical Power of Attorneys).

Notably, the UPOAA incentivizes the use of a form FPOA. In theory, by using the form, it will be easier for our clients to work with banks and other financial institutions. (Presumably, our role will be to download the form and help clients fill in the blanks.)

The proposition that by having a statutory form FPOA, financial institutions would be compelled to accept our documents or face penalties, was the main selling point of the UPOAA to the probate and elder law practitioners who were paying attention.

2. **Epic changes to EPIC numbers** ☻ ☻ ☻

Many of the numbers that are important in the realm of estate administration have been freshened up. To me, the Big Two are:

- Transferring titles to vehicles via the Secretary of State is upped to $100,000 (from $60,000).
- Parents or guardians of minors can receive $50,000 for the minor, without establishing a conservatorship (up from $5,000).

Honorable mention: The upper limit for a small estate petition for assignment nearly doubles from $28,000 to $50,000.

3. **Secret Trusts Quietly Arrive** ☻ ☻ ☻

You can now draft a trust the terms, and even the existence, of which need not be disclosed to one or more of the trust beneficiaries. The authority for what is commonly called a "secret trust" is spelled out in a new section of EPIC: MCL 700.7409a.

The law quietly came into existence as part of an omnibus bill that took effect February 21, 2024.

The maximum period of nondisclosure is 25 years.

Such Trusts may include provisions allowing accounts to be settled and the interests of the blind beneficiary to be protected through virtual representation, thereby providing the Trustee with protection from future claims.

The law also provides that a Trustee who violates the nondisclosure provision (i.e., who tells a blind beneficiary about their interest) can be removed but will not be held financially liable for any resulting damages.

4. **More Omni-Business**

The same omnibus legislation that brought us Secret Trusts also made several other notable changes to probate law, including:

<u>Standby Guardians for LII's</u> ☻ ☻ ☻

Courts can appoint standby guardians in EPIC guardianships now, just like they have always been able to do for DD guardians. The law will also allow standby guardians to fill in on a temporary basis during periods in which the appointed guardian is unavailable.

Analysis: I like it.

<u>No More Big Gifts from Clients</u>

A brand new law says lawyers who draft wills, trusts and other such instruments can't make themselves beneficiaries of a substantial gift unless they are related to the person making the gift/devise.

By "related" they mean: (a) A spouse of the individual. (b) A lineal ascendant or descendant of the individual or the individual's spouse. (c) A sibling of the individual. (d) A spouse of the individual described in subdivision (b) or (c).

By "prepared" they mean: Directly or indirectly prepared or supervised the preparation, execution, or both, and that includes basically anyone in the same firm as the benefiting attorney.

"Substantial" means more than $5,000.

Clarification of the "Qualified Trust Beneficiary"

The term that has flustered so many trust attorneys for so long has been simplified. Thanks to the new legislation it's now going to be easy to figure out who is and who isn't a "qualified trust beneficiary."

Imputed "Knowledge" Relocated

The definition of when someone can be said to have knowledge of a fact has been moved from the MTC to EPIC, so that it applies more broadly (the MTC being a subset of EPIC).

All of these changes, and a few others, took effect February 21, 2024.

B. Court Rule Changes

1. **More Privacy**

As of January 1, 2024, when you open a decedent's estate, you are required to submit two death certificates: one redacted and one unredacted.

In addition, if the decedent's will includes their social security number or date of birth, you have to do the same when you file a will.

Court Rules have been modified to prevent disclosure of the following information:

- date of birth,
- social security number or national identification number,
- driver's license number or state-issued personal identification card number,
- passport number, and
- financial account numbers.

C. Published Cases (not about Medicaid)

1. **Probate Court Lacks Authority to Order Visitation in Minor Guardianship**

Citing numerous authorities, the COA holds that a probate court has no power to order visitation in a minor guardianship (other than under the narrowly limited provisions of Michigan's grandparent visitation laws).

However, the COA notes, a probate court has authority to remove a guardian who fails to facilitate healthy socialization in the context of the minor's welfare. Hence (wink wink), the COA observes that this concern could be addressed by the probate court in a subsequent review hearing.

In Re ADW, minor is a published opinion.

3683611

2. **COA Upholds Family Cottage Uncapping**

This case looks at an uncapping that occurred when shares of a corporation holding a family cottage were conveyed.

At the start of the calendar year at issue, A owned 24% of let's call it the "Cottage Corporation." During the year, A acquired an additional 48% of the shares of the Cottage Corporation. (A now owns 72% of the Corporation.) In the same year, A transferred 20% of the shares it held to B. (A now owns 52%.)

Township says that the receipt of 48% and sale of 20% resulted in more than 50% of the shares of the Cottage Corporation changing hands in the same calendar year, and therefore the property taxes were uncapped. A cries foul, claiming that the shares it sold to B were from the shares it had just received from the Corporation, and therefore the Township was counting the same shares twice. A appeals to the Tax Tribunal, seeking to have the uncapping reversed.

The Michigan Tax Tribunal upheld the Township's decision to uncap, and A appeals to the Court of Appeals. The COA affirms the Tax Tribunal in a published opinion called: Resort Properties Co-Operative v Township of Waterloo.

364744

3. **Equities in Divorce and Death – Again ☻ ☻ ☻**

In Re E. Earl Lyden Trust, Earl and Denice were married. Denice filed for divorce. Earl revised his estate plan and beneficiary designations so that it would all go to his kid, Hunter (and not to Denice). When Earl died, before the divorce was final, Hunter got Earl's property. The property Hunter received included much of what would have been characterized as "marital property" in the divorce and would have been split between Denice and Earl per divorce law.

Denice seeks relief through a variety of equitable theories, all of which are rebuffed by the trial court and in this published opinion the trial court is affirmed by a majority of this panel of the Court of Appeals.

The Dissent

There's a dissent.

The dissent argues that equity is available and should be employed to fix this injustice.

362112

4. **Bones to Advocates in MSC Guardianship Case ☻ ☻ ☻**

The Michigan Supreme Court has issued a decision in two guardianship matters: In Re Molloy and In Re Jenkins.

Attorney Darren Findling of Oakland County (aka "The Probate Pro") operates a professional guardianship entity and was appointed guardian in both matters. Because both matters arose in the context of car accidents, so-called "PIP benefits" were available to pay the

guardianship fees for both wards. Auto Owners was in the insurer in both cases.

But when Findling filed his statement for services, Auto Owners balked. The insurance company asserted that they did not have to pay Findling's fees because Findling didn't personally do the work. They argued that, under Michigan law, a guardian is an individual person and that the court appoints that person to perform the tasks associated with being the guardian. The insurer said that because Findling delegated pretty much everything to his employees (who were not the appointed guardians), they didn't have to pay.

This raised the question of whether a guardian can delegate its duties to agents, and if so, to what extent.

The trial court granted Findling summary judgment, finding that the ability of a professional guardian to delegate its duties was essentially unlimited. In a published decision, the COA affirmed the trial court. But Auto Owners did not go away and sought leave to the Michigan Supreme Court. What's fun (or at least curious) is that, in their effort to get the COA decision overturned, the insurer got help from some strange bedfellows.

A Probate Firestorm

As the Michipremes soon found out, questions about professional guardians and the manner in which they run their businesses invite responses from entrenched interests on both sides.

In the context of the leave to appeal, in addition to the litigants, amicus briefs were filed by the Probate Section of the State Bar as well as the Michigan Guardianship Association. These groups endorsed the decision of the COA, and supported the idea that a professional guardian should be allowed to delegate essentially all of its required duties. Implicit in their position is the concern that, without such a holding, professional guardians in Michigan would likely cease to exist. And then where would we be?

Meanwhile, amicus briefs from Legal Services of Michigan and the Michigan Elder Justice Initiative argued that the only reasonable construction of the law is that the person appointed guardian must

personally perform the tasks assigned to them, that vulnerable people need and deserve personal attention, and (implicitly) that the demise of the professional guardianship industry would be a positive development.

We Get It!

The Michipremes decided not to grant leave, but issued an opinion notwithstanding (wait, what?). In said lengthy opinion, the MSC goes overboard (IMO) to show that they really really really appreciate how important it is for our legal system to protect vulnerable adults. There can be no doubt about that! And that's sincere!!

But in the End

After the bones are thrown to the advocacy community, the MSC vacates the COA decision and remands the matter to the trial court with the following direction:

We hold that a professional guardian cannot, without complying with MCL 700.5103, lawfully delegate to employees their final decision-making authority over a guardianship "power" that is explicitly listed in MCL 700.5314 or over any guardianship task that alters or impairs an incapacitated individual's rights, duties, liabilities, or legal relations. However, a professional guardian may lawfully have employees assist in exercising a guardianship power and may have employees perform any other guardianship task on behalf of the professional guardian.

So basically, a professional guardian can delegate whatever they want to delegate except perhaps decisions such as whether to move a ward or end their life. The COA decision, although technically vacated, is for all practical purposes affirmed. This is a win for the Michigan Guardianship Association, and a loss to the advocates.

Not saying I think it should have been decided otherwise. Just saying.

165018

165020

5. **3701 fixes untimely complaint**

Connie applied for appointment as personal representative of her deceased husband's estate. While her application was pending, she filed a wrongful death complaint in her capacity as "anticipated personal representative."

A few weeks later, letters of authority were issued to Connie.

In the time between the date the complaint was filed and the time the letters were issued, the statute of limitations for this wrongful death action lapsed.

Because the law says only a PR can file the complaint for a wrongful death actions, and because the letters were not issued to Connie until after the statute of limitations had run, the defendant claimed that the suit was untimely and should be dismissed.

And yet, as everyone who practices estate administration knows, MCL 700.3701 says that someone who expects to be appointed PR can do things to preserve the assets of the estate prior to their appointment, and that those acts are given the imprimatur of the office notwithstanding the fact that they occurred before the letters were issued.

Although the trial court failed to apply section 3701 (and granted summary judgment to the defendant), the COA understood it's import and, accordingly, reversed the trial court, thereby reinstating the wrongful death action.

Estate of Eversole v Orion Family Physicians is published.

366566

6. **Lessons in Collections from a Mercy Murder Drama**

The tragic story goes that one child of a demented parent killed that parent and herself when that child could no longer see her parent suffer the pain and indignities of advanced dementia and assorted aging issues.

Some of the siblings of the child who committed murder and suicide then sued the estate of their deceased sibling for money damages to compensate themselves for their alleged loss of consortium with their demented parent.

In a first trip up to the Court of Appeals, the COA upheld a jury verdict against the estate of the deceased child. [We will get to that case later].

That same case has worked its way back up to the COA, and the issue now is: What assets paid to the trust of the deceased murderous child can be reached to satisfy the judgment against her. At issue are the proceeds of a 401(k) account and the proceeds of a life insurance policy. A critical fact is that, with respect to both the retirement account and insurance policy, the deceased child's trust was the named beneficiary.

The trial court reviewed the applicable laws – those being MCL 700.7605(2) and Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 et seq, as to the retirement account; and MCL 700.7605(1) and MCL 500.2207 as to the life insurance proceeds. The trial court concluded that the life insurance proceeds could be reached by creditors of the trust, but the 401(k) proceeds could not. The COA found otherwise, holding that both pots of funds were available to satisfy these creditors on these facts.

Bottom line: If you name your trust (or estate) as beneficiary of your retirement plan or a life insurance policy that you own on your own life, you forego the statutory creditor protections otherwise afforded such assets.

<u>In Re Estate of Jennifer L. Fowler</u> is a published decision.

365603

7. **Cross Eyed**

A confusing settlement agreement is deemed unambiguous by the probate court as well as the Court of Appeals in this (surprisingly) published decision.

The Story

Maureen, the Trustee and a beneficiary, settles a trust dispute with beneficiaries Wallace and Kathleen. The terms of the settlement agreement include the following two paragraphs:

> 10. The further administration of any of the activities of either trust, or the administration of any estate of either LOIS M. CONLEY or RAYMOND T. CONLEY will not involve **Wallace or Kathleen**. In other words, they will have no claims of interest, **nor will they have any responsibility.**
>
> 11. **All parties will be responsible for** their own attorney fees, costs or other **obligations associated with the administration of the Trusts or the settlement of all matters**.(emphasis added)

Then, after the settlement, Wallace and Kathleen receive tax notices (K-1 forms) indicating that they have tax obligations related to "capital gains, attorney fees, and accountant fees" arising from the conveyance of a parcel of real property to Maureen, individually, which conveyance was agreed to as part of the settlement.

Wallace and Kathleen complain that they settled the case in reliance on the agreement's provision that they had no further "responsibility" vis a vis the trust administration.

Court Decisions

After a big waffle, the trial court says that the settlement agreement is unambiguous and that therefore, Wallace and Kathleen are obligated to pay the taxes.

The Court of Appeals affirms. The case is called In Re Raymond T. Conley Trust.

366180

8. **Ward's Preference can be Assessed In Camera**

Parents served as co-guardians of an adult with developmental disabilities, until that didn't work anymore. Both petitioned to have the other removed, so that they could serve as sole guardian. Probate court held hearings, and in the process conducted an in camera interview with the ward about her preference.

In a lengthy published opinion about an issue for which there seems to be no obvious authority, the Michigan Court of Appeals affirmed the trial court. In doing so it seems the COA has established the rule that an in camera interview with as DD ward will suffice in a contest over the appointment of a guardian for the purpose of considering the ward's preference.

The case is called: In Re Guardianship of AMMB.

368915

D. Medicaid Cases and Policy Changes

1. **Seed of Hegadorn Targets SBO Planning**

The Michigan Court of Appeals issued a published decision in the matter of Hegadorn v DHHS. Yes, you've heard the name before.

In June 2017, the first Hegadorn decision was issued by the Michigan Court of Appeals. That opinion held in favor of the DHHS, concluding that they correctly denied the Hegadorn application and beginning what might be called the first dark age for SBO Trusts in Medicaid planning.

The case was taken up by the Michigan Supreme Court. And two years later, in May 2019, the MSC reversed the COA decision and found that assets in an SBO Trust were not available resources… but … their decision was not fully favorable to planners. Rather than instructing DHHS to approve the Hegadorn application, they remanded the matter to the administrative process so that the administrative law judge ("ALJ") could incorporate their holdings while exploring other possible theories that might have been missed in the first analysis.

The MSC decision was greeted with "cautious" optimism and most planners started using SBO Trusts again, bringing an end to the first dark age. In these intervening four years, SBO Trusts have been commonly used and routinely approved.

Practically Speaking

Most SBO Trusts should be unaffected by this case as it seems to be limited to facts that are unique to the SBO Trust that the Hegadorns used.

356756

2. **Big Medicaid Win (but not for LTC)**

While most of the readers of this blog have some interest in cases involving Medicaid funded in-home care services; as elder law

attorneys, most of us think primarily about Medicaid's long-term care (LTC) benefits, including MI Choice Waiver. This case is not about that.

This case is about Medicaid in-home care services for persons with disabilities.

CB, a person with disabilities, was eligible for Medicaid funded in-home care services. He participated in a "person-centered" planning process, resulting in an "individual plan of services" with a budget to meet his needs. The agency that DHHS contracted with to provide these services to CB was the local community mental health (CMH) office.

When CMH failed to provide the services for an extended period of time, CB sued. The cause of action was a writ of mandamus, and the complaint incorporated various demands including a demand for damages for "isolation and mental suffering." Such damages were claimed under MCL 600.4431 which simply states:

Damages and costs may be awarded in an action for mandamus.

During the course of litigation, CMH began providing the contracted for services to CB. Accordingly, the mandamus action became moot and the case was dismissed. When pressed about the damages element, the trial judge decided that CB's claim for damages went away with the underlying mandamus action.

So … the issue left to the Court of Appeals was whether CB's claim for damages survived the dismissal of the mandamus action before a writ was issued. In this published decision, the COA holds that damages pursuant to MCL 600.4431 are not contingent on the issuance of a writ of mandamus, although they are dependent on the claim for mandamus having had merit in the first place.

The case is called: CB v Livingston County Community Mental Health.

363697

3. **Medicaid Planning with Protective Orders on Life Support**

In Re Estate of Jerome E. Sizick is an unpublished case from the Michigan Court of Appeals involving the use of protective orders in probate court to establish an elevated protected spousal amount and to increase the community spouse income allowance. Bottom line: The protective order in this case was ineffective in achieving either objective because it was filed before the Medicaid application had been approved.

The focus of the Court's decision is on the meaning of MCL 700.5401(3)(b), which is a required finding in order for a court to issue a protective order (or, for that matter, establish conservatorship). It says:

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

This panel of the COA focuses on the meaning of the word "needed" and concludes that the needs of the community spouse may not be assessed without regard to the needs of the nursing home spouse.

This construction of the law is fatal to the whole idea of planning with protective orders in that the protective order is the device that creates the new protected spousal amount upon which approval of the application is dependent. And while this interpretation of the statute seems to circumvent common sense, and to go way beyond what the statute actually says, it is rooted in the language (arguably dicta) of two prior published opinions: Schroeder v DHHS and Estate of Vansach.

Protective orders would still seem viable to seek income diversion after the initial income allowance is determined, which orders would require the Department to make the adjustment midstream, perhaps at the annual review.

Leave to appeal to the MSC has been filed. We'll see.

364321

4. **Shake Up in SNT Land** ☻ ☻ ☻

As sophisticated elder law lawyers understand, drafting a special needs trust ("SNT") is one thing, advising trustees on how to administer them is something else – something more.

The challenge of advising SNT trustees is due, in large part, to the complex rules that apply to the government benefits that beneficiaries of SNTs typically receive, notably Supplemental Security Income ("SSI") and Medicaid (in its various forms). An SNTs trustee has to be cautious in making distributions to, or purchasing goods and services for, their beneficiaries so as not to cause problems with these needs-based government benefits.

The changes which are the subject of this blog post relate to new SSI rules.

There are two.

<u>One Less Bell to Answer</u>

SSI rules provide that a person on SSI will have their benefit (i.e., their monthly income) reduced if a third-party provides financial help with their "necessities." This is true because, in theory, the SSI payment is supposed to provide for their necessities. Forever, those "necessities" have been defined as three things: food, clothing, and shelter.

That means, for example, if someone allows an SSI beneficiary to live in their house and not pay rent – or not pay fair market rent – that SSI beneficiaries will have their SSI benefit reduced. Same thing if an SNT helps a beneficiary with housing (i.e. "shelter").

The big news is that the Social Security Administration ("SSA") has dropped food from that list. That means that now a third-party (or SNT) can buy someone on SSI a dinner, or some groceries, and they won't have to report it, and it won't reduce their monthly benefits.

<u>Overpayments</u>

SSI overpayments are common. Historically, when it was determined that an overpayment had occurred, the SSA would simply hold back future benefit payments until the overpayment was cured. Now the

rate at which such overpayments will be recovered is limited to the greater of 10% of the benefit amount or $10.00. That's a big change, and a good change for people who live on very little and who face extended periods of abject poverty as a result of errors, often of no fault of their own.

Well Done

Both of these changes make for kinder and more forgiving SSA rules. Good for the SSA and good for the organizations and advocates who brought this about, including, but not limited to, CT's own Chris Smith.

E. Interesting Unpublished Cases

1. **Devo Theory Falls Short**

The story goes:

Child is living in Parent's house prior to Parent's death, and continues to do so for an extended period thereafter.

At some point after the estate is opened, the Probate Court orders the Child removed so that the house can be sold. The Probate Court also assesses the Child rent for the period of time that she continued to occupy the house post-death.

Child appeals the post-death assessment of rent, arguing that the Parent's Will left everything to the three kids equally, that she is one of those three, and therefore that ownership of the house devolved to her and her siblings as joint tenants when the Parent died, and that as a joint tenant she had the right to occupy the property and therefore cannot be charged rent.

Child relies on MCL 700.3101, which says, in part:

Upon an individual's death, the decedent's property devolves to the persons to whom the property is devised by the decedent's last will …

In affirming the Probate Court's assessment of rent against the Child, the COA notes that MCL 700.3101 goes on to say that the devolution of property rights is "subject to homestead allowance, family allowance, and exempt property, to rights of creditors, to the surviving spouse's elective share, and to administration." And they place an emphasis on "administration."

But does that really do it?

<u>Might be Different If ….</u>

The COA also observes that this Child is one of three <u>residual</u> beneficiaries, and that the Will does not specifically devise the house to any of the Children. Accordingly, when Parent died, it was uncertain whether the house would be distributed to one

or more of the Children, or sold to a third party (which is what happened).

In offering this clarification, the COA suggests that: had the Will specifically devised the real property at issue to one or more devisees, the outcome might be different – that is, the 'joint tenancy vesting at death' argument would have more merit.

In Re Estate of Elze D. Harris is unpublished

362364

2. **COA addresses Capacity to Execute Deed**

Anna signed deed conveying an interest in real property to Alvin.

Anna's child contests the deed on the theory that Anna lacked sufficient capacity to execute a valid deed.

The trial court rules for Anna's child and sets the deed aside.

The COA affirms the trial court and in doing so reminds us that:

Persons executing a deed of conveyance must have "sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others." [Citation omitted]

As well as:

Whether a person was mentally competent is determined by a preponderance of the evidence.

In Re Estate of Anna Brudek is unpublished.

361462

3. **COA Locates Law for PR Removal** ☻ ☻ ☻

Parent dies leaving no surviving spouse and two kids: Amos and Rita.

A year after Parent dies, Rita applies to open an intestate estate and have herself appointed personal representative ("PR"). Amos gets notice but files no response, and so the estate is opened and Rita is appointed.

A few months later, Amos files a petition to have Rita removed, have himself appointed, and also to admit a Will which he has attached to the Petition. The Will nominates Amos first for the position of PR.

Lots of facts and disagreements typical of a sibling rivalry, but the takeaway in this case (I think) is summarized in the following paragraph from the opinion:

> *While EPIC allows an interested party to object to the initial appointment of a personal representative, MCL 700.3203(2), it does not define the grounds that would support such an objection, nor does EPIC define the term "unsuitable." However, this Court has recognized that the grounds for removing a personal representative in MCL 700.3611(2) are "sufficient to support an interested person's objection to the initial appointment of a personal representative under MCL 700.3203(2)." Those grounds include, that "[r]emoval is in the best interest of the estate," MCL 700.3611(2)(a), or the proposed personal representative has "[d]isregarded a court order[,]" "[b]ecame incapable of discharging the duties of office[,]" "[m]ismanaged the estate[,]" or "[f]ailed to perform a duty pertaining to the office[,]" MCL 700.3611(2)(c)(i)-(iv). Further, the party challenging suitability has the burden of establishing unsuitability by a preponderance of the evidence. [Citations removed]*

In this case, the trial court denied the request to remove Rita. The COA affirmed.

The case is called In Re Johnson Estate.

362927

4. **Bad Actor Tagged Twice** ☻ ☻ ☻

The Players

Brohl is an old man in a senior living complex. Until shortly before his death, he had about $233,000 in the bank. He's dead now and the other two players, Thon and Woodcock, are fighting over the money.

The case identifies Thon as being "apparently" a stepchild of a deceased sibling.

Woodcock claims no familial connection.

The Events

Thon steps in first and "helps" Brohl get his money into a bank account that is jointly titled with her.

Woodcock claims that when he came along, Brohl was complaining about the way Thon was managing his money. And so, Woodcock "helps" Brohl get Woodcock appointed as his agent under a durable financial power of attorney. Then, using the FPOA, Woodcock sets up an account in Brohl's name and with Woodcock's listed on the account as Brohl's FPOA. Woodcock then moves the money from the account that is joint with Thon to this new account.

But not for long. The day after moving $233,000 into the newly created account, Woodcock moves substantially all the money into an account in his name individually.

Five days later Brohl dies.

Thon sues Woodcock for conversion. They settle that case. Woodcock pays Thon some of the money he got from Brohl.

But then, a few weeks later, Thon petitions to open an estate for Brohl, so that, as personal representative, she can sue Woodcock again to recover $233,000 misappropriated from the estate (although it's unclear how Thon believes the money recovered by the estate comes back to her).

In any event, the trial court opens the estate, but appoints a lawyer as PR, not Thon. PR sues Woodcock and obtains a money judgement for the $233,000 he got from Brohl.

On Appeal

With a couple tweaks, the COA affirms the judgment against Woodcock.

The case is called In Re Estate of George Brohl.

362333

5. **Probate Jurisdiction nets Ladybird Deed in Will and Trust Contest ☻ ☻ ☻**

A jury trial was held in a probate court on the validity of the various estate planning documents, including a will, a trust and a ladybird deed. The jury found that the decedent lacked capacity and that the documents were the product of undue influence. Accordingly, the trial court entered an order setting aside those documents.

Among the many issues raised on appeal was an argument that the ladybird deed was a non-probate and non-trust conveyance, and accordingly, outside the limited jurisdiction of the probate court.

In affirming the trial court (and the jury's decision), the COA finds that the while the probate court's jurisdiction is limited as prescribed by statute; all of EPIC, including the jurisdictional provisions, are to be "construed liberally" so as to "make effective a decedent's intent in distribution of the decedent's property." That is to say, the probate court had the authority to set it aside the ladybird deed in the context of resolving issues related to the settlement of the decedent's affairs.

The case is called: In Estate of Scott; In RE Matthew G. Scott Trust.

360654

6. **Same Case Part 2: Legal Fees Rejected for Will Contest Losers**

Background is: Our client challenged a document purporting to be his father's will on theories of undue influence and lack of capacity – and won.

In Braun Kendrick v Estate of Matthew Scott, the losing party's lawyers sought to recover their fees for the period of time that their client was acting as personal representative under the will subsequently determined to be invalid.

The trial court denied the claim for fees and in this unpublished decision, the Michigan Court of Appeals affirms.

In reaching its conclusion, the COA says that to get your legal fees from the estate, your client has to be acting in "good faith," and where the fact-finder decides that your client is defending a document that was procured through undue influence from an incompetent testator, there can be no finding of good faith.

363756

7. Assisted Suicide Like Murder Results in Money Judgment ☻ ☻ ☻

An adult child of a severely demented parent took her mother out of the nursing home, put her mother to bed, got a gun, climbed in bed with her, and killed both herself and her mother.

Before pulling the trigger, this child called her sister's boyfriend and explained that she could not allow her mother to continue to suffer as she was.

That's tragic.

But equally tragic, it seems to me, is that fact that, when it was over, two other adult children of the decedent (but not the one whose boyfriend got the call) sued the estate of the sibling who pulled the trigger for loss of consortium with their demented parent.

The record reflects that the offending child was not wrong about the hell that her mother was going through. And the record also reflects that the one that pulled the trigger and the child that chose not to sue are the two that were most involved in their mother's care.

At trial, the court directed a verdict on liability and allowed a jury to decide damages. The allegedly distraught children were awarded several hundred thousand dollars.

The COA affirmed the jury award and justified the result as follows:

> *We disagree with the premise of defendant's argument that there can be no loss of society and companionship if the plaintiff's decedent is suffering from a mental illness or other significant health concern. Although Helen's illness and resulting behavioral issues may have impacted her contact with her children, she still could engage with them. Furthermore, she was receiving medical care that offered hope that her condition could improve and be controlled by adjusting her medications. Her past behavioral issues did not eliminate the possibility of maintaining a relationship with her children, both presently and in the future.*

Estate of Helen G. Fowler v Estate of Jennifer L. Fowler is unpublished .

361353

8. **Dead Control Freak Gets His Way**

Appellant is a one-quarter (25%) beneficiary of her parents' joint trust. But after Mom dies, Dad amends the trust to say that she only gets the gift if she informs her estranged child who his father is.

She doesn't do it.

In the unpublished decision of In Re Bernard Boutet Revocable Living Trust, the Court of Appeals affirms the trial court's decision which holds that the Appellant forfeited her beneficial interest in the Trust for failing to satisfy the gift's condition.

364575

9. **Guardian has Right to Proper Removal**

Appellant is appointed co-plenary guardian over her developmentally disabled child.

During a review hearing at which Appellant was not present, the Court heard from various witnesses, as well as the guardian ad litem, each complaining about Appellant's obstructive and unproductive behaviors. Those concerns (and the fact the Appellant had yet to file an acceptance), persuaded the trial court to remove Appellant as co-guardian – which it did sua sponte.

On appeal, the Appellant raised several issues. But only one had traction.

In this decision, the Court of Appeals reviews the procedural requirements for removing a guardian under the Mental Health Code, focusing on MCL 330.1637. The COA concludes that the law requires that a petition for removal or modification be filed before the Court can act. Proceeding without said petition is apparently not harmless error. Accordingly, the trial court's order is vacated, and the case remanded.

The case is called In Re Guardianship of IS.

367266

10. **Richland Animal Rescue Forever**

Mega-wealthy business person dies leaving a Trust that primarily benefits a charity: the Richland Animal Rescue.

The issues in these three consolidated cases on appeal have to do with the authority of a Michigan probate court to hear and decide matters after the situs of the trust has been moved to another state – in this case Illinois.

After relocating the Trust situs to Illinois, the Trustee resigns. The Michigan probate court that had been handling extensive litigation involving this Trust prior to its relocation to Illinois, entertains various petitions and in doing so appoints a professional fiduciary as Trustee,

rather than the person nominated in the Trust instrument to serve as the successor. That nominated successor appeals based on the grounds that (1) the Michigan court lacked jurisdiction and (2) even if the Michigan court had jurisdiction, it was improper to bypass a named successor trustee without an evidentiary hearing.

In In Re Michael Eyde Trust the Court of Appeals affirms the trial court's orders. The case is unpublished.

The COA says that facts of this case fall within the broad scope of MCL 700.7205(1)(b) which allows a Michigan Court to decide issues related to a "foreign" trust if it correctly concludes that a failure to so do would result in the "interests of justice" being "seriously impaired." Here, the COA agrees with the Trial Court's conclusion that, with all of the property and all of the beneficiaries situated in Michigan, having to litigate these matters in Illinois would result in just such an impairment of justice.

With respect to the trial court's sua sponte decision to bypass the nominated successor trustee, the COA notes that the appointment of the professional fiduciary was temporary pending a full hearing, and that pursuant to MCL 700.7901(2)(e) a trial court may remove a fiduciary based on an anticipated breach. Here, the COA notes that the trial court had been enmeshed in the matters leading up to these hearings for an extended period, and in that context had a been sufficiently educated to have formed a reasonable basis to expect that the appointment of the complaining bypassed successor trustee would only lead to further mischief.

Hence, the Trial Court's orders are affirmed.

363882

11. A Case About Nothing

This same case provided one entertaining post in 2022 when first came up to the Court of Appeals. In that opinion, the trial judge colorfully ranted about the manner in which a vulnerable adult's estate and trust had been dissipated by legal fees and costs and, in that context,

dissolved a trust at issue without legal justification. The decision to dissolve the trust was reversed, and the case was remanded on other issues.

We learn now that, on remand, the rant not only continued but went to another level.

The case is called: In Re Edward and Elaine Jaye Trust.

The Story Goes

Ms. Jaye apparently had some money at one point when she lived in Nevada. But between overreaching family members and endless excessive litigation, by the time this case is being decided (after her move to Michigan), there isn't much money left. And, what really triggers this trial judge is that basically all the money that is left is being claimed for fees by the massive number of lawyers involved. [I count nine firms on the entitlement, excluding the appellee/lawyer/trustee/conservator to whom the trial judge attributes no abuse.]

Among the trial judge's comments is a comparison of this case to the Seinfeld TV show, in that, like the show, this case "is about nothing."

Love the show.

But it's a bad look for us lawyers.

363847

12. **"This is not a final order" … or is it?** ☻ ☻ ☻

There's an important lesson in this recently released opinion from the Michigan Court of Appeals, a lesson about when to file a claim of appeal in probate matters.

A "Final Order"

Mark and his sibling engaged in a long drawn-out battle over the administration of their parent's trust. At various points during the course of the litigation, orders were issued resolving various aspects of their ongoing dispute.

There was an order in December.

Another order in January.

The December and January orders each included language expressly stating that these orders were “not final orders” and did not close the case.

Then in September, the Trustee filed a petition asking the court to approve the final accounting and allow for distributions of the property remaining in trust as set forth in a proposed schedule of distributions, thereby closing the case. That petition was granted and an order approving the requested relief was issued. This order included language that this was a “final order” and that the court file would now be closed.

Mark appealed but did not object to the final accounting or distribution schedule. Rather, Mark sought relief from the December and January orders.

In this opinion, the COA explains that the objections Mark raised were “not properly before the Court.” That’s because, the December and January orders were each themselves “final orders” and each order independently triggered Mark’s right to file a claim of appeal. That, notwithstanding the language in each of those orders plainly stating that they were not “final orders.”

The Court Rules

Open your browser to the Michigan Court Rules and let’s go.

One court rule [MCR 2.602(A)(3)] says any time a “judgement” is entered, or anytime a court issues an order disposing of the last pending claim and closing a matter, the order must expressly say so. That court rule does not seem to require that every order which does not resolve the last pending claim needs to say that it is not such an order (as the December and January orders did in this case). And note, this court rule does not invoke the term of art “final order.”

Rather, the term “final order” appears in at least two other court rules: MCR 7.202(6) and MCR 5.801.

MCR 7.202(6) explains a party's right to an appeal is triggered by a "final order." And it defines the term "final order," providing specificity with respect to final orders in civil actions, while acknowledging that other forums (like a probate court) may generate final orders to the extent they are defined as such in their own discreet court rules.

One such discreet court rule is MCR 5.801, which tells us what constitutes a final order in a probate case. MCR 5.801(2) lists 31 such orders. Probate litigators should be intimately familiar with this list as many (probably most) of the types of orders obtained in the routine course of litigation are themselves independent grounds for an appeal. As the appellant in this case learned, if these orders are not timely appealed, the right to a claim of appeal is lost.

Turns out, the nature of both the December and January orders were on the list of 31.

A Trap for the Unwary

Clearly, part of the problem is that this trial court was including language in orders that wasn't needed, understandably giving rise to the Appellant's confusion. The orders said they were "not final orders," but they were.

As the COA explains, the language of an order is not determinative of whether an order is a "final order" for the purposes of determining whether it triggers a parties' right to a claim of appeal. In short, that's the lesson of this case.

This case is called In Re Gladys V. Ragsdale Trust.

358720

13. Credibility Carries Conversion Case

A and B jointly own a house.

When B moves out, B signs a deed taking her name off the property, which deed is not notarized or witnessed, and never recorded.

Later, in an unrelated transaction, A delivers a check in the amount of about $140,000 to B and asks B to deposit it in B's account.

When A dies, B claims ownership of the house.

A member of A's family is appointed Personal Representative of A's estate. The PR claims that house belonged solely to A by operation of the unrecorded imperfect deed; that B still owed A $140,000; and further that, after A died, B stole $14,000 that was in an envelope at the house and marked to be used for A's funeral expenses.

B says she didn't take the $14,000, and that she did with the $140,000 as she was instructed by A, which included gifting it to certain of A's family members and keeping $40,000 for herself.

At the end of the trial, the judge said that B was not a credible witness, and that there was no question in the judge's mind that B had lied on the stand. Accordingly, the trial court issued a judgment finding that the house belonged to A's estate and that B had converted both the $140,000 and the $14,000. The trial judge awarded A's Estate treble damages and attorney fees.

The Court of Appeals affirmed in an unpublished decision. The case is called Kovaci v Estate of Dedvukaj.

365348

14. Deeds 6 – Scrivener's Affidavit 0

This newly released unpublished opinion provides some interesting lessons or reminders about issues that arise when trying to correct erroneous deeds after the grantor is dead.

The Story

After Matthew died, Matthew's Estate got into it with Ivan over which half of an eighty-acre parcel Matthew had given to Ivan and which half remained in the estate.

On summary disposition, the probate court ruled that Ivan owned the west half, as he (Ivan) claimed.

Matt's estate appealed.

In affirming the trial court's decision, the Michigan Court of Appeals reviews two steps taken by Ivan's attorney attempting to clear up the confusion, after Matthew died.

Scrivener's Affidavit

First, Ivan's lawyer obtained an affidavit of scrivener's error from the attorney who drafted a deed conveying the east half from Matthew to Ivan. The affidavit asserted that the legal description on the deed was an error, as it should have said that Matthew was conveying the west half to Ivan and not the east half.

The COA points out that this affidavit of scrivener's error was of no value in this dispute because it was executed after Matthew died. The COA says:

MCL 565.451(d)(2)(b) states that an affidavit of scrivener's error may not "alter the substantive rights of any party unless it is executed by that party." Because the Scrivener's Affidavit altered Matt's ownership of property and he died before its execution, the affidavit was invalid.

Deeds Back

Second, Ivan's lawyer sent deeds to the six heirs of Matthew's estate, which deeds would, if executed, convey their interest in the west half to Ivan. Although each heir signed the deeds provided to them, the estate argued that this effort did not cure the problem because those deeds had never been delivered to Ivan.

In fact, Ivan did not have the deeds nor had they been recorded at the register of deeds office. Rather, all six deeds were discovered in the file of a title company that became involved when Ivan sought title insurance on the property. Apparently, although no one is confident about this, the deeds were signed by the various heirs and returned to Ivan's lawyer who sent them to the title company in whose file they remained, unrecorded, until the litigation caused them to be discovered.

Whereas the affidavit of scrivener's error failed to score, the COA holds that the deeds were delivered and that, accordingly, Ivan owned the west half.

On the question of delivery, the COA explains that delivery is a factual finding, and that delivery to third party can constitute delivery to the grantee under the right circumstances. Among the circumstances that justified a finding of delivery to Ivan in this case are the facts that Ivan operated a business there, paid the taxes on the property, as well as a notation on the bottom of each deed indicating that the grantor intended the deeds to be recorded and, after recording, returned to Ivan.

The case is called In Re Malnar Estate.

366963