Jackson Year in Review 2019

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Introduction

Most of the exhibits are from plantobe100.com posts, and you will have to go to the blogsite to click to the links if you want those.

I. Smart Phone Will

Duane Horton typed a testamentary expression on a smart phone application and wrote a note indicating that his testamentary wishes could be found there. This case completes a long line of cases interpreting MCL 700.2503, and clearly establishes that this is a third independent method for admitting a will (or codicil)l under Michigan law. The other two methods being: (1) traditional execution requirements, and (2) holographic wills.

Picked up from the UPC when EPIC was adopted, and sold as a "harmless error" exception, the statute has taken on a life of its own (to the delight of some, and disappointment of others). To admit a document (and document is defined very broadly), it need be shown that the document was intended to be testamentary by clear and convincing evidence.

Placed in the context of the ongoing national dialogue to define "digital wills", one wonders whether Michigan has stumbled into the best answer.

Exhibit A: Phone App "document" is a Valid Will in Michigan

II. (A) Directed Trustees

In adopting a Michigan version of the Uniform Directed Trustees Act, the legislature eliminated the term "Trust Protector" from the law, and has replaced it instead with the concepts of "Trust Director" and "Directed Trustee." The new law clarifies the acts that can be exercised by a Trust Director in a non-fiduciary capacity, and those that cannot. The change does not negate the implications of documents that now exist which use the terms "Trust Protector" or "Trust Advisor" (or similar terms) but rather would treat such actors as Trust Directors and apply the new statutory implications to their actions and authority.

II. (B) Divided Trustees

As opposed to the concept of a Directed Trustee (which was an adoption of a uniform law), this additional concept of a "divided" trusteeship is purely a Michigan creation. It purports to allow for trusts to create a variety of roles, including an investment trustee, a distributions trustee and a "resultant trustee." This scheme would allow various trustees to play roles in the administration of discretionary trusts, and if properly drafted, would alleviate the liability of a co-trustee so appointed to only those functions for which they are responsible (subject to collusion). This is a very unique concept, which may allow for great creativity in special needs planning in particular.

Exhibit B: The Next Big Think in Michigan Trust Law

III. Veterans Administration Benefits

Long proposed changes to the VA Aid and Attendance Pension program were finally implemented in 2018. These new rules grew out of the perception that elderlaw attorneys were advising veterans to manipulate the benefits system in inappropriate ways. The resulting changes include several rules that mimic Medicaid long term care program rules: including a three-year divestment look-back, a homestead acreage limit, and fixed countable asset limits.

Exhibit C: VA Program adds Divestment and More

IV. Mardigian

The Michigan Supreme Court ruled on the case of a lawyer who drafted himself (and his family) into a client's estate plan for a substantial inheritance. The MSC held that while the lawyer could be sanctioned by the state bar under the rules of professional conduct, the actions of the attorney are not evidence in the undue influence case, except to the extent the attorney is a fiduciary, and the resulting presumption of undue influence is imposed.

The outcome was achieved by a three-three tie. One of the seven justices recused himself (having been one of the prevailing votes on the COA case that was before them), leaving six voting justices, and they were split 3-3. This resulted in the COA decision being affirmed. The dissent discusses extensively the limitations in Michigan's undue influence case law, including the rebuttable presumption, but would remedy the

deficiencies by imposing new rule which would impose a non-rebuttable finding of undue influence where the attorney drafted the self-benefiting document.

Exhibit D: State Supremes Issue Split Decision on Mardigian

V. BEM Changes Homestead and Notes

The Medicaid Bridges Eligibility Manual (BEM) was revised repeatedly through the year, some of the more notable changes related to the definition of an exempt homestead, and the treatment of promissory notes.

The language regarding homestead exceptions are so poorly written as to be essentially meaningless, but further clarification is expected. It is likely that these changes will come to mean that the prior liberal treatment that any residential real estate that the Medicaid applicant previously lived in could be exempted, is ending and some new restrictions regarding ownership and occupancy will be put in its place.

Clarifications were placed on the terms of a seller's interest in land contract, which will result in more such arrangements being treated as "divestment." Likewise, further restrictions have been placed on the use of promissory notes, including a contemporaneous requirement that will result in the inability to use notes to "cure" prior divestments.

Exhibit E: Puzzling New Medicaid Policy on Homestead Exemption to Take Effect, and
Exhibit F: Proposed Policy Promises Problems for Planners

VI. Capacity and Complexity

The case of Mehennick Family Trust offers what I think is a great published decision, addressing one of the most critical issues in probate litigation. It holds that capacity to engage in a legal act is a function of how complicated that act is. In this case, the Court specifically finds that the test of capacity for a power of attorney is not the same as the test of capacity for a business proxy assignment. In other words, although both may have been executed relatively contemporaneously, one may be upheld while the other may be set aside. Because this was not a probate case, many probate practitioners may have missed this one.

Exhibit G: Test of Capacity if a Function of Complexity

VII. New Post Form Released

We discussed the POST form last year. A year later, the State has released what will likely be the final draft of the document that medical providers will be using. This form allows a person, their guardian, or their patient advocate, to create a treatment plan that includes end-of-life decisions, during the course of treatment for a specified condition. It is not a form that lawyers will create, but is a form that lawyers should understand, and that should be addressed in the patient advocate designations.

Exhibit H: Another POST post.

See Also Supplemental Handout

VIII. Capacity to Nominate

The unpublished decision of In Re Guardianship and Conservatorship of David P. VanPoppelen looks at what effect the nomination of a fiduciary has in a guardianship and conservatorship proceeding. That is, can a person who is cognitively impaired nominate who they want to serve, and if so, what weight is given to such nominations.

Interestingly, the answer is different in a guardianship and conservatorship proceeding. Whereas in the guardianship proceeding, the nomination of the ward gives priority notwithstanding the capacity of the ward, that is not the case in a conservatorship proceeding. Unfortunately the COA bungled this analysis in their decision.

Exhibit I: Capacity to Nominate

IX. Securing PR Fees after removal

In In Re Estate if Jack Edward Busselle the COA concludes that a removed PR must file a claim for fiduciary services and legal fees within four months of removal. A good reminder, as this is not something everyone thinks of doing, I suspect.

Exhibit J: Opinion Puts Fees of Former PR's (and their Attorneys) at Risk

X. Constructive Trust

The unpublished decision of In Re Guardianship and Conservatorship of Dorothy Redd the COA affirms the decision to set aside a deed without finding incapacity, duress or

undue influence – simply because the grantor probably didn't intend the result at the time. In reaching this result, the COA offers a solid discussion of the remedy of constructive trust, an often underappreciated in probate litigation cases.

Exhibit K: The Awesome Power of Constructive Trust

Bonus: Conservator Recovery of Allegedly Misappropriated Assets

The unpublished decision of In Re Conservatorship of Marilyn Burhop looks at the question of how much a conservator should spend chasing after assets potentially recoverable where financial exploitation is suspected prior to the conservator's appointment; and, additionally, does that extend to challenging EP documents created under suspicious circumstances. Here, $175,000 was spent unsuccessfully pursuing both. I think the trial court and COA got it wrong.

Exhibit L: Reflections from a Costly Good Chase

Exhibit A: Phone App "document" is a Valid Will in Michigan

It happened and it's published.

The Michigan Court of Appeals held, in a published decision, that a paragraph posted by a decedent on his phone is a valid will under Michigan law, and specifically, MCL 700.2503.

We've discussed Michigan's uniquely liberal law regarding instruments intended to be wills before. See, for instance, Section 2503 Grows Up (click on name).

In this case, Duane Horton wrote a note in his journal stating that his testamentary wishes could be found on his phone app. They looked and they found it. The trial court admitted the electronic expression as the decedent's will under MCL 700.2503. The Court of Appeals affirmed.

Click here to read In re Estate of Duane Francis Horton, II

It's an important case as it further fleshes out the impact of Michigan's cutting edge law.

First, it dismisses the number one misconception about Section 2503, which is that it is intended only to fix "minor, technical deficiencies" in documents that would otherwise be admissible as holographic wills or otherwise. The COA holds that the statute doesn't say that, and doesn't mean that. Rather Section 2503 is a stand alone, separate process for admitting testamentary expressions which does not require any formality, only clear and convincing evidence of intent.

Equally important, the case stands for the proposition that an electronic document is a "document" for the purposes of this statute.

These are powerful developments in probate law, and, for better or worse, Michigan seems to be on the cutting edge. Fun issues, fun times.

EXHIBIT B: The Next Big Thing in Michigan Trust Law

Legislation currently moving through Michigan's House and Senate will, if passed, dramatically impact the world of trust law in Michigan, and especially the drafting of discretionary trusts. Indications are that there is a good chance this legislation will become law before the year end. And so .... it's probably time to start thinking about it.

The new law alters the way that trusts agreements can be crafted with respect to the roles of trustees and other fiduciary and non-fiduciary parties involved in the administration of a trust. While the proposed law is Michigan's adoption of the Uniform Directed Trust Act, it goes well beyond the Uniform Act, particularly with respect to the provisions related to separate trustees. In fact, it is probably best to understand this new development as two distinct changes to the law: (1) Rules relating to use of separate trustees when drafting discretionary trusts, and (2) the elimination of the Trust Protector, and replacement of that office with the Trust Director.

Separate Trustees

The new law defines several new types of roles and relationships that can be used in drafting trusts.

The law uses the term "Separate Trustee" to identify one of three types of separate trustees that have discrete powers and duties. They are:

* Investment Trustee. A Trustee exclusively responsible for investing the trust assets.

* Distributions Trustee. A Trustee exclusively responsible for making discretionary distributions of trust assets. Note: There is no provision for a distributions trustee with respect to non-discretionary interests.

* Resultant Trustee. The Trustee responsible for all actions not otherwise allocated to an investment or distribution trustee.

So Long Trust Protectors

In addition to the creating laws to support the use of separate trustees (discussed above), the new law introduces the term "Trust Director" which equates roughly to what many would have heretofore defined as a Trust Protector. The scope of powers that can be given to a Trust Director are broad and it is not necessary for the trust agreement to have appointed separate trustees for the agreement to implement the use of a Trust Director. The MTC defined the term "Trust Protectors" when it came into being in 2010, which was an important development associated with that legislation. But with these

changes, that term is removed and no longer defined. [It is unclear (to me) how Courts will construe this term going forward, and what rules will apply to trust protectors appointed in documents. In many instances, the powers typically allocated to a trust protector would seemingly result in those persons falling within the scope of what is now defined as a "Trust Director."]

The law also then introduces the term "directed trustee" to refer to a trustee who takes direction from a trust director.

It's All About Liability

With respect to the separate trustee provisions of the law, the idea is that without collusion, a separate trustee is not responsible for the acts of another separate trustee. And this is really the central legal development that makes this aspect of the new law click. Heretofore, you could draft trusts with co-trustees and give them each a discrete role in the administration of a trust – but you could not, thereby, allow one trustee to be non-liable for the breach of their fellow co-trustee. Now, by using this approach, you can.

In the simplest example, what that means is that you can appoint a bank as the investment trustee, and appoint the trust beneficiary's sibling as the distributions trustee, and neither will be responsible for the other's foibles. That is true even if the bank knew or should have known that the sibling was engaged in a breach, and vice versa. Again, the exception would be if the separate trustees were colluding with each other with respect to the inappropriate conduct. This development will make it much easier to have professional investment companies assume trusteeships over the investments, where others are making decisions about discretionary distributions.

When a power is exercised in a fiduciary capacity and when it is not; when a trustee or trust director is subject to liability and when they are not; are all addressed in detail in the legislation.

Special Needs Planning and Discretionary Trusts

In no area of trust planning will these changes be more relevant than in the drafting of discretionary trusts. And while there are many discretionary trusts that are not special needs trusts, all special needs trusts are discretionary trusts. The complexity of discretionary trust drafting will increase significantly with the passage of these laws, as will the opportunities to be more creative in the drafting of such trusts.

"Keep it simple" has long been the mantra of drafting SNTs. It is well recognized that the more detailed an SNT, the more likely the document is to

be reviewed and perhaps challenged by the government entities which provide benefits to the SNT beneficiary. For "high end" SNT planners, this opportunity might be an exception to that rule. The ability to work with institutional investors may mandate the adoption of separate trustee provisions.

The idea that you will soon have new tools to allow financial institutions to manage the money in the SNT, while having the family members (or family lawyer) make the decisions about how resources are used to improve the quality of life of the beneficiary is huge, and a big reason SNT planners will need to carefully consider how this legislation will change their practices. As everyone in the SNT world knows, banks and other financial institutions have attempted to gain entry into the world of special needs planning, but they are inevitably ill-suited to mange the distribution decisions associated with taking on the role of trustee. This legislation provides a safe harbor approach which allows them to manage the money while taking them off the hook of doing the dirty work of special needs trust administration.

These new laws offer SNT planners an opportunity that in many instances will be too hard to pass up, but they come with requirement that special needs trust drafters elevate their games. Dabblers in SNT drafting beware.

IF You Decide To Go There

The good news for some no doubt, is you don't have to use separate trustees or trust directors or otherwise incorporate these options into your trust agreements. And in fact, most simple "will substitute" trusts wouldn't need or benefit from such provisions.

But if you draft inter vivos irrevocable trusts, or draft any trusts that continue after death, you will want to consider the possible benefits of these new tools. If you do, you need to read the statute carefully, because there are a whole host of requirements that spell out what has to be express in the trust agreement, and a handful of rules that cannot be altered or negated by your drafting.

If you have used Trust Protectors in your documents in the past, or want to use the concept in the future, you will need to understand the term Trust Director, how it differs from a Trust Protector and what the rules are in terms of appointment, exculpation and scope of authority.

So for many, keeping it simple may be best. For others, the possibilities will be too intriguing. At times, perhaps, the objectives of the client may demand separate trustee provisions, and it may be malpractice to draft agreements that are not sufficiently attentive to these new rules.

Conclusion

It's been a wild ride since Michigan adopted the Michigan Trust Code in 2010. In the eight years since, we've seen dramatic additional developments to Michigan trust law, including domestic self-settled asset protection trusts and liberalized decanting rules. This is the next big thing.

Michigan's own Jim Spica is a member of the Uniform Directed Trust Act Committee, and the primary author of Michigan's proposed law. As with everything Jim touches, this legislation is thorough and thoughtful. To read the legislation in its present form click on the following House Bill links:

HB 6129 (Relating to the provisions for Separate Trustees)

HB 6130 (Relating to the Provisions for Trust Directors)

HB 6131 (Corresponding changes to other provisions of EPIC and the MTC)

And if f you are really in love with this topic, click here to read the Uniform Act, which includes commentary. If you look you will see that Michigan's law varies significantly in many substantive ways from the Uniform Act.

EXHIBIT C: VA Program Adds Divestment Rules and More

The so-called "Aid and Attendance" pension has become an important source of income for older adults needing long term care services, and an important source of business for some elder law attorneys. The program is offered through the Veterans Administration. Eligibility requires military service during a period of conflict, or being the spouse or surviving spouse of a veteran that meets that requirement. In addition, there are asset and income eligibility rules. Those income and asset rules will change dramatically with the implementation of new regulations formally adopted today (but taking effect in 30 days).

There are several changes. Some of the more notable changes are outlined below. Before I get into those, I think it would be helpful to acknowledge the context of these changes and the overriding themes that tie them together.

First, it seems evident that these new rules are a reaction to the role of lawyers and financial planners who, for the past ten years or so, have become increasingly involved in "helping" veterans qualify for these benefits. The VA clearly perceives this development as harmful to the program and perhaps even exploitative towards the veterans.

Second, this VA benefit is often considered by older adults who need help with aging issues, as something available either in addition to, or as an alternative to, applying for long term care benefits through Medicaid. For historical reasons, these two programs have had very different financial (asset and income) eligibility rules. These changes make the VA benefit rules more like the Medicaid eligibility rules.

Divestment. Divestment means giving away your assets (or taking other steps to artificially reduce their availability) in order to qualify for the benefit. Heretofore, there was no penalty if an applicant gave away resources in order to qualify for this VA benefit. Now there will be. Most Medicaid long term care programs have had divestment rules for at least 20 years.

Like the Medicaid long term care programs, penalties for asset transfers will result in periods of ineligibility the duration of which will be a function of the amount sheltered. Whereas the so-called "look back period" for Medicaid is five years, the look-back for this program will be three years.

Use of trusts and annuities in planning can result in divestment analysis under these new rules.

There are exceptions, and interestingly there is an exception for elders who were taken advantage of by an advisor who was marketing services purportedly designed to allow them to qualify for this benefit. Or, in other words, if an attorney told you to put your assets in an irrevocable trust or annuity, and now, as a result, you are ineligible for benefits, you merely have to assert that the lawyer was a charlatan to avoid the penalty (at least that how I read it).

Homestead Exemption. Both this VA benefit and Medicaid have historically exempted the primary residence from consideration as a countable asset. In recent years, Medicaid has placed a limit on the value of an exempt homestead. Now VA will limit the exempt homestead by using a different measurement – two acres.

Countable Asset Limit. The amount of exempt assets that have historically been excluded for this VA benefit has been uncertain. While some offices used a "rule of thumb" figure at times, the real rule required a calculation taking into account the income shortfall of the applicant, their life expectancy and their available resources. Medicaid has long had a simple $2,000 rule for single people, and a formula for married persons, with a ceiling. That Medicaid formula is called the Community Spouse Resource Allowance (or CSRA) (also sometimes called the "protected spousal amount"). Each year the Medicaid program announces the maximum CSRA. In 2018, the maximum CSRA is $123,600. VA has adopted, as their new asset limit for all applicants, the Medicaid maximum CSRA.

Conclusion. These are dramatic changes for lawyers who offer advice on this benefit. There are other changes. Above are those that I perceive as most notable. To read more: click here to read the rule changes as they were originally published in 2015 (yes it has been around that long); and click here to read the VA commentary that accompanied the announcement that the rule changes would finally be implemented today.

EXHIBIT D: State Supremes Issue Split Decision on Mardigian

Relish the moment because this is as exciting as probate law gets.

We've written about the case before (See: This is Awkward). Attorney prepares an estate plan (will and trust) for non-relative, leaving millions to said attorney and attorney's family.

Trial court says: An attorney can't do that under the rules of professional conduct, and therefore the estate plan is void – on summary disposition.

Court of Appeals reverses the trial court. COA says: While the lawyer may face discipline for the ethics violation, the validity of the trust is not implicated by the ethics rule. That decision was 2 to 1.

Now, the Michigan Supreme Court reviews the Court of Appeals, and it's a 3 to 3 tie [The 7th Justice abstains because he was on the COA panel that decided it – and was one of the two votes on the prevailing side.] Apparently a tie means the COA decision is affirmed.

So the issue is whether a violation of the MRPC rule 1.8(c) (which precludes an attorney from creating estate plans for non-relatives in which they receive a substantial benefit) has any role in a trial contesting the validity of the estate plan? The answer is "no, it does not." While everyone agrees that the attorney is a fiduciary and that, as such, the presumption of undue influence is in play, the prevailing opinion is that the ethics violation, in and of itself, is not a factor in the case.

It's a Long Decision

As indicated, there are two opinions, each with 3 signatories. In all it's 53 pages long. Click here to read the case.

The three who vote to affirm the COA ultimately conclude that it's not their role to change the law of undue influence to enforce ethical obligations of the bar. The other three see this as an opportunity to do just that. Their approach would be to treat a violation of the ethics rule as giving rise to an per se finding of undue influence. They assert that the law needs to catch up with changes that have taken place since the last time the MSC reviewed this question more than 50 years ago, which changes included the adoption of MRPC 1.8(c).

Each opinion includes a lengthy discussion of undue influence and the presumption. It at least attempts to clarify some of the confusion that exists about the presumption and particularly about how it is rebutted. This case will

no doubt be quoted in litigation going forward. So if you do this kind of work, you need to read this case.

They're Making My Point

The Supremes don't know it, and likely won't revisit this issue in my lifetime, but their decision demonstrates the point I was trying to make in my recent post: The Imperfect Bandage of Undue Influence (click on name to read it). My point is that: Undue influence isn't cutting it.

In both opinions, but especially the opinion of the non-prevailing Justices, the Justices seem uncomfortable with how difficult it is to prove undue influence and how easy it is for the presumption to be rebutted. For me though, their distress is too narrowly focused. Even the side that would change the law to prevent this result in this case, would only do so in situations where a lawyer is involved. From my perspective, it is just as suspicious when a benefiting child or housekeeper prepares the will, deed, beneficiary designation, etc..

So, in conclusion, the MSC has spoken. It's a long opinion and long awaited by many in the probate community. The facts of the case and the evenly divided court add a dash of drama. Required reading for probate geeks.

EXHIBIT E: Puzzling New Medicaid Policy on Homestead Exemption to Take Effect

As of February 1, 2019, Bridges Eligibility Manual Item 400 (aka "BEM 400") will be changed. For the uninitiated, BEM 400 is the source of Medicaid policy relating to exempt and countable assets.

In Medicaid planning, there is probably no topic that is more foundational and complicated than "exempt assets." Accordingly, BEM 400 is an unusually lengthy policy item. Click here to view the policy item as it will exist beginning February 1, 2019. The changes are indicated by lines on the right side of the page.

The change I want to discuss relates to the rules that allow an applicant to exempt a homestead when they are no longer living in the home. [Footnote: This discussion is not relevant if the Medicaid applicant's spouse is living in the home, or if a blind or disabled child of the applicant is living in the home. In those cases the homestead is exempt per se.]

Historically, the rule has been that any home that the applicant owns where they formerly lived, could be claimed as a homestead. Currently that exemption is worded as follows:

*Exclude a homestead that an owner formerly lived in if **any** of the following are true:*

- *The owner intends to return to the homestead.*
- *The owner is in an LTC facility, a hospital, an adult foster care (AFC) home or a home for the aged.*
- *A co-owner of the homestead uses the property as his home.*

Now let's go to the policy that takes effect February 1. If you want to follow along, go to the middle of page 36 and look at the topic of "Absent from Homestead." The introductory paragraph has been reworded to say:

*Exclude the homestead (see definition in this item) that an owner lived inprior to the time the indiidual left the property if **any** of the following are true:*

First, it's hard to ignore that there are two obvious typographical errors in this sentence.

Substantively, we see that the following words are added: "that an owner lived in prior to the time the individual left the property. ..."

So, what does that even mean – if it means anything?

If the applicant is now absent from the home (presumably because they are in institutional care), they must have lived in the home prior to the time they left the home. But then, why put those words in there?

My initial concern is that the department intends to use this language to limit the availability of the homestead exclusion to real estate that was occupied immediately prior to entering long term care. But it doesn't say that, and could easily have said that. So maybe I'm just reading too much into it.

Is there another explanation? I think so. And you don't have to look far to see it.

Also on page 36, immediately following the cited provision, is a section that talks about when a homestead can be exempt if a relative is occupying the property. The new language says:

Relative Occupied. *Exclude a homestead provided both of the following are true:*

- *The owner is in an institution; see BPG Glossary.*
- *The owner's spouse or relative (see below) lives there.*

The current policy reads:

Relative Occupied. *Exclude a homestead even if the owner never lived there provided both of the following are true:*

- *The owner is in an institution; see BPG Glossary.*
- *The owner's spouse or relative (see below) lives there.*

Here the difference is clear. To use the relative occupied exclusion, heretofore, it was not required that the owner ever lived in the home. Now the "never lived there" language is gone. So, perhaps all that the department is trying to say is that the applicant-owner had to live in the home at some point in order to obtain the exemption for a relative-occupied house? Although, again, that is not what it says, and it could have easily said that.

In conclusion, I guess we will have to wait to see what these changes are intended to mean. Maybe it just means that the relative occupied exclusion requires that the applicant own and formerly lived in the house. But maybe the department will attempt to place greater restrictions on the homestead

exemption, by limiting to only those situations in which the person went directly from the house into long term care.

EXHIBIT F: Proposed Policy Promises Problems for Planners

This is a post about Medicaid long term care planning. The topic is a proposed policy change related to the use of promissory notes in Medicaid planning. If adopted, the new policy would take effect July 1, 2019.

The proposed policy says:

In order for a promissory note to be a bona fide loan:

- ***The loan must be enforceable under Michigan law;***
- ***The note agreement must be in effect at the time of the loan transaction;***
- ***The borrower must acknowledge the obligation to repay the loan;***
- ***There must be a plan to repay in the loan document; and***
- ***The repayment plan must be feasible.***

Medicaid planners use private promissory notes in a couple important contexts, both in relation to divestment. [Divestment is the term used by the Michigan Department of Health and Human Services to mean non-exempt asset transfers for less than fair market value that occur during the five year "look back" period. Divestments result in penalties.]

Promissory notes are sometimes used as alternatives to commercial annuities in "half loaf" divestment planning. And promissory notes are used to "cure" divestments that clients come in the door with (i.e., divestments done before they met with an attorney).

The primary impact of these proposed changes would seem to be the elimination of promissory notes as a tool to cure preexisting divestments. Specifically, the second bullet above which would require that the note be "in effect" when the funds are transferred to the borrower, would be hard to work around in the typical situation in which a client comes to the lawyer having already made penalizing divestments.

The other bullet points in this notice seem to be directed at the integrity of the arrangement. While ominous, these bullets appear to be less clearly impactful on current planning approaches.

Like annuities, promissory notes, have become a target of MDHHS policy writers. Hope that the new administration in Lansing might be less antagonistic toward Medicaid planning concepts may be misplaced.

EXHIBIT G: Test of Capacity if a Function of Complexity

Party A argued that because a person executed a financial power of attorney and patient advocate designation in June of 2013, the trial court should have found that said person must have been competent to execute a shareholder's proxy signed in December of that same year. But the trial court found otherwise.

In affirming the trial court, the Court of Appeals says: Not only is it reasonable for the trial court to have concluded that the person's capacity diminished in the intervening months, but – wait for it – – – it is also true that a proxy is a different thing than a power of attorney and therefore the test for capacity is not the same.

That, my friends, is a proposition that is commonly argued, but heretofore not so clearly stated in Michigan law. The proposition that the test of capacity is a function of the complexity of the decision being challenged comes up in litigation all the time. **And this is a published decision**. (emphasis added)

Menhennick Family Trust v Timothy Menhennick (click on the name to read the case) purports to be about the meaning of a statute in the Business Corporation Act, but the holding primarily turns on the issue of capacity. Several large chunks of this relatively short opinion clearly state the rules relating to a finding of capacity and how that test can vary with the decision at issue. Well worth the read.

This is an important decision for probate litigators. I know I will be citing this decision in cases to come, and I am sure others will as well.

Exhibit H: Another Post Post

It's been over a year since Michigan adopted a law authorizing the use of a Physician's Order for Scope of Treatment (POST). The details of that law were discussed in that prior post: POST set to join Michigan's Medical Directive Stew. (Click on the name to read that post.)

As discussed in that prior post, as a result of the passage of the law, State regulators were tasked with creating a uniform POST form. They have done that. It has been published, and yesterday was the deadline for comments. I don't know if any comments were submitted, or if any changes will be forthcoming. But for now, I think it is safe to assume that the following document is either exactly what will be used, or very close to what will be used: MI-POST Form (click on name to see the form). I will post more in the future if significant changes are made as a result of comments.

The same State site also offers an information sheet (click here) and a frequently asked questions sheet (click here), both of which might be helpful to those wanting to better understand the purpose and use of this new planning tool.

Lawyers won't be preparing MI-POST forms for clients, but estate planning lawyers need to be aware of these forms and understand their place. Clients may have questions about them, and patient advocate designations should probably be updated to include POST powers.

EXHIBIT I: Capacity to Nominate

The question is this: When a person who is the subject of a petition for guardianship or conservatorship nominates an individual they want to serve in those capacities, to what extent is the court required to grant the nominated individual a priority of appointment? A new unpublished opinion discusses that question, and while I think the opinion falls short in some respects, the issue comes up routinely in contested guardianship and conservatorship matters and this case offers the opportunity to delve into the law. So here we go:

Let's start with the law.

MCL 700.5313(2) provides the order of appointment for a guardianship. Its relevant provisions say:

(2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, in the following order of priority:

(a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.

(b) A person the individual subject to the petition chooses to serve as guardian.

(c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.

(d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

For a conservatorship the relevant language is in MCL 700.5409(1), which says:

(1) The court may appoint an individual, a corporation authorized to exercise fiduciary powers, or a professional conservator described in section 5106 to serve as conservator of a protected individual's estate. The following are entitled to consideration for appointment in the following order of priority:

(a) A conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides.

(b) An individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney.

These provisions are similar, but importantly different:

While both statutes provide that, unless someone has already been appointed to serve as guardian or conservator by another state, the highest priority goes the person nominated by the proposed ward. But in the guardianship context, the law provides that the court "shall appoint" the person with priority if they are suitable and willing to serve. In a conservatorship proceeding, the court "may appoint" and having a priority merely provides that such persons "are entitled to consideration."

Interestingly, the conservatorship statute says that before considering a person nominated by the proposed ward, the court must find that the proposed ward "is of sufficient mental capacity to make an intelligent choice." In the guardianship context there is no requirement that the proposed ward be capable of making a good choice.

The guardianship law also elevates the person nominated by the proposed ward at the hearing above a person previously nominated in a power of attorney or patient advocate designation. In the conservatorship context, those two forms of priority are equal.

For the record, both statutes are further buttressed by MCL 700.5106 which more specifically addresses the limitations placed on a court with respect to the appointment of a public fiduciary.

All three cited statutes are linked to the law, which can be read in their entirety by clicking on the statute.

Now let's look at the case of In Re Guardianship and Conservatorship of David P. VanPoppelen. Click on the name to read the opinion. Click here to read the concurrence/dissent which goes into an interesting issue about suitability, which, for the sake of brevity, I won't discuss in this post.

In this case, the proposed ward ("David") nominated June to be his guardian and conservator. He did so both in his power of attorney and patient advocate designation, and he did so when he was questioned by the court-appointed guardian ad litem. But the trial court bypassed June by finding that the David was not competent to execute the patient advocate designation and power of attorney when they were executed, and further, the court says "He was similarly incompetent to informally select his fiduciary."

So my complaint with this holding is that while I think the court was certainly within its power to invalidate a power of attorney and patient advocate designation based on a finding of lack of capacity at the time of execution; and to bypass June as conservator by finding, in accordance with MCL 700.5409, that David lacked the ability to "make an intelligent choice" at the time of his verbal nomination; because MCL 700.5313 (the guardianship law) does not

include a provision that allows the court to make a verbal nomination contingent on the existing mental capacity of the proposed ward, to my thinking, June should have been given the priority in the guardianship matter.

In conclusion, although I think this court provided an imperfect analysis, I appreciate the opportunity to review the law as it relates to this important question.

EXHIBIT J: Opinion Puts Fees of Former PR's (and their Attorneys) at Risk

If you are a lawyer who handles probate estate administration, you will want to take note of this unpublished Court of Appeals opinion. The gravamen of this decision is that a claim for fees by a personal representative who has been removed or who resigns, will be barred unless it is filed within four months of their removal or resignation; and the same would be true of the fees for legal services or other professional services provided to the former PR.

In In Re Estate of Jack Edward Busselle (click on name to read the case), the Court of Appeals construes the provisions of MCL 700.3803 (click here to read the statute) that address time limits to claims that arise after the decedent's death.

MCL 700.3803(2) says that such claims must be filed within 4 months, but MCL 700.3803(3)(c) says that time limit does not apply to:

(c) Collection of compensation for services rendered and reimbursement of expenses advanced by the personal representative or by an attorney, auditor, investment adviser, or other specialized agent or assistant for the personal representative of the estate.

What this case holds is that the term "the personal representative" as used in MCL 700.3803(3)(c) does not include a former personal representative, and therefore a former personal representative has four months from the date of their removal or resignation to file a claim for services. This statutory construction would then impose the same time limit on claims from professionals, including lawyers, who did work for the former PR.

This case should probably be published since it appears to be an issue of first impression and relies on no prior authority for this interpretation of the law. The COA's interpretation seems to present a malpractice trap for lawyers who have clients who resign or are removed as PR and who take more than four months to file a claim for their client's fees. The law as construed in this case also would present a time bar for lawyers who represent clients who resign or are removed and PR, and who do not file a claim for their own fees within the four month window.

In any event, it has been a while since I have seen my old friend Tom Trainer who acted as successor PR in this matter, and who prevailed as Appellee in this case. Nice to know Tom is still out there stirring things up.

EXHIBIT K: The Awesome Power of Constructive Trust

Mom made the house joint with son, rights of survivorship. Now Mom, in her demented state, tells the court that, when she did it, she thought her son would share the house with his siblings after she died. The court uses that testimony to void the deed, citing the equitable remedy of constructive trust. The Court of Appeals upholds that decision.

This new unpublished case is In Re Guardianship and Conservatorship of Dorothy Redd (click on the name to read the case). You might recognize the name. This is a second appeal arising from the same file. The first resulted in a published decision, and is addressed in my prior post Seeing Redd (click on the name to read that prior post), a case which offers an important rule about fiduciary removal for interference with family relations.

Constructive Trust is a remedy, which also can be pled as a cause of action. I plead it all the time. To me, constructive trust is the Hail Mary of probate court litigation. In the grey world of family exploitation cases, if all else fails, ask the court "to do the right thing." Who knows, it might just work? It worked in this case.

Let's review:

When Mom was competent, she deeded the house to herself and her son as joint tenants with rights of survivorship. Now she says that at the time, her express intent was that when her son received the property at her death, that he would share the proceeds with his other siblings. There is apparently no, or insufficient, evidence to attack the deed for lack of capacity, undue influence or duress. And there is apparently also no, or insufficient, evidence to impose an oral trust on the property (that is, no evidence that son made representations to mom that caused her to believe he was accepting the deed based on the agreement that he would share the proceeds with his siblings).

But the court decided that it simply wouldn't be fair for son to keep the house, and voided the deed by exercising its equitable powers of constructive trust.

The Outer Bounds of Equity

Even in the wide-open range of equity, constructive trust is an anomaly, seemingly untethered by any evidentiary requirement.

It's one thing to invoke equity by saying: "I took care of the old geezer for twenty years based on the promise that I would get compensated from his estate, and I wouldn't have continued to do the work if I had known that he

was leaving me nothing." In those cases, the fact that the contract wasn't in writing, or the terms were uncertain, can be remedied through equity (quantum meruit or unjust enrichment). That's equity, but at least there are some rules. In those cases, the claimant has to prove that they would not have provided the care 'but for' the promise of compensation.

Constructive Trust doesn't require anything so firm. It simply requires convincing the trial court that the outcome isn't fair. The leading case on constructive trust is the 1958 case of Kent v Klein, 352 Mich 652, 656; 91 NW2d 11. Kent is cited extensively in this Redd case, and those quotes demonstrate just how loose the parameters are:

A constructive trust may be imposed whenever "the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done."

As Spiderman's uncle once said: "With great power comes great responsibility." So, for argument's sake, let's read between the lines of this decision.

In the first Redd case, this same son was removed as guardian because the trial court found that he was actively undermining the relationships between his demented mother and her other children, his siblings. So, he was already the bad guy in this court when the questions at issue in this appeal arose. In this appeal, his accountings are disallowed, he is removed as beneficiary of a life insurance policy his mother established on her life, and the deed leaving him her home is voided.

One explanation is that he really is the bad guy and had a hand in the getting mom to execute the deed. But if those were the facts, as discussed above, the contestants would have had legal grounds to attack the deed: duress and undue influence. That evidence, presumably, didn't exist.

Remember also that the testimony about what mom believed or intended at the time she created the deed, comes from a demented woman who is no doubt being influenced by the people around her; and since her son's removal as guardian, should we assume those people are the other siblings? How much weight should be given to her current memories of what she did some years earlier? Also, the COA opinion mentions only in an off-handed way that, in explaining her decision to execute the deed, mom states that at least part of her motivation was that her son had made improvements to the house.

So, the other possible perspective is that maybe son is the good kid. Maybe his siblings didn't have a lot to do with mom, but lawyered up when they realized they were getting cut out. Maybe he had reasons for his keeping the other kids away from mom, although perhaps he was too strident in how he did it. Maybe he is the only one who cared. I don't know. But I suspect the story is richer than this opinion reveals.

Conclusion

I'm not saying this case is wrongly decided, I'm just saying it's grey – it's always grey; and unleashing unfettered equitable powers in these cases is dicey.

Speaking of which, I have an article coming out on this very topic. It will be in the February edition of the Michigan Bar Journal. It's called: Best Practices for Family Exploitation Cases. If you are so inclined, give it a read, and I hope you find it worthwhile.

EXHIBIT L: Reflections from a Costly Goose Chase

The crux of this unpublished opinion is whether the cost of litigation initiated by a conservator that turns out to be a big waste of money, should be paid out of the estate.

In In Re Conservatorship of Marilyn Burhop the probate court appointed a local lawyer ("Jones") as conservator over a vulnerable adult (click on the name to read the case). Jones learned that prior to her appointment, the ward, Marilyn, transferred nearly $500,000 to certain acquaintances (the "Sirchias"). In addition, Marilyn changed her estate plan to benefit the Sirchias exclusively.

After some preliminary investigation, Jones decided to sue the Sirchias to recover the funds and to initiate litigation to set aside the estate planning changes. After incurring about $175,000 in legal and fiduciary fees, Jones settles. Curiously, perhaps conveniently, the COA fails to share the details of the settlement – such as whether the conservator recovered anything. But reading between the lines, it seems that Jones simply dropped the case. The issue then became whether the massive fees that Jones and her attorneys charged to pursue this litigation should be allowed as expenses of the estate, when, in the end, the estate received no benefit. The trial court allowed the fees in their entirety, and the order allowing those fees is what was appealed and affirmed.

Here's what I think:

Seek Instruction

The way this case begins is all too common. These days, conservators are often appointed to protect a vulnerable adult from financial exploitation, which exploitation may have already begun. Accordingly the question of whether the conservator should simply protect what's left or pursue recovery of what may have been improperly removed is typical. In this case, Jones apparently did some preliminary investigation before initiating litigation, but what Jones did not do, and what I think was her initial mistake, was to ask the probate court for instruction.

In our firm, when handling these matters, we commonly to seek court instruction at the outset. We ask the court to authorize the conservator to pursue litigation and also to enter into an engagement with our firm. In that process we present the court with the proposed engagement letter. We don't do this in every case, but I am thinking we will start doing it more often.

Certainly, it seems to me that, before Jones was $175,000 into the litigation, she should have gone before the court and asked whether this matter should continue to be pursued and at what cost. Perhaps the court would have told her not to pursue the litigation at all, perhaps the court would have found that a contingency fee arrangement would have been more appropriate, or perhaps the decision to drop the matter would have been made at an earlier date? We won't know, because court instruction was apparently never requested.

Asset Recovery v Estate Plan Changes

In this opinion, the COA fails to address what I think is a critical distinction. The appropriateness of a conservator seeking to recover misappropriated funds is one thing, challenging estate planning documents is quite another.

With respect to misappropriated funds, such funds would become property of the conservator, would provide additional resources to benefit the ward during her remaining life, and failure to pursue recovery in a timely manner would present the possibility that a statute of limitations would be missed or that the funds would be dissipated and become unrecoverable.

Challenging the estate planning documents is different. Assuming the changes are strictly with respect to testamentary disposition, setting them aside would not increase the resources available to provide for the ward's needs, and in most cases there would be no statute of limitations to worry about. In fact, our laws are structured so that such changes are disclosed to the real parties in interest upon death (or in the case of a trust, upon incapacity) and the real parties in interest are empowered to protect their own interests at their own cost. If there is any argument that a conservator would have a reason to engage in litigation over the validity of estate planning documents, it would be with respect to MCL 700.5428 which imposes duties on the conservator to manage resources in manner that does not disrupt the known estate plan. Accordingly, for instance, if there are specific gifts, beneficiary designations or joint accounts, in deciding what resources to dissipate on the needs of the ward, the conservator must take into account the impact of those decisions on the overall estate plan of the ward. But this issue was not raised in this case, and if it were, the appropriate approach would seemingly be to seek court instruction regarding the use of resources.

To my thinking, the decision of this conservator to spend money litigating the validity of the estate planning documents in this case is highly questionable.

Disregarding Valentino

There is an old rule that says a fiduciary is entitled to fees when what they have done has benefitted the estate. The 1983 Michigan Court of Appeals case In Re Valentino Estate, 128 Mich App 87 (1983) is often cited for this rule. This opinion holds that Valentino was superseded by EPIC. Well, that's news to me. First, I would be interested in knowing whether there is any published authority for that conclusion, I know of none and they cite none. Further, it is worth noting that as recently as 2010, with the adoption of the Michigan Trust Code, the concept of a benefit to the estate being a basis for allowing fees was seemingly recognized in MCL 700.7904. While that law relates to a non-fiduciary's claim for recovery of fees from a trust, the commentary cites cases much older than Valentino for this rule.

Outspent

A common litigation strategy is to simply outspend your opponent until they wilt. In this case, the COA asserts that the Sirchias did just that. The COA says the Sirchias engaged in a "scorched earth" litigation strategy, noting that no less than sixteen motions for summary disposition were filed (and denied). The suggestion is that Jones may have had a case, but only relented because she was running out of money to spend on the litigation. Seems plausible. But where in the law does it say that in deciding whether to initiate litigation the conservator should assume that the opposing party will play nice? Rather, I think, this is all the more reason that Jones should have sought court instruction before starting this fight, should have limited the scope of litigation to asset recovery, or retained counsel on a contingency basis.

A Duty to Litigate

In passing the COA in this opinion says that Jones would have been negligent "under the circumstances" not to have pursued this litigation. Um. Not a published decision so I guess I will leave that conclusion alone.

The Specter of Bleak House

Let's step outside our bubble for a minute and look at this from the perspective of the Sirchias. The estate of someone they apparently had a close relationship with is diminished by $175,000. Their inheritance is diminished by $175,000. They presumably had to spend a similar amount defending themselves against claims that, in the end, were dropped.

Many people (who are not probate lawyers) perceive the probate court as a place where the property of the dead and dying is consumed by a hungry pack of lawyers and court officials. It's an unflattering image that dates back centuries. Without passing judgment on anyone involved in this sordid affair,

you can't help but acknowledge, I think, that this case sort of feeds into that perception.

Conclusion

I've gone on long enough.

Many many conservatorship cases arise where something is amiss and prior conduct may give rise to the possibility of financial exploitation of the ward. Whether the conservator tries to remedy those wrongs and recover the missing assets, or to simply move forward and do their best with what they have control over, is often a decision they need to make.

I don't mean to beat up on the conservator in this case, or to suggest that she didn't act in good faith. Jones may well have been justifiably outraged by the actions of the Sirchias in the period prior to her appointment as conservator. But even giving this conservator the benefit of every doubt, in the end, it is hard to say that the ridiculously unfavorable outcome of this case could not have been ameliorated, perhaps avoided, had other reasonable decisions been made along the way.