CASE LAW AND LEGISLATIVE UPDATE

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I. INTRODUCTION

Materials address new court rules, legislation, and appellate court decisions in the probate area that have occurred within the last year.

II. COURT RULE AMENDMENTS

PROBATE APPEALS – ADM 2016-32, Effective June 21, 2017

A. Adopted to fully effectuate the recent legislative changes (discussed infra) providing that all probate appeals are to be filed with the Court of Appeals.

B. **All appeals for final orders are appealable as of right to the Court of Appeals.** Final orders added include those previously appealed to the Circuit Court: orders affecting rights\interests of adult\minor in guardianship proceeding, mental health orders, (new) order (other than civil action [addressed at **MCR 5.801(A)(1)**] otherwise affecting with finality rights\interests of party\interested person, and (new) adoption subsidy appeals. **MCR 5.801(A).**

C. All other orders not listed are appealable by leave to the Court of Appeals as interlocutory orders. **MCR 5.801(A).**

Observation: Promotes judicial efficiency and economy in appeals.

D. All references to probate court are deleted from subchapter 7.100, Circuit Court Appeals.

E. Probate Court retains jurisdiction regarding other matters pertaining to appealed proceeding. **MCR 7.208(D).**

Observation: Useful addition; allows underlying probate proceeding (i.e., administration of guardianship, conservatorship, estate, etc.) to continue except for the specific aspect appealed.

F. Probate proceedings added to references for appeal bonds and stays of proceedings. **MCR 7.209.**

Observation: Gives Probate Courts the same ability to set and approve stay bonds as other trial courts.

G. Adds references to guardianship and mental health proceedings to record on appeal court rule. **MCR 7.209.**

H. Adds references to guardianship and mental health proceedings to briefs court rule. **MCR 7.210.**

I. Guardianship and involuntary mental health cases are given the same priority as Child Custody Cases on the Court of Appeals calendar. **MCR 7.213(C)(2).**

Observation: Significant change. Only interlocutory criminal appeals are given higher priority. Ensures that guardianship\mental health cases (previously appealed to Circuit Court) will be heard on an expedited basis.

III. NEW LEGISLATION

A. KEVIN'S LAW
2016 PA 320 - Effective February 14, 2017

1. Significant changes to Mental Health Code.

2. Key modifications:

   a. A single method to initiate mental health proceedings - filing a petition.

   b. Standard for obtaining a transport order lowered – allows for earlier intervention for individuals alleged to need mental health treatment.

   c. Assisted Outpatient Treatment (AOT) can be ordered in any mental health case.

3. For a detailed analysis of this legislation, see "Navigating the Amended Kevin's Law", which is included in the 2017 Attorney Training Materials.

B. REPEAL OF DOWER
2016 PA 490 - Effective April 6, 2017

1. Dower has finally been abolished.

2. It is unenforceable either through statute or common law.

3. The only exception is a widow's ability to take their dower right if she elects against her husband's will pursuant to **MCL 700.2202** if the decedent died prior to April 6, 2017.

   Note: The requirement that a divorce judgment include a provision in lieu of dower has been eliminated.

C. DOMESTIC ASSET PROTECTION TRUST ACT
2016PA 330 - Effective March 3, 2017

1. Law allows for the creation of irrevocable trusts whose assets cannot be attached by creditors under certain circumstances.

2. A detailed discussion of this topic is beyond the scope of this outline.

D. PROBATE APPEALS TO COURT OF APPEALS
2016 PA 186 - Effective June 21, 2016;
2016 PA 287 - Effective December 26, 2016;
2016 PA 490 - Effective April 6, 2017

These Acts, along with the court rule amendments discussed supra, provide that all appeals from Probate Court will now be made directly to the Court of Appeals.

E. POWER OF ATTORNEY DELEGATION – MINOR
2016 PA 483 - Effective March 29, 2017

1. New section added to EPIC's provision allowing a parent or guardian to delegate their authority over a minor for up to six months.

2. Cannot exercise power for purposes of permanently transferring custody in violation of **MCL 750.136c**:

a. Transferring\attempting transfer of legal\physical custody with intent to permanently divest parent of parental responsibility (unless pursuant to order from court of competent jurisdiction).

b. Arranging\assisting in permanent transfer, adoption, adoptive placement or other permanent physical placement of child.

MCL 700.5103(2).

F. GUARDIAN\CONSERVATOR JURISDICTION
2016 PA 498 - Effective April 6, 2017

1. Adds sections to adult guardianship (**MCL 700.5301b**) and conservatorship (**MCL 700.5402a**) subchapters of EPIC.

2. Court has jurisdiction over individual if they reside in or are present and have significant connection to state. **MCL 700.5301b(1); MCL 700.5402a(1).**

3. The following factors are to be considered in determining whether person has significant connection to state:

    a. Individual's wishes.

    b. Location of individual's family\other interested persons.

    c. Length\time individual present in Michigan\duration of any absence.

    d. Location of individual's property.

    e. Extent of individual's ties to Michigan, such as voter registration, state tax return filing, vehicle registration, driver license, social relationships, and receipt of services.

    f. Any other factor the court considers relevant.

MCL 700.5301b(2); MCL 700.5402a(2).

Observation: Designed to provide additional guidance to court to determine whether jurisdiction should be exercised in a guardianship or conservatorship proceeding.

G. EPIC – SURVIVING SPOUSE
2017 PA 20 - Effective June 29, 2017

Provides that an individual party to divorce\annulment proceeding with decedent at time of decedent's death is not considered to be a surviving spouse for purposes of making funeral\burial arrangements and disposing of decedent's remains pursuant to EPIC Sec. 3206. **MCL 700.2801(3)(b).**

Observation: Useful change – appropriate to exclude person from making funeral\burial arrangements under these circumstances.

IV. CASE LAW

A. WRITING INTENDED AS WILL – HARMLESS ERROR – UNSIGNED DOCUMENT
In re Attia Estate, 317 Mich App 705; 895 NW 2d 564 (2016)

1. This unanimous Court of Appeals decision reversed a ruling by the Wayne County Probate Court granting summary disposition dismissing a petition to admit an unsigned will to probate under the "harmless error" provision of EPIC. The case was remanded for a hearing to determine whether the proponent can establish by clear and convincing evidence that the decedent intended the document to constitute his will.

2. In **Attia**, the decedent died on September 11, 2014 and was survived by four daughters. He executed a will on July 8, 1996 and codicils on February 17, 2009 and February 1, 2013. Prior to his death, the decedent visited his attorney to have him draft a new will. According to the appellant, the attorney and others were present when Sabry Attia asked for a new will and explained his intentions. The lawyer drafted the will and arranged for its execution on September 11, 2014 but the decedent died on that day. The daughter serving as personal representative (appellee) offered the original will and two codicils for probate. The appellant, another of the decedent's daughters, objected and asked that the unsigned will be admitted instead. Appellant relied on **MCL 700.2503**, the "harmless error" provision of EPIC, contending that even though **MCL 700.2502** requires a will be signed it can still be adjudicated to be a testamentary instrument if they can show by clear and convincing evidence that the decedent intended the document to constitute his will. The Probate Judge granted the appellee's motion for summary disposition, ruling that as a matter of law an unsigned will cannot be admitted to probate, since **MCL 700.2503** relates to a document which is executed but flawed in its execution.

3. The Court of Appeals reversed the Wayne Probate Court. It relied on the language of **MCL 700.2503**, which states:

> Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear

> and convincing evidence that the decedent intended the document or writing to constitute any of the following:
> (a) The decedent's will.
> (b) A partial or complete revocation of the decedent's will.
> (c) An addition to or an alteration of the decedent's will.
> (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.
> (emphasis added)

The appellate panel also noted that **MCL 700.1201(b)** provides that EPIC is to be construed liberally, including "…[t]o discover and make effective a decedent's intent in distribution of the decedent's property." According to the appeals court, the plain language of **MCL 700.2503** permits the probating of a will without meeting the requirements of **MCL 700.2502**, including that the document must be signed by the testator, as long as the proponent can establish by clear and convincing evidence that the decedent intended the document to be a will. While acknowledging that no Michigan cases addressed this issue, the appellate panel found a New Jersey decision to be persuasive – **In re Probate of Will & Codicil of Macool, 416 NJ Super 298, 303-304; 3 A3d 1258 (NJ App 2010)**. New Jersey's harmless error statute is virtually identical to Michigan's. The trial court took testimony on whether an unsigned draft will based on the handwritten note of a decedent who died before being able to review the draft will should be admitted as a testamentary instrument. The lower court determined that the harmless error requirements were not satisfied, and added that the document had to be executed or signed by the testator. The New Jersey appellate court affirmed the trial court, but noted in dicta that a will does not need to be signed by the testator in order to be admitted to probate. As a result of their reliance on this language, the Court of Appeals remanded the case to the Wayne County Probate Court and directed that the parties conduct discovery regarding whether the decedent intended the document to be his will.

4. This case appears to stand for the narrow proposition that under certain circumstances an unsigned will could possibly be admitted to probate. At a minimum, discovery and an evidentiary hearing would be required. While the proponent is to be given an opportunity to present proofs, query what evidence would be sufficient to meet the burden under **MCL 700.2503** to prove that an unsigned version of a document is a testamentary instrument. It is noteworthy that the **Macool** case was not remanded since the appellate court held the proponent of the will needed to establish by clear and convincing evidence that the decedent actually reviewed the document and gave her final asset to the rough draft of the will.

5. Application for leave to appeal was not filed.

B. INVENTORY FEE – WAIVER\SUSPENSION OF FEE – INDIGENT

In re Decoste Estate, In re Fletcher Estate 317 Mich App 339; 894 NW 2d 685 (2016)

1. In these consolidated appeals, the Court of Appeals affirmed the decision of the Jackson County Probate Court denying the request of two personal representatives to obtain a waiver of estate inventory fees based on indigency.

2. In each estate, the sole asset was the decedent's home. Both personal representatives were indigent and received waivers of their filing fees. Each fiduciary filed a request to waive their inventory fee pursuant to **MCR 2.002(C)**, which was denied by the probate court since this fee is not chargeable to a party but to the estate which has assets. The issue of whether a personal representative is indigent or receiving public assistance is not relevant to the inventory fee. The fiduciaries appealed.

3. In affirming the Probate Court, the Court of Appeals noted that **MCR 2.002**, the fee waiver rule, applies only to filing fees required by law. Since the inventory fee is an expense of administration and cannot be waived under this rule. Although the personal representatives, as devisees, preferred to keep the houses instead of liquidating them, they had a fiduciary responsibility to liquidate estate assets to pay administrative costs and expenses. As a result, the waiver of this fee was inappropriate.

4. **The lesson of this case:** An inventory fee cannot be waived (or suspended) due to a personal representative being indigent or receiving public assistance.

5. Application for leave to appeal was not filed.

C. **CONSERVATORSHIP –LEGAL MALPRACTICE – REAL PARTY IN INTEREST – ATTORNEY REPRESENTS CONSERVATOR, NOT ESTATE**
Maki Estate v Coen 318 Mich App 532; - NW 2d - (2017)

1. This Court of Appeals decision affirmed the Oakland County Circuit Court's ruling that an attorney retained by a fiduciary represents that individual and not the estate. As a result, the successor conservator was not a real party in interest and was precluded from bringing an action against the lawyer for the first fiduciary.

2. In **Coen**, a series of conservators (and their attorneys) made errors which adversely affected a minor conservatorship. Upon the ward reaching 18, his father was appointed plenary guardian of the estate. He then filed a malpractice action against the lawyers of the prior conservators. The trial court granted the defendant's motion for summary disposition, agreeing with their argument that the only person entitled to bring an action against the attorney was the first conservator (who had a judgment entered against

her) and who was represented by the defendant lawyer. The plaintiff appealed.

3. The appellate court initially noted that the key point of the defendant's argument was that the plaintiff was not the real party in interest since the Coen defendant represented the initial conservator, not the estate. They determined that the relevant court rule and statutory language indicates a lawyer retained to perform services for a conservator represents that fiduciary, not the estate.

   The Court of Appeals noted that EPIC's language (**MCL 700.5423(2)(z)**) clearly provides that an attorney provides necessary legal services and assistance for the conservator in the performance of their duties. This language differs from that of the former Revised Probate Code (RPC), which speaks of a fiduciary employing counsel to perform necessary legal services on behalf of an estate. The new language of EPIC makes clear that the attorney provides services to the conservator. In addition, **MCR5.117(A)** states: "An attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary."

4. **The takeaways from this case:** 1. A lawyer hired by a conservator represents the conservator, not the estate. 2. The rationale of this case may be extended to all fiduciary situations; i.e., an attorney retained by a fiduciary will represent the fiduciary, not the estate.

5. Application for leave to appeal has been filed and is still pending.

D. **TRUSTS – JURISDICTION – STANDING – CONTINGENT BENEFICIARY- EQUITABLE POWERS OF COURT**
In re Brody Trust, - Mich App - ; - NW 2d - (2017), #330,871, rel'd 9\12\17

1. This unanimous Court of Appeals ruling affirmed in part, reversed in part, and remanded a case to the Oakland County Probate Court regarding the administration of a trust.

2. **Brody** involved a trust which held two family businesses. The daughter of the settlor (petitioner) brought a petition to remove the settlor's husband (and her father) as trustee, requested accountings and temporary court supervision, an order rescinding certain trustee transactions, and damages. The Probate Court granted partial summary disposition in favor of the petitioner by resolving the claims related to these businesses, declaring the settlor disabled pursuant to the trust's terms, and removing her husband as successor trustee. The trustee and his son (also a child of the settlor) (respondents) appealed.

3. The appellate panel rejected respondents' argument that the Probate Court lacked jurisdiction because the case included a business or commercial dispute within the mandatory jurisdiction of the business court pursuant to **MCL**

600.8035. They noted that while a "business or commercial dispute" is defined broadly under **MCL 600.8031(1)(c)**, proceedings under EPIC were specifically excluded pursuant to **MCL 600.8031(3)(e)**.

The Court of Appeals also did not accept the contention of the respondent that the petitioner lacked standing. As a contingent beneficiary, she had the ability to bring this proceeding. She is the settlor's child, and an interested person per **MCL 700.1105(c).** Petitioner is also a beneficiary under **MCL 600.1103(d)**; specifically, she has a future (upon the death of the settlor) contingent (subject to amendment\revocation) interest. The appeals court also affirmed the Probate Court's granting of summary disposition on the issue of the respondent having breached his fiduciary duty in administering the trust and his removal as trustee. The actions which led to his removal included failure to appoint a co-trustee to ensure the beneficiaries' best interests were served while the respondent was in a potentially conflicting role with regarding the companies and the creation of an option agreement which inappropriately favored his son over his daughter.

Regarding the remedies imposed for breach of fiduciary duties, the appellate panel agreed with the respondents that the Probate Court lacked the power to reform the contract related to the trustee's sale of an asset from one of the businesses contained in the trust to the trustee's son's trust and the son's children. (The court had increased the sales price and interest rate charged to the purchasers.) They noted that the plain language delineated the terms. The Court of Appeals rejected the petitioner's argument that the broad equitable powers of **MCL 700.7901** supported reformation, since this power was not included in the extensive list of authority given to the probate court under this section.

However, the appeals court did affirm the Probate Court's ruling to set aside the option agreement. This contract granted the settlor's son the ability to purchase substantial amounts of the trust upon the settlor's death, for which he had a 15 year period to exercise, at the conclusion of which the respondent would receive her remainder interest in the trust. A $2 million no-contest\interference clause was also contained against the petitioner, who was also not given the option to purchase trust assets. The appellate panel noted that imposition of this equitable remedy was appropriate, since this was part of a pattern of the trustee favoring the respondent over the petitioner and that the delay in distribution to her was contrary to the trust's terms.

4. This case provides useful guidance on the probate court's jurisdiction in trust controversies involving business assets and proscribes limits on the equitable remedy powers of the court in these circumstances.

5. Application for leave to appeal has not yet been filed.

E. **CONSERVATORSHIP – APPOINTMENT - PRIORITY - SUITABILITY**
In re Brody Conservatorship, - Mich App - ; - NW 2d - (2017), #332,994, rel'd 9\19\17

1. In this case, the Court of Appeals, in a 3-0 decision, affirmed the Oakland County Probate Court's appointment of the former special fiduciary in this proceeding as conservator.

2. The **Brody Conservatorship** involves the same interested parties as in the **Brody Trust** proceeding discussed supra. The attorney, who was serving as special fiduciary in the conservatorship, was also appointed successor trustee in the **Brody Trust**. The husband and son aligned against the daughter in opposing the appointment of a conservator. The standard for appointing a conservator is enunciated in **MCL 700.5401(3)**, which provides:

> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (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.
> (emphasis added)

The ward's husband (respondent) argued that **MCL 700.5401(3)(b)** was not satisfied – i.e., she had no property which would be wasted or dissipated without proper management. The appellate panel rejected this argument and indicated that the prospective risk of waste or dissipation of the ward's property existed; it was unnecessary to show that this had already occurred. They were not persuaded by the respondent's contention that the ward's joint assets should not be considered regarding the evaluation of whether waste or dissipation could occur, noting that although a conservator may not change the nature of joint assets they are not precluded from managing them or considering these assets at the hearing for conservatorship. Respondent's assertion that a conservatorship was unnecessary since he was agent for the ward under a durable power of attorney (DPOA) was also not accepted.

Regarding priority for appointment, the Appeals Court determined that the independent fiduciary had priority over the respondent, who was the ward's

spouse. They relied on the language of **MCL 700.5409(1)**, which states in pertinent part:

> 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.
>
> (c) The protected individual's spouse.
>
> ***
>
> (emphasis added)

Although the attorney who was appointed successor trustee was done so by the Oakland Probate Court – the same court in which she was made conservator – the appellate panel ruled that **MCL 700.5409(1)(a)** was operative; since the independent fiduciary was not found to be unsuitable, she was entitled to the highest priority for appointment. They noted the trial court's finding that the respondent had abdicated his responsibilities under the DPOA (he was 91 and requires caregiver assistance); his son had exhibited controlling behavior over him, and it was reasonable to assume this would occur in the future regarding the conservatorship. In addition, the Court of Appeals noted that "The statute's priority classifications are merely a guide for the probate court's exercise of discretion." (Slip Opinion, pg. 4).

3. **The takeaways from this case:** 1. Reasonably founded speculation that assets could be wasted is sufficient to justify appointment of a conservator. 2. The Court of Appeals appears to misconstrue the provisions of **MCL 700.5409(1)(a)** by determining that the independent professional fiduciary appointed as trustee in the same court meets this definition. This section had been widely understood to mean a conservator previously appointed in another jurisdiction has priority.

4. Application for leave to appeal has not yet been filed.

F. **GUARDIANSHIP – REMOVAL – SUITABILITY – STANDARD OF PROOF**
In re Redd Guardianship, - Mich App - ; - NW 2d - (2017), #335,152, rel'd 9\19\17

1. This unanimous Court of Appeals ruling affirmed the Oakland County Probate Court's decision to remove the guardian and appoint a successor fiduciary.

2. In **Redd**, a son of the ward and an attorney were appointed co-guardians. Several disputes arose between family members and the child co-guardian. After an extensive trial involving testimony from 17 persons, the Oakland Probate Court determined that the co-guardian was actively interfering with visitations and attempting to cause the ward to become distrustful of other members of her family. Although the ward testified that she wished her son to remain as guardian, the probate judge determined that his unwillingness to facilitate relationships between family members and the ward rendered him unsuitable to continue as guardian and as a result her preference was not required to be honored. The co-guardian (respondent) was removed and replaced by his daughter (petitioner). The respondent appealed.

3. The Appeals Court noted that EPIC empowers the ward to choose who they wish to serve a guardian, provided that the person is suitable and willing to serve. **MCL 700.5306a(1)(aa).** They also acknowledged that a guardian can be removed if they are determined to be no longer suitable and willing to serve.

   The appellate panel ruled that a preponderance of evidence standard was to be used to determine whether a guardian should be removed for unsuitability. In their analysis, the Court of Appeals noted that EPIC established a clear and convincing standard for the appointment of a guardian, but no level of proof was enunciated for whether a person is to be determined not suitable to be appointed or remain as guardian. As a result, they concluded that the Legislature did not intend that the clear and convincing standard be applied to the question of an individual's suitability to be appointed or continue to serve as guardian. Pursuant to Michigan jurisprudence, when no explicit statutory standard is established, the default standard in civil cases is preponderance of evidence. The Court of Appeals also noted that the trial court correctly placed the burden of proof on the petitioner as the moving party seeking the respondent's removal, and that the probate court did not clearly err in finding that his interference with the ward's relationships with family members rendered him unsuitable to continue to serve as guardian.

4. This decision is useful in that it clarifies that a guardian's actions attempting to undermine and\or alienate family relationships with the ward can serve as a basis for their removal, since this scenario is not infrequent. Efforts may be made by practitioners to extend the rationale of this case to fiduciaries in other probate case types.

5. Application for leave to appeal has not yet been filed.

V. CONCLUSION

Knowledge of the preceding court rule amendments, recent legislation, and new case law will enhance your skills as a probate practitioner.

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