



2026 CRITICAL LEGAL DEVELOPMENTS

VisTaTech Center, Livonia, Michigan

September 16, 2026

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MISSION STATEMENT

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Agenda

8:30 – 8:40 Opening Remarks Christopher M. Williams

8:40 – 9:20 Estate Planning Client Questions & Misconceptions Jeffrey D. Ryan

9:20 – 9:50 Contribution & Distribution of Partnership Debt Gary Schwarcz

9:50 – 10:05 **Break – 15 minutes**

10:05 – 10:35 When to Tell Your Client to Call a Lawyer Mark S. Frankel

10:35 – 11:10 Employee or Independent Contractor?
Classifying Workers Appropriately & Why It's Important David A. Lawrence

11:10 – 11:25 **Break – 15 Minutes**

11:25 – 12:00 Uncapping the Truth: Approach & Strategy for Property
Transfers Under the General Property Tax Act Ronn S. Nadis

12:00 – 12:30 Probate
Mental Health Code
Guardianships & Conservatorships Monica D. Moons

This material does not attempt to give specific legal or tax advice. For advice in particular situations, the services of competent legal, tax or financial planning advisors should be obtained.





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Continuing Education Class Announcements/Protocol

At every classroom or speech/seminar each instructor or Provider Designated Person or Provider on-site representative shall be required, prior to the commencement of instruction, to read the following statements:

One credit is 50 minutes of instruction with no more than 10 minutes for a break. Fractional credits will not be awarded. Registration, coffee and lunch breaks, or social hours do not qualify for CE credit.

A student that arrives 10 or more minutes late or departs early will not receive CE credit.

All classroom courses must have attendance verified through a sign-in/sign-out sheet with a door monitor. Only students meeting minimum attendance requirements may receive Certificates of Completion.

Students must provide their name, address, license number (not SSN), time-in and time out. Reminders are given by the instructor to sign the attendance forms.

Providers must give Certificates of Completion to all individuals who complete the requirements of a CE course.

Providers should make students aware that licensees cannot receive CE credit for both a self-study (examination) course and a classroom course based on the same published materials.

Providers should make students aware that licensees are not allowed to receive or carry over credit for the same course in the same review period.

No conduct of insurance or other business by any means whatsoever or the reading of newspapers or publications unrelated to the courses may occur during the instructional period. Use of electronic devices is determined by the education provider. All electronic device ringers or sound effects should be turned off at the start of class. Emails, voice messages, etc. may be checked during breaks or lunch.

To facilitate learning, all students taking the course must be attentive and respectful to instructors and fellow students. ACTIVE participation is required.

Representatives of PSI and members of DIFS and/or its designees, may audit classroom courses, course materials, instructors' presentations, and course records. Audits will be conducted in a manner that will minimize disruptions.



**Estate Planning
Client Questions & Misconceptions**

Jeffrey D. Ryan

ESTATE PLANNING
CLIENT QUESTIONS AND MISCONCEPTIONS

I. INTRODUCTION

A. Everyone has an estate.

The word “estate” often causes clients to think only of substantial wealth, federal estate tax, or elaborate trusts. In its ordinary planning sense, however, a client’s estate consists of everything the client owns or controls, together with the obligations, relationships, and decision-making responsibilities that must be addressed during incapacity and at death. A checking account, a home, retirement benefits, life insurance, vehicles, household property, digital accounts, and even a claim or refund are all part of the client’s estate.

A client may therefore have a significant need for planning. The need may arise because the client has minor children, an unmarried partner, a blended family, a beneficiary receiving governmental benefits, a closely held business, real estate in another state, or simply a desire to choose who will act if the client becomes unable to make decisions. In many cases, the selection of the right fiduciaries and the coordination of asset ownership are the driving force for sophisticated planning.

B. Estate planning is not only for wealthy clients.

Some confuse estate tax planning with estate planning. A client may need a durable power of attorney, patient advocate designation, nomination of a guardian for minor children, beneficiary designations, and a plan for avoiding unnecessary probate, regardless of their current wealth. Indeed, a planning failure may be more disruptive for a family that has fewer liquid resources available to absorb legal fees, delays, and tax mistakes.

The advisor’s role is often critical. Advisors routinely see account titles, beneficiary forms, family relationships, and financial behavior that the estate planning attorney may see only periodically. An advisor may be the first person to notice that an ex-spouse remains named on an account, that a child has been added as a joint owner, that a trust was never funded, or that the client has no one authorized to act during incapacity. Estate planning works best when the attorney, accountant, financial advisor, and insurance professional understand that they are working from the same plan.

C. Estate planning is not limited to transferring property at death.

Some of the most serious estate planning problems occur while the client is still alive. A client may lose capacity gradually, become temporarily unable to manage financial matters, or require assistance with healthcare decisions. Without an effective financial power of attorney and patient advocate designation, the family may need to seek a court-appointed conservator or guardian. That process can be expensive, public, and emotionally difficult, and it places the ultimate decision in the hands of the probate court rather than the client.

Lifetime planning also includes protection from exploitation, long-term care planning, business succession, management of digital property, and instructions regarding personal effects. The dispositive plan is only one component. A complete estate plan should identify

who will make decisions, what standards will guide those decisions, how assets will be managed, and how the plan will remain workable when family circumstances change.

- D. Every client already has an estate plan, even if the client has never signed a document.

When a client does not plan, state law, account contracts, and title documents supply the plan. Intestacy statutes determine who receives probate property. Joint ownership arrangements determine what passes by survivorship. Beneficiary designations, or the lack thereof, control who receives retirement accounts and life insurance proceeds. Default priority rules determine who may serve as personal representative or seek appointment as guardian. The client has not avoided an estate plan; the client has accepted a plan designed by others.

- E. Advisor takeaway.

A useful opening question is therefore not whether the client has an estate plan, but whether the client knows what the existing plan actually says. The client may discover that the current result is driven primarily by old beneficiary forms and convenience ownership rather than by the will or trust sitting in a desk drawer.

II. I HAVE A WILL SO MY FAMILY WILL AVOID PROBATE, RIGHT?

- A. A Last Will and Testament is a tool for probate, not a probate-avoidance device.

A will becomes operative through the probate process. It identifies beneficiaries of probate assets, nominates a personal representative, may nominate guardians for minor children, and may create trusts for beneficiaries. The will is submitted to the probate court after death, admitted as the decedent's valid testamentary instrument, and administered under court review or supervision.

Clients often misunderstand the distinction because they correctly associate a will with orderly administration. A well-drafted will can simplify probate and provide clear directions, but it does not generally change the ownership form of an account, create a beneficiary designation, or transfer an asset into a revocable trust without the probate process, and therefore does not "avoid probate."

- B. Whether probate is required depends primarily on asset titling and beneficiary designations.

Property that is jointly owned with a valid right of survivorship generally passes to the surviving owner by operation of law. Life insurance and retirement benefits generally pass under the beneficiary designation on file, if any. Accounts with payable-on-death or transfer-on-death designations pass to the named beneficiaries. Assets properly titled in a revocable trust are administered by the successor trustee rather than by a personal representative through probate.

The estate planning documents and the client's assets must therefore be coordinated. A client may have an excellent revocable trust and still require probate if the residence, investment account, or business interest was never transferred to the trust. Conversely, a client with only a simple will may avoid probate for most assets because those assets pass

by beneficiary designation or survivorship. The dispositive result is determined asset by asset.

C. Probate avoidance is not always the only goal.

Probate is sometimes portrayed as an outcome that must be avoided at all costs. Probate provides a structured process for presenting claims, resolving disputes, establishing authority, and transferring assets. In some cases, probate may be necessary or beneficial. The planning objective should be to avoid unnecessary probate and to understand the consequences, rather than to use titling devices that create greater risks merely to keep an asset outside the court process.

For example, adding a child as joint owner may avoid probate at the parent's death, but it may expose the asset to the child's creditors and may distort the intended division among beneficiaries. A transfer-on-death designation may avoid probate but provide no management structure for a beneficiary who is young, disabled, financially inexperienced, or in a difficult marriage. Probate avoidance should be coordinated with tax planning, creditor protection, and the client's actual family objectives.

D. Out-of-state property can create ancillary probate.

A client who owns real estate in another state may face an additional probate proceeding in the state where the property is located. A Michigan will does not eliminate the need to establish authority under the law of the other state. Transferring the property to a revocable trust, using an appropriate beneficiary deed where permitted, or placing the property in a properly structured entity may avoid ancillary administration. Advisors should ask about vacation homes, inherited land, mineral interests, and other real property outside the client's home state.

E. Advisor takeaway.

The practical lesson is that documents alone do not determine whether probate will occur. The advisor should review how each material asset is titled, whether beneficiary designations are current, whether the trust is funded, and whether the ownership structure remains consistent with the estate plan. A periodic account review often reveals more about the client's actual estate plan than the summary of the will or trust.

III. DOESN'T MY SPOUSE SIMPLY INHERIT EVERYTHING ANYWAY?

A. A surviving spouse has important statutory rights, but does not necessarily inherit the entire estate.

Clients often assume that marriage automatically causes all property to pass to the surviving spouse. While that is true for jointly owned assets or accounts naming the spouse as beneficiary, property passing through probate in the absence of a will (intestacy) is governed by statute, and the surviving spouse's share may depend upon whether the decedent left descendants, whether those descendants are also descendants of the surviving spouse, and whether the deceased spouse has children from another relationship.

Michigan Intestacy Rules With Surviving Spouse

Family Situation	Surviving Spouse Receives	Who Gets the Rest
No descendants and no surviving parent	100% of the intestate estate	N/A
No descendants, but a surviving parent	First \$301,000 + $\frac{3}{4}$ of the balance	Parent(s) receive the remaining $\frac{1}{4}$
All of decedent's children are also spouse's children, and spouse has no other children	First \$301,000 + $\frac{1}{2}$ of the balance	Decedent's descendants split the remainder by representation
All of decedent's children are also spouse's children, but spouse has children from another relationship	First \$301,000 + $\frac{1}{2}$ of the balance	Decedent's descendants split the remainder by representation
Some (but not all) of decedent's children are also spouse's children (mixed family)	First \$301,000 + $\frac{1}{2}$ of the balance	Decedent's descendants split the remainder by representation
None of decedent's children are spouse's children (all are from a prior relationship)	First \$201,000 + $\frac{1}{2}$ of the balance	Decedent's descendants split the remainder by representation

The result may be a division between the surviving spouse and the decedent's descendants. That division may be especially surprising in a second marriage. A client may believe that the surviving spouse will receive everything and later "do the right thing" for the children, while the law may immediately allocate part of the probate estate to the children. Conversely, a client may intend to preserve assets for children from a prior marriage, but jointly owned property and beneficiary designations may transfer most of the wealth outright to the new spouse.

- B. The phrase "my spouse gets everything" often ignores which assets are controlled by which instruments.

A spouse may receive a jointly owned residence by survivorship, retirement benefits under a beneficiary designation, and life insurance under the policy contract, while the probate estate passes under the will or intestacy statute. A revocable trust may contain a separate marital and family trust structure. Each asset must be traced to the governing document or ownership arrangement. The percentage of the client's overall wealth passing to the spouse cannot be determined by reading the will alone.

This issue is particularly important where one spouse has substantially greater wealth, where assets were inherited, where there is a prenuptial agreement, or where the spouses maintain separate finances. It is also important where the residence is the principal asset but liquidity is needed for expenses, taxes, debts, or equalization among beneficiaries.

C. Blended families require intentional planning.

A plan that leaves everything outright to a surviving spouse relies on the surviving spouse's later decisions. The spouse may remarry, change beneficiary designations, suffer creditor problems, become incapacitated, or revise the estate plan in a manner that excludes the deceased spouse's descendants. This does not necessarily mean the spouse should be restricted, but the client should make the choice knowingly.

A marital trust, QTIP trust, or other continuing trust can provide support for the spouse while preserving a remainder for descendants. The appropriate structure depends on tax considerations, family dynamics, the spouse's financial sophistication, decisions on who controls the trust, and the degree of flexibility desired. The central planning question is not merely how much the spouse should receive, but whether the spouse should receive assets outright, in trust, or through a combination of both.

D. Advisor takeaway.

While Michigan law provides rights and allowances for a surviving spouse, federal law may provide protections with respect to certain retirement plans. Those rights can be important safety nets, but they are not tailored to the family's objectives. Relying on default rights can produce litigation, administrative delay, or an economic result neither spouse expected. Advisors should encourage married clients to review ownership, beneficiary designations, prenuptial agreements, and dispositive documents together--especially having what may be a hard talk now about planning for a blended family in order to avoid litigation later on.

IV. WHY CAN'T I JUST ADD MY CHILD TO MY BANK ACCOUNT OR HOUSE?

A. Adding a child as an owner is not the same as appointing the child to assist.

Clients frequently add a child to an account "for convenience" so the child can pay bills or help manage finances. Depending on the account agreement and applicable law, however, the addition may create a present ownership interest or survivorship right. The child may become more than an agent. The account may pass to that child at death even if the will or trust directs an equal division among all children.

A durable power of attorney, trust arrangement, or authorized signer designation may provide the needed assistance without changing beneficial ownership. The correct tool depends on the institution and the client's goals, but the distinction between authority and ownership should be made explicit. Convenience should not unintentionally determine the inheritance.

B. Joint ownership can expose the asset to the child's financial problems.

Once a child becomes an owner, the child's creditors may attempt to reach the child's interest. Divorce, bankruptcy, tax liens, lawsuits, and business failures can create risks that did not exist when the parent owned the property alone. Even if the parent contributed all of the funds, resolving the ownership question may require litigation and documentation of the parties' intent.

The same concern applies to real estate. Adding a child to the deed may expose the property to claims involving the child and can complicate refinancing, sale, or later changes to the parent's plan. The child's signature may be required for transactions, and the child may refuse to cooperate or may lack capacity when action is needed.

C. The transfer may create gift tax and income tax consequences.

Adding a child as a present owner can constitute a gift, depending on the property and the rights transferred. A gift may require a federal gift tax return even if no current gift tax is payable. More importantly for many families, lifetime gifting can affect income tax basis. Property inherited at death may receive a basis adjustment under federal law, while property gifted during life generally carries over the donor's basis. A transfer made solely to avoid probate may therefore increase the capital gain ultimately recognized by the family.

With jointly owned property, the basis result depends on the form of ownership, the source of consideration, and the applicable tax rules. The client should not assume that adding a name is tax neutral. Before changing title, the advisor should identify the client's basis, the current value, the anticipated holding period, and the actual planning objective.

D. Joint ownership can undermine equality among children.

A parent may add one child as a joint owner because that child lives nearby or handles the bills, while still intending all children to share equally. At death, the surviving child may assert that the account belongs entirely to the child. The other children may contend that the arrangement was merely for convenience. Even when the surviving child voluntarily divides the account, the transfer to siblings may create additional gift or tax issues. These disputes are common because the paperwork and the parent's statements may not match. The safer approach is to use a legal arrangement that gives the assisting child appropriate authority while stating clearly who owns the property and who should receive it at death.

E. Medicaid and long-term care consequences should also be considered.

A transfer of property for less than fair market value may affect eligibility for means-tested long-term care benefits. Adding a child to a home or account can be treated as a transfer even though the parent continues to use the property. The rules are fact specific and should be reviewed before any ownership change is made. A decision intended to make bill paying easier can have consequences years later when long-term care becomes necessary.

F. Advisor takeaway.

When a client proposes adding a child to an account or deed, the first question should be what problem is the client trying to solve. If the goal is assistance, use an agency or trust mechanism. If the goal is probate avoidance, consider beneficiary designations or trust funding. If the goal is a gift, document and report the gift appropriately. The title change should be the result of the planning analysis, not a substitute for it. With the popularity of Ladybird deeds for real estate, adding a child to a home during lifetime should now be a thing of the past.

V. DOESN'T MY BENEFICIARY DESIGNATION CONTROL EVERYTHING ANYWAY?

A. Beneficiary designations generally control the assets to which they apply.

For life insurance, retirement accounts, annuities, and many financial accounts, the beneficiary designation is a contract governing payment at death. The will or revocable trust ordinarily does not override a valid designation naming another beneficiary. A client can therefore sign a new trust leaving assets equally to the children while an old IRA designation still names a former spouse or only one child. The asset will generally follow the beneficiary form, not the later estate planning document.

This is why beneficiary designations are not administrative details. They are dispositive instruments and should be treated with the same care as a will or trust. Advisors are often in the best position to confirm exactly what is on file, whether the designation was accepted by the institution, and whether primary and contingent beneficiaries are properly identified.

B. Outdated designations are among the most common estate planning failures.

A designation may have been completed when the account was opened decades earlier. Since that time, the client may have married, divorced, had children, experienced a beneficiary's death, or created a trust. The client may believe the designation was changed because the intention was discussed, but the institution's records may still reflect the old form. A copy in the client's files is useful, but confirmation from the custodian is better.

Life changes should trigger an immediate review. Marriage, divorce, birth, adoption, death, disability, estrangement, and changes in the client's charitable objectives can all affect the proper designation. Retirement plan mergers and account transfers can also create uncertainty about whether older elections carried forward.

C. Naming a minor beneficiary creates a management problem.

A minor ordinarily cannot receive and manage substantial assets directly. If a child is named individually, a conservatorship or other court-supervised arrangement may be required. The court-selected structure may terminate when the child reaches the statutory age, even if the client would have preferred longer management and protection. A trust can name a trustee, establish distribution standards, and continue until an age or event selected by the client.

The same concern applies to an adult beneficiary who is financially inexperienced, has special needs, is vulnerable to exploitation, or has creditor or marital concerns. Direct payment may be simple, but simplicity at the designation stage can produce complexity after death.

D. "Per stirpes" is useful but often misunderstood.

Clients frequently select "per stirpes" on a beneficiary designation form without understanding how the institution defines the term or how the designation will operate if a beneficiary predeceases the client. Generally, the concept is intended to direct a deceased beneficiary's share to that beneficiary's descendants, but the precise result can depend on the wording of

the form and applicable law. It may not address stepchildren, adopted persons, descendants conceived after death, or the client's desire to redistribute among surviving named beneficiaries.

A designation should identify the intended result in the actual family tree. The advisor should ask what the client intends to happen if a child dies first, whether grandchildren should receive the deceased child's share, and whether that share should be held in trust. The client's answer may reveal that the standard checkbox is not sufficient.

E. Beneficiary designations must be coordinated with the broader estate plan.

A client may want taxes, debts, or expenses paid proportionately, but beneficiary-designated assets may pass outside the estate without contributing to those obligations. A plan may contain trusts for children, but retirement assets may pass outright. A charitable bequest in the will may be funded with after-tax assets while a taxable retirement account passes to family members. Coordination can improve tax efficiency and make the overall division more consistent. In a trust centric estate plan, the trust as beneficiary is usually the most appropriate, allowing for a uniformity of management, creditor protection, special needs planning, or control among all beneficiaries as the settlor intends. The beneficiary review should therefore be performed together with the estate planning attorney rather than in isolation.

F. Advisor takeaway.

Beneficiary designations deserve the same level of attention as a client's will or trust because they often control the disposition of the client's most valuable assets. Advisors should make beneficiary reviews a routine part of every client meeting—not only after deaths or divorces, but also following marriages, births, retirements, changes in family circumstances, or the creation of a trust. Every review should ask whether the beneficiary designation still matches the client's overall estate plan, whether the designation has actually been accepted by the institution, and whether the chosen beneficiaries should receive assets outright or through a trust. A five-minute beneficiary review today can prevent years of litigation, unintended tax consequences, or distributions to the wrong people.

VI. I SIGNED MY TRUST, NOW EVERYTHING IS DONE, RIGHT?

A. A revocable trust generally controls only the property connected to it.

Clients sometimes view the signing ceremony as the completion of the estate plan. The trust, however, is not a vacuum that automatically absorbs all present and future property. Assets generally must be titled in the trustee's name, assigned to the trust, or made payable to the trust under an appropriate beneficiary designation. If the ownership records never change, the trust and successor trustee likely have no authority over the asset. This is called "funding" the Trust.

While a pour-over will serves as a backstop for probate assets, that only applies to assets that fall into probate, and again, will often require the court and the probate process. A client who created a trust to avoid probate but failed to fund it may therefore achieve the intended ultimate distribution only after the probate process, which the client sought to avoid.

B. Trust funding is an asset-by-asset process.

Real estate may require a deed (often these days a Ladybird Deed). Bank and brokerage accounts may require retitling or new account documentation. Business interests may require an assignment and compliance with an operating agreement, shareholder agreement, or buy-sell arrangement. Tangible personal property may be assigned by a general transfer document, while vehicles and other titled property may require separate consideration. Retirement accounts are not retitled to a revocable trust during life, but their beneficiary designations may name a Trust and must be coordinated with the plan.

The client may not want every asset titled in the trust. Jointly owned marital property, qualified retirement accounts, health savings accounts, and certain incentive arrangements may require specialized treatment. The point is not that all assets must be transferred, but that each asset should be intentionally addressed in coordination with the intent that ownership will be ultimately resolved by the trust, or, if intended, another method.

C. Future-acquired assets can recreate the problem.

A trust may be properly funded soon after it is signed and become partially unfunded later. Clients open new accounts, refinance real estate, change employers, receive inheritances, purchase vacation property, and move assets between institutions. A new account may be opened in the client's individual name even though the prior account was titled in the trust. A refinancing lender may deed the residence out of the trust and fail to return it after closing.

The estate plan should therefore include a maintenance process. Advisors can assist by using consistent account registrations, reviewing titles when assets are moved, and asking whether new property should be owned by the trust. The attorney should be contacted when the client acquires real estate in another state, a substantial business interest, or an asset with unusual transfer restrictions.

D. Funding must be coordinated with beneficiary designations.

A trust may be designed to provide lifetime trusts for children, but an account naming the children directly will bypass those protections. A trust may provide a special needs share, but a direct designation to the beneficiary may disrupt benefits. A marital trust may be intended to preserve a remainder for children from a prior marriage, but an IRA naming the spouse outright may give the spouse complete control over the asset.

The client's funding memorandum or asset schedule should identify the intended disposition of each major asset. This is not merely clerical. Different assets have different income tax characteristics, payout rules, and creditor protections. Coordination is necessary to make the economic result match the written plan.

E. A trust must be reviewed as family and laws change.

A revocable trust signed ten or fifteen years ago may still be legally valid but no longer appropriate. Trustees may have died or become unsuitable. Children may have matured or developed creditor, marital, substance abuse, or disability concerns. The client's wealth may

have increased, tax exemptions may have changed, and retirement account rules may have been revised. The trust should be treated as a living planning instrument rather than a document to be stored and forgotten.

A regular review does not necessarily require a complete restatement. Sometimes the documents remain sound and only beneficiary designations or titles need attention. The purpose of the review is to identify whether the client's current facts still fit the old plan.

F. Advisor takeaway.

Signing a trust is only the beginning of the planning process. An unfunded trust often provides little practical benefit, regardless of how well it is drafted. Advisors are uniquely positioned to help ensure that newly acquired assets, refinanced real estate, new investment accounts, and updated beneficiary designations continue to work with the trust rather than around it. During periodic reviews, advisors should ask a simple question: "If the client died today, would each significant asset actually pass the way the trust intends?" If the answer is uncertain, the estate planning attorney should be consulted before the inconsistency becomes an expensive probate or administration problem.

VII. I THOUGHT MY TRUST COULDN'T BE THE BENEFICIARY OF MY IRA?

A. A trust can be named as the beneficiary of an IRA or other retirement account.

No rule prohibits a trust from being named as beneficiary of a retirement asset. While designating a trust may introduce additional tax and administrative rules that must be addressed, in many cases, the retirement plan payout rules are identical to naming an individual beneficiary. A properly designed trust may qualify as a "see-through" trust so that the retirement account is administered by reference to the trust beneficiaries under the applicable minimum distribution rules.

B. The see-through trust requirements matter.

In general terms, the trust must be:

- valid under state law,
- become irrevocable at the account owner's death,
- have identifiable beneficiaries, and
- satisfy the custodian's applicable documentation requirements.

The beneficiaries who count for retirement distribution purposes must be determined under detailed federal rules. Powers of appointment, charitable beneficiaries, estates, older generations, and remote remainder beneficiaries can affect the analysis.

The purpose of these rules is to determine whether the trust can be looked through to human beneficiaries for payout purposes. Failure to qualify can result in a less favorable distribution period. While most modern trusts take into account the rules necessary to maintain the most beneficial payout options of a retirement account, not all trusts, and often older trusts, may fail to do so, so review of the applicable provisions should be made.

C. Conduit and accumulation trusts serve different purposes.

A conduit trust generally requires retirement distributions received by the trustee to be distributed to the current beneficiary. This can simplify the identification of the relevant beneficiary, but it limits the trustee's ability to retain the retirement withdrawals for creditor protection, spendthrift management, or tax planning. The beneficiary may receive substantial distributions during the applicable payout period even though the client intended long-term protection.

An accumulation trust permits the trustee to retain retirement distributions in the trust. That flexibility can provide stronger management and creditor protection, but it may expose retained income to compressed trust income tax brackets and creates a more complicated see-through analysis. The choice should be driven by the client's priorities, the beneficiary's circumstances, and the expected size and composition of the retirement account.

D. The SECURE Act changed the practical analysis.

For many beneficiaries, inherited retirement accounts are now subject to a ten-year distribution period rather than lifetime stretch distributions. Certain eligible designated beneficiaries remain subject to different rules. The change reduced the long-term income tax deferral available in many cases and increased the importance of deciding when distributions should leave the retirement account and whether they should remain protected in trust after withdrawal.

A trust drafted before the SECURE Act may have assumed annual life-expectancy distributions or may require all retirement withdrawals to be passed immediately to the beneficiary. That structure may produce a large mandatory payout in the final year or otherwise operate differently than the client expected. Older retirement trust provisions should be reviewed in light of current law.

E. A trust can provide protections that a direct designation cannot.

A direct beneficiary designation answers who receives the account. A trust can also answer how, when, and under what protections the benefit is received. The trustee may manage funds for a minor, protect a beneficiary receiving governmental benefits, limit distributions during substance abuse or incapacity, preserve assets in a blended family, and reduce exposure to divorce or general creditors to the extent permitted by law.

F. Advisor takeaway.

Retirement accounts are often a client's largest financial asset and should not be reviewed separately from the estate plan. Before naming a trust, confirm that the attorney has reviewed the trust for retirement benefits. After death, obtain advice before changing account registrations or taking distributions, because an administrative shortcut can foreclose available options.

VIII. I THOUGHT IRREVOCABLE TRUSTS COULD NEVER BE CHANGED?

A. “Irrevocable” does not always mean “unchangeable.”

An irrevocable trust generally cannot be revoked unilaterally by the settlor in the same manner as a revocable trust. That does not mean every administrative and beneficial provision is frozen forever. Modern trust law recognizes that tax laws, family circumstances, fiduciaries, and financial conditions change. Depending on the trust language and applicable law, modification may be possible without defeating the trust’s essential purposes.

The first step is always to read the trust agreement. The instrument may authorize a trustee, trust protector, distribution advisor, or other person to remove and appoint trustees, divide or combine trusts, amend administrative provisions, grant powers of appointment, or modify the trust to address tax changes. These provisions may provide the simplest and safest solution.

B. Nonjudicial settlement agreements can resolve certain matters without a court proceeding.

Michigan law permits interested persons to enter into a nonjudicial settlement agreement regarding specified trust matters, subject to statutory limitations. The agreement may address interpretation, approval of accounts, trustee appointment or resignation, trustee powers, compensation, liability, and other matters that could properly be approved by the court. The agreement cannot be used to accomplish a result that violates a material purpose of the trust or exceeds what the court could approve.

Representation and consent must be analyzed carefully. Current beneficiaries, future beneficiaries, minors, unborn persons, and persons with conflicting interests may need to be represented under statutory rules or by a court-appointed representative. A document signed only by the trustee and the persons currently receiving distributions may not bind all interests.

C. Decanting may permit assets to be distributed to a new trust.

Decanting is the exercise of a trustee’s distribution authority to move trust property from an existing trust into a second trust with modified terms. The available changes depend on the trustee’s discretion under the first trust, the applicable decanting statute, the identity of the beneficiaries, and the nature of the proposed modification. Decanting may be used to improve administrative provisions, change trustee succession, add modern special needs language, strengthen protections, or respond to tax law changes.

Decanting is not simply a redrafting exercise. The trustee must act in a fiduciary capacity and consider the purposes and beneficiaries of the original trust. Notice requirements, limitations on reducing vested rights, tax consequences, and the trustee’s own conflicts must be addressed. A proposed decanting that benefits the trustee personally or shifts beneficial interests may require an independent trustee or court review.

D. Judicial modification or reformation may be available.

A probate court may have authority to modify a trust because of unanticipated circumstances, to further the trust's purposes, to correct a mistake, to address impracticable administration, or to achieve the settlor's tax objectives. Reformation focuses on conforming the written instrument to the settlor's actual intent when the writing was affected by mistake. Modification may instead adapt a valid instrument to circumstances that developed later.

Court involvement can provide certainty where the interested parties disagree, where representation is difficult, or where a tax-sensitive change requires a formal record. The evidence must support the statutory basis for relief. Contemporary drafting files, correspondence, tax advice, and testimony may be important in demonstrating the settlor's intent.

E. Trust Director and directed-trust provisions can provide built-in flexibility.

Some trusts appoint a Trust Director (which may also be referred to as a trust protector) or advisor with authority over specified matters, such as removing trustees, changing situs, amending for tax law, resolving ambiguities, or consenting to distributions. These powers can permit adaptation without relying solely on the acting trustee. The scope of authority, fiduciary status, standards of conduct, and succession provisions should be clear.

A broad power held by the wrong person can create tax, creditor, or fiduciary problems. Flexibility should therefore be designed, not improvised. The person holding the power should be selected with the same care as the trustee and should understand the purpose and limits of the role.

F. Advisor takeaway.

An old irrevocable trust should not be ignored merely because it cannot be revoked. When the trust no longer fits the family, tax law, or administrative reality, counsel should review the instrument and the available tools. Often there is a lawful path to improve the trust, but the method must be matched to the trustee's authority, the beneficiaries' rights, and the tax consequences.

IX. CONCLUSION

A. The best estate plans are coordinated rather than document-driven.

A will, trust, power of attorney, deed, beneficiary designation, retirement account, insurance policy, and business agreement may each control a different part of the client's affairs. No single document can be evaluated in isolation. The planning team should understand which instrument controls each asset, who will act during incapacity, and whether the combined result reflects the client's objectives. The advisor's continuing relationship with the client creates an opportunity to identify problems before they become permanent.

B. Estate planning should be reviewed after family, financial, and legal changes.

A review is particularly important after marriage, divorce, birth, adoption, death, disability, relocation, acquisition or sale of a business, receipt of a significant inheritance, purchase of out-of-state real estate, or a substantial change in wealth. Changes in tax law and retirement distribution rules can also affect older documents even when the family facts remain the same. The review should include the dispositive documents, fiduciary appointments, beneficiary designations, account titles, trust funding, insurance coverage, and business succession arrangements. A short periodic review can prevent the expensive administration and litigation that occur when the client's documents and assets tell different stories.

C. Takeaway message.

Everyone has an estate plan. The meaningful question is whether the plan was intentionally designed, properly implemented, and kept current. Estate planning is less about implementing a particular document and more about identifying the ordinary decisions that produce extraordinary consequences. Coordinated advice allows the client to preserve control during life, protect beneficiaries after death, and reduce the likelihood that default law or outdated paperwork will determine the family's future.



Contribution and Distribution of Partnership Debt

Gary Schwarcz

CONTRIBUTION AND DISTRIBUTION OF PARTNERSHIP DEBT

I. CODE SECTION 721

- A. Section 721(a) provides generally that no gain or loss is recognized by a partnership or any of its partners as a result of a contribution of property in exchange for an interest in the partnership. This nonrecognition provision applies to contributions of property by partners both at the time of the formation of the partnership and thereafter.
- B. Furthermore, unlike the nonrecognition scheme of § 351 (relating to contributions to corporations), § 721 nonrecognition treatment is not conditioned on the contributor(s) being in “control” of the partnership immediately after the transfer.

II. PARTNER DEBT CONTRIBUTED IN EXCHANGE FOR PARTNERSHIP INTEREST

- A. It is common for partners to contribute a combination of cash and a promissory note to a partnership in exchange for a partnership interest. The promissory note does not have a basis for the partner. The promissory note also has no basis in the hands of the partnership. What is the tax consequence if the note is distributed to the partner before being satisfied?
- B. Should the distribution to the contributing partner be a nonevent?

III. CODE SECTION 752

- A. Code Section 752 provides that increases in a partner's share of partnership liabilities are treated as cash contributions by the partner and decreases in a partner's share of partnership liabilities are treated as cash distributions to the partner.
- B. Section 752(a) provides that an increase in a partner's share of partnership liabilities or an assumption by a partner of a partnership liability increases the partner's basis for his partnership interest. Section 752(b) provides that a decrease in a partner's share of partnership liabilities or the partnership's assumption of a liability of such partner either decreases his basis under or is treated as a taxable distribution of money to him.
- C. Section 752 dictates how partnership level debt is allocated among the partners.
 - 1. Where a nonrecourse liability for which no partner has guaranteed the liabilities, and no partner bears the economic risk of loss, the Treasury Regulations allocate such liabilities among partners first in accordance with the partners' shares of “partnership minimum gain” and then in accordance with the amount of the 704(c) built-in gain that would be allocated to each partner if the partnership disposed of all property subject to one or more nonrecourse liabilities for the amount of such liabilities. Any leftover unallocated nonrecourse liabilities are “excess nonrecourse liabilities.”

2. Recourse debt is generally allocated to partners in the proportions that they bear the economic risk of loss for such liabilities.

IV. CREDITOR CONTRIBUTION OF NOTE TO DEBTOR PARTNERSHIP

- A. What is the tax impact of a contribution of partnership indebtedness to a partnership in exchange for an interest in the partnership?
- B. The Code states: "for purposes of determining income of a debtor from a discharge of indebtedness, if a debtor partnership transfers a capital or profits interest in such partnership, to a creditor in satisfaction of its recourse or nonrecourse indebtedness, such partnership shall be treated as having satisfied the indebtedness with an amount of money equal to the fair market value of the . . . interest. In the case of any partnership, any discharge of indebtedness income recognized under this paragraph shall be included in the distributive shares of taxpayers which were the partners in the partnership immediately before such discharge."
- C. The Treasury Regulations provide that in determining the fair market value of a partnership interest, all the facts and circumstances are considered.
- D. If the fair market value of the debt-for-equity interest does not equal the fair market value of the indebtedness exchanged, then general tax law principles shall apply to account for the difference.
- E. The Treasury Regulations provide a safe harbor under which the fair market value of a debt-for-equity interest is deemed to be equal to the liquidation value of the partnership interest if four (4) conditions are met:
 1. The creditor, debtor partnership, and its partners treat the fair market value of the indebtedness as equal to the liquidation value of the partnership interest for purposes of determining the tax consequences of the debt-for-equity exchange,
 2. If, as part of the same overall transaction, the debtor partnership transfers more than one debt-for-equity interest to a creditor in exchange for debt, then each creditor, debtor partnership, and its partners treat the fair market value of each such debt-for-equity interest transferred by the partnership to such creditors as equal to its liquidation value,
 3. The debt-for-equity exchange is an arm's length transaction, and
 4. Subsequent to the debt-for-equity exchange, neither the partnership redeems nor any person related to the partnership purchases the interest as part of a plan (at the time of the exchange) that has as principal purpose the avoidance of COD income by the debtor partnership.
- F. The Regulations define liquidation value of a debt-for-equity interest to equal the amount of cash that the creditor would receive with respect to the debt-for-equity interest if, immediately after the debt-for-equity exchange, the partnership sold all of its assets (including good will, growing concern value, and any other intangibles) for cash equal to the fair market value of those assets and then liquidated.

G. Example One.

1. ABC partnership has assets with an aggregate adjusted basis of \$160,000 and a fair market value of \$300,000 and \$100,000 of outstanding debt owed to Z. The debt has a fair market value of \$100,000. X and Y, the two 50% partners of ABC, are each allocated \$50,000 of the debt under Code § 752 and each has an \$80,000 basis in its interest in ABC. Z contributes the \$100,000 debt to ABC in exchange for an interest in ABC worth \$100,000.
2. Code § 108(e)(8)(B) provides that ABC partnership is treated as having satisfied its \$100,000 debt with an amount of money equal to the fair market value of the ABC partnership interest received by Z, or \$100,000.
3. ABC partnership does not realize any COD income since the fair market value of the partnership interest transferred equals the amount of debt that was eliminated. Pursuant to Code § 752(b), X and Y are each deemed to receive a \$50,000 cash distribution as a result of the reduction of partnership liabilities. As a result of the deemed distribution, X and Y each has a \$30,000 basis remaining in its partnership interest.
4. Code § 721 applies to a contribution of a partnership's indebtedness by a creditor to the debtor partnership in exchange for a capital or profits interest in the partnership. Code § 721 states that no gain or loss shall be recognized to a partnership or to any of its partners in the case of a contribution of property to the partnership in exchange for an interest in the partnership.
5. As a result, ABC partnership does not recognize any gain or loss on its transfer of a partnership interest to Z and Z does not recognize any gain or loss on its contribution of the debt to ABC partnership in exchange for the partnership interest.

H. Example Two.

1. The facts are the same as in Example One except that the partnership interest received by Z has a fair market value of \$60,000.
2. Pursuant to the Regulations, ABC is treated as having satisfied its \$100,000 debt with an amount equal to the fair market value of Z's partnership interest in ABC, or \$60,000.

As a result, ABC has \$40,000 of COD income. Code §108(e)(8) requires that the COD income be allocated to X and Y, the partners in ABC immediately before the debt-for-equity exchange, or \$20,000 to each partner.

3. X and Y will each (1) increase its basis in its partnership interest in ABC by its share of ABC COD income, or \$20,000 and (2) be deemed to receive a \$50,000 cash distribution under Code § 752(b). Neither ABC nor Z recognizes any gain or loss under Treasury Regulations §1.721-1(d) on the debt-for-equity exchange.

I. Example Three.

1. The facts are the same as in Example One except that ABC partnership has a \$20,000 basis in its assets and X and Y each has a \$10,000 basis in its partnership interest.
2. The tax results are the same as in Example One except that X and Y will each recognize \$40,000 of capital gain under Code § 731(a)(1) since each is deemed to have received a \$50,000 cash distribution under Code § 752(b), which exceeds each partner's \$10,000 basis in its ABC partnership interest.

V. DISTRIBUTION OF DEBT OWED BY A DEBTOR PARTNER TO THE CREDITOR PARTNERSHIP

- A. If a partner has borrowed money from a partnership and the partnership cancels the loan or distributes the obligation to the debtor/partner, what is the tax consequence?
- B. If the partnership cancels the indebtedness, the Regulations provide that "the obligor partner will be considered to have received a distribution of money or property at the time of cancellation."
- C. Thus, the distributee partner will not recognize gain under §731(a)(1) unless the amount of money deemed to have been distributed to the partner exceeds the basis of the partner in his partnership interest.
- D. If the distributee partner recognizes gain or loss, the basis of the partnership assets may be increased pursuant to Code §734(b)(1)(A) or decreased under Code §734(b)(2)(A), if the partnership has a Code §754 election in effect.

E. Example Four.

1. In year one, Big Bucks partnership lends one of its partners, Sam, \$100,000. In year three, when the debt amount is \$100,000 and its fair market value is \$90,000 and Sam has a \$25,000 basis in his partnership interest, Big Bucks partnership cancels the debt.
2. Since Big Bucks partnership lent Sam \$100,000 in year one, pursuant to Regulation § 1.731-1(c)(2), Sam is treated as having received loan proceeds in year one. However, in year three when Big Bucks partnership cancels the debt, Sam is treated as having received a distribution of money.
3. By treating the loan as a distribution of money upon its cancellation, the Regulations operate in the same fashion as §752(b) allowing the debtor partner to first recover its basis in the partnership interest before recognizing any income or gain.
4. However, the Treasury Regulations do not specify whether the deemed distribution is the face amount of the debt at the time of cancellation or the fair market value of the debt at such time.

5. If we consider the deemed distribution equal to the face amount of the loan, Sam is treated as having received the distribution of \$100,000 from Big Bucks partnership.
6. Since the deemed distribution of \$100,000 exceeds Sam's basis in the partnership interest of \$25,000, Sam will recognize a \$75,000 capital gain under §731(a)(1).
7. Although the debt is only worth \$90,000 at the time of cancellation, Sam would not recognize any COD income and Big Bucks partnership would not recognize any gain or loss on the debt.
8. If, however, the deemed distribution is equal to the fair market value at the time the debt is cancelled, Sam would recognize \$10,000 of COD income (the extent the debt of \$100,000 exceeds the fair market value of the debt of \$90,000). The partnership would recognize a \$10,000 loss at the time the debt was cancelled. Sam would then be deemed to have received a \$90,000 cash distribution and would recognize \$65,000 of capital gain (to the extent that the deemed distribution of \$90,000 exceeds Sam's basis in his partnership interest of \$25,000).
9. Thus, if the deemed distribution equals the fair market value of the debt, Sam would have \$10,000 of COD income and only \$65,000 of capital gain from sale or exchange.

VI. CODE SECTION 707

- A. Section 707 is intended to recharacterize certain contributions and distributions as “disguised sale” transactions.
- B. The general rule is that a disguised sale exists if, based on all the facts and circumstances, the distribution would not have been made but for the contribution and there was not an intervening sharing of entrepreneurial risk.
- C. Code Section 707(a).

Section 707(a), by its terms, applies to every “transaction” between a partnership and a partner who is not acting in his/her capacity as a member of the partnership. Subject to various statutory limitations, transactions subject to Section 707(a) are treated as “occurring” between the partnership and one who is not a partner.

D. Disguised Sales.

1. Under the general rules of Sections 721 and 731, contributions to and distributions from partnerships are not taxable events. The possibility of combining contributions and distributions to achieve the economic substance of a sale without the attendant tax consequences was one of the catalysts for the enactment of Section 707(a)(2)(B).
2. If a contribution is characterized as a sale, in whole or in part, under Section 707(a)(2), it is treated as a sale to the same extent for all purposes of the Code, effective as of the date that the partnership becomes the owner of the contributed property for federal income tax purposes.

For example, the installment sale rules of Section 453 could become applicable.

3. Contributions of unencumbered property (other than money or an obligation to contribute money) are treated as sales only if, based on all the facts and circumstances, (1) a distribution of money or other consideration from the partnership to the partner would not have been made but for the contribution of the property to the partnership, and (2) a distribution of money or other consideration either is made simultaneously with the property contribution or is not dependent on the entrepreneurial risks of partnership operations.
4. If a contribution and a distribution occur simultaneously, there is little or no entrepreneurial risk that the distribution will not be made. In this context, the entire focus is on the interdependence between the contribution and distribution (i.e., the “but-for” test). The but-for test is normally satisfied where the transfers are simultaneous, and, consequently, most simultaneous transfers are transformed into sales under the Regulations.
5. With respect to nonsimultaneous transfers, the Regulations create the following rebuttable presumptions:
 - a. If the transfers occur within a two-year period, then, regardless of the order, they are presumed to constitute a sale unless the facts and circumstances clearly establish that no sale occurred, and
 - b. If the transactions are more than two years apart, they are presumed not to constitute a sale, unless the facts and circumstances clearly establish to the contrary.

E. Example Five.

1. The equal EF partnership owns two unencumbered parcels of unimproved land with a total value of \$2 million. Partner *E* contributes a third unimproved parcel with an unencumbered value of \$1 million to EF, increasing his/her partnership interest from one half to two thirds. Immediately thereafter, the partnership sells one of the two previously owned parcels for \$500,000 and distributes two thirds of the proceeds to *E* and one third of the proceeds to *F*.
2. Because the distribution is within two years of *E*'s contribution of the third parcel to EF, it is deemed to be part of a sale of the third parcel to EF. However, because *E* would have received one half of the \$500,000 distribution even if *E* had not contributed the third parcel, only \$83,000 (\$333,000 less \$250,000) of the distribution is treated as part of a sale of a portion of the third parcel to EF.
3. The key element in determining whether the two-year presumption, either for or against sale treatment, will be determinative is the degree of entrepreneurial risk assumed by the property-contributing partner that he/she will not receive the distribution “relating to” the contribution.

4. The dominant factor in this analysis is whether the payment is subject to an appreciable risk as to amount. Where the recipient receives a distribution that is subject to a significant entrepreneurial risk as to both the amount and the probability of payment, the recipient-partner should generally be considered receiving such sums in his entrepreneurial capacity as a partner.
5. Conversely, where there is limited risk as to amount and payment, the distribution to the recipient-partner should be viewed as payment in a nonpartner capacity.

The 707 Regulations specifically provide that a transfer of property (excluding money) by a partner to a partnership and a transfer of money or other consideration (including various types of liability “assumptions”) by the partnership to the partner constitute a sale of property, in whole or in part, by the partner to the partnership, only if based on all the facts and circumstances as follows:

- a. the transfer of money or other consideration would not have been made but for the transfer of property, and
- b. in cases in which the transfers are not made simultaneously, the subsequent transfer is not dependent on the entrepreneurial risks of partnership operations.



When to Tell Your Client to Call a Lawyer

Mark S. Frankel

WHEN TO TELL YOUR CLIENT TO CALL A LAWYER

I. AN OUNCE OF PREVENTION

Clients are often their own worst enemies. They come to you to help them build wealth, and often because of their success, they think they can solve their own problems. In an attempt to save a few hundred dollars, they fail to consult an attorney when doing so could save tens of thousands of dollars later. A client may think the only time one needs a lawyer's help is if they are being sued or they need to sue someone, but that is not the case. Sometimes a lawyer's expertise can also come in handy if they are trying to protect their rights. As you are often a friend and confessor, you have the opportunity to advise a client when to call for help.

II. WHEN TO REFER YOUR CLIENT TO COUZENS LANSKY

A. Any time it might involve handcuffs.

An incident of driving under the influence or domestic violence; accusations of any kind of criminal behavior, including white collar crime or tax fraud, should send your client straight to a lawyer.

B. When the client has been threatened or sued.

Some telltale signs your client needs to engage a lawyer are when someone is threatening to sue them (like a neighbor or a business contact), when they are being asked to sign something where they are giving up their rights or accepting money (other than an Apple Music agreement or the on-line terms with their bank), when they receive something official in the mail from a law office or court, or when they want to change the terms of something that is already written down (like a contract to do business, or the terms of a custody agreement, etc.).

C. Personal injury.

Your client may have bought a house that is causing them asthma from hidden mold, been in a car accident, or had a child's friend seriously injured playing on their backyard trampoline. They should not depend on their insurance company to fight their battle, unless they are hiring a lawyer for your client. Even then, they may need a separate lawyer.

D. Employment issues.

1. As employer.

An employer should have a good relationship with an employment lawyer from the date the employer first hires someone not related to the employer. Having the right procedures in place, including employee manuals, etc., is good business. When an

employee is not working out, it is a good idea to consult with an employment lawyer to be sure that any separation is handled properly.

2. As employee or former employee.

If there has been a long-standing employment relationship which has been suddenly terminated, particularly just before a large bonus or stock options become due, call a lawyer. If your client's work place is uncomfortable and your client is feeling harassed, the client should call a lawyer.

E. Estate planning.

No estate plan is simple enough to do over the Internet, as much as those on-line ads would like to convince you otherwise. Your clients typically have no idea what they do not know when it comes to drafting enforceable and effective estate planning documents. I have spent too much of my career fixing what people thought were simple estate plans that they did using a form or the Internet. The financial well-being of your client's heirs, especially minor children, is too important to risk simply to save a few dollars. This will be money well spent, even if your client will not be alive to appreciate it.

F. Estate and trust administration.

There are websites that purport to be able to walk you through the steps to administer an estate. Again, your clients have no way of knowing what the website is not telling them. There may be federal estate tax returns; trust or estate income tax returns; and various notices to file. Money saving tax elections may need to be filed. Not handling them properly could open your client to personal liability. Call an expert.

G. Incapacity due to age or addiction.

These are issues that can be addressed in advance as part of estate planning. Most of us will face a decline due to age where our ability to make sound decisions wanes. I have, unfortunately, seen many clients with loved ones who suffer from psychological ailments, driven by disease or addiction, which robs them of the ability to protect themselves. While there are limitations on what a court can do, an attorney can help your client address these issues.

H. Contract formation.

Where long-term commitments and large sums of money are involved, such as buying or selling a house, a business, a book, a screenplay, or an idea, call a lawyer who specializes in that kind of contract.

III. WHO SHOULD YOUR CLIENT CALL?

Couzens Lansky, of course. While you may not realize it, Couzens Lansky is a full-service law firm. We have lawyers who can address nearly every legal need your clients are likely to

encounter. Aside from the estate and tax planning attorneys you are familiar with, Couzens Lansky has a complete array of corporate, banking, tax, real estate, intellectual property, estate, commercial litigation, personal injury and divorce lawyers. We also maintain relationships with trusted attorneys outside the firm to address issues outside our area of expertise.

IV. BE PREPARED

Clients are sensitive to fees. Attorneys bill by the hour. Litigators want to focus on salient issues.

A. Be honest and bring everything to the table.

Your client needs to be prepared to lay all their cards on the table. Rule number one in consulting with an attorney is to be honest and truthful. Conversations with lawyers are legally protected, which means now is not the time to hold back. When your lawyer says "tell me everything," the lawyer means it.

B. What a lawyer needs to hear.

Your clients should be prepared to tell their story chronologically, completing every thought before moving on to the next. The lawyer needs to understand the events they are describing or their situation as close to how they happened as possible. Jumping forward and back in time or going off on tangents is confusing, and may lead to an important detail being overlooked. Your client needs to be specific, but avoid using legal terminology unless they absolutely know what they are talking about (for example, don't call something a "contract" or a "deed" unless they are certain it was, legally).

C. Communicate effectively: It saves both time and money.

It is critical to come prepared as well. After all, they are likely paying for the lawyer's time, so it is important to make the most of it. Our lawyers understand this too. If your client has been sued, or subpoenaed, or searched, or arrested, they have almost certainly received some papers. What court is this in? Is it civil or criminal (that means are they being charged with a crime by the government or sued by someone for money)? Does it say "Circuit Court" or "United States District Court" or what? Your client should be as familiar as they possibly can with the content of the papers, and have them in front of them when they call. If they do not have the ability to scan documents to get them to the lawyer, figure out ahead of time how they will do so, by going to FedEx or a friend's house or something. As a last resort, cellphone pictures of the document may suffice. Have them make an outline of what they want to discuss with their lawyer before they meet with the lawyer, and decide what information they would like to get out of the conversation by the time it is over. Send documents, and even a short narrative or questions, to the lawyer ahead of time so both client and lawyer are on the same page.

V. WHEN TO CHILL INSTEAD

- A. When it is "a matter of principle."
- B. When a neighbor has planted a hedge on the property line or has a tree hanging over the fence.
- C. When a client has been fired for no apparent reason after a brief stint on the job.
- D. When a contractor goes over budget.
- E. When someone has written something about the client that the client finds offensive.



**Employee or Independent Contractor?
Classifying Workers Appropriately and
Why It's Important**

David A. Lawrence

EMPLOYEE OR INDEPENDENT CONTRACTOR?

CLASSIFYING WORKERS APPROPRIATELY AND WHY IT'S IMPORTANT

I. POTENTIAL RAMIFICATIONS FOR MISCLASSIFICATION OF WORKERS

- A. Underpayment/nonpayment of income taxes, FICA taxes, UI taxes and WC premiums.
- B. Federal and state agency recoupment of underpaid taxes with penalties determined through coordination and collaboration of federal and state agencies (sharing of data collection and analysis).
 - 1. IRS and Michigan's UIA.
 - 2. Michigan's UIA and Wage & Hour Division.
 - 3. Michigan's UIA and Workers' Compensation Agency.
- C. Subject to future audits to ensure compliance.
- D. Continued misclassification can result in employer being subject to penalties that quadruple the amount of taxes owed on any misclassified wages.
- E. Unanticipated application of all state and federal employment statutes and common law – discrimination, Title VII, FMLA, ADA, ESTA.

II. INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT (FLSA)

- A. Key Take-Away: A worker should only be paid as a 1099 independent contractor when the test for employee vs. independent contractor under the FLSA has been satisfied.
- B. Department of Labor (DOL) Independent Contractor Rule (ICR) [86 FR 1168].
- C. Intent/Purpose.
 - 1. Simplify, clarify and harmonize factors for determining when a worker is an independent contractor vs. employee under the FLSA.
 - 2. Intended to be the sole and authoritative interpretation.
- D. History of the ICR.
 - 1. Published January 7, 2021 and scheduled to take effect March 8, 2021.
 - 2. February 5, 2021 - DOL publishes proposal to delay the effective date until May 7, 2021.
 - 3. March 4, 2021 - DOL publishes a final rule delaying effective date to May 7, 2021.

4. March 12, 2021 - DOL publishes notice of proposed rulemaking proposing to withdraw ICR.
5. May 5, 2021 - DOL announces final rule withdrawing ICR, effective immediately upon publication on May 6, 2021.
6. March 14, 2022 - Federal district court (ED of Texas) holds that the DOL's 2021 delay and ultimate withdrawal of ICR was unlawful and vacates DOL's various rules, including rule withdrawing ICR.

Court also holds that the ICR became effective on March 8, 2021 and remains in effect.

7. May 13, 2022 - DOL appeals the federal court's decision to the 5th Cir.
 8. June 3, 2022 - DOL announces development of proposed rule to determine employee or independent contractor status under the FLSA.
 9. June 7, 2022 - DOL files motion in the 5th Cir. asking the court to hold the appeal in abeyance pending the completion of the DOL's new rulemaking proceedings.
 10. June 10, 2022 - 5th Cir. grants DOL's motion and stays the appeal for 180 days.
 11. October 11, 2022 - DOL announces publication of a notice of proposed rulemaking, *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, which would rescind the ICR.
- E. The Economic Reality Test - Analysis of the Work Relationship **before** Adoption of the ICR [*US v Silk*, 331 US 704 (1947); *Rutherford Food Corp v McComb*, 331 US 722 (1947)].

1. How much control does the employer have over the employee's work?
2. Does the worker have an opportunity to earn more or less money based on how they manage their work (i.e., opportunity for profit and loss)?
3. Does the worker own or invest in the equipment required to perform the work?
4. Does the work performed require a special skill?
5. Is this a long-term or permanent working relationship, or a short-term, temporary relationship?
6. How integral, or central, is the task performed by the worker to the business?

F. What Changed? Analysis of the Work Relationship **under** the ICR.

1. The Core/Primary Factors.
 - a. The nature and degree of control over the work.
 - b. The worker's opportunity for profit or loss based on initiative and investment.

2. The Guideposts.

- a. The amount of skill required for the work.
- b. The degree of permanence of the working relationship between the worker and the potential employer.
- c. Whether the work is part of an integral unit of production.

III. HERE WE GO AGAIN - REVISITING INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FLSA – THE DEPARTMENT OF LABOR’S FEBRUARY 2026 NOTICE OF PROPOSED RULEMAKING

Background.

A. 2021 Rule – “Independent Contractor Status Under the Fair Labor Standards Act.”

Five economic reality factors.

1. Two core factors.
2. Where both core factors weighed in favor of the same classification, there was a “substantial likelihood” the classification was accurate.

B. 2024 Rule – “Employee or Independent Contractor Classification Under the Fair Labor Standards Act.”

1. Replaced 2021 Rule.
2. Return to a totality-of-the-circumstances analysis.
3. Non-exhaustive six-factor economic realities test with each factor carrying equal weight.
 - a. Opportunity for profit or loss depending on managerial skill;
 - b. Investments by the worker and the potential employer;
 - c. Degree of permanence of the work relationship;
 - d. Nature and degree of control;
 - e. Extent to which the work performed is an integral part of the potential employer’s business; and
 - f. Skill and initiative.

IV. FEBRUARY 26, 2026 NOTICE OF PROPOSED RULEMAKING – “EMPLOYEE OR INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT, FAMILY AND MEDICAL LEAVE ACT, AND MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT” (THE 2026 PROPOSED RULE)

- A. Will rescind the 2024 Rule and reinstate a modified version of the 2021 Rule.
- B. Ultimate inquiry focuses on an individual's 'economic dependence' for work.
- C. Five-factor economic reality test with two core factors.
 - 1. The nature and degree of control over the work (core factor);
 - 2. The individual's opportunity for profit or loss (core factor);
 - 3. The amount of skill required for the work;
 - 4. The degree of permanence of the working relationship between the individual and the potential employer; and
 - 5. Whether the work is part of an integrated unit of production.
- D. When the two core factors point toward the same classification, there is a "substantial likelihood" that the classification is correct.
 - 1. In those circumstances, the remaining three factors are "very unlikely," whether considered individually or collectively, to outweigh the combined probative value of the core factors.
 - 2. The final three factors function as secondary considerations, potentially informative, but less determinative, and, in some cases, may carry little to no weight in the overall analysis.
- E. Emphasis on actual practice.
 - 1. "[T]he economic reality of the working relationship, as shown by actual practices, is an employment relationship."
 - 2. Carefully drafted independent contractor agreements likely won't overcome operational practices that resemble an employment relationship.
- F. Includes eight fact-specific real world examples applying the factors.

V. CORE FACTORS UNDER THE 2026 PROPOSED RULE

- A. Control.
 - 1. Employee, not Independent Contractor, where employer "exercises substantial control over key aspects of the performance of the work," such as controlling the individual's schedule or workload, or directly or indirectly requiring exclusivity.
 - 2. Requirements to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy similar terms typical of contractual business relationships do not constitute the type of control that would characterize an individual as an employee.

B. Opportunity for Profit or Loss.

1. Independent contractor status where the worker exercises initiative, such as managerial skill or business acumen or judgment, or manages investments in or capital expenditure (for example, in helpers, equipment or material).
2. Employee, not Independent Contractor, "to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster."

VI. WHAT'S NEXT?

A. Wage and Hour Division accepted public comments through April 28, 2026.

B. Wait and see.

VII. IRS INDEPENDENT CONTRACTOR TEST

A. Key Take-Away: The IRS presumes that a worker is an employee unless proven otherwise.

B. Intent/Purpose.

1. Determining whether a worker is an independent contractor or an employee for purposes of federal employment taxes (income tax, FICA, unemployment).
2. Focuses on the degree of control and independence.

C. History.

1. Previously involved analyzing 20 separate factors under the IRS 20 Factor Test.
2. IRS refined the analysis in 2021 and essentially did away with the 20 Factor Test.
3. Now, analysis is based on evaluation of factors under 3 broad categories.
 - a. Behavioral Control - Does the business control or have the right to control how the worker does their job?
 - b. Financial Control - Does the business have the right to control the economic aspects of the worker's job?
 - c. Relationship of the Parties - How do the worker and the business view their relationship with one another?

D. Analysis under the former IRS 20-Factor Test.

1. Actual instruction or direction of the worker.
2. Training.
3. Integration of services.

4. Personal nature of services.
 5. Similar workers.
 6. Continuing relationship.
 7. Hours of work.
 8. Full-time work.
 9. Work on premises.
 10. Order of performance.
 11. Submitting reports.
 12. Method of payment.
 13. Payment of expenses.
 14. Tools and materials.
 15. Investment.
 16. Profit or loss.
 17. Exclusivity of work.
 18. Services available to the general public.
 19. Right of discharge.
 20. Right to quit.
- E. Analysis under the Current Refined Test (Post 2021).
1. Behavioral Control - Does the business control or have the right to control how the worker does their job?
 - a. Type of instructions given.
 - b. Degree of instruction.
 - c. Evaluation systems.
 - d. Training.
 2. Financial Control - Does the business have the right to control the economic aspects of the worker's job?
 - a. Significant investment.

- b. Unreimbursed expenses.
 - c. Opportunity for profit/loss.
 - d. Services available to the public/market.
 - e. Method of payment.
3. Relationship of the Parties - How do the worker and the business view their relationship with one another?
- a. Written contracts.
 - b. Employee benefits.
 - c. Permanency of the relationship.
 - d. Services provided as a key activity of the business.

F. Analysis Pointers.

- 1. Weigh all factors to determine relationship.
- 2. No one factor is more important than any other.
- 3. Not all factors may be relevant to the situation.
- 4. Consider the entire relationship and the degree/extent of the right to direct and control.
- 5. Document, document, document.
- 6. If unclear about status, file Form SS-8 and the IRS will determine for you.

VIII. WHAT'S AN EMPLOYER TO DO?

- A. Be proactive.
- B. Conduct internal audits of current independent contractor classifications.
- C. Review written agreements to ensure they reflect actual working relationships.
- D. Evaluate operational practices to determine the level of control exercised.
- E. Coordinate with legal.



**Uncapping the Truth: Approach and Strategy for Property Transfers
Under the General Property Tax Act**

Ronn S. Nadis

UNCAPPING THE TRUTH: APPROACH AND STRATEGY FOR PROPERTY TRANSFERS UNDER THE GENERAL PROPERTY TAX ACT

I. INTRODUCTION

A. History and purpose of the Headlee Amendment and Proposal A.

1. The Headlee Amendment (1978).
 - a. State constitutional amendment championed by Richard Headlee, CEO of Alexander Hamilton Life Insurance, that, among other things, requires a local unit's authorized millage rate to be rolled back when growth in the existing-property tax base, excluding new construction and improvements, exceeds inflation. Mich. Const 1963, art IX, §§ 6, 25 to 34.
 - b. Applies at the municipal level; does not impact tax assessment of individual parcels.
2. Proposal A (1994).
 - a. Prior to Proposal A, each property was assessed as of December 31 in order to establish the property's state equalized value for the following calendar year.
 - b. Proposal A was adopted, in part, to address issues left unaddressed by the Headlee Amendment.
 - c. Caps increase in taxable value of individual tax parcels at 5% per year or the rate of inflation, whichever is less, beginning in 1995.
 - d. A transfer of ownership uncaps the property's taxable value and causes the property's taxable value for the following calendar year to become the state equalized value for the calendar year following the transfer. MCL 211.27a(3).
 - e. Subsequent annual increases are capped until the next transfer of ownership occurs.

B. Key concepts.

1. State equalized value (SEV): an annual state-mandated confirmation that all property classes (e.g., residential, commercial, agricultural) are uniformly assessed at 50% of true cash value (TCV).
2. Assessed value: determined by the local assessor based upon 50% of true cash value.
3. True cash value.
 - a. The usual selling price of the property at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction

sale except as otherwise provided in this section, or at forced sale. MCL 211.27(1)

b. The assessor may not rely solely on the sale price.

(1) An individual sale price may not be a good indicator of the true cash value of the property for a variety of reasons (such as an uninformed buyer, an uninformed seller, insufficient marketing time, buyer and seller are relatives, and other possible reasons). State Tax Commission Bulletin No. 19 of 1997.

(2) MCL 211.27(6) provides: "The purchase price paid in a transfer of property is not the presumptive true cash value of the property transferred. In determining the true cash value of transferred property, an assessing officer shall assess that property using the same valuation method used to value all other property of that same classification in the assessing jurisdiction."

(3) True cash value is usually determined by reference to sale prices for comparable properties, adjusted for any differences from the subject property.

4. Taxable value: established each year based upon the SEV but may not increase from the prior year's taxable value by more than 5% or the amount of increase in the Consumer Price Index (CPI) from the prior year, whichever is lower, subject to "additions" and "losses."

5. "Additions" are all increases in value caused by new additions or remodeling, and the value of property that was exempt from taxes or was not included on the assessment roll (subject to a number of exceptions).

a. New construction is defined as property not in existence on the immediately preceding tax day that is not replacement construction. For commercial property, replacement construction is only construction that replaces property damaged or destroyed by accident or act of God. A new roof that replaces an old, worn-out roof is new construction that can increase a property's taxable value above the cap. But a new roof that replaces a roof destroyed by a fallen tree is replacement construction that does not increase the property's taxable value.

b. Example - Knier, Powers, Martin & Smith, LLC v. City of Bay City (Docket No. 167593).

(1) A law firm owned a commercial office building in Bay City. In 2021, the firm replaced the building's roof at a cost of approximately \$70,000.

(2) For tax year 2022, Bay City assessed the property at a significantly higher taxable value because the new roof was an "addition" within the meaning of MCL 211.34d(1)(b)(iii).

- (3) The firm challenged the assessment, arguing that a routine roof replacement did not constitute an addition. The Michigan Tax Tribunal sided with Bay City and granted summary disposition in Bay City's favor. The Court of Appeals affirmed.
- (4) The Court held that the new roof was "new construction" under the statute because it was property not in existence on the immediately preceding tax day, and it was not replacement construction.
- (5) The Michigan Supreme Court vacated the August 8, 2024 Court of Appeals judgment on March 25, 2026, and remanded. On July 16, 2026, the Court of Appeals ordered supplemental briefing.
- c. MCL 211.27(2) expressly exempts residential roof replacements as normal maintenance not treated as additions. There is no comparable exemption for commercial property.
- 6. "Losses" are all decreases in value caused by the removal or destruction of property, or the value of property that has been exempted or removed from the assessment roll.
- 7. Whether or not the cap applies can significantly affect the tax bill.
- 8. Example - applying the cap.
 - a. Residential property purchased in 2010 for \$600,000 (true cash value). Property held by same owner since 2010 with no additions or losses. In 2025 the property's true cash value had increased about 5% per year to \$1,200,000, but during that time, the rate of inflation only averaged 2.64%.
 - b. The 2011 taxable value is \$300,000 (one-half of TCV).
 - c. Property sold in 2025.
 - d. The 2026 capped taxable value is \$443,500, which results in a tax bill of \$20,401 (at 46 mills).
 - e. Assuming the property is subject to a millage rate of 46 mills, the 2026 uncapped taxable value is \$600,000 (one-half of TCV), resulting in an uncapped property tax bill of \$27,600, a difference of \$7,199 in taxes per year.

II. WHAT IS A TRANSFER OF OWNERSHIP?

- A. Because the Proposal A cap on taxable value only remains in place until "a transfer of ownership occurs," understanding when there is a transfer of ownership is crucial.
- B. Statutory Definition, MCL 211.27a(6).

1. “The conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest.”
2. MCL 211.27a(6) contains a long series of example conveyances that are considered a transfer of ownership (with exceptions specified within the examples).
3. MCL 211.27a(7) contains a series of exemptions from uncapping, some, but not all, of which correspond to the exceptions in subsection (6).
4. If an exception or exemption applies, a property owner may transfer ownership of property without uncapping its taxable value.

C. Special cases.

1. Land contracts – beneficial ownership transfers when the contract is signed not when it is paid off. MCL 211.27a(6)(b).
2. Long-term leases - a lease over 35 years, including renewal options, or containing a bargain purchase option (not more than 80% of projected TCV at end of lease MCL 211.27a(6)(g)).
3. Equity interest transfers.
 - a. A conveyance of more than 50% of the ownership interest of a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity results in uncapping. MCL 211.27a(6)(h).
 - b. Incremental transfers of less than 50% of the ownership interests result in uncapping once more than 50% of the ownership interests have been transferred. *Resort Properties Co-Operative v Township of Waterloo*, 21 NW3d 896 (2025); *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694; 714 NW2d 392 (2006).

III. EXCEPTIONS AND EXEMPTIONS

A. A transfer “escapes” uncapping if it falls into one of these categories:

1. **E** – estate planning transfers.
2. **S** – special classes of property.
3. **C** – court orders.
4. **A** – affiliated entities.
5. **P** – pledges and other financing transfers.
6. **E** – eligible family members.

7. **S** – shared ownership (joint tenancies).

B. Estate planning transfers.

1. Key definitions.

- a. "Beneficial use" means the right to possession, use, and enjoyment of property, limited only by encumbrances, easements, and restrictions of record. MCL 211.27a(11)(b).
- b. "Commercial purpose" means used in connection with any business or other undertaking intended for profit, but does not include the rental of residential real property for a period of less than 15 days in a calendar year. MCL 211.27a(11)(c).
- c. "Residential property" means "platted or unplatted parcels, with or without buildings, and condominium apartments located within or outside a village or city, which are used for, or probably will be used for, residential purposes. MCL 211.34c. MCL 211.27a(11)(h).

2. Property subject to a life estate (ladybird deeds).

- a. A transfer of that portion of property subject to a life estate or life lease retained by the transferor, until expiration or termination of the life estate or life lease. MCL 211.27a(7)(c).
- b. A transfer of that portion of residential real property that had been subject to a life estate or life lease retained by the transferor resulting from expiration or termination of that life estate or life lease, if the transferee is the transferor's or transferor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the transfer. MCL 211.27a(7)(d).

3. Conveyance to a trust.

- a. Exception: a conveyance to a trust after December 31, 1994, except under any of the following conditions:
 - (1) the settlor or the settlor's spouse, or both, conveys the property to the trust and the sole present beneficiary or beneficiaries are the settlor or the settlor's spouse, or both, or
 - (2) beginning December 31, 2014, for residential real property, if the settlor or the settlor's spouse, or both, conveys the residential real property to the trust and the sole present beneficiary or beneficiaries are the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(6)(c)(ii).

b. Exemption: a conveyance to a trust if the settlor or the settlor's spouse, or both, conveys the property to the trust and any of the following conditions is satisfied:

(1) the sole present beneficiary of the trust is the settlor or the settlor's spouse, or both, or

(2) beginning December 31, 2014, for residential real property, if the sole present beneficiary of the trust is the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(7)(g)(ii).

4. Conveyance by or distribution from a trust.

a. Exception: a conveyance by distribution from a trust, except under any of the following conditions:

(1) the distributee is the sole present beneficiary or the spouse of the sole present beneficiary, or both, or

(2) beginning December 31, 2014, **a distribution** of residential real property if the distributee is the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(6)(d)(ii).

b. Exemption: beginning December 31, 2014, for residential real property, a **conveyance** from a trust if the person to whom the residential real property is conveyed is the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(7)(v).

c. A distribution requires the transferee to be a beneficiary of the trust. However, trust property can be conveyed to non-beneficiaries.

5. Change in trust beneficiary.

Exception: a change in the sole present beneficiary or beneficiaries of a trust, except under any of the following conditions:

a. a change that adds or substitutes the spouse of the sole present beneficiary, or

b. beginning December 31, 2014, for residential real property, a change that adds or substitutes the settlor's or the settlor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or

granddaughter and the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(6)(e)(ii).

6. Transfer by will or intestate succession.

- a. Exception: A conveyance by distribution under a will or by intestate succession, except under any of the following conditions:

(1) the distributee is the decedent's spouse, or

(2) beginning December 31, 2014, for residential real property, if the distributee is the decedent's or the decedent's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(6)(f)(ii).

- b. The State Tax Commission treats the exception in subsection (6)(f) as more specific than, and therefore overriding, the court order exemption in subsection 7(h).

C. Special classes of property.

1. Qualified agricultural property.

- a. Exemption: a transfer of qualified agricultural property, if the person to whom the qualified agricultural property is transferred files an affidavit with the assessor of the local tax collecting unit in which the qualified agricultural property is located and with the register of deeds for the county in which the qualified agricultural property is located attesting that the qualified agricultural property will remain qualified agricultural property. MCL 211.27a(7)(o).

- b. Subject to recapture tax when the property ceases to qualify as qualified agricultural property due to a change in use.

2. Qualified forest property.

- a. Exemption: a transfer of qualified forest property, if the person to whom the qualified forest property is transferred files a qualified forest taxable value affidavit with the assessor of the local tax collecting unit in which the qualified forest property is located and with the register of deeds for the county in which the qualified forest property is located attesting that the qualified forest property will remain qualified forest property. MCL 211.27a(7)(p).

- b. Subject to recapture tax when the property ceases to qualify as qualified forest property due to a change in use.

3. Conservation easements.

- a. A conveyance of property under section 2120a(6) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2120a. MCL 211.27a(7)(x).
- b. Beginning on December 8, 2006, a transfer of land, but not buildings or structures located on the land, which meets one or more of the following requirements:
 - (1) the land is subject to a conservation easement under subpart 11 of part 21 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.2140 to 324.2144, and
 - (2) the transfer of ownership of the land or a transfer of an interest in the land is eligible for a deduction as a qualified conservation contribution under section 170(h) of the Internal Revenue Code, 26 USC 170. MCL 211.27a(7)(q).
- D. Transfers pursuant to a court order. A transfer pursuant to a judgment or order of a court of record making or ordering a transfer, unless a specific monetary consideration is specified or ordered by the court for the transfer. MCL 211.27a(7)(h).
- E. Transfers among affiliated entities.
 - 1. Entities under common control. MCL 211.27a(7)(m).
 - a. Transfer of real property or other ownership interests among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entities does not cause uncapping if the entities are commonly controlled.
 - b. Common control is determined by Revenue Administrative Bulletin 1989-48, which adopts the controlled group rules of Treas. Reg. 1.414(c)-2.
 - c. Entities are under common control if they are part of a parent-subsidary group, a brother-sister controlled group, or a combined group—a mix of parent-subsidary and brother-sister controlled groups.
 - d. A brother-sister controlled group exists if the same five or fewer persons own at least 80% of each entity and identical ownership exceeds 50%. Each group member must conduct a business activity, which may include owning and operating rental property. Treas. Reg. 1.414(c)-2(c).
 - e. Initial contributions of property.
 - (1) If there is a business purpose, there are two situations in which entities that do not qualify as entities under common control under Michigan Revenue Administrative Bulletin 1989-48 may still be considered entities under common control:
 - (a) Initial transfers by individuals of a fee simple interest in a property, made to an entity such as a corporation, a limited liability company or

a partnership, are considered to be transfers between commonly controlled entities and not transfers of ownership, if the ownership interests and extent of control which the individuals have in the entity are identical to the ownership interest and extent of control which each of the individuals had in the property prior to the initial transfer, and

(b) Transfers where the fee simple interest in a property is conveyed (retransferred) from an initial transferee entity, as described above, to the individuals who made the initial transfer to that entity, if the ownership interests and extent of control which those individuals have in the entity at the time of the retransfer are identical to the ownership interests and extent of control which each of the individuals had in the property prior to the initial transfer and those interests have not changed between the time of the initial transfer and the time of the retransfer.

(2) The State Tax Commission holds that initial contributions of real property to limited partnerships do not qualify because such transfers involve a change in control.

2. Transfers among members of an affiliated group. MCL 211.27a(7)(k).

- a. A transfer of real property or other ownership interests among members of an affiliated group does not cause uncapping.
- b. An "affiliated group" consists of one or more corporations connected by stock ownership to a common parent corporation.
- c. Limited to corporations; does not include limited liability companies or partnerships.

3. Transfers in connection with a tax-free reorganization under Section 368 of the Internal Revenue Code of 1986. MCL 211.27a(7)(n).

F. Pledges and other financing transfers.

1. Transfers for security or as an assignment or discharge of a security interest are exempt under MCL 211.27a(7)(j).
2. Foreclosure or forfeiture. MCL 211.27a(7)(e).
3. Redemption of property forfeited for delinquent taxes. MCL 211.27a(7)(f).

G. Transfers to eligible family members.

1. Transfer from one spouse to another or from deceased spouse to survivor. MCL 211.27a(7)(a).
2. Transfer from one spouse or both creating or disjoining a tenancy by the entireties. MCL 211.27a(7)(b).

3. Beginning December 31, 2014, a transfer of residential real property if the transferee is the transferor's or the transferor's spouse's mother, father, brother, sister, son, daughter, adopted son, adopted daughter, grandson, or granddaughter and the residential real property is not used for any commercial purpose following the conveyance. MCL 211.27a(7)(u).
4. Beginning in 2025, a conveyance of property from a parent to a child and the child's spouse is an exempt conveyance under MCL 211.27a(7)(u) if the property conveyed was classified as residential real property and if the use of the real property does not change following the transfer of ownership. Property conveyed to a married couple is held as a tenancy by the entireties unless the deed expressly provides otherwise. In a tenancy by the entireties, the spouses are considered one person in the law. Therefore, the addition of the child's spouse no longer results in partial uncapping. *Transfer of Ownership Guidelines*, Michigan State Tax Commission, February 25, 2025, p. 14.

H. Shared ownership and joint tenancies.

1. A transfer of property held as a tenancy in common is deemed a transfer of ownership, except that portion of the property not subject to the ownership interest conveyed. Accordingly, a transfer of a 50% tenancy in common interest in property will constitute a transfer of ownership only to the extent of 50% of the value – so a 50% uncapping. MCL 211.27a(6)(i).
2. A transfer creating or terminating a joint tenancy between two or more persons is exempt if at least one of the persons was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least one of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created. MCL 211.27a(7)(i); *Klooster v City of Charlevoix*, 488 Mich 289; 795 NW2d 578 (2011).

IV. UNCAPPING TAXABLE VALUE VS. REAL ESTATE TRANSFER TAX

- A. Both taxes are triggered by a transfer of ownership and are therefore commonly confused.
- B. State and county real estate transfer tax.
 1. State and county transfer taxes apply to written conveyances of real property, subject to MCL 207.526 and MCL 207.505, respectively.
 2. State transfer tax is \$3.75 per \$500 of consideration. County transfer tax is \$0.75 per \$500 of consideration.
 3. Examples.
 - a. Land contracts.

- (1) A land contract transfers beneficial ownership when signed, causing uncapping in the following calendar year unless an exemption applies.
 - (2) The deed conveying legal title may not be delivered and recorded until years after the land contract is signed.
 - (3) Transfer tax is paid when the land contract is satisfied and the deed is delivered and recorded, not when the land contract is signed.
- b. Deed for nominal or no consideration.
- (1) A deed may cause uncapping regardless of consideration, even when the transfer is a gift, unless an exception or exemption applies.
 - (2) Because transfer tax is measured by consideration, a conveyance for which the consideration is less than \$100 bears no state or county transfer tax.
 - (3) Example:
 - (a) Moe transfers residential property to his good friends Curly and Larry for no consideration.
 - (b) The transfer is exempt from state and county transfer tax because the consideration is less than \$100.
 - (c) The transfer uncaps the property's taxable value because no exception or exemption applies.

V. PRACTICE EXAMPLES

A. Transferring the family cabin.

1. On January 1, 2025, Grandma and Grandpa conveyed the family cabin to their children Brady, Brody and Broody.
 - a. Is this a transfer of ownership?
 - b. No. The transfer occurred after December 31, 2014. The property is residential real property, and Brady, Brody and Broody are eligible family members. The taxable value will not uncap unless the property is used for a commercial purpose. MCL 211.27a(7)(u).
2. On January 1, 2025, Grandma and Grandpa hired Joe Broker to market the cabin for rent on Airbnb. Joe Broker's efforts were unsuccessful, with the cabin having only a single guest who left after one night.
 - a. Has the cabin been used for a commercial purpose and therefore subject to uncapping?

- b. No. A commercial purpose does not include the rental of residential real property for a period of less than 15 days in a calendar year. MCL 211.27a(11)(c).

B. Partial uncapping.

1. Huey, Dewey, and Louie own real property as tenants in common. Huey has a 50% interest and Dewey and Louie each have a 25% interest. Huey conveys his interest to Dewey.
 - a. Is this a transfer of ownership that uncaps the property's taxable value?
 - b. Yes. Assuming no exception or exemption applies, this transfer results in a partial 50% uncapping.
2. Dewey and Louie convey the property to themselves as joint tenants with full rights of survivorship.
 - a. Is this a transfer of ownership that uncaps the property's taxable value?
 - b. No. A transfer creating a joint tenancy does not result in uncapping taxable value where at least one of the grantors was an original owner. MCL 211.27a(7)(i).

C. Entities under common control.

1. A husband and wife own rental property in an LLC of which their trust is the sole member. The couple has two children. The couple wants the rental property to pass to their children upon their deaths.
2. A combination of two exceptions can be used to transfer the property to their children without uncapping its taxable value: (1) a transfer of no more than 50% of the ownership interest of an entity owning real property, and (2) the exemption for transfers between entities under common control.
 - a. Step 1: The trust transfers 25% of the membership interest of the rental property LLC to each of their two children. The transfer does not uncapse the property's taxable value because the owner of no more than 50% of the membership interest of the LLC has changed. MCL 211.27a(6)(h).
 - b. Step 2: The husband and wife form a new holding company owned 20% by their trust and 40% by each of their two children.
 - c. Step 3: The rental property LLC conveys the property to the newly formed holding company. The transfer is exempt because the parent LLC and the holding company are part of a brother-sister controlled group. Three people own 80% or more of the equity interests in both companies (the trust and the children own 100% of parent LLC and the holding company) and the identical ownership is greater than 50% (the trust's 20% interest in the holding company plus each child's 25% interest in the rental property LLC equals 70%).

- d. Step 4: The trust transfers its 20% membership interest in the holding company to the children. The transfer is not a transfer of ownership under MCL 211.27a(6)(h) because not more than 50% of the membership interest in the holding company has changed.

VI. CONCLUSION

- A. How we got here: the Headlee Amendment and Proposal A.
- B. Transfers of ownership.
- C. Exceptions and Exemptions.
 - 1. **E** – estate planning transfers.
 - 2. **S** – special classes of property.
 - 3. **C** – court orders.
 - 4. **A** – affiliated entities.
 - 5. **P** – pledges and other financing transfers.
 - 6. **E** – eligible family members.
 - 7. **S** – shared ownership (joint tenancies).
- D. Uncapping vs state and county transfer tax.



**Probate
Mental Health Code
Guardianships and Conservatorships**

Monica D. Moons

PROBATE
MENTAL HEALTH CODE
GUARDIANSHIPS & CONSERVATORSHIPS

I. MENTAL HEALTH CODE INTRODUCTION

What is the mental health code?

The Michigan Mental Health Code is the collection of state statutes that deal with all aspects of mental health care in Michigan, including the sole method of involuntary hospitalization for mental illness. Involuntary hospitalization is the process used to assist a person who may be mentally ill and cause harm to themselves or others, who refuses to seek treatment or whose judgment is so impaired that they do not understand their need for treatment. In addition to covering mental illness, the Mental Health Code covers the treatment and care of adults with a developmental disability.

Mental illness is defined by MCL 330.1400(g), as “a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”

When attempting to obtain treatment for a mentally ill person, it is essential to understand that under Michigan’s Mental Health Code, it is not enough for a person to be diagnosed as “mentally ill.” The person must also be considered an adult “person requiring treatment” or a “minor requiring treatment” for the Court to become involved.

A “person requiring treatment” must have “mental illness” and any of the following:

- A. The individual can reasonably be expected within the near future to intentionally or unintentionally seriously injure him or herself or another person, and who has already done so or threatened to do so, or
- B. The individual is unable to attend to his or her basic physical needs such as food, clothing, or shelter, and has failed to attend to those needs, or
- C. The individual lacks judgment and is unable to understand his or her need for treatment to prevent a relapse or harmful deterioration of his or her condition, and presents a substantial risk of significant physical or mental harm to himself or herself or another.

MCL 330.1401.

There are some exceptions to the definition of a “person requiring treatment.” An adult who has been affected by age, epilepsy, alcoholism, or drug dependence is not necessarily “a person requiring treatment.” The individual must also meet at least one of the three requirements noted above. MCL 330.1401(2).

II. DEVELOPMENTAL DISABILITY

A. Individual who meets the criteria. MCL 330.1100a(27).

A guardianship for a developmentally disabled adult in Michigan can be established when a person is unable to care for themselves or their estate due to a mental or physical condition:

1. The individual must have a chronic condition that began before age 22.
2. The condition must be likely to continue indefinitely.
3. The condition must significantly limit the individual's ability to perform at least three of the following activities: self-care, language, learning, mobility, self-direction, independent living, or economic self-sufficiency.

B. Probate Process for Guardianship.

A petition can be filed with the Probate Court in the county where the individual lives or was found. The petition must include:

1. The petitioner's relationship to the individual and their reasons for requesting guardianship.
2. The individual's name, date of birth, and address.
3. The names and addresses of the individual's current guardian and presumptive heirs.
4. The individual's current residence.
5. An estimate of the individual's estate value and annual income.
6. The name, address, and age of the proposed guardian.
7. A description of the individual's developmental disability.
8. A report from a physician or psychologist who has evaluated the individual's mental, physical, social, and educational condition.

The court will appoint a suitable person or agency as guardian. The court will also consider the individual's preference for a guardian, if they have one. The guardian can be responsible for the individual's person or estate, or both. For example, a parent could be the guardian of the person and an attorney could be the guardian of the estate. These plenary guardianships must be renewed every five (5) years.

III. KEVIN'S LAW

A. Purpose of the Law.

The Assisted Outpatient Treatment (AOT) law, aka Kevin's Law, provides for the protection and care of individuals with mental illnesses, who are impaired in their judgment regarding the need for treatment.

B. Probate Process.

Family or friends of individuals in need of mental health treatment can petition the probate court to order outpatient mental health treatment. Generally, this process is used for individuals with untreated severe mental illness. Frequently, these orders are used to provide for injectable psychiatric medications for patients who refuse to take medication voluntarily.

After the petition is filed, the individual will be assessed to determine their treatment needs and, if necessary, a hearing will be held. If the court finds that the individual will not help him or herself, the court will order the individual to contact the county community health network and a social worker will be assigned to the case to help the individual develop a treatment plan.

C. Dealing with Individual Violating Court Order.

Under Kevin's Law, when an AOT order is issued, the social worker assigned to the case has the power to order the individual hospitalized, if they violate the terms of the AOT order.

IV. TRANSPORT ORDERS

A. Description of what they are and when they're useful.

There are three methods by which an individual may be transported for an emergency evaluation if they do not agree to treatment. Protective Custody is a method used by the police alone. Transport by Medical Certification is used where an individual with mental illness agrees to be examined. And a Court Order to Transport is used when an individual with mental illness refuses treatment. Where the individual is a minor, additional safeguards and requirements exist under the mental health code.

B. Process.

1. Protective Custody.

When a police officer observes an individual behaving in a manner which causes the officer to reasonably believe that the adult is a "person requiring treatment" or a "minor requiring treatment" and presents a serious danger to self or others, the officer may take the individual into protective custody and transport them to a hospital, without obtaining a Transport Order from the Court. MCL 330.1427.

2. Transport by Medical Certification.

Where an adult agrees to be examined by a physician or psychiatrist and the doctor concludes that the individual is a “person requiring treatment,” again a Court order is not needed. The doctor simply completes a Clinical Certificate, and a family member or friend completes a Petition/Application for Hospitalization. These two documents are shown to the police or ambulance service so that the person may be transported. This process provides for treatment for 72 hours from the completion of the Clinical Certificate. No Court hearing is required to have the patient transported and evaluated. A probate court hearing will be held, however, within seven days of the Court’s receipt of these pleadings, to determine whether the patient should remain hospitalized. MCL 330.1423.

3. Court Order to Transport.

Often it is necessary to use the probate court’s Mental Health Division to obtain an Order to Transport the individual to a hospital for evaluation and examination. The petitioner in that case must have personally observed recent examples of behavior or speech evidencing “mental illness.” If granted by the Court, the police or an ambulance may transport the person for evaluation. MCL 330.1438.

V. GUARDIANSHIPS FOR THE MENTALLY ILL

Limitations on guardians relating to mental health care.

The most important limitation on guardians for the mentally ill is the lack of authority to order psychiatric medication. That is where the AOT order comes in to provide that coverage without hospitalization. In all cases, when attempting to place an individual with mental illness in a facility, such as a group home geared toward mental health care, obtaining the consent of the individual will make the process smoother and obviate the need for court intervention. Such a placement can also be made part of an AOT order.

VI. INTRODUCTION TO ADULT CONSERVATORSHIPS AND GUARDIANSHIPS

A. What adult conservatorships and guardianships are (broad definition/description).

1. “*Protective Proceedings*”: The purpose is to **protect** adults who do not have the ability to manage their own assets and affairs or make medical and “placement” decisions in their own best interests.
2. Appointment and supervision of **substitute decision makers**.
3. Adult Conservatorship: Proceeding by which a probate court appoints and supervises someone to manage the property, business and legal affairs of an adult who is unable to manage these things themselves.
4. Adult Guardianship: Proceeding by which a probate court appoints and supervises someone to make medical treatment and place of residence decisions for an adult who lacks the capacity to make these decisions for their own best interests.

B. Why Insurance, financial and accounting professionals should be informed about them.

1. Increasingly common: In the tri-counties (Wayne, Oakland, and Macomb), there were 25,353 total new filings in 2023 and 6,004 were adult guardianships, adult conservatorships, and protective order proceedings (approximately 24%).
2. They affect whose requests and directions control, and what can be done with assets.

VII. SPOTTING POTENTIAL CONSERVATORSHIP OR GUARDIANSHIP SCENARIOS

A. Person who meets the criteria.

1. Adult Conservatorship:

- a. 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;

AND

- b. 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.

MCL 700.5401(3).

2. Adult Guardianship:

"... impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." MCL 700.1105(a).

B. Inadequate or no estate planning: Properly done estate planning *can* eliminate the need for an adult guardianship or adult conservatorship. That will be discussed in greater detail below.

C. Good estate planning but the impaired or incapacitated person, in their compromised state, is contradicting that planning:

Both agents/attorneys-in-fact under durable powers of attorney and patient advocates can be effectively "dismissed" by the principal by the principal expressing they no longer wish for the designated agent/advocate, and their nominated successors, to have that power. This is so even if the principal is mentally incapacitated. When this happens, a conservator and/or guardian will have to be appointed.

D. Family discord:

1. Challenges by family members to the validity of relevant planning documents;
2. Allegations from family members that the relevant fiduciaries acting under durable powers of attorney or patient advocate designations are breaching their duties or that persons nominated to act under such documents are not fit and should not be permitted to act.

E. People without close relationships to people who can be trusted to handle their affairs for them.

VIII. PROCESS AND REQUIREMENTS FOR CONSERVATORSHIPS AND GUARDIANSHIPS

A. The process for these proceedings: In both of these proceedings,

1. Petition is filed:

- a. May be filed by any person interested in the welfare of the person who allegedly needs the guardian or conservator, and for a conservatorship, any person who would be adversely affected by the lack of effective management of the property and business affairs of person who allegedly needs the help;
- b. Type and qualify of information to be included in a Petition for each type of action is provided below.

2. All “interested persons” must be served: this always includes the person who allegedly needs the protection. The other persons who must be served are determined by court rule (additional detail given below).

3. Guardian ad litem appointment: Unless the allegedly incapacitated individual has retained an attorney they’ve chosen, before the first hearing, the court will appoint a guardian ad litem. The guardian ad litem is a lawyer who makes determinations and informs the court on:

- a. Whether there are available and appropriate alternatives to the appointment of a guardian;
- b. Whether other actions should be taken in addition to the appointment of a guardian or conservator;
- c. Whether the person who is the subject of the proceeding wants to contest the petition, attend the hearing, object to the appointment of the person the petition seeks to appoint as guardian and/or conservator;
- d. Whether the case should go to mediation.

4. First hearing: the Court will hold an initial hearing, at which time an order resolving the matter may be entered if there is agreed resolution *or* if it is determined this early that the petition may resolve even absent agreement.

5. Right to Appointed Counsel: If the subject does not have a retained attorney, and the subject disputes the relief requested in the petition, an attorney will be appointed for them. (Usually the guardian ad litem is appointed as counsel after they give their report.)
6. Medical examination: Courts may order examination of the allegedly impaired or incapacitated person by a physician or mental health professional appointed by the court. The individual alleged to be incapacitated also has the right to secure an independent evaluation, at the individual's own expense, unless the individual is indigent. The professionals' reports are not part of the public record.
7. Further hearings / mediation / evidentiary hearings / trials: Conservatorships and guardianships can be fully litigated like any other probate matter. Contested proceedings can last a long time and be costly.

B. Focus on Guardianship Proceedings:

1. Petition: must include "specific facts about the individual's condition and specific examples of the individual's recent conduct that demonstrate the need for a guardian's appointment." MCL 700.5303(1).
2. People who receive notice and can "weigh in" (the "interested persons"):
 - a. The subject.
 - b. The subject's spouse.
 - c. The subject's children or, if they have no children, their parents.
 - d. If no spouse, child, or parent of the subject is living, then the subject's presumptive heirs.
 - e. The person who has the subject in their care or custody.
 - f. The nominated guardian.
 - g. Any guardian or conservator appointed for the subject in another state.
3. Finding Required: to appoint a guardian, the Court must find by clear and convincing evidence "both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual." MCL 700.5306(1).
4. Court is required to "design the guardianship to encourage the development of maximum self-reliance and independence in the individual." MCL 700.5306(2).
5. The Court may determine that some measure less involved than a guardianship can offer the needed protection.

6. Priority for appointment: the following order of priority is to be followed by the Court in appointing a guardian:
 - a. Spouse of the subject, or a person nominated in the will of the spouse if the spouse is deceased.
 - b. Adult child of the subject.
 - c. Parent of the subject, or a person nominated in the will of a deceased parent.
 - d. Relative of the subject with whom the subject has resided for more than 6 months preceding the filing of the petition.
 - e. A person nominated by a person who is caring for or paying benefits to the subject.
 - f. If none of these persons is suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian.
7. Professional guardians: usually lawyers or guardianship agencies, they charge professional fiduciary rates (typically in excess of \$100/hour, sometimes up to \$250/hour) for providing guardianship services.
8. Ongoing supervision: at minimum, annual reports to the court and usually an annual hearing.

C. Focus on Conservatorship Proceedings:

1. Petition:

For a conservatorship to be granted, the Court must find that:

- a. The subject 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;

AND

- b. EITHER the subject has property that will be wasted or dissipated unless proper management is provided;

OR

- c. Money is needed for the subject's support, care, and welfare or for those entitled to the subject's support, and a conservatorship is necessary to obtain or provide money.

Therefore, not only does a petition for conservatorship require similar (but not identical) information as a guardianship petition does regarding the

evidence that the subject of the petition cannot effectively manage their property and business affairs themselves, but it also requires provision of financial information such as a general statement of the subject's property and an estimate of its value, as well as statements of all government benefits and income received by the subject.

2. People who receive notice and can “weigh in” (the “interested persons”):
 - a. The subject;
 - b. The subject's “presumptive heirs” (spouse, then living children, then children of deceased children, etc.);
 - c. Any person named as agent for the subject under a durable power of attorney;
 - d. The nominated conservator;
 - e. Governmental agencies paying benefits to the subject or to whom an application for benefits for the subject has been filed; and
 - f. Any conservator or guardian appointed for the subject in another state.
3. No finding of incapacity is required, and inability to manage property and business affairs effectively can be for reasons other than those listed above. *For example – sometimes people become especially vulnerable to romance scams after a divorce or death of their spouse.* While susceptibility to scams would not likely be grounds for establishing a guardianship so long as the subject does not actually lack mental capacity, it CAN be a basis for a conservatorship.
4. Priority for appointment: the following order of priority is to be followed by the Court in appointing a conservator:
 - a. A conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction, where the protected person resides;
 - b. If the protected person is 14 or older and with sufficient mental capacity to make an intelligent choice, an individual or corporation they nominate – including a nomination made in a durable power of attorney;
 - c. Parent of the protected individual or a person nominated by the will of a deceased parent of the protected individual;
 - d. Relative of the protected person with whom the protected person has resided for more than 6 months before the petition is filed;
 - e. A person nominated by the person who is caring for or paying benefits to the protected person;
 - f. If none of the above persons are suitable and willing to serve, any person that the Court determines *is* suitable and willing to serve.

5. Professional Conservators: Usually attorneys who practice probate law are appointed by the probate court if the court determines that no one with higher priority is suitable and willing to serve. They charge professional fiduciary fees of typically at least \$100/hour but often \$250/hour or more.
6. Bonds: Courts often require conservators to post a bond in the amount of the value of the assets under supervision.
7. Supervision of conservators: accountings. Conservators will usually be required by probate courts to file annual accountings, which must be reviewed and approved by the Court.
8. Compensation: conservators are entitled to reasonable compensation, but that compensation is taxed and the compensation is reviewed by the probate court for reasonableness. Rates for conservators who are not themselves professionals (like attorneys or accountants) and even rates for conservators who *are* professionals vary among the different courts and things like complexity of the work involved and the amount of assets being managed are considered.
9. Less restrictive options:
 - a. Trusts;
 - b. Financial powers of attorney;
 - c. Adding joint owners to bank accounts (if the issue is ability to access the account due to lack of mobility, physical infirmity, etc.).
 - d. Protective Orders. (See below).

IX. USING ESTATE PLANNING TO AVOID CONSERVATORSHIPS AND GUARDIANSHIPS

A. Avoiding guardianships – patient advocate designations:

A properly designated patient advocate can make decisions on medical care and place of residence for a person deemed to lack capacity to make these decisions themselves.

B. Avoiding conservatorships – durable powers of attorney and trusts:

1. **Durable Powers of Attorney**: If properly written, a durable power of attorney can effectively provide the “agent” or “attorney-in-fact” named in that document all powers needed to manage the property, business and legal affairs for someone unable to do that themselves.

Uniform Power of Attorney Act (MCL 556.219 et seq.): Effective July 1, 2024, as long as a durable power of attorney meets the requirements of these statutes, there can be potential liability for attorney fees incurred if the power is not accepted for a reason determined to be frivolous. *This is expected to significantly reduce frequency of rejection of these documents by financial institutions, investment custodians, insurance companies, etc.*

2. **Trust(s) Properly Funded**: If a person's assets are titled to their trusts before they lose their ability to manage them, then the designated trustee or successor trustee, as the case may be, can manage the assets for the principal without the need for a conservatorship.
- C. When conservatorship and guardianship may be needed despite thorough estate planning. This is most likely to happen when:
1. As described above, the impaired or incapacitated person is stating they do *not* wish to have the people nominated in their durable powers of attorney or patient advocate designations serve as their fiduciaries, after all; or
 2. All persons nominated in powers of attorney or patient advocate designations are deceased, incapacitated or decline to serve; or
 3. A healthcare or placement facility, like an assisted living or memory care facility, requires it.

X. **"JUST THIS ONE THING" – PROTECTIVE ORDERS**

A. Description of what they are and when they're useful:

These are Court orders that affect the property and business affairs of an individual who cannot manage their own affairs *without* appointing a conservator.

These orders can:

1. Authorize, direct, or ratify a transaction necessary or desirable to achieve a security, service, or care arrangement meeting the subject's foreseeable needs:

Examples:

- a. Authorize a contract for life care, training, or education;
 - b. Authorize placement in hospice when no guardianship has been established or is contemplated.
2. Authorize, direct, or ratify a contract, trust, or other transaction relating to the subject's personal property and business affairs *if* the Court determines that it is in the subject's best interests:

Examples:

- a. Approve transfer of an asset to an existing trust (completing funding of the trust);
- b. Authorize a deed that conveys title from a land contract vendor who has become incompetent to the vendee once the vendee has paid in full;
- c. Purchase an annuity;

B. Process: Same as a conservatorship.

XI. PRACTICAL/SELF-HELP OPTIONS FOR FAMILIES TRYING TO AVOID COURT INTERVENTION

A. Termination of driving privileges by Secretary of State. Complete and submit a Request for Driver Evaluation (DA-88) to the Michigan Secretary of State's office. The name of the person requesting the evaluation is kept confidential:

<https://www.michigan.gov/sos/license-id/driver-assessment#:~:text=The%20Michigan%20Department%20of%20State%20has>

B. Use of private and community services. Look into private pay and community funded and managed resources for meal service, home maintenance and management, visits, monitoring/daycare, and respite sessions for family caregivers.

C. Family/friend assistance. Pretty self-explanatory. Utilize family and friends who can be trusted to provide care, supervision, and services.

XII. PROTECTING YOUR CLIENTS AND YOURSELVES

A. Who has authority? (Whose requests/instructions must you honor?)

1. Agent under Durable Power of Attorney: the days of “the company requires you use their form” were over in Michigan as of July 1, 2024, when the Uniform Power of Attorney Act became effective. If a provided Durable Power of Attorney complies with the provisions of that Act, and you have no information or knowledge that would lead you to believe the document is not still in force, it should be honored.
2. Conservatorships: If a conservator has been appointed, and you are dealing with an issue as to a protected person's legal or business affairs or their assets, then the *conservator* is the only person with authority to make decisions and give direction.

Caveat: A limited conservatorship gives the conservatorship control of some, but not all, of a protected person's property. Always ask to see a *certified copy* of the order appointing conservator so that you can review what property the conservator controls. If there is no specification limiting the authority to particular property, the conservator controls all of a protected persons legal, business and financial affairs, and assets.

3. Guardianships: If a person has had a guardian appointed over them, they have been determined to lack mental capacity as a matter of law. This means that they cannot make their own decisions on any matters. The Guardian controls as to medical decisions and decisions on placement.

Caveat: As with conservatorships, a guardianship can be *limited* to facilitate preservation of as much independence as safely possible in the protected person.

4. Durable Power of Attorney vs Conservator: IF you are faced with a situation where one person claims authority as an agent under a durable power of attorney and another claims authority as conservator, review the Order Appointing Conservator. If there is no limitation on the Conservator's authority, the Conservator is the authority, not the agent under the power of attorney.
5. Guardian vs Conservator: These two typically have different *areas* of authority, as detailed above. Often they are the same person, but sometimes they are not. Ask to see certified copies of orders and letters of authority.

B. Practices and procedures that may be helpful:

1. Make sure your companies have updated policy on review and acceptance of durable powers of attorney to comply with Michigan's Uniform Power of Attorney Act (MCL 556.219 et seq.).
2. Ask clients and their families about their estate planning, encourage them to have planning done and then reviewed/updated periodically by a qualified attorney who focuses on estate planning and probate work and is up-to-date on the latest developments. Have names and contact information for those attorneys ready. If the client offers to provide you copies of things like durable powers of attorney that tell you who has authority if the client loses capacity, log the information and keep a copy of the document(s).
3. Ask about whether any guardianship or conservatorship orders have been entered since the last time you spoke with your clients, note the response and ask them to provide copies.
4. If a client shows signs of having a capacity issue, if any member of the family is alleging a client has lost capacity, or loss of capacity is apparent and the family requests assistance, refer the family to a probate lawyer whose practice includes guardianships and conservatorships. Have names and contact information for these attorneys ready.

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SHELDON A. FEALK is a senior attorney of the firm. Mr. Fealk's practice has focused on the areas of commercial law, corporate law, labor law and tax controversies, including:

- Complex commercial litigation, involving such areas as corporate governance issues, contractual disputes, breach of fiduciary duty, unfair competition, covenants not to compete, fraud and deceptive trade practices, disparagement, dissolutions and other business claims
- Defense of employers in labor law disputes
- Commercial contract preparation and review
- Service as an arbitrator in business contract matters



JACK S. COUZENS, II is a shareholder of the firm. Mr. Couzens has headed the firm's estate planning group since 1978. As a Chartered Life Underwriter, he brings significant knowledge regarding insurance products to his client representation on matters of estate planning and corporate law, employee benefits law and executive compensation. His principal areas of focus have included:

- Sophisticated gift, estate, generation skipping transfer tax planning and documentation
- Wealth transfer planning and implementation
- Probate and trust administration
- Design and implementation of Wills, revocable trusts, irrevocable trusts, special needs trusts, charitable trusts and special trust agreements of various kinds
- Executive compensation arrangements, including deferred compensation and split dollar agreements
- Retirement distribution planning
- Business and personal income, gift and estate tax planning

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JERRY M. ELLIS is a senior attorney of the firm. Mr. Ellis has over 40 years' experience in insolvency, workout, restructuring and bankruptcy matters, including the related litigation. He is the former Mayor of the City of Farmington Hills, MI, providing him with a unique perspective in disputes or planning involving government entities. Examples of matters he has focused on include:

- Work with clients to resolve complex business issues, including shareholder disputes, loan renegotiations, executive terminations and restructuring
- Representation of creditors, debtors and creditor committees in Chapter 7 and 11 bankruptcy cases
- Lender representation in the workout and bankruptcies of troubled secured real estate matters, out of court loan modifications and foreclosures
- Complex business and commercial litigation

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DONALD M. LANSKY is a shareholder of the firm. Mr. Lansky has focused his practice on individual and business tax planning, business entity planning, family wealth transfers, estate planning and mergers and acquisitions. He has extensive experience in areas such as the following:

- Planning, formation, development, operation and tax compliance regarding closely held business entities
- General representation of business entities
- Tax planning with respect to partnerships, S corporations, limited liability companies and similar pass through entities
- Development of effective compensation and long-term benefit plans for business entities
- Tax planning involving mergers, acquisitions, divestitures and tax-free reorganizations
- Representation of buyers and sellers in the purchase or sale of businesses
- Preparation of estate planning documentation, including Wills, revocable trusts, irrevocable trusts, special needs trusts, qualified personal residence trusts, charitable trusts, intentionally defective grantor trusts, grantor retained annuity trusts and family limited partnerships
- Development of effective wealth transfer planning strategies and techniques
- Assistance in forming and obtaining tax rulings for private charitable foundations and public charities, as well as general legal representation for such organizations

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ALAN C. ROEDER is a shareholder of the firm. Mr. Roeder is licensed in Michigan and Colorado and concentrates his practice in the areas of estate planning and taxation, closely held business law and real estate. This has included such matters as:

- Designing, drafting, implementing and administering estate plans for a broad range of estate sizes
- Assisting closely held businesses in formation, operation, tax planning, restructuring and termination
- Executive compensation and buy-sell agreement planning
- Real estate ownership structure, tax planning, financing, sale, purchase and development
- Lease negotiation and documentation
- Client assistance in real property management
- Land use, environmental compliance and zoning

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RENARD J. KOLASA is a senior attorney of the firm. Mr. Kolasa has concentrated his practice in the areas of estate planning and taxation, closely held business law and tax-exempt organizations. This has included such matters as:

- Designing, drafting, implementing and administering estate plans for a broad range of estate sizes
- Designing and drafting trusts of all types, including charitable trusts
- Business succession planning
- Assisting closely held businesses in formation, operation, tax planning, restructuring and termination
- Assisting tax-exempt organizations get established, obtain appropriate government approvals and operate in compliance with applicable rules
- Church and ecclesiastical law matters
- Advanced wealth transfer planning and implementation

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KATHRYN GILSON SUSSMAN is a shareholder of the firm. Ms. Sussman has concentrated her practice in the areas of estate planning, estate administration, elder law and non-profit organizations, including:

- Estate and gift tax counseling
- Design and preparation of standard and sophisticated estate planning documentation
- Probate Law representation
- Representation in Guardianship/Conservatorship proceedings
- Elder Law, including Medicaid and Social Security claim representation
- Business succession planning
- Drafting trusts of all types
- Estate and trust administration for individual and corporate fiduciaries
- Contested estate representation
- Preparation of Gift and Estate Tax returns, including generation skipping analysis

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JEFFREY A. LEVINE is a shareholder of the firm. Mr. Levine's practice primarily focuses on general business counseling, business tax planning and acquisition transactions. There is a strong transactional emphasis on Mr. Levine's practice, including:

- General corporate representation including counsel to Boards of Directors, entity formation and capitalization, shareholder agreements, all contract matters, customer-supplier relationships, compensation planning, employee benefits and executive employment matters
- Mergers, acquisitions, investments, controlling interest sales, management buy-outs, joint ventures, restructuring, recapitalizations and equity incentive plan implementation
- Federal and state corporate tax planning and compliance
- Individual income tax planning
- Structure and implementation of family wealth transfer transactions

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PHILLIP L. STERNBERG is a shareholder of the firm with over 48 years of trial experience representing individuals, corporate and business clients. Mr. Sternberg's practice extends from routine through sophisticated and highly complex litigation. However, he knows it is best to avoid litigation when possible, and he will utilize aggressive and innovative negotiating strategies to avoid litigation when it's in the client's best interest. To that end, Mr. Sternberg is skilled in negotiating and drafting a variety of legal documents to avoid or resolve disputes before seeking resolution in the courts. He will always provide his client with an honest cost/benefit analysis, prior to engaging in litigation, so that the client can make an educated choice before proceeding.

Mr. Sternberg is both a tenacious courtroom advocate as well as a skilled and inventive theorist of the law. He has successfully pursued litigation in a broad range of categories and levels, including the state and federal appellate courts, U.S. District Court, Eastern and Western Districts of Michigan, Circuit Courts, and the U.S. Tax Court in diverse areas of law including, but not exclusively, the following:

- Business & Commercial Litigation
- Domestic Relations
- Employment Contract Litigation
- Insurance Disputes
- Investment Practices
- Negligence and Personal Injury Matters
- Probate and Trust Litigation

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LISA J. WALTERS is a shareholder of the firm. Ms. Walters concentrates her practice in the areas of estate planning, elder law, guardianships and conservatorships, probate, probate avoidance, tax planning strategies and trust and estate administration. Examples of her representation include:

- Estate and gift tax counseling
- Standard and complex estate, gift and charitable transfer planning
- Estate and trust administration for individual and corporate fiduciaries
- Durable powers of attorney for financial matters and medical treatment decisions
- Guardianship/conservatorship proceedings (including assisting in obtaining the appointment of the guardian and conservator as well as the ongoing administration)
- Advanced wealth transfer planning and implementation

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DONALD A. WAGNER is a senior attorney of the firm. Mr. Wagner's practice focuses primarily on business financing transactions and all areas of commercial lending, including:

- Real estate and commercial/asset based transactions, such as construction loans, end mortgage loans, land acquisition and development loans, revolving credit facilities, government backed loans, involving various types of real estate, including condominiums, office buildings, shopping centers, mobile home parks, health care facilities, commercial and industrial complexes, hotels, resort and marina complexes with related environmental assessment and compliance documentation
- Letters of credit, equipment leases and other specialized transactions, including documentary and commercial (sight and stand-by) letters of credit and transactions secured by letters of credit from others. Financing to and/or involving third party lessors and lessees, machinery and equipment purchase facilities, warehouse and bridge facilities, equity kicker and equity participation arrangements, demand and piggyback rights agreements relating to a variety of areas, including for example, broadcast facilities, utility assets, multi-lender participations and pension and profit sharing plans

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MARK S. FRANKEL is a shareholder of the firm. Mr. Frankel is a member of the firm's litigation section and he has concentrated his practice in the arena of probate law, complex commercial litigation, real estate, bankruptcy and creditors rights, commercial and business law. He is head of the firm's Probate Litigation Group. Examples of some of the matters he has handled include:

- Representation of estates, trusts, trustees and beneficiaries in contested estate, trust and probate administration matters
- Probate Court proceedings of all types, including Will, trust and estate administration and contests, guardianships, conservatorships, trust reformations, Trustee representation and examination of accountings
- Real estate litigation and administrative proceedings, including zoning and land use proceedings, contract litigation, environmental compliance and economic development
- Resolving title disputes
- Representation of individuals and business entities in connection with tax controversies before the Internal Revenue Service, the Michigan Tax Tribunal, zoning Boards of Appeal and other courts and administrative bodies
- Complex commercial litigation, including corporate governance issues, contractual disputes, breach of fiduciary duty, unfair competition, covenants not to compete, fraud and deceptive trade practices, disparagement, dissolutions and other business claims

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DAVID A. LAWRENCE is a shareholder of the firm. Mr. Lawrence concentrates his practice on civil litigation and employment and labor law. Mr. Lawrence's trial success includes the third largest Michigan jury verdict of 2007 (*Pamela Anton and Cheryl Freeman Snipes v. SBC Global Services, Inc.*, U.S. District Court for the Eastern District of Michigan, Case Nos. 01-40198 and 01-40213, affirmed by the Sixth Circuit Court of Appeals, Case Nos. 08-1307 and 08-1325).

- Mr. Lawrence provides both advisory services and litigates matters concerning discrimination, wage/hour and all other employment issues, physician and executive employment agreements, restrictive covenants, business contracts of all types, business torts, complex commercial cases, commissioned sales representatives, shareholder/member disputes, management side labor and occupational safety and health
- Mr. Lawrence regularly practices before the state and federal trial and appellate courts of Michigan, and several other states as necessary, the Equal Employment Opportunity Commission, National Labor Relations Board, Michigan Department of Civil Rights, U.S. Department of Labor, Michigan Wage & Hour Division, Michigan Unemployment Insurance Agency, Occupational Safety and Health Administration and Michigan Occupational Safety and Health Administration

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RONN S. NADIS is a shareholder of the firm. Mr. Nadis has concentrated his practice in the area of commercial real estate. He represents institutional and private property owners in sales, acquisitions, finance, development and commercial leasing and property management issues. Representative legal matters include the following:

- Commercial real estate ownership, structure, sale, purchase and development
- Commercial real estate finance including CMBS (commercial mortgage-backed securities) and mezzanine lending and tax planning
- Office, retail and industrial lease transactions for investors, landlords, property managers and tenants
- Real estate sales and acquisitions for developers and other real estate companies, including multi-state transactions

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PHILLIP J. NEUMAN is a shareholder of the firm. Mr. Neuman focuses his practice on real estate and business litigation, including title issues, construction lien matters, contract disputes and commercial and residential landlord tenant matters. Examples of the types of matters he has handled include:

- Real estate litigation in Michigan and federal courts, including quiet title actions, title insurance coverage, mortgage priority disputes, adverse possession claims, forged deeds, construction lien foreclosure and condominium and homeowners' association lien foreclosure
- Resolution of title disputes, including reformation of recorded documents, boundary disputes
- Landlord tenant evictions and lease negotiation, drafting, interpretation, enforcement and litigation
- Commercial litigation involving business contracts of all types
- Bankruptcy matters, including non-dischargeability claims (published opinion of the Sixth Circuit Court of Appeals) and automatic stay issues

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MONICA D. MOONS is a shareholder of the firm. Ms. Moons concentrates her practice in the areas of estate planning and taxation, estate and trust administration, probate and tax litigation and real estate. This has included such matters as:

- Estate and gift tax counseling
- Design and preparation of standard and sophisticated estate planning documentation
- Estate and trust administration for individual and corporate fiduciaries
- Representation of estates, trusts, trustees and beneficiaries in contested estate, trust and probate administration litigation matters
- Probate Court proceedings of all types, including Wills, trusts and estate administration and contests, guardianships, conservatorships, trust reformations, Trustee representation and examination of accountings
- Preparation of Gift and Estate Tax returns
- Commercial and residential real estate acquisition and sale

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JOSEPH H. WENER is a shareholder of the firm. He concentrates his legal practice in the areas of real estate law, corporate and business law, commercial transactions and contracts and issues concerning Canadian law. Examples of matters he has handled include:

- Planning, formation, development, operation and tax compliance regarding closely held business entities in both the United States and Canada
- General representation of business entities
- Tax and succession planning with respect to partnerships, corporations, limited liability companies and other business organizations
- Analysis and documentation concerning mergers, acquisitions, investments, controlling interest sales, buy-outs, joint ventures, restructuring and recapitalizations
- Real estate ownership structure, sale, purchase, leasing and development
- Real estate and asset-based financing (acting for both institutional lenders and borrowers)
- Capital markets finance

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CHRISTOPHER M. WILLIAMS is a shareholder of the firm. He specializes in mergers and acquisitions, business formation and operation, and commercial real estate transactions. He has represented clients in a wide variety of industries including: automotive, construction, dentistry, engineering, food service, graphic design, health care, information technology, machining, manufacturing, marketing, mechanical contracting, real estate, retail sales, veterinary practice and website development.

Mr. Williams regularly assists clients with:

- Business purchases and sales
- Ownership buy-outs
- Business formation and organizational documents
- Contract review and drafting
- Annual meetings and record keeping
- Commercial real estate purchases and sales
- Commercial leases

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MATTHEW A. FERRARA is a shareholder of the firm. He concentrates his practice in the areas of estate planning, probate avoidance, tax planning strategies, business formation and succession planning, probate, and trust and estate administration for clients of all ages and needs. Examples of his representation include:

- Holistic estate planning to address concerns regarding minor children, caring for older relatives, family members with disabilities, blended families, and LGBTQ+ relationships
- Design and implementation of complex estate planning including revocable, irrevocable, charitable, and asset protection trusts
- Wealth transfer, lifetime gifting, and charitable bequest planning and implementation
- Probate and trust administration from simple guidance to full-service administrative services
- Business planning including organization, buy-sell planning, and sales of businesses

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MARK E. MERLANTI is a shareholder of the firm. He is a member of the firm's litigation and real estate practice groups. He concentrates his practice in the areas of real estate and business transactions and disputes. Mr. Merlanti has broad experience regarding the trial, arbitration and mediation of business and real estate disputes, including appellate representation. Examples of the types of matters he handles include:

- Shareholder disputes
- Contract and commercial litigation disputes
- Drafting business agreements
- Real estate and quiet title litigation
- Construction contract drafting and construction litigation
- Boundary and riparian rights disputes
- Drafting commercial and residential leases
- Handling commercial and residential disputes, including landlord/tenant litigation
- Matters involving Condominium Association and Homeowners Association construction applications and disputes

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GARY SCHWARCZ works primarily in the areas of business planning, estate planning and taxation. He has spoken on numerous occasions to professional groups, including CPAs, on tax topics, including the technical aspects of partnership and S corporation taxation. Examples of legal matters he has handled for clients include the following:

- Federal and state business tax planning and compliance
- Individual income tax planning
- Planning, formation, development, operation and tax compliance regarding closely held business entities
- General representation of business entities
- Tax planning with respect to partnerships, S corporations, limited liability companies and similar pass through entities
- Tax analysis and documentation concerning mergers, acquisitions, investments, controlling interest sales, buy-outs, joint ventures, restructuring and recapitalizations
- Planning and preparation of estate planning documentation
- Tax analysis, structure and implementation regarding family wealth transfer transactions

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MICHAEL K. DOROCAK focuses his legal practice in the areas of commercial and real estate litigation and real estate and commercial transactions. Examples of his work include:

- Business and commercial litigation, including contract litigation, construction disputes, commercial and residential tax appeals, supplier disputes and appeals
- Real estate litigation, including resolution of title insurance disputes, quiet title actions, lien and mortgage priority disputes, riparian rights and water access, easement and road disputes, boundary disputes, forged or fraudulent conveyances
- Landlord tenant, including lease negotiation, preparation, interpretation, enforcement and litigation
- Documentation of commercial and real estate transactions of all types, including purchase agreements, operating agreements, leases, easement agreements, financing documents and condominium and homeowners' association documents
- Contract review and drafting
- Representation of non-profit organizations

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JENNIFER K. JOHNSON works primarily in the areas of estate planning and trust administration, as well as business and corporate law. Representative examples of her practice include:

- Drafting complex estate planning documents: Wills, codicils, trusts, financial and health care powers of attorney, deeds and ancillary documents
- Analyzing legal and tax issues related to estate planning
- Analyzing and preparing documents related to gifting strategies
- Estate and trust administration for individual and corporate fiduciaries
- Corporate and limited liability company formation and capitalization
- General representation of business entities

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JEFFREY D. RYAN works primarily in the areas of estate planning and trust administration, as well as business and corporate law. Representative examples of his practice include:

- Designing, drafting and implementing estate plans for a broad range of estate sizes
- Probate and trust administration for individual and corporate fiduciaries
- Analyzing and preparing documents related to gifting strategies
- Advanced wealth transfer planning and implementation
- Estate and gift tax counseling, including generation skipping analysis
- Corporate and limited liability company formation and capitalization
- Business succession planning
- Preparation of Gift and Estate Tax returns

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PRERANA R. BACON works primarily in the areas of litigation and dispute resolution, business and corporate and employment and labor. Ms. Bacon is a seasoned and skilled litigator with extensive experience prosecuting, defending and managing cases of varying exposure. Leveraging her unique engineering and project management background and skills and passion for the ethical practice of the law, she has successfully represented individual and business clients before federal and state tribunals and government agencies and has a proven track record of obtaining case dismissals, no-cause verdicts and negotiating favorable settlements. Ms. Bacon has also counseled organizational clients on a wide array of labor and employment, regulatory compliance, governance, business tort, contractual and general legal matters. Legal colleagues have often selected Ms. Bacon to sit on multi-arbitrator panels on their client's behalf. Ms. Bacon regularly advises clients in the following areas:

- Negligence & Intentional Tort Litigation
- Personal Injury Litigation
- Civil RICO Prosecution and Defense
- SIU & Insurance Fraud Investigation
- Insurance Coverage & Disputes
- Commercial & Business Litigation, including Directors & Officers and Shareholder Litigation
- Regulatory Compliance and Corporate Governance
- Employment & Labor Charges/Complaints/Litigation
- Intellectual Property Litigation
- E-Discovery, Document Retention and Preservation Planning

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EMILY M. SULLIVAN works primarily in the areas of commercial real estate and commercial business and corporate transactions. Ms. Sullivan regularly advises clients in the following areas:

- Reviewing and drafting real estate, commercial and asset-based financing documents for institutional lenders and businesses, including leases and secured transactional documents
- Assisting closely held and medium-sized businesses in formation and organizational matters
- Handling commercial real estate transactions, including purchase agreements and title review
- Reviewing and drafting all types of business contracts
- Business owner buy-outs, purchases and sales
- Lease negotiation and documentation
- Client assistance in real property management
- Real estate acquisitions and dispositions

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KAREN V. FAIRMAN works primarily in the areas of estate and trust administration and litigation. Examples of her representation include:

- Providing estate and trust administration advice and assistance to individual and corporate fiduciaries
- Representation in Probate Court proceedings of all types including Will, trust and estate administration matters, guardianships, conservatorships and trust reformations
- Prosecuting and defending claims by or against Personal Representatives, Trustees, beneficiaries and other interested persons in contested estate, trust and probate matters, including Will and Trust contests, contested proceedings for guardianship and conservatorship and breach of fiduciary duty claims

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OF COUNSEL



BRUCE J. LAZAR is Of Counsel to the firm. Martindale-Hubbell has awarded Mr. Lazar the highest rating of AV, which identifies a lawyer with very high to preeminent legal ability. In addition, Mr. Lazar has been chosen as a Michigan Super Lawyer on multiple occasions. His practice concentrates primarily in the area of commercial litigation and he has tried a multitude of cases in both state and federal courts, as well as arbitration proceedings. Along with trial work, Mr. Lazar has extensive appellate experience with many published opinions. His career has concentrated in the following areas of practice:

- Construction contract litigation matters involving a variety of private, nonprofit and government entities, covering issues such as contract interpretation, construction delay, construction defects, mechanic's liens and stop notices
- Real estate litigation
- Complex commercial litigation, including corporate governance issues, contractual disputes, breach of fiduciary duty, unfair competition, covenants not to compete, fraud and deceptive trade practices, disparagement, dissolutions and other business claims
- Representation of public pension funds
- Representation of municipal government entities
- Representation of individuals and business entities in connection with tax controversies before the Internal Revenue Service, the Michigan Tax Tribunal and other courts
- Representation of estates, trusts, trustees and beneficiaries in contested estate, trust and probate administration matters

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GREGG A. NATHANSON is Of Counsel to the firm. Mr. Nathanson has concentrated his practice in the areas of real estate, business, finance, environmental and corporate law. He is a prolific publisher and speaker concerning real estate matters, including service as an editor or advisor for the Michigan Institute of Continuing Legal Education and the Michigan Land Title Association regarding real estate matters. Examples of matters he has been involved in include:

- Representation of hundreds of owners, lenders, developers, builders, corporate users, landlords, tenants, investors, local government agencies, contractors and property managers regarding real estate matters
- Lease negotiation and documentation
- Client assistance in real property management
- Environmental, including due diligence and compliance
- Real estate tax planning and economic development, including Section 1031 like kind exchanges
- Resolution of title disputes
- Real estate acquisitions and disposition

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MARK G. LANDAU is Of Counsel to the firm. Mr. Landau has focused his practice in the areas of estate planning, probate, estate administration, business succession planning and taxation. This has included such items as:

- Design and preparation of estate planning documentation, including Wills, revocable trusts, irrevocable trusts, special needs trusts, qualified personal residence trusts, charitable trusts, intentionally defective grantor trusts, grantor retained annuity trusts, and family limited partnerships
- Estate and gift tax counseling
- Buy-sell agreement design and implementation
- Estate and trust administration for individual and corporate fiduciaries
- Development of effective wealth transfer planning strategies and techniques

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STEPHEN L. GUTMAN is Of Counsel to the firm. Mr. Gutman concentrates his practice in the areas of taxation, business and corporate law and trusts and estates. This has included:

- Tax litigation
- Mergers and acquisitions
- All aspects of estate planning
- Trust and estate administration

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EUGENE W. PYATENKO is Of Counsel to the firm. He focuses his practice in the areas of real estate, litigation and dispute resolution, banking and finance, construction law, business and corporate, mergers and acquisitions and medical practice management. He is a prolific speaker concerning real estate matters, banking and business transactions, bankruptcy and international business. Examples of the matters he has been involved in include:

- General commercial, banking and business transactions
- Debtor/creditor rights
- Commercial litigation and construction lien law
- Bank/borrower relationships
- All aspects of bankruptcy reorganization, including debtor reorganization not undertaken in the context of formal bankruptcy proceedings
- Establishing contacts and trade between U.S. and foreign entities with an emphasis on enterprises located within the Former Soviet Union
- Bilateral trade negotiations
- Establish joint ventures and intermediary activity between public and private sectors, ministries and government officials

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EDWIN SADIK is Of Counsel to the firm. He works primarily in the areas of estate planning, probate litigation, taxation, probate, probate avoidance, tax planning strategies and trust and estate administration. Examples of his representation include:

- Sophisticated gift, estate, generation skipping transfer tax planning and documentation
- Wealth transfer planning and implementation
- Probate and trust administration
- Design and implementation of Wills, revocable trusts, irrevocable trusts, special needs trusts, charitable trusts and special trust agreements of various kinds
- Executive compensation arrangements, including deferred compensation and split dollar agreements
- Retirement distribution planning
- Closely held business succession and transition planning
- Business and personal income, gift and estate tax planning

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GEOFFREY L. SILVERMAN is Of Counsel to the firm. Mr. Silverman is a member of the firm's business and corporate, litigation and real estate practice groups. His practice areas include creditors' rights and bankruptcy, asset protection, sale and financing of real estate and businesses, shareholder and member disputes and transactional work. Mr. Silverman has served as an expert witness on various aspects of creditors' rights and asset protection. Examples of the types of matters he handles include:

- Work with clients to resolve complex business issues, including shareholder and member disputes, loan renegotiations and restructuring
- Representation of creditors, debtors and creditor committees in Chapter 7 and 11 bankruptcy cases
- Lender representation in the workout and bankruptcies of troubled business entities and their owners
- Complex business and commercial litigation
- General corporate representation

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SARA ZIVIAN ZWICKL is Of Counsel to the firm. Ms. Zwickl focuses on estate planning, probate court matters, trust administration and pre-marital/non-marital agreements. She also serves as a fiduciary for clients and as a mediator, helping parties to find peaceful resolutions to their disputes. Examples of her representation include:

- Probate matters such as modification of trusts, deceased estates, guardianships and conservatorships
- Advising and assisting fiduciaries in administering estates and trusts
- Estate planning tailored to each client's unique situation, including special needs planning

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LAWRENCE F. SCHILLER is Of Counsel to the firm. Mr. Schiller concentrates his practice on the topics of employee benefits, ERISA, pension and profit sharing plans, tax-qualified retirement plans and executive compensation law. Examples of the types of representation he has provided to clients include:

- Design, drafting, implementation and compliance documentation for all types of qualified and non-qualified employee benefit plans, including flexible benefit plans, medical expense reimbursement plans, medical savings accounts, group life insurance programs, split dollar insurance arrangements and similar programs
- Executive compensation arrangements, including deferred compensation and split dollar agreements
- ERISA interpretation, application and compliance
- Discrimination testing analysis
- Correction of plan compliance failures (IRS and DOL)
- Handling of government audits of plans (IRS and DOL)

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KENNETH F. POSNER is Of Counsel to the firm. Mr. Posner has focused his legal practice on the areas of real estate, commercial law and general litigation. Examples of his work include:

- Commercial litigation and alternative dispute resolution involving business contracts of all types
- Real estate litigation in Michigan and federal courts and administrative agencies
- Resolution of title disputes
- Landlord tenant litigation

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STEPHEN M. FELDMAN, IN MEMORIAM, was a partner of the firm and sadly passed away on April 24, 2026. He worked primarily in the areas of business planning, estate planning and taxation. On numerous occasions, he spoke to professional groups, including CPAs, on various tax topics. Examples of legal matters he handled for clients include the following::

- Estate administration and probate litigation
- Resolution of Internal Revenue Service and Michigan tax liability disputes including at Michigan Tax Tribunal; U.S. Tax Court, U.S. Court of Appeals and Administrative Offices of the Internal Revenue Service (collections, appeals)
- Preparation of Estate Plan documents including charitable planning
- Assisting buyers and sellers of businesses with planning for optimal tax results
- Tax controversy litigation
- Mergers & Acquisitions