COUZENS LANSKY
ATTORNEYS & COUNSELORS

2024
CRITICAL LEGAL DEVELOPMENTS

VisTaTech Center, Livonia, Michigan

November 4, 2024

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COUZENS LANSKY
ATTORNEYS & COUNSELORS

MISSION STATEMENT

Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C. is a respected law firm dedicated to meeting the legal needs of individual, corporate and business clients in diverse areas such as business and corporate law and planning, taxation, trust, estate and charitable planning, probate and trust administration, litigation and dispute resolution, real estate law, construction law, employment and labor law and banking and finance.

The firm is a proven catalyst for success, and takes pride in anticipating and responding to our clients' needs. We help our clients with their personal and business matters, offering practical and strategic advice drawn from our decades of experience with top level expertise and value-based personalized service. We continually seek to enhance our reputation for finding creative solutions to even the most complex legal issues.

As a firm, we strive to maintain an environment for our team members which is positive and productive. We demand the highest degree of ethical conduct from every employee of the firm.

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Agenda

8:30 - 8:40	Opening Remarks	Christopher M. Williams
8:40 - 9:20	Succession Planning for the Family Business	Christopher M. Williams
9:20 - 10:00	Mental Health Proceedings, Adult Guardianship and Adult Conservatorship: Coming to a Family Near You	Monica D. Moons and Chiara F. Mattieson
10:00 - 10:15	**Break**	
10:15 – 10:55	Tax Cuts and Jobs Act Sunset	Edwin Sadik and Gary Schwarcz
10:55 – 11:10	**Break**	
11:10 – 11:50	Estate Planning – Answers to Common Questions and Keeping Planning Flexible	Matthew A. Ferrara and Jeffrey D. Ryan
11:50 – 12:30	Michigan's Resurrected Earned Sick Time Act	David A. Lawrence

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.

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES
LANSING

PATRICK M. McPHARLIN
DIRECTOR

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.

Succession Planning for the Family Business

Christopher M. Williams

SUCCESSION PLANNING FOR THE FAMILY BUSINESS

I. INTRODUCTION

Why are we discussing this topic?

A. A major benefit of owning a family business is not only the opportunity to provide for your current family, but also to provide for future generations of your family.

B. If a family business owner fails to develop a plan regarding the future ownership and operation of the family business, then when that owner is no longer capable of running the business:

1. the business could fail,

2. the business could be sold for less than its potential value,

3. employees (including your family members) could lose jobs, or

4. family relationships could be strained or broken by the stress associated with trying to handle the business.

C. Studies show that 100% of all people will die, including 100% of all people that own family businesses.

D. If you want to provide for your family beyond this lifetime, then you must engage in succession planning.

II. DEFINITIONS

A. Succession Planning: The process by which the current owners develop a plan concerning the future ownership and operation of a business.

B. Family Business: A corporation or limited liability company whose ultimate beneficial owners are persons related by blood, marriage, or adoption.

Common Characteristics:

1. Closely held (i.e., having a single owner or a small group of owners).

2. Active management and control by family members.

3. Multi-generational.

4. Private.

C. Succession Planning for the Family Business: The process by which the current owners develop a plan concerning the future ownership and operation of a Family Business, whether by transferring it to the next generation or otherwise.

III. SESSION GOALS

A. To learn how to engage in Succession Planning for a Family Business.

B. To learn where to get help with Succession Planning for a Family Business.

C. To understand the process of transferring a Family Business.

IV. KEY ELEMENTS OF SUCCESSION PLANNING

A. Estate Planning.

1. Establishing what happens to the Family Business in the event of the owner's death.

2. Implemented through estate planning documents.

a. Will.

b. Trust.

B. Restrictions on Transfer of Ownership.

1. Establishing controls on how and when ownership can be transferred.

2. Essential if there is more than one owner in a Family Business.

3. Implemented through a buy-sell agreement.

a. Can be a stand-alone document.

b. In the case of a limited liability company, can also be provisions contained in an operating agreement.

c. Explains what happens when a Triggering Event occurs.

(1) Death.

(2) Disability.

(3) Retirement.

(4) Termination of Employment (with or without Cause).

(5) Involuntary transfer (e.g., bankruptcy, divorce, etc.).

(6) Third-party offers.

d. Explains how the price is determined and when it is paid.

C. Transfer of Ownership.

1. Gifting.

a. Can be documented through an instrument of gift.

b. Gift tax returns required for gifts in excess of the Annual Gift Tax Exclusion Amount which is $18,000 per person in 2024. This changes on an annual basis.

c. Lifetime Estate and Gift Tax Exemption for 2024 is $13.61 million per person. This changes on an annual basis.

d. Tax implications of gifting to a family member that is also an employee.

2. Sales.

a. Establishing the terms of a sale of a Family Business.

(1) Equity Sale: a transaction in which the ownership interest in a business is sold (e.g., stock or membership interest). Effectively, a sale of the business entity itself, not just its assets.

(2) Asset Sale: a transaction in which some or all of the assets of a business are sold.

(3) Merger: a transaction involving the combination of companies into a single company.

b. Implemented through transaction documents.

V. PRE-TRANSFER PLANNING

A. Pre-Transfer Planning is the planning that occurs prior to transferring all or any part of a Family Business.

B. Pre-Transfer Planning should begin as soon as possible and preferably not immediately prior to a transfer or even a negotiation to transfer the Family Business.

C. Key Pre-Transfer Planning Activities.

1. Find qualified professional advisors to assist in Succession Planning.

a. Types of advisors.

(1) Certified public accountants.

(2) Estate planning attorneys.

(3) Business attorneys.

(4) Financial advisors.

(5) Insurance professionals.

b. Professional advisors help clients by identifying potential problems and any biases and blind spots.

c. Professional advisors can assist in the pre-transfer planning process.

2. Evaluate goals and objectives.

a. Financial considerations.

(1) Do the owners need to receive a certain economic return from a transfer?

(2) If so, what is that economic return?

b. Timing considerations.

(1) When should a transfer occur?

(2) Should a transfer occur incrementally or all at once?

c. Transferee considerations.

(1) Family.

(a) Who is qualified to run the Family Business?

(b) How will family dynamics be affected if only certain family members will be owners?

(2) Management or key employees.

(a) Do they have the financial resources to purchase?

(b) Can they make the transition from employee to owner?

(3) Third party.

(a) Is it in the family's best interest for the Family Business to be sold?

(b) What will be the impact on the family if the Family Business is sold?

(4) What documents need to be prepared?

(a) Estate planning documents.

(b) Buy-Sell Agreement.

(c) Transfer documents.

3. Prepare an estate plan that is consistent with your goals and objectives and regularly review it for any needed updates (upon the occurrence of a major event and at least every five years).

4. Evaluate and support the value of the Family Business.

    a. Value the business.

        (1) Professional appraisal.

        (2) Consider comparables, industry multipliers, liquidation value, etc.

        (3) Review and evaluate financial statements.

            (a) Consider from a Quality of Earnings perspective (i.e., a report that makes normalizing adjustments to reported EBITDA - Earnings before interest, taxes, depreciation, and amortization).

            (b) Consider from a Net Working Capital perspective (i.e., current assets minus current liabilities).

            (c) If the Family Business is being sold to a third party, financial statements need to show the company's financials trending in the right direction. The 6-month window before closing is critical.

    b. Is there a gap between the owner's perceived value and what can be supported?

    c. Importance of valuation.

        (1) Critical for gifting purposes.

        (2) Critical to make sure that you are getting fair value in the case of a sale.

5. Keep reliable books and records.

    a. Maintain and update corporate (in the case of a corporation) and company (in the case of an LLC) record books.

        (1) Corporations.

            (a) Minutes of annual meetings.

            (b) Stock certificates.

            (c) Stock transfer ledger.

        (2) LLCs.

            (a) Operating agreements.

            (b) Amendments to Operating Agreements.

(c) Current members must be identified in the Operating Agreement as amended.

b. Benefits.

(1) Needed in case of an IRS audit.

(2) Buyers will want this information.

(3) Family Members who become owners will need this information.

6. Review and organize contracts.

a. Have signed copies of all contracts.

b. Assignability of contracts and permits.

c. Approved vendor considerations.

7. Review employee matters.

a. Who would a Buyer want to retain?

b. How will Seller retain key employees in anticipation of a sale?

c. Are employees (including family member owners) subject to confidentiality, non-solicitation, and non-competition agreements?

8. Evaluate tax implications of transfers.

a. What is the tax impact of a transfer?

(1) Tax impact of a gift.

(2) Tax impact of structuring a transfer of the Family Business as an equity sale or an asset sale.

b. Does the Seller's entity structure maximize tax advantages?

c. All succession planning should involve a qualified certified public accountant.

D. In the case of a sale of a Family Business, a Seller will <u>not</u> maximize value if their house isn't in order.

1. Buyers will be spooked and pay less or cancel the deal if problem areas are identified and can't be adequately explained or quickly resolved.

2. Transaction costs will be higher as expedited professional services will be required to meet transaction deadlines.

VI. PRELIMINARY TRANSACTION MATTERS

A. What type of transaction is involved?

B. Source of Offers.

1. Directly from third-party buyers.

a. Strategic buyers.

(1) Make us better.

(2) Make them better.

b. Financial buyers.

(1) Investment.

(2) What is their experience in the business?

(3) How long will they be around?

(4) How have their prior deals gone?

2. Management or key employees.

a. How will they pay?

b. Employee vs owner mentality.

3. Family.

4. Investment bankers and business brokers.

C. Non-disclosure agreements and other restrictive covenants.

1. Sellers should have a non-disclosure agreement in place before disclosing sensitive or proprietary information to prospective Buyers.

2. Depending on the circumstances, it may be necessary to have additional restrictive covenants in place.

a. Non-solicitation agreements with respect to employees.

b. Non-solicitation agreements with respect to vendors, suppliers, and/or customers.

c. Non-competition agreements.

D. Letter of Intent.

1. An overview of general transaction terms.

2. Sets the ground rules.

3. "No shop provision."

4. It is important to have a clearly defined closing timetable.

5. Non-binding.

6. Break-up fee.

VII. PRE-CLOSING MATTERS

A. Due Diligence.

1. Due diligence is the process by which a Buyer studies a Seller's business and a Seller confirms a Buyer's ability to complete a transaction.

2. Areas that a Buyer should examine include:

a. Existence of, title to, liens upon, and condition of assets.

b. Uniform Commercial Code (UCC) searches.

c. Financial statements (both audited and unaudited).

d. Accounts receivable and accounts payable reports.

e. State and federal tax returns.

f. Contracts (both written and verbal), warranties, permits, and licenses.

g. Real property, including title, encumbrances, zoning, condition, and environmental matters.

h. Intellectual property, including copyrights, trademarks, patents, and domain names.

i. Insurance policies and claim information.

j. Litigation and claims including litigation searches.

k. Labor and employment matters.

l. Benefit plans and arrangements.

m. Seller organizational documents and minute books.

3. Areas that a Seller should examine include:

    a. Buyer organizational documents.

    b. Litigation and claims including litigation searches.

4. Professional advisors should assist and coordinate in the due diligence process.

B. Pre-Closing Notices, Filings, and Forms which may be applicable in a sales transaction.

1. Michigan Unemployment Insurance Agency UIA 1027 - Business Transferor's Notice to Transferee of Unemployment Tax Liability and Rate.

2. UIA 1395 - Clearance of Account.

3. Michigan Department of Treasury Form 5156 - Request for Tax Clearance Application.

4. Other Notices.

    a. Worker Adjustment and Retraining Notification (WARN) Act notices.

    b. Hart-Scott-Rodino Antitrust Improvements Act of 1976.

    c. Notices to unions or employees.

    d. COBRA notices.

    e. Notices to lenders, customers and suppliers or otherwise required under existing contracts.

VIII. KEY TERMS AND CONDITIONS OF THE TRANSACTION

A. Gift Transaction.

1. Value of the gift.

2. Terms of Buy-Sell Agreement.

B. Sales Transaction.

1. Purchase Price and Payment.

    a. Entire amount paid.

    b. Portion paid.

        (1) Down payment.
        (2) Promissory note with interest.
        (3) Collateral for repayment.

c. Adjustments to purchase price.

(1) Inventory adjustments.

(2) Accounts receivable adjustments.

(3) Net working capital adjustments.

(4) Earnouts.

d. Allocation of purchase price for tax purposes (IRS Form 8594) if an Asset Sale or treated as an Asset Sale for tax purposes.

2. Included and Excluded Assets.

a. All assets included less specific excluded items.

b. Only specified assets are included and everything else is excluded.

c. Common excluded assets can include:

(1) Cash and cash equivalents.

(2) Bank accounts.

(3) Insurance policies.

(4) Prepaid deposits.

(5) Corporate minute books and records.

(6) Tax returns, refunds, and credits.

(7) Vehicles.

3. Assumed and Excluded Liabilities.

a. Most common: Only certain liabilities are included and everything else is excluded.

b. Less common: All liabilities included except for specific excluded liabilities.

c. Identify assumed liabilities. Will a maximum cap be applied?

4. Consents and Liens.

a. Approval of third-parties.

(1) Are any contracts, licenses, or permits to be assigned?

(2) Assignment provisions and processes should be reviewed.

b. Discharge of liens.

(1) UCC terminations.

(2) Payoff letters.

5. Employment Matters.

a. Termination of employees by Seller.

b. Hiring of employees and/or consultants by Buyer.

(1) Employment agreements.

(2) Consulting agreements.

c. Employee benefit plans.

6. Real Estate Matters.

a. Leases.

(1) Termination with new lease.

(2) Assignment and assumption of lease.

(3) Proration of rent.

(4) Security deposit.

b. Purchase of real estate.

c. Environmental matters.

7. Representations and Warranties.

a. Who is making them?

(1) Owners.

(2) Entity.

b. Scope.

c. Knowledge.

d. Survival periods.

(1) Forever.

(2) Expiration of statute of limitations.

(3) Specific time period (e.g., 12 - 36 months).

e. Fraud.

f. Representation and warranty insurance.

8. Indemnification.

a. Scope.

(1) Representations and warranties.

(2) Covenants.

(3) Line item indemnities. Watch out for double dipping!

b. Cap.

c. Basket.

(1) Deductible.

(2) Tipping.

d. Escrows and holdbacks.

e. Right to offset.

f. Sandbagging.

g. Materiality scrape.

9. Timing of Closing.

a. Sign and delay.

b. Sign and close.

10. Industry Specific Issues (Examples).

a. Transfer of patient records.

b. Government contracts.

IX. KEY TRANSACTION DOCUMENTS

A. Gift Transaction.

1. Instrument of gift.

2. Certificates representing ownership being gifted.

a. Stock certificates.

b. Membership Interest (or Membership Unit) certificates, if applicable.

3. Assignment separate from certificate.

4. Buy-Sell Agreement.

5. Corporate resolutions.

B. Sales Transaction.

1. Purchase Agreement.

a. Types.

(1) Stock purchase agreement.

(2) Membership Interest (or Membership Unit) Purchase Agreement.

(3) Asset purchase agreement.

b. The most important document.

c. One size does not fit all.

d. Needs to be reviewed from both a Seller's perspective and a Buyer's perspective.

e. Drafter has the advantage.

f. Needs to be reviewed by professional advisors.

2. Disclosure Schedules.

a. Attached to the Purchase Agreement.

b. Provides qualifications and exceptions to representations and warranties.

c. Needs to be accurate and complete to avoid liability.

d. A key area where professional advisors can help.

3. Financing and Security Documents.

a. Promissory note.

b. Security agreement.

c. UCC financing statement.

d. Mortgage.

e. Personal guaranty.

f. Collateral assignment of life insurance.

4. Closing Statement.

    a. Wire instructions.

    b. Payoff letters.

    c. Professional advisor fees and commissions.

5. Ancillary Documents (depending on the type of transaction).

    a. Bill of Sale (Asset Sale).

    b. Stock or Membership Interest (or Membership Unit) certificates and Assignments separate from certificate (Equity Sale).

    c. Vehicle titles endorsed for transfer.

    d. Assignment and assumption agreement.

    e. Escrow agreement.

    f. Employment agreements / consulting agreements.

    g. Confidentiality, non-solicitation, and non-competition agreements.

    h. Bring-down certificates.

    i. Secretary's certificates for entity parties.

    j. Corporate resolutions for entity parties.

    k. Resignations.

    l. Certificate of good standing for entity parties.

    m. Amendment to articles to change name, if acquired.

    n. Termination of assumed names / Certificate of assumed name.

    o. Real estate acquisition documents.

    p. Lease assignments / terminations.

X. CLOSING MATTERS

A. Gift Transaction.

1. Execute the transaction documents.

2. Deliver the transaction documents to the applicable parties.

B. Sales Transaction.

1. Execute the transaction documents.
2. Deliver the transaction documents to the applicable parties.
3. Satisfaction of Conditions Precedent.
4. Authorization and Approvals.
5. Insurance Matters.
    a. Seller: What insurance should be adjusted?
    b. Buyer: Is insurance in place?
6. Banking Matters.
    a. Ensure all bank financing and loan documents are prepared.
    b. Remove terminated employees from bank accounts being retained.
    c. New signature cards will be needed for bank accounts being transferred.
7. Employment Matters.
    a. Notice to employees.
    b. Benefit plans and payroll in place for new employees.
8. Real Estate Matters.
    a. Change of utilities.
    b. Transfer keys, codes, combinations, and garage door openers.
    c. Ensure all real estate documents are prepared if real estate is included.

XI. POST-CLOSING MATTERS

A. Gift Transaction.

1. Update corporate or company record book, as applicable.
2. Update stock transfer records, if applicable.
3. Cancel surrendered stock certificates, if applicable.
4. Update operating agreement, if applicable.

B. Sales Transaction.

1. Post-Closing Adjustments to the Purchase Price.

    a. Follow necessary procedures.

    b. Pay attention to deadlines.

2. Post-Closing Covenants (Examples).

    a. Access to records.

    b. Retention of records.

    c. Mail.

    d. Litigation assistance.

3. Tax Filings.

    a. Michigan Department of Treasury Form 5156 - Request for Tax Clearance Application.

    b. Michigan Department of Treasury Form 163 - Notice of Change or Discontinuance.

    c. IRS Form 8594 - Asset Acquisition Statement under IRC Section 1060.

    d. UIA Schedule B - Successorship Questionnaire. To be completed by a Buyer.

    e. Form UIA 1772 - Discontinuance or Transfer of Payroll or Assets in Whole or Part. To be completed by Seller.

4. Announcements.

5. Industry Specific Filings (Examples).

    a. Statutorily required notice concerning sale of a medical or dental practice.

    b. Statutorily required notice concerning transfer of patient records.

XII. CONCLUSION

A. Succession Planning for the Family Business: The process by which the current owners develop a plan concerning the future ownership and operation of a Family Business, whether by transferring it to the next generation or otherwise.

B. Key Elements of Succession Planning:

    1. Estate Planning.

    2. Restrictions on Transfer of Ownership (through a Buy-Sell Agreement).

    3. Transfer of Ownership via a gift or sale.

C. Engage in Pre-Transfer Planning

    1. Find qualified professional advisors.

    2. Evaluate goals and objectives (e.g., financial, timing, and transferee considerations).

    3. Prepare an estate plan and regularly review and update it (at least every five years).

    4. Evaluate and support the value of the Family Business.

    5. Keep reliable books and records.

    6. Review and organize contracts.

    7. Review employee matters.

    8. Evaluate tax implications of transfers of all or part of the Family Business.

D. Be prepared to review any offers concerning the Family Business.

    1. Non-disclosure agreements and restrictive covenants.

    2. Letter of intent.

E. Be prepared to handle pre-closing matters.

    1. Due Diligence.

    2. Pre-Closing Notices, Filings, and Forms.

F. Develop the key terms and conditions of a transfer transaction.

    1. Gift.

        a. Value of the gift.

        b. Terms of Buy-Sell Agreement.

    2. Sale.

        a. Purchase price and payment.

        b. Included and excluded assets.

c. Assumed and excluded liabilities.

d. Consents and Liens.

e. Employment matters.

f. Real Estate matters.

g. Representations and Warranties.

h. Indemnification.

i. Timing of Closing.

j. Industry Specific Issues.

G. Prepare key transaction documents.

1. Gift Transaction.

a. Properly document gift transactions of ownership to family members.

b. Prepare a Buy-Sell Agreement if a Family Business is owned by more than one owner.

2. Sales Transaction.

a. Purchase Agreement.

b. Disclosure Schedules

c. Financing and Security Documents.

d. Closing Statement.

e. Ancillary Documents.

H. Handle closing matters.

1. Execution and delivery of closing documents.

2. Satisfaction of conditions precedent.

3. Authorizations and approvals.

4. Insurance matters.

5. Banking matters.

6. Employment matters.

7. Real Estate matters.

I. Handle any post-closing matters.

1. Updating corporate or company record books, as applicable.
2. Post-Closing adjustments and covenants.
3. Tax filings.
4. Announcements.
5. Industry specific filings.

Mental Health Proceedings, Adult Guardianship and Adult Conservatorship: Coming to a Family Near You

Monica D. Moons and Chiara F. Mattieson

MENTAL HEALTH PROCEEDSINGS, ADULT GUARDIANSHIP AND ADULT CONSERVATORSHIP: COMING TO A FAMILY NEAR YOU

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 themself 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. 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 themself, 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 $200/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 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/licenseid/driverassessment#:~: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.

Tax Cuts and Jobs Act Sunset

Edwin Sadik and Gary Schwarcz

TAX CUTS AND JOBS ACT OF 2017 ("TCJA") SUNSET

I. ESTATE AND GIFT TAX

Basic Exclusion Amount.

A. Current under TCJA:

The Basic Exclusion Amount (BEA) represents the value of assets a taxpayer can transfer in their lifetime before triggering estate and gift tax. Under the TCJA, the BEA for taxpayers who die in 2024 or 2025 is $13.61M per person and $27.22M per married couple.

A 40% tax is assessed on gifts and transfers in excess of the BEA.

B. BEA after TCJA Sunset:

Unless Congress acts, the BEA will automatically revert in 2026 to $5M per person and $10M per couple after the TCJA sunset. The amounts will be indexed for inflation. In 2026, the BEA will revert to approximately $7M per person and $14M per couple.

C. Planning Recommendations:

Pursuant to the 26 CFR § 20.2010-1(c), a decedent's estate can use the unified credit equal to the basic exclusion amount in effect during the year of the decedent's prior adjusted taxable gifts. In other words, there is no claw back on gifts made before the BEA sunsets.

In light of the anti-claw back regulation, consider using up the BEA before it expires. Planning should be done in light of basis management. Key planning options to explore include: outright gifts; grantor retained annuity trusts (GRATs); and spousal lifetime access trusts (SLATs).

II. INDIVIDUALS AND FAMILIES

A. Marginal Tax Rates.

1. Current under TCJA:

   10%, 12%, 22%, 24%, 32%, 35%, and 37%.

2. Marginal Tax Rates after TCJA sunset:

   Marginal rates will revert to previous brackets: 10%, 15%, 25%, 28%, 33%, 35%, and 39.6%. The income ranges applicable to each bracket are annually adjusted for inflation.

3. Planning Recommendations:

   Assess both the change in brackets and the change in income levels associated with each bracket. Many taxpayers will have income in higher brackets post-TCJA, but there are some taxpayers who could end up being taxed in a lower bracket post-TCJA.

   Taxpayers who expect to be in a higher bracket post-TCJA should accelerate income to take advantage of the lower brackets prior to the TCJA sunset.

B. Child Tax Credit.

   1. Current under TCJA:

      Maximum Credit: $2,000.

      Maximum Additional Credit (refundable portion): $1,700.

      Formula for Additional Credit: 15% of earned income above $2,500.

      Phaseout: $200,000/$400,000.

   2. Child Tax Credit after TCJA sunset:

      Maximum Credit: $1,000.

      Maximum Additional Credit (refundable portion): $1,000.

      Formula for Additional Credit: 15% of earned income above $3,000.

      Phaseout: $75,000/$110,000.

C. Personal Exemption.

   1. Suspended under TCJA.

   2. Reverts to Pre-TCJA amount and then adjusted for inflation.

      For 2017, prior to TCJA, the amount was $4,050.

D. Standard Deduction.

   1. Standard Deductions available under TCJA:

      TCJA nearly doubled the standard deduction to $12,000/$24,000. These amounts are adjusted annually and are $14,600/$29,200 for 2024.

   2. Reverts to Pre-TCJA amounts and then adjusted for inflation:

      For 2018, prior to TCJA, the standard deduction was $6,500/$13,000.

3. Planning Recommendations:

   Prepare clients to start itemizing again and keep records.

E. Itemized Deductions.

1. Charitable Contributions:

   a. Limitation under TCJA.

      The TCJA temporarily increased the AGI limit for cash donations made to public charities from 50% to 60%. Other limitations based on the form of the donation and the recipient organization were unchanged by the TCJA.

   b. Limitation after TCJA sunset.

      Cash contributions to public charities will generally be limited to 50% of the taxpayer's AGI.

   c. Recommendations.

      Consider deferring contributions in light of the change in the standard deduction and the charitable contribution limit.

2. State and Local Tax ("SALT") Deduction:

   a. Limitation under TCJA.

      Taxpayers who itemize can deduct up to $10,000 in state and local income or sales tax, and property taxes, as well as foreign income taxes (but not foreign real property taxes). Property taxes associated with carrying on a trade or business are fully deductible (i.e., not subject to a cap).

   b. Limitation after TCJA sunset.

      The $10,000 cap on this deduction will not apply and hence taxpayers will be able to deduct all eligible state and local income, sales (in lieu of income), and property taxes, as well as foreign income taxes. Taxpayers will also be able to deduct foreign real property taxes.

   c. Recommendations.

      Defer payments of Q4 obligations to Q1.

3. Mortgage Interest Deduction:

   a. Limitation under TCJA.

      Taxpayers who itemize their deductions may deduct interest paid on the first $750,000 ($375,000 for married filing separately) of mortgage debt (combined for first and second homes). The limitation applies to new loans incurred after December 15, 2017.

Taxpayers with mortgage debt incurred on or before December 15, 2017, who itemize their deductions may deduct interest on the first $1 million ($500,000 for married filing separately) of combined mortgage debt. No deduction is allowed for interest payments made for new or existing home equity debt if such debt is used for purposes unrelated to the property securing the loan.

b. Limitation after TCJA sunset.

The $750,000 limitation will increase to $1 million of combined (first and second home) acquisition debt regardless of when the debt was incurred. The interest on the first $100,000 of home equity debt will also be deductible, regardless of whether or not the taxpayer incurred the debt to finance costs associated with the home.

c. Recommendations.

Defer home equity loans.

4. Personal Casualty Loss:

a. Limitation under TCJA.

Taxpayers who itemize their deductions can generally claim a deduction only for noncompensated personal casualty and theft losses associated with a disaster and theft Casualty losses are generally deductible if they exceed $100 per casualty, and to the extent aggregate net casualty losses exceed 10% of adjusted gross income (AGI).

b. Limitation after TCJA sunset.

Taxpayers will be able to claim an itemized deduction for noncompensated personal casualty and theft losses regardless of whether the losses result from a federally declared disaster.

5. Gambling Losses:

a. Expansion under TCJA.

Taxpayers who itemize their deductions can deduct gambling losses, provided those losses do not exceed gambling winnings included in gross income. Gambling losses include deductible expenses incurred in carrying on the gambling activity, for both recreational and professional gamblers.

b. Contraction after TCJA sunset.

Gambling losses will no longer include expenses incurred in carrying on the gambling activity. Professional gamblers will be able to deduct ordinary and necessary nonwagering business expenses.

6. Itemized Miscellaneous Expenses:

    a. Disallowance under TCJA.

        There is no itemized deduction for certain miscellaneous expenses such as unreimbursed employee expenses or tax preparation fees.

    b. Limitation after TCJA sunset.

        Individual taxpayers who itemize their deductions will be able to deduct miscellaneous expenses to the extent that such expenses collectively exceed 2% of their AGI. Expenses subject to the 2% floor will include unreimbursed employee expenses, tax preparation fees, and certain other expenses.

    c. Recommendations.

        Defer miscellaneous expenses.

7. Limit on Itemized Deductions:

    a. Current rule.

        The total amount of itemized deductions that can be claimed by a taxpayer is the sum of all allowable itemized deductions and there is no overall limitation on itemized deductions.

    b. Limit after TCJA sunset.

        For taxpayers with AGI above certain thresholds, the total amount of itemized deductions will be reduced by 3% of the amount by which their AGI exceeds the threshold. (For 2018, before the TCJA, the thresholds would have been $267,700/$320,000).

        The total reduction will be capped at 80% of the deductions. Itemized deductions not subject to the limitation include deductions for medical and dental expenses, investment interest, charitable contributions, casualty and theft losses, and wagering losses.

III. AMT

A. Provisions under TCJA.

The TCJA increased the AMT's exemption and dramatically raised the exemption's phaseout threshold.

For 2024, the AMT exemption amounts are $85,700/$133,300. Phases down at $578,150/$1,156,300.

In 2017, 5 million taxpayers were subject to the AMT, or 3 percent of returns. In 2023, only 200,000 taxpayers were subject to the AMT.

Before TCJA, 10 million taxpayers had to calculate their potential AMT liability, while only roughly 5.7 million taxpayers had to in 2021.

B. Reverts to Pre-TCJA amounts and then adjusted for inflation.

More taxpayers will be subject to AMT.

For 2018, prior to the TCJA, the exemption amounts were $55,400/$86,200. Phaseouts were $123,100/$164,100 (adjusted for inflation).

IV. BUSINESS PROVISIONS

A. 199A Qualified Business Income Deduction.

1. Current provision under TCJA:

   The TCJA added a deduction for taxpayers equal to 20% of qualified business income for qualified pass-through entities (from sole proprietorships, partnership, limited liability companies, or S corporations) referred to as the "pass-through deduction" (section 199A). The deduction is generally limited to the greater of 50% of W-2 wages, or 25% of W-2 wages plus 2.5% multiplied by depreciable property.

   Specified service trade or businesses (SSTBs) (such as healthcare professionals, law, accounting, actuarial science, performing artists, consulting, athletics, financial services, brokerage services, including investing and investment management, trading, or dealing in securities, partnership interests, or commodities, and any trade or business whose principal asset is the reputation or skill of one or more of its employees) generally may not claim the deduction except in specific circumstances.

2. Provision after TCJA sunset:

   The 199A deduction will expire. As a result, pass through income will be taxed without the benefit of this deduction.

3. Recommendations:

   Consult with tax advisers to determine ways to structure these businesses to maximize this deduction. Should qualifying entities take advantage of this tax savings opportunity while they still can?

   Will tax rates be higher in the future? Should you alternatively defer deductions? Accelerate income?

   Should you consider converting to a C corporation?

B. 168 Bonus Depreciation.

1. Expansion under TCJA:

   A taxpayer generally must capitalize the cost of property used in a trade or business or held for the production of income and recover such cost over time through annual deductions for depreciation or amortization. The TCJA temporarily allowed full expensing (i.e., 100% bonus depreciation) through 2022.

2. Phase out:

   The 100% bonus depreciation deduction began to phase out after 2022, decreasing by 20 percentage points each year until it reaches zero in 2027. Bonus depreciation is now limited to:

   60% for property placed in service after Dec. 31, 2023, and before Jan. 1, 2025;

   40% for property placed in service after Dec. 31, 2024, and before Jan. 1, 2026;

   20% for property placed in service after Dec. 31, 2025, and before Jan. 1, 2027; and

   0% (bonus expires) for property placed in service after Dec. 31, 2026.

   After 2026, businesses will generally capitalize the cost of property used in a trade or business or held for the production of income and recover such cost over time through annual deductions for depreciation or amortization without the use of bonus depreciation.

3. Recommendations:

   Bonus depreciation deduction is available, in part, until December 31, 2026. It is still a beneficial deduction for businesses that own machinery, computer systems, software, certain vehicles, equipment or office furniture.

C. 163J Business Interest Deduction.

1. Contraction under TCJA:

   After the TCJA, every business, regardless of its form, is generally subject to a disallowance of a deduction for net interest expense in excess of 30% of the business's adjusted taxable income (ATI). ATI is calculated by taking the taxable income for the year and then adding and subtracting specific amounts, such as deductions for interest and net operating losses. The business interest limitation generally applies at the taxpayer level. However, for partnerships and S corporations, the limitation applies at the entity level.

2. Provision after TCJA sunset:

   The limitation is set to expire after 2025.

D. Research and Experimentation Costs.

1. Amortization under TCJA:

   For tax years beginning prior to January 1, 2022, businesses could fully deduct research and experimentation expenses in the year the expenses were incurred. For tax years beginning after December 31, 2021, businesses are required under the TCJA to amortize research and experimentation (R&E) expenses over five years.

2. Not slated to sunset after TCJA:

E. Excess Business Loss Limitation.

1. Limitations under TCJA:

   For taxpayers, other than C corporations, a deduction in the current year for excess business losses is temporarily disallowed, originally through 2026 by the TCJA and subsequently extended to 2028 by the Inflation Reduction Act of 2022. In addition, such losses are treated as an NOL carryover to the following year.

   An excess business loss is the amount that a taxpayer's aggregate deductions attributable to trades and businesses exceed the sum of (1) aggregate gross income or gain attributable to such activities, and (2) $305,000 ($610,000 if married filing jointly) in 2024. For partnerships and S corporations, this provision is applied at the partner or shareholder level.

2. Limitations after TCJA sunset:

   Businesses will be allowed to carry over an NOL to certain past and future years. In 2026, the two-year NOL carryback and the 100% NOL carryforward rules will apply.

F. NOL Limitations.

1. Current provision under TCJA:

   Prior to the enactment of the TCJA, net operating losses were fully deductible and could be carried back two years and forward 20 years. Under the TCJA, it was then limited to 80% of taxable income, and was no longer allowed to be carried back. It also lifted the 20-year limit on carry-forwards, essentially making such carry-forwards indefinite.

2. Limitations after TCJA sunset.

   This provision will expire at the end of 2028.

G. Corporate Tax Rate.

1. Rate reduction under TCJA:

   The TCJA reduced the corporate tax rate from 35% to 21%.

2. Not slated to sunset after TCJA:

   The corporate tax rate of 21% will not sunset after TCJA.

3. Recommendations:

   Should you rethink business structure because of 21% rate?

Estate Planning – Answers to Common Questions and Keeping Planning Flexible

Matthew A. Ferrara and Jeffrey D. Ryan

ESTATE PLANNING

ANSWERS TO COMMON QUESTIONS AND KEEPING PLANNING FLEXIBLE

I. LIVING TRUSTS

A. Living Trust vs beneficiary designations:

What form of transfer provides the client with the necessary flexibility? For clients with simple balance sheets and uncomplicated distribution plans using beneficiary designations, transfer on death designations, and other transfers by "operation of law" may be sufficient. However, beware of favoring simplicity over security and flexibility.

1. Unintended consequences of beneficiary designations.

    a. Assets transfer directly to beneficiaries without any supervision or guardrails.

    b. Limited opportunity to address unexpected changes in circumstance.

    c. Distributions to minor beneficiaries will often require the appointment of a Conservator.

    d. If primary and contingent beneficiary designations are not done properly, it can result in unexpected distribution of assets.

2. Unexpected probate.

    If named beneficiaries predecease the original account owner, a probate proceeding will be needed to transfer assets to whomever will inherit.

3. Benefits of a Living Trust.

    a. Provides structure for making distributions and gives the Trustee discretion to allocate assets to best achieve client goals.

    b. Ensures that a Trustee can oversee distributions to minors, rather than needing a court appointed Conservator.

    c. The impact of a primary beneficiary's death is defined in the terms of the Trust and even if there is a failure of beneficiaries, the Trustee is still responsible for distributing assets to remote contingent beneficiaries without the need for a probate proceeding.

B. Living Trust and minor beneficiaries.

When planning for clients with minor beneficiaries, a Living Trust is invaluable because it allows for administration and supervision of distributions without the need for oversight from the probate court.

1. Who controls the monies?

    a. The Trustee is responsible for managing assets and ensuring they are properly invested for the beneficiary.

    b. It is possible for the terms of the Trust to provide additional flexibility, allowing parents, guardians, or even the beneficiaries with influence over the distribution of funds, if appropriate.

2. Who is the Trustee and who is the Guardian?

    a. The Trustee is the person who is entrusted with managing assets and has the ultimate decision-making authority in the case of distributions.

    b. The Guardian is responsible for the day-to-day raising of children.

    c. The Guardian and Trustee can be the same person, but at a minimum should be people who are able to work together for the overall well-being of the minor beneficiaries.

3. When does the minor beneficiary control?

    a. When does the client think it's appropriate?

    b. Principal distributions may be made over time to ensure that the beneficiary has the maturity to handle their inheritance.

    c. A beneficiary may serve as co-Trustee or sole Trustee after specific milestones.

4. Conservatorship for assets in excess of $50,000 for a minor beneficiary (new Michigan law).

C. Living Trust and charitable bequests.

Living Trusts can also be useful when a client has a charitable inclination to ensure that bequests provide tax savings and recipients use the bequests as intended.

1. Beneficiary designations on retirement plan accounts.

    a. As with individual beneficiaries, charitable beneficiaries receive assets via beneficiary designation without supervision.

    b. The scope of control over such designations is generally limited to the percentage of an account which passes to the beneficiary.

    c. Allowing charitable designations to pass through a Trust provides the Trustee with the ability to oversee the use of funds and provides the client with much more flexibility regarding how bequests are used and to whom they are made.

2. Use of IRA/IRD to fund charitable bequests in the Trust.

   By naming the Living Trust as the beneficiary of IRA/IRD assets, clients give the Trustee an additional tool to maximize benefit to the various charitable and non-charitable beneficiaries. If the terms of the trust provide the Trustee with adequate direction, authority and flexibility, it can allow the Trustee to allocate qualified assets to satisfy charitable bequests, reserving assets with less tax implications to satisfy distributions to non-charitable beneficiaries.

D. Providing added protection to beneficiaries.

   The terms of a Living Trust, broadly, are designed to ensure that beneficiaries receive the enjoyment of what the client chooses to leave to them, regardless of outside circumstances which can limit that enjoyment. A well drafted Trust will provide strong protection against the majority of events which could limit a beneficiary's enjoyment, to the extent that assets are held in trust for the beneficiary.

   1. Protection from self.

      a. Minor.

      b. Incapacitated.

      c. Substance abuse.

      d. Bankruptcy.

   2. Protection from outside problems.

      a. Divorce.

      b. Creditor claims.

         (1) Professional liabilities.

         (2) General liabilities and personal injury.

      c. Undue influence.

E. Single joint Trust vs. 2 separate Trusts.

   1. Joint Trust.

      a. Generally easier to administer. The surviving spouse does not need to worry about an additional annual tax return, Schedule K-1s, and keeping track of assets in multiple accounts.

      b. Not irrevocable on the first death. If there are changes in circumstances following the death of one Grantor, the surviving spouse can easily modify the dispositive provisions to address those changes.

      c. Step-up in basis on all assets on the death of the survivor.

2. Reasons to still have a 2 separate Trust plan.

    a. Blended family.

        (1) Provide for the spouse.

        (2) Protect/maintain an interest for children.

    b. Protection of the surviving spouse against undue influence.

    c. Expert third-party trustee can control asset management while the surviving spouse or other beneficiaries enjoy the benefit of the assets.

    d. Concern for control of a family business.

    e. Liability protection.

        (1) Assets of first spouse to die are held in trust for the surviving spouse to provide protection from surviving spouse's liabilities.

        (2) Physicians/attorneys/accountants/business owners - wherever there may be significant exposure to personal liabilities.

    f. Estate tax planning.

        (1) The 2024 estate tax exemption amount is $13,610,000.

        (2) With the introduction of portability in 2013, the use of 2 separate Trusts for estate tax planning has been less prevalent. IRC Section 2010(c)(4).

        (3) Given the potential sunset of the Tax Cuts and Jobs Act (TCJA) and the associated decrease in the estate tax exemption, it is possible that the use of separate Trusts will see a resurgence.

    g. Inherited assets.

        (1) One spouse maintains a separate Trust with assets inherited from that spouse's family.

        (2) Beneficiaries may only include the issue of the Trust settlor and not the Trust settlor's spouse.

II. <u>DURABLE POWER OF ATTORNEY - NEW FOR 2024</u>

A. New Michigan statutory changes to powers of attorney.

B. What powers to provide to the attorney in fact.

    1. General powers for a durable power of attorney.

    2. Powers requiring specific authorization under the statute.

C. Immediate vs. springing power of attorney.

1. Can provide for immediate authority for the designated individual(s) to act (eliminating the need for affidavits of incapacity to be obtained).

2. Otherwise often required to obtain two affidavits from doctors.

III. ESTATE PLAN ADMINISTRATORS

A. Who to name?

1. Guilt is a wasted emotion. It is more important to name people who the client trusts than to worry about whether someone will feel slighted or left out.

2. If there are children or others who the client doubts will follow the instructions, they should not be named.

B. Single designee vs. multiple designees.

1. If one person can handle the job, is it necessary to have two people named jointly?

2. What benefit is the client seeking to gain by naming multiple designees?

C. Consistency across the plan.

1. Consistency is great because those people named will be able to act with limited additional coordination, but consistency is not always what is best for the client.

2. Having different people make legal and medical decisions is very common. Additionally, having one person named as Attorney in Fact to handle shorter term decision making while another is named as Trustee to manage asset management is common as well.

IV. PLANNING FOR BUSINESS INTERESTS

A. Buy sell planning.

1. Ensuring the next generation is invested in the business.

2. Ensuring that there is a plan for how the business passes to a future owner, whether through purchase or inheritance.

B. Lifetime business succession planning – you don't need to work forever.

1. Multiple strategies are available for structuring buy outs and sales of businesses.

2. Sales to key employees, third-parties, or a combination of both provide the original owner with options for ensuring ongoing business success.

C. Business owners vs. business operators – who has a voice in business decisions?

1. When a family business represents a major asset in an estate plan, it is important for the first generation to set future generations up for success.

2. Establishing the Operating Agreements that ensure the ongoing operation of the business, if needed, separate from the influence of those people who will receive a cut of the profits is key to success.

D. Failing to plan is planning to fail.

V. IRREVOCABLE TRUSTS FOR ESTATE TAX PLANNING

A. Using the current estate tax exemption.

1. 2024 estate/gift tax exemption - $13,610,000.

2. 2026 sunset of the TCJA.

a. January 1, 2026, estate tax exemption reduced to $5,000,000 plus cost-of-living increases.

b. Anticipated amount - $7,000,000 to $7,400,000.

3. Exemption is use it or lose it.

a. May lose $7,000,000 of estate tax exemption on January 1, 2026.

b. If exemption is used before January 1, 2026, that would be lost after the TCJA sunset, there is no clawback.

B. Access and control of assets.

1. Must weigh loss of control and use of assets vs. tax savings.

2. Estate tax savings vs. loss of capital gains step-up.

3. Consider shorter life expectancy vs. longer life expectancy.

C. Spousal Lifetime Access Trust (SLAT).

1. Who gifts?

a. Consider maximizing the use of one spouse's lifetime exemption to plan for potential loss of exemption with sunset of TCJA.

b. Consider longevity of spouse.

c. Consider how assets are currently owned.

2. Who controls?

    a. Often spouse of Settlor as sole Trustee.

    b. May have Co-trustees and/or other/independent Trustees.

        (1) Child as Trustee or Co-trustee.

        (2) Professional or corporate Trustee.

3. Reciprocal Trust Doctrine – when both spouses make SLATs.

    a. IRS position is that there is no change in economic substance before and after the transfers.

    b. Draft for substantive differences in the SLATs.

        (1) Different Trustee structure – for example, have a Co-trustee or independent Trustee of one SLAT.

        (2) Different beneficial rights – for example, one SLAT can be for the benefit of spouse alone (children as contingent beneficiaries), while the other SLAT is for the benefit of the spouse and the children/grandchildren being concurrent or "sprinkle" beneficiaries.

        (3) Different powers in SLATs – for example, one SLAT can provide the spouse with a limited power of appointment, while the other SLAT does not; also, the SLATs can provide different authorities for designating/replacing Trustees.

    c. Have the two SLATs created and funded as "separate plans".

        (1) A separation of time between establishing and funding one SLAT and the establishment and funding of the second SLAT.

            (a) Must be a real difference.

            (b) Prefer 6 months or longer.

        (2) "Season" funds in separate accounts if originally held jointly.

    d. If funding substantially all of the household assets into two SLATs, the IRS could argue that there was agreement as to administration of both and that it was part of a single plan.

4. Preferred funding.

    a. Investment assets.

    b. Life insurance on Settlor's life.

c. Stay away from personal use assets like personal residence or vacation home.

5. SLAT drawbacks.

a. Spouses could die in unexpected order.

b. Spouse could have shorter than expected longevity.

c. No basis step-up on transferred assets on death of either spouse.

D. Gifting Trusts.

1. Alternative to UTMA or 529 account.

a. More options for investments.

b. May provide more long-term control options.

c. Asset protection (divorce/creditors).

d. Insulated from estate tax inclusion.

e. Many are setup as “Grantor Trusts” which makes the income taxable to the donor during the donor’s lifetime, so during the donor’s lifetime, the trust will not be burdened by the income tax on the trust’s income.

2. Children.

a. Child as Trustee if mature?

b. For minor children, non-gifting spouse could be Trustee.

c. Child can have limited power to appoint to child’s issue or a broader power to include potentially spouses, charities, or anyone.

3. Grandchildren.

a. Donor’s child as Trustee?

b. May provide for long-term dynasty provisions.

4. Drawbacks.

a. Income tax reporting.

b. No basis step-up on a donor or beneficiary’s death.

E. Valuation discounts for transfers of interests.

1. Leverage gifting by giving assets that can be valued with a discount.

    a. Lack of marketability.

    b. Lack of control.

2. Privately held entities (including those structured with voting and non-voting interests).

F. Reliance on Portability Election.

1. Since the introduction of Portability in 2011, many estate plans have been "simplified" to remove the classic Marital/Credit Shelter plan in favor of a streamlined outright to spouse distribution or joint trust plan.

2. Portability election requires filing of an Estate Tax Return (Form 706).

3. Portability election must be made within 5 years from the date-of-death if an Estate Tax Return is not otherwise required. Rev. Prov. 2022-32.

4. Generation Skipping Transfer Tax is not portable.

5. Portability gift trap – If a surviving spouse has "deceased spouse unused exclusion" amount (DSUE), when surviving spouse makes taxable gifts those gifts are first made from the DSUE.

    a. If surviving spouse wishes to use their own estate tax exemption before expiration of the TCJA, must first give away the DSUE amount.

    b. May require significantly greater gifts.

    c. May not have the liquidity for the necessary gifting.

    d. May be remedied via disclaimer if the estate planning provides flexibility, but must be handled within 9 months from the death of the first spouse.

VI. CHANGING AN IRREVOCABLE TRUST - BE FLEXIBLE - CIRCUMSTANCES CHANGE

A. Common reasons that changes are needed.

1. Old planning that does not reflect newest law or tax concerns.

2. Wrong/no Trustee or successor Trustee.

3. Wrong beneficiaries or standards for distribution.

4. Special asset funding concerns.

5. Estate tax and income tax handling pursuant to the Trust.

6. Early distribution of assets.

7. Terminating an uneconomical or unnecessary Trust.

8. Change location or governing law of administration.

B. Beneficiary's ability to change the Trust.

1. Powers to replace Trustee.

a. May be restricted to a class of Trustee type (i.e., professional/corporate, independent or "not related or subordinate").

b. May allow for beneficiary to designate their spouse to be Trustee in the event the beneficiary becomes incapacitated or for the children/issue of the beneficiary.

2. Powers of Appointment.

a. Can be limited/special or general.

b. Can restrict not only the class/identity of the appointees but also provide limitations as to what can be changed and what property can be appointed.

c. Contingent general power of appointment – special provision to obtain a basis step-up on a beneficiary's death where a standard general power is not otherwise intended.

(1) Provides for formula to include assets with gain in the estate of the beneficiary to the extent it does not trigger additional taxes.

(2) Could subject the assets subject to the contingent general power to claims by the beneficiary's creditors.

3. Disclaimers.

a. Wealth transfer to the younger generation.

b. Income transfer to the younger generation.

c. Qualified Disclaimer. IRC Section 2518(b).

(1) Must be in writing.

(2) Must be received by transferor (Trustee, Personal Representative, Financial Institution, Insurance Company, etc.) within 9 months of creation of the interests (often the date of death or date an irrevocable trust is created).

(3) Disclaimant must not have accepted any benefits of the disclaimed interest.

(4) As a result of the disclaimer, the disclaimed interest passes without direction of the disclaimant to either:

(a) The spouse of the decedent; or

(b) A person other than the disclaimant.

C. Trustee's ability to change the Trust.

1. Express powers provided in the Trust.

a. Appointing successor Trustees.

b. Tax protection provisions.

(1) Ability to change provisions of the Trust to adopt to tax law or law changes.

(2) Power to make new tax law elections.

c. Early distribution.

(1) Age or maturity of beneficiary.

(2) Small or uneconomical Trust.

(3) Trust is no longer required to serve the purpose originally intended (tax law changes, beneficiary changes, etc.).

2. Discretionary authority.

a. Standard distributions to a beneficiary.

b. Ability to distribute to or for a group of beneficiaries, in unequal shares.

3. Decanting.

a. Trustee's power to "pour" the assets of the Trust into another Trust.

b. Limitations of this based on the Trustee's power to distribute.

(1) If Trustee has broad discretion to distribute to a beneficiary, then Trustee could establish a Trust that provides for more specifics as to the distribution/rights of the beneficiary.

(2) If Trustee has discretion to distribute to a beneficiary based on a standard [such as health, education, maintenance and support (HEMS)], then new Trust change may be limited to administrative provisions that do not materially change the beneficial interests of the beneficiary.

D. Nonjudicial settlement agreements (NJSA).

1. The interested persons of a Trust may enter into a binding nonjudicial settlement agreement with respect to any matter involving the Trust (subject to limitations).

2. The NJSA may not violate a material purpose of the Trust and may only include terms and conditions that could be properly approved by the court or other applicable law.

3. A NJSA is often used to resolve matters regarding:

    a. The interpretation or construction of the terms of the trust.

    b. The approval of a Trustee's report or accounting.

    c. Direction to a Trustee to perform or to refrain from performing a particular act or to grant to or to withhold from a Trustee any power.

    d. The resignation or appointment of a Trustee and the determination of a Trustee's compensation.

    e. To correct a mistake in a Trust agreement.

4. A NJSA may not be used to "modify" a Trust, but can solve controversies or mistakes by "reforming" the applicable Trust provisions in line with the intent and material purpose of the Settlor/Trust. Interpretation and construction of the Trust are often part of a NJSA.

5. A NJSA cannot be used to effectuate the early termination or distribution of a Trust.

6. Usually executed by the Trustee and the Trust beneficiaries.

    a. Virtual representation for missing beneficiary with substantially identical interest (without conflict).

    b. Representation of minor beneficiary (without conflict).

E. Sale of assets between 2 Grantor Trusts.

1. Sale of assets from one Grantor Trust to a second Grantor Trust (with the same Grantor) is ignored for income tax purposes.

2. Often used to transfer a life insurance policy from an older Grantor Trust to a new Grantor Trust with more preferred provisions.

3. Will leave a note receivable from the new Trust to the old Trust.

F. Trust Director / Trust Protector.

1. Michigan statutory law (since 2019), but originated in common law.

2. The Trust Director is designated in the Trust agreement to make changes.

    a. Limited to the express authority provided in the Trust agreement.

    b. A party may be authorized to appoint a Trust Director, including a beneficiary, the Trustee, or the Settlor/Settlor's spouse.

3. Grant of authority.

    a. Limited – grant may be limited to administrative provisions, tax law, trust situs, etc.

    b. Broad – grant may include to change beneficial interests in the Trust and/or add/remove beneficiaries.

    c. Common broad powers of direction:

        (1) Power to authorize the sale or retention of a family business.

        (2) Power to determine the investment strategy of the Trust.

        (3) Power to approve or veto a distribution to a Trust beneficiary.

        (4) Power to alter beneficial interests of someone other than the powerholder.

        (5) Power to grant a power of appointment to a beneficiary or someone else.

4. Modify a Trust to add a Trust Director.

5. If providing broad powers to the Trust Director, should limit to persons who are not related or subordinate to the Settlor or beneficiary.

G. Powers of Appointment.

1. Provided to a third party in the Trust.

2. May be extremely broad or narrow.

3. May be able to transfer assets from one Trust to a newer Trust, or even consolidated various Trusts.

H. Court order.

1. Substantial authority to interpret and/or modify the provisions of a Trust.

2. Binding on all current or future interested parties.

3. May terminate a Trust and/or interest in a Trust.

4. Absent specific authorization in a Trust agreement, only a Court order can modify a Trust.

5. Filing of a Petition and notice of the interested parties to the matter.

I. Planning review for potential changes.

1. Review the estate plan every 5 years.

a. Not just for revocable Trust planning.

b. Review the irrevocable Trust and how the law, assets and/or family have changed.

2. Considerations of major changes.

a. Birth and/or adoptions (included in class of beneficiaries or not).

b. Death (intended beneficiary no long alive).

c. Move (are new state laws potentially problematic or beneficial).

d. Wealth change or inheritance.

e. Tax law changes.

f. Governing law changes.

g. New Michigan law – a Trust can be made "undisclosed" for up to 25 years which can be used to limit administration of the Trust as well as to provide privacy from current and/or future beneficiaries. MCL 700.7409a.

J. Beneficiary consents to change in conditions.

1. Keep in mind that the beneficiaries consenting to changes which may shift, reduce or eliminate benefits is likely a gift of some portion of their interests among the beneficiaries.

2. McDougall v. Commissioner, 163 TC No. 5 (September 17, 2024) (recent case) – children consented via a NJSA to terminate a QTIP trust early, for the benefit of their parent. IRS determined and tax Court agreed that children effectuated a gift to the parent based on the value of their vested contingent remainder interest in the Trust. May have had the same outcome if the children consented (or failed to challenge) a court petition requesting the same.

VII. RETIREMENT PLANS AFTER DEATH

A. Naming individual beneficiaries vs. Trusts as beneficiary.

1. In Trust planning for spouse.

a. Conduit provision required in order to have Trust treated as an eligible designated beneficiary (spousal lifetime stretch).

b. Accumulation provision will result in application of the 10 year distribution rule.

2. Special provisions for disabled beneficiary.

B. SECURE Act and SECURE Act 2 (Final Regulations for Secure Act Changes - Released July 18, 2024).

1. Required Minimum Distributions for 10-year Period Beneficiary.

a. If Plan Participant was required to take Required Minimum Distributions (RMD) (i.e., older than age 70 ½, 72, 73 [after 12/31/2022] or 75 [after 12/31/2032], as applicable):

For 10-year Period Beneficiary.

(1) Must take RMD based on beneficiary's life expectancy table, but all must be distributed by December 31 of 10th year anniversary of Plan Participant's death.
(2) These distributions were waived for years 2021, 2022, 2023 and 2024- No make-up or excise tax for not taking those distributions.

(3) Starting 2025, RMD must be taken from inherited IRA based on calculations as if RMD calculated since year after death of Plan Participant (life expectancy minus 1 for each applicable year).

(4) RMD for 2024 is still waived.

b. If Plan Participant passes away before RMD, 10-year Period Beneficiary has no RMDs, but must withdraw all by December 31 of 10th year anniversary of Plan Participant's death.

2. Definition of "Child" for purposes of determine whether a minor beneficiary can qualify as an Eligible Designated Beneficiary (EDB) during minority (to age 21).

a. Now expressly includes a stepchild, adopted child, and eligible foster child of the Plan Participant.

b. During period of minority (until age 21), take RMDs at beneficiaries age per life table, and when turn age 21, begin 10-year payout, with final payment to occur by December 31 of the year in which beneficiary attains (or would attain) age 31.

3. If Retirement Plan is payable to a Trust that provides for a "pot" with multiple minor child beneficiaries (age 21), the Trust can qualify as an EDB (required distribution based on age) until the youngest minor beneficiary attains age 21. Originally this was supposed to trigger life expectancy rule when oldest beneficiary attains age 21.

4. Separate Account Rule Change.

    a. If Retirement Account designates a Trust as beneficiary, and:

        (1) Trust provides for immediate division into separate sub-shares for beneficiaries; and

        (2) Retirement Accounts assets are not specifically allocated to any share; and

        (3) Trustee must allocate IRA appropriately to shares; then

        (4) Each sub-trust share can use the separate age of the specific beneficiary thereunder for purpose of determining RMD amount.

    b. Previous rule would have required using the age of the oldest beneficiary for all beneficiaries.

5. Late Withdrawal Penalty – Under SECURE, reduced to 25%, and could be as low as 10% (if timely corrected within 2 years), of the amount of IRA that was supposed to be withdrawn.

C. Use of retirement accounts for charitable planning.

1. Qualified Charitable Distribution (QCD).

    a. Now subject to inflation increases – 2024 – may distribute $105,000 annually.

    b. May begin making QCDs after attaining age 70 ½ (does not use the new ages 73 or future 75 which will be start date for RMD).

    c. Must be made directly to a public charity, and not to a foundation or donor advised fund account.

2. Designate charities at death directly on beneficiary designation form.

    a. Public charities.

    b. Donor advised fund established by the decedent.

    c. Private foundation.

3. Allocate any IRA assets payable to a Trust to charitable gifts in the Trust. There are some issues related to phrasing and timing of distributions that must be taken into account.

Michigan's Resurrected Earned Sick Time Act

David A. Lawrence

MICHIGAN'S RESURRECTED EARNED SICK TIME ACT

I. LEGISLATION THROUGH REFERENDUM AND LITIGATION

A. "Adopt and Amend" Timeline.

1. 9-5-18: Adoption of ballot proposals/proposed acts; Legislature passes ESTA and IWOWA.

    a. Earned Sick Time Act (ESTA).

    b. Improved Workforce Opportunity Wage Act (IWOWA) – minimum wage.

2. 12-14-18: Acts are amended and signed into law.

    a. Paid Medical Leave Act (PMLA) = amended version of ESTA.

    b. PA 368 = amended version of IWOWA.

B. Court Proceedings.

1. 2022: Court of Claims rules "adopt and amend" unconstitutional; amendments stayed pending appeal.

2. 2023: Court of Appeals reverses; Legislature can legislate as it sees fit absent specific and express prohibitions.

3. 7-31-2024: Supreme Court agrees with Court of Claims; "adopt and amend" strategy unconstitutional.

    Legislature has 3 options upon receipt of a valid ballet proposal/voter initiative: (1) adopt the proposal without change; (2) reject the proposal which would result in the proposal appearing on the ballot in the next general election; or (3) reject the proposal, propose an alternative, and let the voters decide between the proposal and the alternative.

C. Rulings.

1. ESTA and IWOWA, as initially adopted = controlling laws.

2. ESTA and IWOWA, as initially adopted, is effective February 21, 2025.

II. REINSTATEMENT OF 2018 PA 338: ESTA, **EFFECTIVE 2-21-25**

A. Who Needs to Comply?

1. ESTA:

a. "Employer" - any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity that **employs 1 or more individuals** (excluding US government).

b. "Small Business" - an Employer for which **fewer than 10 individuals work for compensation during a given week**.

(1) Count includes **all individuals performing work for compensation on a full-time, part-time, or temporary basis shall be counted, including individuals made available to work through the services of a temporary services or staffing agency or similar entity**.

(2) **NOTE** - Employer which maintained 10 or more employees on its payroll during any 20 or more calendar workweeks in either the current or the preceding calendar year is not a "Small Business".

2. V. PMLA: any person, firm, business, educational institution, nonprofit agency, corporation, limited liability company, government entity, or other entity that employs 50 or more individuals (excluding US or state government).

B. To Whom Does the Benefit Apply?

1. ESTA:

a. "Employee" - an i**ndividual engaged in service to an employer in the business of the employer** (excluding US government employees).

b. Michigan employees ("employer's employees in this state").

c. Fair Labor Standards Act ("FLSA") non-exempt and exempt employees.

d. Likely excludes *properly-classified* independent contractors.

e. Applies to Collective Bargaining Agreement ("CBA")-covered (**Union**) employees, but not until the stated **expiration date** of a CBA in effect prior to 2/21/25, notwithstanding any statement in the CBA that it continues in force until a future date or event or the execution of a new CBA.

(1) ESTA does not preempt or override terms of CBA in effect prior to 2/21/25.

2. V. PMLA: "Eligible employee" - an individual (**excluding** FLSA exempt employees, CBA-covered employees, outside sales employees, out-of-state employees, and various transportation industry employees).

C. How is Leave Time Accrued?

1. ESTA:

   a. 1 hour of sick leave per 30 hours worked.

   b. Accrual begins on 2/21/25 or upon commencement of the employee's employment, whichever is later.

   c. Silent re: caps on accrual.

   d. **NOTE** – FLSA exempt employees are "assumed to work 40 hours in each workweek, unless the employee's normal work week is less than 40 hours, in which case earned sick time accrues based upon that normal workweek."

2. V. PMLA: 1 hour of paid medical leave per 35 hours worked. Employer may cap accrual to not less than 40 hours per year.

D. How Can Earned Sick Time be Used?

1. Use as Accrues.

   a. ESTA and PMLA: Earned sick time can be used as it is accrued **BUT** employer can require employees hired after 4-1-19 to wait until the 90th calendar day after commencing employment before using accrued earned sick time.

2. Annual Caps on Use of Earned Sick Time.

   a. ESTA:

      (1) "Year" - a regular and consecutive twelve-month period, as determined by employer.

      (2) "Employer" - Employees capped at using **72 hours of paid earned sick time** per year, unless employer sets higher limit.

      (3) "**Small Business**" (less than 10 employees) - Employees capped at using **40 hours of paid earned sick time** per year, unless employer sets higher limit.

         (a) **NOTE** – If Small Business employee accrues more than 40 hours of earned sick time in calendar year**, then employee entitled to use an additional 32 hours of unpaid earned sick time** in the year, unless employer sets higher limit.

   b. V. PMLA: Employees capped at using 40 hours of paid medical leave per year, unless employer sets higher limit.

3. Increments of Use.

    a. ESTA: hourly increments or smallest increment payroll system uses to account for absences or other time, **whichever is smaller**.

    b. V. PMLA: 1-hour increment or employer's other written policy.

4. Reasons.

    a. ESTA and PMLA: Employee's or employee's family members' mental or physical illness.

    b. ESTA and PMLA: Employee's or employee's family member's domestic violence matters.

    c. ESTA and PMLA: Closures by a public health office due to a public health emergency.

    d. ESTA: For meetings at a child's school or place of care related to the child's health or disability, or the effects of domestic violence or sexual assault on the child.

    e. **NOTE** – ESTA expands PMLA definition of "family member" to include "[a]ny other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

5. ESTA: No requirement for search for/secure replacement worker.

E. What about Carry-Over of Accrued Time?

1. ESTA: Earned sick time "**shall carry over** from year to year**"**.

2. V. PMLA: Employer is not required to allow an eligible employee to carry over more than 40 hours of paid sick leave from year to year if time is front-loaded.

F. Can an Employer Provide a Comprehensive Bank of Paid Leave – "Front Load"?

1. ESTA:

    a. "Employer" – compliance with ESTA established if "**any paid leave in at least the same amounts** as that provided under this act **that may be used for the same purposes and under the same conditions** provided in this act **and that is accrued at a rate equal to or greater than the rate**" set forth in ESTA is provided.

    b. "Small Business" – compliance established the same way as an "Employer" **and** must also allow employees to use **paid earned sick time before using unpaid earned sick time**.

    c. Michigan Department of Labor and Economic Opportunity ("LEO") says - "An employer's paid time policies, that provide at least the same amounts as that

provided in the Act and may be used for the same purposes and under the same conditions and that is accrued at a rate equal to or greater than the rate described in the act may be in compliance. For small employers, employees must be allowed to use paid earned sick time before using unpaid sick time provided for under the Act."

2. V. PMLA: Employer in compliance if it provides at least 40 hours of paid leave to an eligible employee each benefit year.

3. ESTA and PMLA: "Paid leave" - paid vacation days, personal days, and paid time off.

4. ESTA: **is silent** about front-loading all 72 hours of leave time at the start of "year".

   But LEO says - "There is no prohibition in the law preventing an employer from providing the total amount of sick time at the beginning of the 12-month period provided it complies with the accrual, use, carryover, and other provisions of the Act during the benefit period."

5. V. PMLA: Employers can front-load all 40 hours of leave time at the start of benefit year.

G. Are there Employee Notification and Documentation Obligations?

   1. ESTA:

      a. Notice – if need for leave is "foreseeable", employer can require 7-day advance notice, otherwise "as soon as practicable".

      b. Documentation supporting use of ETSA Leave.

         (1) Can only be required **after 3 consecutive days of leave.**

         (2) On employer's request, must be provided "in a timely manner".

         (3) Cannot delay commencement of leave due to lack of receipt of documentation.

         (4) "Reasonable documentation" that earned sick time has been used for ESTA reasons.

            (a) Signed by "health care professional" (defined broadly as "[a]ny person licensed under federal law or the law of this state to provide health care services, including, but not limited to, nurses, doctors, and emergency room personnel; and a certified midwife") indicating earned sick time is necessary.

            (b) For leave taken due to domestic violence or sexual assault - police report, signed statement from victim/witness advocate confirming

receipt of services from victim services organization, court documents indicating legal action associated with domestic violence or sexual assault.

(5) Employer pays for employee's out of pocket costs associated with providing documentation, including "any costs charged to the employee by the health care provider for the specific documentation required by the employer."

2. V. PMLA: Employer can require employee to comply with its usual and customary notification, procedural and documentation requirements (typically, what's indicated in employee handbook).

H. How is the Wage Rate Calculated when Earned Sick Time is Used?

1. ESTA: rate = greater of either the normal hourly wage for that employee or the minimum wage established under IWOWA.

NOTE – Where employee's hourly wage varies depending on the work performed, "normal hourly wage" = the average hourly wage of the employee in the pay period immediately prior to the pay period in which the employee used paid earned sick time (suggests consideration of OT, bonuses, commissions, tips, etc.).

2. V. PMLA: rate = normal hourly wage/base wage excluding OT, holiday pay, bonuses, commissions, supplemental pay, tips, etc.

I. What Happens to Accrued but Unused Earned Sick Time Upon Transfer, Separation of Employment, or Sale of the Business?

1. Employee Transferred but Remains Employed.

ESTA and PMLA: if employee transfers to separate division, entity or location, then employee retains all previously accrued, unused time.

2. Separation of Employment.

a. ESTA: no payout of accrued, unused leave time required, **BUT** if employee rehired within 6 months of separation, must reinstate accrued leave. However, there may

be other laws which require payout upon termination based on a written policy or employment contract.

b. V. PMLA: no payout of accrued, unused leave time required and no requirement to reinstate accrued leave if rehired.

3. Employer is Succeeded or Replaced.

   ESTA: if different employer succeeds or takes place of existing employer and employee retains employment with successor employer, then successor employer assumes responsibility for ESTA compliance and employee retains all previously accrued, unused time.

J. What about Employer Policies regarding Attendance/Absences?

   ESTA:

   a. Attendance policies "**shall not** treat earned sick time taken" under ESTA "as an absence that may lead to or result in retaliatory personnel action."

   b. "**Retaliatory personnel action**" = any of the following:

      (1) Denial of any right under ESTA.

      (2) A threat, discharge, suspension, demotion, reduction of hours, or other adverse action against an employee or former employee for exercise of a right under ESTA.

      (3) Sanctions against an employee who is a recipient of public benefits for exercise of a right under ESTA.

      (4) Interference with, or punishment for, an individual's participation in any manner in an investigation, proceeding, or hearing under ESTA.

   c. **"Rebuttable Presumption of Violation"** if Employer takes adverse personnel action within 90 days after employee does **any** of the following:

      (1) Files a complaint with the department or a court alleging a violation of ESTA.

      (2) Informs any person about an employer's alleged violation of ESTA.

      (3) Cooperates with the department or another person in the investigation or prosecution of any alleged violation of ESTA.

      (4) Opposes any policy, practice, or act that is prohibited by ESTA.

      (5) Informs any person of his/her rights under ESTA.

K. What are an Employee's Remedies if the Employer Violates the Act?

1. ESTA:

a. File a Lawsuit.

(1) No prerequisite to exhaust administrative process before filing.

(2) Potential damages - payment of used earned sick time; rehiring or reinstatement to the employee's previous job, payment of back wages, reestablishment of employee benefits to which the employee otherwise would have been eligible if the employee had not been subjected to retaliatory personnel action or discrimination; and an equal additional amount of liquidated damages, together with costs and attorneys' fees.

b. File a Claim with the Michigan Department of Licensing and Regulatory Affairs ("LARA").

(1) Not a bar to filing a lawsuit.

(2) LARA can impose penalties and civil fines (up to $1,000) and grant to an employee or former employee earned sick time previously withheld, any and all damages incurred by the complainant as a result of the violation, back pay, and reinstatement in the case of job loss.

c. Statute of Limitations: lawsuit or claim must be filed within 3 years of alleged violation or when employee knew of the violation, whichever is later.

2. V. PMLA: employees have 6 months to file a claim with LARA in the event of violation; LARA may impose penalties and administrative fines (up to $1,000) and grant an eligible employee or former eligible employee payment of all paid medical leave improperly withheld.

L. What are the Employer's Notice Requirements?

1. ESTA:

a. Written Notice to Employees (via Handbook or otherwise).

(1) To be provided at the time of hire or on 4-1-19 [sic – 2-21-25], whichever is later.

(2) Must be provided in English, Spanish, and any language that is the first language spoken by at least 10% of workforce (as long as LARA has translated the notice into such language).

(3) Contains at least the following required statements:

(a) The amount of earned sick time required to be provided under ESTA;

(b) How “year” is determined;

(c) When sick time may be used;

(d) Prohibition of “retaliatory personnel action” for exercise of rights under ESTA; and

(e) Employee’s remedies for violation.

b. LEO Wage and Hour Poster – presumably in addition to the above notice.

2. V. PMLA: wage and hour poster sufficient.

M. What are an Employer’s Recordkeeping Requirements?

1.ESTA:

a. Record of hours worked and earned sick time used for each employee must be retained for 3 years.

b. LARA mandatory access to records (with appropriate notice and at mutually agreeable time) to monitor compliance.

c. **Rebuttable presumption of violation of ESTA** (when alleged by an employee) if

(1) Employer doesn’t maintain or retain record of hours worked and earned sick time used for employee, or

(2) Employer doesn’t allow LARA “reasonable access” to records.

III. PRACTICAL IMPLICATIONS OF ESTA

A. Small employers not immune.

B. Applies to all employees, not just FLSA non-exempt.

C. Ripe-for-abuse policy.

D. Increased costs for employers.

E. Potential to create staffing shortages or exacerbate existing ones.

F. Compliance paperwork nightmare.

G. Increased time and paperwork associated with employee disciplinary issues (and to rebut “rebuttable presumption” of potential allegations of ESTA violation”).

H. More threats to sue and lawsuits.

IV. RECOMMENDED NEXT STEPS

A. Review existing leave policies and update as necessary.

B. Identify internal resources necessary to ensure compliance and implement procedures, processes, systems to do so.

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- 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
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- 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
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- Complex business and commercial litigation

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- 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
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- 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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- 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
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- 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
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- 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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- 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
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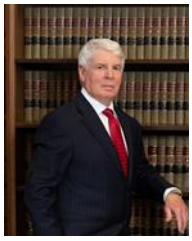

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Mr. Sternberg is both a tenacious courtroom advocate as well as a skilled and inventive theorist of the law. He has successfully pursued litigation in a broad range of categories and levels, including the state and federal appellate courts, U.S. District 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:

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- 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)
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- 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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- 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
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- 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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- 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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- 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
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- 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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- 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
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- 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)
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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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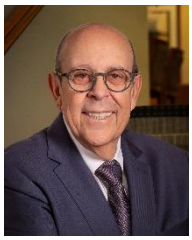

STEPHEN M. FELDMAN is a shareholder of the firm. He works primarily in the areas of business planning, estate planning and taxation. On numerous occasions, he has spoken to professional groups, including CPAs, on various tax topics. Examples of legal matters he has handled for clients include the following:

- 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

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ATTORNEYS & COUNSELORS

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 concentrates her practice in the areas of litigation and dispute resolution, business and corporate and employment and labor. 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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OF COUNSEL

MARK G. LANDAU is Of Counsel of 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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CHIARA F. MATTIESON is Of Counsel to the firm. She focuses on probate and trust litigation and administration, civil and commercial litigation and estate planning. Examples of her representation include:

- Probate litigation in areas of capacity challenges, guardianships or conservatorships, prosecuting and defending breach of fiduciary duty claims and will and trust contests
- Assisting fiduciaries in administering estates and trusts and defending fiduciaries against claims of breach of fiduciary duty
- Litigation of civil disputes in state and federal courts that are related to or arise from estate and trust matters

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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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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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