

## CASE LAW AND LEGISLATIVE UPDATE

By

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Wayne County Probate Court

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### I. INTRODUCTION

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

## II. NEW LEGISLATION

### MINOR GUARDIANSHIP – ELIMINATION OF AUTHORITY TO CONSENT TO MARRIAGE

**2023 PA 72, eff. 7\18\23**

- A. This legislation is part of a series of bills signed into law which increases the minimum age an individual can get married in Michigan from 16 to 18 years old.
- B. References to a “married minor” have been eliminated in EPIC, including the ability of a full minor guardian to consent to the marriage of their minor ward or the ability to delegate this now nonexistent authority pursuant to the six month power of attorney provision. **MCL 700.5103(1), .5215(d).**
- C. The Michigan Statutory Will has been modified to provide distributions of up to \$5,000 per year can be made directly to a minor only if they were married before this new law took effect – i.e., 7\18\23.

## III. CASE LAW

### A. ADULT GUARDIANSHIP – DELEGATION OF POWERS\DUTIES [In re Malloy](#), - Mich App - ; - NW 2d – (2022), #358,006, rel’d 10\13\22

1. In this consolidated appeal, the Appellate Panel unanimously reversed in part and remanded for additional proceedings regarding whether a guardian impermissibly delegated their fiduciary powers conferred under EPIC.
2. Malloy involved two guardianships necessitated by individuals who suffered serious injuries from auto accidents. Both were receiving No Fault insurance payments. The defendant insurer refused to pay for legal and guardianship expenses submitted by the fiduciary attorney and his law firm, arguing that the appointed guardian did not personally perform the services and there was no authority to delegate guardianship duties to employees of his firm. Summary disposition motions were granted in favor of the plaintiff, and the defendant appealed.
3. The Court of Appeals rejected the defendant’s argument that the guardianship services were not lawfully rendered since the provisions of **MCL 700.5103**, which addressed the process for delegating guardianship powers, were not followed in these cases. **MCL 700.5103** concerns the delegation of powers by a guardian. However, the

language of **MCL 700.5106** clearly indicates that the Legislature clearly contemplated individuals other than the guardian would perform duties on the ward's behalf. Moreover, a guardian's duties and powers are plainly distinguished in **MCL 700.5314**. No violation of **MCL 700.5103** occurred where the plaintiff largely delegated duties but not guardianship powers. However, a genuine issue of material fact existed as to whether having individuals other than the named guardian prepare for and attend hearings seeking to modify the guardianship was proscribed by **MCL 700.5103**, since these could result in the modifications of the duties, liabilities, or other legal relationships with the wards in question. The cases were remanded for a determination as to whether the defendant had to pay for these tasks.

4. This case is another chapter in the long running conflict between auto insurers and guardians regarding the scope of fees required to be paid to fiduciaries of individuals who suffered severe injuries due to motor vehicle accidents. It furnishes helpful insight on this issue.
5. Application for leave to appeal has been filed and is still pending.

## **B. TRUSTS – BREACH OF TRUST – STATUTE OF LIMITATIONS**

**[Kilian v TCF National Bank](#), - Mich App - ; - NW 2d – (2022), #358,761, rel'd 10\20\22**

1. In this case, the Court of Appeals ruled 3-0 to affirm the decision of the Benzie County Probate Court granting summary disposition dismissing the plaintiffs' actions against the defendant trustee for breach of fiduciary duty, holding that the report they each received adequately disclosed the existence of a potential cause of action, which triggered the one year statute of limitations period under the Michigan Trust Code.
2. The plaintiffs in **Kilian** were children of the settlor and beneficiaries of his trust. From January 1, 2000 to March 31, 2014, the statements sent to the beneficiaries listed beginning and ending market values, receipts, disbursements, gains and losses, and each transaction. Market values for each real property parcel were also listed. Beginning November 1, 2013, all account statements included the one year limitations period for breach of trust claims per **MCL 700.7905**. Defendant resigned as cotrustee on October 13, 2017; plaintiffs brought their action on November 4, 2019. Defendant's summary disposition motion was granted, as the Probate Court ruled that the claims were barred by under **MCL 700.7905**. Plaintiffs appealed.
3. In affirming the Probate Court's decision, the Appellate Panel rejected plaintiff's argument that failure to include the specific one year limitation language in statements

issued before November 2013 triggered the application of the five year default statute of limitations provision of **MCL 700.7905(3)**.

**MCL 700.7905** declares in pertinent portion:

(1) The following limitations on commencing proceedings apply in addition to other limitations provided by law:

(a) A trust beneficiary shall not commence a proceeding against the trustee for a breach of trust more than 1 year after the date the trust beneficiary or a representative of the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.

\* \* \*

(3) If subsection (1) does not apply, a judicial proceeding by at trust beneficiary against a trustee for breach of trust shall be commenced within 5 years after the first of the following to occur:

(a) The removal, resignation, or death of the trustee.

(emphasis added)

The Court of Appeals determined that the information provided in the account statements were sufficient to inform them of potential causes of action for breach of trust, including the list of static market values on the real property parcels and the allegedly improper distributions made to one of the beneficiaries.

Plaintiff's argument that the duties of a trustee should include reasonable efforts to ensure beneficiaries clearly understand the information was rejected. This is not required by statute, which merely mandates sufficient information be provided so the ...beneficiary or representative knows of the potential claim *or should have inquired into the potential claim's existence*. **MCL 700.7905(2)** (emphasis added)" (Slip Opinion, pg. 7)

4. This decision provides useful guidance on the type of information necessary in a report to a trust beneficiary adequate to trigger the one year limitations period of **MCL 700.7905**.
5. Application for leave to appeal was not filed.

**C. MINOR GUARDIANSHIP – SPECIAL IMMIGRANT JUVENILE STATUS –  
PROCEDURE\FINDINGS**

**In re Velasquez, - Mich App - ; - NW 2d – (2022), #360,057, rel'd 11\10\22**

1. This 2-1 ruling by the Court of Appeals, on an issue of first impression regarding a special immigrant juvenile status (SIJ), vacated an order from the Ionia County Probate Court and entered its own order with special findings of fact establishing SIJ status for the minor.
2. The minor's uncle, filed a full minor guardianship petition and asked the probate court to make findings required to allow the child to apply for SIJ status (he add entered the United States as an unaccompanied minor). Based on the testimony and evidence presented, the probate court granted the guardianship petition.

Testimony was presented to support the motion for special findings to establish SIJ status. The minor's father died when he was young, and he began working in agriculture at age eight instead of attending school. He had to work with dangerous equipment and chemicals to support his family. When unable to work, his mother would scold him and hit him with a belt, stick, or branches; when he was injured on the job, she did not seek medical care for him, and he was often hungry in her care. The court denied the SIJ motion, ruling that since the mother was not given proper notice it could not conclude whether abuse or neglect occurred since she had no opportunity to rebut the testimony. The petitioner's request for adjournment to provide additional notice to the mother was denied.

3. The appellate panel noted that the process for obtaining SIJ status consists of two steps: the first involves a state court determining a minor is under 21, unmarried, and dependent upon the juvenile court (this has been construed as applying to\covering probate courts), cannot viably be reunited with one\both parents due to neglect, abandonment, or similar basis under state law, and the best interest of the juvenile would not be served by a return to their country of origin. **8 USC 1101(a)(27)(j)**. Next, an application is filed with the USCIS, who conducts a far more expansive inquiry an determines whether SIJ status should be granted.

The Court of Appeals ruled that the probate court erred in determining notice was sufficient to approve the guardianship but inadequate for the SIJ proceedings. Hearing notice was properly sent under EPIC. The appellate panel also determined the probate court erred in concluding the minor was not abused and neglected per Michigan law, and it was an abuse of discretion to refuse to make findings as to whether the child's reunification with his mother was viable and in his best interests.

On an issue of first impression, the Appeals Court held that the preponderance of evidence standard applies as to the proof necessary to grant SIJ status. They noted that to grant this, three factual findings are required by state courts: (1) a declaration that the juvenile is dependent on a juvenile court; (2) juvenile's reunification with one\both parents is not viable due to neglect, abandonment, or similar basis found under state law; and (3) juvenile's interests would not be served by a return to their country of origin. The panel observed that other states had applied a preponderance of evidence standard in these cases and found their rationale to be persuasive.

Regarding the issue of abuse and neglect, the Court of Appeals examined various Michigan statutes, noted that other jurisdictions applied their own state laws on this question, and that courts in SIJ status proceedings have broadly interpreted the meanings of abuse, neglect, and abandonment. On the record's basis, they determined it was clear error for the probate court to fail to conclude that the minor's mother's actions did not constitute neglect and abuse under Michigan law. It was also error to rely on the minor's illegal entry into the US in its analysis, as the findings in these cases are limited to child welfare determinations.

4. In an unusual action, instead of remanding the case the appellate panel (also 2-1) exercised its discretion to make the requisite findings concerning the minor's best interests and vacate the probate court's decision.
5. This case provides useful guidance on the requisite procedure and standards to be followed regarding SIJ status requests.
6. Application for leave to appeal was not filed.

**D. MENTAL HEALTH PROCEEDINGS – NOTICE\SERVICE  
In re Jestila, - Mich App - ; - NW 2d - (2023), #362,500, rel'd. 1\26\23**

1. This unanimous Court of Appeals decision vacated a Benzie County Probate Court order for continuing mental health treatment due to improper notice to the subject of the petition.
2. In **Jestila**, a petition for an order of continuing mental health treatment was filed and along with the notice of hearing personally served on the respondent. The hearing was repeatedly rescheduled; in the first three instances she was sent notice via first class mail, which were returned as undeliverable. The probate register then sent an email

asking an individual to personally serve the respondent at an upcoming medical appointment. No proof of service was filed, and the subject of the petition did not appear at the hearing. Per an affidavit from the respondent, her first notice was via a text message from her attorney eight minutes before the hearing asking if she would be attending. Another one year treatment order was entered and the subject of the petition appealed.

3. The appellate panel ruled that the respondent was denied her due process rights since she did not receive proper notice of the hearing. They noted that per **MCL 5.734(A)**, the respondent in mental health court proceedings must be personally served. Notice for the first three rescheduled hearings was improper since personal service is required and nothing in the record indicates that personal service was waived. Crucially, there is no information suggesting personal notice was ever given for the hearing actually conducted, as no response to the register's email could be found and the proof of service filed did not list the respondent. As a result, the continuing treatment order was vacated and another petition will have to be filed and properly served on the subject of the petition.
4. Key takeaways from this case: 1. Proper notice of hearing is crucial in all proceedings, especially those involving involuntary mental health treatment. 2. Don't have your register request via email (or any other method) that a third party provide personal notice to a respondent and not verify before the hearing that it was done. 3. If no improper notice given, adjourn the case.
5. Application for leave to appeal was not filed.

**E. TRUSTS – LIFETIME CONVEYANCE – ADVANCE - DEFAULT JUDGMENT AS A DISCOVERY SANCTION**

**[In re Gregory Hall Trust](#)** - Mich App - ; - NW 2d - , (2023), #361,528, rel'd 3/12/23

1. This 3-0 decision by the Court of Appeals affirmed the ruling of an Oakland County Probate Judge granting default judgment in favor of two of the children\beneficiaries\co-trustees against the third child\beneficiary\co-trustee as a discovery sanction.
2. In 1993, the settlor created a revocable trust with provided that each of his three children were to receive an equal share of the corpus upon his death. On October 15, 2014, the settlor convened his home to his son Ken and his wife for no consideration. An Excel spreadsheet was set up by the settlor on September 23, 2014 summarizing his assets. The contents of that document were unknown, but one from January 8, 2018

lists his assets and placed the “distribution” of his \$500,000 home in Ken’s column; it indicated his assets being divided equally among his three children. The settlor died on April 11, 2018, and a dispute arose as to whether the house transfer constituted an advance against Ken’s trust share. After a protracted discovery process, partial summary disposition was granted in favor of Ken’s siblings on May 4, 2022. A default judgment against Ken was entered on July 18, 2022 as a discovery sanction pursuant to **MCR 2.313(B)(2)(c)**. Ken appealed.

3. Regarding the items on the spreadsheet, the Probate Judge ruled that this item met the requirements of a contemporaneous writing pursuant to **MCL 700.2608(1)(b)**, which is applicable to trusts under **MCL 700.7112**, and amends the settlor’s trust. However, the question of fact remained for the jury as to whether it was intended that the house transfer be treated as an advancement of Ken’s share. The appellate panel did not review this summary disposition decision, since its decision to affirm the discovery sanction default judgment made this unnecessary.
4. The Court of Appeals noted that “The discovery process in this case turned into an expensive, time-consuming catastrophe.” (Slip Opinion, pg. 3). The litigation lasted two years, and seven hearings were held on e-discovery. Ken’s attorney repeatedly violated the probate court’s e-discovery orders. His siblings wanted discovery of correspondence between the settlor and Ken regarding the transfer of the house. The contemporaneous emails from Gregory Hall’s computer were all deleted. Ken’s siblings sought e-discovery of his and his wife’s electronic devices, and hired an e-discovery vendor to search them. To facilitate discovery, a plan was devised to give Ken the opportunity to raise privilege objections before producing the data to his siblings. However, Ken acted in continual bad faith. Prior to producing one device, he downloaded data to a USB drive and then deleted the data; he refused to turn over the drive. His wife failed to turn over her prior cell phone. In addition, Ken raised bogus objections based on “relevance” to the data the vendor located, which ground the e-discovery process to a halt.

The probate court imposed a series of escalating sanctions against Ken for his repeated violation of discovery orders, but he did not alter his behavior. The appeals court enunciated the standard of using default judgment as discovery sanction:

“Before imposing the sanction of a default judgment, a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to [parties seeking the sanction], and whether



willfulness has been shown. **Thorne v Bell, 206 Mich App 625, 632-633; 522 NW 2 d 711 (1994)**” (Slip Opinion, pg. 8)

The Court of Appeals noted that Ken’s failure to comply with discovery extended over years, that he violated at least two discovery orders, many months elapsed between his violations and entry of default judgment, his siblings were severely prejudiced by their inability to obtain most of the e-discovery they were entitled to, and the probate court found Ken’s discovery violations to be willful and wanton. As a result, entry of the default was an appropriate sanction.

5. What are the lessons from this case? First, e-discovery rules apply to probate litigation. Also, a litigant who conducts spoliation of evidence, which occurred here, opens themselves to severe sanctions. Finally, petitioners in probate litigation should, as soon as their dispute arises, immediately send letters advising the other party of their duty to preserve electronic data.
6. A motion for reconsideration was denied, and application for leave to appeal was not filed.

#### **IV. CONCLUSION**

Knowledge of the preceding legislation and new case law will enhance your skills as a probate practitioner.

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