

## TRUSTS & ESTATES

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### I. INTRODUCTION

The *Survey* period began only two months after the Michigan Trust Code took effect.<sup>1</sup> Thus, attorneys handling matters subject to the new trust law were only beginning to delve into how their practices will change.<sup>2</sup> At the same time, estate planners who handle larger estates spent the first part of the *Survey* period on edge about federal estate tax uncertainty.<sup>3</sup> Although Congress in mid-December 2010 did act to

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1. MICH. COMP. LAWS ANN. § 700.7101 (West 2010). The Michigan Trust Code became effective on April 1, 2010.

2. See, e.g., Daniel Cogan, *Navigating the Michigan Trust Code*, 29 MICH. PROB. & EST. PLAN. J. 41, 41 (2010), available at [www.michbar.org/probate/pdfs/summer10.pdf](http://www.michbar.org/probate/pdfs/summer10.pdf) (“Perhaps there will not be quite the sense of rhythm experienced by a motorcyclist, but after study and review the Michigan Trust Code will certainly reveal its logic and its organization, and it will ultimately make our jobs easier.”).

3. See, e.g., Mandy Chardoul, *Estate Planning: Reacting to the New Law*, 30 MICH. PROB. & EST. PLAN. J. 2 (2011), available at [www.michbar.org/probate/pdfs/spring11.pdf](http://www.michbar.org/probate/pdfs/spring11.pdf) (describing the estate planning bar’s reaction to “months of concern regarding looming tax increases”, and observing that “[n]ow that the law has passed, we can breathe a sigh of relief.”).

extend the estate tax relief of the past decade, it did so only temporarily,<sup>4</sup> leaving many questions for future planning.<sup>5</sup> With the new Michigan Trust Code and the federal estate tax changes, practitioners came through the *Survey* year with much on their plate to digest.<sup>6</sup> It is perhaps fortunate that few cases were decided in this field at either the Michigan Court of Appeals or Michigan Supreme Court level, and those few did not signal significant new directions in the law.

## II. SELECTED MICHIGAN TRUSTS & ESTATES CASES 2010-2011

In the *Survey* period, the Michigan Court of Appeals decided four cases that settle questions relating to decedents' estates. They are discussed below in order of the decisions.

### A. *In re Leix Estate*

#### 1. Description

The *Leix* case<sup>7</sup> dealt with so-called "mutual wills" executed by each of two married spouses and assets transferred by one spouse following the first spouse's death.<sup>8</sup> Viola Leix (Mrs. Leix) died in December 1983.<sup>9</sup>

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4. The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) [hereinafter "EGTRRA"], among other things, raised the dollar level above which individual estates are subject to the federal estate tax, with the level increasing over time and vanishing altogether in 2010. But EGTRRA's relief came with a sunset date at the end of 2010, after which—unless Congress took action—the federal estate tax would automatically revert to its pre-2001 level. In mid-December 2010, Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010) (codified in various sections of 26 U.S.C.), which avoided significant change by simply extending the EGTRRA provisions another two years. See generally Jonathan G. Blattmachr et al., *Estate Planning after the 2010 Tax Relief Act: Big Changes, But Still No Certainty*, 114 J. TAX'N 68 (2011).

5. See, e.g., George W. Gregory, *An Overview of Estate Planning and Estate Administration Under the 2010 Tax Act: The "Clawback," Electing Out of the Federal Estate Tax, Electing to Pay the Generation-Skipping Transfer Tax for 2010 Because the Inclusion Ratio Is Zero, Portability Is Useful, but the Credit Shelter Trust Is Not Dead Yet*, 30 MICH. PROB. & EST. PLAN. J. 4 (2011) (discussing and proposing various alternatives for estate and gift planning); Lorraine F. New, *Path to Portability*, 30 MICH. PROB. & EST. PLAN. J. 18, 19 (2011) ("After many years of subtle changes in estate tax rules and planning we have hit a phase of volatility. It is time to be alert for pitfalls and opportunities for our clients in an effort to help them distribute their assets as they desire with the correct amount of tax paid.").

6. See Gregory, *supra* note 5; see also New, *supra* note 5.

7. *In re Leix Estate*, 289 Mich. App. 574, 797 N.W.2d 673 (2010).

8. *Id.* at 575.

She and her husband, Carlton J. Leix (Mr. Leix), had owned various assets together, including bank accounts and real estate.<sup>10</sup> Little more than a year before Mrs. Leix's death, the couple executed three documents—"identical wills, a revocable-trust agreement, and an agreement to execute mutual wills"—that worked together to establish a trust for the lifetime benefit of their granddaughter, Melady,<sup>11</sup> with the couple's issue as the remainder beneficiaries receiving equal shares following Melady's death.<sup>12</sup> During the years following Mrs. Leix's death, her surviving husband took a number of steps to ensure that Melady would receive all of his assets after his death.<sup>13</sup> By the time of Mr. Leix's death in 2008, "nearly all of the assets were titled jointly in his and Melady's names or named Melady as beneficiary."<sup>14</sup> As a result, upon Mr. Leix's death, most of his assets passed outside probate directly to Melady, bypassing the trust.<sup>15</sup>

Not surprisingly, as in many cases where immediate family members are skipped over in a will, the couple's son, Carlton E. Leix (Carlton), was not happy with his father's financial arrangements.<sup>16</sup> By arranging for assets to transfer outside probate, the father effectively deprived the trust of assets that would otherwise have eventually passed to the contingent beneficiaries, including the younger Carlton.<sup>17</sup> Along with an omitted grandchild, Carlton asked the probate court to rectify the situation by imposing "a constructive trust on certain assets in" Melady's control.<sup>18</sup> The unhappy descendants claimed that Mr. Leix's transfers of assets into Melady's name violated the 1982 mutual wills agreement.<sup>19</sup>

The probate court, which heard the initial suit, supported Melady.<sup>20</sup> The court found the 1982 mutual wills agreement to be "valid and binding," but nevertheless concluded "that nothing in the agreement put

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9. *Id.* at 576.

10. *Id.*

11. *Id.*

12. *Id.* at 578.

13. For example, Mr. Leix took funds from bank accounts previously owned with Viola and purchased annuities with Melady as beneficiary. *Leix*, 289 Mich. App. at 576. He opened checking accounts with Melady as joint owner. *Id.* He also had real estate re-titled with himself, Melady, and her mother as joint tenants with right of survivorship. *Id.*

14. *Id.*

15. *Id.* at 578.

16. *Id.* at 577.

17. *Id.* at 576-77.

18. *Id.* at 576-78.

19. *Leix*, 289 Mich. App. at 577.

20. *Id.* at 576-78.

21. *Id.* at 577.

22. *Id.*

any restrictions on what the surviving party could do with the parties' assets . . . ."<sup>21</sup> In the absence of any such restriction, according to the court, Mr. Leix had the right to transfer assets during his lifetime without running afoul of the mutual wills agreement from years past.<sup>22</sup>

On appeal, no one disputed the validity of Mr. and Mrs. Leix's agreement to execute mutual wills. The court of appeals focused instead on "whether an agreement to execute mutual wills limits a surviving spouse's ability to dispose of the assets that the parties held jointly as he or she chooses."<sup>23</sup> In other words, did the terms of the agreement constrain Mr. Leix to preserve the assets so that they would be available to fund the trust for Melady and, after her death, for the other beneficiaries of the trust? From the court's perspective, two distinct issues were involved: "(1) whether assets that are held jointly by the contracting parties are subject to an agreement to make mutual wills[,] and (2) to what extent does an agreement to make mutual wills restrict the surviving spouse's ability to transfer assets."<sup>24</sup>

The court dealt quickly with the first issue. Melady and her husband, the respondents at the appellate level, sought a ruling that "in every instance, an agreement to make mutual wills does not apply to property that the contracting parties own jointly at the time the first testator dies . . . ."<sup>25</sup> The court rejected that broad proposal.<sup>26</sup>

Turning to the second issue, the court acknowledged that "Michigan caselaw is not well developed."<sup>27</sup> The following pages of the opinion then attempted to clarify Michigan law, albeit on the inherently limited question of "whether an agreement to make mutual wills restricts the surviving spouse's ability to dispose of assets absent express limitations

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21. *Id.* at 577.

22. *Id.* at 577.

23. *Leix*, 289 Mich. App. at 578.

24. *Id.* at 579.

25. *Id.* at 580.

26. *Id.* at 582. Melady and her husband relied heavily on another Michigan Court of Appeals case, *In re VanConett Estate*, 262 Mich. App. 660, 687 N.W.2d 167 (2004), in which the couple's wills "revealed a clear expression of their intent to enter into a contract to dispose of their property in the manner expressed in their wills . . . ." *Leix*, 289 Mich. App. at 579. In *Leix*, another Michigan Court of Appeals panel limited *VanConett* to its very specific facts. *Id.* at 582. One well-known Michigan trusts and estates commentator, retired Calhoun County Probate Judge Phillip E. Harter, observed that it would have been preferable for such limitation to come from the Michigan Supreme Court but, in lieu of such clarification from the higher court, "we should probably follow this opinion and consider *In re VanConett Estate* limited to its particular circumstances." Phillip E. Harter, *Recent Decisions in Michigan Probate, Trust, and Estate Planning Law*, 30 MICH. PROB. & EST. PLAN. J. 8, 9 (2010), available at [www.michbar.org/probate/pdfs/winter10.pdf](http://www.michbar.org/probate/pdfs/winter10.pdf).

27. *Leix*, 289 Mich. App. at 582.

in the agreement . . . .”<sup>28</sup> The court rejected the appellants’ urged cases on the ground that those cases all “involved agreements to convey specific property,”<sup>29</sup> which was not the case here. As with the position pushed by Melady and her husband on the first point, the court here, in effect, found the stance taken by the junior Carlton and his niece too broad. The younger Carlton and his niece wanted the court to adopt, as “[a] corollary of the rule that the surviving co-maker of an agreement to make a mutual will is irrevocably bound by that agreement after the death of the other co-maker,” a holding “that the surviving co-maker cannot transfer assets in a manner that would defeat the agreement.”<sup>30</sup> The court declined the invitation.<sup>31</sup>

Instead, the decision provided an overview of competing jurisdictions’ approaches to handling a decedent’s assets when that decedent had agreed to a mutual will. As the *Leix* court pointed out, “[s]ome jurisdictions allow the surviving spouse . . . to use the property for support and ordinary expenditures, but not to give away considerable portions of it or make gifts that defeat the purpose of the agreement.”<sup>32</sup> Alternatively, the court pointed out that some jurisdictions allow survivors to deal with property as they wish during their lifetimes, without regard to any agreements as to mutual wills.<sup>33</sup> The court also noted jurisdictions where courts actually invalidated transfers made by a surviving spouse when those transfers negated or limited the effect of a mutual will.<sup>34</sup> In those cases, the courts generally held that allowing such transfers violated an implied covenant of good faith.<sup>35</sup>

In the end, however, the Michigan Court of Appeals noted with approval jurisdictions in which courts have “focused on enforcing the terms of agreements to make wills as they are written.”<sup>36</sup> The court then declined “to recognize implied limitations on the transfer of assets by the surviving spouse in the case of an agreement to make mutual wills.”<sup>37</sup> Because the agreement to make mutual wills between the couple did not contain express restrictions on Mr. Leix’s use of the assets after his

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 590.

32. *Id.* at 584.

33. *Leix*, 289 Mich. App. at 584.

34. *Id.* at 586-87.

35. *Id.* at 586-88.

36. *Id.* at 589.

37. *Id.* at 590.

wife's death (or on Mrs. Leix should her husband have predeceased her), the court refused to read such restrictions into the agreement and restrict Mr. Leix's behavior.<sup>38</sup> Instead, the court protected Mr. Leix's choices even though they would result in little to no assets eventually available for the trust's contingent beneficiaries.<sup>39</sup>

## 2. Discussion

On the surface, the *Leix* case resolves a relatively narrow issue: whether a valid agreement to enter into mutual wills restricts a surviving spouse's use of assets following one spouse's death. The ruling in *Leix* makes clear that a surviving spouse can do as he or she wishes as long as the mutual will does not contain any specific restriction on use of assets.<sup>40</sup> Should a mutual will include disposition of specific property, however, other cases cited by the *Leix* court indicate that the mutual will would be upheld as to that property.<sup>41</sup> Moreover, should an agreement to enter into mutual wills contain express limitations on a surviving spouse's general ability to treat property as his own following the first spouse's death, the *Leix* decision suggests that such an express limitation also would be upheld if the contract contained "clear and unambiguous" language to that effect.<sup>42</sup>

The *Leix* case provides a cautionary tale for practitioners. If clients are going to enter into an agreement to make mutual wills, such an agreement must be precise as to its application. If the parties intend for the surviving spouse to have complete control over any assets jointly owned, that should be so stated.<sup>43</sup> Alternatively, if the parties intend to allow the surviving spouse only some degree of control—but not absolute freedom—with regard to those assets, the degree of control should be meticulously delineated. Of course, the problem with such specificity lies in the unpredictability of human nature. Although both parties might be unable to envision a future period when either would wish different choices, such a future may nonetheless develop. Lawyers tend to incorporate flexible, broad provisions to accommodate

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38. *Id.* at 591.

39. *Leix*, 289 Mich. App. at 591.

40. *See id.* at 590-91.

41. *Id.* at 579, 581 (citing *Schondelmayer v. Schondelmayer*, 320 Mich. 565, 31 N.W.2d 721 (1948); *Getchell v. Tinker*, 291 Mich. 267, 289 N.W. 156 (1939)).

42. *Id.* at 590 (quoting *Burkhardt v. Bailey*, 260 Mich. App. 636, 656-57, 680 N.W.2d 453 (2004)).

43. Admittedly, one might question why such a couple would enter into a mutual will if they intend to give each other the power to defeat such will after the first dies.

uncertainties. Unfortunately, the more flexible the language, the greater the risk of litigation over any uncertainties.

Thus, an agreement to maintain the provisions of mutual wills is not the best answer. A trust may offer a better and more flexible solution for a client who desires to ensure the availability of assets for the surviving spouse while maintaining protection for future generations.

### *B. In re Leete Estate*

#### *1. Description*

The *Leete* case<sup>44</sup> involved a number of procedural questions in addition to interpretation of Michigan's simultaneous death provisions<sup>45</sup> as they appear in the Michigan Estates and Protected Individuals Code (EPIC).<sup>46</sup> The property at issue was a cottage in Mackinaw City that had been owned for the past century by the family of Frederick Leete, one of the decedents, but with regard to which Mr. Leete (who had inherited the property) had "executed a quitclaim deed" that transferred ownership to himself and his wife "as tenants by the entirety."<sup>47</sup> Mr. Leete and his wife, Barbara, died in their home in Indiana as a result of carbon monoxide poisoning.<sup>48</sup> Mrs. Leete was found dead on February 28, 2008; Mr. Leete died "on March 3, 2008, at 9:10 p.m."<sup>49</sup> Mr. Leete died testate, with a will dated in 1974; Mrs. Leete died intestate.<sup>50</sup> Both "had children from prior marriages" but no children together, although they had been married for thirty-four years at the time of their demise.<sup>51</sup>

Mr. Leete's will, in relevant part, left his wife the property in Mackinaw City "if she shall survive me for a period of more than thirty (30) days" and otherwise to his children.<sup>52</sup> Following the couple's deaths, both Mr. Leete's son and Mrs. Leete's daughter claimed ownership rights in the Mackinaw City property. The son argued, as the appellant, that the property belonged entirely to his father's estate while the daughter argued, as the appellee, that one-half of the property belonged to her mother's estate.<sup>53</sup> The son's argument in the trial court appeared to rest

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44. *In re Leete Estate*, 290 Mich. App. 647, 803 N.W.2d 889 (2010).

45. MICH. COMP. LAWS ANN. § 700.2702 (West 2002).

46. MICH. COMP. LAWS ANN. § 700.1101-8206 (West 2002).

47. *Leete*, 290 Mich. App. at 650.

48. *Id.* at 651.

49. *Id.*

50. *Id.*

51. *Id.* at 650.

52. *Id.* at 651.

53. *Leete*, 290 Mich. App. at 651-52.

on his unsupported allegation<sup>54</sup> that Mr. Leete survived his wife by more than 120 hours because she died on February 27, 2008.<sup>55</sup> The daughter's argument relied on the EPIC provisions governing simultaneous death.<sup>56</sup> Specifically, the daughter pointed to the basic rule that, "if it is not established by clear and convincing evidence that 1 of 2 co-owners with right of survivorship survived the other co-owner by 120 hours, 1/2 of the co-owned property passes as if 1 had survived by 120 hours and 1/2 as if the other had survived by 120 hours."<sup>57</sup>

After some wrangling, the parties agreed to an order issued May 19, 2009 by the trial court that gave Mr. Leete's son ninety days to produce evidence that his father survived Mrs. Lette by at least 120 hours.<sup>58</sup> The order further provided for summary disposition in favor of Mrs. Leete's daughter should the son fail to produce the requested evidence within the specified time frame.<sup>59</sup> On August 20, 2009, once the ninety-day period passed, the trial court granted summary disposition for the daughter, citing "no clear and convincing evidence" that the senior Mr. Leete had outlived his wife by the requisite 120 hours.<sup>60</sup>

On appeal, Mr. Leete's son focused on technical, procedural arguments. First, he complained that the trial court's summary disposition order in favor of Mrs. Leete's daughter was "void because it did not meet the requirements" of the applicable Michigan court rule.<sup>61</sup> Specifically, he claimed that the conditional quality of the initial order violated the rule and "that the order was not in conformity with the probate court's decision."<sup>62</sup> The appellate court rejected all of the son's points.<sup>63</sup> Relying on the "plain and ordinary meaning" of the rule's language, the court observed that nothing in Michigan Court Rule

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54. The appellate court noted that the son "did not provide any evidence in support of this allegation." *Id.* at 653.

55. Mrs. Leete's body was discovered by her daughter on February 28, 2008 at about 1:40 p.m. The death certificate listed her date of death as that same day with the time of death left "unknown." *Id.* at 651. The Michigan Court of Appeals noted that "[t]he longest length of time possible between Barbara's and Frederick's deaths would be 117 hours and 10 minutes," which "calculation assumes that Barbara died at the earliest time possible on February 28th, i.e., immediately after the day began at midnight." *Id.* at 652 n.2.

56. *Id.* at 664-65. The 120-hour rule is part of EPIC's simultaneous death rule. *See* MICH. COMP. LAWS ANN. § 700.2702.

57. *Leete*, 290 Mich. App. at 652 (emphasis omitted) (quoting MICH. COMP. LAWS ANN. § 700.2702(3)).

58. *Id.* at 654.

59. *Id.*

60. *Id.* at 654.

61. *Id.* The court rule was MICH. CT. R. 2.602(B).

62. *Id.* 659.

63. *Leete*, 290 Mich. App. at 659.



2.602(B) expressly prohibits a conditional order of the type entered here.<sup>64</sup> As for the argument that the order did not “comport[] with the court’s decision” as the rule requires,<sup>65</sup> the appellate court observed that, “because a court speaks through its written orders, the court’s signature on the May 19 order implies that the substance of the order was in conformity with its decision to follow appellee’s suggested course of action.”<sup>66</sup> Then, because the August 20 order granting summary judgment complied with the provisions of the May 19 order, the appellate court “conclude[d] that the August 20 order was validly entered under the same subrule.”<sup>67</sup>

The appellate court seemed annoyed by Mr. Leete’s son. Not only did it call part of his argument “illogical,”<sup>68</sup> but the court also condemned the son’s desired position as one that “would allow litigants to haphazardly agree to the entry of orders that envision the entry of additional orders and later escape the effect of those subsequently entered orders on appeal by declaring the later orders void.”<sup>69</sup> Creating such a situation, according to the court, would be “a waste of judicial resources . . . .”<sup>70</sup>

The son also quibbled with the summary disposition the trial court granted to Mrs. Leete’s daughter, and the appellate court spent more than half of the opinion dispensing with the son’s arguments on this issue.<sup>71</sup> First, the son argued that the trial court should have made a ruling as to whether Indiana law applied and its effect.<sup>72</sup> Because Mr. and Mrs. Leete maintained a residence in Indiana and, in fact, died in Indiana, the son wanted Indiana law to apply.<sup>73</sup> However, the younger Mr. Leete also filed an affidavit of domicile with the trial court that listed his father’s domicile as the Mackinaw City address.<sup>74</sup> Moreover, the court noted, by its terms, EPIC applies to a “nonresident’s property that is located in this state.”<sup>75</sup> The court concluded that “application of EPIC, as opposed to

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64. *Id.* at 657.

65. *Id.* at 656 (quoting MICH. CT. R. 2.602(B)(2)) (emphasis omitted).

66. *Id.* at 658.

67. *Id.*

68. *Id.* at 658.

69. *Leete*, 290 Mich. App. at 659.

70. *Id.* at 659.

71. *Id.* at 659-71.

72. *Id.* at 660.

73. *Id.* at 661-62.

74. *Id.* at 662.

75. *Leete*, 290 Mich. App. at 662 (quoting MICH. COMP. LAWS ANN. § 700.1301(b)).

Indiana law, was appropriate," whether Mr. Leete was deemed a Michigan or Indiana resident.<sup>76</sup>

Second, the son claimed that, because his father's will and the quit claim deed both preceded enactment of EPIC, EPIC did not apply to the situation.<sup>77</sup> Here, too, the appellate court bluntly disagreed, stating that "EPIC applies to a governing instrument executed before EPIC came into effect, as long as it does not affect an accrued right and as long as the governing instrument does not contain a contrary intent."<sup>78</sup> Neither the will nor the deed contained any language suggesting "that EPIC should not apply."<sup>79</sup> In addition, the court cited precedent to the effect that an "accrued right" for purposes of EPIC does not include an expectancy under a will, which can be changed until the point of a testator's death.<sup>80</sup>

Third, if EPIC did apply, the son wanted the court to reject the simultaneous death provisions of EPIC as applied to the situation.<sup>81</sup> The appellate court provided background on the evolution of the simultaneous death provisions, explaining that prior to EPIC, "the 120-hour survival requirement did not always apply to nonprobate transfers, such as joint estates with rights of survivorship[,] as in this case."<sup>82</sup> Mr. Leete's son focused on two perceived problems with the 120-hour requirement. First, he returned to the same argument he offered against application of EPIC in the first place—namely, that the "governing instrument" evidenced a "contrary intent."<sup>83</sup> The appellate court, however, pointed again to the absence in the will and the deed of any language suggesting that current law (i.e., EPIC) should not apply. Without that, the contrary intent argument failed completely.<sup>84</sup>

Having found that EPIC's simultaneous death provisions applied and observing that Mr. Leete's son did not dispute the meaning of the provisions or provide any evidence whatsoever indicating that his father had outlived Mrs. Leete, the court also dismissed the one exception the son urged.<sup>85</sup> EPIC provides an exception to the simultaneous death rule

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76. *Id.* at 663.

77. *Id.*

78. *Id.* (citing *In re Temple Marital Trust*, 278 Mich. App. 122, 127-28, 748 N.W.2d 265 (2008)).

79. *Id.*

80. *Id.* at 663-64 (citing *In re Estate of Smith*, 252 Mich. App. 120, 127-28, 651 N.W.2d 153 (2002)) ("[A]n 'accrued right' . . . mean[s] something other than a right under a will upon the testator's death . . .").

81. *Leete*, 290 Mich. App. at 665.

82. *Id.* at 665 (citing *VanConett*, 262 Mich. App. at 667-68).

83. *Id.* at 666 (referencing MICH. COMP. LAWS ANN. § 700.2701 (West 2002)).

84. *Id.*

85. *Id.* at 669.

where “application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition.”<sup>86</sup> Although the court admitted that “multiple governing instruments” existed thanks to the presence of both the will and the deed, it rejected the son’s position that application of the 120-hour rule would cause “an unintended failure . . . of a disposition.”<sup>87</sup> From the court’s perspective, the fact that Mr. Leete executed a quitclaim deed subsequent to execution of his will reflected a change in Mr. Leete’s intentions with regard to the Mackinaw City property.<sup>88</sup> In effect, by executing the quitclaim deed, Mr. Leete revoked the part of his will relating to that piece of property. Thus, application of the 120-hour rule to preserve one-half of the property for Mrs. Leete’s estate carried out Mr. Leete’s intentions. To have allowed Mr. Leete’s will to control disposition would have frustrated his intent, according to the court.<sup>89</sup> The court also considered an argument from the son as to whether the trial court applied the wrong standard of review, but immediately rejected the issue.<sup>90</sup>

## 2. Discussion

In all, the appellate court agreed on every point with the trial court, and the son lost every issue. The result was hardly surprising. As the appellate court noted, simultaneous death statutes have a long history. They accomplish a socially desirable goal of adjusting distributions on death “to ensure that a decedent’s property passes to a beneficiary who can personally benefit, as opposed to a beneficiary who became deceased a short time later.”<sup>91</sup> The son’s arguments that EPIC should not apply—either based on a choice of law determination or because EPIC became law after execution of both governing documents in this case—similarly were doomed. The express language of EPIC answered the questions easily.<sup>92</sup>

Viewed from a distance, this case reflects the frustration of an adult child striving to retain property viewed as a family heirloom for one side of a family. The problem is a common one with second marriages and children from previous unions. The case highlights the importance of

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86. MICH. COMP. LAWS ANN. § 700.2702(4)(d).

87. *Leete*, 290 Mich. App. at 669.

88. *Id.* at 669.

89. *Id.* at 669-70.

90. *Id.* at 670.

91. *Id.* at 664-65.

92. *Id.* at 661-63.

revisiting estate plans throughout the years as families change. Mr. Leete executed his will in 1974,<sup>93</sup> presumably around the time of his marriage to his second wife. He executed the quitclaim deed that transformed ownership of the cottage in 1996,<sup>94</sup> but never revised his will. If not for that will and its contradiction in terms with the reality of the deed's ownership change, this case could have been avoided. The fact that Mr. Leete made his wife a co-owner of the cottage almost fifteen years before they died indeed suggests that his intentions toward that cottage had changed over time. The conflict with his son might have been unavoidable, but the time spent in the Michigan courts was unnecessary. The irritated tone of the appellate court hints at this sentiment. Had Mr. Leete's will been updated appropriately, as surely should have occurred at some point in the thirty-four years of their marriage, the update could have reflected the changes in the cottage ownership. While the son's emotions might still have resulted in conflict, his legal options would have been limited.

### *C. In re Nale Estate*

#### *1. Description*

The *Nale* case<sup>95</sup> involves Michigan's slayer statute, the provision of EPIC that causes an individual who "feloniously and intentionally" kills a decedent to "forfeit[] all benefits . . . with respect to the decedent's estate."<sup>96</sup> The decedent's wife in this case was convicted of voluntary manslaughter in the stabbing death of her husband.<sup>97</sup> The probate court applied the EPIC slayer statute rule and barred the wife from receiving anything from her husband's estate.<sup>98</sup> She appealed.<sup>99</sup> The wife argued that voluntary manslaughter did not constitute a felonious and intentional killing within the meaning of the slayer statute.<sup>100</sup> In particular, she claimed that the killing was not intentional in the way first or second degree murder is.<sup>101</sup> She pointed to the fact that she had been acquitted of murder as support for her position.<sup>102</sup>

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93. *Leete*, 290 Mich. App. at 651.

94. *Id.* at 650.

95. *In re Nale Estate*, 290 Mich. App. 704, 803 N.W.2d 907 (2010).

96. MICH. COMP. LAWS ANN. § 700.2803(1) (West 2002).

97. *Nale*, 290 Mich. App. at 705.

98. *Id.* at 706.

99. *Id.* at 706.

100. *Id.* at 708.

101. *Id.*

102. *Id.* at 708.

The appellate court disagreed with the wife and affirmed the probate court's application of the slayer statute.<sup>103</sup> Noting that the courts in Michigan look to common law for the elements of voluntary as opposed to involuntary manslaughter,<sup>104</sup> the court cited precedent that characterized voluntary manslaughter as "intentional killing,"<sup>105</sup> as compared to involuntary manslaughter, which is characterized as "the killing of another without malice and unintentionally."<sup>106</sup> The appellate court also noted that, even before EPIC's codification of the slayer rule, the Michigan Supreme Court had "referred favorably" to a treatise explanation of the common law approach.<sup>107</sup> The appellate court further observed that the legislature is "presumed to know the existence of the common law" when it takes action, yet the Michigan legislature made no effort to limit the common law when it included the slayer rule in EPIC.<sup>108</sup>

## 2. Discussion

Given the widespread application and acceptance of slayer statutes across the United States and the clear wording of the Michigan version, the result in *Nale* is predictable.<sup>109</sup> From a policy perspective, it is also a desirable result given the strong public policy incentive of preventing those who intentionally kill another from profiting from their violent action.<sup>110</sup> Nonetheless, the *Nale* case provides the valuable clarification

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103. *Nale*, 290 Mich. App. at 710.

104. *Id.* (citing *People v. Pouncey*, 437 Mich. 382, 388, 471 N.W. 2d 346 (1991)).

105. *Id.* (citing *People v. Mendoza*, 468 Mich. 527, 534-35, 664 N.W. 2d 685 (2003)).

106. *Id.* at 709 (citing *People v. Scott*, 29 Mich. App. 549, 551, 185 N.W.2d 576 (1971)).

107. Among other points, the cited treatise discussion highlighted that "no distinction can be made between a death caused by murder and one caused by manslaughter." *Id.* (citing the Michigan Supreme Court's favorable reference to WHARTON ON HOMICIDE (3d ed.) in *Garwols v. Bankers' Trust Co.*, 251 Mich. 420, 428, 232 N.W. 239 (1930), and *Budwit v. Herr*, 339 Mich. 265, 270-71, 63 N.W.2d 841 (1954)).

108. *Nale*, 290 Mich. App. at 710 (citing *Wold Architects & Engineers v. Strat*, 474 Mich. 223, 234, 713 N.W.2d 750 (2006)).

109. See RESTATEMENT (THIRD) OF PROPERTY § 8.4 (2003) (noting that forty-seven states have adopted a slayer statute).

110. See, e.g., John W. Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 715 (1936) ("That a man who murders another and then seeks to take property as a result of his death is attempting to take advantage of his own wrong is clear. That to allow such a result is repugnant to all sense of justice is equally obvious."). See also *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) ("No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.").

that Michigan's statute applies equally to murder and to voluntary manslaughter.<sup>111</sup>

*D. In re Lundy Estate*

*1. Description*

The *Lundy* case<sup>112</sup> dealt with the rights of a bank as a secured creditor to exercise its rights to pledged property upon default. The estate sought to have the property at issue distributed to the family in accordance with "the priority claims and allowances" established under EPIC.<sup>113</sup> The bank had accepted assignment by the decedent (David Gary Lundy) of a security interest in a Certificate of Deposit (CD) account as collateral for a promissory note.<sup>114</sup> Mr. Lundy personally guaranteed the note and a mortgage between the bank and Lundy's Lane, L.L.C., his family-owned party store.<sup>115</sup> In relevant part, the assignment agreement provided that in the event of a default (which was defined to include Mr. Lundy's death),<sup>116</sup> the bank could "take all funds in the CD account and . . . apply the funds to the indebtedness."<sup>117</sup> Mr. Lundy died in late February 2008<sup>118</sup> and the bank exercised its rights to the CD account at the end of April 2008.<sup>119</sup> Shortly afterward, in mid-May, the estate claimed the assets in the CD account for various allowances for family under EPIC.<sup>120</sup>

In early January 2009, Mr. Lundy's estate filed a claim for return of the CD funds on the ground that, under EPIC, "the bank's security interest in the CD account was of lower priority than the surviving spouse's claim for reimbursement of reasonable funeral expenses, the

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111. *Nale*, 290 Mich. App. at 710.

112. *In re Lundy Estate*, 291 Mich. App. 347, 804 N.W.2d 773 (2011).

113. *Id.* at 347. When an estate does not have sufficient assets to pay all claims, EPIC provides a list of priorities, starting with "[c]osts and expenses of administration" and continuing with "[r]easonable funeral and burial expenses," followed by the "[h]omestead allowance," the "[f]amily allowance," and "[e]xempt property." MICH. COMP. LAWS ANN. §§ 700.3805(1)(a)-(e) (West 2002).

114. *Lundy*, 291 Mich. App. at 349.

115. *Id.*

116. *Id.* at 350 n.4.

117. *Id.* at 350.

118. *Id.*

119. *Lundy*, 291 Mich. App. at 350.

120. *Id.* at 350-51.

homestead allowance, the family allowance, and exempt property.”<sup>121</sup> The bank, however, claimed that it had perfected its security interest in the CD account and thus acquired “an interest superior to any and all claims to the same collateral.”<sup>122</sup>

Although the trial court agreed that the bank had a perfected security interest, the court also believed that the bank’s right to take funds in the CD account and apply them to reduce the related indebtedness should have been exercised during Mr. Lundy’s lifetime or, at the latest, before the filing for probate and appointment of a personal representative for the estate.<sup>123</sup> Once a personal representative was appointed, from the trial court’s perspective, EPIC took precedence over the Uniform Commercial Code (UCC) provisions that govern secured interests.<sup>124</sup> As a result, the trial court ruled the spouse’s claims for homestead and family allowance trumped the bank’s claims.<sup>125</sup>

The appellate court considered both Article 9 of Michigan’s version of the UCC<sup>126</sup> and EPIC. Looking first at the UCC and the assignment agreement, the court concluded that the “[b]ank was entitled . . . to apply the balance of the CD account to the obligation secured by the account (the mortgage) because the bank held the deposit account.”<sup>127</sup> Turning then to EPIC, the court described how secured creditors—such as the bank in this case—are distinguished from other creditors of an estate.<sup>128</sup> For example, under certain circumstances a secured creditor may proceed to enforce its security against the decedent’s estate before appointment of a personal representative, whereas other creditors must wait.<sup>129</sup> In discussing another exception for secured creditors in EPIC, the appellate court emphasized part of the Reporter’s Supplemental Comment: “The secured creditor . . . has a priority position only as to the asset in which the security is held. If the security is inadequate, the creditor has no preference when trying to collect any deficiency.”<sup>130</sup>

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121. *Id.* at 351. EPIC places “debts and taxes with priority under other laws of this state” several steps below the various types of allowances for family. MICH. COMP. LAWS ANN. § 700.3805(c), (d), (e) and (h).

122. *Lundy*, 291 Mich. App. at 351.

123. *Id.*

124. *Id.*

125. *Id.* at 351-52.

126. MICH. COMP. LAWS ANN. §§ 440.9101-9994 (West 2003).

127. *Lundy*, 291 Mich. App. at 354.

128. *Id.* at 354-59.

129. *Id.* (citing MICH. COMP. LAWS ANN. § 700.3104 (West 2002)).

130. *Id.* at 355 (emphasis omitted) (citing EPIC Reporter’s Supplemental Comment for 2005 to MICH. COMP. LAWS ANN. § 700.3801 (West 2002)).

The estate argued, however, that the bank had “no priority position” except as against an unsecured creditor.<sup>131</sup> In making this argument, the estate relied on EPIC’s hierarchy of priorities in paying out assets of an estate in cases where the estate could not meet all claims.<sup>132</sup> Under that list, “[d]ebts and taxes with priority under other laws of this state” fall well below the priority of the homestead allowance, family allowance and exempt property, among other claims.<sup>133</sup>

The court, however, drew a distinction between the creditor’s right to exhaust the security in payment of the debt and the same creditor’s right to bring a claim against the estate. According to the court, “[n]o provision requires a secured creditor that is otherwise entitled to exhaust a security to first bring a claim against the estate in order to be permitted to exhaust the security.”<sup>134</sup> A secured creditor may surrender the security interest and file a claim as a general creditor against the estate, but would then lose the priority position afforded by the security interest.<sup>135</sup> Alternatively, and more likely, a secured creditor could apply the assets subject to the security interest against the debt and then file a claim for any remaining amount of indebtedness, but with regard to such remaining debt the secured creditor is again only a general creditor.<sup>136</sup>

The appellate court highlighted other EPIC provisions that similarly distinguish a secured creditor from other general creditors.<sup>137</sup> In each case, the court noted that the various provisions “treat a secured creditor differently and contemplate a secured creditor’s right to collect from the security without bringing a claim against the estate for estate funds.”<sup>138</sup> The court also looked to Minnesota and Arizona, both states with probate codes modeled—as is Michigan’s—on the Uniform Probate Code, and cited cases with similar facts where the courts ruled a secured creditor could exhaust its security interest before filing a claim with the estate.<sup>139</sup> The Michigan court then concluded that “the bank was entitled to

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131. *Id.* at 356.

132. *Id.*

133. MICH. COMP. LAWS ANN. § 700.3805(1) (West 2002).

134. *Lundy*, 291 Mich. App. at 357.

135. *Id.* at 357-58 (citing EPIC Reporter’s Supplemental Comment for 2005 to MICH. COMP. LAWS ANN. § 700.3809 (West 2002)).

136. *Id.* at 358.

137. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.3812 (West 2002) (prohibiting certain actions against estate property, but noting that “[t]his section shall not be construed to prevent the enforcement of a mortgage, pledge, or lien upon property in an appropriate proceeding.”).

138. *Lundy*, 291 Mich. App. at 358-59.

139. *Id.* at 359-60 (citing *In re Estate of Larson*, 359 N.W.2d 281 (Minn. Ct. App. 1984) and *In re Estate of Stephenson*, 173 P.3d 448 (Ariz. Ct. App. 2007)).



exhaust the funds in the CD account” and reversed the trial court ruling in *Lundy*.<sup>140</sup>

## 2. Discussion

The obvious conflict in the case arises from two parallel parts of Michigan law: Article 9 of the UCC and the priority list for claims under EPIC. Perhaps naturally, given their areas of expertise, the estate looked solely at EPIC and failed to delineate between types of creditors, whereas the bank focused on the rights of secured creditors as governed by the UCC. As a matter of statutory construction, the appellate court sided with the bank. And, indeed, the parts of EPIC that the estate apparently overlooked strengthened the bank’s position. Article 9 of the UCC protects secured creditors’ rights,<sup>141</sup> and the decision in this case reflects that, for better or worse.

On the other hand, the list of priority for payment of claims places certain claims far ahead of general debts, specifically including allowances for the surviving spouse and family.<sup>142</sup> By not distinguishing between general and secured creditors in the list of priorities, the legislature left open the path the estate followed here. This court appears to have perceived the legislature’s omission almost as an oversight handled by reference to the distinctions elsewhere in the statute, and decisions from other jurisdictions support that analysis. But one could see the alternative: that the legislature chose to classify secured creditors with other creditors when the estate was otherwise insufficient to pay all claims. The conflict lies in determining who most deserves estate assets. Is society better served by elevating secured creditors over family members in an insufficient estate? After all, after funeral expenses and administrator’s fees, the homestead allowance and family allowance do not total to large sums.<sup>143</sup> Would it perhaps be preferable to let creditors slip below those minimal amounts in order to assist grieving and possibly near-destitute surviving family members? Whatever the policy

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140. *Id.* at 361.

141. See, e.g., Ingrid Michelsen Hillinger & Michael G. Hillinger, 2001: *A Code Odyssey (New Dawn for the Article 9 Secured Creditor)*, 106 COM. L.J. 105, 110 (2001) (observing that “when Cousin Vinny masters Revised Article 9, the world is going to be the secured creditor’s oyster—inside and outside bankruptcy”).

142. MICH. COMP. LAW ANN. § 700.3805.

143. The 2011 homestead allowance was \$20,000. MICH. COMP. LAWS ANN. § 700.2402 (West 2002). The 2011 family allowance was \$24,000. MICH. COMP. LAWS ANN. § 700.2403 (West 2002). The exempt property allowance for 2011 was \$14,000. MICH. COMP. LAWS ANN. § 700.2404 (West 2002). The amounts are adjusted for years after 2000 in accordance with MICH. COMP. LAWS ANN. § 700.1210 (West 2002).

considerations, the case at least provides clarity, resolving the question firmly in favor of creditors, at least for the time being.<sup>144</sup>

### III. CONCLUSION

The four cases discussed above do not move the law in Michigan in any significant direction. With the exception of the *Leete* decision, they each resolve specific questions in Michigan probate law. Of the four, *Lundy* may prove the case with the greatest impact because of the current economic climate. Given the number of struggling businesses, one can easily imagine that more and more decedents may leave secured claims against personal assets used to prop up business interests. If this happens, families may be stunned to learn that, notwithstanding the apparent protections in EPIC, secured creditors come first. Of course, given the appeal of protecting families, *Lundy* may also prove the case with the greatest chance of legislative intervention in the future.

*Nale*, on the other hand, seems the most straightforward of the cases. Certainly, no one wants killers to profit from their wrongdoing. By clarifying that voluntary manslaughter triggers application of the slayer statute, the Michigan Court of Appeals furthers this basic societal goal.

The simultaneous death case, *Leete*, is also straightforward but adds little if anything to the law. It works best as a caution to future potential litigants to consider carefully before entering into a conditional agreement and then suing in an effort to overturn its effect. The annoyance seeping through the opinion should serve as a warning.

The mutual will agreement case, *Leix*, similarly delivers a lesson, both to practitioners and individuals. The case illustrates why agreements to make mutual wills are ill-advised. Not only do they breed litigation, but they often fail to accomplish their goal, as happened here. While the *Leix* case provides a path for future drafters who seek to create enforceable mutual will agreements, the takeaway message should be to avoid this road in the first place and seek alternative vehicles to carry out client wishes.

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144. Estate administrators may wish to provide formal notice to secured creditors in order to take advantage of shorter statutes of limitations provided under EPIC. See MICH. COMP. LAWS ANN. § 700.3801(2), and Harter, *supra* note 26, at 11.