



Warner Norcross + Judd

PROBATE LITIGATION

WINTER 2019

Trial Attorneys | Inheritance Disputes | Elder Law Issues

HOT TOPICS

P2 Cell Phone Wills?!

P4 Surviving Spouse: Til Death Do Us Part — Or Not

P6 Undue Influence Claims — Getting Harder to Win

WHO WE ARE



LAURA MORRIS, PARTNER

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- *Best Lawyers' 2019 Grand Rapids Trusts & Estates Litigation Lawyer of the Year*
- *Best Lawyers in America for Trusts & Estates Litigation (since 2018)*
- *Michigan Super Lawyers Magazine Rising Star in Trusts & Estates Litigation (since 2013)*



DAVID SKIDMORE, PARTNER

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- Secretary of Probate & Estate Planning Council, State Bar of Michigan
- ACTEC Fellow
- *Best Lawyers in America for Trusts & Estates Litigation (since 2015)*
- *Michigan Super Lawyers for Trusts & Estates Litigation (since 2013)*

CELL PHONE WILLS?!

A note on a cell phone — can that be a will? Yes, said the Court of Appeals this past year in *Horton*. There, a man left a short handwritten note directing the viewer to see a “farewell” note on his cell phone. His cell phone contained a typed note stating where he wanted his assets to go. The cell phone note was not dated, did not contain his signature, and there were no witnesses to him typing the cell phone note. His mother argued that the cell phone note was not a valid will.

Typically, for a will to be valid, it must be signed and witnessed by two people. However, there is an exception if “clear and convincing” evidence shows that the writing was intended to be the deceased person’s will. MCL 700.2503.



In *Horton*, the Court of Appeals analyzed the language in the cell phone note, and the handwritten note, and determined that the cell phone note was intended to direct where his assets went at death and was therefore a valid will.

THE TAKEAWAYS?

First, an attorney-drafted will avoids the question of whether the document was intended to be a will. The people in *Horton* went all the way to the Court of Appeals to answer the question of whether this cell phone note was a valid will. **Second**, this case is a glimpse into how technology is changing our behavior and the law. We expect more cases in the future to test the validity of electronic wills. In the meantime, paper wills and pen signatures are best until the law has further evolved. Beware — cutting corners on your estate plan can lead to court battles.

WHAT WE DO

We handle all issues relating to inheritance disputes and vulnerable people:

- Charitable gift disputes
- Trust disputes
- Will disputes
- Power of attorney disputes
- Life insurance disputes
- Joint account disputes
- Sibling disputes
- Blended family disputes
- Guardianship disputes
- Conservatorship disputes
- Trust/estate creditor issues
- Seeking to remove a trustee or executor
- Getting more information from a trustee or executor
- Defending a trustee or executor
- Protecting an elderly person from financial abuse
- Obtaining judgments against a person who took advantage of an elderly person
- Challenges to a will or trust's validity
- Challenges to a property transfer's validity
- Forgery issues
- Claims of mental incapacity
- Claims of undue influence
- Appointment of guardians (adult and children)
- Appointment of conservator (adult and children)
- Seeking to remove a guardian or conservator
- Modifying an existing guardianship or conservatorship
- Modifying a trust
- Obtaining court clarification of a trust's terms
- Memorializing a family agreement

Michigan Probate Litigation Cases and News

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SURVIVING SPOUSE:

TIL DEATH DO US PART — OR NOT

When a deceased person has assets that require a court proceeding to administer (aka “probate”), a surviving spouse has certain rights in the estate assets. But, what if the couple wasn’t living together anymore when the spouse died? What if the couple acted as though they were essentially divorced?

The *Erwin* case from 2018 explored these issues, and held that each marital situation must be evaluated on a case-by-case basis to determine if the surviving spouse will in fact be treated as a spouse under estate laws.

Erwin concluded that a surviving spouse will be considered “willfully absent” from the marriage, and as a result not a spouse for the deceased person’s estate, if: (1) the surviving spouse intended to be absent from the deceased spouse for one year or more before death; and (2) there was a complete physical absence and emotional absence between the spouses for one year or more before death (resulting in a practical end to the marriage). Estate administration can get complicated; we can help.



BIG WINS

LAURA — DEFENDS A UNIVERSITY'S LARGEST GIFT IN SCHOOL HISTORY

Laura represented Ferris State University and helped secure the University's largest gift in its 134-year history: \$6.59 million. Disgruntled family members sought to undo the entire gift to Ferris in court. Laura has extensive experience with clients in disputes over inheritances, including defending a \$25 million dispute to a nonprofit, and Laura put this experience to work for Ferris:

"[Laura] demonstrated the **breadth of her legal expertise** and knowledge to represent the University in what turned out to be a **particularly complex probate court dispute**.[.] Some folks forget the difference that good lawyering makes.[.] I can tell you that we would not have achieved this result at all, had Laura not so carefully positioned the case.[.] She did an **extraordinary job** and it will make a difference for many generations of pharmacy students, which is exactly what [the donor] intended."

—Miles J. Postema, Vice President and General Counsel,
Ferris State University.

DAVID — WROTE AN AMICUS BRIEF THAT CORRECTED MICHIGAN LAW

The Michigan Court of Appeals' 2017 decision in *In re: Brody Trust* caused great concern to trust and estate attorneys because it held that a trust settlor's child always has the right to file a lawsuit regarding the trust in probate court. Previously, Michigan law allowed a trust settlor's child to bring a trust lawsuit only under narrow circumstances. The Probate and Estate Planning Section of the State Bar of Michigan filed an amicus brief (drafted by David) with the Michigan Supreme Court, asking it to reverse the decision. The Michigan Supreme Court remanded the case to the Court of Appeals, which revised its decision consistent with the Probate Section's amicus brief, which the Court of Appeals found "persuasive." Trust and estate attorneys breathed a sigh of relief after this decision was corrected.

UNDUE INFLUENCE CLAIMS— GETTING HARDER TO WIN



A legal document is invalid if signed under such pressure that it reflects the intent of the influencer rather than the signer.

Undue influence claims are common in cases in which a person with some level of mental decline changes their estate plan to exclude heirs or treat heirs unequally.

The contestant typically argues that the person who benefitted from the estate plan unduly influenced the mentally declining person and the estate plan is invalid.

Michigan judicial decisions reflect that it can be challenging to prove undue influence. A recent example: The Court of Appeals in November 2018 in *Krum* upheld the lower court's decision dismissing the undue influence claim. *Krum* hammers home some important points of these claims: the person making the undue influence claim has the burden of proof, mere opportunity or motive to influence a person is not the same as actually unduly influencing a person, and speculation that the person was unduly influence is not evidence.

COMMUNITY INVOLVEMENT

PROBATE COUNCIL

David was elected Secretary of the Probate and Estate Planning Council, the governing body of the Probate and Estate Planning Section of the Michigan State Bar committed to improving the practice of law in this area. He also concluded his five-year term as Chair of the Council's Amicus Committee.

58TH ANNUAL PROBATE & ESTATE PLANNING INSTITUTE

David gave the fiduciary litigation case law update at ICLE's 2018 Probate Institute in both Acme and Plymouth, and he is scheduled to give this update in 2019 as well.



LEADERSHIP GRAND RAPIDS

Laura is a graduate of the Leadership Grand Rapids Class of 2018. Leadership Grand Rapids is a nine-month community leadership program committed to enhancing and connecting leaders from business, nonprofits and government.



FAMILY PROMISE OF GRAND RAPIDS

In 2018, Laura was added as a board member for Family Promise of Grand Rapids, a nonprofit that provides emergency shelter and affordable housing for families.



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