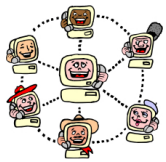


# The Gavel

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A periodic newsletter on legal issues for clients and friends of **David B. Forest, P.C.**  
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## *Website redesigned!*

A list of articles from back issues is included with this issue of *The Gavel*. This and ALL back issues of *The Gavel* are available at our Webpage, which was recently redesigned. We hope you like the changes, and use the Website as a reference source. *Disclaimer: Nothing in this newsletter is intended to be or is a substitute for legal advice.*

## **Avoiding Probate?**

One of the things people have often heard in estate planning is to “avoid probate”. **Most people do not know why they should avoid having their estate probated, but they have heard it so many times that they believe it must be true.**

The old reason for avoiding probate was the time and money consuming aspect of having an estate probated. **However, in most instances, the probate laws and procedures have been streamlined so that the time has been cut down.** The money involved (court costs and attorney fees) have also been reduced because of the relative ease with which most wills can be probated. In April, a new set of probate laws and procedures (called EPIC) was put into place, and should make probating a will even easier (after the attorneys finish figuring it all out!).



Also, the inheritance taxes to be paid have been eliminated in Michigan (reference the 1/95 issue of *The Gavel* at our Website).

So, should Probate no longer be avoided? **All in all, it is still better to avoid probating an estate if possible, to save on time and expense.** Some of the methods that have been used to avoid probating an estate include trusts and retitling property prior to death.

What is best for you? That depends on your circumstances, including special needs, minor children or incompetent relatives, estate tax considerations, etc. If your estate planning is not in order, please contact us to discuss what your needs are, and what solutions are available to best meet your needs.

## Preuptial Agreements

Many people have heard of a Prenuptial Agreement, but few people know much about it, or its legal effect. Nuptial is a Latin word for marriage, so a Prenuptial Agreement is a contract agreed to by both the prospective bride and groom before the wedding ceremony. Agreements entered into after the marriage are called Postnuptial agreements.



A marital agreement is uncommon for first marriages, especially when the couple marries young and have little in the way of assets. **The agreement is more useful in subsequent marriages.** When the prospective bride and/or groom have children and property that was accumulated prior to the second marriage, the marital agreement can ensure that the property that each spouse brings to their marriage ultimately goes to that spouse's children or other beneficiaries.

Whether pre or post, Marital agreements allow the married couples to modify and waive legal property rights that they each would have at the death of the other spouse. Most people are unaware of these Michigan statutory rights, such as the right to a family allowance, a homestead allowance, dower and the right to elect against a spouse's will.

In interpreting and enforcing a marital agreement, the courts look primarily to whether the parties to the agreement were mature, understood the meaning and effect of the agreement, and whether any fraud was involved. **The two key questions asked by the Court are (1) did each party fully disclose their respective assets at the time the Agreement was entered into? and (2) did each party understand that they had the right to their own, separate attorney for counseling regarding the nature and effect of the Agreement?** Some courts will also try to determine if the agreement was blatantly unfair at the time it was made (or as the law refers to it: "unconscionable").

So long as the Nuptial agreement passes muster under the Court's scrutiny, it will be enforced. There are two instances when the provisions of the agreement will be enforced: at death and upon divorce. **While marital agreements have usually been enforced upon death, about ten years ago Michigan courts started looking at enforcing the agreement's provisions upon divorce as well.**

## What is your Business Worth?

For most small businesses, the time will come when it will be necessary to know the value of the business. Such events that require business valuation include federal estate taxation, divorce, sale, and buyout of shareholders.

**This task is much more difficult than it sounds.** Why not just look at the balance sheet? Because book value is one of the least accurate methods of business valuation.



The goal in business valuation is to arrive at fair market value; i.e. the cash price at which the property would change hands between a willing buyer and a willing seller, neither of whom are compelled to buy or sell. Unfortunately, small businesses are not sold very often (as opposed to a large company whose shares are sold on an exchange), so there is no ready marketplace in which to sell or even to compare to. No two businesses are alike, whether because of location, assets and liabilities, management, ownership, cash flow, marketing approach, customers, etc.

So with no “comps” to use, how is a business to be evaluated? First, information is gathered about the business from financial statements, historical data and future forecasts, customer lists, interviews with owners and managers, economic and industry data, etc. Professionals in this area then use one or a combination of three different procedures: (1) Income approach, (2) Market approach and (3) Asset approach.

The **Income** approach is often used for operating companies. Valuation is based on expected future cash flow and other benefits that could be derived from the business, which are then equated to present day value based on a rate of return. In simple terms, the business is looked at as an investment that produces a stream of payments.

The **Market** approach attempts to look at recent sales of other businesses that might be similar, or at least have a reasonable basis of comparison. However, for closely held businesses, this approach is never a major factor in evaluation, simply because good ‘comps’ cannot be found.

The final approach, **Cost**, is based on the value of the assets. This approach is often used for holding companies (as opposed to operating companies), in which the value of the business is the assets held, such as real estate or securities, less liabilities.

There are numerous factors that will affect the valuation. Some of the factors include: will the seller stay around and offer his/her expertise? Will the owner sign a covenant not to compete? Is this a sale of the entire business, or an asset only purchase? Will the management team be staying in place? Does the business also own the realty upon which it is located, and if not is there a long term lease? What is the make up of customers: one primary one, numerous, loyal customers, etc.? Is the cash flow sufficient, or will the buyer have to inject supplemental cash?

If you need to value your business, contact your accountant or this office; you may be directed to an outside professional, who specializes in business valuations. Sources: *Michigan Lawyers Weekly; MCBA seminar.*

## CASE IN POINT:



### **Age Discrimination Against the young?**

We have always assumed that age discrimination meant that an employer could not discriminate against an employee because they were ‘too old’. However, a recent Michigan Court of Appeals decision has turned that assumption upside down.

Plaintiff went to work for her employer in 1985. She was later promoted to the position of account executive. At some point before she was fired in 1996 (at the age of 31), her supervisor told her that her voice “*sounded too young on the phone*” and that “*clients wanted an older account executive.*”

Plaintiff sued her employer under Michigan’s Civil Rights Act (“CRA”), which prohibits discrimination against employees because of age. Her employer filed a motion for summary disposition, claiming that the “age” referred to in the Act only concerns persons too old, not too young. To support its argument, the employer cited to the federal Age Discrimination in Employment Act (ADEA), which specifically referred to discrimination against individuals at least forty years of age.

The trial judge granted the employer’s motion to throw out the case. However, on appeal, the Michigan Court of Appeals reversed the decision and held for the employee. **The holding was that while the ADEA may prescribe what is meant by “age”, Michigan’s CRA does not - it only refers to discrimination based on chronological age, “without limiting its reach to any particular age group.”** As the court reasoned, the CRA seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices and biases, even against young people. Zanni v Medaphis Physician Services Corp.



## ➡ REFERRALS

If you are pleased with the **service and professionalism** you have received from our office, it would be greatly appreciated if you passed the good word along. **Referrals are always appreciated and encouraged**, and we look forward to the opportunity to serve your associates and friends. If we cannot immediately service their needs, we will be happy to **refer them to the appropriate attorney specializing** in their specific area of need.

However, if you have not been pleased, contact us directly!

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