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MICHAEL C. MORAN, Retired

June 22, 2011

*Via Email Only*

Michigan House Judiciary Committee

Re: HB 4672 and HB 4673

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Dear Judiciary Committee:

I am writing to express my concern over the sweeping changes to current law that are embodied in HB 4672 and HB 4673. Contrary to the claims of proponents of the bills, these laws make radical changes in existing law, and go far beyond the claimed goal of providing clear guidance in the area of property division. The bills are poorly worded and filled with gaps, loopholes and inconsistencies that will invite litigation. They embody policy choices that will have severe consequences for many Michigan families. Please do not approve these Bills without allowing time for input from the Family Law Section of the State Bar, the AAML, and other family law practitioners.

To assist you in evaluating my opinion, I enclose a copy of my Curriculum Vitae. I have practiced family law for 33 years. I wrote the chapter on Property Division in ICLE's Michigan Family Law (including the soon to be published 7th edition), which is widely relied upon by practitioners and has been cited repeatedly by the Court of Appeals. I edited the Property Division chapter in the Michigan Family Law Bench Book, a primary resource for Michigan family law Judges. I was one of the major participants in planning ICLE's Family Law Certificate program and I teach the limited enrollment property division seminars that are a required part of the Family Law Certificate program. My other teaching credentials are on my C.V. I am a member of the American Academy of Matrimonial Lawyers; have been voted a Michigan Super Lawyer each year since inception of the program, and am listed in Best Lawyers of America. I summarize these credentials in hopes that you will recognize that I have a sound knowledge of Michigan's law concerning property division in divorce, and have done considerable thinking about practice and policy in this area.

Although I believe HB 4672 and 4673 are poorly drafted and confusing in their wording, I will restrict my comments here to a few substantive areas: (1) The emphasis on "reimbursement/compensation" rather than *sharing* of separate property or awarding separate property based on need; (2) The requirement of "appreciation" before a spouse can be

compensated for personal contributions to the other spouse's separate property; (3) The confused treatment of "income" and (4) The treatment of Pre-Nuptial Agreements.

**The "Reimbursement" Concept Fails to Address the Real Costs to Spouses who Sacrifice for the Marriage, and Fails to Address Need:**

Current law allows one spouse to share in the other spouse's separate property under two sets of circumstances: (a) if he/she *contributed* to its acquisition, improvement or accumulation; or (b) if the marital estate is insufficient for the claiming spouse's suitable support, i.e. in cases of *need*. HB 4672 says that in cases of contribution, the claiming spouse cannot share in the separate property, but is now limited to "reimbursement" of any contribution that has not already been "reasonably compensated." *And, HB 4672-3 does not allow for claims of need at all.*

Here are some common scenarios:

Wife and Husband both bring equal assets and savings to the marriage. By mutual agreement, Wife spends her savings to help support the family. Husband leaves his money invested. They agree that it's ok to spend freely and live well because Husband's investments are doing well. Years pass. They accumulate few joint savings and their house doesn't go up in value as they had hoped. When they divorce, Husband says "Too bad we spent all your money, and we have no marital money, but I get to keep all my investments." Under HB 4672-3, is Wife required to live out her last years in poverty? Wife might have a claim for alimony, but what if Husband doesn't earn much, or is about to retire?

These House Bills lack any provision for spouses in need. They allow consideration of need in dividing the *marital* estate, but do not appear to allow an award of *separate* property to address need.

Wife has a stock account at the time of marriage. During the marriage, both parties invest money totaling \$10,000. The stock grows to \$100,000. Under HB 4672-3, if they divorce, the "marital estate" gets back its \$10,000, of which Husband gets half, and the wife keeps the rest. Suppose that the Husband was a stay-home homemaker and had no other savings because the Wife always told him "everything I have is yours" and that she would take care of him in his old age. Is this a reasonable result?

What about the couple who never saved for retirement because one spouse was independently wealthy and both spouses—by mutual agreement—relied for decades on those funds being available in their old age? These Bills allow no discretion for a court to address this situation.

Just giving someone back what they originally "contributed" fails to address the *opportunity cost* to the spouse who contributed—for example, the lack of retirement savings, job seniority, skills and earning power resulting from years spent *not* building a career; or the long-term consequences of *not* saving money because one's spouse was doing the saving. Married

people make these choices together, in reliance on what they believe to be mutual resources, and a statute that prohibits Courts from considering these circumstances will yield some very harsh results, especially in long term marriages.

### **Appreciation and Personal Services:**

Even the limited right to “reimbursement” in these Bills seems to be unavailable to a spouse who contributes personal efforts *but the assets decline in value*. Suppose Husband’s parents gift him a share of the family business. He works there for thirty years. Wife stays at home, raises the kids, and makes it possible for Husband to work long hours and travel. Wife never develops a career of her own. Husband draws enough of a salary to support the family but never takes any extra pay to allow savings, reasoning that leaving money invested in the business is the best way to ensure a bright future. The business is automotive-related and its value goes down from \$3 million to \$1 million. Even though the business has declined in value, it is still by far the most valuable asset of the marriage. Under current law, the Wife could probably receive a share of the value of the (separate) business because of her contributions to the marriage. Under HB 4672-3, it seems she could not, because despite her years of contributions, the business declined in value.

### **Confusing Treatment of Income:**

One of the most accepted tenets of marital property law is that wages or compensation for personal efforts or labor during the marriage are marital. Yet these Bills do not say this anywhere. Instead, they open the door to a totally contradictory rule, by saying that if property is separate (as defined in the various categories 5(B)(i)-(vi)), then *income* from the property is also separate. This has huge consequences for business owners and their spouses. If a doctor has a medical practice before the marriage, does this mean that everything she earns from the practice during the marriage remains separate, so that all the property accumulated over years of marriage remain separate? Does it matter whether she takes her pay as “dividends” as opposed to “salary?” What if she chooses to leave her profits in the business rather than distributing them out to herself?

Under these Bills, virtually any owner of a separate-property business may argue that an entire lifetime of earnings—and everything accumulated from those earnings—is separate, leaving nothing for a dependent spouse.

### **Pre-Nuptial Agreements:**

Where a Pre-Nuptial Agreement defines property to be separate, HB 4672 treats this as merely one type of separate property that is, apparently, treated the same as any other separate property *regardless of the terms of the Pre-Nuptial Agreement*. According to HB 4672, if property is separate, then any *income* from it is also automatically separate, and appreciation is also separate but subject to claims for “reimbursement.” Nowhere does this Bill give recognition to the primacy of a legally enforceable Pre-Nuptial Agreement, nor does it appear to recognize

the body of law that allows parties the freedom to make their own contracts. Many Pre-Nuptial Agreements *do* (contrary to this Bill) include appreciation in the marital estate, and many more (again, contrary to this Bill) include income. Many Pre-Nuptial Agreements would *preclude* claims for "reimbursement," where this Bill permits it. This Bill seems to take these decisions out of the hands of contracting parties and to substitute its own rather murky and poorly considered statutory scheme in place of the terms of the parties' negotiated Pre-Nuptial Agreement.

As an aside, any statute dealing with property division would do well to address both Pre-Nuptial and *Post-Nuptial* Agreements. The latter are the subject of much confusion and inconsistency in the law.

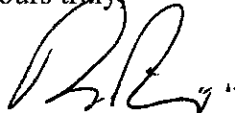
**Conclusion:**

I agree that our property statutes could use updating and clarification, and that our state's citizens would benefit from uniformity and predictability in property division matters. I do not believe that these bills do the job, and indeed, I think they will do great harm.

There are model statutes that have been carefully drafted with input from both theoreticians and practitioners. There are statutes in other states dealing with these issues that have had the opportunity to have their "kinks" worked out in daily application. Our Family Law Bar is filled with smart, experienced and thoughtful lawyers who could provide valuable insight into how to clarify and improve existing law.

I urge this Committee in the strongest terms to set these Bills aside, to invite input from the Family Law Bar, and to construct a more careful, comprehensive, and consistent set of principles to guide the Courts in this critically important area, which touches the lives of so many Michigan families.

Yours truly,



Diana Raimi

DR/jls  
Enclosures

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**Practice Areas:** Domestic Relations law focusing on property division in high-asset divorce, pre- and post-nuptial agreements, and mediation and arbitration services; Commercial transactions including business formation, purchases and sales, and ongoing advice as outside general counsel to medical professional corporations, real estate LLCs, restaurants and other small businesses; Commercial real estate law including purchases, sales, and negotiation and drafting of leases; Commercial and Probate litigation in state and federal courts including contracts, trade secrets, business torts, shareholder rights, construction, will contests, and ERISA litigation; *pro bono* representation of The Ecology Center, Recycle Ann Arbor, and other nonprofits.

**Martindale Hubbell Rating:** AV

**Admitted:** 1977, California; 1978, Michigan; 1983, U.S. District Court, Eastern District of Michigan; 1994, U.S. District Court, Western District of Pennsylvania and U.S. Court of Appeals, Sixth Circuit.

**Law School:** Boalt Hall School of Law, University of California, J.D., 1977. Clinical semester clerkship for the Honorable Spurgeon Avakian, Alameda County Superior Court. Associate Editor, Ecology Law Quarterly, 1976 - 1977.

**College:** University of Michigan, B.S. in biology, with high distinction, 1974; Charles B. Angell Scholar, Phi Beta Kappa.

**Member:** Washtenaw County Bar Association, 1978 - Present; State Bar of Michigan, 1978 - Present; State Bar of California (inactive) 1978-present; State Bar Committee on Character and Fitness, 1995 - 1999; Fellow, American Academy of Matrimonial Lawyers, 2004 - Present; ICLE Family Law Advisory Board, 2004 - Present; Fellow, Michigan State Bar Foundation, 2005 - Present; Washtenaw County Trial Court Case Evaluation Committee 2007 - 2009.

#### **Employment:**

1978 - 1980: Associate, Law Offices of Gerard J. Matuszak, Ann Arbor, Michigan;  
1980 - 1982: Private Practice, Matuszak and Raimi, Ann Arbor, Michigan;  
1982 - Present: Associate, Junior Partner, then Partner/Shareholder, Moran, Raimi, Goethel & Karnani, P.C. (formerly Moran, Raimi & Goethel, Stein, Moran, Raimi &

Goethel; Stein, Moran & Westerman; O'Brien, Moran & Stein; O'Brien, Moran & Dimond.)

**Biography:**

Author: Chapter, "Property Settlement," Michigan Family Law, ICLE, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6th Edition with supplements; 7<sup>th</sup> Edition to be released in 2011.

Reviewing Editor: Michigan Family Law Bench Book for Michigan Judges, ICLE 1999 - present.

Listed in Best Lawyers in America, 2007 - Present; Michigan Super Lawyer, 2007 - Present; Top 50 Women Lawyers in Michigan, Super Lawyers Magazine, 2007.

Speaker: "Drafting Family Law Documents," ICLE, 1994; "What Every Divorce Lawyer Should Know About Tax Law," ICLE, 1995; "Separate Property," ICLE, Troy, Michigan, 2003; "Pre- and Post-Nuptial Agreements," ICLE, Ann Arbor, Michigan, 2003; "Alternative Dispute Resolution," ICLE, Ann Arbor, Michigan, 2002; "Bankruptcy and the Family Court," Annual Judicial Institute, Lansing, Michigan, 2005; "Divorce and the Family Business," ICLE, Dearborn, Michigan, 2005; The Impact of Bankruptcy Proceedings on Divorce," ICLE, Troy, Michigan, 2005; "Direct and Cross Examination of a Financial Expert," AAML, Birmingham, Michigan, 2006; "Bankruptcy and Divorce", ICLE, Plymouth, Michigan, 2006; "Handling the Debt Burdened Marital Estate", ICLE, Plymouth, Michigan 2007 and Ann Arbor, Michigan, 2008; "Timely Topics for Divorce Practitioners," Legal Services Training, Lansing, Michigan, 2008; "Everything You Always Wanted to Know About the Double Dip," ICLE, Plymouth, Michigan 2009; "Negotiating Property Settlement Agreements in Divorce," ICLE, Plymouth, Michigan, 2007 - 2011.

Course Commentator: "What Every Attorney Needs to Know About QDROs, EDROs and Deferred Compensation Orders," ICLE, Ann Arbor, Michigan, 1993; "Drafting Family Law Documents," ICLE, Grand Rapids and Troy, Michigan, 1994; "What Every Divorce Lawyer Should Know About Tax Law," ICLE, Troy, Michigan, 1995; "Pre- and Post-Nuptial Agreements," ICLE Ann Arbor, Michigan, 2001.

Moderator, Speaker and/or Course Designer: "Marital Property Update," ICLE, Troy, Michigan, 2002 - Present; Annual Family Law Institutes, ICLE, 2002 - Present; "Drafting Family Law Documents," ICLE, Troy, Michigan, 2006.

Curriculum Design and Planning: Family Law Certificate program, ICLE, 2005 - present.

Completed 40 Hour Course in Divorce Mediation, 1996.

**Reported Cases:** Shield Benefit Administrators, Inc. and Over-Fresh Bakeries, Inc. v. Regents of the University of Michigan, 225 Mich App 467, 1997; Regents of the

University of Michigan v. Employees of Agency Rent-A-Car Hospital Association et. al.,  
122 F3d 336, 1997.

**Born:** Rochester, New York, October 12, 1953: