I. Call to Order: Nancy L. Little, Section Chairperson, called the meeting to order at 10:15 a.m. based on the Notice previously sent by e-mail.

II. Excused Absences – Nancy Little reported that Council Members Thomas Sweeney and J. David Kerr had contacted her about why they could not attend this meeting and they were excused.

Other Absences – Hon. Kathryn A. George

III. Introduction of Guests – Nancy Little asked everyone in the room to introduce themselves by name and city. All present did so.

Council Officers Present

Nancy L. Little, Chairperson
Harold G. Schuitmaker, Chairperson – Elect
George W. Gregory, Secretary
Mark K Harder, Treasurer

Council Members Present

Josh Ard
Ellen Sugre Hyman
Marilyn A. Lankfer
Patricia M. Ouellette
James B. Steward
Robert P. Tiplady, II

Susan M. Allan
Amy N. Morrissey
Rebecca A. Schnelz
Marlaine C. Teahan

Robin D. Ferriby
Shaheen I. Imami
Hon. David J. Murkowski
IV. Minutes of the Council Meeting of January 10, 2009 – Upon a motion duly made and seconded, and with the consent of all present the Minutes of the Council Meeting of January 10, 2009 were approved as submitted.

V. Treasurer's Report – Mark K. Harder submitted a written report. A copy is attached. He also reported that Revenue has now hit the amount projected for the fiscal year ending September 30, 2009. This is not unusual as Revenue is almost exclusively from dues mostly received in October and November. He reported that the Journal is costing more than expected to date, but that on balance things were going well.

VI. Chairperson's Report – Nancy L. Little reported that the Section is participating in Law School for Legislators. Amy Morrissey has been instrumental with this project. She also reported that she is working on an index for the Journal.
VII. Report of Committee on Special Projects

Amy N. Morrissey/Richard J. Siriani reported that the Committee on Special Projects recommended the following:

A. The Section take a public policy position in favor reinstatement of the Federal Credits for State Death Taxes and State Generation Skipping Transfer Taxes Paid.
   a. The topic was discussed and by a vote of 20-0, the Council approved it.
   b. Robin Ferriby indicated he would make the necessary online report to the State Bar reporting this public policy position and would draft letters for Nancy Little to sign on behalf of the Section.

B. Council should file an amicus brief supporting the Michigan Supreme Court granting leave to appeal from the Michigan Court of Appeals *In Re Griffin*, on the sole issue of the Rule Against Perpetuities analysis, expressing no position regarding MCL 700.2518. It was further recommended that Ellen Sugre-Hyman be authorized to retain an attorney for this purpose at a cost not to exceed $5,000.
   a. This was followed by much debate.
   b. By a vote of 10-8, the Council, upon a motion duly made and seconded, tabled this issue until the March meeting.

VIII. Standing Committee Reports

A. Internal Governance

1. Budget B George W. Gregory – No report
2. Bylaws B Marilyn A. Lankfer – No report
3. Michael Irish Award B Brian V. Howe – No report
4. Long-Range Planning B Douglas G. Chalgian / Lauren M. Underwood – No report
5. Nominations B Michael McClory – No report
6. Relations with the State Bar B Thomas F. Sweeney was excused, but had communicated with Nancy Little who reported that the Committee has put together three articles which will be published in Oakland County. Rhonda Clark is working with Tom on getting articles published in mid-Michigan. The focus is on what estate planners do that benefits the public.
7. Annual Meeting B Harold Schuitmaker – brought up various alternatives for holding the annual meeting and the organizational meeting. This year the organizational meeting will be held in Kalamazoo. He is still working on scheduling issues, but the consensus was to hold the organizational meeting after the annual meeting.

B. Education & Advocacy Services for Section Members

1. Amicus Curiae B Ellen Sugrue-Hyman
Susan Westerman Letter Attached
Report of the Committee attached.
This topic was covered extensively in connection with the Committee on Special Projects above.

2. Continuing Education & Annual Probate Institute  B  Douglas Chalgian reported that the schedule is set and the publicity is out. Greenleaf will sponsor the speakers’ dinner. After further discussion and a motion duly made and seconded it was:
   RESOLVED: The Hearts and Flowers fund will contribute $200 to the Cycling Club of Grand Traverse for their assistance in connection with the bicycle tour during the afternoon of the Annual Institute at the Grand Traverse.

3. Section Journal  B  Nancy L. Little – No report

4. State Bar Journal  B  Amy N. Morrissey reported that the next Probate and Estate Planning issue will be June 2010.
   Report attached.

5. Pamphlets  B  Ellen Sugrue Hyman reported that the Committee is continuing to revise the pamphlets.


C. Legislation and Lobbying

1. Legislation  B  Harold G. Schuitmaker/John R. Dresser/George W. Gregory – Harold Schuitmaker reported that HB 4180 (2009) would allow a power of attorney for a funeral representative. There have been a number of proposals to protect the vulnerable. There will be a bill on the Rule Against Perpetuities as it applies to real estate held in trust. There are proposals to protect tenants in the event of a foreclosure of the landlord’s interest. The Statute of Repose was discussed and the possibility of linking it with similar legislation about architects. Becky Bechler said she would approach Senator Sanborn about this. Becky Bechler discussed the painful budget projected by the Governor. Even with the requested cuts it will be difficult. It calls for removing the arts, State Fair, and many other items.


3. Michigan Trust Code  B  Mark K. Harder asked that if questions arise about the Michigan Trust Code, Mark said he and members of the MTC Committee would be happy to answer them for us. He also reported that the Michigan Bankers Association Trust Executive Committee has approved adoption and appointed persons to represent the Michigan Bankers Association. The Committee has worked out the remaining issues with the Michigan Probate Judges Association. Senator Kuipers’ office is
working with the Legislative Service Bureau on a new blueback. On February 13th, Tracy Sonneborn of the Michigan Attorney General’s Office sent additional comments to Mark, which Mark will address with the Michigan Trust Code. He asked that if there are inquiries from legislators, those should be directed to him or to Becky Bechler. Rebecca Bechler stated that she and Tyrone Sanders of her office would begin calling on various legislators about the Michigan Trust Code. Judge Murkowski stated that the Michigan Probate Judges Association had signed off on the Michigan Trust Code and would instruct their lobbyist to support it.

4. Solicitation of information of Lobbying Report – George W. Gregory asked that everyone report any monies spent on legislators, political appointees, or civil servants if they buy them lunch or anything else while working on Section matters. Robin D. Ferriby said that they should also keep track of their time. George Gregory said he was working off a report Becky Bechler gave him. Becky Bechler said she would look into it.

D. Ethics, Professionalism and Standards

1. Ethics B J. David Kerr – No report
2. Unauthorized Practice & Multidisciplinary Practice B Bob Taylor reported on a trust mill and other matters they have discussed with the State Bar’s UPL committee.
3. Specialization and Certification B James B. Steward reported that the committee will meet today.

E. Administration of Justice

2. Uniformity of Practice B Derek A. Walters – No Report.

F. Practice Issues, Related Areas & Liaisons
1. Charitable Giving/Exempt Organizations  
Robin D. Ferriby reported that there was an article in the Wall Street Journal on February 9, 2009 which addressed the advantages of a charitable lead trust today and another on February 11, 2009 about states revising endowment legislation. He thought both were substantially accurate. UPMIFA legislation is before the legislature.

2. Transfer Tax  
Thomas F. Sweeney
Pat Ouellette’s report is attached. Pat explained the role of the 2% floor and how it does not fit well into trust and estate taxation. It creates problems in deducting accountant and attorney fees for income tax purposes. AICPA and other groups oppose the proposed regulations.

Lorraine New submitted a report on FDIC limits.

3. Guardianships and Conservatorships  
Constance Brigman – no report

4. Business Law/Liaison to Business Section  
John R. Dresser – no report

5. Elder Law/Liaison to Elder Law Section  
Amy R. Tripp reported that the Elder Law Section is involved in a class action with the State of Michigan. The State of Michigan does not allow someone to pay off prior medical expenses to become eligible for Medicaid. This is a violation of Federal law. In addition she discussed estate recovery. The Federal government has submitted questions to the State of Michigan on how the State of Michigan would implement its policy. The public – private long term care agreement (if a set amount of long term care is purchased, there will be no estate recovery) is linked to estate recovery. In response to a question from Nancy Little, she agreed to do something for an e-blast.

6. Family Law/Family Law Section Liaison  
Patricia M. Ouellette – no report

7. Real Property Law/Real Property Section Liaison – Daniel P. Marsh – no report

8. State Bar Section to Section Action Team Liaison – Robert Tiplady reported that they have not identified other sections who would be interested in the Michigan Trust Code. Nancy recommended that the Consumer Law Section might be. Doug Chalgian commented that the Elder Law Section has been informed on an ongoing basis.

9. Tax and Tax Section Liaison – Lorraine F. New reported that the Taxation Section Annual Tax Conference will be held on April 29, 2009. George Cassar, chair of the Trusts and Estates Committee of the Taxation Section would like a joint meeting of his committee and the Probate and Estate Planning Section.

10. State Bar Liaison  
Richard J. Siriani – No report
11. Court Rules and Forms Committee Liaison B Marlaine C. Teahan – No report
12. Trust Institutions and Liaison with Michigan Bankers Association B Susan Allan, Chair – No report

There being no other business, and with the consent of all present Nancy Little adjourned the meeting at 11:50 a.m.
Attachments

  Treasurers Report
  State Death Tax Credit – Robin Ferriby
  Susan Westerman Letter (Amicus Curiae) In Re Griffin
  Amicus Curiae Committee Report In Re Griffin
  Amy Morrissey Report – Next State Bar Issue in June 2010
  Michigan HB 4180 (2009)
  UPMIFA Legislation
  Patricia Ouellette Tax Nugget – 2% Floor on Itemized Deductions
  Lorraine New Tax Nugget – FDIC Insurance Coverage
  Committee Assignments
Probate and Estate Planning Section

Agenda

Saturday, February 14, 2009

University Club
East Lansing

9 a.m.  Meeting of Committee on Special Projects
10 a.m.  Council Meeting
Probate and Estate Planning Section
State Bar of Michigan

NOTICE OF MEETING

Saturday, February 14, 2009

University Club East Lansing, Michigan

9:00 a.m. Meeting of Committee on Special Projects

10:00 a.m. Council Meeting

There will be a meeting of the Committee on Special Projects on January 10, 2009 at the University Club, East Lansing, Michigan, 48933-2012 beginning at 9:00 a.m., followed by a Meeting of the Council of the Probate and Estate Planning Section at 10:00 a.m.

George W. Gregory
Secretary
NEXT MEETING

March 14, 2009
University Club East Lansing, Michigan

MEETING OF COMMITTEE ON SPECIAL PROJECTS MEETING AT 9:00 A.M.

COUNCIL MEETING AT 10:00 A.M.
AGENDA FOR THE
COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION

February 14, 2009 University Club
10:00 a.m. Lansing, Michigan

I. Call to Order

II. Excused Absences –

III. Introduction of Guests

IV. Minutes of the Council Meeting of January 10, 2009

V. Treasurer's Report B Mark K. Harder

VI. Chairperson’s Report B Nancy L. Little

VII. Report of Committee on Special Projects B Amy M. Morrissey/Richard J. Siriani

VII. Standing Committee Reports

A. Internal Governance

1. Budget B George W. Gregory
2. Bylaws B Marilyn A. Lankfer
3. Michael Irish Award B Brian V. Howe
4. Long-Range Planning B Douglas G. Chalgian / Lauren M. Underwood
5. Nominations B Michael McClory
6. Relations with the State Bar B Thomas F. Sweeney
7. Annual Meeting B Harold Schuitmaker

B. Education & Advocacy Services for Section Members

1. Amicus Curiae B Ellen Sugrue Hyman
   John Bos
   Susan Westerman Letter Attached
2. Continuing Education & Annual Probate Institute B Douglas Chalgian
3. Section Journal B Nancy L. Little
4. State Bar Journal B Amy M. Morrissey
   Report attached.
5. Pamphlets B Ellen Sugrue Hyman
6. Electronic Communication  Josh Ard

C. Legislation and Lobbying
1. Legislation  Harold G. Schuitmaker/John R. Dresser/George W. Gregory
3. Michigan Trust Code  Mark K. Harder

D. Ethics, Professionalism and Standards
1. Ethics  J. David Kerr
2. Unauthorized Practice & Multidisciplinary Practice  Bob Taylor
3. Specialization and Certification  James B. Steward
4. Practice Management  Patricia Ouellette

E. Administration of Justice
2. Uniformity of Practice  Derek A. Walters

F. Practice Issues, Related Areas & Liaisons
1. Charitable Giving/Exempt Organizations  Robin D. Ferriby
2. Transfer Tax  Thomas F. Sweeney
   Pat Ouellette report attached.
3. Guardianships and Conservatorships  Constance Brigman
4. Business Law/Liaison to Business Section  John R. Dresser
5. Elder Law/Liaison to Elder Law Section  Amy R. Tripp
6. Family Law/Family Law Section Liaison  Patricia M. Ouellette
7. Real Property Law/Real Property Section Liaison – Daniel P. Marsh
8. State Bar Section to Section Action Team Liaison – Robert Tiplady
9. Tax and Tax Section Liaison – Lorraine F. New
10. State Bar Liaison  Richard J. Siriani
11. Court Rules and Forms Committee Liaison  Marlaine C. Teahan
12. Trust Institutions and Liaison with Michigan Bankers Association  Susan Allen, Chair
14. Law School Liaison – Josh Ard

X. Other Business

XI. Hot Topics

XII. Adjournment
Probate and Estate Planning Section  
Treasurer's Report as of January 31, 2009

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| Disbursements                 |                   |                   |                     |                          |        |           |
| Journal                       | $3,750            | $277              | $45,000             | (44,723)                 |        |           |
| Chairperson's Dinner          |                   | $6,000            | (6,000)             |                          |        |           |
| Speakers Dinner               | $568              | $2,469            | $13,500             | (11,031)                 |        |           |
| Travel                        | $2,000            | $10,000           | $24,000             | (14,000)                 |        |           |
| Lobbying                      | $947              | $4,496            | $9,000              | (4,504)                  |        |           |
| Printing                      |                   | $2,400            | (2,400)             |                          |        |           |
| Strategic Planning            |                   | $820              | $820                |                          |        |           |
| Publishing Agreements         |                   | $5,000            | (5,000)             |                          |        |           |
| Support for Annual Institute  |                   | $5,000            | (5,000)             |                          |        |           |
| Amicus Briefs                 |                   | $5,000            | (5,000)             |                          |        |           |
| Listserv                      | $70               | $280              | $850                | (570)                    |        |           |
| Postage                       | $1                | $900              | (899)               |                          |        |           |
| Telephone                     |                   | $500              | (500)               |                          |        |           |
| Copying                       | $50               | $50               |                     |                          |        |           |
| Other                         | $75               | $357              | $1,000              | (643)                    |        |           |
| Total Disbursements           | $7,460            | $18,750           | $113,150            | (94,450)                 |        |           |

Increase $4,520 $104,556 $97,757

Additional Information

Fund Balance $166,857
February 4, 2009

John E. Bos, Esq
Chalgian and Tripp Law Offices PLLC
139 W. Lake Lansing Road
Suite 200
East Lansing, MI 48823

Dear John:

Over the past couple of years, you’ve kept me updated on the status of the Mary E. Griffin Revocable Trust. The scrivener accidentally omitted the residuary provisions and a life income beneficiary objected to the provisions established for his benefit. There is a no contest clause in the trust.

I use no contest clauses. Not in every document, not in most documents, but when a client evidences concerns about certain behaviors in a beneficiary or the nature of the litigation process or the manner in which his assets will be spent, I may ask if he would like no contest language in his document. I agree with the language in Schiffer v. Brenton:

Such provisions serve a wise purpose; they discourage a child from precipitating expensive litigation against the estate, and encourage and reward other children in their effort to sustain their parent’s disposition of his property if such contest is precipitated; they discourage family strife, they discourage litigation, and the law abhors litigation.

I understand the reasons behind the language in MCL 700.2518 which provides:

A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

The very important phrase above is “probable cause” as defined by the Restatement:

Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there
was a **substantial likelihood** that the challenge would be successful.

And not as defined by that awful Iowa case you described to me.

We have both seen unscrupulous persons prey upon the elderly, the weak, the uneducated, the vulnerable. The resulting wills and will substitutes do not represent the wishes of the testator but rather the results of undue influence, mistake, and fraud. To have those documents protected from litigation by a no contest clause would be a miscarriage of justice.

And as you can see from my choice of citations above, I think the Griffin case reviewed the correct law. But what the court did not do is understand the very important nexus between the beneficiary filing the contest and the probable cause which would result in a substantial likelihood that the challenge would be successful and benefit the challenger. In Griffin the court tied the probable cause prerequisite to the violation of the rule against perpetuities that would have resulted from the scrivener’s mistake in omitting the residuary provisions. That violation was irrelevant to the provisions benefitting the challenger (except as a back door mechanism of voiding the entire document which would not happen with the savings clause). The allegations which needed to meet the probable cause test were the allegations of undue influence. No where in the court’s decision was there a finding that the challenger had probable cause based upon the allegations of undue influence.

I understand that the statute does not specifically say that the probable cause must be directly related to the interested person’s claims but it must certainly be inferred. To be able to use uncontested matters, raised in a multi-count pleading, to meet the probable cause standard, should not be sufficient. This is the opposite example of using no contest clauses to protect the documents resulting from the acts of the unscrupulous discussed above.

I do not believe that no contest clauses should be against public policy. Since it is the clients’ wills and trusts that will be controlled by this law, some consideration should be given to the clients’ wishes. It should not be against public policy for the clients, who are given the right by the law to execute wills and trusts, to do so in a manner that will carry out their wishes...including the wish to avoid litigation. It used to be against public policy for a couple wishing to marry to enter into a prenuptial agreement. That same couple could enter into a partnership which governed their financial relationship with regard to a business enterprise but not within a marriage. That anachronism is
gradually being replaced by the sensible acknowledgment that adults like to be in control of their financial affairs.

This is equally, if not more so, true of estate planning. My clients’ want to be in control even though they have died. And they, better than most courts, know the nature and behavior patterns of their beneficiaries.

There is no right in Michigan for anyone, other than a spouse, to inherit. Why then should the beneficiary’s rights be more honored by public policy than the testator’s?

And finally, the inability to add meaningful no contest clauses to Wills and Trusts ignores that a substantial amount of wealth is transferred by beneficiary designations. Those beneficiary designations are effective upon death and the assets transferred prior to any litigation is commenced, often beyond the reach of the courts and non-benefitting parties. By refusing to permit no contest clauses in Wills and Trusts, the statutes reward residents whose assets pass by beneficiary designations and penalize the others.

My preference is that no-contest clauses are neither favored nor held to be against public policy; the law should be neutral on this issue. However, if a client chooses to include one in his document, then a beneficiary’s obligation when filing a contest is that he must have demonstrable probable cause...at that moment, not after years of litigation in which his attorneys engage in a fishing expedition...to conclude that there is a substantial likelihood that the challenge will be successful.

Very truly yours,

WESTERMAN & ASSOCIATES, P.C.

Susan S. Westerman
Memorandum

To: Probate and Estate Planning Council Members
From: Ellen Sugrue Hyman, Melisa Mysliwiec and Derek Walters,
Amicus Curiae Committee Members
Date: February 12, 2009
Re: In re Mary E. Griffin Revocable Grantor Trust, _____ Mich App _____ (2008), #277268, 12/2/08

The Amicus Curiae Committee (“Committee”) recommends that the Probate Council (“Council”) not file an Amicus Curiae brief in the case of In Re Griffin. This case involves the validity of a no-contest clause (in terrorem clause) in a trust, and what constitutes a probable cause exception to the enforcement of a no-contest clause. In the proposed Michigan Trust Code (“MTC”), the Probate Council has taken the position that a no-contest clause within a trust should be enforceable with a probable cause exception. The Committee believes that the Council’s position is set forth in the MTC and that the MTC, if passed, will supplant the effect of this decision and thus, the matter is not a worthwhile use of the Council’s resources.

Background
This case involves a lengthy trust contest between the Trustee of the Mary Griffin Trust, Mary Griffin’s granddaughter, Priscilla Hall, and the Trust’s main beneficiary, Mary Griffin’s son and the Trustee’s father, Otto Nacovsky. When Otto sought to challenge the trust based upon undue influence and to reform the defects in the trust, Patricia sought to enforce the no-contest clause.

EPIC has a provision regarding no-contest clauses in wills: 700.2518. However, there is no similar provision for trusts within EPIC, and there was no Michigan case law on the issue of no-contest clauses in trusts prior to the Court of Appeal’s decision in this matter.

The Committee was asked to take up this matter by John Bos, counsel for the Trustee. John provided the Committee with a complete copy of all pleadings. All Committee members reviewed the Court of Appeals Opinion, the Appellant’s Motion for Reconsideration and the Appellee’s Response. The Committee then held a conference call and had separate discussions with both John Boss and Mark Hibbs, counsel for the Appellee, Otto Nacovsky.
Status of the Appeal
The Court of Appeals decision was published on 12/2/2008. The Appellant filed a Motion for Reconsideration, which was denied. The Appellant is now filing Leave to Appeal with the Michigan Supreme Court.

Decision of the Court of Appeals
The Committee members all expressed concern about the reasoning behind the court’s decision; however, the majority’s decision — that a no contest clause in a trust is enforceable unless there is probable cause to challenge the trust — is consistent with the proposed MTC section:

Section 113. Penalty clause for contest of trust.

A provision in a trust purporting to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

Similarly, the Court’s discussion of the standard for probable cause follows the definition of probable cause in the 2 Restatement Property, 3rd, Wills and Other Donative Transfer, §8.5 page 195. The definition states, “Probable Cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.”

The Committee members also expressed concern over the court’s discussion regarding the Rule Against Perpetuities (“RAP”). The Court based the probable cause exception on a “facial” violation of the rule. The Committee is concerned about the court’s interpretation because the court misstates and misapplies the Uniform Statutory RAP. The Committee’s concern, however, does not rise to the level of believing that the filing of an Amicus Brief in this matter is necessary to rectify the potential impact of the court’s decision.

Conclusion
The Amicus Curie Committee recommends that the Probate Council not file an Amicus Curiae brief in this matter.
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the SBM
From: Amy Morrissey, Chair of State Bar Journal Committee
Date: January 27, 2009
Subject: Report on Status of Next SBM Journal P&EP Section Dedicated Issue

1. On December 8, 2008, I sent a request to Linda Novak, Editor of the Michigan Bar Journal, to determine the next possible Journal publication date in which the Probate and Estate Planning Section could submit articles for an issue dedicated to probate and estate planning issues. In response, Ms. Novak suggested that the next possible "open" date was March 2010, and that the Council should submit a proposal to her to be forwarded to the Publications and Website Advisory Committee (PWAC) for its consideration of our request at its January 2009 meeting.

2. After discussion at our December 13, 2008 Council meeting, the Council decided that the P&EP Section should submit a request for a March 2010 dedicated issue with the proposal that the issue focus on the Michigan Trust Code, considering the likelihood that any legislation passed in 2009 would be effective April 1, 2010, and it was agreed that I would submit the request on behalf of the Council.

3. On December 17, 2008, I submitted the following request to Ms. Novak:

"The Council of the Probate & Estate Planning Section of the State Bar met on Saturday, Dec. 13 for its monthly meeting. The Section would like to request that the March 2010 issue be dedicated to a Probate & Estate Planning topic. The likely topic will be the Michigan Trust Code, which although not yet adopted by the Michigan Legislature, is approaching that status.

The Section, under a committee led by attorney Mark Harder, has been working for the past five years to develop a trust code that would be adopted in Michigan, a substantial undertaking which would affect not only probate and estate planning attorneys, but many other practitioners as well.

This legislative session, there was legislation introduced to amend the Estates and Protected Individuals Code to adopt such a trust code. We are anticipating that within the next year, the Michigan Legislature will adopt a version of the
Michigan Trust Code.

The Section is also anticipating that such legislation would likely be effective by April 1, 2010, which is why we feel that the March 2010 issue would be appropriate and very timely. The Michigan Trust Code Committee has several members who would be able to submit articles for publication.

Another possible topic for the March 2010 issue is the Federal estate tax. President-elect Obama has indicated that there would likely be changes in 2009 to this tax. Again, this is a topic that will affect many, and the Section would be prepared to address the possible issues.

I ask that you please pass this request along to the PWAC for consideration at its next meeting. I appreciate your time and consideration of our request.”

4. On January 27, 2009, I received the following response from Ms. Novak to our request:

"...the Publications and Website Advisory Committee (PWAC) met yesterday by teleconference and accepted your proposal for a probate and estate planning theme issue in 2010. The committee scheduled a general issue for March 2010 to accommodate our backlog of general-interest articles awaiting publication. Your theme issue has been scheduled for June 2010, which was our next available opening..."

5. In her January 27 e-mail, Ms. Novak supplied article guidelines and the name of a contact person for article submission questions, both of which I am forwarding to Mark Harder, Chair of the Michigan Trust Code Committee per our December 13, 2008 meeting.
Bill is a copy of 2008 SB 393 – except that Enacting Section at end will need current references.


THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 124. (1) This act does not modify the requirements of the following:

(a) The supervision of trustees for charitable purposes act, 1961 PA 101, MCL 14.251 to 14.266.

(b) 1965 PA 169, MCL 450.251 to 450.253.

(c) The charitable organizations and solicitations act, 1975
(d) The uniform PRUDENT management of institutional funds act, 1976 PA 157, MCL 450.1201 to 450.1210.

(e) The career development and distance learning act, 2002 PA 36, MCL 390.1571 TO 390.1579.

(2) A corporation subject to any or more of the acts listed in subsection (1) shall comply with those acts and shall comply with this act. If there is any inconsistency between those acts and this act, those acts shall control.

Sec. 261. (1) A corporation, subject to any limitation provided in this act, in any other statute of this state, in its articles of incorporation, or otherwise by law, shall have power in furtherance of its corporate purposes to DO ANY OF THE FOLLOWING:

(a) Have perpetual duration.

(b) Sue and be sued in all courts and participate in actions and proceedings judicial, administrative, arbitrative, or otherwise, in like cases as THE SAME MANNER AS A natural person.

(c) Have a corporate seal, and alter the seal, and use it by causing it or a facsimile to be affixed, impressed, or reproduced in any other manner.

(d) Adopt, amend, or repeal bylaws, including emergency bylaws, relating to the purposes of the corporation, the conduct of its affairs, its rights and powers, and the rights and powers of its shareholders, members, directors, or officers.

(e) Elect or appoint officers, employees, and other agents of
the corporation, prescribe their duties, fix their compensation and
the compensation of directors, and indemnify corporate directors,
officers, employees, and agents.

(f) Purchase, receive, take by grant, gift, devise, bequest,
or otherwise, lease, or otherwise acquire, own, hold, improve,
employ, use, and otherwise deal in and with, real or personal
property, or an interest therein—IN REAL OR PERSONAL PROPERTY,
wherever situated, either absolutely or in trust and without
limitation as to amount or value.

(g) Sell, convey, lease, exchange, transfer, or otherwise
dispose of, or mortgage or pledge, or create a security interest
in, any of its property, or an interest therein—IN THE PROPERTY,
wherever situated.

(h) Purchase, take, receive, subscribe for, or otherwise
acquire, own, hold, vote, employ, sell, lend, lease, exchange,
transfer, or otherwise dispose of, mortgage, pledge, use, and
otherwise deal in and with, bonds and other obligations, shares or
other securities or interests or memberships issued by others,
whether engaged in similar or different business, governmental, or
other activities, including banking corporations or trust
companies. A corporation organized or conducting affairs in this
state under this act—shall not guarantee or become surety upon
a bond or other undertaking securing the deposit of public money.

(i) Make contracts, give guarantees, and incur liabilities,
borrow money at such rates of interest as the corporation may
determine, issue its notes, bonds, and other obligations, and
secure any of its obligations by mortgage or pledge of any of its
property or an interest therein—IN THE PROPERTY, wherever situated.

(j) Lend money, invest and reinvest its funds, and take and
hold real and personal property as security for the payment of
funds loaned or invested.

(k) Make donations for public welfare or for community fund,
hospital, charitable, educational, scientific, civic, or similar
purposes, and in time of war or other national emergency in aid
thereof—OF WAR OR OTHER NATIONAL EMERGENCY.

(l) Pay pensions, establish and carry out pension, savings,
thrift, and other retirement, incentive, and benefit plans, trusts
and provisions for any of its directors, officers, and employees.

(m) Purchase, receive, take, otherwise acquire, own, hold,
sell, lend, exchange, transfer, otherwise dispose of, pledge, use,
and otherwise deal in and with its own shares, bonds, and other
securities.

(n) Participate with others in any corporation, business
corporation, partnership, limited partnership, joint venture, or
other association of any kind, or participate with others in any
transaction, undertaking, or agreement which—that the participating
corporation would have power to conduct by itself, whether or not
the participation involves sharing or delegation of control with or
to others.

(o) Cease its corporate activities and dissolve.

(p) Conduct its affairs, carry on its operations, and have
offices and exercise the powers granted by this act in any
jurisdiction within or without the United States, and, in the case
of a corporation the purpose or purposes of which require the
transaction of business, the receipt and payment of money, the care
and custody of property, and other incidental business matters,
transact such business, receive, collect, and disburse such money,
and engage in such other incidental business matters as are
naturally or properly within the scope of its articles.

(q) Have and exercise all powers necessary or convenient to
effect any purpose for which the corporation is formed.

(2) A corporation subject to Act No. 157 of the Public Acts of
1976, being sections 451.1201 to 451.1210 of the Michigan Compiled
Laws, shall have THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL
FUNDS ACT HAS all powers granted under BOTH this act and Act No.
157 of the Public Acts of 1976—THAT ACT. However, in the event of
an inconsistency between this act and Act No. 157 of the Public
PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT CONTROLS.

(3) The corporate existence of all corporations incorporated
before the effective date of this act JANUARY 1, 1983, without
capital stock, for religious, benevolent, social, or fraternal
purposes, shall be deemed CONSIDERED to be in perpetuity. A
limitation or term fixed in the articles or in the law under which
the corporation originally incorporated shall not be IS NOT
effective unless the corporation has affirmatively waived its right
to perpetual existence subsequent to AFTER September 18, 1931, by
fixing a definite term of existence by amendment to its articles.

(4) Any nonprofit power corporation which THAT is authorized
to furnish electric service may construct, maintain, and operate
its lines along, over, across, or under any public places, streets,
and highways, and across or under the waters in this state, with
all necessary erections and fixtures. A nonprofit power corporation may exercise the power of eminent domain, in the manner provided by Act No. 87 of the Public Acts of 1980, as amended, being sections 213.51 to 213.77 of the Michigan Compiled Laws THE UNIFORM CONDEMNATION PROCEDURES ACT, 1980 PA 87, MCL 213.51 TO 213.75. As a condition to the exercise of any of these powers, nonprofit corporations shall be ARE subject to the jurisdiction of the Michigan public service commission pursuant to Act No. 106 of the Public Acts of 1909, as amended, being sections 460.551 to 460.559 of the Michigan Compiled Laws 1909 PA 106, MCL 460.551 TO 460.559, Act No. 419 of the Public Acts of 1919, as amended, being sections 460.51 to 460.62 of the Michigan Compiled Laws 1919 PA 419, MCL 460.54 TO 460.62, and Act No. 3 of the Public Acts of 1939, as amended, being sections 460.1 to 460.8 of the Michigan Compiled Laws 1939 PA 3, MCL 460.1 TO 460.10CC.

Sec. 501. (1) The business and affairs of a corporation shall be managed by its board, except as otherwise provided in this act. A director need not be a shareholder or member of the corporation unless the articles or bylaws so require. The articles or bylaws may prescribe qualifications for directors.

(2) The board of a corporation which THAT is subject to Act No. 157 of the Public Acts of 1976, being sections 451.1201 to 451.1210 of the Michigan Compiled Laws, shall have THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT HAS the powers granted under Act No. 157 of the Public Acts of 1976—BOTH THAT ACT and this act. However, in the event of an inconsistency between this act and Act No. 157 of the Public Acts of 1976, Act No. 157
shall control THE 2 ACTS, THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT CONTROLS.

Sec. 541. (1) A director or an officer shall discharge the duties of that position in good faith and with the degree of diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances in a like position. In discharging the duties, a director or an officer, when acting in good faith, may rely upon the opinion of counsel for the corporation, upon the report of an independent appraiser selected with reasonable care by the board, or upon financial statements of the corporation represented to the director or officer as correct by the president or the officer of the corporation having charge of its books or account, or as stated in a written report by an independent public or certified public accountant or firm of accountants fairly to reflect the financial condition of the corporation.

(2) A director or officer of a corporation subject to the uniform PRUDENT management of institutional funds act, Act No. 157 of the Public Acts of 1976, being sections 451.1201 to 451.1210 of the Michigan Compiled Laws, shall be considered in compliance with this section IF the director or officer complies with section 7 of Act No. 157 of the Public Acts of 1976 SECTION 5 OF THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT in the administration of the powers specified in that section.

(3) If the corporation's articles of incorporation contain a provision authorized under section 209(c), then a volunteer director of the corporation shall only be personally liable for monetary damages for a breach of fiduciary duty as a director to


the corporation, its shareholders, or its members to the extent set forth in the provision.

(4) If the corporation's articles of incorporation contain a provision authorized under section 209(d), then a claim for monetary damages for a breach of a volunteer director's duty to any person other than the corporation, its shareholders, or its members shall not be brought or maintained against the volunteer director. Such a claim shall be brought or maintained instead against the corporation, which corporation shall be liable for the breach of the volunteer director's duty.

(5) An action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered, or should reasonably have been discovered, by the complainant, whichever occurs first.

Enacting section 1. This amendatory act does not take effect unless (need proper cross reference to UPMIFA Bill No) of the 95th Legislature is enacted into law.
A bill to establish duties and obligations of nonprofit, charitable institutions in the management and use of funds held for charitable purposes; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "uniform prudent management of institutional funds act".

Sec. 2. As used in this act:

(a) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(b) "Endowment fund" means an institutional fund or part of an institutional fund that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. Endowment fund does not include assets that an institution designates as an endowment fund for its own use.

(c) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(d) "Institution" means any of the following:

(i) A person, other than an individual, organized and operated exclusively for charitable purposes.

(ii) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.

(iii) A trust that had both charitable and noncharitable
interests, after all noncharitable interests have terminated.

(e) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. Institutional fund does not include any of the following:

(i) Program-related assets.

(ii) A fund held for an institution by a trustee that is not an institution, unless the fund is held by the trustee as a component trust or fund of a community trust or foundation.

(iii) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise on violation or failure of the purposes of the fund.

(f) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(g) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(h) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Sec. 3. (1) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(2) In addition to complying with the duty of loyalty imposed by law other than this act, each person responsible for managing and investing an institutional fund shall manage and invest the
fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(3) In managing and investing an institutional fund, both of the following apply:

(a) An institution may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution.

(b) An institution shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(4) An institution may pool 2 or more institutional funds for purposes of management and investment.

(5) Except as otherwise provided by a gift instrument, all of the following rules apply:

(a) In managing and investing an institutional fund, the following factors, if relevant, shall be considered:

(i) General economic conditions.

(ii) The possible effect of inflation or deflation.

(iii) The expected tax consequences, if any, of investment decisions or strategies.

(iv) The role that each investment or course of action plays within the overall investment portfolio of the fund.

(v) The expected total return from income and the appreciation of investments.

(vi) Other resources of the institution.

(vii) The needs of the institution and the fund to make distributions and to preserve capital.

(viii) An asset's special relationship or special value, if any, to the charitable purposes of the institution.
(b) Management and investment decisions about an individual asset shall not be made in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(c) Except as otherwise provided by law other than this act, an institution may invest in any kind of property or type of investment consistent with this section.

(d) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(e) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this act.

(f) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

Sec. 4. (1) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated
otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, all of the following factors:

(a) The duration and preservation of the endowment fund.
(b) The purposes of the institution and the endowment fund.
(c) General economic conditions.
(d) The possible effect of inflation or deflation.
(e) The expected total return from income and the appreciation of investments.
(f) Other resources of the institution.
(g) The investment policy of the institution.

(2) To limit the authority to appropriate for expenditure or accumulate under subsection (1), a gift instrument must specifically state the limitation.

(3) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", "rents, issues, or profits", or "to preserve the principal intact", or words of similar import, do both of the following:

(a) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund.
(b) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (1).
Sec. 5. (1) Subject to any specific limitation set forth in a gift instrument or in law other than this act, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in doing any of the following:

(a) Selecting an agent.

(b) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund.

(c) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(2) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(3) An institution that complies with subsection (1) is not liable for the decisions or actions of an agent to which the function was delegated.

(4) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(5) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this act.
Sec. 6. (1) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A donor may give prior consent to an institution for release or modification of a restriction or charitable purpose in a gift instrument which also includes a restriction or stated charitable purpose subject to this section 1. A release or modification shall not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(2) A court, on application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the attorney general of the application, and the attorney general shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor's probable intention.

(3) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, a court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the attorney general shall be given an opportunity to be heard.
(4) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the attorney general, may release or modify the restriction, in whole or in part, if all of the following apply:

(a) The institutional fund subject to the restriction has a total value of less than $25,000.00.

(b) More than 20 years have elapsed since the fund was established.

(c) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

(5) Nothing in this section shall affect the right of a governing body of an institution to exercise powers conferred by the institution’s governing instruments or by a gift instrument to modify restrictions contained in a gift instrument.

Sec. 7. Compliance with this act shall be determined in light of the facts and circumstances existing at the time a decision is made or action is taken and not by hindsight.

Sec. 8. This act applies to institutional funds existing on or established after the effective date of this act. As applied to institutional funds existing on the effective date of this act, this act governs only decisions made or actions taken on or after that date.

Sec. 9. This act modifies, limits, and supersedes the electronic signatures in the global and national commerce act, 15 USC 7001 to 7031, but does not modify, limit, or supersede 15 USC 7001(a) or authorize electronic delivery of any of the notices
described in 15 USC 7003(b).

Sec. 10. In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Sec. 11. This act applies solely to matters included within the meaning of the terms “institution”, “institutional fund”, and “person” as defined in this act and no part of this act shall apply to, or affect, the validity, construction, interpretation, effect, administration or management of any other trust, estate or applicable governing instrument.

Proposed Treas. Reg. § 1.67-4 provide guidance on when the exception to the 2% floor on miscellaneous itemized deductions for costs in connection with the administration of an estate or a trust is applied. If a cost is unique to an estate or trust then it is not subject to the 2% floor.

**UNIQUE.** A cost is unique to an estate or non-grantor trust if an individual would not have incurred that cost in connection with property not held in an estate or trust. In making this determination, it is the type of product or service rendered to the estate or trust, rather than the characterization of the cost of that product or service, that is relevant. A non-exclusive list of products or services that are unique to an estate or trust includes those rendered in connection with: fiduciary accountings; judicial or quasi-judicial filings required as part of the administration of the estate or trust; fiduciary income tax and estate tax returns; the division or distribution of income or corpus to or among beneficiaries; trust or will contest or construction; fiduciary bond premiums; and communications with beneficiaries regarding estate or trust matters.

A non-exclusive list of products or services that are not unique to an estate or trust, and therefore are subject to a 2% floor, includes those rendered in connection with: custody or management of property; advice on investing for total return; gift tax returns; the defense of claims by creditors of the decedent or grantor; and the purchase, sale, maintenance, repair, insurance or management of non-trade or business property.

**BUNDLED FEES.** If an estate or non-grantor trust pays a single fee, commission or other expense for both costs that are unique to estate and trusts and costs that are not, then the estate or non-grantor trust must identify (if any) the legal, accounting, investment advisory, appraisal or other fee, commission or expense that is unique to estate and trusts and is thus not subject to the 2% floor. The taxpayer must use any reasonable method to allocate the single fee, commission or expense between the costs unique to estates and trusts and other costs.
There has been a substantial amount of opposition to the regulations based on the following:

- Although the regulations gave some examples of the type of expense subject to the 2% floor, many items were not mentioned such as the costs for maintaining real and personal property owned by the trust.

- The regulation is overly complex. In order to claim a full deduction for trust administration expenses, the trustee must predict whether an ordinary individual with the same property would have incurred the same cost or a portion thereof. If the cost is not fully deductible then the tax return requires an algebraic formula to determine the deduction.

- The regulation requires extensive recordkeeping.

- The costs for trust, legal and accounting services should be exempt from the 2% floor since the majority of these fees relate to matters that do not apply to individuals.

- Application of the 2% creates phantom income. If the trustee is unable to deduct the entire cost incurred to manage a trust or estate then the beneficiaries and/or trust are paying income tax on income that is never received.

- The regulation discourages compliance with mandatory fiduciary duties. Trustees are required to perform certain duties under the Prudent Investor Act or delegate them. If these duties are delegated then they are subject to the 2% rule.

- Trusts are already heavily taxed. Trusts pay 35% on income in excess of $11,150, compared to individuals who pay 35% on income in excess of $372,950.
Over 96% of trusts and estates report less than $100,000 of gross income. Most beneficiaries are surviving spouses, the elderly, the disabled, and children of millions of middle income families. Thus these regulations effect a portion of the population that are the most disadvantaged.

Compliance and enforcement costs of the present law outweigh the tax collected. Smaller trusts may just take the position that it is not cost effective to track the expenses, thus subjecting all administrative expenses to the 2% floor.

The regulation was supposed to be effective for the 2008 tax year. I spoke with Jennifer Keeney who is the IRS drafting attorney these regulations. There is no date set for the final regulations. The interim guidance issued by the IRS states that taxpayers are not required to determine the portion of a Bundled Fiduciary Fee that is subject to the 2% floor for any tax year beginning before January 1, 2009. However, costs paid to an investment advisor by a non-grantor trust or estate are subject to the 2% floor for miscellaneous itemized deductions in keeping with the Supreme Court’s decision in Michael J. Knight, Trustee of William L. Rudkin Testamentary Trust v. Commissioner, 552 U.S. _____, 128 S. Ct. 782 (2008).
January 2009 TAX NUGGET

F.D.I.C- Increased Federal Deposit Insurance Coverage—Here Today and Gone Tomorrow

Recently, bank failures made all of us insecure, and the Emergency Economic Stabilization Act of 2008 increase of the base limit of FDIC insurance from $100,000 to $250,000 per depositor made us feel better. However, what was not as widely publicized was that the increase was temporary. Unless extended, the coverage limit will return to $100,000 for checking, savings, money market accounts and certificates of deposit at insured banks on January 1, 2010. This may present problems for you and your clients, especially with certificates of deposit that could be a longer term. It makes it even more important that you understand the FDIC regulations applicable to bank deposits and their various forms of ownership, and that you explore, research, and keep track of, how accounts are owned.

The F.D.I.C. has a website, [www.fdic.gov.deposit](http://www.fdic.gov.deposit), which gives examples of various forms of ownership that can increase the insured amount beyond the $100,000 or now $250,000 temporary insurance amount depending on ownership. It is certainly worthwhile to review the rules for single, joint, revocable trust, and irrevocable trust accounts because a depositor could have over $2,000,000 insured in various accounts in one bank depending on the number of joint owners, beneficiaries, and terms of the trusts. In particular, the F.D.I.C. has EDIE the Estimator, a tool to calculate the FDIC insurance coverage for each bank that you have deposits in at [www.fdic.gov/edie/index.html](http://www.fdic.gov/edie/index.html). One needs to have records of all the deposit accounts, current balances, and names of all account owners and beneficiaries in order to get definitive answers from EDIE. Using this tool may help you sleep better or provide you with a plan to move funds or add beneficiaries prior to January 1, 2010. Another source of information is an article by Ruth Shaw in 33 Estates, Gifts and Trust Journal, (11-08) “Get More Bang for Your Buck—Or How to Maximize FDIC Deposit Insurance Coverage”

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Attached is a copy of the Olga Koehler decision in the Troy case.

Last month, I attended the council meeting and raised this issue at the end of the CSP meeting. I wanted to know if this (trustees holding legal title to real estate in the name of a nominee losing PRE) was a problem for any other bank or trust company other than the Wells Fargo banks in the UP. At the meeting, I was told that this was not a problem for any one else. I also spoke last week with George Gregory who called me about this issue. George gave me some history regarding the historical practice of holding real estate in nominees. While this was a common technique a number of years ago, most – if not all – downstate banks have discontinued this practice. I also called a number of other bank trust departments in the UP. None of them indicated they have had a problem. This problem appears to be isolated to Wells and the practice it inherited when it acquired the UP banks. It is not a problem going forward for Wells as all new real estate placed in trust is held “Wells Fargo as trustee of the Ken Seavoy Trust...”.

I spoke with the trust real estate officer at Wells to see how many of these issues he has faced. At this point, it doesn’t seem to be a large number. We have responded and requested an informal hearing in the one situation which raised my concern. Wells wants to monitor the situation, but it doesn’t appear to be a major problem and hopefully it stays that way.

As I said in my initial email, one of the things that concerned me is that the language quoted in the letter (attached) is broad enough that, if read literally, would deny PRE to real estate held by ANY corporate trustee – not just real estate held in a nominee. I raised that point in my letter to Treasury requesting the informal conference. Right now however, I don’t see this as a large enough problem to warrant CSP or Council action. I will, of course, keep you posted if things change or we have a surprise at the informal hearing.

Thank for your help. I have also copied George Gregory on this email as well as Dave Faust, the Wells Fargo Real Estate Trust officer.

Ken
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This email may contain confidential and privileged material for the sole use of the intended recipient(s). Any unintended review, use, distribution or disclosure is strictly prohibited. If you have received this message in error, please contact the sender.
Hi Ken:

Would it be too much trouble to send me the Troy case decision and any briefs you have readily available?

Also, do you know the status of the new Wells Fargo issue? Any updates?

Have you spoken to anyone else about this on the Probate Council?

I would like to do the following with this issue.....

Step 1: Figure out what the law is.
Step 2 Identify issues / problems

Maybe an article on this point on the above

Step 3 Mention at Real Estate Meeting and see if they see as a problem / issue to be resolved, are opposed, etc.
Step 4 Take to CSP
Step 5 CSP takes to Council

Maybe another article or talk

Maybe legislative change

Any response, suggestions or comments you have are appreciated!

Any tax advice in this e-mail, including attachments, may not be used to avoid penalties or promote any tax related matter.

Daniel P. Marsh, PLLC
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248-687-1600

-------- Original Message --------
Subject: Probate Council committee?
From: "Kenneth Seavoy" <kseavoy@kendrickslaw.com>
Date: Wed, November 19, 2008 5:27 pm
To: <dan@danielpmarsh.com>
Dan,

I don't know if you are the still the person to contact about this, but I thought I would try you first. A couple of years ago, you were the chair of a project of the Probate Council to try to identify estate planning issues which impact on various real estate issues.

The issue which I was most interested in was the Homestead (now Principal Residence) Exemption (PRE). I had a case in Troy where Wells Fargo Bank, acting as trustee of a trust, held the real estate in a nominee partnership (First Mar & Company). The Troy assessor denied the PRE saying that "the trust" wasn't the owner of the house and therefore wasn't eligible for the PRE. We appealed to the Tax Tribunal and also lost at that level because, in my opinion, the Tribunal did not correctly understand the law of agency and trusts. The minimal amount at issue in what seemed to be an isolated instance didn't justify the cost of appeal.

Today, I received a call from the same bank and they have another instance where the PRE is being denied. The new letter, however came from the "Property Tax Exemption Section - Michigan Department of Treasury", not from a local assessor. The letter said the PRE was denied "for the following reason:

The owner of a qualifying parcel must be a person(s) who holds legal title to the parcel. A partnership, corporation, limited liability company, association, or other legal entity does not meet the requirements of an owner as defined by MCL 211.7dd."

In this instant case, similarly to the Troy case, the property is being held by a nominee. It might be that the denial of PRE is a problem unique to Wells Fargo and its historical practice of using a nominee to hold trust real estate. However, under the language above, it would seem any residence held in trust by a corporate trustee would fail to qualify for the PRE. I do not know if that is how this is being interpreted or applied by Treasury, but it causes me concern. Stranger things have happened.

Do you know the status of the committee that is looking at these issues? If you can help, or point me in the right direction, I would appreciate it. Thanks.

Ken
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