

**MINUTES OF THE
COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION
MARCH 14, 2009**

- I. Call to Order by Nancy Little, Chairperson, at 10:40 am, the University Club, Lansing, Michigan
- II. Excused Absences – Richard Siriani, Hon. Kathryn George, Robin Ferriby, Shaheen I. Imami, Hon. David J. Murkowski
- III. Others Counsel Members Absent - Susan M. Allan
- IV. Introductions – Nancy Little, Chairperson, asked those present 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

Amy N. Morrissey
Rebecca A. Schnelz
Thomas F. Sweeney
Marlaine C. Teahan

J. David Kerr
Robert M. Taylor

Ex-Officios Present

John Bos

Hon. Phillip E. Harter
Douglas A. Mielock

Others Present

James P. Spica
Dan Cogan
Rebecca Bechler
Lorraine New
Amy Tripp

Mike Kotarski
Mark Hibbs
Kim Mitchell
Jennifer Remondino
Carol Sewell

Kathy Goetsch
John Dresser
Connie Brigman
Derek A. Walters
Sara Starch

Kristin Vanpract
Daniel P. Marsh
Christine M. Savage
Jeanne Murphy
Liisa Speaker

Mark E. Kellogg
Meg Lentz
Mark Pasquali
Cynthia S. Andrews
Melisa Mysliwicz

Val Lafferty

V. Minutes of the Council Meeting of February 14, 2009

George Gregory reported that others had reported errors to him. He had corrected those errors. Upon a motion made and seconded, the Minutes were approved as corrected.

VI. Treasurer's Report B Mark K. Harder reported that income and expenditures were online with the budget. A written report is attached.

- VII. Chairperson's Report B Nancy L. Little reported that the Section agreed to participate in the Law School for Legislators sponsored by the State Bar. However, on the sessions scheduled so far, there have been sessions where no one from the legislature or their staff attended. Two staff people signed up for all of the sessions, but have attended none. Those were the only persons who signed up for our session. Based on that we have decided to cancel the Sections presentation to the Law School for Legislators.

Nancy Little also reported that Jeff Kirkey of ICLE nominated XXXXXXXX (its supposed to be a secret) for the George Cooney award. In the future, Nancy thinks this nomination should be forwarded to the committee which handles the Michael Irish Award. Nancy explained that George Cooney was active in the Council and ICLE. George did speaking and writing for ICLE. He helped in the design of the Probate Certificate program. The award recognizes those, like George, who have been active in speaking and writing.

Doug Chalgian moved and John Bos seconded that we endorse the recommendation of XXXXX for this award and the motion passed unanimously.

- VIII. Report of Committee on Special Projects B Amy M. Morrissey reported that the Committee on Special Projects:
- a. Recommended that the Council oppose House Bill 4331 and that Nancy Little and Amy Morrissey draft a letter to Representative Meadows. The recommendation carried by a vote of 17-0-0.
 - b. Recommended that Douglas Chalgian and Rebecca Bechler meet with the Funeral Directors to see if something can be worked out regarding HB 4505 and two similar bills which as a concept the Council supports. The recommendation carried by a vote of 17-0-0
 - c. Recommended that the Council take no action on the various identity theft bills introduced in the House. No one moved that the Council take any action.
 - d. Recommend that the Council form an Ad Hoc Committee to deal with the Proposed Changes in the Uniform Principal and Income Act (UPIA) recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and which Senator Kuipers has sent to be blue backed. In the interest of not reproducing the entire document with amendments at this time, a web site is provided below. The primary area of change are section 409 dealing with retirement plans (partially in response to the United State Treasury's criticism about UPIA in connection with the income requirement for the marital deduction) and section 505 addressing the income tax impact of S corporations and

partnerships on trusts. The committee members are: Robert Tiplady, II, Mark Harder, Dan Cogan, Pat Ouellette, Daniel P. Marsh, Carol Sewell, and Meg Lentz.

http://www.law.upenn.edu/bll/archives/ulc/upaia/2008_final.htm#_Toc210617363

- e. Upon a motion duly made and seconded, and by a vote of 16-1 the Council removed the previously tabled recommendation of the Committee: The Committee recommends that the Council file an amicus curiae brief in support of the Michigan Supreme Court accepting certiorari *In re Mary E. Griffin Revocable Grantor Trust*, 281 Mich. App. 532, 760 N.W.2d 318 Mich. App., December 02, 2008 (Court of Appeals Docket Number 277268). Interested parties were asked to leave. Following a thorough discussion which supplemented the thorough discussion at the Special Projects Committee Meeting which preceded the Council Meeting, it was rejected by a vote of 1-15-0 (two members of the Council were asked to leave the meeting as they or their law firm had an interest in the matter). Nancy Little clarified that this meant we would not be doing a brief and the vote remained unchanged. A discussion followed in which it was concluded that this did not commit us to a course of action if the Supreme Court asked for a brief.

IX. Standing Committee Reports

A. Internal Governance

1. Budget B George W. Gregory reported that he is counting on the same level of support for the 2010 Institute as the 2009 Institute. Harold Schuitmaker reported that he was working on the same level of outside support.
2. Bylaws B Marilyn A. Lankfer had no report.
3. Michael Irish Award B Brian V. Howe submitted no report, but Nancy Little repeated that she thinks this Committee should also deal with the George Cooney Award in the future.
4. Long-Range Planning B Douglas G. Chalgian had no report.
5. Nominations B Michael McClory submitted no report.
6. Relations with the State Bar B Thomas F. Sweeney reported that the committee is still working on publishing the newspaper articles previously discussed and expected a positive report next month.

7. Annual Meeting B Harold Schuitmaker reported that he is looking at three places for the meeting. He has not selected a date yet. He is working on a sponsor.

B. Education & Advocacy Services for Section Members

1. Amicus Curiae B Ellen Sugrue Hyman
Tabled from Last Month's Meeting: Position on Mary E. Griffin Revocable Grantor Trust, _____ Mich. App _____ (2008), #277268, 12/2/08. This was dealt with in connection with the report of the Special Projects Committee.
Marilyn Lankfer suggested that the Committee have a procedure for Amicus Curiae briefs. This would include criteria for the Committee to consider and the process by which they are submitted to the Council. Ellen Sugre Hyman welcomed the suggestion and stated everyone wanted the process to be even-handed and that the Committee would address these issues.
2. Continuing Education & Annual Probate Institute B Douglas Chalgian reported that things were going well for the Institute.
3. Section Journal B Nancy L. Little reported that an e-blast of the recent issue went out recently and that older members would receive hard copy in the mail as well.
4. State Bar Journal B Amy M. Morrissey had no report.
5. Pamphlets B Ellen Sugrue Hyman reported the committee is still working on pamphlet revisions.
6. Electronic Communication B Josh Ard had no report.

C. Legislation and Lobbying

1. Legislation B Harold G. Schuitmaker reported that all of the materials he had were covered in the Committee on Special Projects.
2. Power of Attorney Act – Daniel P. Marsh reported that the committee met last month. The Michigan Bankers Association attended and made a suggestion based on New York and Ohio which have safe harbor documents for Financial Institutions to rely upon.
A written report is attached.

3. Michigan Trust Code B Mark K. Harder was please to state he had no report other than the legislation is expected to be introduced next Tuesday. The main legislation will be sponsored by Senator Alan Cropsey. Other legislation will be sponsored by Senators Hansen Clarke, Bruce Patterson, and Wayne Kuipers. Once it clears the Senate, Representative Mark Meadows will help in the House.
4. *Solicitation of information of Lobbying Report* – Rebecca Bechler reported that we did not need to report the time we spend on lobbying unless we are registered lobbyists.
5. *Procedure for Public Policy Positions* – Mark Harder recommended that the Secretary of the Council be responsible for posting our policy positions with the State Bar website. The Section is required to report its position in a few days, the Secretary only has to learn it once for the year, and has the minutes on the vote. In addition, Mark discussed the disclaimers we must provide if we are speaking on behalf of the Section, that we are a Section of the State Bar, and not the State Bar, and if we are members of the Section, but speaking on behalf of ourselves, that we are doing so. Nancy Little stated the recommendation was a good one and should be followed.

D. Ethics, Professionalism and Standards

1. Ethics B J. David Kerr reported that the State Bar ethics committee said they would send him items of interest to the Section.
2. Unauthorized Practice & Multidisciplinary Practice B Bob Taylor reported that he heard from attorney Lee Elliott about CLAUSA.COM who sent him an invitation to attend. He did. At the presentation a Bob Schmidt explained that for \$2,550 CLAUSA would line up an attorney who would draft an estate plan (for \$550 of the \$2,550) and they would fund the trust and provide post death administration. Bob Taylor referred the matter to the State Bar. Others commented on their own experiences with CLAUSA.
3. Specialization and Certification B James B. Steward reported that the Committee met last week, was meeting again in two weeks and was continuing to review the proposed rules.
4. Practice Management B Patricia Ouellette had no report.

E. Administration of Justice

1. Contested and Uncontested Probate Proceedings B Douglas G. Chalgian had no report.
2. Uniformity of Practice B Derek A. Walters had no report.
3. Hiring of Court Employees – Nancy Little reported on proposed changes to Judicial Cannon 2 which would prohibit a Court from hiring as an employee or independent contractor anyone who was a spouse, sibling or child of an attorney who had his practice or practiced in front of the Court. The matter was thoroughly discussed and upon a motion duly made and seconded by a vote of 17-0-0 it was resolved that the Section opposed the proposed changes to Judicial Cannon 2.

F. Practice Issues, Related Areas & Liaisons

1. Charitable Giving/Exempt Organizations B Robin D. Ferriby submitted no report.
2. Transfer Tax B Thomas F. Sweeney submitted a written report and orally reported that there are two bills which would extend the Federal estate tax through 2010. Tom predicted that such an extension would take place, but did not know if either one of these bills would be the vehicle. The first bill would extend the current exemption equivalent of \$ 3.5 million, and have a 5% higher rate over \$10 million, and limit discounts when entities primarily own marketable securities. The second bill would raise the exemption equivalent to \$5 million and provide for the portability of the unused exemption at the death of the first spouse. The Tax Nugget is attached.
3. Guardianships and Conservatorships B Constance Brigman reported that the committee would meet today and that they are looking at the Guardianship Act.
4. Business Law/Liaison to Business Section B John R. Dresser reported that the State of Michigan is in the process of revising Superfund baseline environmental assessment process, and replace it with an annual testing and reporting process. This would be very expensive.
5. Elder Law/Liaison to Elder Law Section B Amy R. Tripp reported that yesterday the Elder Law Section had its spring conference.

The fall conference will be at the end of September at Crystal Mountain and one of the featured speakers is Robert Fleming who was very popular at a recent Probate Section Institute and she encouraged members of the Probate Section to attend.

6. Family Law/Family Law Section Liaison B Patricia M. Ouellette had no report.
7. Real Property Law/Real Property Section Liaison – Daniel P. Marsh reported on the retroactive amendment to the State Real Estate Transfer Tax to tax transfers of interests in entities when more than 90% of the assets of the entity are real estate. It does not extend to the County Real Estate Transfer Tax. Many feel that the retroactive nature of this tax is unconstitutional. The tax does not extend to gifts. Dan will provide a follow up written report.
8. State Bar Section to Section Action Team Liaison – Robert Tiplady discussed House Bill 4331 and that he thought the Elder Law Section and the Consumer Law Section would take positions similar to ours.
9. Tax and Tax Section Liaison – Lorraine F. New reported that the Tax Section sent an e-blast of our recent *Journal* to its members in order to encourage cross section membership. Nancy Little thanked Lorraine for facilitating this with Jess Bahs, Chairperson of the Taxation Section.
10. State Bar Liaison B Richard J. Siriani submitted no report.
11. Court Rules and Forms Committee Liaison B Marlaine C. Teahan reported that the Committee has formed a subcommittee of people familiar with the Michigan Trust Code so that proposed rules would be in place for when it passes. The subcommittee members are Marlaine C. Teahan, Douglas Mielock, Tess Sullivan, Douglas Chalgian, and Robert Tiplady, II.
12. Trust Institutions and Liaison with Michigan Bankers Association B Susan Allan, submitted no report.
13. Michigan Probate Judges Association Liaison B Hon. Phillip Harter stated that there was no report.
14. Law School Liaison – Josh Ard stated he had no report.

X. Other Business – John Bos tanked the Council for its time and effort on his request for an amicus brief, even though the Council did not act on it in the way he wanted.

XI. Hot Topics – none were raised.

XII. Adjournment – Nancy Little encouraged those who do not regularly attend to do so and to volunteer for Committees as that is the best way to become involved. There being no further business the meeting adjourned at 11:55 am.

Attachments

1. Treasurer's Report
2. HB 4331
3. HB 4505
4. Propose Change to Judicial Cannon 2 – Hiring of Court Employees
5. Tax Nugget
6. Report from the Amicus Curiae Committee
7. Report from the Power of Attorney Act Committee (labeled February)
8. Report to Real Property Section from Liaison Daniel P. Marsh (labeled February)
9. Committee Assignments

HOUSE BILL No. 4331

February 18, 2009, Introduced by Reps. Cushingberry, Durhal and Sheltroun and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending the title and section 1108 (MCL 700.1108), and by adding sections 5109 and 5110.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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TITLE

An act to codify, revise, consolidate, and classify aspects of the law relating to wills and intestacy, relating to the administration and distribution of estates of certain individuals, relating to trusts, and relating to the affairs of certain individuals under legal incapacity; to provide for the powers and procedures of the court that has jurisdiction over these matters; to provide for the validity and effect of certain transfers,

1 contracts, and deposits that relate to death; to provide procedures
2 to facilitate enforcement of certain trusts; **TO IMPOSE FEES; TO**
3 **CREATE FUNDS; TO PROVIDE FOR THE POWERS AND DUTIES OF CERTAIN STATE**
4 **AND LOCAL GOVERNMENTAL OFFICERS AND ENTITIES;** and to repeal acts
5 and parts of acts.

6 Sec. 1108. As used in this act:

7 (A) "VULNERABLE ADULT" MEANS THAT TERM AS DEFINED IN SECTION
8 145M OF THE MICHIGAN PENAL CODE, 1931 PA 328, MCL 750.145M.

9 (B) ~~(a)~~"Ward" means an individual for whom a guardian is
10 appointed.

11 (C) ~~(b)~~"Will" includes, but is not limited to, a codicil and
12 a testamentary instrument that appoints a personal representative,
13 revokes or revises another will, nominates a guardian, or expressly
14 excludes or limits the right of an individual or class to succeed
15 to the decedent's property that is passing by intestate succession.

16 SEC. 5109. (1) A POWER OF ATTORNEY MADE BY A PRINCIPAL WHO IS
17 60 YEARS OF AGE OR OLDER OR WHO IS A VULNERABLE ADULT SHALL BE
18 DEPOSITED BY THE PRINCIPAL, OR BY A PERSON FOR HIM OR HER, WITH THE
19 COURT IN THE COUNTY WHERE THE PRINCIPAL RESIDES.

20 (2) A POWER OF ATTORNEY DEPOSITED UNDER THIS SECTION SHALL BE
21 ENCLOSED IN A SEALED WRAPPER ON WHICH IS PRINTED ALL OF THE
22 FOLLOWING:

23 (A) THE PRINCIPAL'S NAME, PLACE OF RESIDENCE, AND SOCIAL
24 SECURITY NUMBER OR STATE OF MICHIGAN DRIVER LICENSE NUMBER.

25 (B) THE NAME, ADDRESS, AND TELEPHONE NUMBER OF THE PERSON
26 DESIGNATED AS AGENT IN THE POWER OF ATTORNEY.

27 (C) THE DAY ON WHICH AND THE NAME OF THE PERSON BY WHOM IT IS

1 DELIVERED.

2 (3) A COURT SHALL RECEIVE AND SAFELY KEEP A POWER OF ATTORNEY
3 DELIVERED UNDER THIS SECTION AND SHALL GIVE A CERTIFICATE OF THE
4 DEPOSIT. FOR THIS SERVICE, THE COURT SHALL CHARGE AND COLLECT A FEE
5 OF \$35.00, WHICH SHALL BE DEPOSITED IN THE VULNERABLE ADULT
6 PROTECTION FUND CREATED IN SECTION 5110.

7 (4) EXCEPT AS ORDERED BY THE COURT, A POWER OF ATTORNEY
8 DEPOSITED UNDER THIS SECTION IS A NONPUBLIC RECORD AND SHALL BE
9 DELIVERED ONLY TO THE PRINCIPAL OR THE AGENT, OR TO SOME PERSON
10 AUTHORIZED BY THE PRINCIPAL OR AGENT IN WRITING THAT IS PROVED BY
11 THE OATH OF A SUBSCRIBING WITNESS.

12 SEC. 5110. (1) THE VULNERABLE ADULT PROTECTION FUND IS CREATED
13 WITHIN THE STATE TREASURY.

14 (2) THE STATE TREASURER MAY RECEIVE FEES COLLECTED UNDER
15 SECTION 5109 AND MONEY OR OTHER ASSETS FROM ANY OTHER SOURCE FOR
16 DEPOSIT INTO THE FUND. THE STATE TREASURER SHALL DIRECT THE
17 INVESTMENT OF THE FUND. THE STATE TREASURER SHALL CREDIT TO THE
18 FUND INTEREST AND EARNINGS FROM FUND INVESTMENTS.

19 (3) MONEY IN THE FUND AT THE CLOSE OF THE FISCAL YEAR SHALL
20 REMAIN IN THE FUND AND SHALL NOT LAPSE TO THE GENERAL FUND.

21 (4) THE DEPARTMENT OF TREASURY SHALL BE THE ADMINISTRATOR OF
22 THE FUND FOR AUDITING PURPOSES.

23 (5) THE DEPARTMENT OF TREASURY SHALL EXPEND MONEY FROM THE
24 FUND, UPON APPROPRIATION, ONLY FOR 1 OR MORE OF THE FOLLOWING
25 PURPOSES:

26 (A) INVESTIGATION AND PROSECUTION OF OFFENSES UNDER CHAPTER
27 XXA OF THE MICHIGAN PENAL CODE, 1931 PA 328, MCL 750.145M TO

1 750.145R.

2 (B) ADMINISTRATION OF SECTION 5109 AND THIS SECTION BY THE
3 COURTS AND THE DEPARTMENT OF TREASURY.

HOUSE BILL No. 4505

March 4, 2009, Introduced by Rep. Byrnes and referred to the Committee on
Judiciary.

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending sections 3206, 3207, 3208, 3209, and 3614 (MCL
700.3206, 700.3207, 700.3208, 700.3209, and 700.3614), section 3206
as amended by 2008 PA 41 and sections 3207, 3208, and 3209 as added
and section 3614 as amended by 2006 PA 299, and by adding section
3210.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 3206. (1) Subject to 1953 PA 181, MCL 52.201 to 52.216,
and to part 28 and article 10 of the public health code, 1978 PA
368, MCL 333.2801 to 333.2899 and 333.10101 to 333.11101, **A PERSON**
APPOINTED UNDER SUBSECTION (2), a person with priority under
subsections ~~(2) to (4)~~ **(3) TO (5)**, or **A PERSON** acting under
subsection ~~(5), (6)~~, (7), ~~or (8)~~, **OR (9)** is presumed to have the

right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including, but not limited to, decisions about cremation, and the right to possess cremated remains of the decedent. The handling, disposition, or disinterment of a body shall be under the supervision of a person licensed to practice mortuary science in this state.

(2) AN INDIVIDUAL MAY DESIGNATE A PERSON TO EXERCISE THE RIGHTS AND POWERS UNDER SUBSECTION (1). THE DESIGNATION SHALL BE IN WRITING, SIGNED, WITNESSED IN THE SAME MANNER AS PROVIDED FOR A PATIENT ADVOCATE DESIGNATION IN SECTION 5506(4), DATED, AND EXECUTED VOLUNTARILY. A DESIGNATION UNDER THIS SUBSECTION MAY BE INCLUDED IN A PATIENT ADVOCATE DESIGNATION.

(3) ~~(2) The~~ IF THERE IS NO PERSON DESIGNATED UNDER SUBSECTION (2), THE surviving spouse or, if there is no surviving spouse, the individual or individuals 18 years of age or older, in the highest order of priority under section 2103, and related to the decedent in the closest degree of consanguinity, have the rights and powers under subsection (1).

(4) ~~(3) If~~ THERE IS NO PERSON DESIGNATED UNDER SUBSECTION (2) AND IF the surviving spouse or the individual or individuals with the highest priority as determined under subsection ~~(2)~~**(3)** do not exercise their rights or powers under subsection (1) or cannot be located after a good-faith effort to contact them, the rights and powers under subsection (1) may be exercised by the individual or

individuals in the same order of priority under section 2103 who are related to the decedent in the next closest degree of

consanguinity. If the individual or each of the individuals in an order of priority as determined under this subsection similarly does not exercise his or her rights or powers or cannot be located, the rights or powers under subsection (1) pass to the next order of priority, with the order of priority being determined by first taking the individuals in the highest order of priority under section 2103 and then taking the individuals related to the decedent in the closest or, as applicable, next closest degree of consanguinity in that order of priority.

(5) ~~(4)~~—If 2 or more individuals share the rights and powers described in subsection (1) as determined under subsection ~~(2)~~ ~~or~~ (3) **OR (4)**, the rights and powers shall be exercised as decided by a majority of the individuals. If a majority cannot agree, any of the individuals may file a petition under section 3207.

(6) ~~(5)~~—If **THERE IS NO PERSON DESIGNATED UNDER SUBSECTION (2) AND IF** no individual described in subsections ~~(2)~~ ~~and~~ (3) **AND (4)** exists, exercises the rights or powers under subsection (1), or can be located after a sufficient attempt as described in subsection ~~(9)~~ **(10)**, and if subsection ~~(6)~~ **(7)** does not apply, then the personal representative or nominated personal representative may exercise the rights and powers under subsection (1), either before or after his or her appointment.

(7) ~~(6)~~—If **THERE IS NO PERSON DESIGNATED UNDER SUBSECTION (2) AND IF** no individual described in subsections ~~(2)~~ ~~and~~ (3) **AND (4)** exists, exercises the rights or powers under subsection (1), or can

be located after a sufficient attempt as described in subsection
~~(9)~~(10), and if the decedent was under a guardianship at the time

of death, the guardian may exercise the rights and powers under subsection (1) and may make a claim for the reimbursement of burial expenses as provided in section 5216 or 5315, as applicable.

(8) ~~(7)~~—If **THERE IS NO PERSON DESIGNATED UNDER SUBSECTION (2) AND IF** no individual described in subsections ~~(2) and (3)~~ **AND (4)** exists, exercises the rights or powers under subsection (1), or can be located after a sufficient attempt as described in subsection ~~(9)–(10)~~, if the decedent died intestate, and if subsection ~~(6)–(7)~~ does not apply, a special personal representative appointed under section 3614(c) may exercise the rights and powers under subsection (1).

(9) ~~(8)~~—If there is no person under subsections (2) to ~~(7)–(8)~~ to exercise the rights and powers under subsection (1), 1 of the following, as applicable, shall exercise the rights and powers under subsection (1):

(a) Unless subdivision (b) applies, the county public administrator, if willing, or the medical examiner for the county where the decedent was domiciled at the time of his or her death.

(b) If the decedent was incarcerated in a state correctional facility at the time of his or her death, the director of the department of corrections or the designee of the director.

(10) ~~(9)~~—An attempt to locate a person described in subsection ~~(2) or (3)~~ **OR (4)** is sufficient if a reasonable attempt is made in good faith by a family member, personal representative, or nominated personal representative of the decedent to contact the

person at his or her last known address, telephone number, or
electronic mail address.

(11) ~~(10)~~—This section does not void or otherwise affect an anatomical gift made under part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10123.

(12) ~~(11)~~—As used in this section, "nominated personal representative" means a person nominated to act as personal representative in a will that the nominated person reasonably believes to be the valid will of the decedent.

Sec. 3207. (1) If there is a disagreement as described in section ~~3206(4)~~**3206(5)** or if **THERE IS NO PERSON DESIGNATED UNDER SECTION 3206(2) AND** 1 or more of the individuals described in section ~~3206(2) or (3)~~**3206(3) OR (4)** cannot be located, 1 or more of the following may petition the court to determine who has the authority to exercise the rights and powers under section 3206(1):

(a) An individual with the rights and powers under section 3206(1).

(b) A funeral establishment that has custody of the decedent's body.

(2) Venue for a petition filed under subsection (1) is in the county in which the decedent was domiciled at the time of death.

(3) On receipt of a petition under this section, the court shall set a date for a hearing on the petition. The hearing date shall be as soon as possible, but not later than 7 business days after the date the petition is filed. Notice of the petition and the hearing shall be served not less than 2 days before the date of the hearing on every individual who has highest priority as

determined under section ~~3206(2) and (3)~~ **3206(3) AND (4)**, unless
the court orders that service on every such individual is not

required. Unless an individual cannot be located after a reasonable good-faith effort has been made to contact the individual, service shall be made on the individual personally or in a manner reasonably designed to give the individual notice. Notice of the hearing shall include notice of the individual's right to appear at the hearing. An individual served with notice of the hearing may waive his or her rights. If written waivers from all persons entitled to notice are filed, the court may immediately hear the petition. The court may waive or modify the notice and hearing requirements of this subsection if the decedent's body must be disposed of promptly to accommodate the religious beliefs of the decedent or his or her next of kin.

(4) If a funeral establishment is the petitioner under this section, the funeral establishment's actual costs and reasonable attorney fees in bringing the proceeding shall be included in the reasonable funeral and burial expenses under section ~~3805(b)~~ **3805(1)(B)** or the court may assess such costs and fees against 1 or more parties or intervenors.

(5) In deciding a petition brought under this section, the court shall consider all of the following, in addition to other relevant factors:

(a) The reasonableness and practicality of the funeral arrangements or the handling or disposition of the body proposed by the person bringing the action in comparison with the funeral arrangements or the handling or disposition of the body proposed by

1 or more individuals with the rights and powers under section
3206(1).

(b) The nature of the personal relationship to the deceased of the person bringing the action compared to other individuals with the rights and powers under section 3206(1).

(c) Whether the person bringing the action is ready, willing, and able to pay the costs of the funeral arrangements or the handling or disposition of the body.

Sec. 3208. (1) ~~An~~ **IF THERE IS NO PERSON DESIGNATED UNDER SECTION 3206(2), AN** individual other than a person with priority under ~~subsections (2) to (4)~~ **SECTION 3206(3) TO (5)** or acting under ~~subsection (5), (6), (7), or (8),~~ **SECTION 3206(6), (7), (8), OR (9)** may file an action in the circuit court to challenge the presumption to be determined as the individual who has the authority to exercise the rights and powers under section 3206(1).

(2) Venue for an action filed under this section is in the county in which the decedent was domiciled at the time of death.

Sec. 3209. (1) A funeral establishment is not required to file a petition under section 3207 and is not civilly liable for not doing so.

(2) The order of priority determined under section ~~3206(2) and (3)~~ **3206(3) AND (4)** may be relied upon by a funeral establishment. A funeral establishment is not a guarantor that a person exercising the rights and powers under section 3206(1) has the legal authority to do so. A funeral establishment does not have the responsibility to contact or independently investigate the existence of relatives of the deceased, but may rely on information provided by family

members of the deceased.

(3) A funeral establishment, holder of a license to practice

mortuary science issued by this state, cemetery, crematory, or an officer or employee of a funeral establishment, holder of a license to practice mortuary science issued by this state, cemetery, or crematory may rely on the terms of sections 3206 and 3207 and this section and the instructions of a person described in section 3206(2) to ~~(8)~~-(9), or of an individual determined in an action under section 3208 to be the party to exercise the rights and powers under section 3206(1), regarding funeral arrangements and the handling, disposition, or disinterment of a body and is not civilly liable to any person for the reliance if the reliance was in good faith.

SEC. 3210. IF AN INDIVIDUAL INCLUDES INSTRUCTIONS IN HIS OR HER WILL OR IN A WRITING SIGNED AND WITNESSED IN THE SAME MANNER AS PROVIDED FOR A PATIENT ADVOCATE DESIGNATION IN SECTION 5506(4) FOR FUNERAL SERVICES OR THE HANDLING OR DISPOSITION OF HIS OR HER BODY AFTER DEATH, THE PERSON WHO HAS THE RIGHT AND POWER TO MAKE DECISIONS ABOUT FUNERAL ARRANGEMENTS AND THE HANDLING AND DISPOSITION OF THE BODY UNDER SECTIONS 3206 TO 3208 SHALL FOLLOW THE INSTRUCTIONS TO THE EXTENT POSSIBLE.

Sec. 3614. A special personal representative may be appointed in any of the following circumstances:

(a) Informally by the register on the application of an interested person if necessary to protect the estate of a decedent before the appointment of a general personal representative or if a prior appointment is terminated as provided in section 3609.

(b) By the court on its own motion or in a formal proceeding
by court order on the petition of an interested person if in either

case, after notice and hearing, the court finds that the appointment is necessary to preserve the estate or to secure its proper administration, including its administration in circumstances in which a general personal representative cannot or should not act. If it appears to the court that an emergency exists, the court may order the appointment without notice.

(c) By the court on its own motion or on petition by an interested person to supervise the disposition of the body of a decedent if section ~~3206(7)~~**3206(8)** applies. The duties of a special personal representative appointed under this subdivision shall be specified in the order of appointment and may include making arrangements with a funeral home, securing a burial plot if needed, obtaining veteran's or pauper's funding where appropriate, and determining the disposition of the body by burial or cremation. The court may waive the bond requirement under section 3603(1)(a). The court may appoint the county public administrator if the county public administrator is willing to serve. If the court determines that it will not be necessary to open an estate, the court may appoint a special fiduciary under section 1309 instead of a special personal representative to perform duties under this section.

CANON 2—THE HIRING OF COURT EMPLOYEES

Issue

Shall the Representative Assembly support and endorse a Resolution to Amend the Michigan Code of Judicial Conduct to *add* Section (F) to Canon 2, as follows:

CANON 2 (F) A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

F. A trial court judge should neither contract as an independent contractor nor employ as a court staff member in any capacity a spouse, sibling, parent or child of an attorney having an office located within the same jurisdiction as that trial court or of an attorney who engages in the practice of law in that trial court.

Synopsis

This rule would help avoid impropriety or the appearance of impropriety when family members of judges are working in the same court system.

Background

Relative of judges, prosecutors, defense lawyers and civil attorneys who work in positions of authority within the court system, with access to information in court files and case scheduling opportunities which may be used to assist one party to the disadvantage of another.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on September 18, 2008

Should the Representative Assembly support and endorse a Resolution to amend the Michigan Code of Judicial Conduct to *add* Section (F) to Canon 2 as proposed?

(a) Yes

or

(b) No

Power of Attorney Act Committee

Report to Probate Council

February 2009

Submitted by: Daniel P. Marsh, Chairman

The first meeting of the committee members of the "The Power of Attorney Act Subcommittee" was held at 3:00 am on Friday, January 30, 2009 at Chalgian & Tripp Law Offices, PLLC, and 139 W. Lake Lansing Rd, Suite 200, East Lansing, MI48823

The committee identified several areas of focus to report and lead discussion. Subjects were assigned to groups that will prepare reports and lead discussion at subsequent meetings.

- 1) Enforcement of Third Party Acceptance
 - (1) Debbie Mitin
 - (2) Liam Healy
 - (3) Dan Cogan
 - (4) Kristen Vanpreat
- 2) Developmental Disabilities/Capacity
 - (1) Ellen Sugrue Hyman
 - (2) Josh Ard
 - (3) Sarah R. Prout
 - (4) James P. Lampertius
 - (5) Kristen Arnett
- 3) Acceptance By Agent
 - (1) Kristen Gross
 - (2) Valerie Lafferty
 - (3) Sara Strach
- 4) Enumerate Powers of an Agent
 - (1) Wendy Parr
 - (2) Dan Marsh
- 5) Out of State Acceptance (Execution Issue)
 - (1) Michelle Marquardt
- 6) Accounting Presumptions
 - (1) Derek Walters
 - (2) Susan
- 7) Uniform Trust Code & Power of Attorney Crossovers
 - (1) Doug Chalgian

Next Meeting is scheduled for February 27th at 3:00 at Chalgian & Tripp Law Offices, PLLC, 139 W. Lake Lansing Rd, Suite 200, East Lansing, MI48823

REPORT TO REAL PROPERTY SECTION

FROM

Daniel. P. Marsh

Real Property Law/Real Property Section Liaison
to
Probate and Estate Planning Section

Mortgage Forgiveness Debt Relief Act of 2007

Congress has passed and President Bush has signed on December 20, 2007 H.R. 3648, the "Mortgage Forgiveness Debt Relief Act of 2007." The legislation is effective for discharges of indebtedness on or after January 1, 2007 and before January 1, 2010. The Federal Bailout Legislation H.R. 1424, passed on October 3, 2008, extended this relief through December 31, 2012. This issue arises when there is of foreclosure or "short sale" concerning real estate. See IRS Bulletin in Appendix, Mortgage Forgiveness Debtor Relief Act www.irs.gov/individuals/article/0,,id=17414,00.html

For federal income taxation as a result of foreclosure, see generally 26 U.S.C. sections 1001 through 1016. For federal income taxation of short sales, see generally 26 U.S.C. sections 61, 108 and 1001 through 1016.

In the IRC a "short sale" is a sale of a borrowed item to be replaced at a future date, usually a security. For example, IRC 1233: *Gains and losses from short sales* speaks to capital assets and IRC 1091: *Loss from wash sales of stock or securities*, speaks to securities options. The use of the term "short sale" in a real state context is not in the IRC but is stated at footnote 1 in the 2008 decision, *Stevens v. Commissioner*, T.C. Summary Opinion 2008-61, June 3;

A "short sale" in real estate occurs when the outstanding loans against a property are greater than what the property is worth and the lender agrees to accept less than it is owed to permit a sale of the property that secures its note.

Note the opinion also states the "opinion shall not be treated as precedent for any other case."

Under the new act, IRS code §108(a)(1)(E), provides that a taxpayer will not be taxed upon cancellation of debt income if the following conditions are met:

- The property sold in the "short sale" is the taxpayer's principal residence, as that term is used in IRC Section 121.
- The cancellation of debt is Qualified Principal Residence Indebtedness under IRC Section 163(h)(3)(B).
- The indebtedness is discharged after January 1, 2007 and before January 1, 2013. (The end date was increased by three years from 2010 to 2013 pursuant to H.R. 1424, the Emergency Economic Stabilization Act of 2008).

Thus, cancellation or discharge of "Qualified Principal Residence Indebtedness" (QPRI) is excluded from taxable income. QPRI is **acquisition indebtedness** secured by the principal residence of a taxpayer as defined for the deduction of residential mortgage interest (acquisition indebtedness is defined in IRC section

163). The definition of a QPRI is a loan secured by the residence used to acquire, construct or substantially improve the residence. It does not apply to investment property, vacation homes and second homes are considered personal assets for which losses are not deductible and they aren't eligible for the exclusion for cancellation of debt income relating to a principal residence. In other words, the exclusion only applies to a mortgage secured by the principal residence of the taxpayer.

The limit for the exclusion limit is \$2,000,000 for married filing jointly and \$1,000,000 for married persons filing a separate return. If the balance was greater, see the instructions to Form 982 and the detailed example in Publication 4681.

SUMMARY MICHIGAN LEGISLATURE ACTIVITIES

The following is a summary of activities in Michigan Legislature providing relief to homeowners. Even though there were proposals, one bill made it into statute;

1) SB 791 offered immediate substantial relief for Michigan taxpayers who purchase a home within the next 33 months. The bill would have amended the Income Tax Act to do the following:

-- Allow a taxpayer to claim an income tax credit equal to the difference between the property tax on a parcel before and after a transfer of ownership.

-- Increase the household income ceiling for the homestead property tax credit, and increase the total credit that a taxpayer may claim.

2) The following two bills proposed to amend the Income Tax Act to increase the household income ceiling for the homestead property tax credit, and increase the total credit that a taxpayer may claim.

--SB 790 proposed increasing the income thresholds of the Homestead Property Tax Credit by \$10,000.

--SB 1065 proposed to increase the Homestead Property Tax Credit from \$1200 to \$1300 to those who qualify.

3) Public Act 96 of 2008 (Effective: 4/8/2008) extends principal residence exemption to unsold homes that owner could retain an exemption for up to three years on property previously exempt as the owner's principal residence if that property is not occupied and is for sale.

COMPARE WITH CALIFORNIA

In 1993, the California legislature passed a statute to protect lenders from involuntary (and invalid) transfers of real property to the lender. In California, taxpayers are protected from deficiency judgments. The lender must record a "notice of nonacceptance of a recorded deed" in the county where the real property is located. Redelivering a grant of the real property back to the original homeowner (e.g., borrower) does not legally retransfer the title. (Cal. Civ. Code § 1058.5.)

California mortgage debt forgiveness partial conformity with federal statute enacted.

Governor Schwarzenegger signed S.B. 1055, on September 25 that partially conforms California Revenue and Tax Code Section 17144.5 to federal law with the following exceptions.

The California law is different from the federal law in several respects:

- The California maximum qualified principal residence indebtedness eligible for the exclusion would be limited to \$800,000 or \$400,000 for married persons filing a separate return. The federal limits are \$2 million or \$1 million for married persons filing a separate return.

- The California maximum cancellation of debt exclusion is \$250,000 or \$125,000 for married persons filing a separate return. The federal exclusion is limited to the amount of qualified principal residence indebtedness.
- California allows the exclusion for 2007 and 2008. The federal exclusion is also allowed for 2009 through 2012.

The California legislation also abates penalties and interest for late payment of tax for a 2007 income tax return relating to the discharge of qualified residence indebtedness.

Michigan does not have similar legislation as California.

TAX NUGGET

March 2009

In January, Representative Pomeroy of North Dakota, (how many North Dakota estates will exceed \$3.5MM?) introduced the “Certain Estate Tax Relief Act of 2009.” Its key provisions are:

1. The 2001 Estate Tax sunset provisions of 2011 will not apply.
2. The \$3.5MM applicable credit will be extended to 2010 and subsequent years.
3. The phase-out of the graduated rates and unified credit previously repealed will be reinstated in 2010.
4. Valuation discounts for non-business assets held by a business entity will be disallowed if the asset is not used in the active conduct of a business or trade and will be valued separately.
5. Passive assets shall not be treated as used in the conduct of an active business unless:
 - (i) it is covered by the definition of IRC 1221(a) (1) or (4)[inventory or accounts or notes receivable] or is a hedge with respect to such property, or
 - (ii) asset is real property used in active conduct or real property trades or businesses in which transferor materially participates based on IRC 469 (c)(7)(C) and 469 (c)(7)(B)(ii), or
 - (iii) working capital
6. Certain look through rules where a non-business asset of an entity consists of a 10% interest in any other entity. [this is intended to do with serial discounts in a chain of entities.]
7. Minority discounts would be disallowed if transferee and other family members as defined under IRC 2031A(e)(2) have control.

Tom Sweeney