



## I JUST GOT A LETTER FROM THE IRS!

By **Thomas E. Dew**

It is probably inevitable that at some time during our lifetimes, each one of us will receive some sort of correspondence from the IRS. Usually, letters from the IRS are somewhat innocuous and ask fairly basic questions regarding items reported on a tax return. Some of the most common inquiries from the IRS involve missing or erroneous social security numbers, items of income reported at a value different than what appeared on a form W-2 or form 1099, or requests for verification of deductions or credits claimed on a tax return. Occasionally, the letter is a bit more ominous, such as when the IRS notifies a taxpayer that his or her tax return is going to be audited.

The most important advice regarding correspondence from the IRS is **do not ignore it!** Failing to provide information to the IRS as requested will result in the IRS disallowing the item questioned (even though the deduction or credit is

perfectly legitimate). In addition, it is much more burdensome to try to get the item corrected after a disallowance than to just deal with it in the first place.

### What to Do If You Are Audited by the IRS

No one looks forward to an IRS audit. At last count, an IRS audit ranked just below a root canal in the hierarchy of pain inflicting procedures. If you find yourself on the receiving end of an IRS letter informing you of an upcoming tax audit, pay careful attention to the letter itself. The audit notice usually provides you with information regarding the actual items that the IRS agent wishes to review during the course of the audit.

If you have maintained proper documentation for the items in question, you should be able to deal with the IRS agent's questions and issues in one meeting. However, do keep in mind that, even though the

IRS agent has identified only certain items that he or she wishes to examine, the agent is not limited to those items during the course of the audit. For example, if an agent is examining your deductible taxes or charitable contributions, he or she may discover other items on the return that are questionable and also examine those additional items. This is perfectly legitimate.

*continued on page 3*

## Contents:

|  |          |
|--|----------|
| <b>A Will is Only Part of an Estate Plan .....</b> | <b>2</b> |
| <b>New Faces at Berry Moorman .....</b>            | <b>4</b> |
| <b>To Russia with Trade.....</b>                   | <b>5</b> |
| <b>Property Tax Relief.....</b>                    | <b>6</b> |
| <b>Firm News .....</b>                             | <b>7</b> |



# A WILL IS ONLY PART OF AN ESTATE PLAN

By **Patrice M. Ticknor**

A will is an essential part of any estate plan. A valid will is a legally binding direction as to the disposition of a person's (the testator's) property after death. However, other documents and factors also affect how property will be divided on death. Given the complexities of today's world, chances are that a will won't have any effect on the ultimate distribution of a substantial portion of a testator's property.

Beneficiary designations for insurance policies, IRAs, and 401(k) accounts are not affected by the provisions of a will. A beneficiary designation will take precedence over what a testator's will directs to be done with those and other similar assets. Moreover, under federal law, unless, after marriage, a testator's spouse has signed a notarized statement waiving his or her right to the testator's 401(k) account, the surviving spouse will be entitled to that account no matter what the will or what the beneficiary designation states.

Under Michigan law, it is also possible to register a security or security account in beneficiary form. A pay on death ("POD") or transfer on death ("TOD") account names a beneficiary or beneficiaries to own that account after the account owner's death. On the death of the sole owner (or on the death of the last surviving multiple owner), ownership of the security or account will automatically pass to the named beneficiary or beneficiaries.

Assets held as a tenant by the entirety with a spouse or as a joint tenant with rights of survivorship with any person also will not be affected by the provisions of a will. Instead, upon death, that property will immediately belong to the spouse or to the other joint tenant.

In the case of bank accounts, which are often held jointly with a child or other relative for convenience only, Michigan law applies a presumption that the account was intended to pass to the surviving joint owner on death. Thus, if an account owner wants a friend or relative to have access to the bank account only in order to allow the friend or relative to make deposits, withdrawals, and write checks in the account owner's behalf, that account owner should name the friend or relative as his or her attorney in fact – not make the friend or relative a joint owner of the account.

Assets are also often held in a revocable living trust – an arrangement which can eliminate the need for probate and which often helps to reduce or eliminate death taxes. Typically, assets held by a living trust are to be disposed of on death under the terms of the trust agreement and not under the terms of the testator's will.

Under Michigan law, a surviving spouse has a right to a certain portion of the deceased spouse's estate no matter what the terms of the deceased spouse's will. Therefore, a valid pre or post nuptial agreement

may be essential in addition to a will to ensure that the deceased spouse's beneficiaries (typically the grown children from his or her first marriage) receive all that the deceased spouse intended. These agreements are common in second marriages when both spouses have grown children from a prior marriage and substantial assets of their own. The agreement is used to nullify a surviving spouse's statutory rights to the deceased spouse's assets on death so that the deceased spouse's will may take effect as written.

As time passes and situations change, people easily forget about or delay updating a beneficiary designation, account registration, or trust agreement that was signed long ago. As a result, trusts, beneficiary designations, account registrations, and titles may no longer reflect a testator's wishes regarding who is to receive that property on the testator's death. Inconsistent or out of date provisions or designations could easily result in an "estate plan" that will distribute substantial property in a way the testator would not want – and may result in unnecessary friction and expense after death.

Good estate planning must include a comprehensive review of all applicable beneficiary designations, registrations, and titles. It must also include a review of all estate planning documents, including any existing trusts and pre or post nuptial agreements. It is extremely important to periodically reexamine and reevaluate all of the above – especially after divorce, marriage, or a birth or death in the family.

During the course of the examination, the IRS agent may ask you questions both regarding the tax return at issue and about your lifestyle in general. “What kind of car do you drive?” and “Where do your children go to school?” are examples of the types of questions that may be asked. These “lifestyle” questions are not the agent’s idea of being friendly; rather, they are a fishing expedition to see if your lifestyle matches your income as shown on your tax return. A professional living in an upscale neighborhood who reports an annual income of \$75,000 for tax purposes and who drives a brand new Hummer while his wife drives a Cadillac and their three children attend private school will probably get some “lifestyle” questions. That taxpayer’s return will also get a more careful review from the IRS agent looking for omitted income.

A simple word of advice in dealing with the IRS agent: Be truthful and forthright in your answers to specific questions. Answer **only** the question that the IRS agent has asked. Keep in mind that you have absolutely **no obligation to volunteer** any information that has not been specifically requested. For example, if the agent requests copies of your bank records from ABC bank for a given year, you are not required to provide records from any **other** bank. In addition, if the agent does not ask what kind of car you drive or how big your house is, there is no need to volunteer this information.

### At the Conclusion of the Audit

At some point, the IRS agent will conclude the audit of your tax return and will present you with his or her findings. If the agent does not propose any adjustments, he or she will inform you that your return has been “accepted as filed”, which will conclude the proceedings.

If the agent proposes any adjustments to your tax return, he or she will give you a written “Revenue Agent’s Report” (or “RAR”) that details each item on the tax return that the agent proposes to change and the effect of those changes on your tax liability. If the agent proposes to charge any penalties (for example, for negligence or for failing to provide required appraisals), the proposed penalties will also be detailed on the RAR.

If you agree to the proposed changes, the agent will ask you to sign a waiver of any objections and the audit will be completed. You can pay any additional tax at that time or you will be billed by the IRS for the additional tax, penalty, and interest caused by the accepted changes.

If you do not agree at the initial presentation of the proposed adjustments, you should inform the agent. The agent will go back to his or her office and prepare a “30-day letter” for you. The 30-day letter will outline the agent’s proposed adjustments to your tax return and inform you that you must either agree or file with the IRS Appeals Office a written protest to the proposed adjustments within 30 days of the date of the letter. If you do not respond to the letter, you will lose your right to file an administrative appeal and will be forced to litigate with the IRS in

court to contest the proposed adjustments.

### Seek Professional Assistance

Dealing with the IRS in a tax audit can be intimidating, with the taxpayer at a distinct disadvantage – the IRS agent handles audits every day, while most taxpayers enjoy the experience only a few times (at most) during their lifetimes. It is easy to be lulled into making decisions or disclosures that are not in your best interest if you elect to “go it alone” during the audit. It is also easy to inadvertently provide unsolicited information that is not in your best interest. Finally, you are also at a disadvantage because you may not be aware of all of your rights as a taxpayer during the course of an audit.

We advise that you seek professional assistance if you are audited. Typically, the accounting firm that prepared your tax return will have someone on their staff that is familiar with handling IRS audits or it will be able to refer you to competent professional assistance.

Berry Moorman has several highly experienced tax attorneys who are available to advise you and, if necessary, to represent you during an audit. If you would like to meet with one of our tax attorneys, feel free to contact any of the attorneys at our firm for assistance.

# NEW FACES AT BERRY MOORMAN



**Peter A. Long** has become of counsel to the firm. Between college and law school, Peter served as an officer in the United States Navy. Upon graduation, Peter was an attorney with the Internal Revenue Service. He was later appointed to a position in the administration of then-Governor Milliken and afterward was employed as Deputy Director of the Legal Division of the Michigan State Housing Development Authority. Since 1974, Peter has been in the private practice of law in Ann Arbor.

Peter's practice is primarily in the areas of business and transactional law, securities, taxation, real estate, and non-profit matters. He has worked closely with many entrepreneurs and developers in Michigan and elsewhere in transactions involving complex debt and equity financings. He has participated in numerous revenue bond offerings as counsel to issuers, owners, bond purchasers, and/or institutional trustees. He has prepared documentation and negotiated arrangements for many private placements of securities and has participated in due diligence reviews of a variety of securities offerings.

Peter has also taught courses in tax regulation for business and given presentations on business formation and historic preservation matters. In addition, he also has acted as legal

counsel for historic preservation projects and assisted housing developments in Michigan and elsewhere representing municipalities as well as owners and developers of such properties.

As both a volunteer and as a professional, Peter has been active in economic development matters. He has been legal counsel to several economic development organizations including the Washtenaw Development Council (and is also a past president), the Ann Arbor Area Chamber of Commerce (and is also a past director and member of its Executive Committee), the Ann Arbor Area Convention and Visitors Bureau, Inc., the Economic Development Corporation of the City of Ann Arbor, and the Ann Arbor Housing Development Corporation.



**Kristin A. Lusn** has joined Albert Taylor Nelson, Jr. PLC (which is of counsel to Berry Moorman, PC). Kristin graduated from the Eli Broad College of Business at Michigan State University in 2002. While at the Michigan State University College of Law, she received the Dean King Scholarship for academic achievement. During her graduate studies, Kristin was involved with the tax clinic and the flagship semester of the

small business and nonprofit clinic. Kristin also served as vice-president of the Business Law Society. Kristin graduated from the College of Law in 2005 with concentrations in both corporate law and litigation. She was selected for and completed the Fieger Trial Practice Institute certificate program.

Kristin is a member of the sections of Employment and Workers' Compensation Law, Business Law, Litigation, and the Young Lawyers Division of the Michigan Bar Association. She is also a member of the American Bar Association, the Oakland County Bar Association, and the Michigan Self-Insured Association.

Kristin serves the community as a member of the Marketing and Communications Committee of the Detroit Riverfront Conservancy.



**Leland Prince** has joined Berry Moorman, PC as a senior attorney. Leland has over two decades of experience in courtroom litigation. His practice focuses on commercial and civil litigation, labor and employment law, and corporate law. He is also a case evaluator for the Wayne County Circuit Court Mediation Tribunal and for the Oakland County Circuit Court Mediation Tribunal.

Leland obtained his Bachelor of Arts in economics and history in 1975 from the University of Michigan and his Juris Doctor in 1978 from Howard University School of Law in Washington, DC. During law school, Leland worked as a law clerk in the

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General Counsel's Office of the Federal Election Commission.

Following graduation from law school, Leland worked as a research attorney for the Michigan Court of Appeals.

In addition to his community activities, Leland currently is a member of the State Bar of Michigan, the National Bar Association, the Augustus D. Straker Bar Association, the Michigan Trial Lawyers Association, and the Wolverine Bar Association.



**Richard R. Zmijewski, Sr.** has become an associate with the firm. Rich graduated from Penn State University in 2001 with a major in political science and a concentration in international studies. While an undergraduate, Rich clerked for a congressman and a Pennsylvania state representative. Rich received his Juris Doctor degree from the Ave Maria School of Law in 2007. He was the president of the Intellectual Property Group and was a successful moot court finalist in the law school's appellate moot court competition and the American Bar Association national appellate competition.

Rich's practice focuses on business law including the formation of corporations and limited liability companies and assisting businesses in protecting and utilizing technology and intellectual property assets. He also assists clients with general estate planning and probate matters including planning for succession of family and closely owned businesses. Rich also handles appeals involving a broad range of legal issues and matters.

## BERRY MOORMAN ATTORNEYS PARTICIPATE IN TRADE MISSION TO RUSSIA

Berry Moorman, PC was a sponsor of the Center for Automotive Research/US Department of Commerce Commercial Service Automotive Trade Mission to Russia which took place in both Moscow and St. Petersburg from May 11 to May 17, 2008. Berry Moorman attorneys Randolph M. Wright and Simon M. Edelstein participated in the trade mission as delegates. The purpose of the mission was to encourage US Tier I and Tier II automotive suppliers to enter the Russian market.

Berry Moorman has been active in Russia and other former Soviet republics now comprising the Commonwealth of Independent States ("CIS") since the early 1990s. Since then, there has been tremendous growth in the automotive sector in Russia – from zero Western presence to becoming the fastest growing auto market in Europe.

Berry Moorman has encouraged US companies to do business in Russia for many years. In the past, American automotive companies have lagged behind German and other European companies – but no longer. Ford, General Motors, and many of their suppliers have aggressively entered the Russian market and there are still tremendous opportunities. Russia is projected to be the largest automotive market in Europe by 2010.

The trade delegates were briefed by US Commercial Service officers on the Russian market and the risks and rewards of doing business there. Presentations were also made by

executives of original equipment manufacturers ("OEMs") and their suppliers, including Richard Swando, Managing Director of General Motors – Russia and Jerry Koenig, General Director of Tennaco Automotive Volga.

The delegates toured the Ford manufacturing facility in Leningrad Oblast as well as the Tennaco and Intercos IV facilities in St. Petersburg. The delegation was also hosted by Mary Kruger, US Consul General of the United States at a reception at her residence. The large number of attendees from the US Embassy, the Russian business community, the American Chamber of Commerce, the city of St. Petersburg, and Leningrad Oblast demonstrated the strong support for new business entering the Russian market.

Most of the US companies represented in the Trade Mission have had experience doing business worldwide, including in emerging markets. The obstacles to doing business in Russia are well known and include (1) lack of application of the rule of law, (2) dealing with criminal enterprises, (3) protection of intellectual property, and (4) the shortage of and competition for human resources. A clear consensus of the people "on the ground" in Russia was that there has been a lot of improvement over the past few years in all of these areas. Tough questions were put to the Russian participants and the delegates appeared to have satisfied themselves that the risks of doing business in Russia are manageable.

The Berry Moorman lawyers in the Russia – CIS practice are available to assist your company with Russian legal issues through our affiliate office in St. Petersburg. They can also provide consulting and project management services to increase the likelihood of your success in this emerging market.



# INTENTIONAL AND UNINTENTIONAL PROPERTY TAX RELIEF

By **George H. Runstadler, III** and **Mark E. Straetmans**

## **Homestead Exemption is Now Available for Unsold, Vacant Homes**

On April 8, 2008, Public Act 98 of 2008 became law. The Act allows a homeowner who has established a new principal residence to claim a principal residence exemption on the new home **and** retain the exemption on the now vacant former home. A homeowner who occupies his or her property as his or her principal residence is exempt from up to 18 mills of the local school operating millage. Before the Act was passed, a homeowner would have been allowed to claim the exemption only on the new, occupied home.

A homeowner is eligible for the additional exemption for up to three years if the property is not occupied, is for sale, is not leased, and is not used for a business or commercial purpose. A homeowner must file Form 4640 – “Conditional Rescission of Principal Residence Exemption” with the assessor for the city or township where the home is located on or before May 1 of the first year that the additional exemption is claimed. In other words, to obtain the additional exemption for 2009, the form must be filed by May 1, 2009. In addition, the form must be submitted to the assessor on or before December 31 of each year in order to continue the exemption for the following year.

Since the principal residence exemption significantly reduces property tax, a homeowner who has had to move before selling his or her home and who expects the vacant home to be on the market for some time, should take advantage of this new law. Form 4640 can be obtained from the Michigan Department of Treasury website <http://www.michigan.gov/treasury>.

## **Two Conveyances May Avoid Uncapping Taxable Value**

Even in this era of depressed real estate values, concern over uncapping the taxable value of Michigan real estate is often an impediment to gifting real estate to a relative. However, perhaps unintentionally, the Michigan Legislature has left open a true loophole which would allow a person to transfer property to another without lifting the cap on taxable value.

The key to utilizing the loophole is to use a two-step transaction. In the first step, the granting party, Party A, deeds the property to himself and Party B as equal joint tenants. This first transfer is exempt from uncapping under MCL 211.27(a)(7)(h) because one of the joint tenants (Party A) was an “original owner” prior to the creation of the joint tenancy.

The second step is that Party A and Party B join in deeding the property to Party B. This second transfer is also considered exempt

from uncapping because title to the property was held as a joint tenancy at the time of the transfer and Party B was a joint tenant when the joint tenancy was created and has remained so.

A literal reading of the statute is the reason this is possible. The legislative drafters probably intended “original owner” to mean the person who had an ownership interest immediately following the last non-exempt transfer. However, in a decision issued December 20, 2007, the Michigan Court of Appeals in the case of *Moshier v Whitewater Township* found a literal reading of the statute does not support this conclusion and ruled that under the foregoing scenario, an uncapping did not occur.

On February 5, 2008, the State Tax Commission notified local assessors and equalization directors that it considered the decision of the Court of Appeals to be binding. In the same notice, the Commission indicated that it was working with the legislature to provide clarification.

Undoubtedly, we can expect our legislature to act soon to close this loophole. Property owners who have been thinking of transferring real estate with a low taxable value to a family member but have refrained from doing so to avoid raising property taxes might want to take advantage of this true loophole before it closes.

## FIRM NEWS

**Albert Taylor Nelson, Jr.** was inducted into the College of Workers' Compensation Lawyers as a Fellow on March 28, 2008. Election as a Fellow represents the recognition by AI's colleagues that he has distinguished himself as an outstanding professional who has made a sustained contribution to the field and has met the standards of integrity, professionalism, and character.

AI was also recently selected interim chair of the Personnel Board for the city of Troy.

**Randolph T. Barker** was the keynote speaker at the Real Estate Investors Association of Oakland's membership meeting on February 14, 2008. Randy's presentation, entitled "Your Game Plan: Covering the Angles" highlighted key considerations for investments in real estate, including identifying the target market, property selection, financing, management, and disposition. Randy represents owners, landlords, developers, contractors, architects, investors, and lenders in matters involving the acquisition, sale, and leasing of real estate and real estate litigation and foreclosures. Randy also counsels clients regarding development, construction, land use approvals, and financing of various projects, including condominiums, retail centers, residential subdivisions, and industrial parks. He also serves on the State Bar

of Michigan Real Property Law Section's Special Committee on Commercial Leasing.

**Louise L. Labadie and Patrice M. Ticknor** became members of the Financial and Estate Planning Council of Detroit. The Council promotes cooperative efforts between the various professionals such as attorneys, CPAs, financial planners, and trust officers in the fields of estate and business planning. Its members take part in study, discussions, meetings, and other activities in order to continuously improve their combined services to clients.

**Cindy Lang, Mariuca C. Rofick, and Patrice M. Ticknor** participated in the second annual "Bee on Board for Literacy" spelling bee on May 16, 2008 at Washtenaw Community College. Cindy, Mariuca, and Pat competed as the team "Berry's Brightest" at the fundraiser for the Family Learning Institute in Washtenaw County which seeks to improve the reading, writing, and communications skills of grade 3-8 students who are reading below their expected grade level.

**Thomas E. Dew** was appointed to the Board of Directors of the Family Learning Institute, a non-profit corporation in Ann Arbor, Michigan. The Institute provides support and tutoring for "at risk" students in Washtenaw County. Tom continues as partner in charge of the Ann Arbor office of Berry Moorman, PC.

On March 9, 2008, **Randolph M. Wright and Simon M. Edelstein** spoke to University of Michigan-Flint MBA students. Randy and Simon described their experiences over the past 14 years in negotiating commercial transactions and resolving disputes in Russia. They then led a roundtable discussion about the Russian business climate and answered student questions relating to the upcoming study abroad program. Both Randy and Simon are members of the Russia and International Law practice sections of Berry Moorman.

Randy and Simon also participated in the Center for Automotive Research trade mission from May 11-16, 2008, for automotive suppliers and communities interested in developing business opportunities in Russia – the fastest growing European automotive market. This mission was offered in partnership with the US Department of Commerce Automotive Team and was sponsored in part by Berry Moorman, PC.

The material discussed in Law Notes is meant to provide general information and, given the limited space, is necessarily only an overview of each issue discussed. The information contained in this newsletter is not intended to provide legal advice and should not be acted upon without obtaining legal advice that is tailored to your facts and circumstances.

**IRS Circular 230 Disclosure:** *Any tax advice contained in this communication was not intended or written by the author to be used and it cannot be used by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer. Any tax advice contained in this communication was written to support, within the meaning of Treasury Department Circular 230, the promotion or marketing of the transactions or matters addressed by such advice because the author has reason to believe that it may be used or referred to by another person in promoting, marketing, or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayers. Before using any tax advice contained in this communication, a taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.*

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