

FINANCIAL AND ESTATE PLANNING COUNCIL OF METROPOLITAN DETROIT

AUGUST 2022

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[Register Here](https://www.metrodetroitfepc.org/events/register/23005)

11-10-22 Annual Meeting Dinner Event & Presentation - Orchard Lake Country Club

"How to Choose a Fiduciary & More"

Jill Miller, JD

[Register Here](https://www.metrodetroitfepc.org/events/event/22673)

SAVE THE DATE / May 22, 2023 Golf Outing at Wabeek Country Club

Details to Follow

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**PRESIDENT'S MESSAGE**

Your Board of Directors of the Financial and Estate Planning Council of Metropolitan Detroit has been working hard throughout the spring and summer and we have several great things to share with you.

First and foremost, we are growing! As many great organizations around the country are starting to experience a new and different life in the post-pandemic world, for some, keeping people engaged has become a challenge. Some organizations have seen their members stepping into an early retirement while others have experienced a new work-from-home environment which diminishes attendance at live events. For some organizations, this may mean that it becomes difficult to hold in-person meetings because the benefits of economies-of-scale are lost.

Over the years, the FEPCMD has partnered with many great organizations in metropolitan Detroit to host lunchtime educational events. One such organization was the local chapter of the Society of Financial Service Professionals (FSP) which, like us, is a multidisciplinary group with a similar mission to our own. Recently, the FEPCMD Board learned that the FSP was considering its options as its membership began to decline post-pandemic, much like most other organizations. Through our long-time relationships, the FEPCMD Board engaged the FSP Board to explore the possibility of merging their membership with ours.

After careful consideration, the FSP accepted our offer to add their membership to ours and continue our joint journey as the FEPCMD. To help ensure that we could draw from the best of both worlds, the FEPCMD extended to all FSP Members membership in the council for the remainder of the year. Additionally, we extended a Board seat to the FSP leadership to join our leadership team. Finally, we offered committee positions on most of our existing committees to gain the benefits of the FSP’s experience and add new ideas to our new shared culture.

We believe that combining these two great cultures will produce a stronger community of professionals carrying us into the future!

Another great accomplishment of 2022 was our golf outing. As usual, this year’s event was held at Wabeek Country Club, organized by Andrew McCulloch, Glenn Barnes and Jack Leavy with many other people who supported this great outing. The outing gave Members and their friends a chance to enjoy the outdoors and spend time building relationships. Thanks to the generosity of the attendees, the FEPCMD was able to help raise $1,150 for the Ukrainian National Women’s League of America. These funds will help purchase medical supplies for trauma kits, shoes for defenders, t-shirts and thermal underwear for children impacted by the unprecedented war. Mark your calendars as we tentatively have set the 2023 golf outing date for Monday, May 22.

The Council’s charity endeavors don’t end with the golf outing. Thanks to Diana Moak and Greg Hamilton, the FEPCMD is continuing its estate planning efforts to support first responders. This year the Council will celebrate Estate Planning Month by offering basic estate planning documents to first responders of a city determined by the Board of Directors. The committee is looking for volunteers to participate in this rewarding endeavor this fall. Please contact Kris Wolfe for details on how you can get involved.

The FEPCMD is also proud to announce that we are back with in-person live events. Although it appears COVID-19 is here to stay, it is clear the world has restarted. We are pleased to announce that we have two events scheduled for the fall and more in the works. On September 21st, we are proud to welcome Elizabeth Forspan to Detroit. Elizabeth is a noted speaker for ACTEC and is being featured at this year's annual NAEPC conference. Elizabeth will be sharing planning guidance and best practices around working with the sandwich generation. The event will be held at the Skyline Club in Southfield.

On November 10th, we will be holding our Annual Members’ Meeting at the Orchard Lake Country Club. In addition to electing new Board Members and hearing the officers’ reports, we will be hosting Jill Miller who will share her insights on fiduciary selection and adding a human touch to estate planning documents. Jill is an accomplished speaker and professor at Cornell Law School in New York.

Finally, as my Presidency winds down, I want to take a moment to thank my colleagues on your Board of Directors. These past few years have been challenging for this leadership team. We have faced the consequences of the pandemic and been exposed to great new opportunities. Business as usual no longer applies. These Board Members have jumped through hoops to make themselves available for impromptu Board meetings and have risen to the occasion, sharing their experience, zeal, and wisdom. They have worked as a cohesive team and found common ground while representing their individual views to shape the future of this great organization. I could not be prouder to call them colleagues and more importantly, friends. This organization not only survived one of the most trying times of modern history, but thrived, thanks to Sally Vaughn, Bruce Stone, Jim Smallegan, Margaret Amsden, Glenn Barnes, Angie Choukourian, Greg Hamilton, Andrew McCulloch, Diana Moak and Hannah Thoms along with our Executive Director, Kris Wolfe. I would also like to welcome our new colleagues and friends from the FSP, Dan Donohue and Natalia Gentry, as they will help share in the leadership of this organization.

We hope to continue to serve this membership community as it grows and prospers. We look forward to seeing you at our upcoming events this fall. If you have comments or suggestions, please feel free to share them with any Board member. Happy Fall!!!!

On behalf of the Board of Directors,

Jeffrey R. Hoenle, President



**The Financial and Estate Planning Council of Metropolitan Detroit Presents**

# Wednesday, September 21, 2022 Dinner Meeting

**Skyline Club, 2000 Town Center, Top Floor, Southfield, MI 48075**

**“Planning for the Sandwich Generation and Beyond”**

**5:30 pm Cocktails / 6:30 to 7:30 pm Dinner & Presentation**

**$70.00 per person – Please** [**register online**](https://www.metrodetroitfepc.org/events/register/23005) **or mail check by 9-2-22:**

**FEPCMD, 33006 W. Seven Mile Road, #237, Livonia, MI 48152**

**Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Guest:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Elizabeth Forspan, Esq. of Forspan Klear LLP, a New York-based Trusts and Estates law firm, will discuss the important estate planning documents that those in varying stages of life should consider.  She will also review elder care and Medicaid planning techniques that advisors and clients should be aware of.  Elizabeth will also touch upon the importance of advance planning, particularly with regard to advance directives for those age 18 and above.  It will be an interactive and lively discussion.**



Elizabeth Forspan is a Partner with Forspan Klear LLP, a New York law firm. Elizabeth’s areas of practice include Elder Law, Trusts & Estates and Taxation. Elizabeth speaks throughout the United States on various aspects of Elder Care Planning, Tax Law and Estate Planning. She was the recipient of the prestigious Max Block Award for Outstanding Article in the Category of Technical Analysis, awarded by the New York State Society of Certified Public Accountants’ CPA Journal for her article “Casualty Losses for Property Damaged by Hurricane Sandy”. Elizabeth has been named a Super Lawyers Rising Star in the areas of Estate Planning and Probate in 2016, 2017, 2018, 2019, 2020 and 2021. Elizabeth has been featured in New York Magazine, MarketWatch, and she has been quoted in the New York Times. Prior to co-founding Forspan Klear LLP, Elizabeth was a Tax Manager with Ernst & Young LLP, where she focused on Mergers and Acquisitions and Executive Compensation. Elizabeth earned her Juris Doctor from Fordham University School of Law and her B.A. from Queens College of the City University of New York, where she graduated *summa cum laude* and is a member of Phi Beta Kappa.

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**THE FINANCIAL AND ESTATE PLANNING COUNCIL OF METROPOLITAN DETROIT**

**Presents**

# THURSDAY, NOVEMBER 10, 2022

**Annual Meeting, Dinner & Presentation**

**Orchard Lake Country Club, 5000 W. Shore Dr., West Bloomfield Twp., MI 48324**

**5:30 pm Cocktails / 6:30 to 6:45 pm Annual Meeting/ 6:45 to 7:45 pm Dinner & Presentation**

**$70.00 per person – Please** [**register online**](https://www.metrodetroitfepc.org/events/register/22673) **or mail check by 10-28-22:**

**FEPCMD, 33006 W. Seven Mile Road, #237, Livonia, MI 48152**

**Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Guest:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Jill L. Miller, JD**

**“How To Choose A Fiduciary & More”**



Choosing the right fiduciaries in the initial planning stage is a critical part of the estate planning process. One that can mean the difference between the smooth administration of an estate, with family harmony and low professional fees, or a protracted difficult process that can result in family fractures. This program will discuss the different types of fiduciaries, the job description of each, and provide practical pointers on how to make the right decision. A planning professional who is aware of the importance of these decisions can add significant value to their client and their relationship. This program will also contain an interactive workshop where attendees can go through the process of choosing their fiduciaries and determining if they themselves have made the right choices.

**Jill Miller**, the principal of Jill Miller & Associates, P.C., focuses on formulating sophisticated and highly personalized estate plans for individuals and families with the objectives of minimizing estate taxes and family discord. She also has a particular expertise in estate matters affecting non-US citizens and non-traditional families. Jill takes a detailed and practical approach to the administration of estates. Complicated probate issues are addressed and resolved. Estate tax returns are prepared to minimize the risk of audit.

.Jill founded the firm in January of 2004, after working for over a decade in trusts and estates law. Jill is a fellow of the American College of Trust and Estate Counsel and is a frequent lecturer on estate planning at both private and public symposia. Jill is currently the Director of the Estate Planning Clinic and adjunct professor of Law at Cornell Law School and was an Adjunct Professor at Fordham Law School, teaching Trusts and Estates from 2005 to 2014. Jill is AV Preeminent Peer Review rated by Martindale-Hubbell and is named as a Super Lawyer.

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Roadmap for Intergenerational Split-Dollar Transaction – Estate of Levine v. Commissioner

*Kim V. Heyman, J.D., L.L.M., AEP®*

**The Background**

*Estate of Levine v. Commissioner* (158 T.C. No. 2) is an instance of good facts weighing in favor of the taxpayer and providing a roadmap for others to follow. Before I get into the details, let’s review some of the planning ideas behind the facts.

Even though life insurance proceeds are income tax-free, generally if a decedent owns a life insurance policy at death, the death benefit, for a policy insuring the decedent’s life, or the “interpolated terminal reserve value” of the policy, for a policy insuring another’s life, will be included in a decedent’s taxable estate. That is where an irrevocable life insurance trust (“ILIT”) comes in. If an insurance policy is purchased during the decedent’s life and is owned by an ILIT at the decedent’s death, the proceeds from the life insurance policy will be outside of the decedent’s taxable estate.1

Estate of Levine involves a so-called “split-dollar life insurance arrangement.” This arrangement involves an owner of a life insurance policy and a non-owner who pays the premiums for the policy and is entitled to recover those premiums (or a portion thereof). The repayment of the premiums is to be made from, or secured by, the insurance proceeds.

**The Facts**

Marion Levine (the “decedent”) decided to engage in a split-dollar life insurance transaction as part of her estate planning, because she wanted to help her children with their own estate planning without making additional gifts for their benefit. Through this arrangement, she (or her estate) retained the right to be repaid for those premiums paid on their behalf. The issue before the court was what had to be included in her estate because of this transaction.

During the decedent’s lifetime, the Marion Levine 2008 Irrevocable Trust (the “ILIT”) was created under South Dakota law, with the South Dakota Trust Company, LLC (“South Dakota Trust”) as the independent trustee and an investment committee to direct trust investments. The investment committee had one member, the decedent’s long-time employee and close friend, Bob Larson (“Larson”). Larson, along with the decedent’s son and daughter, was also trustee of her revocable trust (the “Revocable Trust”) and agent under her power of attorney.

The Revocable Trust paid the one-time premiums on life insurance policies on the lives of the decedent’s daughter and son-in-law (her son was not insurable at the time), which policies were owned by the ILIT. In exchange, the Revocable Trust obtained the right to receive the greater of the total premiums paid ($6.5 million) or the cash surrender value of the policies upon the death of the second-to-die of the insureds, or if earlier, the termination of the agreement. If the ILIT terminated the agreement, the Revocable Trust was entitled to the entire cash surrender value of the policies and the ILIT would have received nothing.

For the year in which the premiums were paid, the decedent reported a gift of $2,664, as determined under Treas. Reg. § 1.61-222 (the split-dollar regulations) for the payment of those insurance premiums. The decedent’s estate reported the Revocable Trust’s reimbursement right from the split-dollar arrangement as being worth a little over $2 million.

Before going to court, the IRS and the estate stipulated that the value of the reimbursement right was $2.28 million. However, the IRS asserted that the cash surrender value of the policies at the decedent’s death (approximately $6.2 million) should have been included in her gross estate by reason of Internal Revenue Code (the “IRC”) §2036, §2038 or §2703 (and therefore asserted a 40% gross undervaluation penalty).

**The Planning**

The decedent had amassed an estate worth about $25 million by 2007. While she owned diverse assets, the vast majority of her assets was illiquid. When engaging a new estate planning attorney in 2007, the decedent and her family made it clear that she wanted to retain sufficient assets to maintain her lifestyle until her death. The decedent was competent and participated in her estate planning, including the creation of the split-dollar arrangement. Her estate planning attorney initially suggested she pay $10 million in premiums for the split-dollar arrangement; however, the decedent felt that figure was too high, and decided she wanted to pay only $6.5 million in premiums.

The decedent’s estate planning lawyer created the ILIT under South Dakota law, as South Dakota has no rule against perpetuities, has a directed trustee statute, and has taxpayer-friendly state income tax and premium tax. The ILIT was signed by the decedent’s children and Larson as her agents under her power-of-attorney, as settlor, and the South Dakota Trust as an independent trustee. Larson was the sole member of the ILIT’s investment committee, which would direct South Dakota Trust as to the ILIT’s investments. The ILIT's beneficiaries were the decedent’s children and grandchildren.

As approved by Larson, in his role as the investment committee, the ILIT agreed to purchase the survivorship insurance policies on the lives of the decedent’s daughter and son-in-law while the Revocable Trust agreed to loan the funds for the ILIT to pay the premiums on those policies. In addition, the ILIT agreed to assign the insurance policies to the Revocable Trust as collateral and to pay the Revocable Trust the greater of (i) the total amount of premiums paid for the policies ($6.5 million) and (ii) either (A) the current cash surrender values of the policies upon the death of the last to die of the insureds or (B) the cash surrender values of the policies on the date of termination, if they were terminated prior to the death of both insureds.

The decedent and her children decided, from an investment perspective, to borrow money to fund the life insurance premiums. The decedent’s children and Larson, as her attorneys-in-fact and as co-trustees of the Revocable Trust, executed the paperwork to borrow a total of $6.5 million from various entities. These funds were sent directly to two insurance companies to pay one-time premiums on three separate survivorship policies.

The paperwork provided that (A) the decedent and the Revocable Trust did not have any right, power or duty that was an incident of ownership in the insurance policies, and (B) none of the ILIT, its beneficiaries or the insureds had any access to any current or future interest in the cash value of the insurance policies. Furthermore, only the ILIT, through Larson, its investment committee’s sole member, could terminate the life insurance policies and the split-dollar arrangement. In fact, the agreement provided that if the ILIT surrendered or canceled the policies, the Revocable Trust would have the right to receive the total amount received from the policies and the ILIT would receive absolutely nothing.

Unfortunately, the decedent’s health deteriorated precipitously within months of completing the planning and by January of 2009, she died. The parties reported the gift to the ILIT on Form 709, United States Gift and Generation-Skipping Transfer Tax Return, with the value of the gift being the economic benefit transferred from the Revocable Trust to the ILIT. This value did not require an independent appraisal; instead the regulations under the Internal Revenue Code provide a method to value the gift for split-dollar arrangements (Treas. Reg. §1.61-22(d)(2)). In addition, the split-dollar receivable from the ILIT was reported on the decedent’s estate tax return with a value of about $2 million. This value was a question of fact, as the split-dollar regulations are applicable only for gift and income tax purposes, not for estate tax purposes.

By the time the dispute went before the court, the remaining issue was the value of the receivable included in the decedent’s estate.

**Factors Reviewed by the Court**

1. Is the arrangement a “split-dollar arrangement” as defined under Treas. Reg. §1.61-22?

A split-dollar arrangement between an owner and a non-owner of a life insurance contract is defined as a life insurance contract in which:

• Either party to the arrangement pays, directly or indirectly, all or a portion of the premiums;

• The party making the premium payments is entitled to recover all or a portion of those premiums, and repayment is to be made from, or secured by, the insurance proceeds; and

• The arrangement is not part of a group-term life insurance plan (other than one providing permanent benefits).

The court determined that the split-dollar arrangement at issue met those specific requirements.

2. Under which regime should the split-dollar arrangement fall - the “economic benefit” or the “loan" regime?

The regime depends upon who “owns” the life insurance policy at issue:

• The general rule is that the person named as the owner is the owner. Non-owners are any person other than the owner who has a direct or indirect interest in the contract. Under this rule, the loan-regime rules would apply and the ILIT would be the owner of the policies.

• There is an exception to the general rule. If the donee’s only right or economic benefit is an interest in current life insurance protection, then the regulations provide that the formal ownership structure should be ignored, and the donor should be treated as the owner. Under this exception, the economic-benefit regime would apply.

• Treas. Reg. §1.61-22 treats the amount transferred each year under an arrangement governed by the economic-benefit regime as the cost of current life insurance protection in that year. However, that regulation applies only for income and gift tax purposes, not estate tax purposes. The question remaining for the court was if the ILIT received any other economic benefit.

3. Should this split-dollar arrangement be included in the decedent’s estate? To make this determination, the court first determined what was “transferred,” and then looked at the usual suspects under the IRC that would cause estate inclusion:

• Section 2042 has no application to the inclusion of the value of insurance on the life of a person other than the decedent. The court noted that section 2042 would not govern inclusion.

• Section 2036(a)(1) includes in a decedent’s estate the value of property that she transfers if, after the transfer, she kept either possession or enjoyment of the property or the right to its income (except for a bona fide sale for full consideration).

• Section 2036(a)(2) includes in a decedent’s estate the value of property transferred if the decedent retained the right, either alone or in conjunction with another, to designate who would receive possession or enjoyment of that property or its income (except for a bona fide sale for full consideration).

• Section 2038 provides that a decedent’s estate includes the value of property transferred in which she retained an interest or right, either alone or in conjunction with another, to alter, amend, revoke, or terminate the enjoyment of the property (except for a bona fide sale for full consideration).

• Section 2703(a) provides that under certain circumstances the value of property should be determined without regard to any restriction on the right to sell or use such property.

Because the ILIT purchased the policies, the court found that the policies could not be the transferred “property.” The only property the decedent transferred was cash, in which she retained no right, and in exchange for which she received the receivable. What rights did that provide her?

The decedent had no contractual right to force the early termination of the split-dollar arrangement. Larson, as sole member of the ILIT’s investment committee, had the power to terminate the arrangement. The fact that Larson was also acting as an agent under the decedent’s power of attorney did not change that fact. Larson could not terminate the split-dollar arrangement as the decedent’s agent because the decedent herself could not do it. Therefore, the court determined that the decedent had no right to the cash surrender value of the policies.

The court found that Larson, as the investment committee’s sole member, was under a fiduciary duty to exercise his power to direct the ILIT’s investments prudently, and he faced potential liability to the beneficiaries of the ILIT under state law if he failed to do so, including the decedent’s grandchildren (who were beneficiaries of the ILIT but not of the Revocable Trust). This fiduciary duty would prevent him from surrendering the policies. The court noted that the duties were not illusory. As a result, the cash surrender value could not be included in the decedent’s estate as a right retained by the decedent, either alone or in conjunction with Larson, to designate possession or enjoyment of the property.

The estate successfully argued that the only asset from the split-dollar arrangement owned by the Revocable Trust at decedent’s death was the split-dollar receivable, which provided the right to repayment described previously. The receivable had no restrictions on it – the Revocable Trust was free to transfer or sell it. Therefore, section 2703(a) did not impact its value. Furthermore, the parties had stipulated to the value of the receivable before proceeding to court.

**Key Takeaways – Follow the Roadmap**

**1. Use an Independent Trustee.** The use of an independent trustee, even a directed trustee, was viewed favorably by the court.

**2. Limit ability to terminate the split-dollar arrangement.**  A cornerstone to the court’s determination that this case was distinguishable from the Estate of Cahill and the Estate of Morrissette II (which did not have favorable results for the respective taxpayers) was that in the instant case, the split-dollar arrangement expressly provided that ONLY the ILIT had the right to terminate the agreement. The decedent held no power, alone or in conjunction with anyone else, to terminate the policies. Even though parties to a contract can always modify it, without the specific contractual right to terminate the policies, the court concluded that the decedent did not have any possession or rights to the cash surrender value of the insurance policies.

**3. Have the ILIT purchase the insurance policies.** Having the ILIT purchase the insurance policies from the inception helped the family successfully argue that the only asset from the split-dollar arrangement that the Revocable Trust owned at the decedent’s death was the split-dollar receivable.

**4. Have an estate planning or business purpose for life insurance.** If there is an insurable need, purchasing life insurance is a great planning tool. The fact that the decedent and her family had such a demonstrable need gave the court comfort that the parties were not looking solely to discount cash, as was found in some of the other recent cases. If the intent is to keep insurance until the death of the insured, it looks less like a taxpayer is trying to just discount cash. In the instant case, these facts bested the Commissioner’s argument that the arrangement was merely a scheme to reduce the decedent’s potential estate tax liability.

**5. “Pigs get fed, hogs get slaughtered.”** Discounts are allowed; no need to go overboard as in the Estate of Cahill. Although the value of the reimbursement right was stipulated, the discount was much more reasonable than that claimed by the taxpayers in Cahill.

6. **Carefully manage your practice and communication.** The best facts are those laid out in the planning stage. Written communications should follow the plan and confirm the form of the transaction that the taxpayer will present to the IRS.

**7. Use loan split-dollar regime.** It is generally best to do loan split-dollar, even though the loan’s upfront cost may be more than the economic benefit regime, because the loan split-dollar regulations apply for all Federal tax purposes, including estate tax purposes. The economic benefit regulations are valid only for gift and income tax purposes. Furthermore, a loan for the life of an insured is specifically covered by the regulations (and you can use the long-term applicable federal rate). The fact that the insured has a longer life expectancy than the decedent does not impact the validity of the loan.

*1 If a policy is transferred by an individual to an ILIT, the person must live three years after the transfer date for the policy to be outside the person’s taxable estate for Federal estate tax purposes.*

*2 All section references herein are to the Internal Revenue Code of 1986, as amended, and the Treasury Regulations promulgated thereunder.*

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