



Happy New Year

It's hard to believe we are at the beginning of another new year. We would like to say "thanks" to each of you and to wish you and your family a wonderful new year. We truly appreciate your business and look forward to serving your needs in the future. Shalom, salaam, peace.

BERNICK RADNER & OUELLETTE ATTORNEYS EARN ACCOLADES

Four of our attorneys have again been recognized by Best Lawyers in America in their fields. Their areas of expertise, and the year in which they were first elected to Best Lawyers in America are as follows:

Joe C. Foster Jr.: Taxation (1983) and Trusts and Estates (1983).

Patricia M. Ouellette: Taxation (2007), Tax Litigation and Controversy (2007), Trusts and Estates (2007), and Trusts and Estates Litigation (2007).

Michelyn E. Pasteur: Medicaid Planning (1997) and Business Insolvency and Reorganization, Bankruptcy and Creditor/Debtor Rights (1997).

Nancy L. Little has been named in the areas of Trusts and Estates (1995) and Trusts and Estates Litigation (1995). Nancy was also named by Best Lawyers as "Lansing Lawyer of the Year" in Trusts and Estate Litigation.

Congratulations to **Steve Brey**, who recently passed the Florida Bar Exam and is now licensed in both Michigan and Florida. He joins **Katie Lynwood**, who is also licensed in both states. If you are a "snow bird", consider having two sets of your powers of attorney: one set that complies with Michigan law to keep in Michigan and one set that complies with Florida law to keep in Florida. Steve or Katie can help you put these documents in place.

Mary Schrauben has been named as co-chair of the Ingham County Bar Association's Probate and Estate Planning Section. Her duties include organizing monthly educational presentations for members of the Section. Mary replaces Micki Pasteur, who co-chaired the Section for 6 years. Congratulations Mary and well done Micki!

Katie Lynwood was appointed to serve on the Institute for Continuing Legal Education's New Lawyers Advisory Board. She will serve on the Board through October 2014. This Advisory Board was established by ICLE to better meet the needs of newly-admitted lawyers. Members of the Advisory Board advise ICLE about the practical impact of new legal developments and review ICLE's proposed courses, book, and technology projects to see if they match new practitioners' needs.



HAVE YOU CHECKED YOUR BENEFICIARY DESIGNATIONS LATELY?

By Katie Lynwood

When a person dies, assets that designate a beneficiary pass to the named beneficiary, regardless of the terms of the person's Will or Trust. Your beneficiary designations are made on your life insurance policy, retirement/investment accounts, or they may also be used as a transfer on death (TOD) on your bank accounts.

The beneficiary designations are a contract that you have with the insurance company or retirement/investment Company. You name the beneficiary, and the company agrees to pay the assets out to the named beneficiary.

It's important to review periodically the primary and secondary (or contingent) beneficiaries for each one of your policies and accounts. Why? Most likely the circumstances in your life, or your beneficiary's life have changed since you named your beneficiaries.

Beneficiary designations should be reviewed at least every 5 years (generally we say you should review your estate planning every 5 years) – or after the following events occur in your life or your beneficiary's life:

1. Divorce;
2. Death;
3. Additional beneficiaries added to your family or friend circle;
4. Changes in the beneficiaries' circumstances;
5. Revised estate planning.

If you are recently divorced, immediately remove your ex-spouse as a beneficiary and name a new beneficiary. Under the federal Employee Retirement Income Security Act (ERISA), the company plan administrator is required to pay the benefits to the named beneficiary, no matter who is the actual intended beneficiary. ERISA preempts state law. Consequently, if your ex-spouse is not removed as a beneficiary, he or she may still be entitled to your benefit plans under federal law even though the divorce judgment – which is governed by state law - extinguishes your ex-spouse's rights. Michigan law allows the intended beneficiary to petition the court to obtain an order compelling the unintended named beneficiary of the policy to pay the proceeds over to the intended beneficiary. However, this process is costly, and unnecessary if you are diligent about keeping your beneficiary designations current.

If one of your beneficiaries has passed away, you should name a new one in place of the deceased beneficiary. If there is no beneficiary, the assets will revert to your probate estate.

If you decided to name each one of your grandchildren as a beneficiary, and you were recently blessed with another grandchild, don't forget to add that grandchild as a named beneficiary.

Do you have an intended beneficiary who struggles with substance abuse or legal problems, such as bankruptcy? You should consider whether it is better to name that person as a beneficiary or to name a trust, which can manage the money for that person, as the beneficiary of that person's share.

Have you revised your estate plan? Don't forget to keep your estate planning attorney current about your beneficiary designations. For example: Your biggest asset is an IRA, and you want your children, Ben and Jerry (who are currently minors), to inherit the IRA. If you name Ben and Jerry as equal beneficiaries of your Trust, you would name your Trust as the primary beneficiary of the IRA rather than Ben and Jerry. With your trust as the primary beneficiary, the IRA proceeds will be distributed upon your death to the trustee of your trust, and the trustee would manage and distribute the proceeds for Ben and Jerry's benefit pursuant to the terms of your trust.

Remember, the ultimate goal is that your intended beneficiaries receive the proceeds from your life insurance and retirement/investment accounts. Please contact us if you have any questions regarding how to change your beneficiary designations and how the designations are coordinated with your estate plan.

NANCY L. LITTLE NAMED AMONG MICHIGAN "WOMEN IN THE LAW"



Little has been selected as one of 20 honorees for Michigan Lawyers Weekly's Women in the Law. The honorees were recognized on September 26 at a luncheon at the Detroit Marriott in Troy. The Michigan Lawyer's Weekly editorial panel selected the 20 and considered a number of criteria, including how the nominees:

- * Commit to excellence in the practice of law;
- * Serve as inspiring and accomplished leaders in the profession; - Are mentors to other women; and
- * Contribute significant time and effort to volunteerism and/or pro bono work.

Michigan Lawyer's Weekly Publisher Donald Semmermann said, "With so many great candidates comes a great opportunity for us to showcase the best of the best with these honorees." **Congratulations, Nancy!**



DO YOU HAVE A LOVED ONE THAT RECEIVES MEDICAID? ESTATE RECOVERY IS NOW IN PLAY

By Michelyn E. Pasteur

In 1993 the federal government enacted the Federal Estate Recovery statute, which required all states to adopt an Estate Recovery Program to recoup Medicaid payments used to fund long term care expenses. Michigan was very slow to respond. It wasn't until it was threatened with the loss of its federal Medicaid funding that Michigan became the last state in the union to come on board and, in 2007, it belatedly adopted Public Act 74, now known as Michigan's Estate Recovery Law ("ERL"). Although the ERL was effective September 30, 2007, the State continued to drag its feet with respect to implementation, and no significant effort was taken to enforce the Law until recently. Michigan's Department of Human Services ("MDHS") finally published rules detailing how the ERL will be enforced. Those rules can be found in Section 400 of the Bridges Eligibility Manual (BEM), which were effective July 1, 2011 ("Rules").

Who Is Covered

The ERL clearly provides that only persons who began receiving Medicaid long-term care services after September 30, 2007, are subject to estate recovery. The ERL also requires that "individuals seeking Medicaid eligibility for long-term care services" receive written notice concerning the provisions of the estate recovery law including "a statement that some or all of their estate may be recovered."

The MDHS has included the required notice to applicants in the current Medicaid application form published on October 1, 2011.

When Does It Start?

The ERL was effective on September 30, 2007. It provides that the Michigan Department of Community Health ("MDCH") is charged with implementing Michigan's estate recovery program, and instructs MDCH to obtain approval from the federal government before it begins recovery of estate assets. Specifically it states: "The department of community health shall not implement a Michigan Medicaid estate recovery program until approval by the federal government is obtained."

MDCH takes the position that Medicaid beneficiaries who receive long term care services on or after July 1, 2010, and after they reached the age of 55 years, will be subject to recovery upon their death or the death of a spouse. Arguably the July 1, 2010 date conflicts with the ERL which provides that the MDCH may not implement the estate recovery program until after approval is obtained from the federal government. That approval was not obtained until May 23, 2011. Those in charge of administering estates of Medicaid Recipients who died during the window period (July 1, 2010 to May 23, 2011) should object to any collection attempt based on the plain language of the ERL.

What Assets Are Subject To Estate Recovery?

According to the ERL, the Medicaid recipient's assets subject to recovery consist of all property and other assets included within the individual's estate that is subject to probate administration, except for non-probate assets which might be subject to claims under MCL 700.3805(3). This description of what assets are subject to recovery, omits assets transferred out of the recipient's name prior to death, assets with a beneficiary designation, and assets held jointly with rights of survivorship. The remaining assets subject to recovery are probate assets; and the State stands in line with other creditors who may have priority over its claim.

Let's try a simple example for demonstration purposes. Harry, a single man, who is 65 years old and received long term care Medicaid benefits amounting to \$100,000, died leaving the following assets: a home worth \$70,000 titled in his name, with a \$20,000 mortgage; a bank account with a balance of \$1,500 that was joint with his son; a \$25,000 term life insurance policy naming his son as beneficiary; and a car valued at \$10,000 with a \$6,000 lien on it. First, we must determine whether there are any assets that will pass through Harry's probate estate. In this case, Harry's bank account was jointly titled with his son therefore, under Michigan law, the son became the sole owner upon Harry's death; the bank account is not subject to probate. Harry's life insurance names his son as direct beneficiary; therefore this is not a probate asset either. The remaining assets subject to probate are Harry's house and car. Both of these assets have liens on them, and the secured creditors must be paid first. After the house and car are sold and the liens are paid, there remains \$54,000 in the probate estate.

We then look to the claims section of EPIC to see what claims have priority over the State. If the total value of the probate estate is insufficient to pay all claims and allowances in-full, the personal representative pays claims in the following order:

1. Costs and expenses of administration.
2. Reasonable funeral and burial expenses.

3. Homestead allowance.
4. Family allowance.
5. Exempt property.
6. Debts and taxes with priority under federal law, including, but not limited to, medical assistance payments that are subject to adjustment or recovery from an estate under section 1917 of the social security act, 42 USC 1396p.

In this case, costs and expenses of administration amount to \$5,500; and funeral and burial expenses total \$12,000. There was no spouse, minor children or children dependent upon decedent; therefore there will be no homestead or family allowances. Decedent's son may claim an exempt property allowance of \$14,000. Consequently, the amount that might be available for estate recovery comes to \$22,500. However, there are other exemptions that could trump the State's claim.

What Other Exemptions Are Available For Probate Assets?

There are certain types of assets that are exempt from recovery and other situations specified in the ERL where assets will not be pursued. For example, recovery of assets from the home of a Medicaid recipient is restricted if any of the following exist:

1. the Medicaid recipient's spouse resides in the home;
2. the Medicaid recipient's child who is under the age of 21, blind, or permanently and totally disabled resides in the home;
3. the Medicaid recipient's caretaker relative resides in the home and resided in the home for at least two years immediately before the Medicaid recipient's admission to a medical institution providing care that permitted the Medicaid recipient to stay in their home rather than move to a medical institution; or
4. the Medicaid recipient's sibling who has an equity interest in the home resides in the home and resided in the home for at least 1 year immediately before the Medicaid recipient's admission to a medical institution.

The terms and language of the Rules generally align with this list of exemptions, except that the Rules replace the words "caretaker relative" with the term "survivor"; and omit one significant word in the ERL requiring that the permanently disabled child be classified as "totally" disabled.

Additionally, certain portions of a Medicaid recipient's estate are exempt from estate recovery if recovery would cause an undue hardship. Specifically, the ERL provides that any portion of an estate that is the primary income-producing asset of the Medicaid recipient's survivors (e.g. a family farm or business) is exempt from estate recovery as a hardship. The Rules further qualify this exemption by requiring that the estate be the "sole source" of income for the survivors.

With respect to the homestead, the ERL provides that the portion of the value of the Medicaid recipient's homestead that is equal to or less than 50 percent of the average price of a home in the county the homestead is located in as of the date of the Medicaid recipient's death is also exempt from estate recovery as a hardship. However, there are no details in the ERL suggesting how the homestead is to be valued, or how the average price of homes in the county will be determined. Furthermore, the Rules do not provide any guidance on this issue. They state only that an undue hardship exists when "The estate is a home of modest value." As recognized by many practitioners on the State Bar of Michigan Elder Law Listserv, this "modest homestead exemption" is going to require considerable clarification. There are various ways to ascertain "value" for real estate purposes, and it may be difficult to find consistent statewide data regarding the average price of homes by county. This looks to be an area ripe for challenge, and is likely to generate many contested cases in the short term.

Finally, although Michigan's ERL permits exemptions from estate recovery where hardship can be proved, with respect to determining whether a hardship exists, the rebuttable presumption is that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.

Process for Filing A Claim Against the Probate Estate

Estate recovery does not begin until a Medicaid beneficiary who is 55 years or older dies. It is important to note that any claim the State may have against the probate estate does not create a debt owed by the deceased Medicaid recipient's heirs, or beneficiaries, but rather creates a claim against the assets in the deceased's probate estate. The State asserts in its questionnaire that it will only seek recovery for the total amount of services provided after the decedent turned 55 years old. The State has hired a collection agent to implement its estate recovery plan and file claims on its behalf. Health Management

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FIRM NEWS

Steve Brey participated with his mom and sister in "Purple Light" event in Lansing, November 20th. This event is a remembrance for victims of pancreatic cancer and a celebration for survivors. Steve and his family are remembering his dad, who died of pancreatic cancer, and celebrating that his mom has survived for more than 3 years with the disease. Steve, a "Yooper", also recently traveled to the U.P. to celebrate his twin niece and nephew's second birthday and to Green Bay to take in a Packers game.



Laura Johnson and her husband Kip welcomed their first baby, a beautiful baby girl named Laila Grace. Mom and Dad are over the moon!

Pat Ouellette had a hole-in-one at the 12th Annual Steve Smith Charity Challenge Golf Outing this past June! WOW! Funds raised from the event help support the Steve Smith Charitable Fund, George Webster Scholarship Fund, and the MSU Alumni Club of Mid-Michigan.



Micki Pasteur and her husband, Ernie, helped organize an event honoring the Spartans' 1965-1966 National Championship Football team. The event, which

was held at the Kellogg Center on October 21, was sponsored by the Michigan State University Football Players Association (MSUFPA) and the Michigan State Athletics Spartan Fund. Micki is also president-elect of the mid-Michigan MSU Alumni Association.



Katie Lynwood traveled to Orlando, Florida this past Fall to participate in her cousin's wedding on the Disney Boardwalk. The newlyweds were

the 11th couple to sign up to be married at Disney World on 11-1-11. During Katie's Magical Disney Adventure, I toured Epcot and the featured countries.



Kathie Lindberg's granddaughter, Hannah, was an elf in the Corunna Holiday Parade of Lights. Congratulations Hannah!

Nancy Little recently raised \$1,370 in pledges for the Capital Area Humane Society during its Run/Walk for the Animals. Nancy wants everyone to cue to the theme from Chariots of Fire and to picture her running like the wind! (and if you believe that.....)

Jane Radner and her husband Dan Greenberg were proud parents of the groom at the recent wedding of their son, Steven, and his wife Lena. Best wishes to Steven and Lena!



I'm a Fiduciary! Now What?

By Stephen W. Brey

When something happens to a family member – a death or serious and debilitating injury – everyone goes through a grieving process. With this process comes the reality of learning to deal with a new day-to-day. In the case of a death, you may be called upon to administer an estate or a trust. With a serious injury, you may be asked to act as an agent in a power of attorney or, if there is no power of attorney, as a guardian and conservator for your injured family member. These are examples of "fiduciary" roles, where you would be asked to conduct the business and affairs of the person who has passed away or was injured.

The relationship between you and an estate, trust, or individual who can no longer act on his own behalf is a fiduciary relationship. A fiduciary owes the other person duties of care, loyalty, and good faith. The fiduciary controls property, but cannot use the property for his own benefit; instead, he must use the funds for the benefit of the other person or the person's designated beneficiaries. In the case of an estate or trust, the beneficiaries of the estate/trust are owed the fiduciary duties. In the case of a power of attorney or guardianship/conservatorship, it is the incapacitated individual. If you misuse or mismanage funds which you hold as a fiduciary, you can be held personally liable for damages caused.

Fiduciaries have a lot of responsibilities, and likely a lot of questions. What am I allowed to spend money on? What should I keep track of? Do I report to anyone? Can I hire help?

If you ever have a question about whether you can or should use the assets you hold as a fiduciary for a particular purpose, ask an attorney. They can give you honest and independent advice about whether a purchase or sale would breach a fiduciary duty.

Keeping track of income and expenses is very important. You'll have to report this information to the person to whom you owe the fiduciary duties in an accounting. You may also have to file tax returns. Organized, efficient recordkeeping is essential. Here are some tips:

1. Keep a check register with all income and expenses. Track who you paid, what it was for, and how much it was. Reconcile the balance of your register with monthly or quarterly statements;
2. Keep the monthly or quarterly statements – check images are helpful and easy to get if you have an online account;
3. Keep deposit slips and write down the source of deposited funds – mark detailed entries of deposits in your check register;
4. Keep any 1099 or other tax forms that you receive. These will help your attorney or accountant when the time to complete a tax return arrives;
5. If there are any investments in the decedent or incapacitated individual's estate, talk to an investment advisor to determine the value of the assets – this will save time and money when it's time to report capital gains on a tax return!
6. If you sell real estate, keep the form HUD-1 and any appraisal documents;
7. In the case of an estate/trust, make sure that you know the beneficiaries – names, addresses, phone numbers, and social security numbers. Assure them the information is confidential.

In addition to accounting and recordkeeping duties, every fiduciary has duties of loyalty, impartiality, and care.

The duty of undivided loyalty means that you must put the interest of the fiduciary estate over all other interests, including your own. You must refrain from self-dealing, which means you cannot personally benefit from fiduciary transactions (e.g. add yourself as a joint owner on fiduciary assets, make gifts to yourself, or sell the fiduciary real estate to yourself without court approval).

You will have a duty to keep trust assets separate from your personal assets, which means you cannot place cash owned by the fiduciary estate into your personal bank account. As noted above, you must keep separate, itemized records of all trust income and expenses.

Additionally, a fiduciary may not favor a particular beneficiary's interest over another's interest. You cannot favor beneficiaries from one class over another (i.e. an income beneficiary vs. a remainder beneficiary). This is commonly referred to as a duty of impartiality.

Finally, a fiduciary has a duty of care, which means you must act as a prudent person would act in dealing with the property of another, including following the "Prudent Investor Rule" if you invest assets, this "rule" takes into account the purposes, terms and distribution requirements expressed in the trust.

If you are in the unfortunate position of having to deal with a tragic life event, ask your attorney for help – his job is to assist you in navigating your duties as a fiduciary so you avoid any inadvertent breach of your fiduciary duty. If you keep good records, you will make your attorney's job much easier, saving time and money. It's never easy to deal with tragedy, but with just a little bit of organization on the front end, you can save yourself a great deal of time, expense, and emotional capital.

CONTACT US:

Diane Bernick: dbernick@borpc.com

Pat Ouellette: pouellette@borpc.com

Steve Brey: sbrey@borpc.com

Michelyn Pasteur: mpasteur@borpc.com

Nancy Little: nlittle@borpc.com

Jane Radner: jradner@borpc.com

Katie Lynwood: klynwood@borpc.com

Mary Schrauben: mschrauben@borpc.com

Taxation - Estate Planning - Business Succession Planning - Trust and Estate Administration
Probate and Trust Litigation - Elder Law - Medicaid Planning - Guardianships - Conservatorship
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Bernick,
Radner &
Ouellette, P.C.
2400 Lake Lansing Road
East Lansing, MI 48912

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Systems, Inc. ("HMS"), with offices in East Lansing, Michigan, is not only handling the claims filing process, but is also responsible for processing applications for a hardship waiver. The process is currently set up as follows:

1. Notice is received by the State agency or its agent that a Medicaid recipient who is 55 years of age or over has died.
2. HMS sends a form letter titled: "Notice of Intent to File Claim Against Estate" to the contact person on file with the DHS or other name provided. The letter refers to an enclosed form MSA-0006 titled: Michigan Estate Recovery Questionnaire, which requests information regarding the decedent, his/her assets and whether a probate estate will be opened. The language on the bottom of the Questionnaire states that "Completion is voluntary, but is required for an Estate Recovery exemption."
3. The Heir/Beneficiary/or Personal Representation has the option of requesting a "Hardship Waiver Application" and filling out that Application. According to HMS, "the Hardship Waiver Application must be submitted within 60 days of the date on the letter that will be sent with the application."
4. A response to the Waiver Application will be issued; and if denied, the decision may be appealed under the Administrative Procedures Act within 60 days of receiving the notice of denial.
5. If no waiver is requested, or if it is requested and denied, HMS may then file a claim with the probate estate.

Avoiding Estate Recovery

Currently, the simplest way for a Medicaid recipient to avoid estate recovery is to avoid leaving a probate estate. This can be accomplished in a number of ways, including:

1. Titling assets as joint with rights of survivorship (but watch out for divestment penalties if the joint owner added is someone other than the spouse or an eligible family member).
2. Transferring assets to the spouse during the Medicaid recipient's life.
3. Executing a Lady Bird deed to transfer real property immediately upon death.

Executing POD ("Payable on Death") or TOD ("Transfer on Death") designations on bank accounts, savings bonds, and other similar assets.
Completing beneficiary designations for life insurance, mutual funds, retirement accounts, and other similar assets.

Although the next planning technique will not necessarily avoid probate, it will assist in avoiding estate recovery. When there is real property titled in the name of the Medicaid recipient, consider executing loan documents and record a future advance mortgage secured by the real property during the recipient's lifetime. The Note Holder/Mortgagee could then loan money to the Medicaid recipient in order to pay for capital improvements, insurance and property taxes on an ongoing basis, and get ahead of the state and most other creditors. The Note Holder/Mortgagee would be reimbursed first for those payments as a secured creditor before anyone else would be entitled to receive proceeds from the sale of that real estate.

Conclusion

We are in the very early stages of estate recovery in Michigan. There are many procedural issues and expected legal challenges to work through in order to solidify how implementation of estate recovery in our State will actually play out. In addition to the issues discussed in the Article, there are a variety of other related issues not discussed here that will need to be clarified, such as who has standing to file a Hardship Waiver Application; or whether the private company hired to act as the state's collection agent is subject to the Fair Debt Collection Practices Act. We expect that the State's written policy and practice will be modified several times over the next 12 months based on experience gained while implementing the Estate Recovery Program.

If you are concerned about how estate recovery might affect you or your family, please give us a call and we can review your specific situation with you.