

Accettura & Hurwitz

Estate & Elder Law

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Please Say Nice Things About Us!

If you are unhappy with our service please contact our office and speak with our office manager, Kim Rapp, and we will do our best to remedy the issue. If you are happy with our service, please visit our Facebook page called "Accettura & Hurwitz: Estate and Elder Law" and/or Google Review and give us a good review so others will know of our good work.

This Newsletter is considered general information and is not intended to constitute individual legal advice. Please contact us if you think the information herein impacts you directly. We look forward to speaking with you soon. Please visit our website www.elderlawmi.com

Very truly yours,

ACCETTURA & HURWITZ

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FALL 2019 UPDATE

As is our custom, this semiannual correspondence is intended to keep you abreast of developments in estate and elder law. The following is a brief summary of noteworthy developments since our last communication:



We are happy to announce that attorney Kathleen Halfpenny Svoboda has joined Accettura and Hurwitz as Of Counsel. Kathleen brings more than thirty years of experience as an attorney in private practice, assistant prosecuting attorney, referee, and administrative law judge. Her current practice focuses on estate planning as well as probate and trust administration.

By joining our firm Kathleen and her clients will be able to access the full estate and elder expertise and resources of Accettura and Hurwitz including:

- Wills and revocable trusts
- Probate and trust administration services
- Asset protection trusts
- IRA Trusts
- Veterans benefits
- Medicaid planning
- Estate litigation
- Guardianship and conservatorships
- On-site social worker for nursing home and assisted living placement
- Charitable gift giving

We welcome Kathleen and look forward to working with her and her clients.

The Perils of Joint Ownership

We regularly counsel our clients on the many advantages of revocable trusts over joint ownership as a means of passing assets at death. While joint ownership, sometimes called "the poor man's will," is simple, is easily accomplished, and avoids probate at death, it conveys many lifetime rights that expose the jointly-held asset to the unilateral withdrawals of the joint tenant as well as the claims of the joint tenant's creditors. Joint ownership, as the name implies, conveys ownership and access to the jointly held asset; a right that can easily be abused.

Under Michigan law MCL 487.703 financial institutions are not liable for the withdrawal of the *entire* account by a single joint owner (unless and until the

institution receives written notice not to make any payments from the account). It is in part for this reason that financial institutions do not require more than one signature to remove funds from a jointly-held account. In fact, financial institutions will not even permit an account that requires more than one signature to access the account.

The recent Michigan Court of Appeals case of Estate of *Lewis v Rosebrook* illustrates the problem. Lewis established three accounts with his longtime companion Rosebrook. When Lewis took ill and the parties agreed to separate, Rosebrook withdrew all of the funds from all three accounts totaling approximately \$255,000. Lewis sued and lost at the probate court level, with the court holding that either joint owner had the right under Michigan law to withdraw the entire account.

It was not until the case was appealed to the Michigan Court of Appeals that Lewis, who had since passed away, was partially vindicated. The Court of Appeals held that while Rosebrook had the legal right to withdraw all of the funds in the accounts she nonetheless could not deprive Lewis of his interest. The Court of Appeals held Michigan law presumes that joint tenants were equal contributors to the account and have equal ownership, a presumption that can be rebutted. It concluded that Rosebrook was only entitled to half of the account and was obligated to return the other half.

There are a number of takeaways from this story. You shouldn't have to sue to get your own money back. Also, the money spent to create a revocable trust in which you retain full ownership of your assets is a bargain compared to the cost of litigation to determine your rights and intentions. As the old adage goes, "an ounce of prevention is worth a pound of cure."

Don't Write On Estate Planning Documents!

Somehow, it seems that folks simply can't resist writing on their original Wills, trusts, and powers of attorney. Whether in pen or pencil, crossing out names, adding

or subtracting beneficiaries, or adding new provisions creates legal uncertainty and invariably leads to family conflict and a fast track to probate court litigation. Please call us if you wish to make changes to your estate plan. We'll observe the proper formalities and save you and your family a lot of time, cost, and grief.

Wills are modified by a written codicil (fancy name for an amendment) or by creating an entirely new document. Trusts are altered by written amendment or through an *entire amendment and restatement* if the changes are significant. Powers of attorney, because they are time sensitive, are never amended. Instead they are simply re-done.

Even where there is no will contest, courts require a formal hearing if an edited will is submitted for probate. Edited wills can also evoke the doctrines of *dependent relative revocation and revival*, bringing previous wills back to life. Yikes

Medicaid Planning: Return of the SBO Trust

A key function of our elder law practice is to assist our clients in preserving their assets while getting the best long term care. When that care is in a nursing home we look to Medicaid for payment.

Once eligible, Medicaid pays for the full cost of nursing home care; a substantial benefit considering that a monthly stay in the Detroit Metropolitan area can easily exceed \$10,000 per month!

The techniques we use to preserve assets have evolved over time. The elder law community adopts strategies that legally interpret the law in favor of our clients. The State of Michigan, in turn, attempts to refute our interpretation of the law.

For eighteen years prior to August 20, 2014 the principal technique for married couples where only one was in the nursing home was the *Solely For The*

Benefit Of (SBO) trust. On August 20, 2014, the State of Michigan unilaterally announced that it had been interpreting their own regulations incorrectly and began disallowing SBO trusts. The Michigan State Bar Elder Law Section supported an appeal of the state's decision which resulted in *Hegadorn v Department of Human Services Director* decided by the Michigan Supreme Court on May 9, 2019. The Michigan Supreme Court, in a unanimous decision, held that the State was wrong. The result is that SBO trusts have returned as an essential planning tool to preserve our client's assets.

Assets placed in an SBO trust do not count as assets of either spouse, making the nursing home spouse immediately eligible for Medicaid.

Assets of the SBO trust may be used solely for the benefit of the community (non-nursing-home) spouse in the discretion of the trustee. SBO trusts are irrevocable, and neither spouse may act as trustee (Other family members, like children typically act as trustee.)

Elder Abuse

It is estimated that by 2030 approximately two million of Michigan's residents will be seniors.

In an effort to protect Michigan's aging population, new Michigan Attorney General Dana Nessel created the Michigan Elder Abuse Task Force. To aid the task force, the state has initiated a first-ever statewide vulnerable adult abuse incident report to be used by law enforcement. The new report helps law enforcement identify and prosecute elder abuse. A copy of the new report is available on our website. Michigan residents can report any signs of elder abuse to the Attorney General's office through its anonymous elder abuse hotline at 800 24-ABUSE (800-242-2873).

The state's effort to combat elder abuse is part of a growing awareness of the vulnerability of seniors. We at Accettura and Hurwitz support those efforts and are vigilant to identify any potential elder abuse involving our clients. The documents we prepare, especially financial powers of attorney, grant broad power to allow family members to assist their loved ones. Those powers, though, carry with them a strict fiduciary obligation to act solely on behalf of the person granting the power. Families often report back to us that they had trouble using powers at the hospital or bank. Banks often send a copy of the power of attorney to their legal department where it is critically reviewed. Banks will reject a power of attorney if they see any ambiguity or if they believe the power is too old. It is for this reason that powers of attorney should be regularly reviewed and updated. Ultimately, it is up to the hospital or financial institution as to whether they will accept powers of attorney. We encourage our clients to be patient and courteous, as the attitude of the presenter can increase the likelihood that the power will be accepted.

Call Us Immediately When...

Call us from the hospital *before* you are discharged to "rehab." While hospital discharge planners may suggest a facility, it is ultimately your right to choose the nursing home (nursing homes provide both rehabilitation and long-term care services) where you wish to continue your recovery. Hospital discharge planners often choose facilities that only accept Medicare. Since at least 90% of rehab facilities accept both Medicare and Medicaid, it would be a shame to accept a discharge to a facility that you will have to leave when your Medicare days (potentially up to 100 days) run out. **Also, please call us if we haven't seen you since 2011.**