MICHIGAN PROBATE & ESTATE PLANNING JOURNAL

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Featured Articles:

STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

Subscription Information

The *Michigan Probate and Estate Planning Journal* is published three times a year by the Probate and Estate Planning Section of the State Bar of Michigan, with the cooperation of the Institute of Continuing Legal Education, and is sent electronically to all members of the Section. Lawyers newly admitted to the State Bar automatically become members of the Section for two years following their date of admission. Members of the State Bar, as well as law school students, may become members of the Section by paying annual dues of $35. Institutions and individuals not eligible to become members of the State Bar may subscribe to the *Journal* by paying an annual $25 subscription. The subscription year begins on October 1 and is not prorated for partial years. Subscription information is available from the State Bar of Michigan, Journal Subscription Service, 306 Townsend Street, Lansing, MI 48933-2012, (517) 372-9030. A limited number of copies of prior issues of the *Journal* are available beginning with Fall 1988, Volume 8, Number 1, for $6 each, plus $2 for postage and handling. Copies of articles from back issues cost $7 per article. Prior issues and copies of articles from back issues may be obtained by contacting the Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI, (734) 764-0533. Additionally, copies of the *Journal* beginning with Fall 1995, Volume 15, Number 1, are available online at http://www.michbar.org/probate/journal.cfm.

Editorial Policy

The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria. Manuscripts and letters should be sent to Nancy L. Little, Managing Editor, *Michigan Probate and Estate Planning Journal,* Buhl, Little, Lynwood & Harris, PLC, East Lansing, MI 48823, (517) 859-6900, fax (517) 859-6902, e-mail nlittle@BLLHlaw.com.

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From the Desk of the Chairperson

By Christopher A. Ballard

"May you live in interesting times."

This saying is often misattributed as an ancient Chinese curse. It's actually something dreamt up by an unknown member of the British Diplomatic Corps in the 1930s.* They, too, were living in "interesting times," having survived the 1918 flu pandemic, World War I, and then finding themselves in the midst of the Great Depression. This time is difficult for all of us—we shelter in place, dealing with unknowns about the lives of those we love, with unknowns about our economy, with unknowns about our country. It can be tempting to look at the world around us and just decide to give up.

These are interesting times. They are challenging times. But there is hope—the best qualities of our society emerge when we are faced with challenge. Families find new delight in bonding together, neighbors help neighbors, medical workers serve their patients, and so many low-paid frontline workers continue to pull themselves into their jobs each day, providing our society with the vital infrastructure that keeps us all going. I am brought to tears thinking about all of these selfless acts of kindness constantly going on around us.

Which brings me to thinking about the Probate and Estate Planning Section of the State Bar. We are there, providing for our clients, helping them through the most difficult periods in their lives, lending a sense of order and familiarity in times of upheaval. The service we provide is essential to our clients, and we should take pride in the fact that we, too, are helping to keep the fabric of society woven together.

The Members of the Probate Council constantly amaze me with their dedication and service to this cause that is greater than themselves individually. Council members spend countless hours reviewing and drafting legislation, drafting articles, speaking at seminars, filing amicus briefs, and countless other things that make practicing in our area easier, more efficient, and more effective. Thank you, Council Members, for your work.

During these interesting times, though, a few Council Members have distinguished themselves with exemplary performance.

In particular, I would like to thank Nathan Piwowarski. Nathan is the chair of our legislative drafting committee. He jumped into a project to draft and negotiate an executive order that would permit lawyers to continue executing documents for clients during our current shelter in place restrictions. This project ballooned into something we could not have anticipated at the outset, and he spent dozens upon dozens of hours, working with constituencies from multiple practice areas and industries to come up with a final product to help us. Nathan, thank you.

Also providing vital services to the Section during this difficult time were Angela Hentkowski, who acted as a liaison between our section and the Elder Law section, Dan Hilker, who was monitoring legislation and acting as a liaison with the State Bar, Nancy Little, Melisa Mysliwiec, and Rick Mills, who were putting together the Probate Journal, Mike Lichterman, who was guiding us through the technicalities needed to help the Council meet online, and David Skidmore who was dealing with the unknowns surrounding the annual Probate Institute.

Thank you all. Through your efforts, you have made this time a little less "interesting."

To the members of the Section, stay safe, and look forward to a return to normal times.

*Doing some research, the earliest published version of the quote attributes it to Sir Austen Chamberlain: "It is not so long ago that a member of the Diplomatic Body in London, who had spent some years of his service in China, told me that there was a Chinese curse which took the form of saying, 'May you live in interesting times.' There is no doubt that the curse has fallen on us." Sir Austen Chamberlin, quoted in "Lesson of the Crisis: Sir A. Chamberlain's Review of Events," *The Yorkshire Post*, March 21, 1936, page 11, column 7 (British Newspaper Archive). Found at https://quoteinvestigator.com/2015/12/18 (retrieved April 8, 2020).

Navigating the Insecurities of SECURE: Significant New Limitations on the "Stretch" IRA

By Sara A. Nicholson

The recently signed SECURE Act implemented significant changes to the current rules for contributing to and distributing from an IRA, including a significant narrowing of the "stretch" IRA.

The SECURE Act

The SECURE Act (SECURE) was signed on December 20, 2019, as part of the massive budget bill. The Act applies to traditional and Roth IRAs and qualified plans, but it does not apply to defined benefit plans or annuity payouts in IRAs or defined contributions plans that were annuitized before January 1, 2020. The SECURE Act grafts new rules onto IRC 401(a)(9) rather than adopting a completely new set of rules. For that reason, it is anticipated that the basic concepts found in the current regulations, especially regarding trusts, will not be changed in any proposed regulations, except for those areas that were specifically changed or added by the SECURE Act. Nevertheless, you should read this article knowing that the regulations may surprise us and some of the expected outcomes stated in this article, may, in fact, be different once the proposed and final regulations are issued.

Changes Affecting Account Owners During Their Lifetimes

The SECURE Act pushes back the start of required minimum distributions (RMDs) to age 72 from the current 70 ½, effective for account owners reaching age 70 ½ after December 31, 2019. As a result, no taxpayers will be starting RMDs in 2020.[2] Financial institutions have until April 15, 2020, to correct erroneous 2020 RMD notifications for taxpayers whose RMD was pushed back by SECURE. Custodians and plan administrators must now make annual disclosures of an owner's projected annual income in retirement.

Account owners remain eligible to make qualified charitable distributions beginning at age 70 ½, despite the age change for RMDs and the CARES Act RMD moratorium. The legislation also allows account owners to continue contributing to their IRAs beyond age 70 ½, while they are still working, which was not previously allowed. Account owners should bear in mind that a pre-tax contribution to an IRA after age 70 ½ will offset any future qualified charitable distribution.

SECURE also includes several provisions involving planning for children. It amends the Internal Revenue Code to permit a tax-free withdrawal from a retirement account of up to $5,000 within one year of the birth or adoption of a child. The Act also amended IRC 529 plans to allow apprenticeship programs as qualified education expenses, as well as to permit up to $10,000 in distributions to repay qualified education loans for the benefit of the beneficiary or the beneficiary's siblings. SECURE also repealed the Kiddie Tax provision of the 2017 Tax Cuts and Jobs Act, which had applied the often-higher trust tax brackets to the unearned income of children. The Act reverts the Kiddie Tax treatment back to the more favorable pre-2017 treatment, taxing a minor child's unearned income at the parent's tax bracket, effective retroactively for 2018 and 2019.

Major Changes to the Post-Death RMD Rules

The most far-reaching change under SECURE affects retirement accounts after the owner's death for most non-spouse beneficiaries. Under the previous rules, a "designated beneficiary" of a tax-deferred retirement account, such as a 401(k) or IRA, could withdraw, or "stretch," the RMDs over her lifetime. The definition of "designated beneficiary" encompasses individuals and certain "see-through" trusts. Because withdrawals from these retirement accounts are typically taxable as ordinary income, the ability to "stretch" the payments out over the beneficiary's life expectancy minimizes a beneficiary's tax burden by allowing her to withdraw smaller taxable amounts annually over a longer period. This often prevents beneficiaries from being pushed into a higher tax bracket and allows the funds to grow tax-deferred for a longer time. The SECURE Act does not change the spousal rollover rules: a surviving spouse may still choose to treat the IRA as her own account, rather than treating it as an inherited IRA, which often is the most favorable tax result for a surviving spouse.

The SECURE Act leaves intact the "designated beneficiary" framework but requires most designated beneficiaries to withdraw the account within ten years instead of over the beneficiary's life expectancy. This new "ten-year rule" is expected to function much like the current (still intact) five-year rule for account owners who die before their required beginning date without a designated beneficiary.[3] The beneficiary will need to withdraw the entire account by the end of the tenth year following the death of the account owner. The account will have no RMDs until the end of that tenth year following death, at which point the RMD will consist of the entire remaining balance of the account. After the death of a designated beneficiary, subsequent beneficiaries must withdraw any remaining balance by the end of the ten-year period that started with the death of the original account owner. The subsequent beneficiary does not begin a new ten-year period.

Note that if an account owner dies between the ages of 73 and 80 (under the proposed updated mortality tables expected to take effect in 2021, IRS Notice 2019-67 (Nov. 7, 2019), after his RMDs have begun but when he still has more than ten years of life expectancy remaining, a non-designated beneficiary would receive a longer payout than a designated beneficiary. This anomaly results because SECURE did not change the rule that a non-designated beneficiary of an account owner who dies after his required beginning date can take distributions based on the "ghost" remaining life expectancy of the deceased account owner, but a designated beneficiary is now limited to the ten-year rule. Some commentators expect the U.S. Treasury to "fix" this inconsistency under SECURE guidance. The end result may not be significantly different, however. While taking RMDs out each year would allow more time to withdraw all the assets and incur the taxes, a designated beneficiary subject to the ten-year rule would be able to let all or more of the assets grow tax-deferred for those ten years, without having to take any RMDs out until the very last year.

Exceptions to the Ten-Year Rule: Eligible Designated Beneficiaries

The Act adds a special type of designated beneficiary to the existing framework. The Internal Revenue Code now excepts the following "*eligible* designated beneficiaries" from the new ten-year rule, allowing them to stretch distributions over their remaining life expectancy:

- *Spouses*: The spousal rollover rules have not changed, and a surviving spouse may continue to treat the IRA as her own. Where a spouse does not roll the account over into her own IRA, she will continue to qualify for a payout calculated based on her remaining life expectancy, either via a conduit trust or by maintaining an inherited IRA. An accumulation trust for the benefit of the spouse will likely no longer qualify for the life expectancy payout unless she qualifies as chronically ill or disabled, as described below.
- *Minor children of the account owner*: Beneficiaries who are the minor children of the deceased account owner will qualify for RMDs based on the beneficiary's life expectancy, with a caveat. Once that minor child reaches the "age of majority," the ten-year rule then applies to the remaining assets. "Age of majority" may

be defined according to state law, which in most states is age 18 or 21. Treasury Regulations state that "…(a) child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26." Treas. Reg. 1.401(a)(9)-6, A-15. The regulations do not define the "age of majority" nor "a specified course of study." As currently written, a child could therefore reach majority anywhere between ages 18 and 26. Regulations will hopefully clarify the definition of the "age of majority" and "specified course of study" for purposes of calculating the RMDs for retirement accounts inherited by the minor children of the account owner.

- *Disabled individuals:* The Code refers to IRC 72(m)(7) and Treas. Reg. 1.72-17A(f) to define "disabled." This definition is very similar to "disabled" for purposes of qualifying for SSI or SSDI. The beneficiary must be unable to engage in substantial gainful employment, but the disability must be of "...long-continued and indefinite duration." The beneficiary must qualify as of the date of the account owner's death. Logically, a deadline to accomplish this would be October 31 of the year following death, the current deadline for submitting trust paperwork to the plan administration or IRA custodian to establish see-through trust status. Future regulations will hopefully confirm the deadline and the method for proving the disability in the context of inherited retirement accounts.
- *Chronically ill individuals*: IRC 7702(B)(c)(2), the section addressing long-term care contracts, defines "chronically ill." The beneficiary must be unable to perform two of five activities of daily living without substantial assistance. This inability must be indefinite and reasonably expected to be lengthy in nature. Alternately, a beneficiary may be "chronically ill" if he has a disability similar to the level of disability just described or has a severe cognitive impairment requiring supervision for the beneficiary's health and safety. As with the characterization of "disabled," a deadline and method for certifying a "chronically ill" beneficiary in the context of an inherited retirement account must be established in future regulations.
- *Individuals not more than 10 years younger than the deceased account owner*. This category would be helpful for account owners with a long-term partner to whom they are not married, or who wish to name siblings or other friends to whom they are close in age.

After the death of an eligible designated beneficiary, the subsequent beneficiary will be subject to the ten-year rule. The subsequent beneficiary will have until the end of the tenth year following the eligible designated beneficiary's death to withdraw the remaining account balance. She will not be permitted to withdraw the account over the remaining life expectancy of the original eligible designated beneficiary, as before SECURE.

The new post-death RMD rules under SECURE go into effect for all account owners dying after December 31, 2019. The designated beneficiaries of account owners who died before January 1, 2020, will not be subject to the new ten-year rule and may continue taking RMDs based on their life expectancy. If those designated beneficiaries, however, die after December 31, 2019, but before the account is completely distributed, subsequent beneficiaries will be subject to the ten-year rule beginning at the first beneficiary's death. Previously, these subsequent beneficiaries were allowed to continue taking RMDs based on the remaining "ghost" life expectancy of the first, deceased beneficiary.

Planning and Drafting After SECURE

After SECURE, attorneys should consider actively reaching out to and prioritizing clients:

1. With large retirement accounts;
2. Who have conduit trusts as part of their planning, particularly if the beneficiaries of those conduit trusts are not their own minor children; or,
3. Who are at risk of dying in the near future and whose retirement account planning may be impacted by SECURE.

SECURE significantly affects many planning techniques commonly used by estate planners.

Rethinking Conduit Trusts

SECURE can significantly affect clients with conduit trusts because the conduit trust structure requires that the trustee "directly" pass out to the beneficiary any distributions received by the trust from the IRA. The trustee is prohibited from accumulating any distributions from the IRA. Condensing the IRA payout period to ten years not only increases the tax burden on all designated beneficiaries, but it also gives conduit trust beneficiaries unfettered access to the entire IRA balance much sooner than was intended by many conduit trust settlors.

Of particular concern are conduit trusts established for minor grandchildren, as grandchildren do not qualify for the life expectancy payout for "minor children." The minor grandchildren would thus receive distributions over a ten-year period, instead of the previously expected payout of sixty to eighty years for a minor beneficiary.

If conduit trusts continue to be used, attorneys should review existing language to make sure that certain features of the conduit trust function properly after SECURE. Many existing conduit trusts allow the trustee to withdraw only required minimum distributions. Under the new ten-year rule, no RMD exists until the tenth year following death. Therefore, the trustee would be prohibited from making any withdrawals from the inherited IRA until the tenth year when the account must be liquidated. Also, some conduit trusts state that they were intended to allow the IRA to qualify as a conduit trust only if withdrawals could be taken over a beneficiary's life expectancy. The trust language should instead reference the longest available applicable distribution period, as life expectancy is no longer the measuring unit for most designated beneficiaries.

Conduit trusts should be reviewed within the context of the entire estate. The trustee should have the power to withdraw more than just RMDs from the IRA. The trustee will likely want to make incremental distributions each year, to avoid bunching income as much as possible. In addition, the trustee should have sufficient discretion to make distributions or to vary distributions for tax purposes only. For example, a trustee may want to make uneven distributions from year to year solely to take advantage of one beneficiary's lower tax bracket or higher offsetting deductions or other tax items in a certain year. An independent trustee, as defined in IRC 672, may be required to make such discretionary distributions from the IRA. In fact, because of the tax issues, the trustee should be someone familiar with tax matters and may need to be at a level that is more sophisticated than the average family member. Finally, the client should be made aware that any remaining balance in the IRA at the end of the tenth year will be distributed outright from the trust to the conduit trust beneficiary.

Accumulation Trusts

With the exception of disabled and chronically ill beneficiaries, as described below, most accumulation trusts are no longer expected to qualify for an applicable distribution period based on the life expectancy of the oldest beneficiary, even if the primary beneficiary is an eligible designated beneficiary. Because of the limited pool of eligible designated beneficiaries, these trusts will by necessity have remainder beneficiaries who are not eligible designated beneficiaries, which will force these trusts into the ten-year rule unless future regulations provide otherwise. Indeed, regulations are needed to clarify whether an eligible designated beneficiary who is a remainder beneficiary of an accumulation trust for another eligible designated beneficiary could continue the stretch or must use the ten-year rule.

SECURE does except accumulation trusts for the sole benefit of a chronically ill or disabled individual. These trusts may qualify for an applicable distribution period based on the life expectancy of the chronically ill or disabled beneficiary. The disabled or chronically ill beneficiary must be the sole beneficiary during his or her lifetime and no distributions can be permitted to any other beneficiary until after the primary beneficiary's death. The trust must still qualify as an accumulation trust and therefore must only contain individuals or "designated beneficiaries" as remainder beneficiaries. No charities or entities are permitted. Because remainder beneficiaries are subject to the ten-year rule and have no possibility of obtaining a stretch based on their life expectancies, the applicable distribution period should be calculated based on the age of the primary beneficiary regardless of the ages of the remainder beneficiaries. But until further guidance is issued to clarify, attorneys are advised to continue to name remainder beneficiaries close in age to the primary beneficiary to be safe.

Planning will be particularly difficult for beneficiaries who are disabled or chronically ill but who refuse to seek the treatment or evaluations needed to qualify as such, or for beneficiaries who do not quite qualify as disabled or chronically ill, but who do experience significant challenges. These beneficiaries will need the funds but may incur a higher tax bill due to the condensed payout.

Spousal Planning When Outright Is Not an Option

Many times, the account owner does not wish to name his spouse as an outright beneficiary, such as in the case of a second marriage. Options in such a circumstance include:

1. A conduit trust for the sole benefit of the surviving spouse. This option allows a more advantageous calculation of the RMDs, by which the surviving spouse recalculates life expectancy annually (instead of just subtracting one from the previous year's life expectancy, as with non-spousal beneficiaries qualifying for the life expectancy payout). Under this method, the surviving spouse is less likely to have to withdraw the entire account balance during her lifetime and thus the account is likely to still contain funds for the remainder beneficiaries.
2. A QTIP trust that is an accumulation trust and does not qualify as a conduit trust will be subject to the ten-year rule. The trust will be taxed on the IRA within ten years, but it can then accumulate the remaining funds for the remainder beneficiaries and is not forced to distribute them all to the surviving spouse, unlike the conduit trust.
3. Leave a portion of the IRA outright to the surviving spouse, and leave a portion outright to the children, at the first spouse's death. This will ensure that the children receive a portion without relying on the surviving spouse to name them as beneficiaries and without having to worry about whether the surviving spouse lives long enough to be forced to withdraw most or all of the account assets with RMDs. To the extent the children receive an additional designation of the IRA at the surviving spouse's death (if the spouse rolls her portion over to her own IRA) this allows the children to stretch that IRA over two ten-year periods, instead of withdrawing the total balance over one ten-year period at the second death.
4. If the spouse is disabled or chronically ill, the spouse is still better off electing to roll over retirement benefits and take required minimum distributions using

the Uniform Lifetime Table that assumes that the spouse has a beneficiary who is more than ten years younger than the spouse. However, if the spouse may need Medicaid for long-term care, then a testamentary trust that qualifies under the new accumulation trust rules described above, may be a better choice.

Planning for Minor Children

Planning for minor children becomes more complicated under SECURE—account owners are tempted to ensure that minor children qualify for the life expectancy stretch to obtain the tax benefits, but these options in turn increase the likelihood of funds going to the children directly.

1. Conduit trust for the benefit of the child. The trustee would withdraw RMDs based on the life expectancy of the child until she reaches the "age of majority" (likely somewhere between the ages of 18-26, as discussed above), after which point the trust would have to withdraw the entire account by the end of the tenth year. All withdrawals would then have to go "directly" out to the beneficiary, including those taken during the final ten-year period. Such withdrawals, however, could be deposited into a custodial account for the child's benefit until he reaches age 21, or paid out directly to service providers for the child's benefit, such as medical or education expenses, so that distributions are not being made outright to the child. In addition, many parents who die with minor children will be younger, with lower balances in their retirement accounts, as they will typically have been working for a shorter period of time. In addition, their children will likely have higher expenses to which the conduit withdrawals may be applied, such as tuition or general support. Combined with the low RMDs due to the young age of the beneficiaries, a conduit trust presents less risk of having to distribute funds outright to beneficiaries after age 21 and allows them to minimize the tax expense of such account. Parents with larger retirement accounts, however, may hesitate to choose this option, which may result in large distributions to children in their late twenties or early thirties, to the extent the retirement withdrawals exceed applicable expenses that could be paid directly.
2. Accumulation trust. This option would permit the trustee to stretch the IRA over ten years, while also accumulating funds in the trust to the extent that the trustee does not deem a distribution to or on behalf of the beneficiary to be appropriate. The downsides are that the accumulation trust allows a shorter stretch than the conduit and is more complicated to draft. But the ten-year stretch is better than a five-year stretch, and structuring the beneficiaries of an accumulation trust may become more straightforward if future guidance confirms that the IRS will disregard the relative ages of remainder beneficiaries and merely require that remainder beneficiaries be individuals.
3. No special trust provisions. Many young parents are more likely to hold a significant portion of their retirement funds in employer plans. If an employer plan account has a beneficiary that does not qualify as a designated beneficiary, keep in mind that these plans often require payout in one, lump sum, with no ability to stretch the withdrawals out even over five years. Using an accumulation or conduit trust affords such accounts the opportunity to stretch withdrawals over at least ten years. Nonetheless, some young families will still prefer the simpler trust provisions of a typical revocable trust, with no special conduit or accumulation trust language, combined with sufficient life insurance to help cover that tax bill.

Alternate Planning Strategies for Non-Eligible Designated Beneficiaries

Spouses of clients who died in 2019 and are still within the nine-month disclaimer period may consider, if still available, disclaiming a portion of their IRAs that they will not need, to give those beneficiaries the benefit of the life expectancy payout on that portion of the retirement accounts. Potential alternate planning strategies for living clients' estate plans include:

1. Increasing amounts contributed to or converted to Roth accounts, which are most often not subject to income tax on withdrawal.
2. Life insurance to offset the increasing tax cost to beneficiaries and/or for disclaimer planning to provide flexibility in post-mortem planning to match beneficiaries' tax situation with the tax characteristics of estate assets.
3. Charitable remainder trusts to mimic the lifetime stretch for clients who are charitably inclined.
4. Disclaimer planning, including a partial spousal disclaimer in favor of the children or other secondary beneficiaries after the first death, to at least permit two ten-year stretches for the secondary beneficiaries.
5. Trusteed IRAs in lieu of conduit or accumulation trusts.
6. For sufficiently large estates, creating different accounts within a trust that can be pulled from for certain beneficiaries to match beneficiaries' tax situations and maximize tax efficiency.

Attorneys should discuss these new rules, and their effect on the client's current estate plan, with clients holding any retirement assets subject to the required minimum distribution rules, particularly clients with conduit trusts, special needs beneficiaries, or large retirement accounts. Practitioners should watch for coming regulations and carefully evaluate the actual effect of such guidance as compared to the predictions of this article.

Notes

1. Title V–Revenue Provisions of "Division O" (Setting Every Community Up for Retirement Enhancement) of the "Further Consolidated Appropriations Act, 2020".
2. Note that under the CARES Act signed on March 27, 2020, enacted in response to the COVID-19 crisis, taxpayers who reached age 70 ½ in 2019, but who did not take their RMD in 2019, will not have an RMD for 2019 or 2020. Additional issues exist with the CARES Act moratorium on RMDs, but further analysis of that Act is beyond the scope of this article.
3. The CARES Act RMD moratorium will affect the RMD for inherited IRAs subject to the five-year rule, but the moratorium most likely will not affect the RMD for inherited IRAs for decedents dying in 2020, whether subject to the five- or ten-year rule. Further discussion of that Act is beyond the scope of this article.

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The Revenue Officer Compliance Sweep (ROCS) Program: The Importance of Knowing the Difference Between a Scam and When the IRS Is Actually Knocking at Your Door[1]

By Sandra D. Glazier

A frequent scam relates to calls and other communications that claim to be from the IRS. Historically we could advise individuals to rest assured that the IRS only communicates via mail and any other form of contact should be considered a scam. Vulnerable adults have been extremely susceptible to such scams. The IRS recognized, in a consumer alert, that "thousands of people have lost millions of dollars and their personal information to tax scams."[2]

Despite this acknowledgement, on January 28, 2020, the IRS announced that it has begun to conduct face-to-face contact with taxpayers as part of a special compliance effort entitled Revenue Officer Compliance Sweep (ROCS).[3] Initial efforts are targeting taxpayers in Wisconsin, Texas, and Arkansas,[4] but the plan is to, ultimately, expand this effort nationwide.

The IRS has indicated that it intends to provide an appointment letter requesting certain information to provide the taxpayer with the opportunity to call the IRS to set up an appointment prior to a visit, but the IRS acknowledges that the first face-to-face contact from a revenue officer is most likely to be unannounced.[5] This can be an extremely unsettling and scary event for anyone, but it creates heightened concern if the taxpayer is a vulnerable adult. While tax enforcement is an important function of the IRS, such efforts may further open the door to scammers impersonating revenue officers thereby subjecting vulnerable adults to greater risk of loss.

It may be helpful to alert individuals to:

1. Never provide a social security number or financial information to anyone based upon an unsolicited telephone call, or email;
2. Verify that any written communication they receive originates from and is responded to a verified Internal Revenue office address; and,
3. If someone comes knocking, demand that they provide two official credentials, which should include a pocket commission and a HSPD-12 card. Both of these forms include a serial number and a photo of the IRS employee. While the revenue officer is required to provide the taxpayer with a phone number that can be called to verify the information sought and identity of the revenue agent, current scams often involve calls that provide a call back number that appears to be related to government offices, but in reality is not. Therefore, caution should be exercised if the taxman cometh to your door and efforts undertaken to verify the individual's credentials before engaging in a communication that provides confidential taxpayer information.

Notes

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2. https://www.irs.gov/newsroom/tax-scams-consumer-alerts.
3. Taxpayer Advocate Service, TAS Tax Tip: How to Confirm the Identity of a Field Revenue Officer If They Come Knocking at Your Door, January 28, 2020.
4. *Id*.
5. *Id*.

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Tenancy by the Entireties Ownership—An Analysis

By James ("J.V.") F. Anderton, V and Kevin P. Cummings

In the estate planning process for a married couple, one of the choices a Michigan estate planning attorney will need to discuss with the clients is ownership of assets after the plan has been completed and is being implemented. The issues attendant to this choice are myriad, and at times may be overlooked by a busy practitioner. This article will attempt to outline many of the key issues faced by estate planners in determining whether to advise that clients' property should be held as tenants by the entireties, or if the property should be titled in a joint trust, the trust of one spouse, or perhaps partially in the trust of either spouse.

In considering whether to advise clients to terminate a tenancy by the entireties, it is helpful to be reminded of the benefits of that form of ownership. Both real estate[1] and personal property[2] can be held in a tenancy by the entireties in Michigan. Upon the death of either spouse, the survivor will have sole title to the assets titled in a tenancy by the entireties,[3] so probate is unnecessary on the death of the first spouse to die. A tenancy by the entireties also affords excellent creditor protection for both spouses, as a creditor cannot lien or attach an asset so held unless it is a creditor of both spouses.[4] Also, while a tenancy by the entireties can be terminated by a conveyance from one spouse to another,[5] neither spouse can terminate the tenancy by a transfer to a third party without being joined by the other spouse.[6]

When advising to terminate a tenancy by the entireties (or not creating a tenancy by the entireties for ownership of such property), a practitioner is in effect advising the clients to forego the above benefits. An example of a traditional and basic estate planning strategy is to fund a married couples' residence into their joint revocable trust via quit claim or warranty deed. However, in employing this strategy, how many planners take the time and effort to discuss with the client(s) the legal and practical consequences of using this method to fund a trust? Stated another way, how many clients/couples walk away from an office meeting with their attorney on the day they sign their trust and estate documents with the knowledge and understanding that by signing the deed, that couple destroyed a very effective creditor-protection tool for the sake of expediency in getting assets into their revocable trust to "avoid probate?"

There may be a number of reasons to advise clients not to use tenancy by the entireties ownership for their property, and the rest of this article will explore those considerations to assist estate planners in evaluating whether or not tenancy by the entireties is optimal for their clients. Importantly, practitioners will need to work through the evaluative process for each married couple, as the factual situation and estate planning objectives for each set of clients is different.

One of the more fundamental aspects of the process of determining whether to forego the protections of tenancy by the entireties is whether or not the clients are currently, or in the future may become, eligible for Medicaid. This can be especially important for older clients/married couples who might be meeting with an attorney for the very first time, and prior to such a meeting they have never completed previous estate planning and have little or no knowledge about the process, the documents they might need, or the consequences of executing such estate planning documents. In fact, typical clients might only find themselves in the attorney's office because they were told to do so by their financial planner or C.P.A., or because there was a recent death in their family and these clients are now contemplating their own demise for the very first time.

In bringing their financial reports and other information to the first meeting with the attorney, it might be very common to learn that the client/couple has "vanilla" assets, such as a martial residence, 401(k)/403(b), savings and checking accounts, perhaps a pension, and some personal possessions. That is not to say that these assets might not be substantial, and they very well may be. Often these couples might have been married for 30 or 40 years and have children who are grown, generally responsible, and get along with one another. In meeting with such clients, it is important for the attorney to ascertain exactly what the goal(s) of the clients is(are). Oftentimes, an attorney will learn that the clients simply want to "keep their assets out of probate." However, many of these clients do not come to the table with the idea that Medicaid planning can also be an integral part of the estate planning process. With advances in medicine over the recent years and economic and societal consequences of keeping patients alive over the long term, coupled with the explosion of the cost of care (including long term care), ensuring that clients have a good understanding of these issues is essential. Ultimately, a joint revocable trust having title to all of their assets may still be the best answer for this client/couple for a multitude of reasons. However, when it comes to funding the trust, given the current environment in Michigan with respect to Medicaid and recapture of assets, keeping the martial home out of the trust and instead drafting a Lady Bird Deed to deal with the clients' home subsequent to the death of the surviving spouse, might prove to be the best option for clients of a certain age, medical or cognitive condition. Prudence might also require that these issues are addressed proactively, as the Medicaid process sometimes requires re-deeding a homestead out of a trust and back into the name of an individual so that the property can achieve "exempt" status under the current Medicaid rules. If a party has developed issues with cognition or capacity in the years subsequent to creating their trust, this might prove difficult or impossible to achieve.

As readers to this article are likely aware, estate recovery is a process through which the state of Michigan can seek to recoup expenses paid for long-term care services for individuals over the age of 55 who have received assistance from Medicaid. See 42 USC 1396p(b); MCL 400.112 and MCL 700.3805. Also see *In Re Estate of Rasmer*, 501 Mich 18, 903 NW2d 800 (2017). The process would initiate after the death of the individual who had received these benefits. Michigan statute defines "estate" and "property" for the purpose of estate recovery, as "all property and other assets included within an individual's estate that is subject to probate administration under article III of the estates and protected individuals code." MCL 400.112h, *supra*.

Additionally, the Bridges Eligibility Policy Manual (BEM) is a very important guide as to Medicaid policies and procedures in the state of Michigan, as well as the classification of assets as "exempt" or "non-exempt" for purposes of planning for individuals who might someday require Medicaid services. Section 400 of the BEM defines real property as a countable asset of an individual's estate, for purposes of estate recapture. Per Page 34 of BEM 400, a homestead is defined as, "where a person lives…that they own, is buying or holds through a life estate or life lease. It includes the home, all adjoining land and any other buildings on the land." *Id.* Section 405 of the BEM concerns divestment of resources, for the purpose of Medicaid planning and application. Divestment is, "a type of transfer of a resource and not an amount of resources transferred." *Id.* Further, a divestment means a transfer of a resource by a party or the party's spouse that includes all of the following: "within a specified time frame, for less than fair market value, is not listed under transfers that are not divestment." *Id.* Further, a divestment results in a penalty period, not ineligibility for Medicaid. *Id.* However, depending on the scope of the penalty, incurring the same can potentially be devastating for a client. As readers are aware, there is a five-year (60 months) look-back with respect to divestment of assets for purposes of the Medicaid application. The calculation of the penalty period is outside of the purview of this article, however, in many circumstances, a couple learning that they have incurred a penalty due to poor Medicaid planning and will have to pay out resources to qualify for Medicaid can be shocking, and a difficult conversation to have with a client.

Utilizing a Lady Bird Deed can be valuable in that it does not initiate an immediate gift or trigger divestment penalties because the gift does not complete until the death of the grantor – for a single person, or, until the death of the surviving spouse, in the case of a married couple. A Lady Bird Deed is essentially a contingent future interest for a beneficiary, while the granting party(s) retain their interest in the property until death. Importantly, a Lady Bird Deed does not destroy a tenancy by the entireties and does not trigger an uncapping for purposes of property taxes. A Lady Bird Deed is also fully revocable for the married couple. If they decide to sell the martial home and move, they do not need the consent of the beneficiary with the contingent future interest. Should the married couple stay in the house permanently, upon the death of the surviving spouse, the beneficiary merely needs to record the death certificate(s) of the grantors, as the condition precedent to trigger the remainder gift has now occurred. See MCL 700.6101. The party's marital residence has now avoided probate and is not subject to recapture by the state of Michigan as a result. For a client who has received long-term-care Medicaid benefits, such planning can be very useful for parties whose equity value in their home does not exceed $595,000, as of January 1, 2020. BEM 400.[7]

At the other end of the financial spectrum, estate planning for spouses with wealth usually entails some discussion of protecting assets from potential future creditors. Here, the relevant facts to be considered are if one or both spouses is likely to be subject to creditor risk, if there are prior relationships and if children were born from those prior relationships, the ages of the spouses, and the origin of the wealth, and the emotional issues attendant to transferring assets into the name of a spouse who did not bring assets into a marriage. Each factual situation is worthy of more discussion.

If the practitioner faces a situation where one spouse is significantly more likely to face creditor risk than the other spouse, there may be value in transferring significant assets from the tenancy by the entireties into the name of the spouse without creditor risk. As an example, consider a long-term marriage in which all children from both spouses have been born from that marriage. Additionally, assume one spouse is a surgeon, and the other spouse has retired to pursue philanthropic endeavors. In this situation, the surgeon clearly has the significant creditor risk, while the retired spouse is much less likely to have creditor risk. To be clear, the retired spouse can still have creditor risk as the mere act of driving a car has inherent risk. However, much of the risk of the retired spouse could be mitigated by insurance, including the use of an umbrella policy. In this instance, leaving property in the tenancy by the entireties causes the assets to be at risk should the retired spouse die first. A different approach, which could be considered, is titling the assets in the name of the retired spouse's revocable living trust. Should the retired spouse die first, the terms of the retired spouse's trust may provide for the income and principal to be made available to the surgeon spouse at the discretion of the trustee, and have a third party appointed as the successor trustee of the retired spouse's trust. Under MCL 700.7505, "[t]he transferee or creditor of the beneficiary of a discretionary trust provision does not have the right to any amount of trust income or principal that may be distributed only in the trustee's discretion, and trust property is not subject to the enforcement of a judgment until the income or principal, or both, is distributed directly to the trust beneficiary." This would allow the surgeon spouse to enjoy use and benefit of the house without subjecting it to creditor risk after the death of the retired spouse.

When the practitioner has a situation where both clients are at risk for future creditor actions, perhaps because one spouse is a surgeon and the other is an executive at a publicly traded company, the calculus is different. In this case, having property titled in a tenancy by the entireties is better protection while both spouses are alive than transferring the property into the revocable living trust of one spouse. Also, because the estate planner cannot be certain which spouse will die first or face creditor issues, the availability of creditors to be able to attack property after the death of the first spouse is not any better or worse with a tenancy by the entireties title to property than it would be titling the assets into the name of either spouse's revocable living trust. An alternative approach in this situation would be the use of a Michigan domestic asset protection trust as governed by the Qualified Dispositions in Trusts Act.[8] An estate planner may also wish to consider non-reciprocal spousal lifetime access trusts for a situation such as this.[9]

As with most topics in estate planning, the issue of prior relationships, especially when there are children from those prior relationships, is an important topic to be addressed when considering how to title assets to effectuate the estate plan. The issue here is often that one or both spouses has children from a prior relationship that they want to receive certain assets, or they want to make sure will receive some percentage of their assets after their death or the death of the surviving spouse. In such circumstances, using the tenancy by the entireties to title assets is often a sub-optimal approach. After the death of the first spouse to die, the surviving spouse receives title to the assets that were titled in the tenancy by the entireties, and the surviving spouse is free to do with those assets as he or she may wish. This could result in the surviving spouse being able to invalidate the estate plan the spouses had originally agreed to with the assistance of the estate planning attorney as the relationship between the surviving step-parent and step-child may become more and more antagonistic after the death of the first spouse to die. In these situations, this issue needs to be considered early in the estate planning process.

There are numerous options available to estate planners to deal with these second marriage issues. To the extent the assets are akin to stocks and bonds (and we will use the term "financial asset" for these), titling the financial assets in a trust that becomes irrevocable after the death of the first spouse that has terms providing the surviving spouse a qualified terminal interest[10] in the property ("QTIP"), allowing the surviving spouse the income and the right to make the property productive, but no right to appoint the property to himself or herself, or away from the intended remainder beneficiaries of the first spouse to die, may be a desired approach. Note that a QTIP approach will not work for many non-financial assets that do not generate income, but it may have significant value, both monetary and emotional, because in the QTIP-setting the surviving spouse has a right to require the trustee to make the property productive.[11] This could mean that a family cottage or homestead, or a valuable piece of art or other collectible may be sold and the proceeds invested in some financial assets by the QTIP trustee. Thus, these items should not be placed in a QTIP. Instead, for non-financial assets, careful drafting of the revocable living trust for the owner-spouse with children from a prior relationship to protect can be used to ensure the surviving spouse/step-parent has the appropriate rights to use such non-financial assets, but no right to sell or mortgage. Yet another approach is an immediate transfer to an irrevocable trust that describes the terms of use during the lifetime of either spouse and for future generations/beneficiaries.

Another factual consideration for practitioners in determining whether to use a tenancy by the entireties or another technique is the age of the clients. For younger healthy clients who have roughly the same creditor risks and assets, leaving property in a tenancy by the entireties is appropriate. Since there is no obvious spouse with greater creditor risk, and tenancy by the entireties provides excellent creditor protection while both spouses are alive, there is no need to involve a trust. Further, while there would be a probate should both spouses die simultaneously (or in succession without transferring assets into the trust of the surviving spouse), the risk of such a situation is usually quite small, and probate under the Michigan Estates and Protected Individuals Code[12] is usually not overly burdensome and can be handled almost exclusively by mail. Additionally, if the couple leaves behind one or more minor children, a probate action is hardly the most challenging issue facing the named fiduciary(ies).

Lastly, when spouses either come to a marriage with significantly different assets (and assuming there is no prenuptial agreement for purposes of this article), either through inheritance or wealth accumulation during their lives, it can be challenging for the wealthier spouse to transfer assets either into a tenancy by the entireties, or usually a more emotionally challenging concept, into a revocable living trust for the other spouse because the spouse with the assets is likely the spouse more likely to face creditor risk. In this situation, the "wealthier" spouse may be emotionally willing to transfer property into a tenancy by the entireties designation, but not having his or her name on the title of the assets he or she previously inherited or worked to obtain may not be palatable. In such cases, and depending on the likelihood of creditor risk to such spouse, use of a Michigan Domestic Asset Protection Trust as described above or a tenancy by the entireties may be appropriate.

Much like "pocket" deeds were a common estate planning technique several decades ago, the typical quit claim deed for a married couple placed into their joint trust is a rote solution to funding a couple's joint trust, because, typically that is how a planner, "has just done things" for years. For a planner's clients, however, they might not find that explanation to be acceptable. The complications of modern life, modern medicine, and the unique challenges of day-to-day life demand a better answer as well. A married couple seeking an effective estate plan bring to their attorney their own unique set of marital, financial, and familial circumstances. It is deeply important that a practitioner seek information from their clients, during the evaluative process, well beyond who owns what and where do they want their assets to go when they die. If a joint revocable trust is a "living" document, then then the expectation and understanding should be that the document should be effective for the lifetimes of its creators. During those lifetimes, sometimes people have financial difficulties, sometimes people get sued, and sometimes people get sick and as a result, require expensive care. Oftentimes, the cost of that care might exceed what a couple is able to "self-fund" with what their savings and retirement will allow.

The titling of marital property in the estate planning process, while often thought of as a perfunctory part of the process, can be a thought-provoking and challenging process causing the attorney and clients to engage in an honest discussion of the risks and aspirations that the clients have for their estate plans and themselves. This article has attempted to explore some of the issues and concepts attendant to this topic in the hopes of assisting practitioners in meaningful and effective conversations with their clients.

Notes

1. MCL 554.45.
2. MCL 557.151.
3. MCL 557.81.
4. MCL 600.2807(1) as to real estate and MCL 600.6023(a) as to personal property. *See also Estes v Titus*, 481 Mich 573, 751 NW2d 493 (2008).
5. MCL 557.101.
6. *See* Michigan Land Title Standard 6.9.
7. While Lady Bird Deeds are able to obtain title insurance from most if not all title companies in Michigan, some practitioners question the legal underpinnings of their status. *See*, *e.g.*, "Digging into the Issues of Holding Real Estate in Trust" by James F. Anderton, V, presented at the

ICLE Probate and Estate Planning Institute in 2019.

8. MCL 700.1041 et. seq.

9. See, e.g., "SLATs Provide Flexible Plans for Many Clients" Andrew T. Wolfe and Martin Shenkman, *Trusts & Estates*, May 2017.

10. See IRC 2056(b)(7) and IRC 2523(f).

11. MCL 555.813(1).

12. MCL 700.1101 et. seq.

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Nice v United States: The Tax Man Cometh—Another Potential Adverse Consequence of Elder Financial Abuse[1]

By Sandra D. Glazier

In the recent case of *Nice v United States,*[2] Mary Ellen Cranmer Nice ("Mary Ellen") was found to be responsible for the payment of taxes on IRA distributions withdrawn from Mary Ellen's account by her son ("Chip") under a subsequently determined invalid durable power of attorney ("DPOA"). While various commentators have indicated that a DPOA can be a license to steal, few have commented upon the grantor's potential tax consequences when that occurs.

The backdrop to *Nice* is an all too common scenario. After 61 years of marriage, in 2002 Mary Ellen's husband died leaving substantial assets for her care. Chip became the executor of Mr. Nice's estate and being the dutiful son moved in with Mary Ellen. Mary Ellen began to show signs of cognitive impairment that ultimately resulted in a diagnosis of "probable early dementia." Over the next several years, Mary Ellen's dementia progressed.

Given Mary Ellen's vulnerabilities, Chip was able to engage in financial exploitation of his mother and in 2011 Chip obtained a DPOA naming him as her agent. Allegedly, following her husband's death, Chip engaged in a course of conduct that separated Mary Ellen from access to her accounts, diverted her income for his own personal use, and utilizing the DPOA he arranged for retirement funds to be distributed to Mary Ellen's account from which Chip then diverted the funds for his own personal use. Ultimately, in 2014 Mary Ellen's daughter intervened, brought a court action, and was appointed Mary Ellen's conservator. Through court proceedings, in 2016, it was determined that the DPOA was "an absolute nullity" and it was set aside.

So who owed the $519,502 of tax resulting from the retirement account distributions largely obtained via Chip's use of the DPOA that was subsequently determined to be a nullity? Mary Ellen did.

Mary Ellen's estate claimed because of her circumstances and the control exerted by Chip she did not actually receive the retirement account distributions, citing that:

> [c]ourts have routinely held that even where income is reduced to the possession of a taxpayer by deposit into an account owned by the taxpayer, actual possession does not occur when the possession of the taxpayer is hindered through no fault of the taxpayer, and the taxpayer is not free to enjoy the funds at her own option.[3]

The estate attempted to analogize Mary Ellen's situation to that of *Roberts v CIR*, 141 TC 569 (2013). In *Roberts,* Mr. and Mrs. Roberts separated. However, during their marriage they had established two joint checking accounts. Following their separation, Mr. Roberts maintained exclusive use and control of one of those accounts and Mrs. Roberts maintained exclusive use and control of the other. Mr. Roberts did not have a checkbook, write checks on or withdraw funds from the account over which Mrs. Roberts exerted control, and he did not receive statements for that account. During their separation, Mrs. Roberts caused IRA distributions to be made to the account she controlled. She did so without Mr. Roberts' knowledge via the use of forged signatures. In *Roberts,* the court found that those distributions did not constitute gross income attributable to Mr. Roberts because:

> his estranged wife "signed the withdrawal requests and the checks, and [because] the signatures were made without [his] authorization."[4] Further, the distributions went to a checking account that was "joint in name only;" the taxpayer did not have a checkbook for the receiving account, did not make withdrawals from it, and was "generally unaware of the use of the … account."

Here, due to Mary Ellen's cognitive issues and the fact that DPOA was found to have been void, her estate claimed that she essentially never:

"actually received" the income for which she was taxed because (1) she was unaware of the funds; (2) she could not and did not exercise control of the funds; (3) she was substantially restricted from access to the funds and from using the funds due to her son's control; and (4) she did not benefit from the funds except to a "very limited, and indirect extent."

Unfortunately for Mary Ellen, there was evidence that occasionally Mary Ellen would write a check to get her hair done or pay for piano lessons and that when she did so she would have her checkbook with her. Therefore, despite Chip's apparent financial exploitation of Mary Ellen, she was responsible for the taxes on the wrongfully withdrawn retirement benefits. Chip's use of a DPOA subsequently found to be void to effectuate distributions from a retirement account and his use of those funds without valid authorization did not totally negate Mary Ellen's access to funds in the account or her limited ability to control the disposition of funds in the account into which the IRA proceeds were deposited. As a consequence, the distributions, albeit wrongfully obtained and distributed from the retirement accounts under a void DPOA, were nonetheless taxable as income to Mary Ellen despite Chip's actions that deprived Mary Ellen of the vast majority of the IRA distributions.

Had Mary Ellen been totally out of it and unable to write even a nominal check, would the outcome have been different? Perhaps. However, when financial exploitation of the elderly occurs, it is not uncommon for perpetrators to have the elderly person sign the check. Often the exploited are vulnerable and unable to track financial transactions, but they are still able to engage in very simple transactions (such as paying for a haircut or writing a check to a person who regularly provides a service).

Is there anything we can do to help protect these individuals? Generally, it takes a village. Supervisors at various financial institutions should be receiving training to help identify signs of potential elder financial exploitation under revisions to FINRA[5] and the passage of the Economic Growth, Regulatory Relief, and Consumer Protection Act.[6] Adult Protective Services has been tasked with attempting to address abuse that inflicts physical or psychological harm or deprivations of goods or services that are necessary to meeting the essential needs of an individual under the Elder Justice Act.[7] However, other additional action might be required.

Consider greater transparency. If Mary Ellen's accountant, financial advisor, and/or other children were provided with online access to statements in order to monitor activity, then perhaps the extent of loss suffered and tax liability incurred might have been diminished. In a recent article, Bruce Steiner cites to the use of "guardrails" to limit IRA distributions in excess of required minimum distributions as permitted in Private Letter Ruling 201150037 (Sept. 23, 2011).[8] Whether financial institutions are able to implement and monitor such guardrails remains a question. While there are other options that might be considered when crafting estate plans for vulnerable adults while they are still competent to engage in the process, a discussion of such options go beyond the scope of this article. Suffice it to say, we are all part of the village whose talents might help detect and/or protect vulnerable adults from financial abuse.

Notes

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2. *Nice v United States*, No 18-7362 (ED Louisiana Oct 16, 2019).

3. *Id.*, internal citations omitted.

4. *Roberts v CIR*, 141 TC 569, 577–78 (2013).

5. FINRA Rule 2165.

6. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub L No 115-174, 132 Stat 1296 (2018).

7. 42 USC 1397 (j) to – 1397(m) (5) (2018).

8. Bruce D. Steiner, *Protecting Against Elder Financial Abuse,* Trust & Estates, December 2019, pp. 34-35, at 35.

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Ethics and Unauthorized Practice of Law

By Raymond A. Harris

Attorneys and Cryptocurrency for Payment of Fees

For the last few years, cryptocurrencies have been all the rage in the financial world. In late 2017 and early 2018, cryptocurrencies reached their highest values ever, with Bitcoin topping out at $19,783.06 on December 17, 2017 and Ethereum reaching $1,339.06 on January 12, 2018. This ignited the public's interest in cryptocurrencies, with many stories emerging of people investing their life savings hoping to cash in on this digital gold rush.

This article will focus on the issues surrounding an attorney accepting payment for services in cryptocurrency, rather than the challenges of estate planning with cryptocurrency assets or administering cryptocurrency assets during an estate or trust administration.

Background

There are nearly 3000 different cryptocurrencies, with Bitcoin and Ethereum being the most well-known.[1] Other popular cryptocurrencies include Ripple, Litecoin, Stellar, and Bitcoin Cash. Bitcoin was invented in 2008 by Satoshi Nakamoto, a person—or group of people—whose real identity has never been discovered. Cryptocurrencies rely on an underlying "blockchain," which is a list of records containing the cryptographic hash, timestamp, and transaction data for all activity.

Many cryptocurrencies, including Bitcoin, can be "mined" by specialized computers using a series of complex mathematical formulas, which rewards the miner with cryptocoins. Cryptocurrencies may be purchased or sold through exchanges such as Coinbase and Binance, and can be purchased or sold in fractional amounts, meaning that a person could send $65 to a cryptocurrency exchange to purchase approximately one half of an Ethereum coin as of January 3, 2020.[2] Similarly, buying $65 worth of Bitcoin, with a current price of $7,369.49, would purchase approximately 1/113 of a full Bitcoin.[3]

Accepting Payment for Services in Cryptocurrency

Assume that an attorney is hired to prepare an estate plan. The attorney quotes a flat fee of $2000, which represents the attorney's customary rate and is reasonable based on the amount of work, time, and effort required by the attorney to prepare the documents. The client wishes to pay the attorney in Ethereum; the attorney, who knows about cryptocurrency only in the vaguest sense, accepts and is paid two Ethereum coins by the client. The attorney quickly finds out that he was only paid approximately $260 at Ethereum's current price. Alternately, assume that client knows nothing about cryptocurrency either and offers one full Bitcoin that the client inherited upon the death of the client's tech-savvy child. The attorney is elated to discover that he was paid approximately $7300 for his work.

In the first scenario, the attorney likely has not committed any violations of the Michigan Rules of Professional Conduct (MRPC), though the attorney's bottom line may suffer if he is unable to collect the remaining funds owed for the estate planning services performed. In the second scenario, however, the attorney likely breached MRPC 1.5, which prohibits an attorney from charging or collecting an illegal or clearly excessive fee. In this case, if the attorney's usual and customary fee for the services rendered to client is $2000, the attorney's acceptance of a whole Bitcoin at its current value would likely be considered excessive.

Other issues may arise given the volatility of cryptocurrencies on a day-to-day, month-to-month, or even year-to-year basis. Assume that an attorney is hired by client to carry out probate litigation involving the validity of a trust. The attorney requires a $10,000 retainer, which would normally be deposited into the attorney's IOLTA account. The client is short on liquid funds but offers the attorney 1.357 Bitcoins, which represents approximately $10,000 based on its current value. The attorney accepts the Bitcoins and begins work for the client, but one month later is horrified to discover that Bitcoin has plummeted to its lowest price not seen in nearly a year, $3,380, and the 1.357 Bitcoins are now worth only $4,586.66. May the attorney now seek additional funds from the client?

Further complicating matters is that the attorney has a duty to safeguard the client's property pursuant to MRPC 1.15. Storing cryptocurrency in online exchanges is notoriously unsafe,[4] and if the attorney stores the cryptocurrency in an offline hardware wallet and then loses it or passes away without sharing the key, any cryptocurrency on the hardware wallet is potentially lost forever. The attorney could have converted the 1.357 Bitcoins to standard currency, but to do so the attorney would pay a percentage of the total conversion to the exchange company; such a fee would be paid by the attorney personally rather than shifted to the client pursuant to MRPC 1.15(a)(1).[5]

Another consideration is that because the cryptocurrency was given as a retainer or advance fee, the attorney's failure to convert the cryptocurrency to standard currency likely violates MRPC 1.15(g), which requires that an advance fee be deposited to an IOLTA account.[6] MRPC 1.15(a)(2) defines which institutions are eligible for IOLTA accounts, meaning that a cryptocurrency exchange or hardware wallet would not be an authorized institution.[7] The more appropriate solution would have been for the attorney to insist that the client first convert the Bitcoins to currency, at which point the attorney would then deposit the funds to the IOLTA account as with any other advance fee situation. The attorney who prepared the estate plan should have similarly insisted that the client convert the Ethereum and Bitcoin to standard currency as well, thereby eliminating any ambiguities in the amount that would be paid for the estate planning services.

Conclusion

In some respects, cryptocurrencies represent an exciting and new financial economy not tied to a country's central banks and physical boundaries. From a legal perspective, however, cryptocurrencies are full of unknowns and pitfalls. Due to the volatility in these still-emerging markets and with no foolproof way of securing cryptocurrencies at the present date, attorneys should refuse to accept cryptocurrencies as payment for services; instead, attorneys should insist that clients convert the cryptocurrencies to standard currency before proceeding with a transaction.

Notes

1. https://finance.yahoo.com/news/top-10-cryptocurrencies-market-capitalisation-160046487.html?
2. https://www.coinbase.com/price/ethereum.
3. https://www.coinbase.com/price/bitcoin.
4. https://selfkey.org/list-of-cryptocurrency-exchange-hacks/.
5. MRPC 1.15(a)(1) defines "allowable reasonable fees" for IOLTA accounts as "per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA administrative or maintenance fee. *All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.*" [Emphasis added].
6. MRPC 1.15(g) provides that "[l]egal fees and expenses that have been paid in advance shall be deposited into a client trust account and may be withdrawn only as fees are earned or expenses paid."
7. MRPC 1.15(a)(2) defines an eligible institution for IOLTA accounts as "a bank, credit union, or savings and loan association authorized by federal or state law to do business in Michigan. . . ."

Raymond A. Harris is a shareholder in the firm Buhl, Little, Lynwood & Harris, PLC in East Lansing. He practices in the areas of estate planning, elder law, Medicaid and disability planning, trust and estate administration, and probate litigation. He is licensed to practice law in Michigan and Florida. Ray is the immediate past president of the Michigan Chapter of the National Academy of Elder Law Attorneys and is a council member of the State Bar of Michigan's Elder Law and Disability Rights Section. He is the past president of the Greater Lansing Estate Planning Council. In 2014, he was named by Michigan Lawyers Weekly as one of the "Up and Coming Lawyers" and has been named by SuperLawyers as a "Rising Star" in the area of Elder Law since 2015.

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Ex Officio

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2018-2019 Committee Assignments

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ICLE Products of Interest to Probate Practitioners

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Advising Clients on Elder and Disability Law, Fifth Edition

Edited by Lauretta K. Murphy and Alison E. Hirschel

Covers all elder law and disability rights issues including, incapacity planning, medical treatment decisions, long-term care, government benefits and more.

			0-4 Attorneys	5-29 Attorneys	30+ Attorneys
***Prices:**					
Print Book	$199.00	**Online Book**	$189.00	$299.00	$549.00

***Product #:** 2018552610*

Estate Administration in Michigan, Second Edition

By Michele C. Marquardt and Michael D. Holmes

Whether this is your first estate or hundredth, this book will eliminate unnecessary delays and missteps with the probate court. In addition to step-by-step instructions on filling out the correct SCAO forms, this resource will enable you to determine the correct form of administration, so your client moves quickly throught he process.

			Firm Size 0-4 Attorneys	5-29 Attorneys	30+ Attorneys
***Prices:**					
Print Book	$149.00	**Online Book**	$189.00	$299.00	$549.00

***Product #:** 2012556535*

Upcoming ICLE Seminars

Plan for Retirement Assets Under the SECURE Act

Presented by Amy M. Morrissey, Nancy H. Welber, and Maximillian H. Matthies

Cosponsored by the Probate and Estate Planning Section of the State Bar of Michigan. The SECURE Act made sweeping changes to the treatment of IRAs and retirement benefits post death. Estate planners will need to be nimble to ensure estate plans can continue to meet their clients' financial and legacy goals.

On-Demand Seminar **Now Available!**

General fee: $95 ***Seminar #: 2020CT1189***

Section Members: $85

ICLE Partners: Free **New Lawyers:** $45

Apply 2020 Discovery Rules in Probate Litigation

Presented by Douglas G. Chalgian, Douglas A. Mielock, and Maximillian H. Matthies

*C*osponsored by the Probate and Estate Planning Section of the State Bar of Michigan. The amended Michigan Court Rules governing civil discovery went into effect January 1. MCR 5.131(B)(1) applies the new rules to probate litigation. Get specific guidance on how these amendments will impact contested probate litigation.

On-Demand Seminar **Now Available!**

General fee: $95 ***Seminar #: 2019CT6508***

Section Members: $85

ICLE Partners: Free **New Lawyers:** $45

SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

Date	Place
June 5, 2020	University Club, Lansing

Each meeting starts with the Committee on Special Projects at 9:00 a.m., followed by the meeting of the Council of the Probate & Estate Planning Section, except for the Annual Meeting of the Section, which is held in September, the Committee on Special Projects will start at 9:00 a.m., followed by the Annual Meeting of the Section at approximately 10:00 a.m., which will then be followed by the September Council meeting.