Issue III, Summer 2010

Lampertius & Associates, PLC

"Responsive Today, Prepared for Tomorrow"

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In Focus

In this Issue:

Dear Friends & Clients:

We hope that the Year 2010 is treating you well. Given the economic uncertainty of the current times, in this issue of *In Focus* we are directing our attention to protecting assets against liabilities. Sprinkled throughout this issue are also summaries of the key tax, trust, real estate, elder law, special needs and business planning issues we are encountering in our legal practice as estate planning attorneys. We hope you find it useful in helping you make decisions about your own estate.

As you know, our estate planning firm has specialized over the past ten years in protecting vulnerable persons, such as the elderly and persons with disabilities. Never before have we encountered so many families seeking to understand the proper legal steps to safeguard their assets as in these turbulent times. Traditionally, such concerns have been raised in connection with care for an elder or family member with a disability.

Over the past two years, however, these concerns have often involved beneficiaries who are not elderly or disabled. Rather, these family members of clients have been in the midst of creditor crises, bankruptcy, divorce, addictions or destructive influences. Other concerns have involved the impact of mortgage liabilities or business losses against personal assets. In addition, in light of the financial crisis, both federal and state legislatures have acted this past year to update and extend protections against liabilities.

An effective estate plan has several strategies creating multiple potential safeguards in the event that unforeseen circumstances occur in an otherwise stable family. These "firewalls" may include a combination of retirement planning, asset titling and beneficiary designations, proper insurance, trusts, long term care planning, special needs planning, non-profit planning and limited liability business planning. They involve proper and practical steps under the law. Each of these areas of asset protection are summarized below.

Happy Summer and best wishes to you and your families!

Very truly yours,

The Attorneys and Staff of Lampertius & Associates, PLC

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"Nothing in life is to be feared, it is only to be understood. Now is the time to understand more that we may fear less."
Marie Curie (1867- 1934)

Key Tax Rates
2010 top brackets: 33% and 35%
2011 top brackets: 36% and 39.6%

Long Term Capital Gains
2010: 15% for all individuals except 0% for individuals in lowest income brackets.
2011: 20% for all individuals except 10% for lowest income bracket.

Qualified Dividend Rates
2010: 15%
2011: Your tax rate
(as of June 2010 printing)

Retirement Plans & Protection Against Creditors

Is my IRA protected from creditors under Michigan law? Should I roll my company retirement plan into an IRA?

Retirement plans provide more than the benefit of deferred tax liability; they also offer significant asset protection. Since 2005, all general retirement plans are protected in the event of bankruptcy under the federal bankruptcy code. Short of filing for bankruptcy, plans like a 401(k) and 403(b) are still fully protected under federal ERISA law against creditor claims.

IRAs, however, are not completely protected from creditors unless bankruptcy is pursued, because IRAs are governed by state law and not ERISA. A growing number of states have extended this protection to IRAs against creditors outside of bankruptcy. Michigan, however, has not yet extended this creditor protection to IRAs. Careful analysis then should be conducted prior to rolling over company retirement plans to an IRA when creditor concerns exist, especially when bankruptcy is not necessary.

A Retirement Plan is not an Exempt Asset for the Purposes of Medicaid in Michigan

Contrary to common thought, retirement plans are not exempt assets for the purposes of Medicaid. In fact, Michigan does not even allow credit for taxes that will come due on pre-income tax retirement plans such as IRAs. Quite often, when Medicaid is needed, retirement plan assets must be spent first on tax-deductible medical expenses. Medicaid concerns may involve the need to transfer the IRA from the participant's name to a spouse or child with a disability. Such transfers are taxable distributions.

Careful analysis should occur prior to such lifetime transfers as they will cause income taxes to be realized on the IRA distribution. In certain instances it may be best to turn the IRA into an immediate annuity payment for a spouse or child with a disability.

Keep Contributory IRAs Separate from Rollover IRAs

Contributory IRAs and rollover IRAs from a company plan are treated differently for creditor protection. 2010 contributory IRA limits currently are $5,000 for an individual and $6,000 for persons over 50 but under 70 ½ years old. The United States Bankruptcy Act provides an unlimited exemption from a bankruptcy estate for rollover IRAs. Contributory IRAs are only protected up to $1 million against creditors in bankruptcy. As such rollover IRAs from company plans should generally not be consolidated or co-mingled with contributory IRAs.

Inherited IRAs are likely not protected from Creditors in Bankruptcy

A growing body of case law has developed questioning the exemption of inherited IRAs from bankruptcy estates. A recent Texas bankruptcy court case, *In Re: Russell Jarboe d/b/a RJ's Brokerage & Plants*, highlights this trend. In that case, a daughter inherited an IRA from her mother and later filed for bankruptcy. The daughter argued that the inherited IRA should have the $1 million protection allowed to other IRAs. The court ruled, however, that only the daughter's own funds qualify for the protection. The funds she received from her mother were not exempt from the bankruptcy estate. The daughter's creditors were allowed to reach the assets inside the inherited IRA. The court reasoned that an inherited IRA does not have the same attributes as the daughter's own contributory/rollover IRAs and therefore do not qualify for protection in bankruptcy.

In light of the *Jarboe* decision and others like it, it is more important than ever to revisit the status of your designated IRA beneficiaries, particularly if any of those beneficiaries are experiencing or are likely to experience credit problems. A properly drafted trust can provide such protection against creditors.

Should my Trust be the beneficiary of my IRA upon my death?

A trust can protect a family member against creditors and problems with direct inheritance. The dilemma of leaving a retirement plan to a trust is two-fold: accelerating taxes and increasing income taxes due at the higher trust income tax rates. A properly drafted trust, however, can "stretch out" or defer the taxes due over the life of a beneficiary.

In our Spring 2008 newsletter we discussed the language that the IRS and Michigan law now requires for a trust to handle an inherited IRA. If you have not updated your trust since August 2005, you need to see us. If you did not receive that newsletter, or would like another copy, please visit our website at www.jpllaw.com and click on "*articles*", or give us a call at 248-538-5480.

Special Needs Trusts:
Decrease Tax Liability with a Roth IRA

When a special needs trust is necessary to protect a spouse or child with a disability, a Roth IRA may make better sense than a Traditional IRA. Special needs trusts accumulate and generally do not distribute income. This accumulation of income is taxed at higher, compressed tax rates than individual rates. For example, in 2010 a trust is taxed at the highest tax bracket of 35% at merely $11,200 annual income. Individuals and married couples must earn $372,951 a year to hit that bracket. A Roth IRA is a better choice than a traditional IRA for accumulating assets in a special needs trust because income is not taxed on Roth IRA minimum required distributions.

What is the Roth conversion opportunity for 2010?

Normally, persons with higher incomes (more than $100,000 adjusted gross income) cannot convert a traditional IRA to a Roth IRA. As we discussed in our Spring 2008 newsletter, Congress created an exception for the Year 2010. A Roth conversion may make sense for you if:

- You anticipate higher income tax rates at the time when you or the person inheriting the IRA must make distributions from your IRA; **OR**
- You are not planning on spending the entire IRA in your lifetime; **OR**
- You are young; **AND**
- You can pay the taxes on the conversion from assets other than the IRA without incurring a cash problem.

In addition, Congress is allowing people to spread the taxes on the conversion between the Years 2010 and 2011. If you are thinking about converting a traditional IRA to a Roth IRA this year, keep in mind the expected higher tax brackets in the Year 2011 when the 2001 Tax Relief Act expires. A careful analysis of your "liquid" cash needs, tax liability and your estate plan are critical before you make this move.

Should I use my IRA to invest in real estate or precious metals?

Various clients have inquired about self-directed IRAs. These types of IRAs enable the owner to invest in non-traditional assets such as real estate, commodities, partnerships and hedge funds. For such situations, it is important to link with the right IRA custodian and comply with IRS regulations governing IRAs. It is also necessary to work with the investor's advisors to develop an estate plan strategy appropriate for the IRA and the investor's needs.

"I can write eight life policies naming you as beneficiary however for the ninth policy you have to have a different beneficiary."

(Published with license from cartoonstock.com)

Beneficiary Designations: Issues to Consider

All too often beneficiary designations are not thought out, but rather made under a default recommendation without a full understanding of the account owner's personal situation and related concerns. Sadly, much probate litigation occurs over beneficiary designations, which cause assets to pass from the deceased account owner to the designated beneficiary by contractual designation rather than through the Will or Trust of the deceased person.

A U.S. Supreme Court Case entitled *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan* highlights the importance of accurate beneficiary designations. In that case, Liv Kennedy had been named the beneficiary of her then-husband William's investment plan. Upon their divorce, William did not remove his ex-wife as the beneficiary. The plan administrator distributed the assets to Liv, according to the signed documents. William's estate sued to recover the funds, but the Court denied that claim because William failed to change the designation. The Court declined to burden plan administrators with doing anything other than following the direction of the executed plan documents (January 26, 2009).

Natalie Choate, Esq. and Ed Slott, CPA, our nation's foremost retirement benefits advisors, recently commented on this case:

> ***"Lesson #1: make sure all beneficiary designations (retirement plans, life insurance, etc.) are up to date, especially after life-changing events like a divorce."***

Trust Protections & the New Michigan Uniform Trust Code

Trusts have a long history in Michigan of protecting beneficiaries against their creditors and predators. New trust legislation effective April 1 this year clarifies and strengthens this asset protection. It's called the "Michigan Uniform Trust Code" (the "New UTC"), signed into law by Governor Granholm last summer. Below is a discussion of some of the key points of the New UTC and answers to some commonly asked questions:

Will my revocable living trust protect me and my beneficiaries against our creditors?

Not all trusts have the same protections, nor do all states have the same rules. In Michigan, the answer is generally "No" with respect to you and your creditors and "Yes" with respect to your beneficiaries and their creditors (provided that your trust has been properly drafted to take your beneficiaries' creditors into account).

You and Your Creditors:

The Uniform Fraudulent Transfers Act generally prevents you from intentionally avoiding your own creditors by placing your assets in trust, especially when bankruptcy is contemplated. When there is such wrongful intent, creditors or even a bankruptcy court can pursue assets that have been wrongfully transferred. This has occurred with overseas trusts (e.g. Cayman Islands, Switzerland). The IRS also has focused on attacking such abusive trust strategies. Some states, including Alaska and Delaware, now allow grantors to place assets in trust to protect those assets from creditors, but the grantor must use an authorized trustee in such state and the transfer must occur before any concern of insolvency.

Your Beneficiaries and Their Creditors:

Despite laws aimed against intentional avoidance of creditors, there are a number of exceptions allowed by Congress and Michigan to protect you or a family member, depending on the circumstances. For instance, Congress allows spouses and certain persons with disability to shelter their assets in trust for the purpose of qualifying for Medicaid. Those types of trusts are discussed below, under the heading "Special Needs Trusts."

Specific and proper terms must be drafted in a trust to protect assets for a beneficiary. These trust terms should be appropriate for the beneficiary's needs. These protections have evolved over time through court cases, but Michigan's New UTC has now clarified these protections.

Quite often trusts provide for the staggered distribution of trust assets to minors or withholding of trust assets from incompetent beneficiaries. These trusts have a prohibition against pledge or assignment by the beneficiary. Such provisions are referred to as "spendthrift" clauses, which terms provide a safeguard against creditors aiming to seize a beneficiary's share to which that beneficiary is not yet entitled under the spendthrift terms. These provisions are helpful, but afford limited protection once a beneficiary is old enough and healthy enough to receive an outright distribution.

Since 1986, Michigan has provided protection from creditors to trust beneficiaries in the midst of bankruptcy even when those beneficiaries would otherwise receive an outright distribution of the trust assets, but the trust must include a strong spendthrift clause. We have used this law on a number of occasions over the past year to "intercept" a number of trust inheritances from loss to a bankruptcy creditor.

Still, this law only protects inheritances against "ordinary" creditors; it does not protect the trust assets from super-powerful creditors as the government, the IRS, Medicaid and ex-spouses seeking payment of alimony and child support. Nor does the law protect against problems and predators of a beneficiary who has problems that are not related to creditor liens or bankruptcy. For instance, a beneficiary might not be needing bankruptcy, but rather might suffer from alcoholism or marital distress. Outright distribution to an unstable beneficiary can invite additional problems upon the beneficiary, such as making them more susceptible to undue influence and making poor decisions for the use of the trust assets. Distributing funds to an already trouble beneficiary can be like "throwing gasoline on a fire."

A Stronger Power of Protection exists today: The Trustee's Power of Discretion

For several years, our firm has been providing clients with stronger form of asset protection. By drafting special terms in the trust, the grantor can grant to the trustee the authority to withhold distributions if the beneficiary stands to lose the inheritance. The usual triggers for such protections are financial instability (even short of bankruptcy), marital distress (even short of divorce), chemical addictions and destructive influences. The trustee is given the discretion to withhold the trust assets, even if the beneficiary is otherwise old and healthy enough to receive the distribution.

The New UTC strengthens these protections. It clarifies the difference between distributions made for the "support" of a beneficiary and distributions made at the "discretion" of a trustee. A "discretion" standard gives a trustee much more power to protect assets. Trusts with this "discretion" standard can protect beneficiaries from their own problems. It also protects against super-creditors – such as Medicaid, IRS or even ex-spouses' claims for alimony/child support. The New UTC requires that a trust include the "discretion" standard if the super-creditor protection is intended.

This same requirement exists under Michigan Medicaid law. For example, a well-drafted special needs trust in Michigan should not have words "support" or "maintain," unless government benefits for the beneficiary will not be required.

This very powerful standard of "discretion" must be balanced with other concerns such as taxes and the level of power you wish to grant the trustee. Depending on the purpose of the trust, a support trust or pure discretionary trust may be appropriate. The new statute allows such trusts to be drafted to give the grantor more confidence about asset protection.

"It's a Bird, It's a Plane, It's a Trust Protector!"
George Bearup, Esq., 2009 MI Estate Conference

The New Uniform Trust Code also allows a new "super-power" for trusts called the "Trust Protector." Typically, after a grantor has died, a trust cannot be changed without probate court intervention. The Trust Protector, however, allows a trusted family member, friend or professional to change the terms of a trust after the grantor has died without probate court proceedings. With the Trust Protector, an independent person may privately change the trustee or even the distribution of a trust when the trust otherwise cannot be changed. The Trust Protector also provides for the appointment of a person to monitor the trustee and trust without having the duties of the trustee. That is very powerful authority. As a formal legal role, the trust must have clear terms and understandings for the Trust Protector position. Under the right circumstances, it is a true "safety valve" to protect trust beneficiaries from a trustee that has taken a wrong turn or from living with trust terms that are no longer appropriate for the beneficiaries' needs.

This new legal concept is especially important in connection with irrevocable trusts and special needs trusts. Medicaid and Social Security laws often change for special needs trusts, so the trust terms should be able to change with them. In addition, sometimes the trust terms are no longer appropriate for the beneficiary's needs. The flexibility of the Trust Protector must however be balanced with strict requirements under Social Security and Medicaid rules. We would be glad to discuss the specific application of the "Trust Protector" or any of the new rules under the UTC on your trust and estate.

"Put not your trust in money, but put your money in trust."
Justice Oliver Wendell Holmes (1809-94)

Special Needs Trusts

For clients concerned about Medicaid or long term care costs for a disabled family member, there are several types of special needs trusts which are especially helpful. The appropriate type of special needs trust depends on several factors: 1) Who is the trust for? 2) Who is providing the asset? and, 3) Who will receive the remainder benefits?

1) Who is the special needs trust created for?

Certain special needs trusts are for spouses; others are for children and relatives with a disability.

TRUSTS FOR SPOUSES

A primary question for clients caring for an ill spouse is "*What will happen to my spouse if I die before he does?*" A married person may create two types of trusts to protect assets when long term care concerns exist: one trust for the ill spouse and one trust for the healthy spouse.

Trust for the Ill Spouse

The healthy spouse may ensure that all of his/her assets will not be consumed by the ill spouse's medical bills while the healthy spouse is still living by placing the assets in a **"Testamentary Special Needs Trust"** for the benefit of the ill spouse. Assets in such a trust are not deemed to be countable assets for Medicaid purposes. The language to create a Testamentary Special Needs Trust must be drafted within the Will of the healthy spouse. Including this type of trust in your estate plan is a safe method to ensure that your ill spouse will still have assets if you pass away before he/she does. It is a good option to consider even if you do not anticipate the need for Medicaid but do anticipate serious long term care costs.

There are important "waivers" that the ill spouse should sign in connection with the creation of a Testamentary Special Needs Trust. Through such waivers, the ill spouse waives certain rights he/she would have to claim inheritance under the healthy spouse's will at the healthy spouse's death. It is important to complete this type of trust while the ill spouse can still understand the waivers. Through the waivers, the ill spouse essentially gives up his/her right to control assets, so this type of trust should only be done when long term care costs are a concern.

Trust for the Healthy Spouse

Another primary question of the caregiver spouse is, "*What assets can I keep if my husband/wife requires Medicaid*?" There are limits to the value of the assets that the healthy spouse may keep when the ill spouse requires Medicaid benefits, however, the value of certain assets are exempt from inclusion in the calculation of that limit. For example, the couple's home, the healthy spouse's car and personal items owned by the healthy spouse are excluded from the asset value limit.

In addition to the assets that are excluded for the purposes of Medicaid, the healthy spouse may keep up to one-half the couple's non-exempt or "countable" assets. As of January 2010, the healthy spouse may retain countable assets valued a minimum of $21,912.00 and a maximum of $109,560.00.

The balance of the assets must be either spent down on long term care costs for the ill spouse or sheltered in an irrevocable trust or Medicaid annuity. The special type of irrevocable trust is called a **"Trust Solely for the Benefit of a Spouse."** By law, a healthy spouse may keep additional assets that would otherwise have to be spent down to pay for the ill spouse's long term care. This trust is unchangeable and irrevocable. The assets are paid out to the healthy spouse, but only over time and pursuant to a predetermined stream of payments. Because this type of trust cannot be changed once it is established, it is critical to confirm that Medicaid is actually necessary for the ill spouse and that no other option is available.

TRUSTS FOR CHILDREN OR OTHER PERSONS WITH DISABILITIES

Special rules also exist to protect assets for the benefit of a child or relative with a disability through a special needs trust. A different type of government benefit is involved in such case, typically through a program called SSI-type Medicaid. This type of Medicaid pays for medical services and residential supports for the person with a disability.

Michigan law permits the creation of special needs trusts to hold assets for the benefit of a person with a disability without jeopardizing that person's eligibility for government benefits. The assets of the trust are not available to governmental creditors such as SSI and Medicaid if the trust complies with strict rules. All such trusts must contain:

- A strong spendthrift clause;
- A distribution standard that avoids language like "support" or "maintain," but rather is "discretionary"; and
- No ability to revoke the trust once it has been funded ("irrevocable").

2) Who is providing the trust assets?

The type of trust established in connection with Medicaid or Social Security eligibility will also depend on who will provide the trust assets. The trust may be funded with the assets of the person with a disability, the "first party" (typically assets received by windfall such as a lawsuit or inheritance). The Trust may also be funded with assets of a "third party," such as a parent or other relative.

The rules governing First Party Special Needs Trusts are much more strict than the rules governing Third Party Special Needs Trusts. A Third Party Special Needs Trust need only comply with the rules stated above. A First Party Special Needs Trust must comply with additional requirements:

- It may be created only for a person who is under age 65;
- The beneficiary must be a "disabled person" as determined by the Social Security Administration.
- The trust must provide "solely" for the disabled person.
- A First Party Special Needs Trust is strictly scrutinized by Social Security and Medicaid. For example, in 2009, a federal court in New Mexico determined that assets in a First Party Special Needs Trust were not exempt for the purposes of calculating benefit eligibility because the trust paid distributions to parent caregivers.

3) Who will receive the remainder benefits?

Perhaps the most significant difference between a First Party Special Needs Trust and a Third Party Special Needs Trust is who can be named to receive the assets upon the death of the beneficiary. The grantor of a Third Party Special Needs Trust may name anyone as the remainder beneficiary; however, there are strict rules for designating remainder beneficiaries under a First Party Special Needs Trust.

A First Party Special Needs Trust may allow for only two types of remainder beneficiaries:

1. The agency that is providing Medicaid benefits for the person with disability (a "Medicaid Payback Trust"), OR
2. A trust whose assets are "pooled" with the assets of similar trusts and run by a charity for the benefit of other persons with disability (a "Pooled Trust").

A Medicaid Payback Trust provides more privacy and control, but that type of trust can be more costly to establish and administer than a Pooled Trust.

It is rather simple and cost effective to create a Pooled Trust. The only document required is an agreement with the charity or charities that will be the named as remainder beneficiary(ies) of the trust. A Pooled Trust can be the simple option when the person who has a disability has few assets.

If you have a spouse who is ill or a family member with a disability, even if you do not foresee the need to create a special needs trust for that person, we strongly recommend there be specific provisions in a Durable Power of Attorney permitting the establishment of these types of trusts.

Your House and Other Assets:
In what name(s) should they be titled?

Should your house be titled in the name of your trust?

In general, if you are single, you should title your residence in the name of your revocable living trust. Exceptions exist if you are renting the property, if you need to apply for Medicaid or if you own your property with someone else.

If you are married, in general you should hold title to you house with your spouse as husband and wife. Married couples have a unique protection against claims against either of the spouses individually when they own property as "husband and wife," known legally as "tenancy by the entireties." Under this type of ownership, the asset may still be claimed by the couple's joint creditors. Tenancy by the entireties ownership offers strong protection for personal residences and limited protection for other assets. These protections vary from state to state.

Exceptions to this general rule exist for second marriages or persons inheriting property. In these situations, it is important to clarify whether the property is owned separately by one spouse or as marital property. There are a number of strategies available to clarify ownership, ranging from simple bank account ownership agreements to separate trusts, pre-nuptial agreements and post-nuptial agreements to co-ownership agreements. These documents help ensure the balance of competing legal interests to provide for a spouse, while ensuring protections for other family members, especially in the event of disability or death. We have significant experience in these issues and are glad to address your concerns.

Be Cautious with Joint Ownership

Many unanticipated complications can occur when assets are owned jointly. Before taking title to an asset with another person, ask yourself, "Am I willing to be liable for the other joint owner's problems?" Cars and other vehicles, especially, are a primary source of liability. They should be carefully titled, generally in the name of the principal driver, and <u>not</u> joint with other persons.

Clients often find themselves in the predicament of joint ownership with a car or house when they guarantee their child's loan. Rather than guarantee the loan, quite often the better and less risky solution involves making an "advance" on inheritance as an outright gift or a family loan. Advancements avoid having to add the parent's name on the asset and being a partner to the child's liabilities. In addition, however, that loans in amounts more than $10,000 must accrue interest or tax complications will arise.

Joint Ownership Sometimes has its Advantages

While co-ownership is generally wrought with pitfalls, it has certain benefits. For small bank accounts, joint ownership makes sense for the matter of convenience. Joint ownership of certain assets can also provide unique protections from creditors. For example, it is more difficult for creditors to seize only a partial interest in real estate or a business. They are left with the dilemma of whether to pursue an expensive lawsuit to force the sale of the property. Even the IRS reluctantly recognizes that the partial interest cannot be valued as high as full ownership. Buy/sell agreements for a business clarify rights and mutual obligations when problems, such as death, disability, creditors or retirement force the buy-out of a partner.

Co-ownership Agreements for the House or Family Cottage Help Prevent Conflict

Co-ownership agreements also provide protections to co-owners of real estate. If you own real estate, such as a family cottage, with other family members, a co-ownership is essential to ensuring the continuity of ownership and management in the event of creditor problems or divorce of any co-owner. Careful drafting of that type of agreement will clarify the co-owners' understandings about use and enjoyment of the property, as well as an "exit" plan in the event that a co-owner wishes to sell her share of the property.

Our firm has successfully established such agreements privately and through the probate court to prevent or to resolve difficult conflicts. Such agreements are the subject of a new chapter called "Handling the House" written by our firm in the book, <u>Advising the Older or Disabled Client</u>, published by the Michigan Institute of Continuing Legal Education.

Insurance:
Are you covered?

The starting point to protecting yourself from liabilities is properly insuring against risk. The worst time to worry about insurance coverage is *after* a trauma occurs. Based on our experience, sound estate planning includes ensuring that you are adequately insured against liability in all areas of your life. A detailed analysis should be made by an insurance professional and estate planning attorney of your existing insurance, liabilities and goals with respect to property, casualty, life, malpractice, and board member/officer liabilities.

Sadly, most clients have not had good experiences with life insurance agents, jading their opinion of the industry. While our firm does not sell insurance, we can recommend agents and other insurance professionals with whom we have worked and trusted through the years. The right life insurance is extremely important for a young family, especially when there is a child with special needs.

Fortunately, more and more clients understand the need for "umbrella" insurance, which is general liability insurance in connection with their homeowner's or vehicle insurance policies. Such umbrella insurance is relatively inexpensive, costing generally $150 per year per $1 million of coverage.

We often encounter clients who serve as board members or officers without any insurance provided by the organization. Please see the article on the next page titled "Non Profit Board and Organization Liabilities," regarding proper insurance for directors and officers.

Updates on Real Estate

Nationwide foreclosure rates rose 17.8% in the past year. Michigan is sixth in the country in foreclosure rates. Foreclosures drive down the value of all real estate, which greatly restricts a homeowner's options to move and the price at which a trustee may consider selling a house after the grantor's death. There are, however, certain planning tools that may be used to reduce property and income taxes, and may help you keep your house in the event that you or a family member becomes susceptible to foreclosure, including:

- Appeal the tax assessment to reduce property taxes;
- Take advantage of homestead exemptions available for Special Needs Trusts;
- If you've purchased a new house but have not sold your prior home, take advantage of the homestead exemption on your prior home by filing a "conditional rescission" of the homestead exemption. The conditional rescission allows you to claim the exemption on both houses for up to three years, until you sell your prior home;
- Take advantage of Michigan laws designed to protect homeowners from foreclosure by requiring banks to try to work out payment plans with homeowners before resorting to foreclosure.

For more detailed information about tools available to reduce taxes and increase your protections as a property owner, visit our website, jpllaw.com, under "Articles and Seminars." Choose the article titled "Handling the House."

Medicaid Estate Recovery

Interesting enough, Michigan is still the only state in the United States that does not require "estate recovery" of a Medicaid recipient's home upon that recipient's death. The estate recovery program has been mandated by federal Medicaid law since 1993. Michigan declined to adopt the program. In September 2007, Michigan legislature adopted estate recovery after the federal government threatened to discontinue all federal Medicaid funding, however, the program was never implemented. The federal government ultimately rejected the Michigan program as being insufficient, but it has not discontinued funding. For the time being, the State does not file a lien against the Medicaid recipient's house upon the death of the recipient and has not implemented "estate recovery." So for now, the homes of recipients of Medicaid benefits will not be forfeited to the State upon the recipient's death, but estate recovery could be implemented at any time. We recommend taking one of the following measures to protect the house from estate recovery in the event that is implemented:

- Consider conveying the property and retaining a "life estate" through a so-called "Lady Bird Deed". This type of deed is best for a single person to avoid probate and lien processes by Medicaid.
- Convey title to the house from the name of the ill spouse to the name of the healthy spouse.
- Consider forming a caregiver contract if a family member is providing care in the house. These contracts allow for payment to the caregiver family member for such services without penalty. With certain limitations, caregiver contracts also can allow for the house to be sheltered in the name of a caregiver child.
- Consider sheltering the house in a special needs trust for a child or relative with a disability.

FDIC Protection:
Do you have it?
Increased Protection through 2013

FDIC Protection. To reassure consumers in the U.S. banking system, Congress increased FDIC deposit insurance in May 2009 to $250,000 per depositor through December 31, 2013. Prior to last May, FDIC protection for non-retirement accounts was limited to $100,000. IRAs and certain other retirement accounts had the same $250,000 FDIC protection since 2006. Unlike other accounts, this higher protection for IRAs will continue even after December 31, 2013.

This federal deposit protection exists at banks and savings associations insured by the FDIC as well as credit unions insured by the NCUA. The coverage is generally as follows:

- Single accounts titled in one name only are insured up to $250,000.

- Joint accounts (two or more people) are protected up to $250,000 per owner.
- Transfer on Death accounts or Living Trust accounts may protect up to $250,000 per "Qualified beneficiary."

Common mistakes occur in calculating coverage for living trusts. Mistakes often occur in assuming that both the owner(s) and all beneficiaries receive complete $250,000 coverage. This is not correct. Beneficiaries only have coverage when the last owner of the trust dies. Only "qualifying beneficiaries" receive separate FDIC coverage. Certain beneficiaries as in-laws, nieces and nephews, cousins and charitable organizations are not qualifying beneficiaries. In addition, if the interests of the beneficiaries are equal, the insurance coverage for the particular beneficiary may not involve the full $250,000.

Careful analysis of all trust beneficiaries should be made for full FDIC protection, especially by trustees at the death of the owner. Even though your bank manager may offer such analysis, generally it is a mistake to discuss trust beneficiaries with bank officials as it destroys the attorney-client privilege for otherwise private estate plan arrangements.

Caution should also occur in moving IRA funds to ensure that funds in that IRA have not already been rolled over within the past 12 months. Violations of the annual rollover limit for IRAs will trigger taxation and possible penalties.

Creditor Protections with 529 Savings and Pre-Paid Tuition Plans

Many people put off planning for retirement, thinking that they have plenty of time to "get to it later." Sadly, it is hard to catch up late in life. Another aspect of planning that should not wait is planning for your child's college education. Your 12 year old will graduate from high school before you know it! In addition to providing for your child's college expenses, another advantage of establishing a pre-paid tuition or college savings plan called a "529 plan" are the creditor protections. Up to $5,475 of your contributions to a 529 plan made between one to two years before the bankruptcy filing is protected from your creditors. Contracts purchased more than two years before a bankruptcy filing are generally 100% excluded from the bankruptcy estate. All contracts, regardless of when purchased, are protected from any creditors of the beneficiary. These protections allow you to prioritize contribution to a 529 plan on behalf of your child or grandchild during these uncertain times, especially when other forms of savings are not as protected.

Non-Profit Board and Organization Liabilities

D&O Insurance

We advise a number of non-profit organizations and private foundations. All too often we encounter organizations that do not maintain proper insurance for board members. Even though the board members may be volunteering their time, they are responsible and liable for certain acts in connection with the organization. Without proper insurance, board members are placing their personal assets at risk. The premium for Directors and Officers (D&O) Insurance is typically less than $1,000 per year (for small charities). Such insurance will not cover criminal liability, but it will shift the risk of loss in connection with civil liability from the board member to the insurance company.

New Rules from IRS

A year ago IRS instituted a number of new rules and regulations requiring non-profits to update their governing policies in the following areas:

- Compensation
- Conflicts of Interest policies
- Document Retention, and
- Whistleblowers

These policies are now required to be included in the annual Form 990. The forms and board resolutions to adopt these policies are relatively simple and inexpensive to have properly drafted by an attorney. Obtaining sound legal advice about how to implement the policies is critical.

Starting or Managing a Charity?

If you wish to start a non-profit organization, serve on a charitable board, or form a tax exempt organization, or if you simply wish to obtain a charitable raffle license, give us a call. We often coach people on simple understandings of the otherwise complex rules governing charitable solicitation licenses, 501(c)(3) exemption and charitable gaming. It may help keep you and your non-profit out of trouble. This allows you and your board to concentrate on your charitable activity and fundraising in a legally safe manner.

Medicare, Medicaid & VA Benefits

The status of Medicaid and Medicare is uncertain. Since the Deficit Reduction Act in 2006, strict rules apply with regard to Medicaid gifting, except to spouses and persons with disability. The Michigan Department of Human Services (DHS) is backlogged with Medicaid applications in Wayne and Oakland Counties, with most applications being first reviewed well after the 45 day legal deadline. The government announced last year that Medicare will be bankrupt by 2017 unless additional measures are taken.

Regardless of the recent passage of national health care, there is and will remain, a widening gap of coverage on long term care costs. This problem is compounded by an exponential curve of aging population over the next twenty years in conjunction with widening state and federal budget deficits.

The Veterans Administration continues to be a god-send to assist war-time veterans with costs of home care, assisted living and limited nursing benefits. Other than waiting times exceeding six months, the benefits have kicked in for clients. In addition, a bunch of options beyond the nursing home exist today, at far less cost. See our Spring 2008 newsletter for a summary of these benefits, as well as the chart on this page.

VA "Housebound Benefits," Monthly
(for Wartime Veterans and/or Dependents unable to leave the residence without assistance)

1. Veteran with no dependents - $1,204.00
2. Veteran with dependents - $1,510.00
3. Widows/Widowers of Veterans with no dependents - $808.00
4. Widows/Widowers of Veterans with dependents - $976.00

VA "Aid and Attendance" Benefits
(for Wartime Veterans and/or Dependents who are in permanent need of aid and attendance)

1. Veteran with no dependents - $1,644.00
2. Veteran with dependents - $1,949.00

Each additional dependent increases the monthly benefit by $168.00.

Protecting Your Business

There are three main tasks in protecting you and your business from problems with liabilities and over-taxation:

(see next column)

1. Evaluating the right business limited liability company and tax status as your activities change.
2. Maintaining proper corporate policies and records for issues that arise in your business.
3. Planning appropriately for federal and state taxes.

Continued Liability Protection

If you own a company or an interest in a company, the form of that company's organization has a significant impact on the risk to your personal assets. Generally, forming a corporation or limited liability company (LLC) provides the most protection for an owner's personal assets from business liabilities. A general partnership presents the greatest risk to a general partner's personal assets because a general partner has unlimited personal liability for certain conduct committed by the company and other partners and employees of the company.

You can structure your company or companies to best limit your personal liability and protect your assets. If you establish your corporate interests as separate business units, a creditor's claim against one unit will not damage the entire company. A typical example of separating business units is a large corporation structured as a parent corporation with various corporate or LLC subsidiaries. A creditor problem within one of the subsidiaries will affect that subsidiary only and not the parent or sister companies.

Taxes with Your Business

The Limited Liability Company (LLC) is the simplest way to start, especially if you are the sole owner. Adding partners or even employees causes need to clarify management and handle payroll properly. Most clients do not realize that their LLC can evolve into a C Corporation or even an S Corporation. They can make a simple election with the IRS to change their tax status as they grow. Provided proper timing exists, they can change tax status from "pass through" tax status of a sole proprietorship, partnership or S Corporation to a separate tax status as a C corporation. This election is simple, but has deadlines and time restrictions for making the change.

One reason to make the change to corporation tax status may be to decrease self-employment tax, which hits net business earnings in a sole proprietorships or partnerships but not reasonable "distributions" to owners of S corporations. Please note, the IRS can attempt to re-characterize abusive distributions by S corporations and subject such distributions to payroll taxes. In addition, the Michigan Business Tax now punishes S Corporations which hold back such distributions from wages.

The C corporation provides the most effective tax platform for company benefits, especially health reimbursement plans. Most business owners are not aware of unique abilities to expense long term care insurance premiums for the business owners and/or key employees.

Finally, we hope to have an answer from Congress about the expiration of the estate and generation skipping tax this year. Next year we go back to a $1 million exemption, as discussed above. At the very least, it provides a good reason to map out the shepherding of ownership and management for business owners contemplating retirement.

Health Care Reform:

The Impact on your Estate Planning

We have heard a lot of talk over the past several months about the new health care laws - some of which is difficult to sort the facts from the rhetoric. The following is a summary of some of the most talked-about components of the new health care law and how those components affect you, your family and your business.

Long Term Care Insurance

The law establishes the Community Living Assistance Services and Supports (CLASS) program, a national, voluntary long term care insurance program. CLASS provides a cash benefit to people who are unable to perform activities of daily living (ADLs) to help them purchase long term care services.

All working adults will be automatically enrolled in the program beginning January 1, 2011, unless they choose to opt-out. The CLASS program provides that, after five years of paying a monthly premium through payroll deductions (the premium amount would be determined by the participant's age), the participant will be vested and eligible to receive benefits of an average of at least $50 per day, with the amount proportionate to the person's level of disability. The participant can use the funds to buy non-medical long term care services required to maintain a community residence, including payments to a family caregiver, as well as assisted living or nursing home care. Benefits paid will be disregarded for purposes of determining the participant's eligibility for benefits under any other federal, state or locally funded assistance program. The IRS will treat the CLASS program in the same manner as it treats qualified long term care insurance contracts.

The establishment of a national long term care insurance program offers possibilities, especially for persons with pre-existing conditions. However, long term care costs continue to escalate, and there is no guarantee that the benefits paid through the CLASS program will be adequate to cover your long term care needs. Long term care considerations are a crucial component in estate planning. When private insurance is possible, we encourage clients to consider purchasing long term care insurance through an established provider to ensure adequate coverage of the actual cost of their long term care. As estate planning attorneys, our firm does not sell long term insurance; however, we can assist you in evaluating your options in light of your estate planning objectives.

Medicare

The Medicare Part D "donut hole" (the difference between the initial coverage limit for prescription medications and higher coverage threshold) will be gradually eliminated by 2020. The law provides a one-time rebate in the amount of $250 in 2010 to Medicare Part D beneficiaries who fall within the donut hole. Starting in 2011, beneficiaries in the coverage gap will receive a 50% discount on brand name prescription drugs. In 2013, the federal government will begin offering subsidies for brand name and generic drugs. Those subsidies will increase until 2020 when the donut hole will be finally closed through a combination of manufacturer discounts and government subsidies.

Medicaid

It can often be difficult for Medicaid-eligible persons to find doctors who accept Medicaid because the program pays an average of only 72% of the rates paid by Medicare. In 2013 and 2014, Medicaid's reimbursements to doctors will increase to the Medicare levels, making participation in Medicaid more appealing to doctors.

The law established The Community First Choice Option to allow people who are Medicaid-eligible and who require institutional level care to receive that care in the privacy of their own home through community-based support and service.

The law expands Medicaid to cover people aged 64 and younger whose incomes are equal to or less than 133% of the federal poverty level.

Insurance Market and Coverage Reforms

Beginning September 23, 2010, insurance companies can no longer deny coverage to children based on a pre-existing condition.

Beginning in 2014, insurance companies cannot deny coverage to anyone with a pre-existing condition.

Beginning September 23, 2010, individual and group plans will be required to extend dependent coverage to adult children up to age 26.

Credits and Reimbursements for Businesses

If your small business or tax-exempt organization pays employee health insurance premiums in 2010, you may qualify to claim a new credit worth up to 35% of premiums paid in 2010 on your 2010 tax return.

Employers with 25 or fewer employees (more if you have part-time employees), and less than $50,000 in average wages, may be eligible. Visit www.irs.gov for more information, or simply give us a call.

The law creates a temporary "reinsurance" program for employers that provide health insurance to retirees over age 55 who are not eligible for Medicare. The program will reimburse employers or insurers for 80% of retiree claims between $15,000 and $90,000. Payments from the reinsurance program will be used to lower costs for enrollees in the employer plan. This program will be effective beginning June 23, 2010 through January 1, 2014.

Tax Implications

The Medicare Payroll Tax will be effective on January 1, 2013. The tax program implements a 0.9% tax on individual wages over $200,000 and family/joint income of $250,000. The tax also includes a 3.8% tax on capital gains, dividends and other unearned income of high-income taxpayers.

The tax on high-cost health plans, known as the "Cadillac Tax", will be effective on January 1, 2018. The tax is on employer-sponsored health plans with total values that exceed $10,200 for individuals and $27,500 for families, although thresholds will be indexed to the consumer price index beginning in 2020. The program provides higher threshold amounts for retired persons and persons with high-risk jobs.

HELP US KEEP IN TOUCH

To receive further updates and information, some of which we plan to send via e-mail, please send your current contact information via e-mail to info@jpllaw.com or call us at (248) 538-5480.

About The Firm

Jim Lampertius still is active with Liberty Riders, Inc., a therapeutic horseback riding center for persons with disability. He also assists Angels' Place on special needs issues for their Planned Giving Committee. This past year Jim had the opportunity to present a legal course on "Handling the House" for the State Bar's Annual Estate Plan Conference in Traverse City and Plymouth. It is also the new chapter in Michigan's main legal guide for attorneys entitled, "Advising the Older and Disabled Client," published by the Michigan Institute of Legal Education. In January, Jim conducted a seminar for the Alzheimer's Association on the "Legal and Financial Dimensions of Alzheimer's Disease." For these writings and course outlines please go to www.jpllaw.com, under "articles and seminars."

We are pleased to announce that **Jennifer Goulah** has re-joined our firm as an Associate. Jennifer worked with us several years ago as a law clerk while she was attending University of Detroit Mercy School of Law and serving as an associate editor of the school's law review. After graduating from UDM Law School in 2006, she worked as an Associate with Bodman, LLP. In that position, Jennifer gained significant experience representing a variety of individual and corporate clients in both simple and complex real estate, corporate and banking matters. We are glad to have her back on our team

Christina Borowicz is now co-chair of the Public Policy Committee of the Greater Michigan Chapter of the Alzheimer's Association. Christina and her husband Dave are pleased to announce the birth of their daughter, Isla Marlana Borowicz, born on April 21, 2009.

Jessica Salomon continues to work part-time, assisting with trust and estate tax returns and estate plan drafting. She is also pursuing studies in Japanese at Oakland University.

Janine Mauck, our hard working paralegal, continues to assist with our probate court, real estate and tax filings. She also assists with independent care coordinators, having a graduate degree in gerontology.

Shelly Morell, our office administrator, after ten years of hosting Second Chance at Life's Walk for Organ Donation Awareness is officially their own public charity. Second Chance at Life is unique in Michigan in assisting persons needing organ donation with medical expenses. They were just awarded their first grant and are now assist patients through five local hospitals.

Warm regards,

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Thank you

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